This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

**Usage guidelines**

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

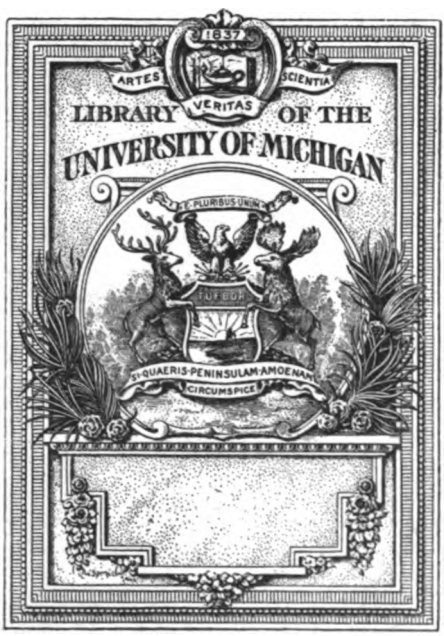
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

**About Google Book Search**

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

B 866,129

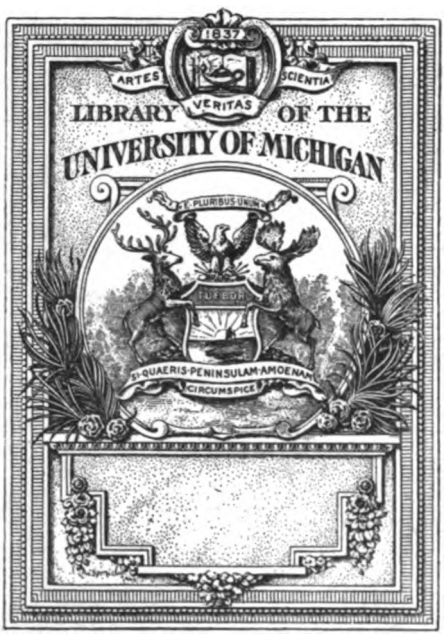
Digitized by Google




Digitized by Google

K
.A55
1901

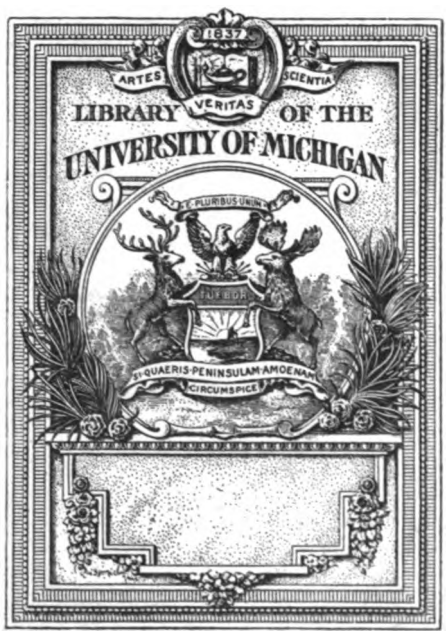
Digitized by Google




Digitized by Google

K
·A55
1901

Digitized by Google




Digitized by Google

K
.A55
1901

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

U. S. Supreme court.

CASES ARGUED AND DECIDED

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

OCTOBER TERMS, 1895, 1896, IN

## 163, 164, 165, 166 U. S.

## BOOK 41,

LAWYERS' EDITION,

COMPLETE WITH HEADLINES, HEADNOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOTNOTES AND PARALLEL REFERENCES,

BY

STEPHEN K. WILLIAMS, LL.D.

---

WITH

"NOTES ON U. S. REPORTS"

BY

WALTER MALINS ROSE.

---

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY,
ROCHESTER, NEW YORK.
1901

Digitized by Google

Copyright 1897 by
THE LAWYERS CO-OPERATIVE PUBLISHING CO.

Copyright 1901 by
WALTER MALINS ROSE.

Copyright 1901 by
THE LAWYERS CO-OPERATIVE PUBLISHING CO., and
WALTER MALINS ROSE.

Digitized by Google

## PREFACE TO SECOND EDITION.

THE first republication, nearly twenty years ago, of the United States Supreme Court Reports in the Lawyers' Edition, was an event of public importance. It has resulted, not merely in the increase, but in the literal multiplication, of the number of lawyers and judges who own and use thir great series of decisions. It has, therefore, materially extended the influence of those decisions upon the general jurisprudence of the country. Now the inclusion of Rose's Notes obviously adds great value to these reports.

At the end of each volume of reports, several of which are bound in every book of this set, will be found Rose's Notes for that volume. These volumes are separated by colored sheets.

289856

Digitized by Google

Digitized by Google

# JUSTICES

OF THE

# SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

---

CHIEF JUSTICE,

HON. MELVILLE WESTON FULLER.

ASSOCIATE JUSTICES,

HON. STEPHEN JOHNSON FIELD,
HON. JOHN MARSHALL HARLAN,
HON. HORACE GRAY,
HON. DAVID JOSIAH BREWER,
HON. HENRY BILLINGS BROWN,
HON. GEORGE SHIRAS, JR.,
HON. EDWARD DOUGLASS WHITE,
HON. RUFUS W. PECKHAM.

ATTORNEY GENERAL,

HON. JUDSON HARMON,
HON. JOSEPH MCKENNA.*

SOLICITOR GENERAL,

HON. HOLMES CONRAD.

CLERK,

JAMES HALL MCKENNEY, ESQ.

REPORTER,

HON. J. C. BANCROFT DAVIS.

MARSHAL,

JOHN MONTGOMERY WRIGHT, ESQ.

---

* Mr. MCKENNA was appointed Attorney General as the successor of Mr. Harmon March 5, 1897.

Digitized by Google

ALLOTMENT, ETC., OF THE

# JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TIME OF THESE REPORTS, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

[1]Allotment, Feb. 3, 1896, see Appendix IV. Book 40.

| Names of Justices, and whence appointed. | By whom Appointed. | Circuits, 1896–1897. | Commissioned. | Sworn in. |
|---|---|---|---|---|
| Associate Justice HORACE GRAY, Massachusetts. | President Arthur. | First. Me., N. H., Mass., Rhode Island. | 1881. (Dec. 20.) | 1882. (Jan. 9.) |
| Associate Justice RUFUS W. PECKHAM, | President Cleveland. | Second. Vermont, Conn., New York. | 1895. (Dec. 9.) | 1896. (Jan. 6.) |
| Associate Justice GEORGE SHIRAS, Jr., Pennsylvania. | President Harrison. | Third. New Jersey, Penn., Del. | 1892. (July 26.) | 1892. (Oct. 10.) |
| Chief Justice MELVILLE W. FULLER, Illinois. | President Cleveland. | Fourth. Md., Va., N. C., W. Va., S. C. | 1888. (July 20.) | 1888. (Oct. 8.) |
| Associate Justice EDWARD D. WHITE, Louisiana. | President Cleveland. | Fifth. Ga., Ala., Fla., Miss., La., Tex. | 1894. (Feb. 19.) | 1894. (Mar. 12.) |
| Associate Justice JOHN M. HARLAN, Kentucky. | President Hayes. | Sixth. Ky., Tenn., Ohio, Mich. | 1877. (Nov. 29.) | 1877. (Dec. 10.) |
| Associate Justice HENRY B. BROWN, Michigan. | President Harrison. | Seventh. Ind., Ill., Wis. | 1890. (Dec. 29.) | 1891. (Jan. 6.) |
| Associate Justice DAVID J. BREWER, Kansas. | President Harrison. | Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Wyo. | 1889. (Dec. 18.) | 1890. (Jan. 6.) |
| Associate Justice STEPHEN J. FIELD, California. | President Lincoln. | Ninth. Cal., Or., Nev., Mont., Wash., Idaho. | 1863. (Mar. 10.) | 1863. (Dec. 7.) |

Digitized by Google

# GENERAL TABLE OF CASES REPORTED IN THIS BOOK.

## VOLUMES 163, 164, 165, 166.


Abbott, Chisholm v. (mem.) - - - 1184
Aberdeen Bank v. Chehalis County (166 U. S. 440) - - - 1069
Acers v. United States (164 U. S. 388) 481
Adams Exp. Co. v. Indiana (165 U. S. 255) - - - - - - - 707
v. Kentucky (166 U. S. 171) - 960
v. Ohio State Auditor (165 U. S. 194) - - - - - - - 683
v. Ohio State Auditor (166 U. S. 185) - - - - - - - 965
Addington v. United States (165 U. S. 184) - - - - - - 679
Ætna L. Ins. Co. v. Florida (mem.) - 311
Agnew v. United States (165 U. S. 36) 624
Agricultural Ditch Co. v. Farmers' I. Ditch Co. (mem.) - - - 1186
Alabama & V. R. Co., Henry v. (mem.) 1180
Albuquerque Hotel & O. H. Co., Medler v. (mem.) - - - - - 309
Alix, *Ex parte*, (166 U. S. 136) - - 948
Allen v. Cannon (mem.) - - - - 305
v. Culp (166 U. S. 501) - - - 1093
v. Georgia (166 U. S. 138) - - 949
v. United States (164 U. S. 492) - 528
United States v. - - - - - - 242
Allgeyer v. Louisiana (165 U. S. 578) - 332
American Bell Teleph. Co. v. Western U. Teleg. Co. (mem.) - - 1187
American Dock & I. Co. v. Jersey City (mem.) - - - - - 317
American Emigrant Co., Rogers Locomotive Mach. Works v. - - - 552
American Exp. Co. v. Indiana (165 U. S. 255) - - - - - - - 707
American Harrow Co. v. Shaffer (mem.) 1187
American Pub. Co. v. Fisher (166 U. S. 464) - - - - - - - 1079
American Road Mach. Co. v. Pennock & S. Co. (164 U. S. 26) - - 337
American Sugar Ref. Co., The Centurion v. (mem.) - - - - 309
American Tobacco Co., United States v. 1061
American Waterworks Co. v. Farmers' Loan & T. Co. (mem.) - 319
Andrews, National Foundry & P. Works v. (mem.) - - - - - 1188
v. Thum (mem.) - - - - - 313
Anglo Californian Bank v. Secretary of the Treasury (mem.) - - 1188
Annapolis v. Revell (mem.) - - - 1178
Applegate, Dowell v. (mem.) - - - 1178
Arizona, Maish v. - - - - - - 567
Armijo y Jaramillo, United States v. (mem.) - - - - - 1185
Arnold, United States, Deimel v. (mem.) 315
Aslesen v. Minnesota (mem.) - - - 312
Atchison, T. & S. F. R. Co., Martin v. 1051
v. Mulligan (mem.) - - - - 311
Atlantic & P. R. Co. v. Laird (164 U. S. 393) - - - - - - - 485
v. Mingus (165 U. S. 413) - - 770
Atlantic City R. Co., *Re*, (164 U. S. 633) 579
Augustin v. United States (mem.) - - 1185
Aulick, United States v. (mem.) - - 308

B.

Baca v. United States (mem.) - - - 312
Bacon v. Texas (163 U. S. 207) - - 132
Baker v. Brickell (mem.) - - - 1186
Baldwin, Robertson v. - - - - 715
Zadig v. - - - - - - - - 1087
Ball v. United States (163 U. S. 662) - 300
Baltimore v. Baltimore Trust & G. Co. (166 U. S. 673) - - - 1160
Safety Insulated Wire & C. Co. v. (mem.) - - - - 1185
Ulman v. (mem.) - - - - - 1184
Baltimore & O. & C. R. Co. v. Yarde (mem.) - - - - - - 311
Baltimore & O. R. Co. v. Sutherland (mem.) - - - - - - 316
Baltimore & P. R. Co., Johnson v. (mem.) 1186
Baltimore Trust & G. Co., Baltimore v. 1160
Baltzell, Wisconsin, *ex rel.*, v. Siebecker (mem.) - - - - - 1182
Bank, Aberdeen, v. Chehalis County (166 U. S. 440) - - - - 1069
Anglo-Californian, v. Secretary of the Treasury (mem.) - - 1188
Capital, of St. Paul v. School Dist. No. 26 (mem.) - - - 1184
Citizens', of Louisiana v. Cannon (164 U. S. 319) - - - - 451
Exchange, Hubbard v. (mem.) - 317
Farmers' Nat., Rockwell v. (mem.) 1177
First Nat., of Aberdeen v. Chehalis County (166 U. S. 440) - 1069
First Nat., of Clark v. South Dakota (mem.) - - - - - - 308
Fourth Street Nat., v. Yardley (165 U. S. 634) - - - - - 855
German, v. Tennessee, Memphis (mem.) - - - - - - 313
Market Nat., McCormick v. - 317
Mechanics' Sav., v. Tennessee, Memphis (mem.) - - - 314
National, of Commerce, Kildare Lumber Co. v. (mem.) - 312
National, of Commerce v. Seattle (166 U. S. 463) - - - 1079




Digitized by Google

Bank, Prairie State Nat., v. United States (164 U. S. 227) - - - - 412
Puget Sound Nat., v. Seattle (166 U. S. 463) - - - - - 1079
Quaker City Nat., v. Nolan County (mem.) - - - - - 315
Seattle Nat., v. Seattle (166 U. S. 463) - - - - - - 1079
Second Nat., of Providence, Garner v. (mem.) - - - - 319
Traders' Nat., v. Chipman - - 164
Union Nat., of Chicago v. Louisville, N. A. & C. R. Co. (163 U. S. 325) - - - - - 177
Washington Nat., v. King County (166 U. S. 463) - - - - 1079
Bank of Commerce v. Seattle (166 U. S. 463) - - - - - 1079
v. Tennessee, Memphis (163 U. S. 416) - - - - - - 311
Barber v. Isaacs (mem.) - - - - 320
v. Pittsburg, Ft. W. & C. R. Co. (166 U. S. 83) - - - - - 925
Barber Asphalt Pav. Co. v. Harrisburg (mem.) - - - - - 309
Barnette, United States v. - - - - 675
Barnitz v. Beverly (163 U. S. 118) - 93
Barrett, Texas & P. R. Co. v. - - 1136
Barton, Gohlman v. (mem.) - - - 306
Bassett v. Minnesota (mem.) - - - 312
Bate Refrigerating Co. v. Toffey (mem.) 309
Bates, Western U. Teleg. Co. v. (mem.) 1179
Bates County, Edwards v. - - - - 155
Battersby, Washington, *ex rel.*, v. Tide Land Appraisers (mem.) - 307
Baughn v. Millirons (mem.) - - - 307
Bear Lake & R. W. & I. Co. v. Garland (164 U. S. 1) - - - - - 327
Garland v. (mem.) - - - - 314
Beaton, Northern P. R. Co. v. (mem.) - 1185
Beck, Flournoy Live Stock & R. E. Co. v. (mem.) - - - - - 305
Bellingham Bay Land Co., Dibble v. - 72
Bent, Singer Mfg. Co. v. - - - - 131
Bertha Zinc & M. Co. v. Carrico (mem.) 310
Beverly, Barnitz v. - - - - - - 93
Bigelow, Coughran v. - - - - - 442
Bilby, Cheney v. (mem.) - - - - 1180
Birtwell, Saltonstall v. - - - - 348
Black v. Black (mem.) - - - - - 318
v. Elkhorn Min. Co. (163 U. S. 445) 221
Bloom, Texas & P. R. Co. v. - - - 580
Board of Equalization, Missouri, Lemon v. (mem.) - - - - - 313
Board of Transportation, Nebraska, *ex rel.*, Missouri P. R. Co. v. - 489
Bohl, Carson v. (mem.) - - - - - 1182
Bondholders & P. of Iron R. R. v. Toledo, D. & B. R. Co. (mem.) 1188
Bonsack Mach. Co., Pollard v. (mem.) - 308
Booth v. Crawford (mem.) - - - - 309
Boston Safe Dep. & T. Co. v. Groome (mem.) - - - - - - 1181
Bowers, Von Schmidt v. (mem.) - 1187
Bradley, Fallbrook Irrig. Dist. v. - 369
Brickell, Baker v. (mem.) - - - 1186
Wheelan v. (mem.) - - - - 1186
Brim, Jones v. - - - - - - - 677
Brooklyn, Long Island Water Supply Co. v. - - - - - - 1165
Brooklyn & N. Y. Ferry Co. v. McMahon (mem.) - - - - 1186
Brow, Wabash W. R. Co. v. - - - 431
Brown, Cleveland, C. C. & St. L. R. Co. v. (mem.) - - - - - 1181
v. United States (164 U. S. 221) - 410
Walker v. - - - - - - - 865
v. Wygant (163 U. S. 618) - - 284
Buck v. United States (mem.) - - - 315
Bullard v. Des Moines & Ft. D. R. Co. (mem.) - - - - - - 1185
Burfenning v. Chicago, St. P. M. & O. R. Co. (163 U. S. 321) - - 175
Burlington, C. R. & N. R. Co., Burlington Gaslight Co. v. - - - 749
Burlington Gaslight Co. v. Burlington, C. R. & N. R. Co. (165 U. S. 370) - - - - - - 749
Bushnell v. Leland (164 U. S. 684) - 598
Butler, Illinois, *ex rel.*, Illinois C. R. Co. v. - - - - - - - 107
Butler County, F. G. Oxley Stave Co. v. 1149

## C.

C. & A. Potts & Co., *Re*, (166 U. S. 263) 994
Cake v. Mohun (164 U. S. 311) - - 447
Caldwell, Robinson v. - - - - 745
California Fig Syrup Co. v. Putnam (mem.) - - - - - - 310
Campbell v. Quigley (mem.) - - 306
v. Richardson (mem.) - - - 1184
v. Schachte (mem.) - - - - 306
v. Thames (mem.) - - - - 306
Cannon, Allen v. (mem.) - - - - 305
Citizens' Bank v. - - - - - 451
Northern P. R. Co. v. (mem.) - 1180
Capital Bank v. School Dist. No. 26 (mem.) - - - - - - 1184
Carothers v. Mayer (164 U. S. 325) - - 453
Carrico, Bertha Zinc & M. Co. v. (mem.) 310
Carson v. Bohl (mem.) - - - - 1182
Carter, Epperson v. (mem.) - - - 306
v. Ruddy (166 U. S. 493) - - 1090
Carver v. United States (164 U. S. 694) 602
Cavanaugh, Northern P. R. Co. v. (mem.) - - - - - - 316
Caverly v. Deere (mem.) - - - - 317
Ceballos v. The Warren Adams (mem.) 316
Cedar Falls & M. R. Co. v. Illinois C. R. Co. (mem.) - - - - - 1180
Central P. R. Co. v. United States (164 U. S. 93) - - - - - 362
Central R. & Bkg. Co., Southwestern R. Co. v. (mem.) - - - - 317
v. Wright (164 U. S. 327) - - 454
Central Trust Co. v. Richmond, N. I. & B. R. Co. (mem.) - - - - 310
Centurion, The, v. American Sugar Ref. Co. (mem.) - - - - - 309
Ceres, The, v. Wessels (mem.) - - 319
Certain Real Estate v. United States (mem.) - - - - - - 318
Champion Min. Co., Walrath v. (mem.) 317
Chapman, *Re*, (166 U. S. 661) - - 1154
v. United States (mem.) - - 1179
v. United States (mem.) - - 1188
v. United States (164 U. S. 436) 504
Chappell v. Chappell (mem.) - - - 1185
Charleston, Western U. Teleg. Co. v. (mem.) - - - - - - 309
Charleston Bridge Co. v. Higbee (mem.) 307
Cheesman, Shreve v. (mem.) - - - 329
Shreve v. (mem.) - - - 1177



Digitized by Google

Chehalis County, Aberdeen Bank v. - 1069
First Nat. Bank v. - - - - 1069
Cheney v. Bilby (mem.) - - - - 1180
Cherokee Nation, Phillips v. (mem.) - 1181
Chester, Western U. Teleg. Co. v. (mem.) 818
Chetwood, *Ex parte*, (165 U. S. 443) - 782
Chicago, Chicago & N. W. R. Co. v. - 511
Chicago, B. & Q. R. Co. v. - - 979
Chicago, B. & Q. R. Co. v. - - - 994
Chicago & N. W. R. Co. v. Chicago (164 U. S. 454) - - - - - 511
Chicago, B. & Q. R. Co. v. Chicago (166 U. S. 226) - - - - - 979
v. Chicago (166 U. S. 258) - 994
v. Jones (mem.) - - - - - 1184
Chicago, K. & N. R. Co. v. Van Cleave (mem.) - - - - - 1177
Chicago, M. & St. P. R. Co. v. Grant (mem.) - - - - - - 1182
Union P. R. Co. v. - - - - 265
Union P. R. Co. v. - - - - 282
Chicago, P. & S. R. Co., Farmers' Loan & T. Co. v. - - - - 60
Chicago, R. I. & P. R. Co. v. Stahley (mem.) - - - - - - 818
Union P. R. Co. v. - - - - 265
Union P. R. Co. v. - - - - 282
United States v. (mem.) - - 1184
Chicago, St. P. M. & O. R. Co., Burfenning v. - - - - - 175
v. Roberts (mem.) - - - - 1183
Chilton, Union P. R. Co. v. (mem.) - 808
Chin Yuen Sing v. Kilbreth (mem.) - - 306
Chipman, McClellan v. - - - - 461
Traders' Nat. Bank v. - - - 461
Chippewa Iron Co., Piper v. (mem.) - 307
Chisholm v. Abbott (mem.) - - - 1184
Chism, Price v. (mem.) - - - 1177
Choppin, Forman v. (mem.) - - - 319
Christie, Mayes v. (mem.) - - - 318
Church of Christ v. Reorganized Church of Jesus Christ of L. D. S. (mem.) - - - - - 314
Cilley v. Patten (mem.) - - - - - 308
Cincinnati, Louisville Trust Co. v. (mem.) 1183
Citizens' Bank v. Cannon (164 U. S. 319) 451
Citizens' Street R. Co., City R. Co. v. - 1114
City R. Co. v. Citizens' Street R. Co. (166 U. S. 557) - - - - - 1114
Claflin v. Tuttle (mem.) - - - - 1187
Clarke v. McDade (165 U. S. 168) - - 673
v. Mott (165 U. S. 168) - - 673
Clarkson v. Farmers' Loan & T. Co. (mem.) - - - - - 319
Cleveland, C. C. & St. L. R. Co. v. Brown (mem.) - - - - - - 1181
Cloughley, Rouse v. (mem.) - - 316
Cloyd, Wheeler v. (mem.) - - 318
Cody, Texas & P. R. Co. v. - - - 1132
Cohen v. United States (mem.) - - 1181
Colburn, Northern P. R. Co. v. - 479
Collins, Wayne Lumber Co. v. (mem.) 319
Colorado E. R. Co., Union P. R. Co. v. (mem.) - - - - - - 310
Colorado Pav. Co., Murphy v. (mem.) - 1188
Columbia & P. S. R. Co., Washington, *ex rel.*, v. Harbor Line Comrs. (mem.) - - - - - 309
Columbus v. Dennison (mem.) - - 314
Comith v. Parkerson (mem.) - - 307
Commissioner of Patents, Du Bois v. (mem.) - - - - - 306
Conolly, Wiggan v. - - - - - - 69
Conqueror, The, (166 U. S. 110) - - 937
Converse, Michigan Dairy Co. v. (mem.) 305
Cook v. Eells (mem.) - - - - 320
Missouri, K. & T. R. Co. v. - 239
v. Street (mem.) - - - - 317
Cooper v. United States (mem.) - - 313
Coovert, Washington v. (mem.) - - 1182
Coquitlam, The, v. United States (163 U. S. 346) - - - - - 184
Corcoran, Hill v. (mem.) - - - - 1182
Cornell v. Green (163 U. S. 75) - - 76
Cornwall, Hentz v. (mem.) - - - 1182
Coughran v. Bigelow (164 U. S. 301) - 442
Covington & L. Turnp. Road Co. v. Sandford (164 U. S. 578) - 560
Craemer v. Washington (mem.) - 1183
Crawford, Booth v. (mem.) - - - 309
Crimp v. McCormick Const. Co. (mem.) 319
Cropper v. McLane (mem.) - - 316
Culp, Allen v. - - - - - - 1093
Cunningham, Gonzales v. - - - 572
Cutajar v. United States (mem.) - 1185

## D.

Dailey v. Ohio (mem.) - - - - 1181
Daily, Western U. Teleg. Co. v. (mem.) 1183
Daly, Webster v. - - - - - - 111
Davenport v. United States (mem.) - 314
Davidson, Illinois C. R. Co. v. (mem.) 1186
Davies, Hanford v. - - - - - 157
Davis v. Patrick (mem.) - - - - 316
v. United States (mem.) - - 1179
v. United States (165 U. S. 373) 750
v. Wakelee (mem.) - - - - 310
Dearborn v. Moran (mem.) - - 1184
Deere, Caverly v. (mem.) - - - 317
Deimel v. Strohelm (mem.) - - 1188
United States, *ex rel.*, v. Arnold (mem.) - - - - - 315
De Lacey, Dennis v. (mem.) - - 306
Delaney, United States v. - - - 435
Delta & P. Land Co., Ford v. - - 590
Goodsell v. (mem.) - - - 1186
Dement, Tubman v. (mem.) - - 314
Dennis v. De Lacey (mem.) - - - 306
Dennison, Columbus v. (mem.) - 314
Deno v. Griffin (mem.) - - - - 310
Des Moines & Ft. D. R. Co., Bullard v. (mem.) - - - - - 1185
Detroit, Detroit Citizens' Street R. Co. v. (mem.) - - - - - 310
Detroit Citizens' Street R. Co. v. Detroit (mem.) - - - - - 310
De Vaughn v. Hutchinson (165 U. S. 566) 827
Deweese v. Reinhard (165 U. S. 386) - 757
Dibble v. Bellingham Bay Land Co. (163 U. S. 63) - - - - - 72
Dickson, District of Columbia v. - 738
Dillingham, Scales v. (mem.) - - 1177
District of Columbia v. Dickson (165 U. S. 341) - - - - - 738
v. Hall (165 U. S. 340) - - 738
v. Johnson (165 U. S. 330) - 734
v. Sheckels (165 U. S. 330) - - 734
Dodge, Perego v. - - - - - 118
Doherty v. Knowlton (mem.) - - 1182
Donald, Gardner v. - - - - 632
Scott v. - - - - - - - 632
Scott v. - - - - - - 648
Douglas v. United States, North Carolina (mem.) - - - - - 307



Digitized by Google

Dow, Electric Co. v. - - - - 1088
Dowell v. Applegate (mem.) - - 1178
Draper v. United States (164 U. S. 240) 419
Drucker, Robertson v. (mem.) - - 308
Du Bois v. Commissioner of Patents (mem.) - - - - - 306
Dubuque & S. C. R. Co. v. Sampson (mem.) - - - - - - 1180
Duffy v. Green (mem.) - - - - 305
Duncanson, Manson v. - - - - - 1105
Dunlop v. United States (165 U. S. 486) 799
Durham, Hussman v. - - - - 664
Duval v. Pullman Palace Car Co. (mem.) 310
Dyer v. United States (mem.) - - 1183

E.

Eastern R. Co. v. Moran (mem.) - - 309
East Tennessee, V. & G. R. Co. v. Jordan (mem.) - - - - - 1180
Eckart, *Re*, (166 U. S. 481) - - - 1085
Eddy v. Lafayette (163 U. S. 456) - - 225
v. Wallace (mem.) - - - - 312
Edgington v. United States (164 U. S. 361) - - - - - - 467
Edwards v. Bates County (163 U. S. 269) 155
Eells, Cook v. (mem.) - - - - - 320
Ross v. (mem.) - - - - - 320
Egan v. Hart (165 U. S. 188) - - - 680
Egeland, Northern P. R. Co. v. - - 82
Einstein, W. & Co. v. United States (mem.) - - - - - - 1188
Elder v. McClaskey (mem.) - - - 315
Electric Co. v. Dow (166 U. S. 489) - 1088
Elkhorn Min. Co., Black v. - - - 221
Elliott, United States v. - - - - 474
Ellis, Gulf, C. & S. F. R. Co. v. - - 666
Elmira & H. R. Co. v. Thomson-Houston Electric Co. (mem.) - - 315
Elmore v. Vicksburg, S. & P. R. Co. (mem.) - - - - - 1177
Epperson v. Carter (mem.) - - - - 306
Esquibel, Southern P. R. Co. v. (mem.) 308
Eufaula, Moore v. (mem.) - - - - 1180
Ewer v. New York (mem.) - - - 1181
Exchange Bank, Hubbard v. (mem.) - 317
*Ex parte* Allx (166 U. S. 136) - - 948
Chetwood (165 U. S. 443) - 782
Jones (164 U. S. 691) - - 601
Kollock (165 U. S. 526) - - 813
Lennon (166 U. S. 548) - - 1110
Lochren (mem.) - - - 319
Lusby (165 U. S. 538) - - 817
McCaully (165 U. S. 538) - 817

F.

Falk, Springer Lithographing Co. v. (mem.) - - - - - - 1179
Fallbrook Irrig. Dist. v. Bradley (164 U. S. 112) - - - - - 369
Fargo v. Poe (165 U. S. 194) - - - 683
Farmer v. National L. Asso. (mem.) - 318
Farmers' L. Ditch Co., Agricultural Ditch Co. v. (mem.) - - - - 1188
Farmers' Loan & T. Co., American Waterworks Co. v. (mem.) 319
Chicago, P. & S. R. Co. (163 U. S. 31) - - - - - - 60
Clarkson v. (mem.) - - - - 319
Green v. (mem.) - - - - - 1187
v. Scott (mem.) - - - - 318
Farmers Nat. Bank, Rockwell v. (mem.) 1177
Farwell Farmers' Warehouse Asso., Minneapolis, St. P. & S. S. M. R. Co. v. (mem.) - - - 310
Faust v. United States (163 U. S. 452) 224
Ferguson, Plessy v. - - - - - 256
F. G. Oxley Stave Co. v. Butler County (166 U. S. 648) - - - - 1149
Filhiol v. United States (mem.) - - 317
Finch, United States v. (mem.) - - 308
First Nat. Bank v. Chehalis County (166 U. S. 440) - - - - - 1069
v. South Dakota (mem.) - - 308
Fisher, American Pub. Co. v. - - - 1079
Fitch, United States v. - - - - - 289
Fitzgerald, Rector v. (mem.) - - - 1178
Fitzgerald & M. Const. Co. v. (mem.) - - - - - - 1188
Fitzgerald & M. Const. Co. v. Fitzgerald (mem.) - - - - - 1188
Fletcher v. United States (mem.) - - 312
Flint, Nelson v. - - - - - - 1002
Florida, Ætna L. Ins. Co. v. (mem.) 311
Osborne v. - - - - - - - 586
Flournoy Livestock & R. E. Co. v. Beck (mem.) - - - - - 305
Ford v. Delta & P. Land Co. (164 U. S. 662) - - - - - - 590
Forman v. Choppin (mem.) - - - 319
Forsyth v. Hammond (166 U. S. 506) - 1095
Foster v. Wistar (mem.) - - - - 307
Fourth Street Nat. Bank v. Yardley (165 U. S. 634) - - - - - 855
Fowler v. Lamson (164 U. S. 252) - 424
Fox, Whitney v. - - - - - - - 1145
Wood v. - - - - - - - 1149
France v. United States (164 U. S. 676) 595
Fred W. Wolf Co., Salt Lake City Brew. Co. v. - - - - - - - 1172
French, Gonzales v. - - - - - 458
Friedman, Willman v. (mem.) - - 313
Friend v. United States (mem.) - - 308

G.

Gaddis, Knox v. (mem.) - - - - 311
Galigher, Yosemite Min. & M. Co. v. (mem.) - - - - - 1181
Garden, Newark Electric Light & P. Co. v. (mem.) - - - - - 1188
Gardner v. Donald (165 U. S. 58) - 632
Garitee v. United States (mem.) - - 315
Garland v. Bear Lake & R. W. & I. Co. (mem.) - - - - - 314
Bear Lake & R. W. & I. Co. v. 327
Garner v. Second Nat. Bank (mem.) 319
Gay, United States v. - - - - - 215
Gentry, Texas & P. R. Co. v. - - - 186
Georgia, Allen v. - - - - - - 949
Gunn v. (mem.) - - - - 306
Hennington v. - - - - - 166
German Bank v. Tennessee, Memphis (mem.) - - - - - - 313
Germania Iron Co. v. United States (165 U. S. 379) - - - - - 754
Gibson v. United States (166 U. S. 269) 996
Gildersleeve, New Mexico, *ex rel.*, v. Perea (mem.) - - - - - 307
Gilliat, United States v. - - - - - 344
Girard L. Ins., A. & T. Co., Taylor v. (mem.) - - - - - - 307
Gladson v. Minnesota (166 U. S. 427) - 1064



Digitized by Google

Glover v. Patten (165 U. S. 394) - - 760
v. United States (164 U. S. 294) - 440
Gohlman v. Barton (mem.) - - - 306
Golsby v. United States (mem.) - - 320
Gomez, United States v. (mem.) - - 1185
Gonzales v. Cunningham (164 U. S. 612) 572
v. French (164 U. S. 338) - - 458
Goodsell v. Delta & P. Land Co. (mem.) 1186
Gorham, United States v. - - - - 729
Gowdy v. Green (mem.) - - - - - 1179
Grand Lodge v. New Orleans (166 U. S. 143) - - - - - - 951
Grant, Chicago, M. & St. P. R. Co. v. (mem.) - - - - - - 1182
Graves v. United States (165 U. S. 323) 732
Grayson v. Lynch (163 U. S. 468) - 230
Greathouse, United States v. - - - 1130
Green, Cornell v. - - - - - 76
Green, Duffy v. (mem.) - - - - - 305
v. Farmers' Loan & T. Co. (mem.) 1187
Gowdy v. (mem.) - - - - 1179
Gregory v. Pike (mem.) - - - - - 311
v. Talbot (mem.) - - - - 311
v. Van Ee (mem.) - - - - - 1183
Griffin, Deno v. (mem.) - - - - 310
Grimes Dry Goods Co. v. Malcolm (164 U. S. 483) - - - - - 524
Grimshaw, Hopkins v. - - - - 739
Groome, Boston Safe Dep. & T. Co. v. (mem.) - - - - - - 1181
Guffey, Hukill v. (mem.) - - - - 306
Gulf, C. & S. F. R. Co. v. Ellis (165 U. S. 150) - - - - - - 666
v. Roff (mem.) - - - - - 1182
Gunn v. Georgia (mem.) - - - - - 306
Gurule, United States v. (mem.) - - 1185

## H.

Hall, District of Columbia v. - - 738
Hamer v. Ogden City (mem.) - - - 319
v. Weber County (mem.) - - 1178
Hammond, Forsyth v. - - - - - 1095
v. Stockton Combined H. & A. Works (mem.) - - - 317
Hanford v. Davies (163 U. S. 273) - - 157
Hanks, Matthews v. (mem.) - - 317
Harbor Line Comrs., Washington, Columbia & P. S. R. Co. v. (mem.) 309
Harden, United States v. (mem.) - - 312
Harman v. Harman (mem.) - - - - 1186
Harrisburg, Barber Asphalt Pav. Co. v. (mem.) - - - - - - 309
Harrison v. United States (163 U. S. 140) 104
Hart, Egan v. - - - - - - - 680
Hathaway v. Marts (mem.) - - - 319
Henderson, Travelers' Ins. Co. v. (mem.) 312
Henderson Bridge Co. v. Kentucky (166 U. S. 150) - - - - - 953
v. Kentucky (mem.) - - - 1179
Hennington v. Georgia (163 U. S. 299) 166
Henry v. Alabama & V. R. Co. (mem.) - 1180
Hentz v. Cornwall (mem.) - - - - 1182
Hevner, Matthews v. (mem.) - - - 1177
Hewecker, United States v. - - - 845
Hickey, Washington & G. R. Co. v. 1101
Hien, *Re*, (166 U. S. 432) - - - 1066
Higbee, Charleston Bridge Co. v. (mem.) 307
Hilborn v. United States (163 U. S. 342) 183
Hill v. Corcoran (mem.) - - - - 1182
Hitchcock, United States v. - - - 412
Hodgkin, United States Mut. Acci. Asso. v. (mem.) - - - - - 1184
Holcomb v. Wright (mem.) - - - - 314
Hooe v. Jamieson (166 U. S. 395) - - 1049
v. Werner (166 U. S. 399) - - 1051
Hopkins v. Grimshaw (165 U. S. 342) - 739
Hornsby, Rouse v. (mem.) - - - - 320
Hoskins v. Minnesota (mem.) - - - 1178
Howard v. United States (mem.) - - 1177
Howell v. United States (mem.) - - 315
Western U. Teleg. Co. v. (mem.) 1178
Hubbard v. Exchange Bank (mem.) - 317
Hudson v. United States (mem.) - - 1178
Huebner, Mutual Ben. L. Ins. Co. v. (mem.) - - - - - 1181
Hukill v. Guffey (mem.) - - - - - 306
Humphrey, Ohio *ex rel.*, Lake Shore & M. S. R. Co. v. - - - - 747
Huning v. United States (mem.) - - 1179
Hunt v. United States (166 U. S. 424) - 1063
Huntington v. Proceeds of The Advance (mem.) - - - - - 317
v. Proceeds of The Allianca (mem.) 317
v. Proceeds of The Vigilancia (mem.) - - - - - - 317
v. Saunders (163 U. S. 319) - 174
Hurlbut Land & C. Co. v. Truscott (mem.) 1185
Hussman v. Durham (165 U. S. 144) - 664
Hutchinson, De Vaughn v. - - - - 827

## I.

Iasigi v. Van de Carr (166 U. S. 391) - 1045
Illinois, Butler, Illinois C. R. Co. v. - 107
Illinois C. R. Co., Cedar Falls & M. R. Co. v. (mem.) - - - - - 1180
v. Davidson (mem.) - - - - 1186
v. Illinois, Butler, (163 U. S. 142) 107
v. Mattoon (mem.) - - - - 309
Sampson v. (mem.) - - - - 1180
v. Walker (mem.) - - - - - 318
Indiana, Adams Exp. Co. v. - - - 707
American Exp. Co. v. - - - - 707
v. Kentucky (163 U. S. 520) - 250
United States Exp. Co. v. - - - 707
Western U. Teleg. Co. v. - - 725
Insurance Co., Ætna L., v. Florida (mem.) 311
Mutual Ben. L., v. Huebner (mem.) 1181
Phenix, Kahnweiler v. (mem.) - 311
Reliance M., v. New York & C. Mail S. S. Co. (mem.) - 1184
Travelers', v. Henderson (mem.) - 312
Insurance Co. of N. A. v. International Trust Co. (mem.) - - - 316
Insurance Soc., Norwich Union F., International Trust Co. v. (mem.) 316
International & G. N. R. Co., Knight v. (mem.) - - - - - - - 1187
International Trust Co., Insurance Co. of N. A. v. (mem.) - - 316
v. Norwich Union F. Ins. Soc. (mem.) - - - - - - 316
Sun Ins. Office v. (mem.) - - 316
Iowa, Missouri v. - - - - - - - 655
Isaacs, Barber v. (mem.) - - - - 320
Ivy, Yancey v. (mem.) - - - - - 319

## J.

James, Union P. R. Co. v. - - - - - 236
Jamieson, Hooe v. - - - - - - 1049
Jersey City, American Dock & I. Co. v. (mem.) - - - - - - - 317



Digitized by Google

Johnson v. Baltimore & P. R. Co. (mem.) 1186
District of Columbia v. - - 784
Jones, *Ex parte*, 164 U. S. 691 - - 601
v. Brim, 165 U. S. 180 - - 677
Chicago, B. & Q. R. Co. v. (mem.) 1184
Union P. R. Co. v. (mem.) - 310
Jonson E. & F. Co. v. The Paradox (mem.) - - - - - 1178
Jordan, East Tennessee, V. & G. R. Co. v. (mem.) - - - - - 1180
Joseph Frankel's Sons v. United States (mem.) - - - - - 819
June Mfg. Co., Singer Mfg. Co. v. - 118

K.

Kahnweiler v. Phenix Ins. Co. (mem.) 311
Kalinski, Supreme Lodge, K. of P. v. 163
Kansas, Lowe v. - - - - - - 78
Kansas City, Ft. S. & M. R. Co. v. Seawell (mem.) - - - - 1179
Kate, The, (164 U. S. 458) - - - 512
Keenan, Walker v. (mem.) - - 1180
Kemp, Western U. Teleg. Co. v. (mem.) 1187
Kentucky, Adams Exp. Co. v. - - 960
Henderson Bridge Co. v. - - 958
Henderson Bridge Co. v. (mem.) 1179
Indiana v. - - - - - - - 250
Keyser, Shute v. (mem.) - - - - 809
Kiesel, Wilson v. - - - - - - 422
Kilbreth, Chin Yuen Sing v. (mem.) - 306
Kildare Lumber Co. v. National Bank of Commerce (mem.) - - 312
King v. Port Royal & A. R. Co. (mem.) 1184
v. United States (mem.) - - 1180
United States v. (mem.) - - 1182
King County, Washington Nat. Bank v. 1079
Kirk v. United States (163 U. S. 49) - 66
Knight v. International & G. N. R. Co. (mem.) - - - - - 1187
Knowlton, Doherty v. (mem.) - - 1182
Knox v. Gaddis (mem.) - - - - 811
Western U. Teleg. Co. v. (mem.) 1179
Knoxville, C. G. & L. R. Co. v. Mason (mem.) - - - - - 1179
Kollock, *Ex parte*, (165 U. S. 526) - - 813
Krug v. Washington (mem.) - - 1183
Kurtz, United States v. - - - - - 346

L.

Lafayette, Eddy v. - - - - - 225
Laird, Atlantic & P. R. Co. v. - - 485
Lake Shore & M. S. R. Co. v. Ohio, Humphrey, (165 U. S. 365) - 747
Lalone v. United States (164 U. S. 255) 425
Lamson, Fowler v. - - - - - 424
Lane, Thomas v. (mem.) - - - 1177
Lange, Raymond v. (mem.) - - 1185
Langford, Riser v. (mem.) - - - 307
Law v. The Trave (mem.) - - - 309
Lawder, Wade v. - - - - - 851
Laws, United States v. - - - - - 151
Lazard v. Merchants' & M. Transp. Co. (mem.) - - - - - 1178
Leak v. Rio Grande W. R. Co. v. - - 160
Lee, St. Louis & S. F. R. Co. v. (mem.) 308
Legg, The Titan v. (mem.) - - - 1188
Leland, Bushnell v. - - - - - 598
Lemon, Missouri, *ex rel.*, v. Board of Equalization (mem.) - - 313
Lenning, White v. (mem.) - - - 314
Lennon, *Ex parte*, (166 U. S. 548) - 1110
Lewis, Reeder v. (mem.) - - - 317
Lincecum v. United States (mem.) - 1178
Link v. Union P. R. Co. (mem.) - 307
Little Rock & Ft. S. R. Co. v. Renfroe (mem.) - - - - - - 1178
Lochren, *Ex parte*, (mem.) - - - 319
United States, Long v. (mem.) 1181
Lomm, Strickland v. (mem.) - - - 317
Long, United States, *ex rel.*, v. Lochren (mem.) - - - - - 1181
Long Island Water Supply Co. v. Brooklyn (166 U. S. 685) - - 1165
Louisiana, Allgeyer v. - - - - - 833
Murray v. - - - - - - 87
Louisville, Louisville & N. R. Co. v. - 1173
Louisville & N. R. Co. v. Louisville (166 U. S. 709) - - - - 1173
Louisville, N. A. & C. R. Co., Union Nat. Bank v. - - - - 177
Louisville Trust Co. v. Cincinnati (mem.) 1183
Lovell, United States v. (mem.) - 309
Lowe v. Kansas (163 U. S. 81) - - 78
Lucas v. United States (163 U. S. 612) 282
Luckey v. United States (mem.) - 314
Lusby, *Ex parte*, (165 U. S. 538) - - 817
Luther, Webster v. - - - - - 179
Lybarger v. Washington (mem.) - - 305
Lynch, Grayson v. - - - - - 230
Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. (mem.) - - 311

M.

McCaully, *Ex parte*, (165 U. S. 538) - 817
McClaskey, Elder v. (mem.) - - 315
McClellan v. Chipman (164 U. S. 347) 461
v. Pyeatt (mem.) - - - - - 306
McConnell v. Providence Sav. L. Assur. Soc. (mem.) - - - - 311
McCormick v. Market Nat. Bank (165 U. S. 538) - - - - - - 817
McCormick Const. Co., Crimp v. (mem.) 319
McCullough v. New York, N. H. & H. R. Co. (mem.) - - - - 312
McDade, Clarke v. - - - - - - 673
McDonald, Press Pub. Co. v. (mem.) 320
McElroy v. United States (164 U. S. 76) 355
McGinnis v. United States (mem.) - 1182
McGlensy v. Van Vranken (mem.) - - 311
Mack v. Porter (mem.) - - - - 315
McKay, Tucker v. (mem.) - - - - 1180
McKee v. United States (164 U. S. 287) 437
McLane, Cropper v. (mem.) - - - 316
McClay, Northern P. R. Co. v. (mem.) 1182
McMahon, Brooklyn & N. Y. Ferry Co. v. (mem.) - - - - - 1186
United States v. - - - - 357
McMillan, United States v. - - - 805
Magarity, Shipman v. (mem.) - - - 305
Maish v. Arizona (164 U. S. 599) - - 567
Majestic, The, (166 U. S. 375) - - 1039
Malcolm, W. B. Grimes Dry Goods Co. v. 524
Manson v. Duncanson (166 U. S. 533) - 1105
Manton, Texas & P. R. Co. v. - - 580
Market Nat. Bank, McCormick v. - 817
Martin v. Atchison, T. & S. F. R. Co (166 U. S. 399) - - - - - 1051
Martin & H. Cash Carrier Co. v. (mem.) - - - - - - 318
Martin & H. Cash Carrier Co. v. Martin (mem.) - - - - - 318



Digitized by Google

Martinez, United States v. (mem.) - - 1185
Marts, Hathaway v. (mem.) - - - 319
Mase, Oakes v. - - - - - - - 746
Mason, Knoxville, C. G. & L. R. Co. v. (mem.) - - - - - - 1179
Mathews, St. Louis & S. F. R. Co. v. 611
Matthews v. Hanks (mem.) - - - 317
v. Hevner (mem.) - - - - 1177
v. Scott (mem.) - - - - - 306
Mattoon, Illinois C. R. Co. v. (mem.) - 309
Mayer, Carothers v. - - - - - 453
Mayes v. Christie (mem.) - - - - 318
Talton v. - - - - - - - 196
Mechanics' Sav. Bank v. Tennessee, Memphis, (mem.) - - - - 314
Medler v. Albuquerque Hotel & O. H. Co. (mem.) - - - - - 309
Meears, Whitehill v. (mem.) - - - 1178
Memphis, Tennessee, *ex rel.*, Bank of Commerce v. - - - - 211
Tennessee, *ex rel.*, German Bank v. (mem.) - - - - - - 313
Tennessee, *ex rel.*, Mechanics' Sav. Bank v. (mem.) - - - - 314
Merchants' & M. Transp. Co., Lazard v. (mem.) - - - - - - 1178
v. Norfolk & W. R. Co. (mem.) - 1181
Meyer v. Richards (163 U. S. 385) - 199
Michelson, Western U. Teleg. Co. v. (mem.) - - - - - - 1181
Michigan Dairy Co. v. Converse (mem.) 305
Miller, Moore v. (mem.) - - - - 310
Millirons, Baughn v. (mem.) - - - - 307
Mills v. United States (164 U. S. 644) 584
Miners' Union, Raven Gold Min. Co. v. (mem.) - - - - - - 315
Mingus, Atlantic & P. R. Co. v. - - 770
Minneapolis, St. P. & S. S. M. R. Co. v. Farwell Farmers' Warehouse Asso. (mem.) - - - - 310
Minnesota, Aslesen v. (mem.) - - - 312
Bassett v. (mem.) - - - - 312
Gladson v. - - - - - - - 1064
Hoskins v. (mem.) - - - - 1178
Missouri v. Iowa (165 U. S. 118) - - 655
Parsons v. (mem.) - - - - 1187
Lemon, v. Board of Equalization (mem.) - - - - - - - 313
Tilley, v. Slover (mem.) - - - 315
Missouri, K. & T. R. Co. v. Cook (163 U. S. 491) - - - - - - 289
Missouri P. R. Co. v. Nebraska, Board of Transp. (164 U. S. 403) 489
Mitchell, Noble v. - - - - - 472
v. South Dakota (mem.) - - 306
Modesto Irrig. Dist., Tregea v. - - 395
Mohun, Cake v. - - - - - - - 447
Monroe, Press Pub. Co. v. - - - - 367
Moore v. Eufaula (mem.) - - - - 1180
v. Miller (mem.) - - - 310
Moran, Dearborn v. (mem.) - - - - 1184
Eastern R. Co. v. (mem.) - - 309
Morse Arms Mfg. Co. v. United States (mem.) - - - - - - 318
Mortenson, Northern P. R. Co. v. (mem.) 1179
Moses v. United States (166 U. S. 571) 1119
Mott, Clarke v. - - - - - - 673
Mount Pleasant Equitable Co-Op. v. W. P. Noble Mercantile Co. (mem.) 1180
Mulligan, Atchison, T. & S. F. R. Co. v. (mem.) - - - - - - 311
Murphy v. Colorado Pav. Co. (mem.) 1188
v. Washington (mem.) - - 1178
Murray v. Louisiana (163 U. S. 101) - 87
Mutual Ben. L. Ins. Co. v. Huebner (mem.) - - - - - 1181

N.

Napier Shipping Co., Panama R. Co. v. 1004
National Acci. Soc. v. Spiro (164 U. S. 281) - - - - - - - 435
National Bank of Commerce, Kildare Lumber Co. v. (mem.) - 312
v. Seattle (166 U. S. 463) - - 1079
National Foundry & P. Works v. Andrews (mem.) - - - - 1188
v. Oconto (mem.) - - - - - 1188
National L. Asso., Farmer v. (mem.) 318
National Mach. Co. v. Wheeler & W. Mfg. Co. (mem.) - - - 1189
National Safe Dep., S. & T. Co. v. Sterett (mem.) - - - - 1187
Neall v. Schrader (mem.) - - - - 319
Nebraska, Board of Transportation, Missouri P. R. Co. v. - - - - 489
Nelson v. Flint (166 U. S. 276) - - 1002
Newark Electric Light & P. Co. v. Garden (mem.) - - - - - 1188
New Mexico, Gildersleeve, v. Perea (mem.) - - - - - - - 307
New Mexico & S. P. R. Co., Walker v. 337
New Orleans, Grand Lodge v. - - - 951
New Orleans City & L. R. Co. v. (mem.) - - - - - - - 312
New Orleans Waterworks Co. v. 518
v. United States, Whitney (mem.) 305
New Orleans & C. R. Co., Sentell v. - 1169
New Orleans City & L. R. Co. v. New Orleans (mem.) - - - - 312
New Orleans Waterworks Co. v. New Orleans (164 U. S. 471) - 518
New York, Ewer v. (mem) - - - - 1181
New York, N. H. & H. R. Co. v. 853
New York & C. Mail S. S. Co., Reliance M. Ins. Co. v. (mem.) - - 1184
New York & N. E. R. Co. v. Rumsey (mem.) - - - - - - 306
v. Rumsey (mem.) - - - - 311
New York, N. H. & H. R. Co., McCullough v. (mem) - - - - 312
v. New York (165 U. S. 628) - 853
Nickels, Northern P. R. Co. v. (mem.) 309
Nixon, Provident Sav. L. Assur. Soc. v. (mem.) - - - - - - 316
Noble v. Mitchell (164 U. S. 367) - - 472
Nofire v. United States (164 U. S. 657) 588
Nolan, Texas & P. R. Co. v. (mem.) - 1177
Nolan County, Quaker City Nat. Bank v. (mem.) - - - - - - 315
Nordstrom v. Washington (mem.) - - 1183
Norfolk & W. R. Co., Merchants' & M. Transp. Co. v. (mem.) - - 1181
Postal Teleg. Cable Co. v. (mem.) 315
Steed v. (mem.) - - - - - 309
Norman, Western U. Teleg Co. v. (mem.) 1182
North Carolina, Railroad Comrs., Western U. Teleg. Co. v. (mem.) 1187
United States, *ex rel.*, Douglas v. (mem.) - - - - - - - 307
Northern P. R. Co. v. Beaton (mem) - 1185
v. Cannon (mem.) - - - - 1180
v. Cavanaugh (mem.) - - - - 316
v. Colburn (164 U. S. 383) - - 479
v. Egeland (163 U. S. 93) - - 82



Digitized by Google

Northern P. R. Co. v. Maclay (mem.) - 1182
v. Mortenson (mem.) - - 1179
v. Nickels (mem.) - - - 309
Oregon S. L. & U. N. R. Co. v. (mem.) - - - - - 1182
v. Peterson (mem.) - - - 316
v. Sanders (166 U. S. 620) - - 1139
v. Spokane (mem.) - - - 1179
v. Sullivan (mem.) - - - 317
v. Teeter (mem.) - - - 1179
Northwestern Express, S. & T. Co., United States v. - - - 599
Norton v. Wheaton (165 U. S. 518) - 810
Norwich Union F. Ins. Soc., International Trust Co. v. (mem.) - 316
Novak, Union P. R. Co. v. (mem.) - 1184

O.

Oakes v. Mase (165 U. S. 363) - - 746
Oconto, National Foundry & P. Works v. (mem.) - - - - - - 1188
Ogden City, Hamer v. (mem.) - - 319
Ohio, Dailey v. (mem.) - - - 1181
Humphrey, Lake Shore & M. S. R. Co. v. - - - - - - 747
Ohio State Auditor, Adams Exp. Co. v. 965
Adams Exp. Co. v. - - - - 683
Olcott v. Rice (mem.) - - - - 315
Old Jordan Min. & M. Co. v. Société Anonyme Des Mines (164 U. 261) - - - - - - 427
Omaha & C. B. R. & B. Co. v. Smith (mem.) - - - - - 1188
Oregon & C. R. Co., United States v. 541
Oregon S. L. & U. N. R. Co. v. Northern P. R. Co. (mem.) - - 1182
Osborne v. Florida (164 U. S. 650) - - 586
Otero, United States v. (mem.) - - 1187
Outze v. Ward (mem.) - - - - 307

P.

Panama R. Co. v. Napier Shipping Co. (166 U. S. 280) - - - 1004
Paradox, The, Jonson E. & F. Co. v. (mem.) - - - - - 1178
Parkerson, Comitis v. (mem.) - - 307
Parsons v. Missouri (mem.) - - 1187
v. Venzke (164 U. S. 89) - - 360
Patrick, Davis v. (mem.) - - - 316
Patten, Cilley v. (mem.) - - - 309
Glover v. - - - - - - 760
Patterson, Southern P. R. Co. v. (mem.) 312
Patton v. Texas & P. R. Co. (mem.) - 1186
Pauly v. State Loan & T. Co. (165 U. S. 606) - - - - - - 844
Pennock & S. Co., American Road Mach. Co. v. - - - - - - 337
Peraltareavis v. United States (mem.) - 316
Perea, New Mexico, Gildersleeve v. (mem.) - - - - - - 307
Perego v. Dodge (163 U. S. 160) - - 118
Perew, United States v. (mem.) - - 1185
Perkins, United States v. - - - 287
Perrine v. Slack (164 U. S. 452) - - 510
Perry Stove Mfg. Co., Lyons-Thomas Hardware Co. v. (mem.) - 311
Peters v. United States (mem.) - - 305
Peterson, Northern P. R. Co. v. (mem.) 316
Phenix Ins. Co. v. Kahnweiler v. (mem.) 311
Phillips v. Cherokee Nation (mem.) - 1181
Pierce, Short v. (mem.) - - - - 1179
Pike, Gregory v. (mem.) - - - - 311
Pim v. St. Louis (165 U. S. 273) - - 714
Piper v. Chippewa Iron Co. (mem.) - 307
Pitts v. United States (mem.) - - - 305
Pittsburg, Ft. W. & C. R. Co., Barber v. 925
Platt v. Poe (165 U. S. 194) - - - 683
Pleasy v. Ferguson (163 U. S. 537) - - 256
Poe, Fargo v. - - - - - - - 683
Platt v. - - - - - - - 683
Sanford v. - - - - - - - 683
Seward v. - - - - - - - 683
Western U. Teleg. Co. v. (mem.) 1183
Pollard v. Bonsack Mach. Co. (mem.) 308
Porter, Mack v. (mem.) - - - - 315
Port Royal & A. R. Co., King v. (mem.) 1184
South Carolina v. (mem.) - - 1184
Postal Teleg. Cable Co. v. Norfolk & W. R. Co. (mem.) - - - - 315
Potts, *Re*, (166 U. S. 263) - - - - 994
Prairie State Nat. Bank v. United States (164 U. S. 227) - - - 412
Prather v. United States (164 U. S. 452) - 510
Press Pub. Co. v. McDonald (mem.) - 320
v. Monroe (164 U. S. 105) - - 367
Price v. Chism (mem.) - - - - - 1177
v. United States (165 U. S. 311) - 727
Proceeds of The Advance, Huntington v. (mem.) - - - - - 317
Proceeds of The Allianca, Huntington v. (mem.) - - - - - - 317
Proceeds of The Vigilancia, Huntington v. (mem.) - - - - - 317
Providence Sav. L. Assur. Soc., McConnell v. (mem.) - - - - - 311
Provident Sav. L. Assur. Soc. v. Nixon mem.) - - - - - - 316
Puget Sound Nat. Bank v. Seattle (166 U. S. 468) - - - - - - 1079
Pullman Palace Car Co., Duval v. (mem.) 310
Putnam, California Fig Syrup Co. v. (mem.) - - - - - - 310
Pyeatt, McClellan v. (mem.) - - 306

Q.

Quaker City Nat. Bank v. Nolan County (mem.) - - - - - - 315
Quigley, Campbell v. (mem.) - - 306

R.

Race Horse, Ward v. - - - - - 244
Railroad Comrs., North Carolina, *ex rel.*, Western U. Teleg. Co. v. (mem.) - - - - - 1187
Railroad Co., Alabama & V., Henry v. (mem.) - - - - - - 1180
Atchison, T. & S. F., Martin v. 1051
v. Mulligan (mem.) - - 311
Atlantic & P., v. Mingus (165 U. S. 413) - - - - - - 770
Atlantic City, *Re*, (164 U. S. 633) 579
Baltimore & O., v. Sutherland (mem.) - - - - - 316
Baltimore & P., Johnson v. (mem.) 1186
Cedar Falls & M., v. Illinois C. R. Co. (mem.) - - - - - 1180
Central P., v. United States (164 U. S. 93) - - - - - 362



Digitized by Google

Railroad Co. Chicago, B. & Q., v. Chicago (166 U. S. 226) - - 979
v. Chicago (166 U. S. 258) - 994
v. Jones (mem.) - - - - - 1184
Chicago, R. I. & P., United States v. (mem.) - - - - - 1184
Citizens' Street, City R. Co. v. - 1114
Des Moines & Ft. D., Bullard v. (mem.) - - - - - - 1185
Dubuque & S. C., v. Sampson (mem.) - - - - - 1180
East Tennessee, V. & G., v. Jordan (mem.) - - - - - - 1180
Illinois C., Cedar Falls & M. R. Co. v. (mem.) - - - - 1180
v. Davidson (mem.) - - - - 1186
v. Illinois, Butler, (163 U. S. 142) 107
v. Mattoon (mem.) - - - - 309
Sampson v. (mem.) - - - 1180
v. Walker (mem.) - - - - 318
Kansas City, Ft. S. & M., v. Seawell (mem.) - - - - - 1179
Knoxville, C. G. & L., v. Mason (mem.) - - - - - - 1179
Louisville & N., v. Louisville (166 U. S. 709) - - - - - 1173
New Mexico & S. P., Walker v. 837
New Orleans & C., Sentell v. - 1169
New Orleans City & L., v. New Orleans (mem.) - - - - 312
New York & N. E., v. Rumsey (mem.) - - - - - - 306
v. Rumsey (mem.) - - - - 311
New York, N. H. & H., McCullough v. (mem.) - - - - - 312
v. New York (165 U. S. 628) - 853
Norfolk & W., Merchants' & M. Transp. Co. v. (mem.) - 1181
Postal Teleg. Cable Co. v. (mem.) 315
Steed v. (mem.) - - - - - 309
Northern P., v. Beaton (mem.) - 1185
v. Cannon (mem.) - - - - 1180
v. Cavanaugh (mem.) - - - 316
v. Colburn (164 U. S. 383) - 479
v. Egeland (163 U. S. 93) - - 82
v. Maclay (mem.) - - - - 1182
v. Mortenson (mem.) - - - - 1179
v. Nickels (mem.) - - - - 309
Oregon S. L. & U. N. R. Co. v. (mem.) - - - - - - 1182
v. Peterson (mem.) - - - - 316
v. Sanders (166 U. S. 620) - 1139
v. Spokane (mem.) - - - - 1179
v. Sullivan (mem.) - - - - 317
v. Teeter (mem.) - - - - 1170
Oregon & C., United States v. - 541
Oregon S. L. & U. N., v. Northern P. R. Co. (mem.) - - - 1182
Panama, v. Napier Shipping Co. (166 U. S. 280) - - - - 1004
Richmond, N. I. & B., Central Trust Co. v. (mem.) - - 310
St. Paul & S. C., United States v. 797
Southern P., v. Esquibel (mem.) - 308
v. Patterson (mem.) - - - 312
v. Tilley (mem.) - - - - 312
v. Walker (mem.) - - - - 312
Southwestern, v. Central R. & Bkg. Co. (mem.) - - - - - 317
Texas & P., v. Scoville (mem.) - 1183
Toledo, D. & B., Bondholders & P. of Iron R. R. v. (mem.) 1188
Railroad Co., Vicksburg, S. & P., Elmore v. (mem.) - - - - 1177
Washington & G., v. Hickey, (166 U. S. 521) - - - - - 1101
Winchester & P., United States v. 145
Winona & St. P., Sage, v. (mem) - 311
United States v. - - - - 789
v. United States (165 U. S. 483) 798
Wisconsin C., v. United States (164 U. S. 190) - - - - - 899
Railroad & Bkg. Co., Central, Southwestern R. Co. v. (mem.) - 317
v. Wright (164 U. S. 327) - - 454
Railway Co., Atlantic & P., v. Laird (164 U. S. 393) - - - - - 485
Baltimore & O. & C., v. Yarde (mem.) - - - - - - - 311
Burlington, C. R. & N., Burlington Gaslight Co. v. - - - 749
Chicago & N. W., v. Chicago (164 U. S. 454) - - - - - 511
Chicago, K. & N., v. Van Cleave (mem.) - - - - - - - 1177
Chicago, M. & St. P., v Grant (mem.) - - - - - - 1182
Union P. R. Co. v. - - - - 265
Union P. R. Co. v. - - - - 282
Chicago, P. & S., Farmers' Loan & T. Co. v. - - - - - - 60
Chicago, R. I. & P., v. Stahley (mem.) - - - - - - 313
Union P. R. Co. v. - - - - 265
Union P. R. Co. v. - - - - 282
Chicago, St. P., M. & O., Burfenning v. - - - - - - - 175
v. Roberts (mem.) - - - - 1183
City, v. Citizens' Street R. Co. (166 U. S. 557) - - - - - 1114
Cleveland, C. C. & St. L., v. Brown (mem.) - - - - - - 1181
Colorado E., Union P. R. Co. v. (mem.) - - - - - - - 310
Columbia & P. S., Washington, *ex rel.*, v. Harbor Line Comrs. (mem.) - - - - - - 309
Detroit Citizens' Street, v. Detroit (mem.) - - - - - - 310
Eastern, v. Moran (mem.) - - 309
Elmira & H., v. Thomson-Houston Electric Co. (mem.) - - 315
Gulf, C. & S. F., v. Ellis (165 U. S. 150) - - - - - - - 666
v. Roff (mem.) - - - - - 1182
International & G. N., Knight v. (mem.) - - - - - - 1187
Lake Shore & M. S., v. Ohio, Humphrey, (165 U. S. 365) - 747
Little Rock & Ft. S., v. Renfroe (mem.) - - - - - - 1178
Louisville, N. A. & C., Union Nat. Bank v. - - - - - - 177
Minneapolis, St. P. & S. S. M., v. Farwell Farmers' Warehouse Asso. (mem.) - - - - - 310
Missouri, K. & T., v. Cook (163 U. S. 491) - - - - - - 239
Missouri P., v. Nebraska, Board of Transportation, (164 U. S. 403) - - - - - - - 489
Pittsburg, Ft. W. & C., Barber v. 925
Port Royal & A., King v. (mem.) 1184
South Carolina v. (mem.) - 1184



Digitized by Google

Railway Co., Rio Grande W., v. Leak (163 U. S. 280) - - - - 160
Rosedale Street, Texas & P. R. Co. v. (mem.) - - - - - 310
St. Louis & S. F. v. Lee, (mem.) 308
v. Mathews (165 U. S.1) - - 611
v. Ryan (mem.) - - - - 309
St. Paul, S. & T. F., Sage v. mem.) 311
Texas & P., v. Barrett (166 U. S. 617) - - - - - - - 1136
v. Bloom (164 U. S. 636) - - 580
v. Cody (166 U. S. 606) - 1132
v. Gentry (163 U. S. 353) - - 186
v. Manton (164 U. S. 636) - 580
v. Nolan (mem.) - - - - 1177
Patton v. (mem.) - - - - 1186
v. Rosedale Street R Co. (mem.) 310
Warner v. - - - - - - 495
v. Chicago, M. & St. P. R. Co. (163 U. S. 564) - - - 265
v. Chicago, M. & St. P. R. Co. (163 U. S. 611) - - 282
v. Chicago, R. I. & P. R. Co. (163 U. S. 564) - - 265
v. Chicago, R. I. & P. R. Co. (163 U. S. 611) - - - 282
v. Chilton (mem.) - - - - 308
v. Colorado E. R. Co. (mem.) 310
v. James (163 U. S. 485) - - 236
v. Jones (mem.) - - - 310
Link v. (mem.) - - - - 307
v. Novak (mem.) - - - - 1184
v. Reese (mem.) - - - - 307
United States v. - - - - 316
United States v. - - - - 797
Wabash W., v. Brow (164 U. S. 271) 431
Railway & Bridge Co., Omaha & C. B., v. Smith (mem.) - - - - 1188
Raven Gold Min. Co. v. Miners' Union (mem.) - - - - - 315
Rawlins, Western U. Teleg. Co. v. (mem.) 1183
Raymond v. Lange (mem.) - - - 1185
Realty Co., United States v. - - - 215
*Re* Atlantic City R. Co. (164 U. S. 633) - 579
*Re* C. & A. Potts & Co. (166 U. S. 263) 994
*Re* Chapman (166 U. S. 661) - - 1154
*Re* Eckart (166 U. S. 481) - - - 1085
*Re* Hien (166 U. S. 432) - - - 1066
Rector v. Fitzgerald (mem.) - - 1178
Reeder v. Lewis (mem.) - - - 317
Reese, Union P. R. Co. v. (mem.) - - 307
Reinhard, Deweese v. - - - - - 757
Reliance M. Ins. Co. v. New York & C. Mail S. S. Co. (mem.) - 1184
Renfroe, Little Rock & Ft. S. R. Co. v. (mem.) - - - - - - 1178
Reorganized Church of Jesus Christ of L. D. S., Church of Christ v. (mem.) - - - - - - 314
Republican Min. Co. v. Tyler Min. Co. (mem.) - - - - - - - 1187
Revell, Annapolis v. (mem.) - - 1178
Raymond, United States v. (mem.) - - 1186
Reynolds, Smith v. (mem.) - - - 1186
Rice, Olcott v. (mem.) - - - - - 315
Richards, Meyer v. - - - - - 199
Richardson, Campbell v. (mem.) - - 1184
Richmond, N. I. & B. R. Co., Central Trust Co. v. (mem.) - - 310
Rider, United States v. - - - - - 101
Riley, Salt Lake R. T. Co. (mem.) - 308
Rio Grande W. R. Co. v. Leak (163 U. S. 280) - - - - - - 160
Riser v. Langford (mem.) - - - 307
Roberts, Chicago, St. P. M. & O. R. Co. v. (mem.) - - - - - 1183
Standley v. (mem.) - - - 1177
Robertson v. Baldwin (165 U. S 275) - 715
v. Drucker (mem.) - - - - 308
Salomon v. (mem.) - - - - 313
Robinson v. Caldwell (165 U. S. 359) - 745
Rockwell v. Farmers' Nat. Bank (mem.) 1177
Roettinger, United States v. (mem.) - 1180
Roff, Gulf, C. & S. F. R. Co. v. (mem.) 1182
Rogers Locomotive Mach. Works v. American Emigrant Co. (164 U. S. 559) - - - - - 552
Rosedale Street R. Co., Texas & P. R. Co. v. (mem.) - - - - - 310
Rosencrans v. United States (165 U. S. 257) - - - - - - 708
Ross v. Eells (mem.) - - - - - 320
Rouse v. Cloughley (mem.) - - - - 316
Hornsby (mem.) - - - - - 320
Rowe v. United States (164 U. S. 546) - 547
Ruddy, Carter v. - - - - - - - 1090
Rumsey, New York & N. E. R. Co. v. (mem.) - - - - - 306
New York & N. E. R. Co. v. (mem.) - - - - - - 311
Russ, Telfener v. - - - - - - - 87
v. Telfener (mem.) - - - - 1187
Ryan, St. Louis & S. F. R. Co. v. (mem.) 309
v. Staples (mem.) - - - - - 1186

S.

Safety Insulated Wire & C. Co. v. Baltimore (mem.) - - - - 1185
Sage v. St. Paul, S. & T. F. R. Co. (mem.) 311
v. Winona & St. P. R. Co. (mem.) 311
St. Louis, Pim v. - - - - - - - 714
v. Western U. Teleg. Co. (166 U. S. 388) - - - - - 1044
St. Louis & S. F. R. Co. v. Lee (mem.) 308
v. Mathews (165 U. S. 1) - - 611
v. Ryan (mem.) - - - - - 309
St. Louis Car Coupler Co. v. Shickle, H. & H. Iron Co. (mem.) - - 1186
St. Paul & S. C. R. Co., United States v. 797
St. Paul, S. & T. F. R. Co., Sage v. (mem.) - - - - - - 311
Salina Creek Irrig. Co., Salina Stock Co. v. - - - - - - - 90
Salina Stock Co. v. Salina Creek Irrig. Co. (163 U. S. 109) - - - 90
Salomon v. Robertson (mem.) - - - 313
Salt Lake City v. Tucker (166 U. S. 707) 1172
Salt Lake City Brew. Co. v. Fred W. Wolf Co. (166 U. S. 707) - 1172
Salt Lake R. T. Co. v. Riley (mem.) - 308
Saltonstall v. Birtwell (164 U. S. 54) - 348
Sampson, Dubuque & S. C. R. Co. v. (mem.) - - - - - 1180
v. Illinois C. R. Co (mem.) 1180
Sanders, Northern P. R. Co. v. - - 1139
Sandford, Covington & L. Turnp. Road Co. v. - - - - - - 560
Sanford v. Poe (165 U. S. 194) - - 683
Santa Fé, United States v. - - - - 874
Saunders, Huntington v. - - - - 174
Scales v. Dillingham (mem.) - - 1177
Schachte, Campbell v. (mem.) - - - 306
School Dist. No. 26, Capital Bank v. (mem.) - - - - - 1184
Schrader, Neall v. (mem.) - - - 319



Digitized by Google

Scott v. Donald (165 U. S. 58) - - 632
v. Donald (165 U. S. 107) - - 648
Farmers' Loan & T. Co. v. (mem.) 318
Matthews v. (mem.) - - - 306
Scoville, Texas & P. R. Co. v. (mem.) 1183
Scranton v. Wheeler (mem.) - - - 318
Seattle, Bank of Commerce v. - - 1079
National Bank of Commerce v. - 1079
Puget Sound Nat. Bank v. - 1079
Seattle Nat. Bank v. - - - 1079
Seattle Nat. Bank v. Seattle (166 U. S. 463) - - - - - 1079
Seawell, Kansas City, Ft. S. & M. R. Co. v. (mem.) - - - - - 1179
Second Nat. Bank, Garner v. (mem.) 319
Secretary of the Treasury, Anglo-Californian Bank v. (mem.) - 1188
Selleck, Smith v. (mem.) - - - - 318
Sentell v. New Orleans & C. R. Co. (166 U. S. 698) - - - - - 1169
Seward v. Poe (165 U. S. 194) - - - 683
Shaffer, American Harrow Co. v. (mem.) 1187
Sheckels, District of Columbia v. - 734
Shickle, H. & H. Iron Co., St. Louis Car Coupler Co. v. (mem.) - - 1186
Shipman v. Magarity (mem.) - - 305
Short v. Pierce (mem.) - - - - 1179
Shreve v. Cheesman (mem.) - - 320
v. Cheesman (mem.) - - - 1177
Shute v. Keyser (mem.) - - - 309
Siebecker, Wisconsin, Baltzell v. (mem.) 1182
Singer Mfg. Co. v. Bent (163 U. S. 205) 131
v. June Mfg. Co. (163 U. S. 169) 118
Slack, Perrine v. - - - - - - 510
Slover, Missouri, Tilley, v. (mem.) - 315
Smith, Omaha & C. B. R. & B. Co. v. (mem.) - - - - - - 1188
v. Reynolds (mem.) - - - 1186
v. Selleck (mem.) - - - - 318
v. Vulcan Iron Works (165 U. S. 518) - - - - - - 810
Warner Valley Stock Co. v. - - 621
Société Anonyme Des Mines, Old Jordan Min. & M. Co. v. - 427
Society of Shakers v. Watson (mem.) - 313
South Carolina v. Port Royal & A. R. Co. (mem.) - - - - - 1184
South Dakota, First Nat. Bank v. (mem.) 308
Mitchell v. (mem.) - - - - 306
Southern Pac. Co. v. Tomlinson (168 U. S. 369) - - - - - 193
Southern P. R. Co. v. Esquibel (mem.) 308
v. Patterson (mem.) - - - 312
v. Tilley (mem.) - - - - 312
v. Walker (mem.) - - - - - 312
Southwestern R. Co. v. Central R. & Bkg. Co. (mem.) - - - - - 317
Spiro, National Acci. Soc. v. - - - 435
Spokane, Northern P. R. Co. v. (mem.) 1179
Springer Lithographing Co. v. Falk (mem.) - - - - - 1179
Springville City v. Thomas (166 U. S. 707) 1172
Stahley, Chicago, R. I. & P. R. Co. v. (mem.) - - - - - - 313
Stallcup v. Tacoma (mem.) - - - 1185
Standley v. Roberts (mem.) - - - 1177
Staples, Ryan v. (mem.) - - - - 1186
Starling v. Weir Plow Co. (mem.) - - 319
Starr v. United States (164 U. S. 627) 577
State Loan & T. Co., Pauly v. - - 844
Steed v. Norfolk & W. R. Co. (mem.) - 309
Sterett, National Safe Dep. S. & T. Co. v. (mem.) - - - - - 1187
Stockton Combined H. & A. Works, Hammond v. (mem.) - - 317
Stone v. United States (164 U. S. 380) - 477
Street, Cook v. (mem.) - - - - 317
Strickland v. Lomm (mem.) - - - 317
Stroheim, Deimel v. (mem.) - - 1188
Sullivan, Northern P. R. Co. v. (mem.) 317
Sun Ins. Office v. International Trust Co. (mem.) - - - - - 316
Supreme Lodge, K. of P. v. Kaliniski (163 U. S. 289) - - - - 163
Sutherland, Baltimore & O. R. Co. v. (mem.) - - - - - 316
Swaim v. United States (165 U. S. 553) - 823
Sydsvenska Angfartygs Aktiebolaget v. Wessels (mem.) - - - - 319

## T.

Tacoma, Stallcup v. (mem.) - - 1185
Taggart, Western U. Teleg. Co. v. - 49
Talbot, Gregory v. (mem.) - - 311
Talton v. Mayes (163 U. S. 376) - 196
Taylor v. Girard L. Ins., A. & T. Co. (mem.) - - - - - 307
Teeter, Northern P. R. Co. v. (mem.) 1179
Telfener v. Russ (163 U. S. 100) - 87
Russ v. (mem.) - - - - 1187
Tenam Ditch Co., Thorpe v. (mem.) 305
Tennessee, Memphis, Bank of Commerce v. - - - - - - 211
Memphis, German Bank v. (mem.) 313
Memphis, Mechanics' Sav. Bank v. (mem.) - - - - - - 314
Texas, Bacon v. - - - - - - 132
Texas & P. R. Co. v. Barrett (166 U. S. 617) - - - - - - 1136
v. Bloom (164 U. S. 636) - 580
v. Cody (166 U. S. 606) - - 1132
v. Gentry (163 U. S. 353) - 186
v. Manton (164 U. S. 636) - - 580
v. Nolan (mem.) - - - 1177
Patton v. (mem.) - - - - 1186
v. Rosedale Street R. Co. (mem.) 310
v. Scoville (mem.) - - 1183
Warner v. - - - - - 495
Thames, Campbell v. (mem.) - - 306
The Centurion v. American Sugar Ref. Co. (mem.) - - - - 309
The Ceres v. Wessels (mem.) - - 319
The Conqueror (166 U. S. 110) - - 937
The Coquitlam v. United States (163 U. S. 346) - - - - - 184
The Kate (164 U. S. 458) - - - 513
The Majestic (166 U. S. 375) - - 1039
The Paradox, Jonson E. & T. Co. v. (mem.) - - - - - 1178
The Three Friends, United States v. 897
The Titan v. Legg (mem.) - - - - 1188
The Trave, Law v. (mem.) - - 309
The Umbria (166 U. S. 404) - - 1053
The Valencia (165 U. S. 264) - - 710
v. Ziegler (165 U. S. 264) - 710
The Warren Adams, Ceballos v. (mem.) 316
Thomas v. Lane (mem.) - - - - 1177
Springville City v. - - - 1172
Thomson-Houston Electric Co., Elmira & H. R. Co. v. (mem.) - - 315
Thornton v. United States (mem) - - 313
Thorpe v. Tenam Ditch Co. (mem.) - 305
Three Friends, The, United States v. 897
Thum, Andrews v. (mem.) - - 313



Digitized by Google

Tide Land Appraisers, Washington, Battersby, v. (mem.) - - - - 807
Tilley, Missouri, *ex rel.*, v. Slover (mem.) 315
Southern P. R. Co. v. (mem.) 312
Titan, The, v. Legg (mem.) - - 1188
Toffey, Bate Refrigerating Co. v. (mem.) 309
Toledo, D. & B. R. Co., Bondholders & P. of Iron R. R. v. (mem.) - 1188
Tomlinson, Southern Pac. Co. v. - 193
Traders' Nat. Bank v. Chipman (164 U. S. 347) - - - - - 461
Trans-Missouri Freight Asso., United States v. - - - - - 1007
Trave, The, Law v. (mem.) - - 309
Travelers' Ins. Co. v. Henderson (mem.) 312
Tregea v. Modesto Irrig. Dist. (164 U. S. 179) - - - - - - 395
Truscott, Hurlbut Land & C. Co. v. (mem.) - - - - - - 1185
Tubman v. Dement (mem.) - - - 314
Tucker v. McKay (mem.) - - - 1180
Salt Lake City v. - - - - 1172
Tuttle, Claflin v. (mem.) - - - 1187
Tyler, Western U. Teleg. Co. v. (mem.) 1180
Tyler Min. Co., Republican Min. Co. v. (mem.) - - - - - 1187

## U.

Uhthoff v. United States (mem.) - - 1177
Ulman v. Baltimore (mem.) - - 1184
Umbria, The, (166 U. S. 404) - - 1053
Union Nat. Bank v. Louisville, N. A. & C. R. Co. (163 U. S. 325) - - 177
Union P. R. Co. v. Chicago, M. & St. P. R. Co. (163 U. S. 564) - - 265
v. Chicago, M. & St. P. R. Co. (163 U. S. 611) - - - - 282
v. Chicago, R. I. & P. R. Co. (163 U. S. 564) - - - 265
v. Chicago, R. I. & P. R. Co. (163 U. S. 611) - - - - - 282
v. Chilton (mem.) - - - - 308
v. Colorado E. R. Co. (mem.) - 310
v. James (163 U. S. 485) - - 286
v. Jones (mem.) - - - - - 310
Link v. (mem.) - - - - 307
v. Novak (mem.) - - - - 1184
v. Reese (mem.) - - - - 307
United States v. (mem.) - - 316
United States v. - - - - 797
United States, Acers v. - - - - 481
Addington v. - - - - 679
Agnew v. - - - - - - 624
Allen v. - - - - - - 528
v. Allen (163 U. S. 499) - - 242
v. American Tobacco Co. (166 U. S. 468) - - - - - 1081
v. Armijo y Jaramillo (mem.) 1185
Augustin v. (mem.) - - - - 1185
v. Aulick (mem.) - - - - 308
Baca v. (mem.) - - - - - 312
Ball v. - - - - - - - 300
v. Barnette (165 U. S. 174) - - 675
Brown v. - - - - - - 410
Buck v. (mem.) - - - - - 315
Carver v. - - - - - - 602
Central P. R. Co. v - - - - 362
Certain Real Estate v. (mem.) - 318
Chapman v. - - - - - - 504
Chapman v. (mem.) - - - - 1179
Chapman v. (mem.) - - - - 1188
United States v. Chicago, R. I. & P. R. Co. (mem.) - - - - 1184
Cohen v. (mem.) - - - - - 1181
Cooper v. (mem.) - - - - 313
Cutajar v. (mem.) - - - - - 1185
Davenport v. (mem.) - - - 314
Davis v. - - - - - - - 750
Davis v. (mem.) - - - - - 1179
v. Delaney (164 U. S. 282) - - 435
Draper v. - - - - - - - 419
Dunlop v. - - - - - - - 799
Dyer v. (mem.) - - - - - 1188
Edgington v. - - - - - - 467
Einstein, W. & Co. v. (mem.) - 1188
v. Elliott (164 U. S. 380) - - 474
Faust v. - - - - - - - 224
Filhiol v. (mem.) - - - - - 317
v. Finch (mem.) - - - - 308
v. Fitch (163 U. S. 631) - - 289
Fletcher v. (mem.) - - - 312
France v. - - - - - - - 595
Friend v. (mem.) - - - - 308
Garitee v. (mem.) - - - - - 315
v. Gay (163 U. S. 427) - - 215
Germania Iron Co. v. - - - 754
Gibson v. - - - - - - - 996
v. Gilliat (164 U. S. 42) - - 344
Glover v. - - - - - - - 440
Golsby v. (mem.) - - - - 320
v. Gomez (mem.) - - - - 1185
v. Gorham (165 U. S. 316) - - 729
Graves v. - - - - - - - 732
v. Greathouse (166 U. S. 601) - 1130
v. Gurule (mem.) - - - - 1185
v. Harden (mem) - - - - - 312
Harrison v. - - - - - - 104
v. Hewecker (164 U. S. 46) - - 345
Hilborn v. - - - - - - - 183
v. Hitchcock (164 U. S. 227) - 412
Howard v. (mem.) - - - - 1177
Howell v. (mem.) - - - - - 315
Hudson v. (mem.) - - - - 1178
Huning v. (mem.) - - - - - 1179
Hunt v. - - - - - - - 1063
Joseph Frankel's Sons (mem.) - 319
King v. (mem.) - - - - - 1180
v. King (mem.) - - - - - 1182
Kirk v. - - - - - - - 66
v. Kurtz (164 U. S. 49) - - 346
Lalone v. - - - - - - - 425
v. Laws (163 U. S. 258) - - 151
Lincecum v. (mem.) - - - 1178
v. Lovell (mem.) - - - - - 308
Lucas v. - - - - - - - 282
Luckey v. (mem.) - - - - 314
McElroy v. - - - - - - 355
McGinnis v. (mem.) - - - - 1182
McKee v. - - - - - - - 437
v. McMahon (164 U. S. 81) - - 357
v. McMillan (165 U. S. 504) - 805
v. Martinez (mem.) - - - - 1185
Mills v. - - - - - - - 584
Morse Arms Mfg. Co. v. (mem.) 318
Moses v. - - - - - - - 1119
Nofire v. - - - - - - - 588
v. Northwestern Express, S. & T. Co. (164 U. S. 686) - - - 599
v. Oregon & C. R. Co. (164 U. S. 526) - - - - - - 541
v. Otero (mem.) - - - - - 1187
Peraltareavis v. (mem.) - - 316
v. Perew (mem.) - - - - - 1185
v. Perkins (163 U. S. 625) - - 287



Digitized by Google

United States Peters, v. (mem.) - - 809
Pitts v. (mem.) - - - - 805
Prairie State Nat. Bank v. - - 412
Prather v. - - - - - - 510
Price v. - - - - - - - 727
v. Realty Co. (163 U. S. 427) - 215
v. Raymond (mem.) - - - 1186
v. Rider (163 U. S. 132) - - 101
v. Roettinger (mem.) - - - 1180
Rosencrans v. - - - - - 708
Rowe v. - - - - - - - 547
v. St. Paul & S. C. R. Co. (165 U. S. 482) - - - - - 797
v. Santa Fé (165 U. S. 675) - - 874
Starr v. - - - - - - 577
Stone v. - - - - - - 477
Swaim v. - - - - - - 823
The Coquitlam v. - - - - - 184
v. The Three Friends (166 U. S. 1) 897
Thornton v. (mem.) - - - 313
v. Trans-Missouri Freight Asso. (166 U. S. 290) - - - 1007
Uhthoff v. - - - - - 1177
v. Union P. R. Co. (165 U. S. 482) 797
v. Union P. R. Co. (mem.) - 316
v. Verdier (164 U. S. 213) - - 407
White v. - - - - - - 865
Wiborg v. - - - - - - 289
Wilkey v. (mem.) - - - - 315
Wilson v. (mem.) - - - 1181
v. Winchester & P. R. Co. (163 U. S. 244) - - - - - 145
v. Winona & St. P. R. Co. (165 U. S. 463) - - - - - 789
Winona & St. P. R. Co. v - 798
Wisconsin C. R. Co. v. - - 399
Wong Wing v. - - - - 140
Yoes v. (mem.) - - - - 1184
v. Zucker (mem.) - - - 320
United States, *ex rel.* Deimel, v. Arnold (mem.) - - - - - 315
Long, v. Lochren (mem.) - - 1181
North Carolina, Douglas v. (mem.) 307
Whitney, New Orleans v. (mem.) 305
United States Exp. Co. v. Indiana (165 U. S. 255) - - - - 707
United States Mut. Acci. Asso. v. Hodgkin (mem.) - - - - 1184

V.

Valencia, The, (165 U. S. 264) - - 710
v. Ziegler (165 U. S. 264) - - 710
Van Cleave, Chicago, K. & N. R. Co. v. (mem.) - - - - 1177
Van De Carr, Iasigi v. - - - 1045
Van Ee, Gregory v. (mem.) - - - 1183
Van Vranken, McGlensy v. (mem.) - 311
Venzke, Parsons v. - - - - 360
Verdier, United States v. - - - 407
Vicksburg, S. & P. R. Co., Elmore v. (mem.) - - - - - 1177
Von Schmidt v. Bowers (mem.) - 1187
Vulcan Iron Works, Smith v. - - 810

W.

Wabash W. R. Co. v. Brow (134 U. S. 271) - - - - - - 431
Wade v. Lawder (165 U. S. 624) - - 851
Wakelee, Davis v. (mem.) - - - 310
Walker v. Brown (165 U. S. 654) - - 865
Illinois C. R. Co. v. (mem.) - 319
v. Keenan (mem.) - - - - 1180
v. New Mexico & S. P. R. Co. (165 U. S. 593) - - - - - 837
Southern P. R. Co. v. (mem.) - 312
Wallace, Eddy v. (mem.) - - - 312
Walrath v. Champion Min. Co. (mem.) 317
Ward, Outzs v. (mem.) - - - - 307
v. Race Horse (163 U. S. 504) - 244
Warner v. Texas & P. R. Co. (164 U. S. 418) - - - - - - 495
Warner Valley Stock Co. v. Smith (165 U. S. 28) - - - - - 621
Warren Adams, The, Ceballos v. (mem.) 316
Washington v. Coovert (mem.) - - 1182
Cruemer v. (mem.) - - - - 1183
Krug v. (mem.) - - - - - 1183
Lybarger v. (mem.) - - - - 305
Murphy v. (mem.) - - - - 1178
Nordstrom v. (mem.) - - - 1183
Washington, *ex rel.* Battersby, v. Tide Land Appraisers (mem.) - 307
Columbia & P. S. R. Co., v. Harbor Line Comrs. (mem.) - 309
Washington & G. R. Co. v. Hickey (166 U. S. 521) - - - - - 1101
Washington Nat. Bank v. King County (166 U. S. 463) - - - - 1079
Watson, Society of Shakers v. (mem.) - 313
Wayne Lumber Co. v. Collins (mem.) 319
W. B. Grimes Dry Goods Co. v. Malcolm (164 U. S. 483) - - - - 524
Weber County, Hamer v. (mem.) - - 1178
Webster v. Daly (163 U. S. 155) - 111
v. Luther (163 U. S. 331) - - - 179
Weir Plow Co., Starling v. (mem.) - 319
Werner, Hooe v. - - - - - - 1051
Wessels, Sydsvenska Angfartygs Aktiebolaget v. (mem.) - - - 319
The Ceres v. (mem.) - - - - 319
Western U. Teleg. Co., American Bell Teleph. Co. v. (mem.) - 1187
v. Bates (mem.) - - - - - 1179
v. Charleston (mem.) - - - 309
v. Chester (mem.) - - - - 318
v. Daily (mem.) - - - - - 1183
v. Howell (mem.) - - - - 1178
v. Indiana (165 U. S. 304) - - 725
v. Kemp (mem.) - - - - 1187
v. Knox (mem.) - - - - - 1179
v. Michelson (mem.) - - - 1181
v. Norman (mem.) - - - - 1182
v. North Carolina Railroad Comrs. (mem.) - - - - - 1187
v. Poe (mem.) - - - - - 1183
v. Rawlins (mem.) - - - - 1183
St. Louis v. - - - - - - 1044
v. Taggart (163 U. S. 1) - - - 49
v. Tyler (mem.) - - - - - 1180
Wheaton, Norton v. - - - - - 810
Wheelan v. Brickell (mem.) - - - 1186
Wheeler v. Cloyd (mem.) - - - - 318
Scranton v. (mem.) - - - - 318
Wheeler & W. Mfg. Co., National Mach. Co. v. (mem.) - - - - 1188
White v. Lenning (mem.) - - - - 314
v. United States (164 U. S. 100) 365
Whitehill v. Meears (mem.) - - - 1178
Whitney v. Fox (166 U. S. 637) - - 1145
United States *ex rel.*, New Orleans v. (mem.) - - - - - 305
Wiborg v. United States (163 U. S. 632) 289



Digitized by Google

Wiggan v. Conolly (163 U. S. 56) - 69
Wilbur, Williams v. (mem.) - - - 305
Wilkey v. United States (mem.) - 315
Willard v. Wood (164 U. S. 502) - - 531
Williams v. Wilbur (mem.) - - 305
Willman v. Friedman (mem.) - - 313
Wilson v. Kiesel (164 U. S. 248) - 422
v. United States (mem.) - - 1181
Winchester & P. R. Co., United States v. 145
Winona & St. P. R. Co., Sage v. (mem.) 311
United States v. - - - 789
v. United States (165 U. S. 483) - 798
Wisconsin, *ex rel.* Baltzell, v. Siebecker (mem.) - - - - - 1182
C. R. Co. v. United States (164 U. S. 190) - - - - - 399
Wistar, Foster v. (mem.) - - - 307
Wong Wing v. United States (163 U. S. 228) - - - - - - 140
Wood v. Fox (166 U. S. 648) - - - 1149
Willard v. - - - - - - 531
W. P. Noble Mercantile Co., Mount Pleasant Equitable Co-Op. v. (mem.) - - - - 1180
Wright, Central R. & Bkg. Co. v. - - 454
Holcomb v. (mem.) - - - 314
Wygant, Brown v. - - - - - 284

## Y.

Yancy v. Ivy (mem.) - - - 319
Yarde, Baltimore & O. & C. R. Co. v. (mem.) - - - - - - 311
Yardley, Fourth Street Nat. Bank v. - 855
Yoes v. United States (mem.) - - 1184
Yosemite Min. & M. Co. v. Galigher (mem.) - - - - - 1181

## Z.

Zadig v. Baldwin (166 U. S. 485) - 1087
Ziegler, The Valencia v. - - - 710
Zucker, United States v. (mem.) - - 320



Digitized by Google

# CITATIONS

## IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.


A.

Abbotsford, The, v. Johnson ("The Abbotsford"), 98 U. S. 440 (25: 168)..... 232
Adderly v. Storm, 6 Hill, 624..... 847
Adams v. Johnson ("Bowden v. Johnson"), 107 U. S. 251 (27: 386) .....847, 848, 851
v. Nashville, 95 U. S. 19 (24: 369) 1075
Adams Exp. Co. v. Kentucky, 166 U. S. 171 (41: 960)..... 955
v. Ohio State Auditors, 165 U. S. 194 (41: 683)....708, 955, 957, 964, 965, 978, 1166
v. State (Ohio) 44 N. E. 506..... 703
Aerkfetz v. Humphreys, 145 U. S. 418 (36: 758)..... 192
Aeronaut, The, 36 Fed. Rep. 497..... 516
Ætna Ins. Co. v. Boon, 95 U. S. 117 (24: 395)..... 232
Ætna L. Ins. Co. v. Middleport, 124 U. S. 534 (31: 537).....210, 416
Aikin v. Wasson, 24 N. Y. 482 ..... 154
Ainsa v. United States, 161 U. S. 222 (40: 678)..... 888
Alberta, The, 23 Fed. Rep. 807..... 1058
Alberty v. United States, 162 U. S. 499 (40: 1051).....283, 580, 579, 589
Alcock v. Alcock, 5 DeG. & S. 671..... 742
Aldridge v. Great Western R. Co. 3 Man. & G. 515, 4 Scott, N. R. 156. 614
v. Williams, 44 U. S. 3 How. 9 (11: 469)..... 1020
Alexander v. Pendleton, 13 U. S. 8 Cranch, 462 (3: 624)..... 540
v. United States, 138 U. S. 353 (35: 954)..... 602
Alexandre v. Machan ("The City of New York"), 157 U. S. 72 (37: 84) ..... 1057-1059
Allen v. Baltimore & O. R. Co. 114 U. S. 315 (29: 201)..... 653
v. Markle, 36 Pa. 117..... 934
v. St. Louis Nat. Bank, 120 U. S. 30 (30: 575)..... 103
v. State, 85 Wis. 22..... 1086
v. United States, 164 U. S. 492 (41: 528)..... 579
Alligator, The, 1 Gall. 145..... 920
Ambrose Light, The, 25 Fed. Rep. 408 .....914, 918
American Const. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372 (37: 486)....104, 788, 914, 939, 1097, .....1098
American Ins. Co. v. 356 Bales of Cotton, 26 U. S. 1 Pet. 511 (7: 242).... 186
American Paper Pail & B. Co. v. National Folding Box & P. Co. 1 U. S. App. 283..... 811
American Publishing Co. v. Fisher, 166 U. S. 464 (41: 1079)..... 1173
American Wood Paper Co. v. Heft, 75 U. S. 8 Wall. 333 (19: 378).... 950
Ames v. Kansas, Johnston, 111 U. S. 462 (28: 487)..... 1113
v. Quimby, 106 U. S. 342 (27: 100) ..... 1005
Amiable Nancy, The, 16 U. S. 3 Wheat. 546 (4: 456)..... 1062
Amis v. Smith, 41 U. S. 16 Pet. 303 (10: 973)..... 408
Amy v. Dubuque, 98 U. S. 470 (25: 228). 157
Anderson v. Philadelphia Warehouse Co. 111 U. S. 479 (28: 478)....848, 851
v. Powers, 59 Tex. 213..... 504
Anderson County Comrs. v. Beal, 113 U. S. 227 (28: 966)..... 527
Andrews, *Ex parte*, 18 Cal. 678..... 169
v. Harper, 8 Mod. 227..... 286
v. United States, 162 U. S. 420 (40: 1028)..... 729
Angier v. Webber, 92 Am. Dec. 751, *note* 1031
Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1 (38: 55)..... 66
Anna Maria, The, 15 U. S. 2 Wheat. 327 (4: 252)..... 1062
Anne Johanne, The, 2 Stuart, Vice Adm. 521..... 1006
Anonymous, 3 Atk. 277..... 743
Comyns, 40, Comb. 463..... 499
Cro. Eliz. 10..... 613
1 Salk. 280..... 499
Ansbro v. United States, 159 U. S. 695 (40: 310).....78, 159, 1088
Antelope, The, 25 U. S. 12 Wheat. 546 (6: 723)..... 409
Apollon, The, 22 U. S. 9 Wheat. 362 (6: 111)..... 945
Appolos v. Brady, 4 U. S. App. 209, 49 Fed. Rep. 401..... 526
Argentino, The, L. R. 13 Prob. Div. 191, L. R. 14 App. Cas. 519...944, 1062
Arkansas M. R. Co. v. Whitley, 54 Ark. 199 (11 L. R. A. 631)..... 503
Armstrong v. Athens County, 41 U. S. 16 Pet. 281 (10: 965)..... 1153
v. Ettlesohn, 36 Fed. Rep. 209.... 787
v. Trautman, 36 Fed. Rep. 276... 787
Arnson v. Murphy, 109 U. S. 238 (27: 920) 355
Arthur Orr, The, 69 Fed. Rep. 350..... 1058
Asher v. Texas, 128 U. S. 129 (32: 368, 2 Inters. Com. Rep. 241)..... 700
Askew v. Hale County, 54 Ala. 639 (25 Am. Rep. 730)..... 559
Astiazaran v. Santa Rita Land & M. Co. 148 U. S. 80 (37: 376)..... 570
Atchison v. Morris, 11 Fed. Rep. 582... 434
Atchison & N. R. Co. v. Baty, 6 Neb. 37 (29 Am. Rep. 356)..... 671
Atchison, T. & S. F. R. Co. v. Hammer, 22 Kan. 763 (31 Am. Rep. 216) 843
v. Thul, 32 Kan. 255..... 947
Atlanta v. Gate City Gaslight Co. 71 Ga. 106 ..... 1118




Digitized by Google

Atlee v. Northwestern Packet Co. 88 U. S. 21 Wall. 389 (22: 619)..... 1005
Atty. Gen. v. Butler, 123 Mass. 304..... 80
v. Great Eastern R. Co. L. R. 5 App. Cas. 473..... 271
v. Smart, 1 Ves. Sr. 72..... 80
v. Wax Chandlers' Co. L. R. 6 H. L. 1..... 744
Aurora, The, 14 U. S. 1 Wheat. 95 (4: 45)..... 516, 713
Aurora v. West, 74 U. S. 7 Wall. 82 (19: 42)..... 156
Austin v. Boston, 74 U. S. 7 Wall. 694 (19: 224)..... 647
v. Cambridgeport, 21 Pick. 215..744, 777
Averill v. Smith, 84 U. S. 17 Wall. 82 (21: 613)..... 82
Avon, The, Brown, Adm. 170..... 1006
Ayer v. Starkey, 30 Conn. 304..... 617
Ayers v. Watson, 137 U. S. 584 (34: 803) 630

B.

Bachelder v. Heagan, 18 Me. 32..... 615
Backhouse v. Wells, 1 Eq. Cas. Abr. 184 830
Bacon v. State, 2 Tex. Civ. App. 692..... 87
Badeau v. United States, 130 U. S. 439 (32: 997)..... 756
Badger v. Badger, 69 U. S. 2 Wall. 87 (17: 836)..... 540, 1149
Bagnell v. Broderick, 38 U. S. 13 Pet. 436 (10: 235)..... 1091
Baker v. Norwood, 74 Fed. Rep. 997..... 985
v. Portland, 5 Sawy. 566..... 654
Baldwin v. Franks, 120 U. S. 678 (30: 766) 474
Balkam v. Woodstock Iron Co. 154 U. S. 177 (38: 953)..... 1100
Ball v. United States, 140 U. S. 118 (35: 377)..... 301, 303
Balleis's Estate, *Re*, 144 N. Y. 132..... 289
Baltimore v. Baltimore & O. R. Co. 6 Gill, 288..... 456
v. Radecke, 49 Md. 217 (33 Am. Rep. 239)..... 524
Baltimore & O. R. Co., *Ex parte*, 106 U. S. 5 (27: 78)..... 191
*Ex parte*, 108 U. S. 566 (27: 812)... 580
v. Baugh, 149 U. S. 368 (37: 772)..... 1052, 1100
v. Fifth Baptist Church, 137 U. S. 568 (34: 784)..... 298
v. Griffith, 159 U. S. 603 (40: 274)..... 193, 1136
Baltimore & P. R. Co. v. Jones, 95 U. S. 439 (24: 506)..... 86
Bangor, O. & M. R. Co. v. Smith, 47 Me. 34..... 1118
Bank of Columbia v. Hagner, 26 U. S. 1 Pet. 465 (7: 223)..... 447
Bank of Commerce v. Tennessee, 104 U. S. 493 (26: 810)..... 457, 592
Bank of Hamilton v. Dudley, 27 U. S. 2 Pet. 492 (7: 496)..... 647
Bank of United States v. Dandridge, 25 U. S. 12 Wheat. 64 (6: 552)..... 590, 1118
v. Ritchie, 33 U. S. 8 Pet. 128 (8: 890)..... 1108
Barbat v. Allen, 7 Exch. 609..... 742
Barber v. Pittsburg, Ft. W. & C. R. Co. 69 Fed. Rep. 504..... 935
Barbier v. Connolly, 113 U. S. 28 (28: 923) 678
Barden v. Northern P. R. Co. 154 U. S. 288 (38: 992)..... 1144, 1145
Bardon v. Northern P. R. Co. 145 U. S. 535 (36: 806)..... 779
Barker v. Barrows, 133 Mass. 578..... 744
Barnard v. District of Columbia, 20 Ct. Cl. 257, 127 U. S. 409 (32: 207) 736
v. Gibson, 47 U. S. 7 How. 650 (12: 857)..... 812
Barnes v. District of Columbia, 22 Ct. Cl. 366..... 407, 736
v. Poirier, 27 U. S. App. 500..... 182
Barnet v. Abbott, 53 Vt. 120..... 1123
Barney v. Baltimore, 73 U. S. 6 Wall. 280 (18: 825)..... 1050
v. Dolph, 97 U. S. 652 (24: 1063).. 75
v. Keokuk, 94 U. S. 324 (24: 224).. 750
v. Rickard, 157 U. S. 352 (39: 730) 352
v. Watson, 92 U. S. 449 (23: 730).. 352
Barron v. Baltimore, 32 U. S. 7 Pet. 243 (8: 672)..... 198
Barrow v. Bailey, 5 Fla. 9..... 286
Barry v. Edmunds, 116 U. S. 550 (29: 729) 639
v. Equitable L. Assur. Soc. 59 N. Y. 587..... 862
v. Louisiana Ins. Co. 12 Mart. (La.) 498..... 206
v. Mercein, 46 U. S. 5 How. 103 (12: 70)..... 511
Bartlett v. Lockwood, 160 U. S. 353 (40: 460)..... 681
Barton v. Barbour, 104 U. S. 126 (26: 672) 450
Bason v. Hughart, 2 Tex. 476..... 498
Bassett v. United States, 137 U. S. 496 (34: 762)..... 741
Batavia, The, 9 Moore, P. C. 286..... 1061
Bates Refrigerating Co. v. Sulzberger, 157 U. S. 1 (39: 601)..... 182
Battle v. State, 74 Ga. 101..... 603
Bauserman v. Blunt, 147 U. S. 647 (37: 316)..... 75, 1100
Baxtor v. Duren, 29 Me. 434..... 209
v. People, 3 Gilm. 368..... 303
Bay v. Williams, 112 Ill. 91..... 540
Bayon v. Vavasseur, 10 Mart. (La.) 61... 204
Beadel v. Perry, L. R. 3 Eq. 465..... 1114
Beal v. Chase, 31 Mich. 90..... 1031
Beale v. Brown, 6 Mackey, 574..... 742
Beard v. Kirk, 11 N. H. 397..... 946
v. United States, 158 U. S. 550 (39: 1086)..... 530, 551, 680
Beatty v. Kurtz, 27 U. S. 2 Pet. 566 (7: 521)..... 742
Beaulieau v. Finglam, Yearbook 2 Hen. IV. 18..... 613
Beaupré v. Noyes, 138 U. S. 397 (34: 991)..... 140, 1089
Beecher v. Wetherby, 95 U. S. 517 (24: 440)..... 780
Beinecke v. The Secret, 3 Fed. Rep. 665. 714
Belgenland, The, 36 Fed. Rep. 504..... 1062
Belgenland, The, v. Jensen, 114 U. S. 355 (29: 152)..... 1006
Belk v. Meagher, 104 U. S. 279 (26: 735). 223
Belknap v. Schild, 161 U. S. 10 (40: 599). 653
Bell v. Knowles, 45 Cal. 193..... 234
Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232 (33: 892)..... 668, 697, 1073, 1075
Belt, *Ex parte*, 159 U. S. 95 (40: 88)..... 510, 574, 1086, 1087
Bennecke v. Connecticut Mut. L. Ins. Co. 105 U. S. 355 (26: 990)..... 166



Digitized by Google

Benner v. Porter, 50 U. S. 9 How. 235 (13: 119) ..... 186
Benson v. McMahon, 127 U. S. 457 (32: 234) ..... 575
Benson Min. & Smelt. Co. v. Alta Min. & Smelt. Co. 145 U. S. 428 (36: 762) ..... 223
Bertonneau v. Directors of City Schools, 3 Woods, 177 ..... 258
Betsey Caines, The, 2 Hagg. Adm. 28 ..... 945
Betts v. Bagley, 12 Pick. 572 ..... 1113
Beverly v. Barnitz, 55 Kan. 451 (31 L. R. A. 74) ..... 98
Bibb County v. Central R. & Bkg. Co. 40 Ga. 646 ..... 456
Biddle's Estate, 28 Pa. 59 ..... 933, 934
Bidwell Cycle Co. v. Featherstone, 14 U. S. App. 632 ..... 811
Bigelow, *Ex parte*, 118 U. S. 328 (28: 1005) ..... 1087
Birch v. Liverpool, 9 Barn. & C. 392 ..... 502
Birtwell v. Saltonstall, 63 Fed. Rep. 1004, 33 U. S. App. 53 ..... 352
Bissell Co. v. Goshen Co. 43 U. S. App. 47 ..... 812
Blackburn v. Crawford, 70 U. S. 3 Wall. 175 (18: 186) ..... 763
Blacklock v. Small, 127 U. S. 96 (32: 70) ..... 453
Black Prince, The, Vern. & L. 568 ..... 944
Blagge v. Balch, 162 U. S. 439 (40: 1032) ..... 220
Blair v. Forehand, 100 Mass. 136 (1 Am. Rep. 94, 97 Am. Dec. 82) ..... 1171
Blanding v. Sargent, 33 N. H. 239 (66 Am. Dec. 720) ..... 501
Blitz v. United States, 153 U. S. 312 (38: 727) ..... 679
Bloom v. Richards, 2 Ohio St. 387 ..... 169
Blount v. Societe Anonyme, 6 U. S. App. 335 ..... 812
Blue Jacket v. Johnson County Comrs. ("The Kansas Indians"), 72 U. S. 5 Wall. 737 (18: 667) ..... 248, 249, 420
Blyth v. Birmingham Waterworks Propra. 11 Exch. 781 ..... 614
Bogart v. Crosby, 91 Cal. 278 ..... 488
Bohanan v. Nebraska, 125 U. S. 692 (31: 854) ..... 949
Bond v. Dustin, 112 U. S. 604 (28: 835) ..... 118
Bonner, *Re*, 151 U. S. 242 (38: 149) ..... 710
Boogher v. New York L. Ins. Co. 103 U. S. 95 (26: 311) ..... 1045
Borgmeyer v. Idler, 159 U. S. 408 (40: 199) ..... 602
Boston & L. R. Corp. v. Salem & L. R. Co. 2 Gray, 1 ..... 1168
Boston & M. R. Co. v. York County Comrs. 79 Me. 386 ..... 991
Boston Beer Co. v. Massachusetts, 97 U. S. 25 (24: 989) ..... 620
Botiller v. Dominguez, 130 U. S. 238 (32: 926) ..... 570
Botsford v. New Haven, M. & W. R. Co. 41 Conn. 454 ..... 836
Bougainville, The, L. R. 5 P. C. 316 ..... 1058
Bowditch v. Boston, 101 U. S. 16 (25: 980) 1172
Bowlsby v. Speer, 31 N. J. L. 351 (86 Am. Dec. 216) ..... 844
Bowen, *Re*, [1893] 2 Ch. 491 ..... 744
Bowman v. Chicago & N. W. R. Co. 125 U. S. 465 (31: 700) ..... 643
v. Lewis ("Missouri v. Lewis"), 101 U. S. 22 (25: 989) ..... 892
Boyd v. Nebraska, Thayer, 143 U. S. 135 (36: 103) ..... 566
v. United States, 116 U. S. 616 (29: 746) ..... 667
Boydell v. Drummond, 11 East, 142 ..... 500, 501
Boyer v. Boyer, 113 U. S. 690 (28: 1089) ..... 1075, 1076
Boykin v. Shaffer, 13 La. Ann. 129 ..... 681
Braceville Coal Co. v. People, 147 Ill. 66 (22 L. R. A. 340) ..... 671
Bradley v. Cartwright, L. R. 2 C. P. 511 829
Bradley Fertilizer Co. v. The Edwin I. Morrison ("The Edwin I. Morrison"), 153 U. S. 199 (38: 688) 1043
Bradshaw v. Rodgers, 20 Johns. 103 ..... 984
Branch v. Jesup, 106 U. S. 468 (27: 279) .. 280
Brandis v. Cochrane, 112 U. S. 344 (28: 760) ..... 1110
Brass v. North Dakota, Stoeser, 153 U. S. 391 (38: 757 4 Inters. Com. Rep. 670) ..... 494
Brattle Square Church v. Grant, 3 Gray, 142 (63 Am. Dec. 725) ..... 744
Brehm v. Great Western R. Co. 34 Barb. 256 ..... 947
Brennan v. Titusville, 153 U. S. 289 (38: 719, 4 Inters. Com. Rep. 658) ..... 700, 706
Brent v. Kimball, 60 Ill. 211 (14 Am. Rep. 35) ..... 1171
Brewer v. Blougher, 39 U. S. 14 Pet. 178 (10: 408) ..... 439, 1020
Briceland v. Com. 74 Pa. 463 ..... 577
Brill v. Singer Mfg. Co. 41 Ohio St. 127 (52 Am. Rep. 74) ..... 126
Brimmer v. Rebman, 138 U. S. 78 (34: 862, 3 Inters. Com. Rep. 485) ..... 644, 646
Brine v. Hartford F. Ins. Co. 96 U. S. 627 (24: 858) ..... 99, 829
British Cast Plate Mfrs. v. Meredith, 4 T. R. 794 ..... 1172
British Queen Min. Co. v. Baker S. Min. Co. 139 U. S. 222 (35: 147) ..... 478
Britton v. Thornton, 25 Pitts. L. J. 158, 112 U. S. 526 (28: 816) ..... 933, 934
Broadwell v. Getman, 2 Denio, 87 ..... 502
Broder v. Natoma Water & Min. Co. 101 U. S. 274 (25: 790) ..... 1144
Brogden v. Metropolitan R. Co. L. R. 2 App. Cas. 666 ..... 862
Bronson v. Kinzie, 42 U. S. 1 How. 311 (11: 143) ..... 98–101
Brooklyn v. Ætna L. Ins. Co. 99 U. S. 362 (25: 416) ..... 398
Brooklyn L. Ins. Co. v. Miller, 79 U. S. 12 Wall. 285 (20: 398) ..... 232
Brooks v. Codman, 162 U. S. 439 (40: 1032) ..... 220
Broome v. New York & N. J. Teleph. Co. 42 N. J. Eq. 141 ..... 1114
Brown v. Atwell, 92 U. S. 327 (23: 512) .. 989
v. Carpenter, 26 Vt. 638 (62 Am. Dec. 603) ..... 1171
v. Duchesne, 60 U. S. 19 How. 183 (15: 595) ..... 69
v. Eastern R. Co. 11 Cush. 97 ..... 1043
v. Houston, 114 U. S. 622 (29: 257) 700
v. Keene, 33 U. S. 8 Pet. 112 (8: 885) ..... 159, 1152
v. Lake Superior Iron Co. 134 U. S. 530 (33: 1021) ..... 116
v. Lawrence, 3 Cush. 390 ..... 932
v. Stewart, 4 Md. Ch. 368 ..... 767



Digitized by Google

Brown v. United States, 113 U. S. 571 (28: 1080)..... 1037
v. United States, 150 U. S. 93 (37: 1010), 159 U. S. 100 (40: 90).. 410
v. Walker, 161 U. S. 519 (40: 819).. 717
v. Webster, 156 U. S. 328 (39: 440).. 157
v. Winnisimmet Co. 11 Allen, 326 271
Brown Chemical Co. v. Meyer, 139 U. S. 540 (35: 247)..... 125
Browning v. Browning, 3 N. M. 371..... 844
Brownsville v. Cavazos, 100 U. S. 138 (25: 574)..... 885
Bubb and Bobb, 39 Pa. 429..... 225
Buchanan, *Re*, 158 U. S. 31 (39: 884)..... 474
Bucher v. Cheshire R. Co. 125 U. S. 555 (31: 795)..... 1100, 1166
Buck, *Re*, [1896] 2 Ch. 727..... 743
Buckstaff v. Russell, 151 U. S. 626 (38: 292)..... 1148
Budd v. New York, 143 U. S. 517 (36: 247, 4 Inters. Com. Rep. 45)..... 494
Buffalo City Cemetery v. Buffalo, 46 N. Y. 506..... 593
Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321 (41: 175). 480, 758
Burgess v. Seligman, 107 U. S. 20 (27: 359)..... 933, 1160
Burke v. Child, 88 U. S. 21 Wall. 441 (22: 623)..... 861
Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312 (12 L. R. A. 486, 3 Inters. Com. Rep. 584)..... 672
Burn v. Carvalho, 4 Myl. & C. 690..... 862
Burroughs v. Housatonic R. Co. 15 Conn. 124 (38 Am. Dec. 64).. 616
Bush v. Kentucky, 107 U. S. 110 (27: 354)..... 259, 262
v. Livingston, 2 Cal. 66 (2 Am. Dec. 316)..... 812
Bushnell v. Kennedy, 76 U. S. 9 Wall. 387 (19: 736)..... 435
v. Leland, 164 U. S. 684 (41: 598). 787, 821
Butcher's Benev. Asso. v. Crescent City L. S. L. & S. H. Co. ("Slaughter-House Cases"), 83 U. S. 16 Wall. 36 (21: 394). 257, 258, 620, 717
Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746 (28: 585)... 836
Butler v. Maples, 76 U. S. 9 Wall. 766 (19: 822)..... 590
v. United States, 88 U. S. 21 Wall. 272 (22: 614)..... 1123, 1224
Butte City Street R. Co. v. Pacific Cable R. Co. 15 U. S. App. 341..... 811
Butterworth v. United States, 112 U. S. 50 (28: 656)..... 1069
Buttz v. Northern P. R. Co. 119 U. S. 55 (30: 330)..... 780, 1145
Buxton v. Traver, 130 U. S. 235 (32: 921) 461

## C.

Cadmus v. Matthews, 2 Paine, 229..... 722
Cadwell's Bank v. Crittenden, 66 Iowa, 237..... 526
Caha v. United States, 152 U. S. 211 (38: 415)..... 815
Calder v. Keegan, 80 Wis. 126..... 666
Caldwell v. Skilton, 13 Pa. 152, 165 Pa. 649..... 934
Caledonia, The, 157 U. S. 144 (39: 651).. 1043
California v. Central P. R. Co. 127 U. S. 1 (32: 150, 2 Inters. Com. Rep. 153)..... 566, 957
v. San Pablo & T. R. Co. 149 U. S. 308 (37: 747)..... 950
California Powder Works v. Davis, 151 U. S. 389 (38: 206)..... 425
Callaghan v. Myers, 128 U. S. 617 (32: 547)..... 590
Callan v. Wilson, 127 U. S. 540 (32: 224). 1081
Calvert v. London Dock Co. 2 Keen, 638 ..... 417, 419
Cameron v. Chicago, M. & St. P. R. Co. 68 Minn. 384..... 672
Campbell v. Missouri P. R. Co. 121 Mo. 340 (25 L. R. A. 175)..... 618
Canada, The, Lush. Adm. 586..... 1063
Canterbury v. Atty. Gen. 1 Phil. Ch. 306 613
Capen v. Foster, 12 Pick. 485 (23 Am. Dec. 632)..... 260
Card v. Colby, 24 U. S. App. 460..... 811
Cardwell v. American River Bridge Co. 113 U. S. 205 (28: 959)..... 247, 748
Carey v. Houston & T. C. R. Co. 150 U. S. 170 (37: 1041)..... 78, 588, 634
Carlisle v. United States, 83 U. S. 16 Wall. 147 (21: 426)..... 145
Carondelet, The, 87 Fed. Rep. 800..... 923
Carroll v. Safford, 44 U. S. 3 How. 441 (11: 671)..... 665
v. Waring, 3 Gill & J. 491 ..... 539
Carroll County Supers. v. Smith, 111 U. S. 556 (28: 517)..... 398
Carter v. Dow, 16 Wis. 299..... 1171
v. Towne, 103 Mass. 507..... 1104
Cary v. Curtis, 44 U. S. 3 How. 236 (11: 576)..... 354
Casey v. Galli, 94 U. S. 673 (24: 168)..599, 821
Cass County v. Gillett, 100 U. S. 585 (25: 585)..... 398
Castle v. Bullard, 64 U. S. 23 How. 172 (16: 424)..... 446
Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155 (39: 931)..... 571
Catlin v. Gunter, 11 N. Y. 368..... 233
v. Trinity College, 113 N. Y. 133 (3 L. R. A. 206) ..... 289
Catron v. Nichols, 81 Mo. 80 (51 Am. Rep. 222)..... 615
Cayuga, The, 2 Ben. 125, Aff'd 7 Blatchf. 385, 81 U. S. 14 Wall. 270 (20: 828)..... 945, 946
Cayuga, The, v. Hoboken Land & Improv. Co. ("The Cayuga"), 81 U. S. 14 Wall. 270 (20: 828)..... 1062
Central Branch Union P. R. Co. v. Atchison, T. & S. F. R. Co. 28 Kan. 453..... 1168
Central Colo. Improv. Co. v. Pueblo County Comrs. 95 U. S. 259 (24: 495)..... 665
Central Irrig. Dist. v. De Lappe, 79 Cal. 351 ..... 389
Central Land Co. v. Laidley, 159 U. S. 103 (40: 91) ..... 136–138, 159
Central P. R. Co. v. California, 162 U. S. 91 (40: 903)..... 55, 954, 956
v. Nevada, 162 U. S. 512 (40: 1057) 571
v. United States, 28 Ct. Cl. 427... 363
Central R. & B. Co. v. Georgia, 92 U. S. 665 (23: 757)..... 456
Central R. Co. v. Keegan, 160 U. S. 259 (40: 418)..... 747



Digitized by Google

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24 (35: 55)..... 271, 274, 290, 446, 821, 822
Central Trust Co. v. Kneeland, 138 U. S. 414 (34: 1014)..... 333
Ceto, The, L. R. 14 App. Cas. 670..1060, 1061
Chae Chan Ping v. United States ("Chinese Exclusion Case"), 130 U. S. 581 (32: 1069)..... 141
Chaffin v. Taylor, 116 U. S. 567 (29: 727) 1005
Chamberlain v. Cleveland, 66 U. S. 1 Black, 419 (17: 93)..... 950
Chambers v. Carson, 2 Whart. 9..... 286
Chandler v. Calumet & H. Min. Co. 149 U. S. 79 (37: 657)..... 557, 558
Chapman, *Re*, 156 U. S. 211 (39: 401)..510, 574
v. Atlantic & St. L. R. Co. 87 Me. 92..... 616
v. Handley, 151 U. S. 443 (38: 227) 423
v. United States, 164 U. S. 436 (41: 504)..... 511, 574
Chappell v. United States, 160 U. S. 499 (40: 510)..... 369, 684, 746, 1133
v. Waterworth, 155 U. S. 102 (39: 85) 745
Charkieb, The, L. R. 4 Adm. & Eccl. 120 1006
Charles River Bridge v. Warren Bridge 36 U. S. 11 Pet. 420 (9: 773).. 1169
v. Warren Bridge, 7 Pick. 344..... 1118
Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386 (35: 1051) 57, 565, 668, 991
Cheavin v. Walker, L. R. 5 Ch. Div. 850 127
Chelton v. Henderson, 9 Gill, 432..... 830, 831
Chemical Nat. Bank v. Hartford Deposit Co. 161 U. S. 1 (40: 595)..... 820
Chenango Bridge Co. v. Binghamton Bridge Co. ("The Binghamton Bridge"), 70 U. S. 3 Wall. 51 (18: 137)..... 563
Cherokee Nation v. Georgia, 30 U. S. 5 Pet. 1 (8: 25)..... 198
v. Southern Kansas R. Co. 135 U. S. 641 (34: 295)..... 199, 1025
Chesapeake & O. R. Co. v. Miller, 114 U. S. 176 (29: 121)..... 563
Chesapeake, O. & S. R. Co. v. Wells, 85 Tenn. 613..... 260
Chew Heong v. United States, 112 U. S. 536 (28: 770)..... 249
Chicago v. Evans, 24 Ill. 52..... 524
Chicago & A. R. Co. v. Joliet, L. & A. R. Co. 105 Ill. 388 (44 Am. Rep. 799)..... 991
v. Springfield & N. W. R. Co. 67 Ill. 142..... 994
Chicago & G. T. R. Co. v. Hough, 61 Mich. 507..... 993
v. Wellman, 143 U. S. 339 (36: 176) 565
Chicago & N. W. R. Co. v. Chicago, 164 U. S. 454 (41: 511)..715, 1088, 1153
v. Chicago, 140 Ill. 309..... 990
v. Fuller, 84 U. S. 17 Wall. 560 (21: 710)..... 172
v. Osborne, 146 U. S. 354 (36: 1002) 1098
v. People, 56 Ill. 356 (8 Am. Rep. 690)..... 494
v. Williams, 55 Ill. 185 (8 Am. Rep. 641)..... 260
Chicago, B. & K. R. Co. v. Missouri, Guffey, 120 U. S. 569 (30: 732) 592
Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226 (41: 979)..... 1168
v. Chicago, 149 Ill. 457..... 988
v. Iowa, 94 U. S. 155 (24: 94)..... 494
Chicago Gaslight & C. Co. v. Peoples' Gaslight & C. Co. 121 Ill. 530 ..... 1025, 1039
Chicago L. Ins. Co. v. Needles, 113 U. S. 574 (28: 1084) .....28, 983, 1153
Chicago, M. & St. P. R Co. v. Minnesota, 134 U. S. 418 (33: 970, 3 Inters. Com. Rep. 209)..... 111, 494, 565
Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co. 143 U. S. 596 (36: 277)..... 271, 272
v. Houston, 95 U. S. 697 (24: 542) 192
Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 641..... 670
v. Pullman Southern Car Co. 139 U. S. 79 (35: 97)..... 1039
Chilton v. People, 66 Ill. 501..... 1123
Chisholm v. Georgia, 2 U. S. 2 Dall. 419 (1: 440)..... 716
Choate v. People, 19 Ill. 63..... 286
Chouteau v. Eckhart, 43 U. S. 2 How. 344 (11: 293)..... 880
Chow Goo Pooi, *Re*, 25 Fed. Rep. 77... 145
Christ Church v. Philadelphia County, 65 U. S. 24 How. 300 (16: 602).. 952
Chubb v. Hamburg-American Packet Co. 39 Fed. Rep. 431..... 1006
v. Upton, 95 U. S. 665 (24: 523).. 822
Church of Holy Trinity v. United States, 143 U. S. 457 (36: 228)...1032, 1034
Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 1 (34: 478)..... 743, 807, 1061
Cincinnati v. White, 31 U. S. 6 Pet. 431 (8: 452)..... 742
Cincinnati, N. O. & T. P. R. Co. v. Citizens' Nat. Bank, 24 Ohio L. J. 198..... 216
v. Interstate Commerce Com. 162 U. S. 184 (40: 985, 5 Inters. Com. Rep. 391).....1028, 1038
v. Kentucky ("Kentucky R. Tax Cases"), 115 U. S. 321 (29: 414) ..... 698, 1175
Citizens' Bank v. First Nat. Bank, L. R. 6 H. L. 352..... 863
Citizens' Sav. & L. Asso. v. Topeka, 87 U. S. 20 Wall. 655 (22: 455) ..... 887, 895, 985
City of Beunos Ayres, The, 1 Asp. Mar. L. Cas. 169..... 945
City of Mexico, The, 25 Fed. Rep. 924. 82
City of Mexico, The, 28 Fed. Rep. 148. 924
City of Panama, The, v. Phelps, 101 U. S. 453 (25: 1061)..... 186
City of Peking, The, L. R. 15 App. Cas. 438..... 944
Clairborne County v. Brooks, 111 U. S. 400 (28: 470)..... 1100
Clarence, The, 3 W. Rob. Adm. 283..914, 947
Clark v. Barnwell, 53 U. S. 12 How. 272 (27: 780)..... 1043
v. Foot, 8 Johns. 421..... 615
v. Graham, 19 U. S. 6 Wheat. 577 (5: 334)..... 829
v. Keith, 106 U. S. 464 (27: 302).. 1005
v. Krause, 2 Mackey, 559..... 742
v. United States, 95 U. S. 539 (24: 518)..... 407
Clarke v. Courtney, 30 U. S. 5 Pet. 319 (8: 140)..... 1093
v. Smith, 49 Md. 117.....830, 831
Clatsop Chief, The, 8 Fed. Rep. 167.... 1005



Digitized by Google

Clapp v. Ingraham, 126 Mass. 200..... 1110
Clay v. Field, 138 U. S. 464 (34: 1044)... 191
v. Smith, 28 U. S. 3 Pet. 411 (7: 728) 1069
Cleveland v. Tripp, 13 R. I. 59..... 895
Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439 (38: 1041, 4 Intera. Com. Rep. 671), 133 Ind. 513 (18 L. R. A. 729).....54, 56, 57, 695, 704, 978
Clinton v. Englebrecht, 80 U. S. 13 Wall. 434 (20: 659).....186, 807
Clune v. United States, 159 U. S. 590 (40: 269)..... 298
Clyde, The, Swab. Adm. 23..... 1062
Coates v. First Nat. Bank, 91 U. S. 26... 862
Coats v. Merrick Thread Co. 149 U. S. 562 (37: 847)..... 125
Coburn v. Cedar Valley Land & C. Co. 138 U. S. 196 (34: 876)..... 116
Coffin v. Reynolds, 37 N. Y. 640..... 154
v. United States, 156 U. S. 432 (39: 481).....530, 630
v. United States, 162 U. S. 672 (40: 1113)..... 630
Cohens v. Virginia, 19 U. S. 6 Wheat. 410 (5: 292)..... 788
Cole v. La Grange, 113 U. S. 1 (28: 896) .....389, 495, 985
Coles v. Ayres, 156 Pa. 197..... 984
Collier v. Simpson, 5 Car. & P. 73..... 754
Colorado, The, v. The H. P. Bridge ("The Colorado"), 91 U. S. 692 (23: 379)..... 1059, 1061
Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138 (37: 1030) .....368, 369, 602
Colorado Coal & I. Co. v. United States, 123 U. S. 307 (31: 182)..... 796
Colorado Improv. Co. v. Pueblo County Comrs. 95 U. S. 259 (24: 495). 570
Columbus, The, 3 W. Rob. Adm. 158.. 1062
Columbus S. R. Co. v. Wright, 151 U. S. 470 (38: 238).....57, 668, 697
v. Robbins, 6 U. S. App. 275, 148 U. S. 266 (37: 445).....104, 812
v. Robbins, 22 U. S. App. 601..... 812
Com. v. Alger, 7 Cush. 53..... 619
v. Andrews, 97 Mass. 543..... 950
v. Cooper, 5 Allen, 495 (81 Am. Dec. 762)..... 603
v. Cullen, 13 Pa. 133 (53 Am. Dec. 450)..... 1118
v. Davis, 11 Pick. 432..... 800
v. Duncan, 91 Ky. 592..... 484
v. Feely, 1 Va. Cas. 321..... 716
v. Giles, 1 Gray, 466..... 800
v. Gould, 12 Gray, 171..... 803
v. Has, 122 Mass. 40..... 169
v. Leonard, 140 Mass. 473 (54 Am. Rep. 485)..... 472
v. M'Neill, 19 Pick. 127..... 1064
v. Peters, 12 Met. 387..... 802
v. Philadelphia County Comrs. 8 Serg. & R. 151..... 1064
v. Purchase, 2 Pick. 521 (13 Am. Dec. 452)..... 802
v. Stebbins, 4 Gray, 25..... 1064
v. Tuck, 20 Pick. 356..... 803
v. Tuey, 8 Cush. 1..... 531
v. Whittaker, 131 Mass. 224..... 805
v. Wood, 4 Gray, 11 ..... 800
v. York, 9 Met. 93 (43 Am. Dec. 373)..... 529
Commercial & R. Bank v. Slocomb, 39 U. S. 14 Pet. 65 (10: 354)..... 434
Commercial Transp. Co. v. Fitzhugh, 66 U. S. 1 Black, 574 (17: 107).. 1005
Comstock v. Crawford, 70 U. S. 3 Wall. 396 (18: 34)..... 1112
Congress & E. Spring Co. v. Edgar, 99 U. S. 645 (25: 487)..... 285
Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51 (27: 648)..... 100
Connecticut, N. Y. & N. E. R. Co. v. Woodruff, 153 U. S. 689 (38: 869) 681
Connersville v. State Bank, 16 Ind. 105. 456
Conqueror, The, 166 U. S. 110 (41: 937). 1005
Conserva, The, 38 Fed. Rep. 431..... 923
Consolidated Piedmont Cable Co. v. Pacific Cable R. Co. 15 U. S. App. 216..... 811
Continental Improv. Co. v. Stead, 95 U. S. 161 (24: 403).....193, 1135
Cook v. Hart, 146 U. S. 183 (36: 934).... 1049
Cooke v. Graham, 7 U. S. 3 Cranch, 229 (2: 420)..... 1122
Cooley v. Philadelphia Port Wardens, 53 U. S. 12 How. 299 (13: 996).. .....171, 854
Cooper, *Ex parte*, 3 Tex. App. 489 (30 Am. Rep. 152)..... 1171
*Re*, 143 U. S. 572 (36: 282).....185, 949
v. Reynolds, 77 U. S. 10 Wall. 308 (19: 931) ..... 1110
v. Roberts, 59 U. S. 18 How. 173 (15: 338)..... 759
Coosaw Min. Co. v. South Carolina, 144 U. S. 550 (36: 537)...545, 777, 1032
Cope v. Cope, 137 U. S. 682 (34: 832).... 246
Cornelius v. Den, Ivins, 26 N. J. L. 376. 777
v. Kessel, 128 U. S. 456 (32: 482).. 1091
Cory v. Carter, 48 Ind. 337 (17 Am. Rep. 738)..... 258
v. Silcox, 5 Ind. 370..... 803
Coulam v. Doull, 133 U. S. 216 (33: 596). 1149
Courrier, The, Lush. Adm. 451..... 1006
Cousett, The, L. R. 5 Prob. Div. 229.... 1063
Covert v. Rhodes, 48 Ohio St. 66..... 863
Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204 (38: 962, 4 Inters. Com. Rep. 64) 494, 562, 954, 959, 960
Covington & L. Turnpk. Road Co. v. Sandford (Ky.) 20 S. W. 1031 561
v. Sandford, 164 U. S. 578 (41: 560)..... 668
Cowdrey v. Galveston, H. & H. R. Co. 93 U. S. 352 (23: 950)..... 450
Cowell v. Colorado Springs Co. 100 U. S. 55 (25: 547).....744, 777
Cox v. Barney, 14 Blatchf. 289..... 82
v. People, 80 N. Y. 500..... 627
v. United States, 76 U. S. 9 Wall. 298 (19: 579)..... 623
Coy, *Ex parte*, 127 U. S. 731 (32: 274)... 1086
Cragin v. Powell, 128 U. S. 691 (32: 566). 759
Craig v. Leitensdorfer, 127 U. S. 764 (32: 322)..... 80
Crain v. United States, 162 U. S. 625 (40: 1097)..... 295
Crane v. Hyde Park, 135 Mass. 147..... 743
v. Morris, 31 U. S. 6 Pet. 598 (8: 415)..... 446
Crease v. Babcock, 10 Met. 525..... 847
Cresson v. Ferree, 70 Pa. 446..... 936
Criswell v. Montana C. R. Co. (Mont.) 44 Pac. 525..... 747



Digitized by Google

Croft v. Day, 7 Beav. 84..... 125
Cromwell v. Sac County, 94 U. S. 351 (24: 195)..... 1100
Cross v. Allen, 141 U. S. 528 (35: 843)... 418
v. Burke, 146 U. S. 82 (36: 896)... ..... 508, 509, 573, 574
v. North Carolina, 132 U. S. 131 (33: 287)..... 1160
v. United States, 145 U. S. 571 (36: 821)..... 103, 508, 509
Crossley v. New Orleans, 108 U. S. 105 (27: 667)..... 681
Crouch v. Davis, 23 Gratt. 62 ..... 769
Crowell v. Randell, 35 U. S. 10 Pet. 368 (9: 458)..... 1153
v. St. Barnabas Hospital, 27 N. J. Eq. 650..... 538
Cruger v. McLaury, 41 N. Y. 219..... 777
Crum v. Cotting, 23 Iowa, 411..... 665
Crutcher v. Kentucky, 141 U. S. 47 (35: 649)..... 587, 588, 700
Cuddy, *Ex parte*, 131 U. S. 280 (33: 154) 1112
Cullum's Will, *Re*, 145 N. Y. 593..... 288
Cummings v. Eden, 1 Cow. 70..... 286
v. Merchants' Nat. Bank, 101 U. S. 153 (25: 903)..... 653
v. Perham, 1 Met. 555..... 1170
Cunnack v. Edwards, [1896] 2 Ch. 679... 743
Curtis v. Overman Wheel Co. 20 U. S. App. 146..... 811
Cutting v. Gilbert, 5 Blatchf. 259..... 654

## D.

Daggett v. Hudson, 43 Ohio St. 548 (54 Am. Rep. 832)..... 260
Daily v. Swope, 47 Miss. 367..... 593, 594
Dair v. United States, 83 U. S. 16 Wall. 1 (21: 491)..... 1123, 1124
Dakota County v. Glidden, 113 U. S. 222 (28: 981)..... 950
Dale Tile Mfg. Co. v. Hyatt, 125 U. S. 46 (31: 688)..... 852
Dana v. Kemble, 19 Pick. 112..... 802
Dandridge v. Washington, 27 U. S. 2 Pet. 370 (7: 454)..... 766
Daniel v. Whartenby, 84 U. S. 17 Wall. 639 (21: 661)..... 831
Darbison v. Beaumont, 1 P. Wms. 229.. 986
Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 518 (4: 629)..... 952
Davey v. Shannon, 4 Exch. Div. 81..... 501
Davidson v. New Orleans, 96 U. S. 97 (24: 616)..... 388, 392, 395, 495, 984
v. Nichols, 11 Allen, 514..... 1104
Davies v. Miller, 130 U. S. 284 (32: 932) ..... 352, 353
Davis v. Braden, 35 U. S. 10 Pet. 286 (9: 427)..... 103
v. Elmira Sav. Bank, 161 U. S. 283 (40: 701)..... 465, 466
v. Mercantile Trust Co. 152 U. S. 590 (38: 568)..... 423
v. Texas, 139 U. S. 651 (35: 301).. 198
v. Wiebbold, 139 U. S. 507 (35: 238) 176
Dawson v. Lee, 83 Ky. 49..... 258
Day v. Owen, 5 Mich. 520 (72 Am. Dec. 62)..... 260
v. Woodworth, 54 U. S. 13 How. 363 (14: 181)..... 80, 637, 638
Dean v. Walker, 107 Ill. 540 ..... 540
Deaton v. Tennessee Coal & R. Co. 12 Heisk. 650..... 501
Debs, *Re*, 158 U. S. 564 (39: 1092)..... ..... 788, 1028, 1160
Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469 (35: 213)..... 527
Del Col v. Arnold, 3 U. S. 3 Dall. 333 (1: 624)..... 1062
Delgo v. Chavez, 140 U. S. 586 (35: 578) 575
Den, Murray, v. Hoboken Land & I. Co. 59 U. S. 18 How. 272 (15: 372) ..... 80, 495
Dent v. West Virginia, 129 U. S. 114 (32: 623)..... 80
Denver & R. G. R. Co. v. Alling, 99 U. S. 463 (25: 438)..... 278
DeSaussure v. Gaillard, 127 U. S. 216 (32: 125)..... 983
Deseret Salt Co. v. Tarpey, 142 U. S. 241 (35: 999)..... 490, 1091
Desmare v. United States, 93 U. S. 605 (23: 959)..... 478
Des Moines & M. R. Co., *Ex parte*, 103 U. S. 794 (26: 461)..... 580
Des Moines Gas Co. v. Des Moines, 44 Iowa, 505 (1 Am. Rep. 256).. 524
Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552 (31: 202)..... 1153
Detroit v. Osborne, 135 U. S. 492 (34: 260) ..... 887, 1100
Devizes v. Clark, 3 Ad. & El. 506..... 841
Dexter v. Gardner, 7 Allen, 243..... 742
Diamond Match Co. v. Rober, 106 N. Y. 473 (60 Am. Dec. 464)... 1030, 1031
Diana, The, Lush. Adm. 539..... 1006
Dibble v. Bellingham Bay Land Co. 163 U. S. 63 (41: 72)..... 474, 1088
Dickson v. Satterfield, 53 Md. 317..... 829
Digges v. Ellason, 4 Cranch, C. C. 619.. 539
Dirst v. Morris, 81 U. S. 14 Wall. 484 (20: 722)..... 1045
District of Columbia v. Hutton, 143 U. S. 18 (36: 60)..... 247
Dobson v. Collins, 1 Hurlst. & N. 81.... 502
Dodge v. Woolsey, 59 U. S. 18 How. 331 (15: 401)..... 658, 953
Dodson v. Mock, 4 Dev. & B. L. 146 (32 Am. Dec. 677)..... 1170
Dolan v. People, 64 N. Y. 485..... 627
Dole v. Johnson, 50 N. H. 452..... 235
Donnelly v. Boston Catholic Cemetery Asso. 146 Mass. 163..... 743
Doolan v. Carr, 125 U. S. 618 (31: 844).. 176
Dordogne, The, L. R. 10 Prob. Div. 6.. 1060
Dorlan v. East Brandywine & W. R. Co. 46 Pa. 520..... 989
Dorr v. Fenno, 12 Pick. 521..... 841
Douglass v. Pike County, 101 U. S. 677 (25: 968)..... 137
Dow v. Beidelman, 49 Ark. 455..... 671, 672
v. Beidelman, 125 U. S. 680 (31: 841, 2 Inters. Com. Rep. 56) 494, 562, 565
v. Johnson, 100 U. S. 158 (25: 632) 103
Dowell v. Applegate, 152 U. S. 327 (38: 473)..... 1113
Dower v. Richards, 151 U. S. 659 (38: 306)..... 474, 681
Dred Scott Case, 60 U. S. 19 How. 393 (15: 691)..... 264
Drummond v. Prestman, 25 U. S. 12 Wheat. 515 (6: 712)..... 1130
Drury v. Hayden, 111 U. S. 223 (28: 408) 538



Digitized by Google

Dubuque & P. R. Co. v. Litchfield, 64 U. S. 23 How. 66 (16: 500)..545, 777
v. Litchfield, 68 U. S. 1 Wall. 69 (17: 514)..... 995
Dubuque & S. C. R. Co. v. Richmond, 86 U. S. 19 Wall. 584 (22: 173).. 111
Duncan v. Missouri, 152 U. S. 377 (38: 485)..... 81
Dudley E. Jones Co. v. Munger Improv. Cotton Mach. Mfg. Co. 2 U. S. App. 55..... 811
Dueber Co. v. Robbins, 43 U. S. App. 391 812
Dulac v. Clusel (Lyons, Nov. 30, 1849, Journal du Palais, 1852, p. 132 206
Duncan v. McCall, 139 U. S. 449 (35: 219) 199
v. Missouri, 152 U. S. 377 (38: 485) 679
Duplex Press Co. v. Campbell Press Co. 37 U. S. App. 250..... 812
Durham v. Seymour, 161 U. S. 235 (40: 682)..... 175
Durkee v. Janesville, 28 Wis. 464 (9 Am. Rep. 500)..... 671
Duval v. United States, 25 Ct. Cl. 46..405, 407
Dyckman v. New York, 5 N. Y. 434.... 1113
Dynes v. Hoover, 61 U. S. 20 How. 65 (15: 838).....823, 826

## E.

Easterbrook v. Tillinghast, 5 Gray, 17 ..... 742-744
Eastern R. Co. v. Relief F. Ins. Co. 98 Mass. 420..... 621
East Line & R. R. R. Co. v. Culberson, 68 Tex. 664..... 195
Easton v. German-American Bank, 127 U. S. 532 (32: 210)..... 849
Eaton v. Benton, 2 Hill, 576..... 769
v. Boston, C. & M. R. Co. 51 N. H. 504 (12 Am. Rep. 147).... 1002
Ebor, The, L. R. 11 Prob. Div. 25....10, 60
Eby v. King, 158 U. S. 366 (39: 1018)... 1095
Eddy v. Lafayette, 163 U. S. 456 (41: 225) 619
Edelin v. Sanders, 8 Md. 118..... 1123
Eden v. People, 161 Ill. 296 (32 L. R. A. 659)..... 671
Edwards v. Elliott, 88 U. S. 21 Wall. 532 (22: 487)..... 198
Egan v. Hart, 165 U. S. 188 (41: 680)... 988
Ehrhardt v. Hogaboom, 115 U. S. 67 (29: 346)..... 557
Eichelberger v. Barnitz, 9 Watts, 447..934-936
Eilers v. Boatman, 111 U. S. 356 (28: 356) 384
Ekiu v. United States, 142 U. S. 651 (35: 1146)..... 1049
Eldridge v. Trezevant, 160 U. S. 452 (40: 490).....1000, 1001
Election Cases, 65 Pa. 34..... 577
Electric Mfg. Co. v. Edison Electric Light Co. 18 U. S. App. 637..... 811
Ellerman v. Chicago Junction R. & U. S. Y. Co. 49 N. J. Eq. 215..... 1031
Ellicott v. Peterson, 4 Md. 476..... 502
Elliott v. Sackett, 108 U. S. 132 (27: 678) 538
Ellis v. Wild, 6 Mass. 321..... 209
Elmore v. Grymes, 26 U. S. 1 Pet. 469 (7: 224)..... 446
Ely v. Peck, 7 Conn. 239..... 716
Emerald, The, [1896] P. D. 192..... 946
Emerson v. Hall, 38 U. S. 13 Pet. 409 (10: 223)..... 220
v. Lowell Gaslight Co. 6 Allen, 148 235
Emert v. Missouri, 156 U. S. 296 (39: 430) 645
Emilie, The, 4 Ben. 235..... 945
Emily Souder, The, v. Pritchard, 84 U. S. 17 Wall. 666 (21: 683)..... 517
Empire Twp. v. Darlington, 101 U. S. 87 (25: 878)..... 398
Episcopal City Mission v. Brown, 158 U. S. 222 (39: 960)..... 539
Equator Min. & S. Co. v. Hall, 106 U. S. 86 (27: 114)..... 933
Ericsson v. Brown, 38 Barb. 390..... 154
Erie R. Co. v. Pennsylvania, 88 U. S. 21 Wall. 492 (23: 595).....57, 697
Erie Rubber Co. v. American Dunlop Tire Co. 28 U. S. App. 470.. 811
Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678 (27: 442).....247, 854
Eslin v. District of Columbia, 22 Ct. Cl. 395, 29 Ct. Cl. 370..... 736
Estes v. Gunter, 121 U. S. 183 (30: 884) 191
Estrella, The, 17 U. S. 4 Wheat. 298 (4: 574)..... 916
Eustis v. Bolles, 150 U. S. 361 (37: 1111) ...74, 139, 140, 178, 425, 681, 1090
Evanston v. Gunn, 99 U. S. 660 (25: 306) 366
Evansville & T. H. R. Co. v. West, 139 Ind. 254..... 727
Evansville Nat. Bank v. Britton, 105 U. S. 322 (26: 1054)..... 1077
Ewing v. Burnet, 36 U. S. 11 Pet. 41 (9: 624)..... 75
Eyre v. Jacob, 14 Gratt. 427..... 288

## F.

Fairbanks v. Jacobus, 14 Blatchf. 337.. 126
Fairfax v. Hunter, 11 U. S. 7 Cranch, 603 (3: 453)..... 778
Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112 (41: 369) .....399, 499
Farmers' Loan & T. Co v. Chicago, P. & S. R. Co. 39 Fed. Rep. 143... 66
Farnsworth v. Boston, 126 Mass. 1..... 442
v. Minnesota & P. R. Co. 92 U. S. 49 (23: 530)..... 778
v. Montana, 129 U. S. 104 (32: 616) .....508, 509, 574
Farrington v. Tennessee, 95 U. S. 679 (24: 558)..... 952
Fassett, *Re*, 142 U. S. 485 (35: 1090).... 944
Favorita, The, v. Union Ferry Co. 85 U. S. 18 Wall. 598 (21: 856)..... 946
Fecheimer v. Robertson, 53 Ark. 101..... 526
Felder v. State, 23 Tex. App. 447 (59 Am. Dec. 777)..... 603
Felix v. Patrick, 145 U. S. 317 (36: 719).. 1091
Fellows v. Denniston ("The New York Indians"), 72 U. S. 5 Wall. 761 (18: 708)..... 248
v. Fellows, 4 Johns. Ch. 25..... 655
Fenn v. Craig, 3 Younge & C. 216..... 1108
v. Harrison, 3 T. R. 757..... 207
Fenton v. Emblers, 3 Burr. 1278, 1 W. Bl. 353.....500, 501
Ferrin v. Myrick, 41 N. Y. 315..... 450
F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648 (41: 1149) ..... 1175
Field v. Clark, 143 U. S. 649 (36: 294)... 217
Filliter v. Phippard, 11 Q. B. 347..... 613
Filor v. United States, 76 U. S. 9 Wall. 45 (19: 549).....150, 151



Digitized by Google

Findlay v. Bear, 8 Serg. & R. 571..... 1170
v. Riddle, 3 Binn. 156 (5 Am. Dec. 355)..... 830
Finley v. Langston, 12 Mo 120..... 615
Finn v. Brown, 142 U. S. 56 (35: 936)... 849
v. United States, 123 U. S. 227 (31: 128)..... 1130
Finney v. Condon, 86 Ill. 78..... 419
First Nat. Bank v. Chehalis County, 6 Wash. 64..... 1078
v. Clark, 134 N. Y. 368 (17 L. R. A. 580)..... 862
v. Dubuque S. W. R. Co. 52 Iowa, 378 (35 Am. Rep. 280)..... 863
v. Kentucky, 76 U. S. 9 Wall. 353 (19: 701)..... 465, 1072
v. Whitman, 94 U. S. 343 (24: 229) 861
v. Yankton County, 101 U. S. 129 (25: 1046)..... 807
First Universalist Soc. v. Boland, 155 Mass. 71 (15 L. R. A. 281)... 744
Fisher v. Bassett, 9 Leigh, 119, 33 Am. Dec. 227..... 1113
v. Carrico ("Fisher v. Perkins"), 122 U. S. 522 (30: 1192)..... 136
v. Rieman, 12 Md. 497..... 209
Fisk v. Henarie, 142 U. S. 459 (35: 1060). 434
Fitch v. Pacific R. Co. 45 Mo. 322..... 618
Fitzgerald v. Chr[illegible]penys, 30 L. J. Ch. 782, 2 Johns. & H. 31..... 1033
Fletcher v. Peck, 10 U. S. 6 Cranch, 87 (3: 162)..... 647, 985
Florence Min. Co. v. Brown, 124 U. S. 385 (31: 424)..... 861
Florentine v. Barton, 69 U. S. 2 Wall. 210 (17: 783)..... 1112
Florida Const. Co. v. Young, 11 U. S. App. 683..... 811
Flynn v. Allen, 57 Pa. 482..... 209
Follett v. Rose, 3 McLean, 332..... 1123
Folsom v. United States, 160 U. S. 121 (40: 363)..... 575
Fong Yue Ting v. United States, 149 U. S. 698 (37: 905)..... 141, 143, 246
Foote v. Woman's Board of Missions, 162 U. S. 439 (40: 1032)..... 220
Forbes v. Gracey, 94 U. S. 762 (24: 313). 223
Forgay v. Conrad, 47 U. S. 6 How. 201 (12: 404)..... 812
Forsyth v. Doolittle, 120 U. S. 73 (30: 586) 946
Fort Scott v. Hickman, 112 U. S. 150 (28: 636)..... 210
Fosdick v. Schall, 99 U. S. 251 (25: 342) 333
Foster v. Com. 8 Watts. & S. 77..... 1160
Fountain City, The, 22 U. S. App. 301.. 1058
Fourth Street Nat. Bank v. Yardley, 165 U. S. 634 (41: 855)..... 871
Fox v. Ohio, 46 U. S. 5 How. 424 (12: 219)..... 198
Francam v. Foster, Skin. 326, Holt, 25.. 499
Franconia, The, 4 Ben. 181..... 1058
Frankland and Kestrel, The, L. R. 4 P. C. 529..... 1059, 1060
Franklin Teleg. Co. v. Harrison, 145 U. S. 459 (36: 776)..... 278
Frasher v. O'Connor, 115 U. S. 102 (29: 311)..... 558
Freddie L. Porter, The, 8 Fed. Rep. 170 1063
Frelinghuysen v. Baldwin, 12 Fed. Rep. 395..... 787
Fremantle v. London & N. W. R. Co. 10 C. B. N. S. 89..... 614
French v. Fyan, 93 U. S. 169 (23: 812)..557 558
Frisbie v. Whitney, 76 U. S. 9 Wall. 187 (19: 668)..... 461
Fritts v. Palmer, 132 U. S. 282 (33: 317). 822
Frolickstein v. Mobile, 40 Ala. 725.... 169
Frorer v. People, 141 Ill. 171 (16 L. R. A. 492)..... 671
Frost v. Wenie, 157 U. S. 46 (39: 614) .....247, 1131
Fulton v. Harman, 44 Md. 263..... 831
Furlong v. Carroll, 7 Ont. App. 145.... 613

## G.

Gadsen v. Brown, Speers, Eq. 38..... 416
Gaines v. Caldwell ("Gaines v. Rugg"), 148 U. S. 228 (37: 432)..... 995
v. Hennen, 65 U. S. 24 How. 558 (16: 770)..... 950
Galena & C. U. R. Co. v. Dill, 22 Ill. 264 991
v. Loomis, 13 Ill. 548 (56 Am. Dec. 471)..... 991
Galley v. Colt's Patent Fire-Arms Mfg. Co. 30 Fed. Rep. 123..... 126
Galt v. Todd, 23 Wash. L. Rep. 98..... 539
Galveston, H. & H. R. Co. v. Cowdrey, 78 U. S. 11 Wall. 459 (20: 199) .....333, 335
v. Le Gierse, 51 Tex. 189.....195, 196
Gandy v. Chicago & N. W. R. Co. 30 Iowa, 420 (6 Am. Rep. 682)..... 617
v. Marble, 122 U. S. 432 (30: 1223) 1068
Gardner v. National City Bank, 39 Ohio St. 601..... 863
Newburgh, 2 Johns. Ch. 162 (7 Am. Dec. 526)..... 985
Gatliff v. State (Tex.) 28 S. W. 466..... 950
Gaussen v. United States, 97 U. S. 584 (24: 1009)..... 409
Gayler v. Wilder, 51 U. S. 10 How. 477 (13: 504)..... 69
Gazelle, The, 2 W. Rob. Adm. 279..... 945
Geer v. Connecticut, 161 U. S. 519 (40: 793)..... 245
Gelpecke v. Dubuque, 68 U. S. 1 Wall. 175 (17: 520)..... 137
Gelston v. Hoyt, 16 U. S. 3 Wheat. 328 (4: 402).....916, 921-924
General Houston's Case, 2 Ops. Atty. Gen. 655..... 1160
General Steam Nav. Co. v. Rolt, 6 C. B. N. S. 550.....417, 419
Geneva Arbitration Case, United States, 138..... 916
Gentry v. State, 91 Ga. 669..... 950
Gerling v. Baltimore & O. R. Co. ("Martin's Admr. v. Baltimore & O. R. Co."), 151 U. S. 673 (38: 311) .....433, 434
German Nat. Bank v. Case, 99 U. S. 628 (25: 448).....846-848, 851
Gertrude, The, 2 Ware, 181, 3 Story, 68 941
Gibbons v. Ogden, 22 U. S. 9 Wheat. 1 (6: 23).....170, 171, 173, 854
Gibbs v. Consolidated Gas Co. 130 U. S. 396 (32: 979) .....1025, 1030, 1039
v. Green, 54 Miss. 592..... 595
v. Williams, 25 Kan. 214 (37 Am. Rep. 241)..... 843
Gibson v. Chouteau, 80 U. S. 13 Wall. 92 (20: 534)..... 663
v. Lyon, 115 U. S. 439 (29: 440).. 933
v. Mississippi, 162 U. S. 565 (40: 1075).....89, 259, 263, 984



Digitized by Google

Gibson v. Shufeldt, 122 U.S.27 (30: 1083) ..... 191, 1017
Giffert v. West, 33 Wis. 617 ..... 209, 234
Gilliam v. Brown, 48 Miss. 641 ..... 769
Gillis v. Stinchfield, 159 U. S. 658 (40: 295) ..... 140
Gilman v. Philadelphia, 70 U. S. 3 Wall. 713 (18: 96) ..... 171, 854
Glozza v. Tiernan, 148 U. S. 657 (37: 599) 668
Gist, *Ex parte*, 26 Ala. 156 ..... 717
Glenmont, The, 34 Fed. Rep. 402 ..... 714
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (29: 158, 1 Inters. Com. Rep. 382) ..... 699, 700, 959, 960, 1164
Goddard v. Gardner, 28 Conn. 172 ..... 768
Godden v. Kimmell, 99 U. S. 201 (25: 431) ..... 1149
Goetz v. Bank of Kansas City, 119 U. S. 551 (30: 515) ..... 802
Golder v. Cropp, 5 Jur. N. S. 562 ..... 829
Goldey v. Morning News, 156 U. S. 518 (39: 517) ..... 433, 435
Gompertz v. Bartlett, 2 El. & Bl. 849 ..... 208
Gonzales v. Ross, 120 U. S. 605 (30: 801) 590
Good v. Martin, 95 U. S. 90 (24: 341) ..... 186
Goodall v. State, 1 Or. 333, 80 Am. Dec. 396 ..... 603
Goodhue v. People, 94 Ill. 87 ..... 357
Goodrich v. United States, 41 Fed. Rep. 392 ..... 848
Goodright v. White, 2 W. Bl. 1010 ..... 936
Goodwin v. State, 96 Ind. 550 ..... 947
Gordon v. Appeal Tax Court, 44 U. S. 3 How. 133 (11: 529) ..... 950
v. Baltimore, 5 Gill, 231 ..... 456
v. United States, 1 Ct. Cl. 1 ..... 405
Gorgas, The, 10 Ben. 666 ..... 1062
Gorman v. Pacific R. Co. 26 Mo. 441 (72 Am. Dec. 220) ..... 618
Gormley v. Clark, 134 U. S. 338 (33: 909) 1100
Goshen Co. v. Bissell Co. 37 U. S. App. 555 ..... 813
Grace v. American Cent. Ins. Co. 109 U. S. 278 (27: 932) ..... 159
Graham v. O'Fallon, 4 Mo. 388 ..... 768
Grand Chute v. Winegar, 82 U. S. 15 Wall. 373 (21: 174) ..... 758
Grand Lodge F. & A. Masons v. New Orleans, 166 U. S. 143 (41: 548) 1117
Grand Rapids v. Grand Rapids & I. R. Co. 58 Mich. 641 ..... 993
Grand Rapids Chair Co. v. Runnels, 77 Mich. 104 ..... 671
Grand Trunk R. Co. v. Ives, 144 U. S. 408 (36: 485) ..... 162, 193, 630
v. Richardson, 91 U. S. 454 (23: 356) ..... 494, 616, 619, 621
Gran Para, The, 20 U. S. 7 Wheat. 471 (5: 501) ..... 916
Grannis v. Cummings, 25 Conn. 165 ..... 617
Grant v. Raymond, 31 U. S. 6 Pet. 218 (8: 376) ..... 1094
Grapeshot, The, v. Wallerstein ("The Grapeshot"), 76 U. S. 9 Wall. 129 (19: 651) ..... 517, 712, 713
Grayson v. Lynch, 163 U. S. 472 (41: 232) 1045
Gratiot v. United States, 40 U. S. 15 Pet. 336 (10: 759) ..... 406
Graves v. American Exch. Bank, 17 N. Y. 205 ..... 862
Gray v. Blanchard, 8 Pick. 284 ..... 744, 777
Gray v. Chicago, I. & N. R. Co. ("The Clinton Bridge"), 77 U. S. 10 Wall. 454 (19: 969) ..... 1001
v. Howe, 108 U. S. 12 (27: 634) ..... 93
v. State, 4 Ohio, 354 ..... 261
Great Eastern, The, Brown & L. Adm. 287 ..... 1061
Great Falls Co. v. Worster, 15 N. H. 412 441
Great Western Teleg. Co. v. Burnham, 162 U. S. 339 (40: 991) ..... 813
Green v. Biddle, 21 U. S. 8 Wheat. 76 (5: 566) ..... 98
v. Green, 90 U. S. 23 Wall. 486 (23: 75) ..... 831
v. Liter, 12 U. S. 8 Cranch, 229 (3: 545) ..... 672
v. Mills, 25 U. S. App. 383 (30 L. R. A. 90), 159 U. S. 651 (40: 293) ..... 811
Greenough v. Gaskell, 1 Myl. & K. 98 ..... 767
Gregory v. McVeigh, 90 U. S. 23 Wall. 294 (23: 156) ..... 136
Gresham v. State, 1 Tex. App. 458 ..... 950
Griefswald, The, Swab. Adm. 430 ..... 1006
Grignon v. Astor, 43 U. S. 2 How. 319 (11: 283) ..... 1112
Grisar v. McDowell, 73 U. S. 6 Wall. 373 (18: 865) ..... 885, 886, 888
Grissell v. Housatonic R. Co. 54 Conn. 447 ..... 616
Gronfier v. Puymirol, 19 Cal. 629 ..... 1108
Gross v. United States Mortg. Co. 108 U. S. 477 (27: 795) ..... 681
Groves v. Sentell, 153 U. S. 465 (38: 785) 205
Guild v. Richards, 16 Gray, 309 ..... 744
Guilford v. Chenango County Supers. 13 N. Y. 143 ..... 220
Gulf, C. & S. F. R. Co. v. Ellis, 87 Tex. 19 ..... 672
Gurney v. Womersley, 4 El. & Bl. 133 .. 203
The Guy v. Tall ("The Guy"), 76 U. S. 9 Wall. 758 (19: 710) ..... 718

## H.

Haberman Mfg. Co., *Re*, 147 U. S. 525 (37: 266) ..... 812
Hackney v. Tracy, 137 Pa. 53 ..... 935
Hagar v. Reclamation Dist. No. 108, 111 U. S. 701 (28: 569) ..... 887, 890, 894
Hale v. Walker, 31 Iowa, 344 (7 Am. Rep. 137) ..... 847
Hall v. De Cuir, 95 U. S. 485 (24: 547) .. 259
v. Law, 102 U. S. 466 (26: 219) ..... 75
v. Nashville & C. R. Co. 80 U. S. 13 Wall. 367 (20: 594) ..... 1068
v. Wisconsin, 103 U. S. 5 (26: 302) 1167
Haller v. Sheridan, 27 Ind. 494 ..... 1171
Halley, The, L. R. 2 Adm. & Eccl. 3, L. R. 2 P. C. 193 ..... 1006
Halstead v. Hall, 60 Md. 209 ..... 829
Hamblin v. Western Land Co. 147 U. S. 531 (37: 267) ..... 674
Hamilton, *Re*, 148 N. Y. 310 ..... 289
v. Vicksburg, S. & P. R. Co. 34 La. Ann. 975 ..... 681
Hamilton County Comrs. v. Mighels, 7 Ohio St. 109 ..... 559
Hamilton Gaslight & C. Co. v. Hamilton, 146 U. S. 258 (36: 965) ..... 1169
Hammersmith & C. R. Co. v. Brand, L. R. 4 H. L. 171 ..... 614



Digitized by Google

Hammock v. Farmers' Loan & T. Co. 105 U. S. 77 (26: 1111)..... 545
Hammond v. Connecticut Mut. F. Ins. Co. 150 U. S. 633 (37: 1206).. 681
v. Hammond, 2 Bland, Ch. 306... 1108
v. Hopkins, 143 U. S. 224 (36: 134) 1149
v. Strauss, 53 Md. 1..... 822
Hammonia, The, 4 Ben. 518..... 1058
Hanford v. Davies, 163 U. S. 273 (41: 157) 368
Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465 (24: 527)...172, 260, 643, 646
v. Shacklett, 30 Mo. 550..... 456
v. Smith, 76 U. S. 9 Wall. 95 (19: 599)..... 558
Hannum v. Richardson, 48 Vt. 508 (21 Am. Rep. 152)..... 209
Hardee v. Wilson, 146 U. S. 179 (36: 933) 423
Harden v. Gordon, 2 Mason, 541..... 722
Hardin v. Hardin, 34 S. C. 77..... 440
Harmon v. United States, 43 Fed. Rep. 560 ..... 404
Harris's Case, L. R. 7 Ch. App. 596.... 862
Harrison v. Wright, 100 Ind. 515 (58 Am. Rep. 805)..... 868
Harrod v. Hamer, 32 Wis. 162..... 822
v. Lafarge, 12 Mart. (La.) 21..... 206
Hart v. Burnett, 15 Cal. 530..... 883
v. Western R. Co. 13 Met. 99 (46 Am. Dec. 719)..... 615
Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 62 Fed. Rep. 904 617
Harvey v. Tyler, 69 U. S. 2 Wall. 328 (17: 871)..... 75
Hastings & D. R. Co. v. Whitney, 132 U. S. 357 (33: 363).....480, 1143
Hauenstein v. Lynham, 100 U. S. 483 (25: 628)..... 249
Havanna, The, 1 Sprague, 402..... 1006
Hawkins v. United States, 96 U. S. 689 (24: 607)..... 406
Haws v. Victoria Copper Min. Co. 160 U. S. 312 (40: 439)..... 93
Hayden v. Stoughton, 5 Pick. 528..... 777
Hayes v. Fischer, 102 U. S. 121 (26: 95). 788
v. Missouri, 120 U. S. 68 (30: 578) 668
Hays v. Pacific Mail S. S. Co. 58 U. S. 17 How. 596 (15: 254)..... 698
Hayward v. Eliot Nat. Bank, 96 U. S. 611 (24: 855)..... 1149
Hazlehurst v. The Lulu, 77 U. S. 10 Wall. 192 (19: 906).....517, 712
Head v. Amoskeag Mfg. Co. 113 U. S. 9 (28: 889)..... 390
v. Hargrave, 105 U. S. 45 (26: 1028) 947
Heard v. Georgia R. Co. 3 I. C. C. Rep. 111 (2 Inters. Com. Rep. 508), 1 C. C. Rep. 428 (1 Inters. Com. Rep. 719)..... 260
v. Horton, 1 Denio, 165 (43 Am. Dec. 659)..... 936
Heasman v. Pearse, L. R. 7 Ch. 275.... 936
Heath, *Re*, 144 U. S. 92 (36: 358)..... .....508, 510, 574, 575
v. Hall, 2 Rose, 271..... 862
v. Wallace, 138 U. S. 573 (34: 1063) .....176, 1035
Hecht v. Boughton, 105 U. S. 235 (26: 1018) ..... 232
Heckman and Hackman, 88 Pa. 120.... 225
Hefner v. Northwestern Mut. L. Ins. Co. 123 U. S. 747 (31: 309)..... 665
Heine v. Com. 91 Pa. 145..... 472
Heisler v. Sharp, 44 N. J. Eq. 167..... 769
Henderson v. Central Pass. R. Co. 21 Fed. Rep. 359..... 985
v. Griffin, 30 U. S. 5 Pet. 151 (8: 79) .....80, 933
v. Stevenson, L. R. 2 H. L. Sc. 470.....1042, 1043
v. Wickham, 92 U. S. 259 (23: 543) .....173, 1032
Henderson Bridge Co. v. Com. (Ky.) 31 S. W. 486..... 964
v. Kentucky, 166 U. S. 150 (41: 953)..... 965
Hennequin v. Clews, 111 U. S. 676 (28: 565)..... 820
Hennington v. Georgia, 163 U. S. 299 (41: 166).....864, 1066
v. State, 90 Ga. 396 (4 Inters. Com. Rep. 413)..... 170
Hepburn v. Carlisle Borough School Directors, 90 U. S. 23 Wall. 480 (23: 112)..... 1075
v. Ellzey, 6 U. S. 2 Cranch, 445 (2: 332)..... 1050
Herrin v. Butters, 20 Me. 119..... 501
Harvey v. Smith, 1 Kay & J. 389..... 1114
Hess v. White, 9 Utah, 61 (24 L. R. A. 277) 1173
Hetherington v. Kemp, 4 Campb. 193.. 802
Hickory v. United States, 160 U. S. 408 (40: 474).....530, 579
Hill v. State, 64 Miss. 431..... 608
v. The Golden Gate, 1 Newb. Adm. 308..... 714
Hiller v. English, 4 Strobh. L. 486..... 803
Hinckley v. Emerson, 4 Cow. 351 (15 Am. Dec. 383)..... 1171
v. Southgate, 11 Vt. 428..... 501
Hitz, *Ex parte*, 111 U. S. 766 (28: 592).. 1049
Ho Ah Kow v. Nunan, 5 Sawy. 552..... 145
Hodge v. Sloan, 107 N. Y. 244..... 1030
Hoff's Estate, 147 Pa. 636..... 935
Hoffman's Estate, *Re*, 143 N. Y. 327.... 288
Hogan v. State, 30 Wis. 428 (11 Am. Rep. 575)..... 1086
Hoghtaling v. Osborn, 15 Johns. 119... 303
Hohorst, *Re*, 150 U. S. 653 (37: 1211)... 580
v. Hamburg-American Packet Co. 148 U. S. 262 (37: 448)..... 580
Holden v. Jay, 84 U. S. 17 Wall. 211 (21: 523)..... 780
Holloway v. Holloway, 18 Beav. 209... 125
Holme v. Brunskill, L. R. 3 Q. B. Div. 495..... 418
Holmes v. Oregon & C. R. Co. 5 Fed. Rep. 77..... 1005
Holtzman v. Wagner, 5 Mackey, 15.... 742
Holyoke Bank v. Burnham, 11 Cush. 183 847
Home Ins. Co. v. New York, 134 U. S. 594 (33: 1025)..... 698
Home of the Friendless v. Rouse, 75 U. S. 8 Wall. 430 (19: 495)..... 953
Homer v. Brown, 57 U. S. 16 How. 354 (14: 970)..... 933
v. McGaughy, 62 Pa. 189..... 769
Hooksett v. Concord R. Co. 38 N. H. 242 616
Hooper v. California, 155 U. S. 648 (39: 297).....473, 833-836
Hopkinson v. Forster, L. R. 19 Eq. 74... 863
Hopt v. Utah, 104 U. S. 631 (26: 873), 110 U. S. 574 (28: 262), 114 U. S. 488 (29: 183), 120 U. S. 430 (30: 708)..... 303
Hornbuckle v. Toombs, 85 U. S. 18 Wall. 648 (21: 966)..... 186



Digitized by Google

Horne v. Lyeth, 4 Harr. & J. 435.....829–831
Horner v. United States (No. 2), 143 U. S. 570 (36: 266).....369, 588, 684
Hornthall v. Keary, 76 U. S. 9 Wall. 566 (19: 562)..... 453
Hosford v. Ballard, 39 N. Y. 147..... 777
Houck v. Southern P. R. Co. 38 Fed. Rep. 226 (4 Inters. Com. Rep. 441)..... 260
Hough v. Texas & P. R. Co. 100 U. S. 218 (25: 515)..... 1139
Houston v. Moore, 18 U. S. 5 Wheat. 1 (5: 19)..... 716
Houston & T. C. R. Co. v. Bradley, 45 Tex. 171.....195, 196
v. Cowser, 57 Tex. 293..... 195
v. Moore, 49 Tex. 31..... 195
Houston County v. Central R. Co. 72 Ga. 211..... 458
Hovey v. McDonald, 109 U. S. 150 (27: 888)..... 812
Howard v. Bugbee, 65 U. S. 24 How. 461 (16: 753)..... 99
v. Henriques, 3 Sandf. 725..... 125
Hoyt v. Chicago, B. & Q. R. Co. 93 Ill. 601..... 494
v. Gelston, 13 Johns. 141..... 916
v. Thompson, 66 U. S. 1 Black, 518 (17: 65).....1152, 1153
Huckle v. Money, 2 Wils. 205..... 636
Hudson v. Guestier, 10 U. S. 6 Cranch, 281 (3: 224)..... 1112
Hughes v. United States, 71 U. S. 4 Wall. 232 (18: 303)..... 756
Huidekoper v. Cotton, 3 Watts, 56..... 303
Hulseman v. Rems, 41 Pa. 396..... 260
Humes v. Missouri P. R. Co. 82 Mo. 221 (52 Am. Rep. 369), 115 U. S. 512 (99: 463)..... 618
Humiston v. Stainthorp, 69 U. S. 2 Wall. 106 (17: 905).....812, 995
Humphrey v. Pegues, 83 U. S. 16 Wall. 244 (21: 326)..... 952
Humphries v. Johnson, 20 Ind. 190..... 947
Hungerford v. Sigerson, 61 U. S. 20 How. 156 (15: 869)..... 758
Hunt v. Blackburn, 128 U. S. 464 (32: 488)..... 768
v. State, 6 Tex. App. 663..... 484
v. United States, 19 U. S. App. 683, 27 U. S. App. 287..... 1063
Hunter v. Cooperstown & S. V. R. Co. 112 N. Y. 371 (2 L. R. A. 832) 86
v. United States, 30 U. S. 5 Pet. 173 (8: 87)..... 404
Huntington v. Attrill, 146 U. S. 657 (36: 1123).....621, 715, 716
Hurd v. Brisner, 3 Wash. 1..... 75
v. People, 25 Mich. 405..... 603
Hurst v. Jones, 4 U. S. 4 Dall. 353 (1: 864) 80
Hurtado v. California, 110 U. S. 516 (28: 232).....199, 1081
Huse v. Glover, 119 U. S. 543 (30: 487).. 854
Hussman v. Durham, 165 U. S. 144 (41: 664)..... 1091
Hutchins v. Low ("Yosemite Valley Case"), 82 U. S. 15 Wall. 77 (21: 82)..... 461
Hutson and Hudson, 7 Mo. 142..... 225
Hypodame, The, v. Chapin ("The Hypodame"), 73 U. S. 6 Wall. 216 (18: 794).....1059, 1061
Hysinger v. Baltzell, 3 Gill & J. 158 .... 540

I.

Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 514 (33: 436) .....93, 116, 117, 282, 334
Illinois C. R. Co. v. Decatur, 147 U. S. 190 (37: 132)..... 593
v. Illinois, Butler, 163 U. S. 142 (41: 107) .....494, 1066
v. Irvin, 72 Ill. 452..... 592
v. Willenborg, 117 Ill. 203 (57 Am. Dec. 862)..... 990
Illinois River R. Co. v. Zimmer, 20 Ill. 654..... 1118
Indiana v. Kentucky, 136 U. S. 279 (34: 329)..... 109
Indianapolis & V. R. Co. v. Backus, 154 U. S. 438 (38: 1040) 133 Ind. 609.....56, 58, 59
Inflexible, The, Swab. Adm. 200..... 945
Ingalls, *Re*, 139 U. S. 548 (35: 266)..... 852
Ingersoll v. Stockbridge & P. R. Co. 8 Allen, 438..... 615
Inglee v. Coolidge, 15 U. S. 2 Wheat. 363 (4: 261)..... 453
Internal Improv. Fund v. Greenough, 105 U. S. 528 (26: 1158)..... 453
Invincible, The, 2 Gall. 29..... 1006
Isaac Newton, The, 4 Blatchf. 21..... 945
Itata, The, 15 U. S. App. 1..... 296
Ivanhoe Min. Co. v. Keystone Consol. Min. Co. 102 U. S. 167 (26: 126)..... 460
Iveson v. Harris, 7 Ves. Jr. 257..... 655

J.

Jackson v. Allen, 3 Cow. 220..... 777
v. Crawfords, 12 Wend. 533..... 1113
v. Crysler, 1 Johns. Cas. 125..... 777
v. Phillips, 14 Allen, 539..... 743
Jackson, St. John, v. Chew, 25 U. S. 12 Wheat. 153 (6: 583)..... 833
Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514 (40: 515).....271, 276
Jacobs v. Hesler, 113 Mass. 157 ..... 742
James v. Fulcrod, 5 Tex. 512 (55 Am. Dec. 743)..... 504
v. Newton, 142 Mass. 366 (56 Am. Rep. 692)..... 861
James Gray, The, v. The John Fraser, 62 U. S. 21 How. 184 (16: 106).. 171
James Watt, The, 2 W. Rob. Adm. 271 1058
Janesville v. Carpenter, 77 Wis. 288, 8 L. R. A. 808..... 671
Jefferson Branch Bank v. Skelly, 66 U. S. 1 Black, 436 (17: 173)....78, 952
Jefferson County v. Ford, 4 G. Greene, 367 ..... 559
Jackson v. Ballantyne, 8 Utah, 245 (16 L. R. A. 689).....1171, 1172
Jenkins v. State, 35 Fla. 787..... 627
v. State, 30 Tex. App. 379..... 484
Jennison v. Kirk, 98 U. S. 453 (25: 240). 1144
v. Leonard, 88 U. S. 21 Wall. 302 (22: 539)..... 232
J. E. Rumbell, The, 148 U. S. 1 (37: 345) .....516, 713
Jesson v. Doe, Wright, 2 Bligh, 1..... 830
Jessup v. United States, 106 U. S. 147 (27: 85)..... 1125



Digitized by Google

Jewell v. Knight, 123 U. S. 433 (31: 193) 103
Johann Friederick, The, 1 W. Rob. Adm. 35 1006
John McIntyre, The, L. R. 9 Prob. Div. 135 1060
Johnson v. Christian, 128 U. S. 374 (32: 412) 1091
v. Laflin, 5 Dill. 65, 6 Cent. L. J. 131 847
v. Sayre, 158 U. S. 109 (39: 914) 826
v. Towsley, 80 U. S. 13 Wall. 72 (20: 485) 176, 460
v. United States, 160 U. S. 546 (40: 529) 599
Johnson Co. v. Wharton, 152 U. S. 252 (38: 429) 1100
Johnston v. Rankin, 70 N. C. 550 984
v. Standard Min. Co. 148 U. S. 360 (37: 480) 540
Jolliffe v. Brown, 14 Wash. 155 671
Jones v. Com. 80 Va. 544 261
v. Festiniog R. Co. L. R. 3 Q. B. 733 614
v. Habersham, 3 Woods, 443, 107 U. S. 174 (27: 401) 742-744
v. Ryde, 5 Taunt. 488 207
v. Van Benthuysen, 103 U. S. 87 (26: 477) 1084
v. Van Doren, 130 U. S. 684 (32: 1077) 744
Joy v. St. Louis, 138 U. S. 1 (34: 843) 278, 279
Jupitz v. People, 34 Ill. 516 471

## K.

Kaine, *Re*, 55 U. S. 14 How. 103 (14: 345) 717
Kan-Gi-Shun-Ca, *Ex parte* ("*Ex parte* Crow Dog"), 109 U. S. 570 (27: 1050) 1033
Kansas v. Butterfield, 89 Mo. 648 947
Kansas City & E. R. Co. v. Riley, 33 Kan. 374 843
Kansas C. R. Co. v. Jackson County Comrs. 45 Kan. 716 993
Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 112 U. S. 414 (28: 794) 1113
v. Dunmeyer, 113 U. S. 629 (28: 1122) 241, 480, 779, 794, 795, 1143
v. Mower, 16 Kan. 573 672
v. Prescott, 88 U. S. 16 Wall. 603 (21: 373) 570, 665
v. Yanz, 16 Kan. 583 672
Karker's Appeal, 60 Pa. 141 934
Kate, The, 56 Fed. Rep. 614 514, 516
Kate, The, 164 U. S. 458 (41: 512) 712
Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254 (35: 1004) 1100
Kearney, *Ex parte*, 20 U. S. 7 Wheat. 38 (5: 391) 1112
v. Case, 79 U. S. 12 Wall. 275 (20: 395) 118, 232
Kearns v. State, 3 Blackf. 335 286
Keller v. Ashford, 133 U. S. 610 (33: 667) 538
Kelly v. Metropolitan R. Co. [1895] 1 Q. B. 944 487
v. Pittsburgh, 104 U. S. 78 (26: 658) 392, 1100
Kelsey v. Crowther, 162 U. S. 404 (40: 1017) 447
Kennedy v. Gibson, 75 U. S. 8 Wall. 498 (19: 476) 599
Kent v. Kent, 62 N. Y. 560, (20 Am. Rep. 502) 502
Keokuk & W. R. Co. v. Missouri, 152 U. S. 301 (38: 450) 224, 592
Keokuk N. L. Packet Co. v. Keokuk, 95 U. S. 80 (24: 377) 647
Kerrison v. Stewart, 93 U. S. 155 (23: 843) 1109
Ketchum v. St. Louis, 101 U. S. 306 (25: 999) 862, 871
Keyes v. United States, 109 U. S. 336 (27: 954) 823
Keyser v. Hitz, 133 U. S. 138 (33: 531) 590
Keystone Manganese & I. Co. v. Martin, 132 U. S. 91 (33: 275) 812
Kidd v. Pearson, 128 U. S. 1 (32: 346, 2 Inters. Com. Rep. 232) 1022
Kilbourn v. Sunderland, 130 U. S. 505 (32: 1005) 116
v. Thompson, 103 U. S. 188 (26: 386) 1158
Kilmer Mfg. Co. v. Griswold, 35 U. S. App. 246 811
Kine v. Defenbaugh, 64 Ill. 291 988
King v. Ackerman, 67 U. S. 2 Black, 408 (17: 292) 936
v. Commerell, 4 Maule & S. 203 80
v. Frick, 185 Pa. 575 934
v. Parker, 9 Cush. 71 743
v. Thomas, 6 Mont. 409 454
Kinsman v. State, 77 Ind. 132 1170
Kirby Hall, The, L. R. 8 Prob. Div. 71 1057, 1060
Klinger v. Missouri, 80 U. S. 13 Wall. 257 (20: 635) 74
Kneass v. Schuylkill Bank, 4 Wash. C. C. 106 672
Knevals v. Hyde, 6 Fed. Rep. 651 241
Knickerbocker L. Ins. Co. v. Pendleton, 115 U. S. 339 (29: 432) 802
Knight v. Lanfear, 7 Rob. (La.) 172 205, 206
v. Leary, 54 Wis. 459 182
v. United Land Asso. 142 U. S. 161 (35: 974) 176, 624, 889, 1091
Knowles, *Ex parte*, 5 Cal. 300 716
Knox County v. Ninth Nat. Bank, 147 U. S. 91 (37: 93) 590
Kreiger v. Shelby R. Co. 125 U. S. 39 (31: 675) 74
Kresanowski v. Northern P. R. Co. 18 Fed. Rep. 229 86

## L.

Laclede Bank v. Schuler, 120 U. S. 511 (30: 704) 861
Lafferty v. Chicago & W. M. R. Co. 71 Mich. 35 671
Lagonda, The, 44 Fed. Rep. 367 946
Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co. 30 Ohio St. 604 991
v. Prentice, 147 U. S. 107 (37: 99) 638
Lake Superior & M. R. Co. v. United States, 93 U. S. 442 (23: 965) 278
Lake View v. Rose Hill Cemetery Asso. 70 Ill. 191 (22 Am. Rep. 71) 991
Lamar v. Manro, 10 Gill & J. 50 539
Lamb v. Davenport, 85 U. S. 18 Wall. 307 (21: 759) 571
Lambert v. Heath, 15 Mees. & W. 486 208, 210



Digitized by Google

Lancashire, The, [1894] A. C. 1..... 1060
Lane v. Vick, 44 U. S. 3 How. 464 (11: 681)..... 933
Langdon v. Sherwood, 124 U. S. 74 (31: 344)..... 1091
Lanigan v. Bradley & C. Co. 50 N. J. Eq. 201..... 861
Lansdale v. Daniels, 100 U. S. 113 (25: 587)..... 480
v. Smith, 106 U. S. 391 (27: 219)..... 540, 1149
Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683 (39: 859)....118, 1100
La Tour v. State (Wis.) 67 N. W. 1138.. 1066
Lau Ow Bew, *Ex parte*, 141 U. S. 583 (35: 868)..... 1098
v. United States, 144 U. S. 47 (36: 340).....104, 545, 1032, 1098, 1158
Lawler v. Earle, 5 Allen, 22..... 841
v. Walker, 55 U. S. 14 How. 149 14: 364)..... 1152
Lawrence v. Lawrence, 105 Pa. 335..... 935
Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537 (34: 998)..... 125
Lawton v. Steele, 152 U. S. 133 (38: 385) 1172
Layman's Will, *Re*, 40 Minn. 371..... 768
Leather Mfrs. Nat. Bank v. Cooper, 120 U. S. 778 (30: 816)..... 601
Leavenworth County Comrs. v. Sellew, 99 U. S. 624 (25: 332)..... 623
Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733 (23: 634)..... 545, 777, 779
Leeper v. Texas, 139 U. S. 462 (35: 225) 984
Lee Tong, *Re*, 18 Fed. Rep. 253..... 145
Leffingwell v. Warren, 67 U. S. 2 Black, 599 (17: 261).....387, 1100
Leftwich v. Com. 20 Gratt. 723..... 950
Legge v. Tucker, 1 Hurlst. & N. 500.... 487
Le Guen v. Gouverneur, 1 Johns. Cas. 436 (1 Am. Dec. 121)..... 812
Lehew v. Brummell, 103 Mo. 546 (11 L. R. A. 828)..... 258
Lehigh Water Co. v. Easton, 121 U. S. 388 (30: 1159)..... 136, 159
Lehnen v. Dickson, 148 U. S. 71 (37: 373)..... 478, 1045
Leisy v. Hardin, 135 U. S. 100 (34: 128, 3 Inters. Com. Rep. 36) .....643–646
Leloup v. Port of Mobile, 127 U. S. 640 (32: 311, 2 Inters. Com. Rep. 134)..... 54, 700
Lem Moon Sing v. United States, 158 U. S. 538 (39: 1082)..... 142
Lennon, *Ex parte*, 150 U. S. 395 (37: 1120)..... 78, 574, 575
Lent v. Tillson, 140 U. S. 316 (35: 419)..... 392, 394, 988
Lentz v. Stroh, 6 Serg. & R. 34..... 1170
Les Bois v. Brammell. 45 U. S. 4 How. 499 (11: 1051)..... 888
Leslie v. Lorillard, 110 N. Y. 519 (1 L. R. A. 456).....1030, 1031
Levi v. Louisville, 97 Ky. 394 (28 L. R. A. 480)..... 964
Lewis v. Clarkin, 18 Cal. 399..... 488
v. Monson, 151 U. S. 545 (38: 265) 1100
v. San Antonio, 7 Tex. 288....880, 885
Lincoln v. Claflin, 74 U. S. 7 Wall. 132 (19: 106)..... 298
v. Power, 151 U. S. 436 (38: 224).. 238
Lincoln & K. Bank v. Richardson, 1 Me. 79 (10 Am. Dec. 34)..... 1118
Linoleum Mfg. Co. v. Nairn, L. R. 7 Ch. Div. 834..... 126
Linscott v. McIntire, 15 Me. 201 (33 Am. Dec. 602)..... 501
Lionberger v. Rowse, 76 U. S. 9 Wall. 468 (19: 721)..... 1074
Littauer v. Goldman, 72 N. Y. 506..... 209
Little v. Bowers, 134 U. S. 547 (33: 1016) 950
Little Rock & Ft. S. R. Co. v. Pankhurst, 36 Ark. 371 ..... 527
v. Payne, 33 Ark. 816 (34 Am. Rep. 55)..... 619
Liverpool & L. & G. Ins. Co. v. Gunther, 116 U. S. 113 (29: 575)..... 234
Lockwood v. Wicks, 40 U. S. App. 136, Overruling 36 U. S. App. 321 611
Loeber v. Schroder, 149 U. S. 580 (37: 856) 715
Logan County Nat. Bank v. Townsend. 139 U. S. 67 (35: 107).....820, 822
Logwood v. Memphis & C. R. Co. 23 Fed. Rep. 318..... 260
London, B. & S. C. R. Co. v. Truman, L. R. 11 App. Cas. 45..... 614
Lord v. Veazie, 49 U. S. 8 How. 351 (12: 1067)..... 950
Lorne, The, 2 Stu. Adm. 177..... 1058
Louisiana v. New Orleans, 102 U. S. 203 (26: 132)..... 100
v. Pilsbury, 105 U. S. 278 (26: 1090) ..... 138
Louisiana Bd. of Liquidation v. McComb, 92 U. S. 531 (23: 623)..... 653
Louisiana Mut. Ins. Co. v. Tweed, 74 U. S. 7 Wall. 44 (19: 65)..... 1103
Louisville & N. R. Co. v. Kentucky, 161 U. S. 677 (40: 849)..... 260, 494
Louisville, C. & C. R. Co. v. Letson, 43 U. S. 2 How. 497 (11: 353)... 600
Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683 (29: 510)..... 137, 1025
Louisville, N. A. & C. R. Co. v. Boney, 117 Ind. 501 (3 L. R. A. 435) 727
Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587 (33: 784, 2 Inters. Com. Rep. 801)..... 259
v. State, 66 Miss. 662 (5 L. R. A. 132, 2 Inters. Com. Rep. 615)..... 259, 260
Low v. Connecticut & P. R. Co. 45 N. H. 370 ..... 946
Lowe v. Kansas, 163 U. S. 81 (41: 78)..... 672, 679
Lowenstein v. Evans, 69 Fed. Rep. 908...647
Lucas v. Brooks, 85 U. S. 18 Wall. 436, (21: 779)..... 741
v. King, 10 N. J. Eq. 277..... 744
Luddington v. Kime, 1 Ld. Raym. 203..... 829, 830
Ludvig Holberg, The, 157 U. S. 60 (39: 620) ..... 1057
Lyles v. Digges, 6 Harr. & J. 373 (14 Am. Dec. 281)..... 830
Lyman v. Boston & W. R. Corp. 4 Cush. 288.....615, 617
Lyng v. Michigan, 135 U. S. 161 (34: 150, 8 Inters. Com. Rep. 143)..... 700

M

McAllister v. United States, 141 U. S. 174 (35: 693).....185, 186, 807, 1061



Digitized by Google

McArthur v. Scott, 113 U. S. 340 (28: 1015) ..... 744
McCafferty v. United States, 26 Ct. Cl. 1. 358
McCall v. California, 136 U. S. 104 (34: 391, 3 Inters. Com. Rep. 181) 700
McCandless v. Richmond & D. R. Co. 38 S. C. 103 (18 L. R. A. 440) ..... 619
McClaren v. Franciscus, 43 Mo. 452 ..... 847
McClary v. State, 75 Ind. 260 ..... 627
McClure v. United States, 116 U. S. 145 (29: 572) ..... 478
McCormick v. Hayes, 159 U. S. 332 (40: 171) ..... 176, 557, 558
v. McElligott, 127 Pa. 230 ..... 934
v. Sullivant, 23 U. S. 10 Wheat. 192 (6: 300) ..... 1112
McCracken v. Hayward, 43 U. S. 2 How. 608 (11: 397) ..... 99
McCreary v. State, 78 Ala. 480 ..... 474
McCulloch v. Maryland, 17 U. S. 4 Wheat. 316 (4: 579) ..... 698
v. Stone, 64 Miss. 378 ..... 592
McCullough v. Fenton, 65 Pa. 418 ..... 935
v. Gilmore, 11 Pa. 370 ..... 933
McDonald v. Hovey, 110 U. S. 619 (28: 269) 500
v. Millaudon, 5 La. 403 ..... 206
McDowell v. United States, 159 U. S. 596 (40: 271) ..... 577, 579
McElrath v. United States, 12 Ct. Cl. 201 405
v. United States, 102 U. S. 426 (26: 189) ..... 406
McElvaine v. Brush, 142 U. S. 155 (35: 971) ..... 1100
McGehee v. Mathias, 71 U. S. 4 Wall. 143 (18: 314) ..... 952
McGoon v. Scales, 76 U. S. 9 Wall. 23 (19: 545) ..... 829
McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536 (36: 1079) ..... 812
McGowan v. People, 104 Ill. 100 (44 Am. Rep. 87) ..... 950
MacGregor v. Keily, 3 Exch. 794 ..... 802
McGregor v. McGregor [1888] L. R. 21 Q. B. Div. 424 ..... 500
McGrew v. United States, 23 Ct. Cl. 273 808
McGwuinn v. Forbes, 37 Fed. Rep. 639 260
Mackall v. Casilear, 137 U. S. 556 (34: 776) 1149
Mackin v. United States, 117 U. S. 348 (29: 909) ..... 142
McKee v. United States, 164 U. S. 287 (41: 437) ..... 440, 1020
McLaughlin v. Bank of Potomac, 48 U. S. 7 How. 22 (120: 675) ..... 1130
McLish v. Roff, 141 U. S. 661 (35: 893) 104, 746, 1098
McMicken v. United States, 97 U. S. 204 (24: 947) ..... 778
McNulty v. California, 149 U. S. 645 (37: 882) ..... 199
Macon v. Patty, 57 Miss. 378 (34 Am. Rep. 451) ..... 593, 594
McPherson v. Cox, 96 U. S. 404 (24: 746) 503
v. State, 9 Yerg. 279 ..... 603
Madden v. State, 70 Ga. 383 ..... 950
Maddox v. Burnham, 156 U. S. 544 (39: 527) ..... 480
Madera Irrig. Dist. Bonds, *Re*, 92 Cal. 296 (14 L. R. A. 755) ..... 389, 394
Mager v. Grima, 49 U. S. 8 How. 490 (12: 1168) ..... 288
Maggie Hammond, The, v. Moreland ("The Maggie Hammond"), 76 U. S. 9 Wall. 435 (19: 772) ... 1006
Magruder v. Colston, 44 Md. 349 (23 Am. Rep. 47) ..... 847
Mahoning County v. Young, 16 U. S. App. 253 ..... 743
Maillard v. Lawrence, 57 U. S. 16 How. 251 (14: 925) ..... 441
Maine v. Grand Trunk R. Co. 142 U. S. 217 (35: 994, 3 Inters. Com. Rep. 807) ..... 57, 695
Mair v. Bassett, 117 Mass. 356 ..... 841
Maish v. Arizona, 164 U. S. 599 (41: 567) 577
Mali Ivo, The, L. R. 2 Adm. & Eccl. 356 1006
Malone v. Boston & W. R. Co. 12 Gray, 388 (74 Am. Dec. 598) ..... 1043
Mammoth Min. Co. v. Salt Lake Foundry & M. Co. 151 U. S. 447 (38: 229) ..... 93, 232, 334
Mann v. Cooper, 2 D. C. App. 226, 22 Wash. L. Rep. 98 ..... 539
Manuel v. Wulff, 152 U. S. 505 (38: 532) 223
March v. Walker, 48 Tex. 372 ..... 195
Marchant v. Pennsylvania R. Co. 158 U. S. 380 (38: 751) ..668, 715, 988, 1001
Marcy v. Clark, 17 Mass. 329 ..... 847
Marden v. Campbell Printing Press & Mfg. Co. 33 U. S. App. 123 .. 811
Marsh v. Nichols, 140 U. S. 344 (35: 413) 852
v. Nichols, S. & Co. 128 U. S. 605 (32: 538) ..... 69
Marte v. Ogden City Street R. Co. 8 Utah, 459 ..... 807
Martello, The, v. Willey ("The Martello"), 153 U. S. 69 (38: 687) ..... 1059
Martin, *Ex parte*, 13 Ark. 199 ..... 984
v. Hunter, 14 U. S. 1 Wheat. 304 (4: 97) ..... 716
v. Mott, 25 U. S. 12 Wheat. 19 (6: 537) ..... 825
v. New York & N. E. R. Co. 62 Conn. 331 ..... 616
Marye v. Baltimore & O. R. Co. 127 U. S. 117 (32: 94) ..... 54
Maryland v. Baltimore & O. R. Co. 44 U. S. 3 How. 534 (11: 714) ..... 559
Mary N. Hogan, The, 17 Fed. Rep. 813 920
Mary Steele, The, 2 Low. Dec. 370 ..... 1062
Mason v. Sainsbury, 3 Dougl. 60 ..... 1085
Mason Lumber Co. v. Buchtel, 101 U. S. 638 (25: 1074) ..... 1100
Massachusetts v. Western U. Teleg. Co. 141 U. S. 40 (35: 628) ..... 695
Mathews v. St. Louis & S. F. R. Co. 121 Mo. 298 (25 L. R. A. 161) ..... 618
Matlack v. Roberts, 54 Pa. 148 ..... 935
Matthews v. Associated Press of New York, 136 N. Y. 333 ..... 1030
Mattox v. United States, 156 U. S. 237 (39: 409) ..... 603
Mauran v. Alliance Ins. Co. 78 U. S. 6 Wall. 1 (18: 836) ..... 917
Maurice v. Worden, 52 Md. 283 ..... 540
Maxwell v. Palmerton, 21 Wend. 407 ... 1171
v. Newbold, 59 U. S. 18 How. 511 (15: 506) ..... 1152, 1153
May v. Tenney, 148 U. S. 60 (37: 368) .. 1100
Mayflower, The, Brown. Adm. 376 .. 945, 1062
Maynard v. Hecht, 151 U. S. 324 (38: 180) 104
Mead v. Ballard, 74 U. S. 7 Wall. 290 (19: 190) ..... 777
v. Norris, 21 Wis. 312 ..... 1113
Mechanics' Bank v. Withers, 19 U. S. 6 Wheat. 106 (5: 217) ..... 577
Meece v. Com. 78 Ky. 586 ..... 803



Digitized by Google

Melton v. State, 30 Tex. App. 273 ..... 484
Memphis & C. R. Co. v. Gaines, 97 U. S. 697 (24: 1091) ..... 457
v. Lenson, 85 Tenn. 627 ..... 260
Memphis & L. R. R. Co. v. Berry, 112 U. S. 609 (28: 837) ..... 653
v. Southern Exp. Co. ("Express Cases"), 117 U. S. 1 (29: 791) .. 279
Meneely v. Meneely, 62 N. Y. 427 (20 Am. Rep. 489) ..... 125
Mercantile Mut. Ins. Co. v. Folsom, 85 U. S. 18 Wall. 237 (21: 827) .. 282
Mercantile Nat. Bank v. New York, 121 U. S. 138 (30: 895) ..... 1076
Merchants' Cotton Press & S. Co. v. Insurance Co. of North America, 151 U. S. 368 (38: 195, 4 Inters. Com. Rep. 499) ..... 1050
Merchants' Despatch Transp. Co. v. Theilbar, 86 Ill. 71 ..... 1043
Merriam v. Famous Shoe & C. Co. 47 Fed. Rep. 411 ..... 127
v. Holloway Pub. Co. 43 Fed. Rep. 450 ..... 127
Merriman v. Wolcott, 3 Allen, 258 ..... 209
Messonnier v. Kauman, 3 Johns. Ch. 66 812
Meteor, The, 17 Fed. Cas. 178 ..... 914, 923
Metropolitan Nat. Bank v. Claggett, 141 U. S. 520 (35: 841) ..... 820
Meyer v. Western Car Co. 102 U. S. 1 (26: 59) ..... 943
Meyers v. Reinstein, 67 Cal. 89 ..... 1148
Michaels v. Post, 88 U. S. 21 Wall. 398 (22: 520) ..... 1112
Michigan C. R. Co. v. Mineral Springs Mfg. Co. 83 U. S. 16 Wall. 318 (21: 297) ..... 1043
Mickley's Appeal, 92 Pa. 514 ..... 934
Middleswarth v. Blackmore, 74 Pa. 414. 935
Mileage & Commutation Cases ("United States v. Phisterer"), 94 U. S. 219 (24: 116) ..... 827
Milligan, *Ex parte*, 71 U. S. 4 Wall. 2 (18: 281) ..... 103, 1049
Miller v. Anderson ("Miller v. Swan"), 150 U. S. 132 (37: 1028) ..... 179
v. Martin, 16 Mo. 508 (57 Am. Dec. 242) ..... 615
v. St. Louis, I. M. & S. R. Co. 90 Mo. 389 ..... 618
v. Stewart, 22 U. S. 9 Wheat. 680 (6: 189) ..... 418
v. Texas, 153 U. S. 535 (38: 312) .. 1153
Millett v. People, 117 Ill. 294 (57 Am. Rep. 869) ..... 671
Milliken v. Pratt, 125 Mass. 374 (28 Am. Rep. 241) ..... 836
Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469 (24: 256) ..... 619
Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26 (28: 585) ..... 565, 620, 668, 678
v. Emmons, 149 U. S. 367 (37: 772) 620
v. Herrick, 127 U. S. 210 (32: 109) 668
Minnesota v. Barber, 136 U. S. 313 (34: 455, 3 Inters. Com. Rep. 185) ..... 169, 644, 646
Minot v. Philadelphia, W. & B. R. Co. ("Delaware R. Tax"), 85 U. S. 18 Wall. 206 (21: 888) ..... 54, 57, 697, 699
v. Winthrop, 162 Mass. 113 (26 L. R. A. 259) ..... 289
Minton's Case, McNally's Ev. 386 ..... 603
Miranda, The, 1 U. S. App. 228 ..... 942
Mississippi & M. R. Co. v. McClure, 77 U. S. 10 Wall. 511 (19: 997) .. 188
v. Rock, 71 U. S. 4 Wall. 177 (18: 381) ..... 159
Mississippi & R. R. Boom Co. v. Patterson, 98 U. S. 403 (25: 206) .989, 993
Missouri v. Iowa, 51 U. S. 10 How. 15 (13: 310) ..... 557, 660
Missouri P. R. Co. v Fitzgerald, 160 U. S. 556 (40: 536) ..... 425
v. Humes, 115 U. S. 512 (29: 463) ..... 388, 620, 669
v. Mackey, 127 U. S. 205 (32: 107), 33 Kan. 298 ..... 620, 621, 668
v. Nebraska, Board of Transportation, 164 U. S. 403 (41: 489) .984, 993
v. Simmons, 121 Mo. 340 (25 L. R. A. 175) ..... 621
Mitchel v. Reynolds, 1 P. Wms. 181 .... 1029
v. Reynolds, 1 Smith Lead. Cas. 705, *note* ..... 1031
v. United States, 40 U. S. 15 Pet. 52 (10: 658) ..... 886
Mitchell v. Clark, 110 U. S. 633 (28: 279) 566
v. Great Works Mill. & Mfg. Co. 2 Story, 648 ..... 1020
v. Pittsburg, Ft. W. & C. R. Co. 165 Pa. 650 ..... 936
v. Williams, 27 Ind. 62 ..... 1171
M. Moxham, The, L. R. 1 Prob. Div. 43 1006
Mobile & O. R. Co. v. Tennessee, 153 U. S. 486 (38: 793) ..... 78, 136
Mobile County v. Kimball, 102 U. S. 691 (26: 238) ..... 388, 700, 854
Modesto Irrig. Dist. Directors v. Tregea, 88 Cal. 334 ..... 390, 392, 393
Moffitt v. Garr, 66 U. S. 1 Black, 273 (17: 207) ..... 1094
Mogul Steamship Co. v. McGregor, L. R. 21 Q. B. Div. 544, L. R. 23 Q. B. Div. 598, [1891] A. C. 25 1025
Monongahela Nat. Bank v. Jacobus, 109 U. S. 275 (27: 935) ..... 768
Monongahela Nav. Co. v. Coons, 6 Watts & S. 101 ..... 1001
v. United States, 148 U. S. 312 (37: 463) ..... 985
Monroe v. Collins, 17 Ohio St. 665 .... 260, 261
Montana R. Co. v. Warren, 137 U. S. 351 (34: 682) ..... 429
Montclair Twp. v. Dana, 107 U. S. 162 (27: 436) ..... 192
Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284 ..... 182
v. Thompson, [1891] A. C. 217 .... 125
Moore v. Brownfield, 7 Wash. 23 ..... 75
v. Illinois, 55 U. S. 14 How. 13 (14: 306) ..... 717
v. Robbins, 96 U. S. 530 (24: 848). 460
v. State, 12 Ala. 764 (46 Am. Dec. 276) ..... 603
v. State, 44 Tex. 595 ..... 950
Moran v. New Orleans, 112 U. S. 69 (28: 653) ..... 700
v. Sturges, 154 U. S. 256 (38: 981). 788
Morewood v. Wakefield, 133 Mass. 240 .. 1171
Morey v. Brown, 42 N. H. 378 ..... 1171
Morgan v. Louisiana, 93 U. S. 217 (23: 860) ..... 563
v. Parham, 83 U. S. 16 Wall. 471 (21: 303) ..... 699



Digitized by Google

**Morgan's** L. & T. R. & S. S. Co. *v.* Louisiana Board of Health, 118 U. S. 455 (30: 237) ....172, 854
**Morley** *v.* Lake Shore & M. S. R. Co. 146 U. S. 162 (36: 925)....100, 1100
**Morrison** *v.* District Court of U. S. 147 U. S. 14 (37: 60)..... 580
*v.* Truby, 145 Pa. 540 ..... 934
*v.* Watson, 154 U. S 111 (38: 927).. 1158
**Morton** *v.* Nebraska. 88 U. S. 21 Wall. 660 (22: 689) ..... 176
**Mount Hope Cemetery Propra.** *v.* Boston, 158 Mass. 509..... 985
**Mount Washington Road Co.'s Petition,** 35 N. H. 134..... 984
**Mouse's Case,** 2 Coke, 63..... 1172
**Mugler** *v.* Kansas, 123 U. S. 623 (31: 205) .....169, 620, 641, 646, 991
**Mullan** *v.* United States, 118 U. S. 271 (30: 170)..... .....405, 406
*v.* United States, 140 U. S. 240 (35: 489)..... 825
**Mullen** *v.* Wine, 26 Fed. Rep. 206..... 182
**Muller** *v.* Dows, 94 U. S. 277 (24: 76)..... 600
**Munn** *v.* Illinois, 94 U. S. 113 (24: 77)... 494
**Murdock** *v.* Memphis, 87 U. S. 20 Wall. 590 (22: 429)..... 213
**Murphy** *v.* O'Sullivan, 11 Ir. Jur. N. S. 111.....500, 501
**Murray** *v.* Gibson, 56 U. S. 15 How. 421 (14: 755)..... 76
*v.* United States ("The Merritt"), 84 U. S. 17 Wall. 582 (21: 682) 942

N.

**Nacoochee, The,** *v.* Mosley ("The Nacoochee"), 137 U. S. 330 (34: 687). 1061
**Nash** *v.* Towne, 72 U. S. 5 Wall. 689 (18: 527).....238, 1122
*v.* Williams, 87 U. S. 20 Wall. 226 (20: 254) ..... 458
**Nashville** *v.* Cooper, 78 U. S. 6 Wall. 250 (18: 852)..... 458
*v.* Linck, 12 Lea, 499..... 169
**Nashville, C. & St. L. R. Co.** *v.* Alabama, 128 U. S. 96 (32: 352, 2 Inters. Com. Rep. 238).....173, 854
**Nathan** *v.* Whitlock, 9 Paige, 152..... 847
**National Bank** *v.* Whitney, 103 U. S. 99 (26: 443)..... 822
**National Bank of the Republic** *v.* Millard, 77 U. S. 10 Wall. 152 (19: 897)..... 861
**National Benefit Co.** *v.* Union Hospital Co. 45 Minn. 272 (11 L. R. A. 437)..... 1031
**National Exch. Bank** *v.* McLoon, 73 Me. 498..... 861
**Nations** *v.* Johnson, 65 U. S. 24 How. 195 (16: 628)..... 788
**Neal** *v.* Delaware, 103 U. S. 370 (26: 567) .....89, 262, 984
*v.* Scruggs ("Neal *v.* Clark"), 95 U. S. 704 (24: 586)..... 820
**Nesbit** *v.* Riverside Independent Dist. 144 U. S. 610 (36: 562)....157, 1100
**Nesbitt** *v.* Lushington, 4 T. R. 783..... 917
**Neslin** *v.* Wells, F. & Co. 104 U. S. 428 (26: 802)..... 334
**Nesmith** *v.* Sheldon, 48 U. S. 7 How. 812 (12: 925)..... 387
**Newark & N. Y. R. Co.** *v.* Newark, 28 N. J. Eq. 515..... 812
**New England M. Ins. Co.** *v.* Dunham, 78 U. S. 11 Wall. 1 (20: 90)..... 103
**New Haven** *v.* City Bank, 31 Conn. 106. 456
**New Jersey** *v.* Wilson, 11 U. S. 7 Cranch. 164 (3: 303)..... 950
*v.* Yard, 95 U. S. 104 (24: 352)..... 952
**New Jersey Steam Nav. Co.** *v.* Merchants' Bank, 47 U. S. 6 How. 344 (12: 465).....261, 1043
**Newman,** *Ex parte,* 9 Cal. 502..... 169
**New Orleans** *v.* New Orleans Waterworks Co. 142 U. S. 79 (35: 943) 1117
*v.* Winter, 14 U. S. 1 Wheat. 91 (4: 44)..... 1050
**New Orleans & A. R. Co.** *v.* Mellen ("United States *v.* New Orleans Railroad"), 79 U. S. 12 Wall. 362 (20: 434)..... 333
**New Orleans City & L. R. Co.** *v.* New Orleans, 143 U. S. 192 (36: 121) 592
**New Orleans Gaslight Co.** *v.* Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650 (29: 516)..... 173, 620, 678, 990, 1025, 1164, 1167
**New Orleans, M. & T. R. Co.** *v.* Mississippi, 102 U. S. 135 (26: 96)... 1113
**New Orleans P. R. Co.** *v.* Parker, 143 U. S. 42 (36: 66)..... 191
**New Orleans Waterworks Co.** *v.* Rivers, 115 U. S. 674 (29: 525)..... .....521, 523, 620, 1116
*v.* Louisiana Sugar Ref. Co. 125 U. S. 18 (31: 607).....78, 136–138
**Newton** *v.* Carberry, 5 Cranch, C. C. 632 1118
*v.* Mahoning County Comrs. 100 U. S. 548 (25: 710)..... 953
**New York** *v.* Tax Comrs. 71 U. S. 4 Wall. 244 (18: 344)..... 1074
*v.* United States, 76 U. S. 9 Wall. 274 (19: 658)..... 987
*v.* Weaver, 100 U. S. 539 (25: 705) .....587, 1075
**New York,** *ex rel.* Schurz, *v.* Cook, 148 U. S. 397 (37: 498).....244, 592
**New York & N. E. R. Co.** *v.* Bristol, 151 U. S. 556 (38: 269).....990, 1164
*v.* Waterbury, 60 Conn. 1..... 991
**New York C. & H. R. R. Co.** *v.* Fraloff, 100 U. S. 24 (25: 531)..238, 998, 1043
**New York, L. E. & W. R. Co.** *v.* Pennsylvania, 153 U. S. 646 (38: 853) 699
*v.* Pennsylvania, 158 U. S. 321 (39: 1043)..... 954, 960
**New York L. Ins. Co.** *v.* Bangs, 103 U. S. 435 (26: 580)..... 1108
*v.* Davis, 95 U. S. 427 (24: 454).... 166
*v.* Eggleston, 96 U. S. 572 (24: 841) 166
**New York, N. H. & H. R. Co.** *v.* New York, 165 U. S. 628 (41: 853).. 1066
**Nichols** *v.* Eaton, 91 U. S. 716 (23: 254).. 1110
**Nielsen,** *Ex parte,* 131 U. S. 176 (33: 118) .....575, 1112
**Noble** *v.* Mitchell, 100 Ala. 519 (25 L. R. A. 238)..... 473
*v.* Mitchell, 164 U. S. 367 (41: 472) 587
**Nofire** *v.* United States, 164 U. S. 657 (41: 588)..... 594
**Nordenfeldt** *v.* Maxim Nordenfeldt Guns & A. Co. [1894] A. C. 535.... 1029
**Norfolk & W. R. Co.** *v.* Pendleton, 156 U. S. 667 (39: 574)..... 563



Digitized by Google

Norman, The, 28 Fed. Rep. 883..... 714
Norris v. Jackson, 76 U. S. 9 Wall. 125 (19: 608)..... 232, 1045
North & South Ala R. Co. v. Morris, 65 Ala. 193..... 670
Northern Indiana, The, 3 Blatchf. 92... 1058
Northern P. R. Co. v. Amato, 144 U. S. 465 (36: 506)..... 601
v. Babcock, 154 U. S. 190 (38: 958) 1139
v. Charless, 162 U. S. 359 (40: 999) ..... 747, 1052
v. Hambly, 154 U. S. 349 (38: 1009) ..... 747, 1052
v. Herbert, 116 U. S. 642 (29: 755).. 1139
v. Lewis, 162 U. S. 366 (40: 1002) ..... 196, 619
v. Patterson, 154 U. S. 130 (38: 924) 571
v. Peterson, 162 U. S. 346 (40: 994) ..... 747, 1052
v. Walker, 148 U. S. 391 (37: 494) ..... 452, 453
Northern Transp. Co. v. Chicago, 99 U. S. 635 (25: 336)..... 1001
North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727 (31: 287)..... 527
North Star, The, 43 Fed. Rep. 807, 22 U. S. App. 242..... 1058
North Star, The, 44 Fed. Rep. 492..... 1062
Northwestern Stove Repair Co. v. Beckwith, 18 U. S. App. 245..... 811
Norton v. Ladd, 5 N. H. 204 (20 Am. Dec. 573)..... 1170
v. Shelby County, 118 U. S. 425 (30: 178)..... 1100
Norwich v. Hubbard, 22 Conn. 587...441, 442
Nueva Anna, The, 19 U. S. 6 Wheat. 193 (5: 239)..... 916

## O.

Oates v. First Nat. Bank, 100 U. S. 239 (25: 580)..... 1032
O'Connell v. Reg. 11 Clark & F. 155 857, 627
O'Connor v. Majoribanks, 4 Man. & G. 435, 5 Scott, N. R. 394..... 741
Ohio & M. R. Co. v. McClelland, 25 Ill. 140 ..... 991
Olcott v. Fond du Lac County Supers. 83 U. S. 16 Wall. 678 (21: 382)... 262
Orchard v. Alexander, 157 U. S. 372 (39: 737)..... 362, 624, 1091
Oregon R. & Nav. Co. v. Oregonian R. Co. 130 U. S. 1 (32: 837)....274, 280, 822
Oregon S. L. & U. N. R. Co. v. Skottowe, 162 U. S. 490 (40: 1048)....868, 1134
Oregon Steam Nav. Co. v. Winsor, 87 U. S. 20 Wall. 64 (22: 315)..... 1030
Orleans v. Platt, 99 U. S. 676 (25: 404)..210, 398
Osborn v. Bank of United States, 22 U. S. 9 Wheat. 738 (6: 204)..... 601, 653
v. State, 70 Ga. 731..... 950
Osborne v. Florida, 164 U. S. 650 (41: 586) 706
Oscanyon v. Winchester Repeating Arms Co. 103 U. S. 264 (26: 541)..... 446
Osman v. Riley, 15 Cal. 48..... 260
Otis v. Cullum, 92 U. S. 447 (23: 496).... 210
Ould v. Washington Hospital, 95 U. S. 303 (24: 450)..... 742
Owens v. Henry, 161 U. S. 642 (40: 753).. 286

## P.

Pacific Exp. Co. v. Seibert, 142 U. S. 339 (35: 1035, 3 Inters. Com. Rep. 810)..... 668, 696, 698, 703, 727
Pacific Mail S. S. Co. v. Joliffe, 69 U. S. 2 Wall. 459 (7: 808)..... 332
Pacific R. Co. v. United States, 158 U. S. 118 (39: 918)..... 738
Page v. Baltimore, 34 Md. 558..... 524
Palmer v. Hussey, 119 U. S. 96 (30: 362).. 820
v. Waddell, 22 Kan. 352..... 844
Palmer's Shipbuilding & I. Co. v. Chaytor, L. R. 4 Q. B. 209..... 940
Palmyra, The, 25 U. S. 12 Wheat. 1 (6: 531)..... 914, 921
Parham v. Decatur County Justices of Inferior Court, 9 Ga. 341..... 984
Park v. Detroit Free Press Co. 72 Mich. 560 (1 L. R. A. 599)..... 672
Parker v. Mise, 27 Ala. 480 (62 Am. Dec. 776)..... 1170
v. Southeastern R. Co. L. R. 2 C. P. Div. 416, L. R. 1 C. P. Div. 618 ..... 1042
v. State, 88 Ala. 4..... 551
Parks, *Ex parte*, 93 U. S. 18 (23: 787).... 303
v. Ross, 52 U. S. 11 How. 362 (13: 730)..... 446
Parmalee v. Lawrence, 78 U. S. 11 Wall. 36 (20: 48) ..... 74
Parsons v. Bedford, 28 U. S. 3 Pet. 443 (7: 735)..... 233, 988
v. Trask, 7 Gray, 473 (66 Am. Dec. 502)..... 722
Patapsdo v. Boyce ("The Patapsco"), 80 U. S. 13 Wall. 329 (20: 696).. 712
Paterson v. Society for Establishing Useful Manufactures, 24 N. J. L. 385..... 593
Patterson v. Kentucky, 97 U. S. 501 (24: 1115)..... 620
Paul v. Virginia, 75 U. S. 8 Wall. 168 (19: 357)..... 473
Paulsen v. Portland, 149 U. S. 30 (37: 637)..... 394
Pauly v. State Loan & T. Co. 56 Fed. Rep. 430, 15 U. S. App 259. 846
Pearce v. Germania Ins. Co. ("The Lady Pike"), 96 U. S. 461 (24: 672). 1005
v. Madison & I. R. Co. 62 U. S. 21 How. 441 (16: 184)..... 821
Pearsall v. Great Northern R. Co. 161 U. S. 646 (40: 838)..... 214
Pearson v. Portland, 69 Me. 278 (31 Am. Rep. 276)..... 672
v. Yewdall, 95 U. S. 294 (24: 436) ..... 198, 392
Pease v. Pattison, L. R. 32 Ch. Div. 154.. 743
Peck v. Collins, 103 U. S. 660 (26: 512).. 1094
v. Waters, 104 Mass. 345..... 284
Pembina Consol. Silver Min. & M. Co. v. Pennsylvania, 125 U. S. 181 (31: 650, 2 Inters. Com. Rep. 24) ..... 565, 668
Pendergast v. The Kalorama ("The Kalorama"), 77 U. S. 10 Wall. 204 (19: 941)..... 712
Peninsular Iron Co. v. Stone, 121 U. S. 631 (30: 1020)..... 1050
Pennock v. Dialogue, 27 U. S. 2 Pet. 1 (7: 327)..... 500



Digitized by Google

Pennoyer v. McConnaughy, 140 U. S. 1 (35: 363) ..... 653
v. Neff, 95 U. S. 714 (24: 565) ..... 523
Pennsylvania v. Wheeling & B. Bridge Co. 59 U. S. 18 How. 421 (15: 435) ..... 1001
Pennsylvania Co., *Ex parte*, 137 U. S. 451 (34: 738) ..... 434, 580
Pennsylvania R. Co. v. Marchant, 119 Pa. 541 ..... 1001
v. St. Louis, A. & T. H. R. Co. 118 U. S. 290 (30: 83) ..... 274, 280, 821
Penryn and Pennyrine, 14 Md. 121 ..... 225
Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1 (24: 708) ..... 700
Penzel Co. v. Jett, 54 Ark. 430 ..... 526
People v. Aikin, 66 Mich. 470 ..... 357
v. Barrett, 1 Johns. 66 ..... 302
v. Campbell, 4 Park. Crim. Rep. 386 ..... 1170
v. Clark, 7 N. Y. 385 ..... 529
v. Davis, 56 N. Y. 102 ..... 298
v. Dean, 14 Mich. 406 ..... 261
v. Dohring, 59 N. Y. 374 (17 Am. Rep. 349) ..... 585
v. Frisbie, 18 Cal. 402 ..... 488
v. Gallagher, 93 N. Y. 438 (45 Am. Rep. 232) ..... 258, 261
v. Garbutt, 17 Mich. 28 (97 Am. Dec. 162) ..... 472
v. Genet, 59 N. Y. 80 (17 Am. Rep. 315) ..... 950
v. Hagar, 52 Cal. 181, 66 Cal. 60 ..... 393
v. Herrick, 13 Wend. 87 ..... 529
v. Irving, 95 N. Y. 541 ..... 484
v. King, 110 N. Y. 418 (1 L. R. A. 293) ..... 260
v. Lake Shore & M. S. R. Co. 52 Mich. 277 ..... 994
v. Lawrence, 21 Cal. 368 ..... 603
v. McRoberts, 62 Ill. 38 ..... 988
v. Petrea, 92 N. Y. 128 ..... 627
v. Pitcher, 15 Mich. 397 ..... 530
v. Platt, 17 Johns. 195 (8 Am. Dec. 382) ..... 984
v. Redinger, 55 Cal. 290 (36 Am. Rep. 32) ..... 950
v. Robertson, 67 Cal. 646 ..... 551
v. Roderigas, 49 Cal. 9 ..... 805
v. Selma Irrig. Dist. 98 Cal. 206 ..... 394
v. Universal L. Ins. Co. 30 Hun, 142 ..... 450
People, *ex rel.* Cunningham, v. Roper, 35 N. Y. 629 ..... 953
Peoria & P. U. R. Co. v. Peoria & F. R. Co. 105 Ill. 110 ..... 991
Peoria, D. & E. R. Co. v. Duggan, 109 Ill. 537 (50 Am. Rep. 619) ..... 672
Percival v. Caney, 14 Jur. 1056 ..... 742
Perego v. Dodge, 163 U. S. 160 (41: 113) ..... 223
Perkins v. St. Louis, I. M. & S. R. Co. 103 Mo. 52 (11 L. R. A. 436) ..... 672
v. Sanders, 56 Miss. 732 ..... 1118
Permoli v. Municipality No. 1 of New Orleans, 44 U. S. 3 How. 589 (11: 739) ..... 247
Perrine v. Slack, 164 U. S. 452 (41: 510) ..... 574
Perry v. Phipps, 10 Ired. L. 259 (51 Am. Dec. 387) ..... 1170
Peter v. Compton, Skin, 353, Holt, 326 ..... 499, 501
Peterborough v. Jaffrey, 6 N. H. 462 ..... 946
Peters v. Westborough, 19 Pick. 364 (31 Am. Dec. 142) ..... 501
Petri v. Com. Nat. Bank, 142 U. S. 644 (35: 1144) ..... 439, 602, 1020
Peugh v. Porter, 112 U. S. 737 (28: 859) ..... 861
Philadelphia & R. R. Co. v. Pennsylvania ("State Freight Tax Case"), 82 U. S. 15 Wall. 232 (21: 146) ..... 644–700, 1019
v. Pennsylvania ("State Tax on Foreign-Held Bonds"), 82 U. S. 15 Wall. 300 (21: 179) ..... 699
Philadelphia & S. M. S. S. Co. v. Pennsylvania, 122 U. S. 326 (30: 1200, 1 Inters. Com. Rep. 808) ..... 699, 700, 957
Philadelphia & T. R. Co., *Re*, 6 Whart. 25 (36 Am. Dec. 202) ..... 1001
Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co. 64 U. S. 23 How. 209 (16: 483) ..... 1005
v. Quigley, 62 U. S. 21 How. 213 (16: 77) ..... 638
Phœnix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174 (40: 660) ..... 214
Phœnix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 312 (29: 873) ..... 1083
Phœnix Mut. L. Ins. Co. v. Bailey, 80 U. S. 13 Wall. 616 (20: 501) ..... 758
Pickard v. Pullman Southern Car Co. 117 U. S. 34 (29: 785) ..... 700
Piggot v. Eastern Counties R. Co. 3 C. B. 229 ..... 614
Pillow v. Roberts, 54 U. S. 13 How. 472 (14: 228) ..... 75
Pillsbury v. Pillsbury, 24 U. S. App. 395 ..... 125
Pim v. St. Louis, 165 U. S. 273 (41: 714) ..... 1088
Pinch v. Anthony, 8 Allen, 536 ..... 871
Pine Grove Twp. v. Talcott, 86 U. S. 19 Wall. 666 (22: 227) ..... 262
Piqua Branch of State Bank v. Knoop, 57 U. S. 16 How. 369 (14: 977) ..... 952
Pirate, The, 82 Fed. Rep. 486 ..... 714
Pitkin v. Long Island R. Co. 2 Barb. Ch. 221 ..... 502
Pittsburg, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371 (33: 157) ..... 276, 821
Pittsburg, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421 (38: 1031, 4 Inters. Com. Rep. 677), 133 Ind. 625 ..... 56, 58–60, 571, 695, 697, 698, 978
Platt v. Beach, 2 Ben. 303 ..... 787
Pleasants v. Fant, 89 U. S. 22 Wall. 116 (22: 780) ..... 192, 446
Plumley v. Massachusetts, 155 U. S. 471 (39: 227) ..... 645
Plunkett v. Lewis, 3 Hare, 316 ..... 767, 769
Poindexter v. Greenhow ("Virginia Coupon Cases"), 114 U. S. 295 (29: 194) ..... 653
Pointer v. United States, 151 U. S. 396 (38: 208) ..... 356, 357, 365
Poirier v. Barnes, 57 Fed. Rep. 956 ..... 182
Polak v. Everett, L. R. 1 Q. B. Div. 669 ..... 417
Pollard v. Dwight, 8 U. S. 4 Cranch, 421 (2: 666) ..... 435
v. Hagan, 44 U. S. 3 How. 212 (11: 565) ..... 247
Pope v. Allis, 115 U. S. 363 (29: 393) ..... 334
Porter v. Beard, 124 U. S. 429 (31: 490) ..... 355
v. Sabin, 149 U. S. 473 (37: 815) ..... 787




Digitized by Google

Portland & R. R. Co. v. Deering, 78 Me. 61 (57 Am. Rep. 784)..... 991
Post v. United States, 161 U. S. 583 (40: 816)..... 709
Postal Teleg. Cable Co. v. Adams, 155 U. S. 688 (39: 311, 5 Inters. Com. Rep. 1).....695, 702–705, 960
v. Charleston, 153 U. S. 692 (38: 871, 4 Inters. Com. Rep. 637). 955
v. United States ("Postal Teleg. Cable Co. v. Alabama"), 155 U. S. 482 (39: 231)..... 1134
Postan v. Stanway, 5 East, 261..... 672
Potomac, The, v. Cannon, 105 U. S. 630 (26: 1194).....945, 1062
Potter v. Couch, 141 U. S. 296 (35: 721). 742
Powell v. Brunswick County Supers. 150 U. S. 433 (37: 1134).....74, 1175
v. Fall, L. R. 5 Q. B. Div. 597.... 615
v. Pennsylvania. 127 U. S. 678 (32: 253)..... 836
v. State, 69 Ala. 10..... 474
Prat v. Dervieux, Journal du Palais, 1807, p. 311..... 206
Pratt v. Atlantic & St. L. R. Co. 42 Me. 579..... 616
Preston v. Dunn, 25 Ala. 507..... 1108
Prevost v. Gratz, 19 U. S. 6 Wheat. 481 (5: 311)..... 742
Price v. Abbott, 17 Fed. Rep. 506..... 787
Prigg v. Pennsylvania, 41 U. S. 16 Pet. 539 (10: 1060)..... 717
Prime's Estate, *Re*, 136 N. Y. 347 (18 L. R. A. 713)..... 289
Printing & N. Registering Co. v. Sampson, L. R. 19 Eq. 462....1025, 1032
Pritchard v. Hicks, 1 Paige, 270..... 766
Probst v. Presbyterian Church Bd. of Domestic Missions, 129 U. S. 182 (32: 642)..... 75
Proprietors of Bridges v. Hoboken Land & I. Co. 68 U. S. 1 Wall. 116 (17: 571).....983, 1153
Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co. 144 N. Y. 152 (26 L. R. A. 610)..... 278
Pugh v. More, 44 La. Ann. 211.....205, 206
v. United States, 80 U. S. 13 Wall. 633 (20: 711).....150, 151
Pullman v. Upton, 96 U. S. 328 (24: 818) .....846, 847
Pullman's Palace Car Co. v. Com. 107 Pa. 158..... 705
v. Pennsylvania, 141 U. S. 18 (35: 613, 3 Inters. Com. Rep. 595) .....54, 57, 695, 697, 705, 979
v. Speck, 113 U. S. 84 (28: 925)... 434
Pumpelly v. Green Bay & M. Canal Co. 80 U. S. 13 Wall. 166 (20: 557) .....985, 1002
Putman v. Payne, 13 Johns. 312..... 1171

## Q.

Queen v. Steel, L. R. 1 Q. B. Div. 482.. 80

## R.

Railroad Co. v. Berks County, 6 Pa. 70. 592
Rainwater-Boogher Hat Co. v. Malcolm, 10 U. S. App. 249, 51 Fed. Rep. 734..... 526
Ramsey County v. Chicago, M. & St. P. R. Co. 33 Minn. 537..... 592
Randall v. Baltimore & O. R. Co. 109 U. S. 478 (27: 1008)..... 192
Randell, *Re*, L. R. 38 Ch. Div. 213..... 744
Randolph, *Ex parte*, 2 Brock. 447..... 1127
Rankin v. Hoyt, 45 U. S. 4 How. 327 (11: 996)..... 590
Rannie v. Irvine, 7 Man. & G. 977..... 1031
Ratterman v. Western U. Teleg. Co. 127 U. S. 411 (32: 229, 2 Inters. Com. Rep. 59)..... 700
Rawson v. Pennsylvania R. Co. 48 N. Y. 212 (8 Am. Rep. 548)..... 1043
v. School Dist. No. 5, 7 Allen, 125 743
Ray v. Alexander, 146 Pa. 242..... 985
Reagan v. Farmers' Loan & T. Co. (No. 1), 154 U. S. 362 (38: 1014, 4 Inters. Com. Rep. 560)..... 565
v. Mercantile Trust Co. (No. 1), 154 U. S. 413 (38: 1028)..... 55
Redfield v. Parks, 132 U. S. 239 (33: 327). 75
Redington v. Cornwell, 90 Cal. 49..... 488
Red River Cattle Co. v. Needham, 137 U. S. 632 (34: 799)..... 1017
Reed, *Ex parte*, 100 U. S. 13 (25: 538) .....817, 826, 827
v. Stouffer, 56 Md. 236..... 743
Reedy v. Scott, 90 U. S. 23 Wall. 352 (23: 109)..... 1094
Reese v. United States, 79 U. S. 9 Wall. 13 (19: 541)..... 418
Regan v. New York & N. E. R. Co. 60 Conn. 124..... 616
Reg. v. Beard, 8 Car. & P. 143..... 529
v. Drury, 3 Cox, C. C. 544, 3 Car. & K. 193..... 303
v. Hertford College, L. R. 3 Q. B. Div. 693..... 1020
v. Heywood, Leigh & C. C. C. 451 357
v. Hill, 8 Car. & P. 274 ..... 529
v. Jones, 9 Car. & P. 258..... 529
v. Lady Joan Young ("Case of Swans"), 4 Coke, 86..... 117C
v. Lonsdale, 4 Fost. & F. 56..... 357
v. Payne, L. R. 1 C. C. 349..... 742
v. Thompson, L. R. 1 C. C. 377.. 742
v. Ward, 10 Cox, C. C. 42..... 357
v. Young, Russ. & R. C. C. 280, *note*..... 357
Reid v. State, 53 Ala. 402, 25 Am. Rep. 627..... 303
Rein v. Clayton, 37 Fed. Rep. 354 (3 L. R. A. 378)..... 69
Reinoehl v. Shirk, 119 Pa. 108.....935, 936
Remsen v. People, 43 N. Y. 6..... 472
Republican River Bridge Co. v. Kansas P. R. Co. 92 U. S. 315 (23: 515)..... 681
Resolution, The, 6 Asp. Mar. L. Cas. 363 1058
Respublica v. Cobbet, 3 U. S. 3 Dall. 467 (1: 683), 2 Yeates, 352.... 1064
Revel v. Lippman, Journal du Palais, 1825, p. 963..... 206
Rex v. Ashton, 2 Lew. C. C. 147..... 604
v. Heydon, 1 W. Bl. 356, 3 Burr. 1304 ..... 80
v. Howell, 1 Den. C. C. 1..... 602
v. Lord Ossulston, 2 Strange, 1107 1160
v. Pease, 4 Barn. & Ad. 30, 1 Nev. & Macn. 690..... 618
v. Pike, 3 Car. & P. 598..... 603
Reynes v. Dumont, 130 U. S. 354 (32: 934) 116



Digitized by Google

Reynolds v. Plymouth County, 55 Iowa, 90 ..... 665
v. Robinson, 82 N. Y. 103 (37 Am. Rep. 555) ..... 769
United States, 98 U. S. 145 (25: 244) ..... 186, 807, 1081
Rhodes, *Ex parte*, 12 Niles, Reg. 264 ..... 716
v. Northern P. R. Co. 34 Minn. 87 494
Rice, *Re*, 155 U. S. 396 (39: 198) ..... 949
Richard v. Mackall, 124 U. S. 183 (31: 396) ..... 1149
Richards v. American Desk & S. Co. 87 Wis. 503 ..... 1031
Richardson v. Rowntree [1894] A. C. 217 1042
Richmond v. Atwood, 5 U. S. App. 151 ..... 811, 812
v. Mississippi Mills, 52 Ark. 31 (4 L. R. A. 413) ..... 526
Richmond F. & P. R. v. Louisa R. Co. 54 U. S. 13 How. 71 (14: 55) .. 1168
Rider v. United States, 163 U. S. 132 (41: 101) ..... 846
Risley v. Phenix Bank, 83 N. Y. 318 (38 Am. Rep. 421) ..... 862, 863
R. L. Maybey, The, 4 Blatchf. 439 ..... 945
Robb v. Irwin, 15 Ohio, 689 ..... 1108
Robbins v. Chicago, 71 U. S. 4 Wall. 657 (18: 427) ..... 233
v. Shelby County Tax. Dist. 120 U. S. 489 (30: 694, 1 Inters. Com. Rep. 45) ..... 644, 700
Roberts v. Boston, 5 Cush. 198 ..... 258
v. Cooper, 61 U. S. 20 How. 467 (15: 969) ..... 1005
v. Rockbottom Co. 7 Met. 46 ..... 501
Robertson v. Cease, 97 U. S. 646 (24: 1057) ..... 1152
v. Stark, 15 N. H. 109 ..... 946
Robinson v. Lord Byron, 1 Bro. C. C. 587 ..... 1114
Robson v. Tomlinson, 54 Ark. 229 ..... 526
Roby v. Colehour, 146 U. S. 153 (36: 922) 983
Roche v. District of Columbia, 18 Ct. Cl. 217 ..... 736
Rochester v. Chester, 3 N. H. 349 ..... 946
Rockingham Mut. F. Ins. Co. v. Bosher, 39 Me. 253 (63 Am. Dec. 618) 1083
Rodemacher v. Milwaukee & St. P. R. Co. 41 Iowa, 297 (20 Am. Rep. 592) ..... 617
Rogers v. Walsh, 12 Neb. 28 ..... 210
v. Wendell, 54 Hun, 540 ..... 450
Ralli v. Troop, 157 U. S. 386 (39: 742) ... 713
Rome R. Co. v. Rome, 14 Ga. 275 ..... 456
Root v. Shields, Woolw. 340 ..... 176
Rose v. Nevada & G. V. Wood & Lumber Co. 73 Cal. 235 ..... 182
Rosen v. United States, 161 U. S. 29 (40: 506) ..... 728, 729, 800
Rosevelt v. Brown, 11 N. Y. 148 ..... 847
Ross v. Boston & W. R. Co. 6 Allen, 87 615
Rowe v. Chandler, 1 Cal. 168 ..... 488
Rowell v. Railroad, 57 N. H. 132 (24 Am. Rep. 59) ..... 616
Royal Ins. Co. v. Stinson, 103 U. S. 25 (26: 473) ..... 1085
Royall, *Ex parte* (No. 1), 117 U. S. 241 (29: 868) ..... 1049
Ruch v. Rock Island, 97 U. S. 693 (24: 1101) ..... 777
Ruggles v. Illinois, 108 U. S. 526 (27: 812) ..... 562, 563
Runkle v. Burnham, 153 U. S. 224 (38: 697) ..... 872
v. United States, 19 Ct. Cl. 396 ... 824
v. United States, 122 U. S. 555 (30: 1170) ..... 1159
Russell v. Allen, 107 U. S. 163 (27: 397) ..... 742, 744
v. Jackson, 9 Hare, 387 ..... 767
v. New York, 2 Denio, 461 ..... 1172
v. Tomlinson, 2 Conn. 206 ..... 616
Russia Cement Co. v. Le Page, 147 Mass. 206 ..... 125
Rutland R. Co. v. Central Vermont R. Co. 159 U. S. 630 (40: 284) ... 140
Ryan v. Rand, 20 Abb. N. C. 313 ..... 450
Rymer, *Re*, [1895] 1 Ch. 19 ..... 743

## S.

Saginaw Gaslight Co. v. Saginaw, 28 Fed. Rep. 529 ..... 1116
St. Anna's Asylum v. New Orleans, 105 U. S. 362 (26: 1128) ..... 952
St. Clair v. United States, 154 U. S. 134 (38: 936) ..... 298
St. Jago de Cuba, The, 22 U. S. 9 Wheat. 409 (6: 122) ..... 516, 713
St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426 (26: 578) ..... 241
St. Louis v. Ranken, 95 Mo. 189 ..... 947
v. St. Louis Gaslight Co. 70 Mo. 69 1025
v. Western U. Teleg. Co. 149 U. S. 465 (37: 810) ..... 1164
v. Wiggins Ferry Co. 78 U. S. 11 Wall. 423 (20: 192) ..... 698
St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649 (39: 567) ..... 565
v. James, 161 U. S. 545 (40: 802) .. 600
v. Mathews, 165 U. S. 1 (41: 251) 668, 678
St. Louis, I. M. & S. R. Co. v. Loftin, 98 U. S. 559 (25: 222) ..... 457
v. Needham, 10 U. S. App. 339 .. 195
v. Williams, 49 Ark. 492 ..... 671
St. Louis Smelt. & Ref. Co. v. Kemp, 104 U. S. 636 (26: 875) ..... 176
St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393 (36: 748) ..... 274, 822
St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1 (35: 77) ... 480, 1091
St. Tammany Waterworks Co. v. New Orleans Waterworks Co. 120 U. S. 64 (30: 563) ..... 522, 523
Salt Mfg. Co. v. East Saginaw, 80 U. S. 13 Wall. 373 (20: 611) ..... 952
Saltonstall v. Birtwell, 150 U. S. 417 (37: 1128) ..... 478
Salvador, The, L. R. 3 P. C. 218 ..... 918
Salzman v. His Creditors, 2 Rob. (La.) 241 ..... 205
Samuel Marshall, The, 49 Fed. Rep. 754, Aff'd 6 U. S. App. 389 .... 516, 714
Samuel Marshall, The, 54 Fed. Rep. 397 713
Sams v. United States, 27 Ct. Cl. 266, 437 440
San Antonia & A. P. R. Co. v. Wilson (Tex. App.) 19 S. W. 910 .... 671
Sandford Fork & T. Co., *Re*, 160 U. S. 247 (40: 414) ..... 813, 995
Sanford v. Poe, 37 U. S. App. 395 ..... 697
San Francisco v. Le Roy, 138 U. S. 656 (34: 1099) ..... 883, 885, 889
v. United States, 4 Sawy. 461 ..... 884



Digitized by Google

Sanger v. Upton, 91 U. S. 56 (23: 220).. 846
San Pedro & C. D. A. Co. v. United States, 146 U. S. 120 (36: 911) ..... 93, 232, 429
Santa Clara County v. Southern P. R. Co. 118 U. S. 394 (30: 118)....565, 668
Sarah Starr, The, 1 Sprague, 453..... 518
Sarah Watson, The, v. The Sea Gull, 90 U. S. 23 Wall. 165 (23: 90)... 1058
Sargent v. Seagrave, 2 Curt. C. C. 553... 69
v. State, 96 Ind. 63..... 950
Saunders v. Kastenbine, 6 B. Mon. 17.. 502
Sayles v. Northwestern Ins. Co. 2 Curt. C. C. 212..... 435
Sayward v. Denny, 158 U. S. 180 (39: 941).....715, 983, 1088, 1153
Scales v. State, 47 Ark. 476 (58 Am. Rep. 768)..... 169
Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249 (26: 1070)..... 1103
Schlesinger's Case, 14 Fed. Rep. 682.... 854
Schmittler v. Simon, 114 N. Y. 176..... 450
Schneider, *Re*, 148 U. S. 162 (37: 406) 575, 1087
Schofield v. Chicago, M. & St. P. R. Co. 114 U. S. 615 (29: 324)..... 192
Schoolfield v. Lynchburg, 78 Va. 366... 288
Schoonmaker v. Stockton, 37 Pa. 461... 934
Schriver v. Meyer, 19 Pa. 87 (57 Am. Dec. 634).....933, 934
Schuchardt v. Allen, 68 U. S. 1 Wall. 359 (17: 645)..... 446
Schulenberg v. Harriman, 88 U. S. 21 Wall. 44 (22: 551).....741, 778
Scotland County v. Hill, 112 U. S. 183 (28: 692)..... 398
Scott v. Armstrong, 146 U. S. 499 (36: 1059)..... 865
v. Harris, 113 Ill. 447..... 768
v. McNeal, 154 U. S. 34 (38: 896) .....523, 715, 984
v. Toledo, 36 Fed. Rep. 385 (1 L. R. A. 688)..... 985
Seaman's Estate, *Re*, 147 N. Y. 69..... 287
Searl v. Lake County School Dist. No. 2, 133 U. S. 553 (33: 740)..... 985
Second Nat. Bank v. Grand Lodge, F. & A. Masons, 98 U. S. 123 (25: 75)..... 588
Second Universalist Soc. v. Dugan, 65 Md. 460..... 743
Seibert v. United States, 122 U. S. 284 (30: 1163)..... 100
Semmes v. Magruder, 10 Md. 242..... 767
Seneca Nation v. Christy, 162 U. S. 283 (40: 970)..... 140
Sessions v. Johnson, 95 U. S. 347 (24: 596)..... 487
Shakspeare, The, 4 Ben. 128..... 1058
Shaffer and Shafer, 29 Kan. 337..... 225
Shain v. Forbes, 82 Cal. 583..... 488
Shand v. Du Buisson, L. R. 18 Eq. 283.. 863
Shauer v. Alterton, 151 U. S. 607 (38: 286) 1148
Shaw, *Ex parte* ("Shaw v. Quincy Min. Co."), 145 U. S. 444 (36: 768)... 434
v. Norfolk County R. Co. 5 Gray, 162..... 1108
v. Wallace, 2 U. S. 2 Dall. 179 (1: 339)..... 80
Sheehan v. Good Samaritan Hospital, 50 Mo. 155 (11 Am. Rep. 412)... 593
Shelby v. Guy, 24 U. S. 11 Wheat. 361 (6: 495)..... 887
Shelley's Case, 1 Coke, 88.....829, 831
Shepard v. Milwaukee Gaslight Co. 6 Wis. 539 (70 Am. Dec. 479)... 1025
Shepherd v. May, 115 U. S. 505 (29: 456) 539
v. Thompson, 122 U. S. 231 (30: 1156)..... 767
Shepley v. Cowan, 91 U. S. 330 (23: 424) .....223, 461
Sherlock v. Alling, 93 U. S. 99 (23: 819) .....173, 854
Sherman v. Buick, 93 U. S. 209 (23: 849) 460
v. Com. 14 Gratt. 677..... 950
v. Maine C. R. Co. 86 Me. 422... 616
Shields v. Thomas, 58 U. S. 17 How. 3 (15: 93)..... 191
Shively v. Bowlby, 152 U. S. 1 (38: 331) .....748, 807, 1000, 100
Shiver v. United States, 159 U. S. 491 (40: 231)..... 1144
Shreve v. Shreve, 43 Md. 382.....829–831
Shreveport v. Cole, 129 U. S. 39 (32: 589) 1117
Shute v. Keyser, 149 U. S. 649 (37: 884).. 575
Shutt v. Rambo, 57 Pa. 149..... 934
Simmerman v. Nebraska, 116 U. S. 54 (29: 535)..... 425
Simmonds v. New York & N. E. R. Co. 52 Conn. 264 (52 Am. Rep. 587) ..... 616
Simmons v. Ogle, 105 U. S. 271 (26: 1037) 409
v. United States, 142 U. S. 148 (35: 968)..... 298
v. Wagner, 101 U. S. 260 (25: 910).. 75
Simpers v. Simpers, 15 Md. 191..... 830
Sinclair v. Cooper ("The Connemara"), 103 U. S. 754 (26: 322)..... 191
Singer Mfg. Co. v. Kimball, 11 Ct. Seas. 3d ed. § 267..... 128
v. Larson, 8 Biss. 151..... 126
v. Loog, L. R. 8 App. Cas. 15, L. R. 18 Ch. Div. 412..... 128
v. Riley, 11 Fed. Rep. 703..... 126
v. Stanage, 6 Fed. Rep. 279..... 126
v. Wilson, L. R. 3 App. Cas. 376, Rev'g L. R. 2 Ch. Div. 434... 128
Sinnickson v. Johnson, 17 N. J. L. 129 (34 Am. Dec. 184)..... 985
Sioux City & I. F. Town Lot & L. Co. v. Griffey, 143 U. S. 32 (36: 64) 1144
Sioux City & St. P. R. Co. v. United States, 159 U. S. 349 (40: 177) 545
Skilbeck v. Garbett, 7 Q. B. 846..... 802
Slidell v. Grandjean, 111 U. S. 437 (28: 329)..... 545
Slocum v. Marshall, 2 Wash. C. C. 397.. 743
Smale v. Mitchell, 143 U. S. 99 (36: 90).. 937
Small, v. Chicago R. I. & P. R. Co. 50 Iowa, 338..... 617
Smith v. Alabama, 124 U. S. 465 (31: 508, 1 Inters. Com. Rep. 804) 111, .....173, 854 1066
v. Boston & M. R. Co. 63 N. H. 25..... 616
v. Chicago & W. I. R. Co. 105 Ill. 511..... 982
v. Condry, 42 U. S. 1 How. 28 (11: 35).....945, 1006
v. Durham, 3 Sumn. 435..... 743
v. Gale, 144 U. S. 509 (36: 521) .. 232
v. London & S. W. R. Co. L. R. 6 C. P. 14..... 614
v. Lyon, 133 U. S. 315 (33: 635) 434, 1050
v. Maryland, 10 U. S. 6 Cranch, 286 (3: 225)..... 778



Digitized by Google

**Smith** v. Sheeley, 79 U. S. 12 Wall. 358 (20: 430) 822
v. United States, 94 U. S. 97 (24: 32) 950
v. United States, 161 U. S. 85 (40: 626) 412
v. Vulcan Iron Works, 165 U. S. 518 (41: 810) 995
v. Westall, 1 Ld. Raym. 316 499
v. Whitney, 116 U. S. 167 (29: 601) 817, 824, 826, 949
Smith County Comrs. v. Labore, 37 Kan. 480 993
Smullen v. Phillips, 92 Cal. 408 488
Smythe v. Fiske, 90 U. S. 23 Wall. 374 (23: 47) 441, 1032
Snell v. Levitt, 110 N. Y. 595 (1 L. R. A. 414) 223
Snow, *Ex parte*, 120 U. S. 274 (30: 658) 575
v. United States, 118 U. S. 346 (30: 207) 509, 575
Snowden v. Snowden, 1 Bland, Ch. 550 1108
Soper v. Henry County, 26 Iowa, 264 559
Souch v. Strawbridge, 2 C. B. 808 500
Soule v. United States, 100 U. S. 8 (25: 536) 1127
South & N. Ala. R. Co. v. Morris, 65 Ala. 193 474
Southard v. Russell, 57 U. S. 16 How. 547 (14: 1052) 996, 996
South Branch Lumber Co. v. Ott, 142 U. S. 622 (35: 1136) 1100
South Carolina v. Georgia, 93 U. S. 4 (23: 782) 1000
Southern P. Co. v. Denton, 146 U. S. 202 (36: 942) 580
Southern R. Co. v. Jackson, 38 Miss. 334 594
Sparf v. United States, 156 U. S. 51 (39: 343) 81, 192, 304, 754
Specht v. Com. 8 Pa. 312 169
Speidel v. Henrici, 120 U. S. 387 (30: 720) 1149
Spencer v. Lapsley, 61 U. S. 20 How. 264 (15: 902) 759
v. Merchant, 125 U. S. 353 (31: 766) 392, 394
v. Spencer, 4 Md. Ch. 456 767, 769
Spies, *Ex parte*, 123 U. S. 131 (31: 80) 888
Spoor v. Spooner, 12 Met. 281 841
Springfield F. & M. Ins. Co. v. Sea, 88 U. S. 21 Wall. 158 (22: 511) 282
Spring Valley Waterworks v. Schottler, 110 U. S. 347 (28: 173) 392
Spurr v. Shelburne, 131 Mass. 439 841
Standard Elevator Co. v. Crane Elevator Co. 46 U. S. App.— 811
Stanley v. Colt, 72 U. S. 5 Wall. 119 (18: 502) 744, 777
v. Schwalby, 162 U. S. 255 (40: 960) 136, 681
Starin v. New York, 115 U. S. 257 (29: 390) 1113
Star of India, The, L. R. 1 Prob. Div. 466 945, 1063
Starr v. United States, 153 U. S. 614 (38: 841) 578
State v. Ambs, 20 Mo. 214 169
v. Bacon, 41 Vt. 526 (98 Am. Dec. 616) 800
v. Baltimore & O. R. Co. 24 W. Va. 783 169
v. Blackburn, 80 N. C. 474 603
v. Chavers, 5 Jones, L. 11 261
State v. Chicago, B. & Q. R. Co. 29 Neb. 412 991
v. Chicago, M. & St. P. R. Co. 36 Minn. 402 495
v. Conners, 20 W. Va. 1 950
v. Cornig, 42 La. Ann. 416 1064
v. Craighead, 44 La. Ann. 968 950
v. Cumberland & P. R. Co. 40 Md. 22 456
v. Dalrymple, 70 Md. 294 (8 L. R. A. 372) 288
v. Daubert, 42 Mo. 242 357
v. Davis, 14 Nev. 407 484
v. Dillon, 74 Iowa, 658 551
v. Doc, 79 Ind. 9 (41 Am. Rep. 599) 1170
v. Elliott, 45 Iowa, 486 603
v. Fire Creek Coal & C. Co. 33 W. Va. 188 (6 L. R. A. 359) 671
v. Ford, 37 La. Ann. 443 303
v. Gibson, 36 Ind. 389 (10 Am. Rep. 42) 259
v. Goodwill, 33 W. Va. 179 (6 L. R. A. 621) 671
v. Holder, 81 N. C. 527 (31 Am. Rep. 517) 1170
v. Humbird, 54 Md. 327 1123
v. Hutchings, 24 S. C. 142 357
v. Kinne, 41 N. H. 238 1064
v. Loomis, 115 Mo. 307 (21 L. R. A. 789) 668
v. Lymus, 26 Ohio St. 400 (20 Am. Rep. 772) 1170
v. McDuffie, 34 N. H. 523 (69 Am. Dec. 516) 1170
v. McNeill, 93 N. C. 552 357
v. Mansfield Comrs. 28 N. J. L. 510 593
v. Mellor, 13 R. I. 666 627
v. Murmann, 124 Mo. 502 1064
v. Nelson, 8 N. H. 165 357
v. Rutter, 12 Niles, Reg. 115 716
v. Smith, 49 Conn. 376 531
v. Williams, 46 La. Ann. 922 884
v. Williams, 2 Speers, L. 26 1160
v. Williams, 27 Vt. 724 580
v. Wood, 53 N. H. 484 235
v. Woodfin, 5 Ired. L. 199 (42 Am. Dec. 161) 1160
v. Wright, 32 La. Ann. 1017 (36 Am. Rep. 274) 950
v. Zimmerman, 31 Kan. 85 80, 81
State, *ex rel.* Abbott, v. Hicks, 44 La. Ann. 770 259
Carlton, v. Dawson, 22 Ind. 272 1118
Durant, v. Board of Liquidation, 29 La. Ann. 77 206
Garnes, v. McCann, 21 Ohio St. 210 258
McGraw, v. Ensign, 11 Neb. 529 82
Marr, v. Luther, 56 Minn. 156 1065
New Jersey R. & Transp. Co., v. Newark, 25 N. J. L. 315 592
Poe, v. Jones, 51 Ohio St. 492 694, 696, 698, 701
Protestant Foster Home Soc., v. Newark, 35 N. J. L. 157 593
South Carolina R. Co., v. Hood, 15 Rich. L. 177 456
Stevenson, v. Reigart, 1 Gill, 1 767
Wood, v. Baker, 38 Wis. 71 260
Stearns v. Barrett, 1 Mason, 153 1064
Steel v. St. Louis Smelt. & Ref. Co. 106 U. S. 447 (27: 226) 176, 460



Digitized by Google

Steele v. United States, 113 U. S. 128 (28: 952)..... 405, 406
Stein v. Bienville Water Supply Co. 141 U. S. 67 (35: 622)..... 568, 1169
v. Bowman, 38 U. S. 13 Pet. 209 (10: 129)..... 741
Stephenson v. The Francis, 21 Fed. Rep. 715..... 713
Stevens v. Atlantic & St. L. R. Co. 46 Me. 95..... 616
v. Fuller, 136 U. S. 468 (34: 461).. 575
Stevenson v. Austin, 3 Met. 474..... 1109
v. Fox, 125 Pa. 568..... 934
v. United States, 162 U. S. 313 (40: 980)..... 754
Stewart v. Salamon, 97 U. S. 361 (24: 1044)..... 995
Stoffer v. State, 15 Ohio St. 47..... 551
Stone v. Farmers' Loan & T. Co. ("Railroad Commission Cases"), 116 U.S.307 (29:636)..111, 562, 565, 1066
v. Framingham, 109 Mass. 303..... 744
v. New York, 25 Wend. 157..... 1172
v. United States, 69 U. S. 2 Wall. 525 (17: 765)..... 405, 406
Story, *Ex parte*, 37 U. S. 12 Pet. 339 (9: 1108)..... 995
Stout v. Lye, 103 U. S. 66 (26: 428)..... 1100
Stoutenburgh v. Hennick, 129 U. S. 141 (32: 637)..... 700
Stovall v. Banks, 77 U. S. 10 Wall. 583 (19: 1036)..... 1130
Strader v. Baldwin, 50 U. S. 9 How. 261 (13: 130)..... 820
Stratton v. Morris, 89 Tenn. 497 (12 L. R. A. 70)..... 668
Strauder v. West Virginia, 100 U. S. 303 (25: 664)..... 259, 262
Strawbridge v. Curtis, 7 U. S. 3 Cranch, 267 (2: 435)..... 1050
v. Warfield, 4 La. 23..... 204
Stretch v. Gowdey, 3 Tenn. Ch. 565..... 451
Stringfellow v. Cain, 99 U. S. 610 (25: 421)..... 93, 334
Strode v. Com. 52 Pa. 181..... 288
Stroma, The, 11 U. S. App. 673..... 516
Struggle, The, 1 Gall. 476..... 920
Stuart v. Baker, 17 Tex. 417..... 504
Sturgis v. Clough, 68 U. S. 1 Wall. 269 (17: 580)..... 945, 947
Stutsman County v. Wallace, 142 U. S. 293 (35: 1018)..... 1100
Sue, The, 22 Fed. Rep. 843..... 260
Suliote, The, 23 Fed. Rep. 919..... 714
Sullivan v. Northern Spy Min. Co. 11 Utah 488 (30 L. R. A. 186).. 334
v. Portland & K. R. Co. 94 U. S. 806 (24: 324)..... 540
Sundry Goods, Wares, and Merchandises v. United States, 27 U. S. 2 Pet. 358 (7: 450)..... 298
Sun Mut. Ins. Co. v. Board of Liquidation, 31 La. Ann. 176..... 206
Suydam v. Williamson, 65 U. S. 24 How. 427 (16: 742)..... 933
Swaim v. United States, 28 Ct. Cl. 173.. 827
v. United States, 165 U. S. 553 (41: 823)..... 1159
Sweet v. Desha Lumber Co. 56 Ark. 629 502
v. Rechel, 159 U. S. 380 (40: 188)..... 620, 985
Swift's Estate, *Re*, 137 N. Y. 77 (18 L. R. A. 709)..... 288
Swigert, *Re*, 119 Ill. 83 (59 Am. Rep. 789)..... 592
Swope v. Leffingwell, 105 U. S. 3 (26: 939)..... 820
Syester v. Brewer, 27 Md. 288..... 540
Syracuse Water Co. v. Syracuse, 116 N. Y. 167 (5 L. R. A. 546)..... 1169

T

Talbott v. King, 6 Mont. 76..... 454
Taylor v. Brown, 9 U. S. 5 Cranch, 234 3: 88)..... 760
v. Secor ("State R. Tax Cases"), 92 U. S. 575 (23: 663)..... 57, 697
Telfener v. Russ, 162 U. S. 171 (40: 930).. 447
Temple Pump Co. v. Goss Pump & Rubber Bucket Mfg. Co. 18 U. S. App 229..... 811
Tennessee v. Davis, 100 U. S. 257 (25: 648)..... 1113
v. Sneed, 96 U. S. 69 (24: 610)..... 100
v. Union & P. Bank, 152 U. S. 454 (38: 511)..... 368, 745, 1133
v. Whitworth, 117 U. S. 129 (29: 830)..... 457
Tenney v. Lenz, 16 Wis. 566..... 1171
Terry, *Ex parte*, 128 U. S. 289 (32: 405).. 1112
Texas & P. R. Co. v. Cody, 166 U. S. 606 (41: 1132)..... 1138
v. Gentry, 163 U. S. 353 (41: 186) 196
v. Interstate Commerce Commission, 162 U. S. 197 (40: 940, 5 Inters Com. Rep. 405)..... 1028
v. Johnson, 151 U. S. 81 (38: 81)..... 582, 583
v. Smith, 159 U. S. 66 (40: 77)..... 176
v. Volk, 151 U. S. 73 (38: 78)..... 1136
Thatcher v. Rockwell, 105 U. S. 467 (26: 949)..... 286
Theological Education Soc. v. Atty. Gen. 135 Mass. 285..... 744
Thiede v. Utah, 159 U. S. 510 (40: 237) 807
Thomas v. Hammond, 47 Tex. 42..... 503
v. Osborn, 60 U. S. 19 How. 22 (15: 534)..... 517
v. West Jersey R. Co. 101 U. S. 71 (25: 950)..... 271, 274, 280, 281, 821
Thomas Kiley, The, 3 Ben. 228..... 945
Thomassen v. Whitwell, 9 Ben. 113..... 1006
Thompson v. Beasley, 3 Drew. 7..... 934
v. Beveridge, 3 Mackey, 170..... 539
v. Dearborn, 107 Ill. 87..... 540
v. Nelson, 37 U. S. App. 478..... 812
v. Perrine, 103 U. S. 806 (26: 612) 398
v. Phenix Ins. Co. 136 U. S. 287 (34: 408)..... 450
v. St. Nicholas Nat. Bank, 146 U. S. 240 (36: 956)..... 822
v. Simpson, L. R. 5 Ch. 659..... 863
v. Tolmie, 27 U. S. 2 Pet. 157 (7: 381)..... 1110, 1112
v. United States, 103 U. S. 480 (26: 521)..... 623
Thorington v. Montgomery, 147 U. S. 490 (37: 252)..... 338
Thorpe v. Adams, L. R. 6 C. P. 135..... 1033
v. Rutland & B. R. Co. 27 Vt. 140 (62 Am. Dec. 625)..... 617, 991
Thouvenin v. Lea, 26 Tex. 612..... 503
Throop Grain Cleaner Co. v. Smith, 110 N. Y. 83..... 862, 863



Digitized by Google

Thurlow v. Massachusetts, 46 U. S. 5 How. 504 (12: 256) ..... 646
Ticonderoga, The, Swab. Adm. 215 ..... 1006
Tiernan v. Rinker, 102 U. S. 123 (26: 103) 647
Tilden v. Blair, 88 U. S. 21 Wall. 241 (22: 632) ..... 836
Tilley v. St. Louis & S. F. R. Co. 49 Ark. 535, 33 Ark. 820 (34 Am. Rep. 55) ..... 619
Tobey v. Moore, 130 Mass. 448 ..... 744
Todd County v. St. Paul, M. & M. R. Co. 38 Minn. 163 ..... 592
Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 54 Fed. Rep. 746 (19 L. R. A. 395, 5 Inters. Com. Rep. 545) ..... 1118
Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296 (33: 905) ..... 333, 335
Toledo, P. & W. R. Co. v. Deacon, 63 Ill. 91 ..... 990
Tourtellot v. Rosebrook, 11 Met. 460 ..... 615
Tower v. Tower, 18 Pick. 262 ..... 1171
Townsend v. Greely, 72 U. S. 5 Wall. 326 (18: 547) ..... 885
Tracy v. People, 97 Ill. 101 ..... 603
v. Tuffly, 134 U. S. 206 (33: 879) 243
Transit, The, 4 Ben. 188 ..... 945
Truscott v. Hurlburt Land & C. Co. 73 Fed. Rep. 61 ..... 421
Tubbs v. Wilhoit, 138 U. S. 134 (34: 887) 557
Tucker v. Ferguson, 89 U. S. 22 Wall. 527 (22: 805) ..... 592, 665, 953
v. Oxley, 9 U. S. 5 Cranch, 34 (3: 29) ..... 500
Turberville v. Stamp, Comyns. 32, 1 Salk. 13, Holt, 9, 1 Ld. Raym. 264, 12 Mod. 152 ..... 613
Turgot, The, L. R. Prob. Div. 21 ..... 516
Turlock Irrig. Dist. v. Williams, 76 Cal. 360 ..... 389
Turner v. Smith, 81 U. S. 14 Wall. 553 (20: 724) ..... 665
Twitchell v. Pennsylvania, 74 U. S. 7 Wall. 321 (19: 223) ..... 198
207½lb. Papers S. Tobacco v. United States ("The Cherokee Tobacco"), 78 U. S. 11 Wall. 616 (20: 227) ..... 246, 420, 779
Tyler, *Ex parte*, 149 U. S. 164 (37: 689) ..... 633, 653, 787, 1112
Tyler, *Re*, [1891] 3 Ch. Div. 252 ..... 774
Tyng v. Grinnell, 92 U. S. 467 (33: 733) 232

## U

Union Mut. L. Ins. Co. v. Hanford, 143 U. S. 187 (36: 118) ..... 540
Union Nat Bank v. Louisville, N. A. & C. R. Co. 163 U. S. 325 (41: 177) ..... 474
v. Matthews, 98 U. S. 621 (25: 188) 823
Union P. R. Co. v. De Busk, 12 Colo. 294 (3 L. R. A. 350) ..... 619
v. Hall, 91 U. S. 343 (23: 428) ..... 111, 274
v. Harris, 158 U. S. 326 (39: 1003) 601
v. McShane, 89 U. S. 22 Wall. 444 (22: 747) ..... 570, 665
v. Myers ("Pacific R. Removal Cases"), 115 U. S. 1 (29: 319) ..... 601, 1133, 1134
v. Snyder ("Union P. R. Co. v. Daniels"), 152 U. S. 688 (38: 600) ..... 1139
Union P. R. Co. v. United States ("Sinking Fund Cases"), 99 U. S. 700 (25: 496) ..... 647
v. United States, 104 U. S. 662 (26: 884) ..... 864
v. Wyler, 158 U. S. 285 (39: 983) ..... 486
Union Switch & Signal Co. v. Johnson R. Signal Co. 17 U. S. App. 609 811
United States, *Ex parte*, 84 U. S. 17 Wall. 439 (21: 696) ..... 345
*Ex parte* ("Vigo's Case"), 88 U. S. 21 Wall. 648 (22: 690) ..... 345
v. Alabama G. S. R. Co. 142 U. S. 615 (35: 1134) ..... 404
v. Alexander, 110 U. S. 325 (28: 166) ..... 1128
v. Arredondo, 31 U. S. 6 Pet. 691 (8: 547) ..... 1113
v. Averill, 130 U. S. 335 (32: 977) ..... 805, 807
v. Bailey, 34 U. S. 9 Pet. 238 (9: 113) ..... 815, 816
v. Ball, 163 U. S. 662 (41: 300) ..... 717
v. Baltimore & O. R. Co. 84 U. S. 17 Wall. 322 (21: 597) ..... 559
v. Bank of Metropolis, 40 U. S. 15 Pet. 377 (10: 774) ..... 404
v. Barker, 15 U. S. 2 Wheat. 395 (4: 271) ..... 409
v. Behan, 110 U. S. 338 (28: 168) ..... 407
v. Bell, 111 U. S. 477 (28: 478) ..... 1127, 1129
v. Bishop, 120 U. S. 51 (30: 558) ..... 677
v. Boutwell, 84 U. S. 17 Wall. 604 (21: 721) ..... 623
v. Bowen, 100 U. S. 508 (25: 631) ..... 943
v. Boyd, 46 U. S. 5 How. 29 (12: 36) ..... 409
v. Bradley, 35 U. S. 10 Pet. 343 (9: 448) ..... 1125, 1126
v. Burbank, 71 U. S. 4 Wall. 186 (18: 321) ..... 1130
v. Burchard, 125 U. S. 176 (31: 662) ..... 405, 406
v. Burlington & M. R. Co. 98 U. S. 334 (25: 198) ..... 796
v. Burns, 79 U. S. 12 Wall. 246 (20: 388) ..... 407
v. California & O. Land Co. 148 U. S. 31 (37: 354) ..... 796
v. Campbell, 6 Hall's L. J. 118 ..... 716
v. Carr, 132 U. S. 644 (33: 483) ..... 406, 407
v. Central P. R. Co. 26 Fed. Rep. 479 ..... 756
v. Chain Cable, 2 Sumn. 362 ..... 941
v. Chaves, 159 U. S. 452 (40: 215) ..... 880
v. Church of the Holy Trinity, 36 Fed. Rep. 303 ..... 153
v. Clark, 96 U. S. 37 (24: 696) ..... 478
v. Clarke, 33 U. S. 8 Pet. 436 (8: 1001) ..... 888
v. Cornell, 2 Mason, 91 ..... 529
v. Coxe, 59 U. S. 18 How. 100 (15: 299) ..... 779
v. Craig, 28 Fed. Rep. 795 ..... 153
v. Crosby, 11 U. S. 7 Cranch, 115 (3: 287) ..... 829
v. Cruikshank, 92 U. S. 542 (23: 588) ..... 984
v. Daniel, 19 U. S. 6 Wheat. 542 (5: 326) ..... 102
v. Debs, 64 Fed. Rep. 724, 158 U. S. 564 (39: 1092) ..... 1033



Digitized by Google

United States v. Eaton, 144 U.S. 677 (36: 591)..... 815, 816
v. E. C. Knight Co. 156 U. S. 1 (39: 325)..... 1018, 1022
v. Erwin, 147 U. S. 685 (37: 331).. 358
v. Ewing, 47 Fed. Rep. 809..... 421
v. Fisher, 6 U. S. 2 Cranch, 358 (2: 304)..... 545
v. Fletcher, 148 U. S. 84 (37: 378)..... 826, 1159
v. Fox, 94 U. S. 315 (24: 192)..... 289
v. Frerichs, 106 U. S. 160 (27: 128) 82
v. Gale, 109 U. S. 65 (27: 857)..... 627
v. Guinet, 2 U. S. 2 Dall. 321 (1: 398)..... 922
v. Guiteau, 1 Mackey, 498 (47 Am. Rep. 247)..... 742
v. Hammond, 2 Woods, 197..... 627
v. Harmon, 147 U. S. 268 (37: 164) 404
v. Hart, 74 Fed. Rep. 724..... 923
v. Healey, 160 U. S. 136 (40: 369)..... 182, 404, 1131
v. Hill, 120 U. S. 169 (30: 627).. 805, 809
v. Hill, 123 U. S. 681 (31: 275)..... 809
v. Hughes, 70 Fed. Rep. 972..... 296
v. Hunt, 105 U. S. 184 (26: 1038).. 1127
v. Illinois C. R. Co. 154 U. S. 225 (38: 971)..... 750
v. Iron Silver Min. Co. 128 U. S. 673 (32: 571)..... 426
v. Irving, 42 U. S. 1 How. 250 (11: 120)..... 1127
v. The Itata, 56 Fed. Rep. 505..... 923
v. Jahn, 155 U. S. 109 (39: 87)..... 746
v. Jones, 33 U. S. 8 Pet. 375 (8: 979) 404
v. Jones, 131 U. S. 1 (33: 90).. 118, 1131
v. Kagama, 118 U. S. 375 (30: 228)..... 199, 420
v. King, 147 U. S. 676 (37: 328).. 347
v. Kirby, 74 U. S. 7 Wall. 482 (19: 278)..... 1032
v. Kirkpatrick, 22 U. S. 9 Wheat. 720 (6: 199)..... 408, 409
v. Knox, 102 U. S. 423 (26: 216).. 599
v. Lacher, 134 U. S. 624 (33: 1080)..... 295, 545, 943
v. Lathrop, 17 Johns. 4..... 716
v. Le Baron, 60 U. S. 19 How. 73 (15: 525)..... 1122
v. Le Baron, 71 U. S. 4 Wall. 642 (18: 309)..... 234
v. Linn, 40 U. S. 15 Pet. 290 (10: 742), 42 U. S. 1 How. 104 (11: 64)..... 1124
v. The Little Charles, 1 Brock. 347 914
v. McBratney, 104 U. S. 622 (26: 869)..... 420, 422
v. McCandless, 147 U. S. 692 (37: 334)..... 347
v. McGlue, 1 Curt. C. C. 1..... 947
v. McLean, 95 U. S. 750 (24: 579)..... 408, 410
v. McLemore, 45 U. S. 4 How. 286 (11: 977)..... 409
v. The Malek Adhel, 43 U. S. 2 How. 210 (11: 239)..... 914
v. McMillan, 10 Utah, 184..... 807
v. Marchant, 25 U. S. 12 Wheat. 480 (6: 700)..... 303
v. The Mary N. Hogan, 18 Fed. Rep. 529..... 924
v. Maurice, 2 Brock. 96..... 1125
v. Minor, 114 U. S. 233 (29: 110).. 405
Uniteds State v. Molloy, 31 Fed. Rep. 19 947
v. Mooney, 116 U. S. 104 (29: 550).. 1032
v. Moorehead, 66 U. S. 1 Black, 488 (17: 80)..... 996
v. More, 7 U. S. 3 Cranch, 159 (2: 397)..... 508, 509
v. Nelson, 2 Brock. 64..... 1124
v. New York, 160 U. S. 598 (40: 551)..... 151
v. Nicholl, 25 U. S. 12 Wheat. 505 (6: 709)..... 409
v. O'Sullivan, 2 Whart. Crim. Law, § 2802, note..... 296
v. Palmer, 16 U. S. 3 Wheat. 610 (4: 471)..... 1031, 1032
v. Partello, 48 Fed. Rep. 670..... 421
v. Payne, 147 U. S. 667 (37: 332).. 1064
v. Pena, 69 Fed. Rep. 983..... 296
v. Pinson, 102 U. S. 549 (26: 226).. 1129
v. Price, 116 U. S. 43 (29: 541)..... 220
v. Pridgeon, 153 U. S. 48 (38: 631)..... 1087, 1112
v. Quincy, 31 U. S. 6 Pet. 445 (8: 458)..... 917, 923, 928
v. Quincy, 71 U. S. 4 Wall. 535 (18: 403)..... 100
v. Reed, 2 Blatchf. 456..... 627
v. Repentigny, 72 U. S. 5 Wall. 211 (18: 627)..... 778
v. Richardson, 28 Fed. Rep. 65..... 627
v. Rogers, 45 U. S. 4 How. 567 (11: 1105)..... 284, 779
v. Rosenberg, 74 U. S. 7 Wall. 580 (19: 263)..... 346
v. Russell, 80 U. S. 13 Wall. 623 (20: 474)..... 150, 151
v. Sanges, 144 U. S. 310 (36: 445)..... 103, 303, 346, 509, 574
v. Schlesinger, 120 U. S. 109 (30: 607)..... 352, 354, 355
v. Schurz, 102 U. S. 378 (26: 167).. 623
v. Sherman, 98 U. S. 565 (25: 235)..... 408, 737
v. 67 Packages Dry Goods, 58 U. S. 17 How. 87 (15: 54)..... 247
v. Small, 2 Curt. C. C. 241..... 484
v. Smith, 158 U. S. 346 (39: 1011).. 184
v. Southern P. R. Co. 146 U. S. 570 (36: 1091)..... 241
v. Stahl, 151 U. S. 366 (38: 194).. 405, 406
v. Stanley ("Civil Rights Cases"), 109 U. S. 1 (27: 835)... 258, 259, 721
v. Stowell, 2 Curt. C. C. 153..... 627
v. Strong, 125 U. S. 656 (31: 823).. 677
v. Symonds, 120 U. S. 46 (30: 557)..... 677, 816
v. Tallman, 10 Blatchf. 51..... 627
v. Tanner, 147 U. S. 661 (37: 321).. 360
v. Thompson, 98 U. S. 486 (25: 194) 409
v. The Three Friends, 166 U. S. 1 (41: 897)..... 939, 1097, 1098
v. Tingey, 30 U. S. 5 Pet. 115 (8: 66)..... 1124, 1125
v. Trumbull, 48 Fed. Rep. 99..... 923
v. 214 Boxes of Arms, 20 Fed. Rep. 50..... 924
v. Union P. R. Co. 91 U. S. 72 (23: 224)..... 153, 1020, 1032
v. Union P. R. Co. 148 U. S. 562 (37: 560)..... 547
v. Union P. R. Co. 160 U. S. 1 (40: 319)..... 274
v. Verdier, 164 U. S. 213 (41: 407) 737



Digitized by Google

United States v. Vigil, 77 U. S. 10 Wall. 423 (19:954)..... 576
v. Villalonga, 90 U. S. 23 Wall. 35 (23: 64)..... 442
v. Ward, Woolw. 17..... 420
v. Weld, 127 U. S. 51 (32: 62)..... 220
v. Ybamez, 53 Fed. Rep. 536..... 296
United States, *ex rel.* McLean, v. Vilas, 124 U. S. 86 (31: 329)..... 410
Miles Planting & Mfg. Co., v. Carlisle, 5 App. D. C. ..... 217
South Carolina, v. Seymour, 153 U. S. 353 (38: 742).....175, 1017
Warden, v. Chandler, 122 U. S. 643 (30: 1244)..... 623
United States International Contracting Co. v. Lamont, 155 U. S. 303 (39: 160)..... 623
United States Mut. Accl. Asso v. Barry, 131 U. S. 100 (33: 60)..... 527
United States Trust Co. v. United States F. Ins. Co. 18 N. Y. 199..... 847
Updegraph v. Com. 11 Serg. & R. 394.. 154
Upton v. Tribilcock, 91 U. S. 45 (23: 203) 846
Utley v. Donaldson, 94 U. S. 29 (24: 54).. 209

V.

Van Duzee v. United States, 48 Fed. Rep. 643..... 348
Van Kleeck's Estate, *Re*, 121 N. Y. 701.. 289
Van Rensselaer v. Kearney, 52 U. S. 11 How. 297 (13: 703)..... 387
Van Riper v. Van Riper, 4 N. J. L. 156 (7 Am. Dec. 576)..... 303
Van Slyke v. Wisconsin, 154 U. S. 581 (20: 240)..... 1072
Van Wyck v. Knevals, 106 U. S. 360 (27: 201).....241, 242, 778
Vanzant v. Waddel, 2 Yerg. 260..... 668
Vasser v. George, 47 Miss. 713.....593, 594
Vaughan v. Dickes, 20 Pa. 509..... 935
v. Taff Vale R. Co. 3 Hurlst. & N. 743, 5 Hurlst. & N. 679..... 614
Vaughn, *Re*, L. R. 33 Ch. Div. 187.... 742
Vaux's Case, 4 Coke, 44.....801, 302
Vermont C. R. Co. v. Burlington, 28 Vt. 198..... 592
Vernon v. Blackerby, 2 Atk. 144. Barn. Ch. 377..... 624
Vick v. Vicksburg, 1 How. (Mich.) 379.. 933
Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 665 (29: 770)..... 592
Vindomora, The, [1891] A. C. 1..... 1058
Vine v. State, 67 Ala. 73..... 474
Virginia, *Ex parte*, 100 U. S. 339 (25: 676)..... 362
*Ex parte* ("Virginia v. Rives"), 100 U. S. 313 (25: 667).....259, 362
Viterbo v. Friedlander, 120 U. S. 707 (30: 776)..... 205
Vivar, The, L. R. 2 Prob. Div. 29..... 1006
Vogel v. Pekoc, 157 Ill. 339..... 672
Vulcan Iron Works v. Smith, 15 U. S. App. 577..... 811

W.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557 (30: 244, 1 Inters. Com. Rep. 31).....700, 959, 960
Wabash W. R. Co. v. Brow, 164 U. S. 271 (41: 431)..... 435
Wagner v. Kenner, 2 Rob. (La.) 122.... 206
Wagoner v. Loomis, 37 Ohio St. 571.... 698
Waite v. Dowley, 94 U. S. 527 (24: 181).. 850
Wakefield v. Fargo, 90 N. Y. 213..... 154
Walden v. Knevals, 114 U. S. 373 (29: 167) 241
Walker v. Bailey, 65 Me. 354..... 841
v. Johnson, 96 U. S. 424 (24: 834).. 503
v. New Mexico & S. P. R. Co. 165 U. S. 593 (41: 837)..... 1081
v. Sauvinet, 92 U. S. 90 (23: 678).. 1061
Wallace v. Myers, 38 Fed. Rep. 184 (4 L. R. A. 171)..... 288
v. United States, 162 U. S. 466 (40: 1039)..... 529
Walling v. Michigan, 116 U. S. 446 (29: 691).....643, 700
Walston v. Nevin, 128 U. S. 578 (32: 544) .....394, 395, 668
Walter v. Northeastern R. Co. 147 U. S. 370 (37: 206)..... 452
Walter A. Wood Mowing & R. Mach. Co. v. Skinner, 139 U. S. 293 (35: 193)..... 852
Walter W. Pharo, The, 1 Low. Dec. 437 946
Ward v. Flood, 48 Cal. 36 (17 Am. Rep. 405)..... 258
v. Huggins, 7 Wash. 624..... 75
v. State, 48 Ala. 161 (17 Am. Rep. 31)..... 1170
Ware v. Richardson, 3 Md. 505 (56 Am. Dec. 762).....829, 831
Warren County v. Marcy, 97 U. S. 96 (24: 977)..... 393
Warwick v. State, 73 Ala. 486 (19 Am. Rep. 59)..... 950
Washington v. Meigs, 1 McArth. 53..... 1171
Washington, A. & G. R. Co. v. Brown, 84 U. S. 17 Wall. 445 (21:675)..... 259
Washington, A. & G. Steam Packet Co. v. Sickles, 72 U. S. 5 Wall. 580 (18: 550).....502, 503
Washington & B. Turnp. Co. v. Maryland, 70 U. S. 3 Wall. 210 (18: 180)..... 1169
Washington & G. R. Co. v. District of Columbia, 146 U. S. 227 (36: 951).....509, 574
v. McDade, 135 U. S. 554 (34: 235) 1139
Washington & I. R. Co. v. Cœur D'Alene R. & Nav. Co. (No. 1), 160 U. S. 77 (40: 346)..... 242
Washington Ice Co. v. Webster, 125 U. S. 426 (31: 798)..... 1130
Washington Market Co. v. Hoffman, 101 U. S. 112 (25: 782)..... 191
Washington University v. Rouse, 75 U. S. 8 Wall. 439 (19: 498)..... 592
Watkins, *Ex parte*, 28 U. S. 3 Pet. 193 (7: 650).....1049, 1112
v. Holman, 41 U. S. 16 Pet. 25 (10: 873)..... 744
Watts v. Washington, 91 U. S. 580 (23: 328)..... 509
Wayman v. Southard, 23 U. S. 10 Wheat. 42 (6: 262)..... 817
Wayne County Sav. Bank v. Low, 81 N. Y. 566 (37 Am. Rep. 533)..... 862
Wayne County Supers. v. Kennicott, 94 U. S. 498 (24: 260)..... 1005
Weatherford, M. W. & N. W. R. Co. v. Wood, 88 Tex. 191 (28 L. R. A. 526)..... 503
Webb v. Odell, 49 N. Y. 583..... 209



Digitized by Google

Webber v. Merrill, 34 N. H. 202..... 303
Webster v. Cooper, 55 U. S. 14 How. 488 (14: 510)..... 387
v. Reid, 52 U. S. 11 How. 437 (13: 761)..... 1080
v. Upton, 91 U. S. 65 (23: 384)..... 846
Welch v. Cook, 97 U. S. 541 (24: 1112).. 952
v. Sullivan, 8 Cal. 168..... 888
Wellesley v. Mornington, 11 Beav. 181.. 1113
Wells v. Horton, 4 Bing. 40, 12 J. B. Moore, 177..... 500
West v. Randall, 4 Mason, 181..... 766
v. State, 22 N. J. L. 212 ..... 303
v. State, 1 Wis. 209..... 805
West Chester & P. R. Co. v. Miles, 55 Pa. 209 (93 Am. Dec. 744)..... 260
Western Metropolis, The, 2 Ben. 389... 1058
Western Paving & S. Co. v. Citizens' Street R. Co. 128 Ind. 525 (10 L. R. A. 770)..... 1116
Western Transp. Co. v. Downer, 78 U. S. 11 Wall. 129 (20: 160)..... 1043
Western U. Teleg. Co. v. American U. Teleg. Co. 65 Ga. 160 (38 Am. Rep. 781).....1025, 1039
v. Atty. Gen. 125 U. S. 530 (31: 790).....54, 55, 57, 695
v. Atty. Gen. 141 U. S. 40 (35: 628) .....55, 56
v. James, 162 U. S. 650 (40: 1105).. 854
v. Pendleton, 122 U. S. 347 (30: 1187, 1 Inters. Com. Rep. 306) 700
v. Taggart, 163 U. S. 1 (41: 49)... 693, 698, 705, 978
v. Taggert, 141 Ind. 294.....58, 59
v. Texas, 105 U. S. 460 (26: 1067) .....54, 700, 1018
Westinghouse Air Brake Co. v. New York Air Brake Co. 26 U. S. App. 248..... 811
Weston v. Charleston, 27 U. S. 2 Pet. 462 (7: 486)..... 1116
West River Bridge Co. v. Dix, 47 U. S. 6 How. 507 (12: 535)....1166, 1167
West Virginia Transp. Co. v. Ohio River Pipeline Co. 22 W. Va. 600 (46 Am. Rep. 527).....1025, 1039
West Wisconsin R. Co. v. Trempealeau County Supers. 93 U. S. 595 (23: 814)..... 953
Weyauwega v. Ayling, 99 U. S. 112 (25: 470)..... 590
Wheatley v. Harris (4 Sneed, 468), 70 Am. Dec. 258..... 1170
Wheaton v. Norton, 29 U. S. App. 409, 44 U. S. App. 118..... 811
Wheeler & Wilson Mfg. Co. v. Shakespear, 39 L. J. Ch. 36.....127, 128
Wheelock v. Kost, 77 Ill. 296..... 847
White v. Howard, 46 N. Y. 144..... 289
v. Manhattan R. Co. 139 N. Y. 19 223
Whitecar v. Michenor, 37 N. J. Eq. 60.. 1114
Whiteside v. Haselton, 110 U. S. 296 (28: 152)..... 1017
v. United States, 93 U. S. 247 (23: 882)..... 406
Whitney v. Taylor, 158 U. S. 85 (39: 906) .....480, 1148
v. Wyman, 101 U. S. 392 (25: 1050) 822
Whittemore v. Amoskeag Nat. Bank, 134 U. S. 527 (33: 1002).....602, 787
Wiborg v. United States, 163 U. S. 632 (41: 289).....914, 923, 924
Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365 (27: 419)..... 457
Wight v. Nicholson, 134 U. S. 136 (33: 865)..... 576
Wilcox v. Jackson, McConnel, 38 U. S. 13 Pet. 498 (10: 264).....460, 1091
Wilder v. Chicago & W. M. R. Co. 70 Mich. 382..... 670
Wilkerson v. Rahrer, ("*Re* Rahrer"), 140 U. S. 545 (35: 572)..... 645
Wilkes v. Wood, Lofft, 19..... 635
Wilkinson v. Buist, 124 Pa. 253..... 936
v. Johnson, 3 Barn. & C. 428..... 207
v. Leland, 27 U. S. 2 Pet. 627 (7: 542)..... 495
Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1 (31: 620).....247, 748
Willard v. Willard, 145 U. S. 116 (36: 644)..... 744
v. Wood, 4 Mackey, 538 ..... 538
v. Wood, 135 U. S. 309 (34: 210).. 538
Williams v. Crary, 4 Wend. 443, 5 Cow. 368..... 769
v. Heard, 140 U. S. 529 (35: 520).. 220
v. Rhodes, 81 Ill. 571..... 540
v. State, 77 Ala. 53..... 357
v. State, 50 Ark. 511..... 947
v. United States, 138 U. S. 514 (34: 1026)..... 756
Williamson v. Allison, 2 East, 452..... 487
v. Barrett, 54 U. S. 13 How. 101 (14: 68).....945, 1062
Willins v. Allen, 59 U. S. 18 How. 385 (15: 396)..... 936
Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279 (36: 972).....78, 136
v. Reid, 80 U. S. 13 Wall. 264 (20: 568)..... 952
Wilson, *Ex parte*, 114 U. S. 417 (29: 89) .....142, 143, 145
v. Black Bird Creek Marsh Co. 27 U. S. 2 Pet. 245 (7: 412).48, 171, 854
v. Chesapeake R. Co. 21 Gratt. 654 1043
v. Com. 10 Bush, 526 (19 Am. Rep. 76)..... 950
v. Gaines, 103 U. S. 417 (26: 401).. 563
Winchester & P. Mfg. Co. v. Creary, 116 U. S. 161 (29: 591)..... 527
Windsor v. McVeigh, 93 U. S. 274 (23: 914)..... 523
Winona & St. P. Land Co. v. Minnesota (No. 1), 159 U. S. 526 (40: 247) 592
Winona & St. P. R. Co. v. Barney, 113 U. S. 618 (28: 1109)..... 545
Winslow v. Minnesota & P. R. Co. 4 Minn. 317 (77 Am. Dec. 519).. 1109
Wisconsin C. R. Co. v. Forsythe, 159 U. S. 47 (40: 71) .....404-406
v. Price County, 133 U. S. 496 (33: 687)..... 1091
Wiser v. Blachly, 1 Johns. Ch. 437..... 766
Withers v. Buckley, 61 U. S. 20 How. 84 (15: 816).....198, 247, 748
Witherspoon v. Duncan, 71 U. S. 4 Wall. 210 (18: 339)..... 665
Wong Yung Quy, *Re*, 6 Sawy. 237..... 145
Wood v. Brady, 150 U. S. 18 (37: 981).139, 159
v. Sheldon, 42 N. J. L. 421 (36 Am. Rep. 523)..... 209
Woods, *Ex parte*, 143 U. S. 202 (36: 125) 1098
Woodson v. State, 19 Fla. 549..... 950
Woolf v. Chalker, 31 Conn. 121 (81 Am. Dec. 175).....616, 1171



Digitized by Google

Woolley v. Woolley, 21 Ark. 472 ..... 225
Worcester v. Georgia, 31 U. S. 6 Pet. 538 (8: 493) ..... 199
v. Great Falls Mfg. Co. 41 Me. 159 (66 Am. Dec. 217) ..... 989
v. Western R. Corp. 4 Met. 564..262, 592
Wortman v. Kleinschmidt, 12 Mont. 316 672
Wotherspoon v. Currie, L. R. 5 H. L. 408 125
Wright v. Nagle, 101 U. S. 791 (25: 931) 1116
v. Roseberry, 121 U. S. 488 (30: 1039) ..... 176, 557, 558
Wright & C. Wire Cloth Co. v. Clinton Wire Cloth Co. 33 U. S. App. 188 ..... 811
Wroe v. State, 29 Ohio St. 460 ..... 603
Wurts v. Hoagland, 114 U. S. 606 (29: 229) 390

Y.

Yates v. Lansing, 9 Johns. 395 (6 Am. Dec. 290) ..... 1160
Yazoo & M. V. R. Co. v. Thomas, 132 U. S. 174 (33: 302) ..... 545, 592
v. Yazoo-Mississippi Delta Levee Comrs. 132 U. S. 190 (33: 308) 592
Yick Wo v. Hopkins, 118 U. S. 356 (30: 220) ..... 143, 145, 260, 670, 984
Young v. Cole, 3 Bing. N. C. 724 ..... 207
v. Davies, 2 Drew. & S. 167 ..... 934
v. King, 3 T. R. 98 ..... 357
v. Mackall, 4 Md. 367 ..... 539, 540

Z.

Zabriski v. Cleveland, C. & C. R. Co. 64 U. S. 23 How. 381 (16: 488) .. 821
Zabriskie v. State, 43 N. J. L. 640 (39 Am. Rep. 610) ..... 805
Zardenta v. State (Tex.) 23 S. W. 684 ... 950
Zeigler v. South & N. Ala. R. Co. 58 Ala. 594 ..... 619

## STATUTES AND CONSTITUTIONS CITED, CONSTRUED, ETC.

**Argentine.**

*Code.*

Art. 1154. Merchant seamen ..... 718

**England.**

*Statutes.*

6 Anne, (1707) chap. 31, § 7. Common-law liability ..... 613
10 Anne, (1711) chap. 14, § 1. Common-law liability ..... 613
13 Car. II., 2 Stat. chap. 2. Jurisdiction of civil causes ..... 509
29 Car. II., chap. 3, § 4. Statute of frauds ..... 498, 502, 504
18 Eliz., chap. 5. Costs in prosecution awarded by court to defendant 80
27 Eliz., chap. 10. Costs in prosecution awarded by court to defendant 80
2 Geo. II., chap. 36. Merchant seamen 719
13 Geo. III., chap. 78, § 64. Costs in prosecution awarded by court to defendant ..... 80
14 Geo. III., (1774) chap. 78, § 86. Common-law liability ..... 613
31 Geo. III., chap. 39. Merchant seamen ..... 719
59 Geo. III., chap. 69. Foreign enlistment act ..... 917, 922
4 Geo. IV., (1823) chap. 34, § 3. Deserter from contract for personal service ..... 717, 724
Henry III., art. 5. Rules of Oleron..718, 719
33 Hen. VIII., chap. 30. Treason; inquest of office ..... 778
8 Statutes of the Realm, 795. Common-law liability ..... 613
9 Statutes of the Realm, 684. Common-law liability ..... 613
6 & 7 Vict., chap. 85. Law of evidence 742
7 & 8 Vict., chap. 112. Merchant seamen ..... 719
14 & 15 Vict., chap. 99, §§ 2, 3. Law of evidence ..... 742
16 & 17 Vict., chap. 83, § 3. Husband and wife ..... 742
17 & 18 Vict., chap. 104, §§ 243, 246, 247. Merchant seamen ..... 719
57 & 58 Vict., chap. 60, §§ 221-223. Merchants' shipping act ..... 719
7 Wm. III., chap. 12. Irish statute of frauds ..... 500
5 & 6 Wm. IV., chap. 19. Merchant seaman ..... 719
4 Wm. & Mary, chap. 18, § 1. Costs in prosecution awarded by court to defendant ..... 80

**France.**

*Statutes.*

Louis XIV., tit. 3, arts. 3, 5. Marine ordinance ..... 718

*Code Napoleon.*

Art. 1693. Warranty ..... 205, 206

**Germany.**

Art. 532. General mercantile law ..... 718

**Netherlands.**

*Code.*

Art. 402. General mercantile law ..... 718

**Spain.**

*Recopilacion.*

Book 4, tit. 5, laws 6, 7, 10. Public land laws ..... 877-879, 882
Book 4, tit. 5, law 9. Contracts for new settlements ..... 879
Book 4, tit. 7, law 6. Grant of land for new settlement ..... 879
Book 4, tit. 7, law 7. Distribution of lands in new settlement ..... 886
Book 4, tit. 7, law 11. Distribution of lands in new settlement ..... 886
Book 4, tit. 7, law 20. Contracts for lands ..... 878, 879



Digitized by Google

Book 4, tit. 7, law 21. Contracts for new settlements..... 879
Book 4, tit. 12, law 14. Public lands... 886
Book 4, tit. 13, law 1. Distribution of lands in new settlement..... 879
Book 6, tit. 5, laws 15, 16. Public land laws..... 882

*White's New Recopilacion.*

Vol. 2, pp. 44, 45. Public land laws..877, 878
Vol. 2, p. 46. Distribution of lands in new settlement.....879, 886
Vol. 2, p. 52. Public lands..... 886
Vol. 2, p. 55. Distribution of lands in new settlement..... 879

**United States.**

*Constitution.*

Art. 1, § 8. Taxation..... 219
Art. 1, § 8. Power to regulate commerce..... 854
Art. 1, § 8. Power of Congress..... 1088
Art. 1, § 10. Bills of credit..... 397
Art. 1, § 10. Obligation of contracts.....1088, 1166, 1167
Art. 3, § 1. Judicial power.....716, 717
Art. 4, § 2. Privileges and immunities of citizens..... 473
Art. 4, § 4. Republican government... 1100
Amend. 1. Freedom of citizens..... 717
2. Right to keep and bear arms 717
5. Criminal proceeding; self-crimination....142, 145, 198, 302, 388, 564, 717, 1001, 1159
6. Criminal prosecution..... .....142, 145, 1081
7. Trial by jury....233, 841, 987, .....1080, 1081, 1173
11. Suits in law or equity..... 653
13. Abolishment of slavery... 145, 257, 258, 262, 716–723, 725
14. Citizenship; privileges and immunities.....73–81, 90, 197, 199, 257–262, 387, 392, 495, 512, 565, 620, 668, 672, 835, 836, 854, 855, 982, 992, 1001, 1075, 1086, 1088, 1151–1153, 1166, 1172, 1176

*Statutes.*

1789, July 31 (1 Stat. at L. 47, chap. 5). Tonnage duties.....942, 943
1789, Sept. 1 (1 Stat. at L. 68, chap. 11). Seizure of vessels for offenses.... 944
1789, Sept. 24 (1 Stat. at L. 73, chap. 20). Judiciary act.....359, 434 435, 627, 788, 812, 1050, 1051, 1151, 1152
1790, April 30 (1 Stat. at L. 112, chap. 9). Crimes act..... 916
1790, July 20 (1 Stat. at L. 131, chap. 29). Merchant seamen's act..... .....716, 719, 720, 721, 723
1790, Aug. 4 (1 Stat. at L. 145, chap. 35). Tonnage duties..... 944
1791, March 3 (1 Stat. at L. 217, chap. 23). Clerks' fees..... 808
1792, May 8 (1 Stat. at L. 277, chap. 36). Clerks' fees.....80, 808
1792, Dec. 31 (1 Stat. at L. 289, chap. 1). Seizure of vessels for offenses.... 944
1793, Feb. 12 (1 Stat. at L. 302, chap. 7). Fugitive slaves..... 717
1793, March 2 (1 Stat. at L. 333, chap. 22). Establishment of judicial courts..... 103
1794, June 5 (1 Stat. at L. 381, chap. 50). Crimes against the government... .....294, 915–917, 921, 922, 944
1794, Nov. 19 (7 Stat. at L. 116). Treaty with Great Britain..... 778
1799, March 2 (1 Stat. at L. 627, chap. 22). Duties on imports and tonnage 944
1801, Feb. 27 (2 Stat. at L. 103, chap. 15). Establishment of circuit court of District of Columbia..... 508
1802, April 14 (2 Stat. at L. 153, chap. 28). Naturalization act..... 808
1802, April 29 (2 Stat. at L. 159, chap. 31). Appellate jurisdiction of U. S. Supreme Court.....102, 103
1803, March 3 (2 Stat. at L. 244, chap. 40). Judiciary act..... 812
1806, April 18 (2 Stat. at L. 379, chap. 29). Seizure of vessels for offenses..... 944
1807, Feb. 24 (2 Stat. at L. 422, chap. 19). Seizure of vessels for offenses.... 944
1812, June 13 (2 Stat. at L. 748, chap. 99). Land claims in Missouri..... 887
1817, March 13 (3 Stat. at L. 370, chap. 58). Neutrality.....915, 916
1818, April 20 (3 Stat. at L. 447, chap. 88). Crimes against the government.....294, 914–916, 922, 924, 925
1819, March 3 (3 Stat. at L. 510, chap. 77). Piracy..... 915
1825, March 3 (4 Stat. at L. 114, chap. 64). Additional allowances by Postmaster General..... 405
1827, Feb. 8 (4 Stat. at L. 202, chap. 9). Land claims in Florida..... 887
1830, Sept. 27 (7 Stat. at L. 333). Treaty with Choctaws..... 779
1831, Feb. 3 (4 Stat. at L. 436, chap. 16). Copyrights..... 113
1832, March 24 (7 Stat. at L. 366). Treaty with Creek Indians..... 779
1832, July 3 (4 Stat. at L. 559, chap. 162). Reissue of letters patent..... 1094
1835, Dec. 29 (7 Stat. at L. 478). Treaty with Cherokees.....197, 779
1836, July 2 (5 Stat. at L. 70, chap. 263). Platting of public lands into towns 750
1836, July 2 (5 Stat. at L. 80, chap. 270). Changing organization of Post-office Department..... 405
1836, July 4 (5 Stat. at L. 117, chap. 357). Reissue of letters patent.....1094, 1095
1841, March 3 (5 Stat. at L. 427, chap. 35). Civil appropriation act..... 808
1841, Sept. 4 (5 Stat. at L. 453, chap. 16). Public land grant; pre-emption..176, 759
1842, May 18 (5 Stat. at L. 483, chap. 29). Appropriation act..... 809
1845, Feb. 26 (5 Stat. at L. 727, chap. 22). Duties on merchandise.....354, 355
1846, Aug. 6 (9 Stat. at L. 871). Treaty with Cherokees..... 779
1848, Feb. 2 (9 Stat. at L. 922). Treaty of Guadalupe Hidalgo..... 888
1849, March 3 (9 Stat. at 395, chap. 108). Clerks' accounts..... 809
1850, Sept. 9 (9 Stat. at L. 446, chap. 49). Act creating territory of New Mexico.....233, 574



Digitized by Google

1850, Sept. 9 (9 Stat. at L. 458, chap. 51). Territorial government for Utah ..... 807, 1081, 1173
1850, Sept. 20 (9 Stat. at L. 466, chap. 61). Railway aid ..... 110
1850, Sept. 28 (9 Stat. at L. 519, chap. 84). Swamp land act..555, 559, 622, 1150
1851, March 3 (9 Stat. at L. 631, chap. 41). Land commissioners.....570, 881
1852, Aug. 26 (10 Stat. at L. 35, chap. 92). Canal grant ..... 558
1853, Dec. 23 (10 Stat. at L. 149, chap. 4). American registry to foreign vessel ..... 942
1853, Feb. 14 (10 Stat. at L. 157, chap. 67). Public land grant ..... 750
1853, Feb. 26 (10 Stat. at L. 161, chap. 80). Clerks' fees.....806, 808, 809
1853, March 3 (10 Stat. at L. 244, chap. 145). Settlements on reserved sections of land ..... 460
1853, Dec. 30 (10 Stat. at L. 1035). Treaty with Mexico ..... 888
1854, July 22 (10 Stat. at L. 308, chap. 103). Private land claims.....570, 875
1855, Feb. 24 (10 Stat. at L. 612, chap. 122). Jurisdiction of court of claims ..... 149, 1131
1855, March 3 (10 Stat. at L. 671, chap. 175). Civil appropriation act..... 806
1855, June 11 (12 Stat. at L. 957). Treaty with Indians ..... 745
1856, May 15 (11 Stat. at L. 9, chap. 28). Railway land grant.....555, 559
1856, June 3 (11 Stat. at L. 20, chap. 43). Railway mail service.....403, 404
1856, Aug. 16 (11 Stat. at L. 49, chap. 124). Clerks' fees and accounts.. 809
1857, Jan. 24 (11 Stat. at L. 155, chap. 19). Attendance of witnesses..1157, 1159
1858, June 14 (11 Stat. at L. 366, chap. 166). United States circuit and district courts ..... 576
1860, March 12 (12 Stat. at L. 3, chap. 5). Swamp land act ..... 622
1861, Aug. 5. (12 Stat. at L. 292, chap. 45). Direct tax act.....437–442
1862, Jan. 24 (12 Stat. at L. 333, chap. 11). Attendance of witnesses..... 1157
1862, May 20 (12 Stat. at L. 392, chap. 75). Homestead land grant.....180–182
1862, June 7 (12 Stat. at L. 422, chap. 98). Direct tax act ..... 439
1862, June 24 (12 Stat. at L. 1237). Treaty with Indians.....70, 71
1862, July 1 (12 Stat. at L. 489, chap. 120). Railway incorporation..... 276, 277, 363–365
1863, Feb. 6 (12 Stat. at L. 640, chap. 21). Direct tax act ..... 476
1863, March 2 (12 Stat. at L. 696, chap. 67). False claims against government ..... 469
1863, March 3 (12 Stat. at L. 755, chap. 81). Judiciary act ..... 987
1863, March 3 (12 Stat. at L. 765, chap. 92). Jurisdiction of court of claims ..... 1131
1864, May 5 (13 Stat. at L. 64, chap. 79). Railway land grant ..... 1065
1864, May 5 (13 Stat. at L. 66, chap. 80). Government use of railroad.....403, 404
1864, May 26 (13 Stat. at L. 85, chap. 95). Organization of territory of Montana ..... 420
1864, June 30 (13 Stat. at L. 202, chap. 171). Duties on merchandise..... 354
1864, July 1 (13 Stat. at L. 333, chap. 194). Title to lands in California ..... 883, 884, 887
1864, July 1 (13 Stat. at L. 335, chap. 197). Salaries of postmasters..... 409
1864, July 2 (13 Stat. at L. 351, chap. 210). Civil appropriation act..... 741
1864, July 2 (13 Stat. at L. 356, chap. 216). Railway aid.....273, 274, 277
1864, July 2 (13 Stat. at L. 365, chap. 217). Railway land grant..... 1140, 1142–1145
1864, July 2 (13 Stat. at L. 374, chap. 222). Law of evidence in District of Columbia ..... 742
1864, July 4 (13 Stat. at L. 381, chap. 240). Jurisdiction of court of claims .....149, 151
1865, March 3 (13 Stat. at L. 500, chap. 86). Jury trial ..... 117
1866, March 8 (14 Stat. at L. 4, chap. 13). Public lands.....883, 884, 887
1866, April 25 (16 Stat. at. L. 713). Treaty with Venezuela ..... 600
1866, June 12 (14 Stat. at L. 59, chap. 114). Salaries of postmasters..408, 409
1866, June 15 (14 Stat. at L. 66, chap. 124). Interstate commerce act .....110, 274, 854
1866, July 19 (14 Stat. at L. 119). Treaty with Cherokees ..... 198
1866, July 23 (14 Stat. at L. 210, chap. 212). Railway land grant..... 241
1866, July 24 (14 Stat. at L. 221, chap. 230). Incorporation act..... 55
1866, July 25 (14 Stat. at L. 239, chap. 242). Railway land grant..362, 363
1866, July 25 (14 Stat. at L. 244, chap. 246). Authorizing construction of bridges and post roads..... 273
1866, July 26 (14 Stat. at L. 253, chap. 262). Canal right of way; mineral lands.....333, 334, 1144
1866, July 26 (14 Stat. at L. 289, chap. 270). Railway land grant..... 241
1866, July 27 (14 Stat. at L. 292, chap. 278). Railway land grant..... 362, 363, 776, 777, 780, 781
1867, Jan. 21 (14 Stat. at L. 687). Treaty with Indians..... 241
1867, Feb. 21 (14 Stat. at L. 397, chap. 57). Military stores..... 149
1867, Feb. 23 (15 Stat. at L. 513). Treaty with Indians..... 70–72
1868, Feb. 21 (15 Stat. at L. 37, chap. 10). Bridge construction and post route ..... 273
1868, March 27 (15 Stat. at L. 44, chap. 34). Amendatory or judiciary act 574
1868, May 7 (15 Stat. at L. 649). Treaty with Crow Indians..... 420
1868, July 3 (15 Stat. at L. 673). Indian treaty ..... 243
1868, July 4 (15 Stat. at L. 679). Treaty with Mexico..... 600
1868, July 20 (15 Stat. at L. 125, chap. 186). Tax on sales of tobacco..... 1084



Digitized by Google

1868, July 25 (15 Stat. at L. 178, chap. 235). Act providing government for Wyoming Territory..... 249
1868, July 27 (15 Stat. at L. 240, chap. 273). Customs, commerce, and navigation..... 185
1868, Dec. 4 (16 Stat. at L. 751). Treaty with Peru..... 600
1869, April 10 (16 Stat. at L. 44, chap. 22). Appointment of circuit judge 108
1869, April 10 (16 Stat. at L. 55). Resolution to purchase lands acquired from Indians.....241, 277
1870, May 4 (16 Stat. at L. 94, chap. 69). Railway land grant.....543, 545
1870, May 5 (16 Stat. at L. 106, chap. 80). Cemeteries.....742, 743
1870, May 6 (16 Stat. at L. 121, chap. 93). Military road..... 273
1870, June 22 (16 Stat. at L. 164, chap. 150). Clerks' accounts.....806, 809
1870, June 30 (16 Stat. at L. 173, chap. 176). Bridge across Niagara river 273
1870, July 1 (16 Stat. at L. 185, chap. 195). Bridge construction..... 273
1870, July 8 (16 Stat. at L. 198, chap. 230). Patent act..... 1095
1870, July 9 (16 Stat. at L. 218, chap. 235). Canal right of way..... 884
1870, July 15 (16 Stat. at L. 304, chap. 292). Private land claims..... 570
1871, Feb. 21 (16 Stat. at L. 419, chap. 62). Contracts by District of Columbia ..... 785
1871, Feb. 24 (16 Stat. at L. 430, chap. 67). Omaha bridge act..... 273
1871, March 3 (16 Stat. at L. 473, chap. 110). Bridge construction ....273, 274
1871, March 3 (16 Stat. at L. 573, chap. 122). Railway aid.....362, 1133
1871, March 3 (16 Stat. at L. 599). Resolution to build bridge over Wabash river ..... 273
1871, April 20 (17 Stat. at L. 19, chap. 33). Railroad bonds..... 777
1871, May 8 (17 Stat. at L. 863). Treaty with Great Britain..... 600
1872, March 1 (17 Stat. at L. 32, chap. 24). Yellowstone Park Reservation..... 246
1872, April 4 (17 Stat. at L. 49, chap. 85). Homestead land grant..... 181
1872, May 2 (17 Stat. at L. 59, chap. 132). Railway aid..... 1133
1872, May 10 (17 Stat. at L. 91, chap. 152). Sale of mineral lands..... 1144
1872, June 1 (17 Stat. at L. 196, chap. 255). Removal of cause to U. S. Supreme Court.....103, 446, 527, 578
1872, June 7 (17 Stat. at L. 262, chap. 322). Shipping commissioners' act .....716, 719
1872, June 8 (17 Stat. at L. 333, chap. 338). Homestead land grant..181, 182
1872, Dec. 17 (17 Stat. at L. 398, chap. 4). Construction of bridges across Ohio river.....110, 954, 955
1873, March 3 (17 Stat. at L. 485, chap. 226). Appropriation for governmental expenses..... 273
1873, March 3 (17 Stat. at L. 575, chap. 234). False pension claims..... 470
1873, March 3 (17 Stat. at L. 605, chap. 274). Homestead land grant..181, 182
1873, March 3 (17 Stat. at L. 627, chap. 324). Improvements in Indian reservation..... 745
1874, April 7 (18 Stat. at L. 27, chap. 80). Jury trial..... .....93, 116, 232, 233, 841, 1061, 1173
1874, June 16 (18 Stat. at L. 72, chap. 285). Army appropriation act.... 1126
1874, June 20 (18 Stat. at L. 111, chap. 331). Act amendatory of act of July 2, 1864..... 273
1874, June 20 (18 Stat. at L. 116, chap. 337). New government for District of Columbia.....785, 786
1874, June 20 (18 Stat. at L. 121, chap. 339). Public marine schools..... 677
1874, June 23 (18 Stat. at L. 256, chap. 469). Fees of clerks, etc..... 806
1875, Feb. 18 (18 Stat. at L. 318, chap. 80). Jurisdiction of court of claims.....149, 151
1875, March 3 (18 Stat. at L. 470, chap. 137). Judiciary act....1032, 1064, 1133
1875, March 3 (18 Stat. at L. 474, chap. 139). Enabling act..... 420
1875, March 3 (18 Stat. at L. 516, chap. 189). Railway land grant..... 279
1876, Feb. 1 (19 Stat. at L. 2, chap. 5). Naturalization act..... 808
1876, March 14 (19 Stat. at L. 211). Duties of commissioners of District of Columbia..... 785
1876, July 12 (19 Stat. at L. 78, chap. 179). Railway mail service..... 404
1876, July 12 (19 Stat. at L. 88, chap. 183). Fees of marshal in charge of prisoners..... 359
1876, Aug. 15 (19 Stat. at L. 202, chap. 297). Real estate in District of Columbia..... 744
1877, Feb. 27 (19 Stat. at L. 240, chap. 69). Duties on merchandise..352, 355
1878, May 7 (20 Stat. at L. 56, chap. 96). Railway aid..... 273
1878, June 8 (20 Stat. at L. 101, chap. 169). Jurisdiction in criminal actions..... 709
1878, June 11 (20 Stat. at L. 102, chap. 180). Permanent government for District of Columbia..... 785
1878, June 19 (20 Stat. at L. 175, chap. 326). Jurisdiction in criminal actions..... 709
1878, June 20 (20 Stat. at L. 241, chap. 352). Railway aid..... 1134
1879, Feb. 25 (20 Stat. at L. 320, chap. 99). Appellate jurisdiction of U. S. Supreme Court..... 574
1879, March 1 (20 Stat at L. 327, chap. 125). Internal revenue stamps... 817
1879, March 3 (20 Stat. at L. 354, chap. 176). Jurisdiction of circuit courts 185
1879, March 3 (20 Stat. at L. 473, chap. 193). American registry to foreign vessel..... 942
1879, June 30 (21 Stat. at L. 43, chap. 52). Drawing of jurors; jury commissioners.....847, 937
1880, Jan. 15 (21 Stat. at L. 673). Treaty with France..... 600



Digitized by Google

1880, Feb. 4 (21 Stat. at L. 63, chap. 18). Jurisdiction in criminal actions.. 709
1880, June 11 (21 Stat. at L. 175, chap. 203). Jurisdiction in criminal actions 709
1880, June 16 (21 Stat. at L. 284. chap. 243). Claims against District of Columbia 735–738
1881, March 3 (21 Stat. at L. 458, chap. 134). Claims against District of Columbia 736–737
1881, March 3 (21 Stat. at L. 505, chap. 140). Jury trial 118
1882, April 11 (22 Stat. at L. 42, chap. 74). Sale and distribution of Indian lands 421
1882, June 5 (22 Stat. at L. 98, chap. 195). Alabama claims 220
1882, July 12 (22 Stat. at L. 162, chap. 290). Jurisdiction over banking associations 601
1882, Aug. 2 (22 Stat. at L. 185, chap. 372). Railway aid 1134
1882, Aug. 7 (22 Stat. at L. 344, chap. 436). Fees of clerks, etc 808
1883, Feb. 14 (22 Stat. at L. 414, chap. 44). Bridges across Ohio river 110, 954, 955
1883, March 3 (22 Stat. at L. 487, chap. 119). Salaries of postmasters..408, 409
1883, March 3 (22 Stat. at L. 511, chap. 121). Tariff act 243, 244
1883, March 3 (22 Stat. at L. 566, chap. 133). Licensing of yachts 942
1883, March 3 (22 Stat. at L. 631, chap. 143). Civil appropriation act.... 807
1884, May 2 (23 Stat. at L. 18, chap. 38). Jurisdiction in criminal actions.. 709
1884, May 17 (23 Stat. at L. 24, chap. 53). Provisions relating to Alaska.... 185
1884, May 29 (23 Stat. at L. 31, chap. 60). Act establishing bureau of animal industry 236
1884, June 26 (23 Stat. at L. 58, chap. 121). Tonnage duties 942
1885, Jan. 20 (23 Stat. at L. 283, chap. 25). French spoliation act 845, 600
1885, Jan. 31 (23 Stat. at L. 296, chap. 46). Forfeiture of railway land grant 543, 545
1885, Feb. 26 (23 Stat. at L. 332, chap. 164). Contract labor act 152, 154
1885, March 3 (23 Stat. at L. 385, chap. 341). Punishment of Indians for crimes 420
1885, March 3 (23 Stat. at L. 437, chap. 353). Appellate jurisdiction of U. S. Supreme Court over circuit court cases 574, 575
1885, March 3 (23 Stat. at L. 488, chap. 354). Revised international regulations 1059, 1061
1885, March 3 (23 Stat. at L. 443, chap. 355). Appeals from final judgments in courts of the District of Columbia 508, 574, 575, 1173
1886, June 19 (24 Stat. at L. 79, chap. 421). Tonnage duties 243, 942, 943
1886, July 6 (24 Stat. at L. 123, chap. 637). Forfeiture of railway lands 777, 781
1886, July 30 (24 Stat. at L. 170, chap. 818). County indebtedness 571
1886, Aug. 4 (24 Stat. at L. 307, chap. 908). Salaries of postmasters 409
1887, Feb. 4 (24 Stat. at L. 379, chap. 104). Interstate commerce act 1033, 1113
1887, Feb. 8 (24 Stat. at L. 388, chap. 119). Indian reservations 421
1887, March 3 (24 Stat. at L. 488, chap. 345). Act establishing investigating commission for railroad 278
1887, March 3 (24 Stat. at L. 505, chap. 359). Suits against the government 149–151, 215, 478, 1130, 1131
1887, March 3 (24 Stat. at L. 552, chap. 373). Judiciary act 156, 229, 434, 435, 601, 1050, 1133, 1134
1887, March 3 (24 Stat. at L. 556, chap. 376). Land patents 795–797, 799
1888, Aug. 8 (25 Stat. at L. 388, chap. 789). Jurisdiction in criminal actions 709
1888, Aug. 13 (25 Stat. at L. 433, chap. 866). Judiciary act 156, 368, 601, 602, 1050, 1133, 1134
1888, Sept. 13 (25 Stat. at L. 479, § 13). Chinese exclusion act 140
1888, Oct. 1 (25 Stat. at L. 504, chap. 1064). Chinese exclusion act.... 141
1889, Feb. 6 (25 Stat. at L. 655, chap. 113). Removal of causes to U. S. Supreme Court 103, 508, 509, 579
1889, Feb. 18 (25 Stat. at L. 668, chap. 150). Entry of public lands for state use 459, 461
1889, Feb. 22 (25 Stat. at L. 676, chap. 180). Admission of Montana as a state 420
1889, March 1 (25 Stat. at L. 783, chap. 333). Jurisdiction in criminal actions 709
1890, April 26 (26 Stat. at L. 72, chap. 187). Jurisdiction in criminal actions 709
1890, May 2 (26 Stat. at L. 81, chap. 182). Government of Oklahoma 198, 526, 527
1890, May 2 (26 Stat. at L. 94, § 31). Government of Indian territory.. 228
1890, July 2 (26 Stat. at L. 209, chap. 647). Interstate commerce act 1011–1028, 1029, 1031, 1033, 1034, 1037
1890, July 10 (26 Stat. at L. 226, chap. 665). Judicial districts of territory 575
1890, Aug. 8 (26 Stat. at L. 313, chap. 728). Sale of intoxicating liquors 645–647
1890, Sept. 19 (26 Stat. at L. 453, chap. 907). Bridge over navigable water 682, 748
1890, Oct 1 (26 Stat. at L. 617, chap. 1244). Tariff act 215–219, 221, 243, 244, 816, 940
1891, March 2 (26 Stat. at L. 822, chap. 496). Property sold for direct taxes 438–442, 476, 477
1891, March 3 (26 Stat. at L. 826, chap. 517). Judiciary act 77, 78, 103, 104, 113, 156, 175–184–186, 190, 846, 869, 508, 510, 514, 575, 588, 601, 633, 711, 746, 788, 811, 812, 913, 1016–1018, 1050, 1064, 1097, 1098
1891, March 3 (26 Stat. at L. 851, chap. 538). Indian depredation act 478, 599, 730, 781



Digitized by Google

1891, March 3 (26 Stat. at L. 854, chap. 539). Court of private land claims ..... 875, 888
1891, March 3 (26 Stat. at L. 905, chap. 540). Appropriation act.....844, 600
1891, March 3 (26 Stat. at L. 1084, chap. 551). Contract labor act.....154, 1049
1891, March 3 (26 Stat. at L. 1093, chap. 559). Land patents.....795
1891, March 3 (26 Stat. at L. 1095, chap. 561). Pre-emption entry of public lands.....362
1892, May 5 (27 Stat. at L. 25, chap. 60). Chinese exclusion act.....141–145
1892, July 20 (27 Stat. at L. 252, chap. 208). Jurisdiction of circuit courts 709
1893, Feb. 9 (27 Stat. at L. 434, chap. 74). Establishment of court of appeals of District of Columbia..... 508, 509, 1067, 1068
1893, March 3 (27 Stat. at L. 745, chap. 220). Clerks' fees..... 809
1894, March 14 (28 Stat. at. L. 43, chap. 39). American registry to foreign vessel..... 942
1894, May 7 (28 Stat. at L. 73, chap. 72). Act to regulate hunting, etc., in Yellowstone Park..... 246
1894, July 12 (28 Stat. at L. 102, chap. 132). Jurisdiction in criminal actions..... 709
1894, July 16 (28 Stat. at L. 111, chap. 138). Judiciary act..... 810
1894, July 30 (28 Stat. at L. 160, chap. 172). Court of appeals of the District of Columbia.....1067, 1068
1894, Aug. 1 (28 Stat. at L. 216, chap. 180). American registry to foreign vessel..... 942
1894, Aug. 1 (28 Stat. at L. 217, chap. 181). American registry to foreign vessel..... 942
1894, Aug. 3 (28 Stat. at L. 219, chap. 190). American registry to foreign vessel..... 942
1894, Aug. 13 (28 Stat. at L. 277, chap. 278). American registry to foreign vessel..... 942
1894, Aug. 18 (28 Stat. at L. 390, chap. 301). Expense of deportation of Chinese.....141, 142
1894, Aug. 23 (28 Stat. at L. 487, chap. 307). Appropriation act.....844, 345
1894, Aug. 27 (28 Stat. at L. 508, chap. 347). American registry to foreign vessel..... 942
1894, Aug. 28 (28 Stat. at L. 509, chap. 349). Tariff act..... 216–218
1895, Jan. 16 (28 Stat. at L. 625, chap. 25). American registry to foreign vessel 942
1895, Jan. 16 (28 Stat. at L. 626, chap. 26). American registry to foreign vessel 942
1895, Feb. 4 (28 Stat. at L. 643, chap. 56). American registry to foreign vessel 942
1895, Feb. 18 (28 Stat. at L. 764, chap. 87). Claims against the District of Columbia.....736–738
1895, March 2 (28 Stat. at L. 910, chap. 189). Sugar bounty act..216, 219, 221
1895, March 2 (28 Stat. at L. 963, chap. 191). Lotteries and lottery traffic 595
1896, March 2 (29 Stat. at L. 42, chap. 39). Land patents..... 795–797, 799
1897, Jan. 20 (— Stat. at L. —, chap. 18). Appeals in case of capital crimes..... 1064
1897, Jan. 25 (— Stat. at L. —). Licensing of yachts..... 943

*Revised Statutes.*

§ 1. Plural and singular number..... 545
8. "Vessel" defined..... 942
102. Refusal of witness to testify.. 504
§§ 102–104. Witnesses.....1157, 1158
§ 161. Departmental government.... 1126
§§ 441, 453, 2478. Public lands..... 623
563, 581. Jurisdiction of district courts..... 709
§ 571. Certain district courts given circuit court jurisdiction ..... 579
§§ 594–604. Cemeteries..... 743
§ 627. Commissioners of circuit courts 578
629. Judiciary.....368, 709, 1064
633. Judiciary..... 1064
637. Judiciary..... 1064
641. Judiciary..... .....89, 1064
643. Judiciary..... 1064
§§ 649, 700. Jury trial ..... 117
650, 652. Division of opinion in civil cases..... 103
§ 651. Division of opinion in criminal cases .....103, 104, 346
§§ 691, 692, 699, 701. Judiciary..... 812
§ 693. Division of opinion in civil cases..... 103
697. Division of opinion in criminal cases .....103, 104, 346
702. Judiciary.....574, 575
705. Judiciary.....573, 574
709. Judiciary..... 136, 512, 588, 674, 675, 715, 821, 852, 854, 982, 987, 1151, 1153
716. Judiciary..... 788
720. Injunctions to stay proceedings..... 788
723. Judiciary..... 758
729. Trial of offenses punishable by death ..... 709
753. Writ of habeas corpus..... 197
761. Disposition of party..... 1048
§§ 763–766. Judiciary.....573, 574, 674
§ 771. Duties of district attorney..... 183
782. Deputy marshal..... 304
802. Jurors.....626, 627
803. Writs of *venire facias*..... 626
804. Petit jury..... 626
808. Grand jury..... 626
819. Challenges..... 107
823. Clerks' fees.....806, 807, 809
§§ 825, 827. Fees of district attorney.. 183
§ 828. Clerks' fees.....847, 806, 807
829. Marshals' fees .....358, 360, 948
833. Clerks' fees.....183, 184, 806, 807
834. Fees of district attorney.....183, 184
§§ 839, 844. Returns of fees.....806, 807
840, 842. Clerks' fees.....806, 808
§ 846. Clerks' fees and accounts..... 809
858. Exclusion of witnesses.....741, 767
859. Witnesses..... 1157
886. Transcripts.....1128, 1129
914. Practice.....446, 537
917. Admiralty proceedings..... 920
§§ 938–941. Admiralty proceedings; customs laws.....919, 920
§ 966. Recovery of interest.....408, 409



Digitized by Google

Rev. Stat. § 970. Judiciary.....82, 943, 944
975. Process in United States courts.....80, 82
989. Judiciary..... 82, 944
1014. Criminal procedure.....1068, 1064
1020. Criminal procedure..... 1064
1024. Charges and indictments..... 356
1025. Indictments..... 729
1030. Marshals' fees..... 360
1035. Verdict of less offense than charged..... 303
1042. Powers of circuit court commissioners..... 578
1043. Capital offenses..... 345
1059. Jurisdiction of court of claims 149
1063. Claims referred by departments.....151, 217
1069. Claims against the government.....1130, 1131
§§ 1079, 1080. Suits against United States ..... 1131
§ 1091. Interest on claims against government ..... 409
1094. Chief signal officer of United States ..... 1126
1195. Colonel of cavalry..... 1126
1342. Article of war .....824, 825
§§ 1556, 1571. Sea service..... 676
1850, 1851, 1891. Territorial legislative power..... 807
§ 1851. Territorial legislative power.. 575
1865. Territorial division into judicial districts.....575, 807
1868. Right to trial by jury..... 116
1871. Jurisdiction of territorial district courts.....807, 808
1874. Judges of territorial district courts .....575, 576
1883. Clerks' fees.....806, 807
1907. Territorial courts..... 575
1909. Appeals from territorial courts 574, 575
1910. Jurisdiction of territorial district court..... 808
1946. Reservation of public lands for schools ..... 459
§§ 1954–1976. Provisions relating to Alaska ..... 185
§ 1977. Judiciary..... 674
1979. Civil rights..... 675
§§ 2021–2023. Deputy marshals..... 358
2165–2174. Naturalization ..... 808
§ 2243. Compensation of registers and receivers ..... 436
2258. Lands not subject to pre-emption..... 176
2263. Assignment of pre-emption rights..... 460
2265. Settlement on land not proclaimed for sale..... 460
2266. Settlement on unsurveyed land ..... 460
2267. Pre-emption claimants..... 460
2268. Public land patent..... 180
2275. Settlements on reserved sections of land.....459, 460
2289. Eligibility to public land patent ..... 176
§§ 2289–2291. Eligibility to public land patent..... 180
2304–2306. Homestead land grant ..... 181, 182
Rev. Stat. § 2306. Homestead land grant to soldiers and sailors.175, 179–181
§§ 2318, 2319. Mineral lands..... 222
2318–2352. Mineral lands..... 1142
§ 2319. Mineral deposits on public lands 600
2320. Mining claims..... 222
2321. Proof of citizenship..... 600
2322. Mining claims..... 222
2324. Locators on mining claims... 222
2325. Patents for mineral lands.... 116, 222, 223
2326. Adverse claim...117, 118, 222, 223
2339. Canal right of way.....333, 334
2340. Canal right of way..... 334
§§ 2387–2389. Entry of public lands for state use..... 459
§ 2449. Title to land..... 1091
§§ 2497, 4131. Registry of foreign vessel 942
§ 2869. Estimated duties on merchandise.....352
§§ 2931, 3011. Duties on merchandise 352, 355
§ 2964. Seizure of vessel for nonpayment of duties..... 944
§§ 3015–3057. Drawbacks..... 244
3312, 3395, 3445, 3446. Internal revenue stamps 817
§ 3426. Internal revenue stamps..... 1083
3477. Transfer of claims against government ..... 416
3893. Obscene books, etc., in mails .. 728
4002. Railway mail service..... 864
4057. Moneys in Postoffice Department .....405, 406
§§ 4132, 4311, 4312. Registry of foreign vessel ..... 942
§ 4136. American registry to foreign vessel..... 942
§§ 4214, 4216. Licensing of yachts..942, 943
4225, 4226. Tonnage duties..... 942
4293–4296, 5368. Crimes against the government..... 915
§ 4596. Seamen's offenses; penalties, etc.....716, 719, 720
§§ 4598, 4599. Deserting seamen..... .....716, 717, 719, 720
§ 4746. False pension claims..... 470
4894. Application for patent ...1068, 1069
4911. Patent cases.....1068, 1069
§§ 4911–4915. Patent cases..... 1067
§ 4912. Appeals in patent cases..... 1066
§§ 4912, 4913. Patent cases..... 1068
§ 4914. Appeals in patent cases..... 1068
4915. Patents obtained by bill in equity.....1068, 1069
§ 5101. Debts entitled to priority.... 409
5190. National banks..... 821
§§ 5114, 5117. Bankruptcy..... 820
5136. National banks.....820, 821
§§ 5136, 5137. Power of national banks over real estate...465, 466
§ 5137. National banks..... 822
5139. National banking associations 845
§§ 5151, 5152. Shareholders of national banking associations ..... .....845, 846, 849, 851
5151, 5234. Assessment upon stockholders of national bank ..... 598
5168, 5169. National banks..... 821
§ 5209. False entries.....630, 782, 1063



Digitized by Google

Rev. Stat. § 5210. National banking associations .....845, 850
5219. Taxation of national banks ..... 1072–1076, 1078
5234. Receiver of national bank..787, 846
5268. Interstate communication..274, 854
5263. Telegraphs..... 55
§§ 5281–5291. Neutrality.....294, 914
§§ 5282. Neutrality.....295, 916
5283. Neutrality ...915, 916, 919–921, 923
5286. Neutrality.....923, 924
5296. Powers of circuit court commissioners..... 578
5341. Manslaughter..... 679
5392. Perjury.....815, 816
5438. False claims against government .....469, 470
5440. Conspiracy ..... 595
5472. Robbery of the mail..... 106
5540. Sentence of imprisonment for crime ..... 359
5541. Execution of sentence of imprisonment.....359, 360
5542. Penitentiary sentences.....359, 360

*Supplement to Revised Statutes.*

P. 901. Judiciary..... 1016

## Alabama.

*Statutes.*

1877, Feb. 3, chap. 89. Liability of railroad for damages to live-stock ..... 619

*Code.*

Chap. 5, tit. 12, art. 2, §§ 1199–1201. Insurance companies not incorporated within the state.. 472
5, tit. 12, art. 2, §§ 1205–1207. Punishment of agents of foreign insurance companies for violation of statute .....472–474

*Code, 1876.*

§ 1715. Attorney's fee ..... 670

*Criminal Code.*

§§ 4537–4539. Jailers' duties..... 366
§ 4555. Jailers' duties..... 366

## Arizona.

*Revised Statutes.*

§ 949. Judiciary..... 196
2680. Taxation..... 571
2681. Definition of real estate..... 571

*Revised Statutes, 1887.*

Tit. 36, §§ 2145–2155. Action for damages..... 195
§ 2685. Delinquent taxes; list of delinquents..... 569
§§ 2686, 2687. Delinquent taxes; action by court..... 569
2690, 2693. Delinquent taxes; sale of property..... 569

*Session Laws, 1891.*

P. 146. Taxes and assessments..... 569

## Arkansas.

*Statutes.*

1859, Feb. 16, § 1. Assignments..... 526
1875, Feb. 8. Mansfield's Dig. § 5557. Liability of railroad company for damages 619
1883, Feb. 28. Assignments..... 526

*Mansfield's Digest.*

§ 4868. Judiciary..... 229
5141. Pleading..... 527
5142. Special finding..... 527
Chap. 119. Pleading and practice..... 527
P. 219. Assignments..... 526

## California.

*Constitution.*

Art. 4, § 26. Suit to recover money..... 1068
14, § 1. Water under public control..... 888

*Statutes.*

1858, chap. 66, p. 52. Title to lands... 888
1887, March 7. Irrigation act..... 886, 889, 893, 894

*Code Civil Procedure.*

§ 339. Statute of limitations.....486, 488
471. Amendment of complaint..... 488
578. Practice act..... 488

*Deering's Code Civil Procedure.*

§ 1880. Incompetent witnesses..... 1148

## Colorado.

*Territorial Statutes.*

1874, Jan. 13 (Laws 1874, p. 225), § 3. Liability for damage by fire..... 619

*General Laws, 1877.*

Art. 2237, § 3. Liability for damage by fire..... 619

*General Statutes, 1883.*

§§ 1037, 2798. Liability for damage by fire..... 619

## Connecticut.

*Colonial Laws, 1750.*

P. 247. Personal liability for damages. 616

*Statutes.*

1789 (Acts and Laws 1796), p. 883. Liability of owner of dog for damages..... 616
1840, chap. 26. Liability of railroad company; proof of negligence 616
1881, chap. 92. Liability of railroad company for damages..... 616

*General Statutes, 1875.*

P. 267, § 3. Liability of owner of dog for damages..... 616
489, § 6. Personal liability for damages ..... 616
Chap. 11, § 29. Liability of railroad company for damages; proof of negligence..... 616



Digitized by Google

*Revised Statutes, 1888.*

§ 1344. Personal liability for damages. 617
3761. Liability for damages..... 616

**District of Columbia.**

*Compiled Statutes.*

Chap. 28, § 7. Statute of frauds..... 502

*Revised Statutes.*

§§ 281–283, 310, 319. Establishment of separate schools, etc., for white and colored races..... 258
§ 466. Limitation of liability..... 539
780. Appeal in patent case..... 1067
846. Judiciary.....573, 574
§§ 876, 877. Law of evidence in District..... 742

**Florida.**

*Statutes.*

1893, June 2 (Laws 1893, chap. 4115). State license tax on express companies..... 587

**Georgia.**

*Constitution.*

Art. 6 § 2, ¶ 6. Judiciary..... 950

*Statutes.*

1762, March 4. Sabbath-day observances .....168, 169
1850, Feb. 11. Running of freight trains on Sunday..... 169
1889, Oct. 16. Taxation of railroad property.....455, 458
1890, Dec. 24. Taxation of railroad property.....455, 458

*Laws.*

1833, p. 246. Incorporation act..... 455
1835, p. 217. Construction, powers, and privileges of Central Railroad & Banking Company.455, 456, 458

*Code.*

§ 4271. Judiciary..... 950

*Code, 1882.*

§ 4310. Punishment for violation of § 4578..... 168
4578. Running of freight trains on Sunday..... 168
4579. Sabbath-day observances..... 169

**Idaho.**

*Revised Statutes, 1887.*

§ 4040. Title to land..... 1093
4556. Public lands..... 1093

**Illinois.**

*Constitution.*

Art. 2, § 2. Due process of law..... 982
2, § 13. Taking of private property without just compensation .....982, 988

*Constitution, 1848.*

Art. 13, § 6. Trial by jury..... 987

*Constitution, 1870.*

Art. 2, § 5. Trial by jury..... 987

*Statutes.*

1851, Feb. 10. Railway aid..... 110
1867, Feb. 25. Railroad connections.... 110
1872, April 10 (Laws 1871–72, p. 218). Incorporation of cities and villages.....982, 988, 990
1874, March 31 (Rev. Stat. 1874, chap. 114, § 37). Railroad crossings..... 991

*Revised Statutes, 1889.*

Chap. 114, § 88. Passenger trains..... 110

*Starr & Curtis' Annotated Statutes.*

Vol. 1, art. 5, pp. 452, 472, § 89. Taking of property without just compensation..... 982
Vol. 1, p. 487, §§ 14, 15. Just compensation for land ..... 982
Vol. 2, p. 1927. Railroad crossings..... 991

**Indiana.**

*Statutes.*

1861, June 4 (Laws 1861, chap. 39, p. 75). Street railways..... 1116, 1117
1891, March 3 (Laws 1891, chap. 55, p. 68). Street railroad..... 1118
1891, March 6, chap. 91. Taxation..56, 58, 59
1891, March 6 (Acts, chap. 99, §§ 59–89). Taxation upon all property within jurisdiction of state..... 726
1891, March 9 (Laws 1891, chap. 97, p. 137). City charter.....1116, 1117
1893, March 6 (Acts, chap. 171). Taxation of telegraph company..... 54, 58, 59, 726, 727

*Burns' Statutes.*

1894, §§ 7915, 7916. Legality of taxes assessed ..... 727

**Iowa.**

*Statutes.*

1851, Feb. 5 (Laws 1850–51, chap. 59, p. 169). Act securing to state railway land grant.. 555
1853, Jan. 18 (Laws 1852, chap. 12, p. 29). Act securing to state swamp lands granted by Congress..555, 556
1855, Jan. 25 (Laws 1854–56, chap. 110, p. 173). Amendatory of act of Jan. 18, 1855..... 556
1855, Jan. 25 (Laws 1854–56, chap. 188, p. 261). Moneys arising from disposition of swamp lands..... 555
1856, July 14. Railway aid ..... 556
1857, Jan. 28. Railway aid..... 556
1886, April 5. Sale of intoxicating liquors..... 643

*McClain's Code.*

1888, vol. 1, p. 353, § 1387. Taxation.. 666

*Code, 1873.*

§ 1289. Liability of railway for damages ..... 617

*Revision, 1860.*

Chap. 47, p. 154, art. 4. Moneys arising from disposi- of swamp lands 556
Chap. 47, p. 154, art. 5. Title to swamp lands..... 556
Chap. 55, p. 215, art. 2. Railway aid.. 556
Chap. 55, p. 222, art. 5. Railway aid.... 556

**Kansas.**

*Statutes.*

1893, chap. 109. Execution sale..... .98, 101

*General Statutes.*

Vol. 1, chap. 23, p. 443, § 112. Powers of railway and other corporations..... 276

*General Statutes, 1889.*

Chap. 82, § 326. Due process of law..79, 81



Digitized by Google

*Code Criminal Procedure.*
§ 327. Due process of law..... 82

**Kentucky.**

*Constitution.*
§§ 171, 172. Ad valorem tax; uniformity of taxation.....964, 965
§ 174. Taxation.....964, 965

*Statutes.*
1834, Feb. 22 (Acts 1833, pp. 544, 548). Incorporation act.....561–564
1839, Feb. 23 (Acts 1838–39, p. 371). Stockholders in railroad corporation..... 561
1851, March 22 (Acts 1850–51, p. 479). Stockholders in railroad corporation.....561, 563
1856, Feb. 14 (Laws 1855, chap. 148, p. 15). Legislative jurisdiction over corporations..... 562
1865, Dec. 11 (Priv. Acts 1865, p. 2). Tolls of railroad corporation.....562, 564, 565
1872, Feb. 13 (Laws 1871–72, p. 23). Railway aid..... 562
1884, May 12 (Laws 1884, p. 1260). Tax laws ..... 1175
1890, May 24 (Laws 1889–90, p. 1893). Tolls .....560–562, 564, 566, 567

*General Statutes.*
Chap. 92. Taxation..... 1175

*General Statutes, 1888.*
Chap. 68, p. 861, § 8. Legislative jurisdiction over corporations.... 562

*Barbour and Carroll's Statutes.*
§ 4019. Rates of taxation ..... 955
4020. Subjects of taxation....955, 956, 964
4058. Return of schedule to taxpayer 964
4077. Board of valuation and assessment.....955–958, 963, 964
4078. Valuation of taxable property.....955–957, 963, 964
4079. Assessment of corporation franchises.....956, 957, 963, 964
4080. Valuation of capital stock.....956, 957, 963
4081. Valuation of capital stock.... 963

*Code, 1895.*
P. 472. Appellate jurisdiction of superior court..... 1175

**Louisiana.**

*Constitution.*
Art. 236. Foreign corporations..... 834

*Constitution, 1879.*
Art. 207. Exemption from taxation... 953
Art. 258. Monopoly features in corporation charters.....520, 521

*Statutes.*
1855, March 15 (Laws 1855, p. 270). No. 255. Exemption from taxation.....952, 953
1858, p. 114. Assessments for local improvements..... 895
1877 (Ex. Sess.) No. 33. Incorporation act.....519, 522, 523
1890, No. 106, § 56. Attorney's fee.... 453
1890, No. 111, p. 152. Act providing separate railway carriages for white and colored races..... 257
1894, No. 60. Marine insurance companies not complying with law .....834, 837

*Civil Code.*
2475. Warranty..... 204
2501. Warranty..... 204
2505. Warranty..... 204
2646, 2647. Warranty..... 204

**Maine.**

*Statutes.*
1842, chap. 9, § 5. Liability of railroad company for damages absolute 616

*Revised Statutes, 1883.*
Chap. 51, § 64. Liability of railroad company for damages absolute.... 616

**Maryland.**

*Statutes.*
1715 (1 Kilty's Laws, chap. 23). Statute of limitations.....539, 767
1765 (1 Kilty's Laws, chap. 12). Limitation act..... 540
1780 (2 Kilty's Laws, chap. 45). Confiscation act..... 778
1890, chap. 370. Authority of mayor and city council..... 1163

**Massachusetts.**

*Colonial Laws.*
1660, p. 31. Common-law liability..... 615
1672, p. 51. Common-law liability..... 615
Ed. 1889, pp. 251, 256. Deserting seamen.....719, 722

*Colonial Records.*
1631, vol. 1, 90. Common-law liability 615
1639, vol. 1, 281. Common-law liability 615
1646, vol. 3, 102. Common-law liability 615

*Statutes.*
1837, chap. 226. Liability of railroad company for damages absolute..... 615
1840, chap. 85. Liability of railroad company for damages absolute.....615, 616, 619
1874, chap. 372, § 106. Liability of railroad company for damages absolute..... 615

*General Statutes, 1860.*
Chap. 63, § 101. Liability of railroad company for damages absolute..... 615

*Public Statutes.*
Chap. 13, §§ 38–40, 42. Taxation of telegraph and other like companies..... 55
Chap. 157, §§ 96, 98. Insolvency....465, 466

*Public Statutes, 1882.*
Chap. 112, § 214. Liability of railroad company for damages absolute..... 615

**Michigan.**

*Statutes.*
1875 (Sess. Laws 1875), No. 226. Sale of intoxicating liquors..... 643
1885, chap. 234. Taxing of attorney's fee in action for damages..... 670

**Minnesota.**

*Statutes.*
1881, March 8. Minneapolis incorporation act..... 176



Digitized by Google

1898, March 31 (Laws 1893, chap. 60, p. 173). Stoppage of trains at county seats..... 1065

*General Statutes, 1878.*

Chap. 8, §§ 102, 129, 148, 174, 195, 220, 227, 258. County seats..... 1066

*Special Laws, 1865.*

Chap. 2, p. 19. Railway land grant.... 1065

**Mississippi.**

*Statutes.*

1859, Nov. 23 (Laws 1859, chap. 14, p. 51). Exemption of corporation from taxation.....591, 593

1867, Feb. 13 (Laws 1867, p. 237). Act appointing board of levee commissioners..... 595

1867, Feb. 20 (Laws 1867, chap. 464, p. 635). Act reviving charter of railroad company.....591, 593

1870, July 21 (Laws 1870, chap. 220, p. 566). Subscriptions to stock of railroad company.....592, 593

1872, March 16 (Laws 1872, chap. 75, p. 313). Railway aid..... 594

1882, p. 110. Judiciary..... 670

**Missouri.**

*Constitution.*

Art. 12, § 5. Corporate rights and privileges..... 618

*Statutes.*

1853, Feb. 24 (Laws 1853, pp. 143, 144, §§ 51, 56). Statute requiring railroad companies to fence line of road... 617

1868, March 23. Railway aid..... 100

1875, Feb. 18 (Laws 1875, p. 131). Railroad company required to maintain fences and cattle guards..... 618

1887, March 31 (Laws 1887, p. 101). Liabilities of railroad company.. 618

*General Statutes, 1865.*

Chap. 63, § 43. Railroad companies required to fence line of road..... 618

*Revised Statutes, 1889.*

§ 2611. Railroad company required to maintain fences and cattle guards..... 618

§ 2615. Liability of railroad company for damage by fire..... 618

*Wagner's Statutes.*

Vol. 1, chap. 37, art. 2, § 43. Railroad company required to maintain fences and cattle guards..... 618

**Montana.**

*Statutes.*

1876, Feb. 11 (Laws 1876, chap. 63). Widow's dower..... 221

*Compiled Laws.*

P. 248, § 2021. Widow's dower..... 221

*Compiled Statutes, 1887.*

§ 697. Liability of corporation to employee..... ..

**Nebraska.**

*Statutes.*

1887, chap. 60. Act prohibiting unjust discrimination in care and transportation of property..493, 494

*Compiled Statutes, 1887.*

Chap. 16, p. 248, § 94. Powers of railroad companies..... 276

**New Hampshire.**

*General Laws, 1878.*

Chap. 162, §§ 8, 9. Liability of railroad company for damages absolute 616

*General Statutes, 1867.*

Chap. 148, §§ 8, 9. Liability of railroad company for damages absolute 616

*Revised Statutes, 1843.*

Chap. 142, §§ 8, 9. Liability of railroad company for damages absolute 616

*Revised Statutes, 1883.*

§§ 1096, 3581. Liability of railroad company for damages..... 616

**New Mexico.**

*Statutes.*

1851–52 (Kearney's Code, 112). Municipal charter of Sante Fé..... 875

1851–52 (Kearney's Code, 272). Repeal of charter of Santa Fé..... 875

1862, Jan. 18, p. 24. District courts of territory..... 576

1874, Jan. 3, chap. 26, p. 47, § 3. Special terms of district courts .....576, 577

1874, Jan. 6, chap. 27, p. 49, § 3. Special terms of district courts .....576, 577

1876, chap. 2, p. 31, § 2. Judiciary.... 844

1889, chap. 1, § 4. Judiciary..... 232

1889, chap. 45, p. 87. Special findings.. 840

1893, Feb. 22 (Laws 1893, chap. 84, p. 51). District courts of territory... 576

1893, chap. 61, p. 108, § 20. Expenses of district courts..... 577

*Compiled Laws.*

§ 2060. Suits before supreme court..231, 233

2190. Suits before supreme court..... 231

*Compiled Laws, 1884.*

§§ 531, 532, 540. District courts of territory ..... 577

§ 537. Adjournment of terms..... 577

§§ 543, 551–553. District courts of territory..... 576

§ 1852. Judges of district courts..... 575

*Revised Laws, 1865.*

Chap. 18, § 4. District courts of territory..... 576

**New York.**

*Statutes.*

1862, chap. 482, p. 956, § 1. Maritime lien on vessel.....514, 712

1885, chap. 483. Inheritance tax..... 287

1886, chap. 385. Public use of water privileges ..... 1167

1887, June 18 (Laws 1887, chap. 616, p. 828). Forbidding heating of cars by stoves..... 853



Digitized by Google

1888, April 27 (Laws 1888, chap. 189, p. 250). Amendment of act June 18, 1887 ..... 853
1891, chap. 215. Inheritance tax ..... 287
1892, §§ 9, 10. Water commissioners ..... 1168, 1169
1892, chap. 399. Taxable transfers of property ..... 287

*Code Criminal Procedure.*

Pt. 6, chap. 1, tit. 4, §§ 828, 830. Fugitive from justice ..... 1047

**North Carolina.**

*Statutes.*

1834 (2 Rev. Stat. 335). Contracts ..... 186

**Ohio.**

*Statutes.*

1893, April 27 (90 Laws, 330). Taxation of express companies ..... 700, 701
1894, May 10 (91 Laws, 220). Taxation of express companies ..... 700, 701

*Laws.*

Vol. 91, 237. Taxation of express companies ..... 700

**Pennsylvania.**

*Statutes.*

1833, April 8 (Laws 1832–33, chap. 128, § 9). Devises of real estate ..... 932, 933
1855, April 27 (Laws 1857, chap. 387, p. 368, § 1). Real estate ..... 933, 934
1870, March 31 (Laws 1870, p. 42). Exemption of certain property from taxation ..... 1074

*Purdon's Digest.*

12th ed. p. 810. Real estate ..... 933
12th ed. p. 2103. Real estate ..... 933

**South Carolina.**

*Statutes.*

1891 (5 S. C. Stat. 169). Mortgage creditors ..... 440
1895, Jan. 2 (Laws 1894, p. 721, No. 518). State dispensary law ..... 633, 642–647, 658
1896, March 6. Sale of intoxicating liquors ..... 645

*General Statutes, 1882.*

§ 1511. Liability for damage by fire ..... 619

**Texas.**

*Statutes.*

1840, Jan. 18. Statute of frauds ..... 498
1879, July 14. Sale of public lands ..... 87, 136–139
1881, March 11. Amendatory act ..... 87
1883, Jan. 22. Sale of public lands ..... 136, 137, 139
1887, chap. 131, p. 120, § 6. Powers and liabilities of railroad corporation ..... 583

*General Laws, 1889.*

Chap. 197, p. 131. Attorney's fee ..... 672

*Revised Statutes.*

§ 3908. Public land surveys ..... 139

*Revised Statutes, 1879.*

Art. 548. Statute of frauds ..... 504
Art. 2464. Statute of frauds ..... 498, 504
§§ 2899–2909. Action for damages ..... 195

*Sayles' Civil Statutes.*

Arts. 2899–2909. Action for damages ..... 195

*Sayles' Civil Statutes Supplement.*

Art. 4266a, p. 768. Attorney's fee ..... 672

*Paschal's Digest.*

Vol. 1, art. 997. Statute of frauds ..... 504
Vol. 1 (4th ed) art. 3875. Statute of frauds ..... 498

**Utah.**

*Statutes.*

1859, Jan. 21 (Laws 1851–70, p. 71). Fee bill ..... 806
1874, Feb. 20 (Laws 1874, chap. 28, p. 37). Fee bill ..... 806
1890, March 12 (Laws 1890, p. 24, § 21). Lien law ..... 332, 333, 335, 337
1892, March 10 (Laws 1892, p. 46). Jury trial ..... 1173

*Compiled Laws.*

Vol. 2, § 3006. Jurisdiction of supreme court ..... 93
Vol. 2, § 3126. Jury trial ..... 116

*Compiled Laws, 1876.*

§ 2378. Fee bill ..... 807

*Compiled Laws, 1888.*

Vol. 1, p. 743, § 2087. Damages by cattle ..... 679
Vol. 2, § 3810. Lien law ..... 331–333
Vol. 2, § 3814. Lien law ..... 332, 333
Vol. 2, § 5441. Fee bill ..... 807
Vol. 2, tit. 10, chap. 2, p. 427. Incompetent witnesses ..... 1148

*Code.*

§ 3340. Jury trial ..... 118
§ 3378. Waiver of jury ..... 118

*Code Civil Procedure.*

§ 3468. Action or suit ..... 116

**Washington.**

*Constitution.*

Art. 27, § 2. Power of attorney ..... 73

*Statutes.*

1881, December 1. Limitation of actions 75
1882, February 2. Power of attorney .. 73
1888, Feb. 2. Limitation of actions .... 75
1891, March 9 (Laws 1891, p. 280, § 21). Taxation of national banks .. 1072

*General Statutes.*

§ 1447. Power of attorney ..... 73, 75

*Code, 1881.*

§ 26. Limitation of actions ..... 75
§ 760. Limitation of actions ..... 76

*Code Procedure.*

§ 5. Judiciary ..... 74

*Hill's Code Procedure.*

Vol. 1, p. 506. Power of attorney ..... 73
Vol. 2, p. 87. Limitation of actions .... 75

**Wisconsin.**

*Statutes.*

1882, February 16. Revocation of land grant ..... 61
1883, March 7. Revocation of land grant 61



Digitized by Google

# CASES

ARGUED AND DECIDED

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

IN

OCTOBER TERM, 1895.

---

Vol. 163.

Digitized by Google

Digitized by Google

# REFERENCE TABLE

OF SUCH CASES

# DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1895,

AND REPORTED HEREIN,

VOL. 163,

AS ALSO APPEAR IN

## OFFICIAL REPORTER'S EDITION.

| Off. Rep. 163 U. S. | Title. | Here in. |
|---|---|---|
| 1–3 | Western U. Teleg. Co. v. Taggart | 49 |
| 3–7 | " " " " | 50 |
| 7–8 | " " " " | 51 |
| 8–11 | " " " " | 52 |
| 11 | " " " " | 53 |
| 14–15 | " " " " | 54 |
| 15–18 | " " " " | 55 |
| 18–21 | " " " " | 56 |
| 21–23 | " " " " | 57 |
| 23–26 | " " " " | 58 |
| 26–29 | " " " " | 59 |
| 29–30 | " " " " | 60 |
| 31–33 | Farmers' Loan & T. Co. v. Chicago, P. & S. R. Co. | 60 |
| 33–35 | " " " " | 61 |
| 35–38 | " " " " | 62 |
| 38–41 | " " " " | 63 |
| 41–44 | " " " " | 64 |
| 44–47 | " " " " | 65 |
| 47–49 | " " " " | 66 |
| 49 | Kirk v. United States | 66 |
| 49–52 | " " | 67 |
| 53–55 | " " | 68 |
| 55–56 | " " | 69 |
| 56–57 | Wiggan v. Conolly | 69 |
| 57–60 | " " | 70 |
| 60–63 | " " | 71 |
| 63–63 | " " | 72 |
| 63–65 | Dibble v. Bellingham Bay Land Co. | 72 |
| 65–68 | " " " " | 73 |
| 68–71 | " " " " | 74 |
| 71–74 | " " " " | 75 |
| 74 | " " " " | 76 |
| 75–76 | Cornell v. Green | 76 |
| 76–79 | " " | 77 |
| 79–81 | " " | 78 |
| 81–82 | Lowe v. Kansas | 78 |
| 82–85 | " " | 79 |
| 85–88 | " " | 80 |
| 88–91 | " " | 81 |
| 91–92 | " " | 82 |
| 93 | Northern P. R. Co. v. Egeland | 82 |
| 93–96 | " " " | 85 |
| 96–99 | " " " | 86 |
| 99 | " " " | 87 |
| 100–101 | Telfener v. Russ | 87 |
| 101 | Murray v. Louisiana | 87 |
| 102–104 | " " | 88 |
| 104–107 | Murray v. Louisiana | 89 |
| 107–109 | " " | 90 |
| 109–110 | Salina Stock Co. v. Salina Creek Irrig. Co. | 90 |
| 110–113 | " " " " | 91 |
| 113–116 | " " " " | 92 |
| 116–118 | " " " " | 93 |
| 118 | Barnitz v. Beverly | 93 |
| 118–119 | " " | 94 |
| 119 | " " | 95 |
| 119–120 | " " | 96 |
| 120–121 | " " | 97 |
| 121–124 | " " | 98 |
| 124–127 | " " | 99 |
| 127–130 | " " | 100 |
| 130–132 | " " | 101 |
| 132 | United States v. Rider | 101 |
| 133–135 | " " | 102 |
| 135–138 | " " | 103 |
| 138–140 | " " | 104 |
| 140 | Harrison v. United States | 104 |
| 141 | " " | 106 |
| 141–142 | " " | 107 |
| 142–144 | Illinois C. R. Co. v. Illinois | 107 |
| 144–147 | " " " | 108 |
| 147–149 | " " " | 109 |
| 149–152 | " " " | 110 |
| 152–154 | " " " | 111 |
| 155 | Webster v. Daly | 111 |
| 155–158 | " " | 112 |
| 158–159 | " " | 113 |
| 160 | Perego v. Dodge | 113 |
| 160–161 | " " | 114 |
| 161–163 | " " | 115 |
| 163–164 | " " | 116 |
| 164–166 | " " | 117 |
| 166–168 | " " | 118 |
| 169 | Singer Mfg. Co. v. June Mfg. Co. | 118 |
| 169–171 | " " " " | 119 |
| 171–174 | " " " " | 120 |
| 174–177 | " " " " | 121 |
| 177–180 | " " " " | 122 |
| 180–182 | " " " " | 123 |
| 182–185 | " " " " | 124 |
| 185–188 | " " " " | 125 |
| 188–191 | " " " " | 126 |
| 191–194 | " " " " | 127 |
| 194–197 | " " " " | 128 |
| 197–199 | " " " " | 129 |



Digitized by Google

| Off. Rep. 103 U. S. | Title. | Here in. |
|---|---|---|
| 199–202 | Singer Mfg. Co. v. June Mfg. Co. | 130 |
| 202–204 | " " " " | 131 |
| 205 | Singer Mfg. Co. v. Bent | 131 |
| 205–207 | " " " | 132 |
| 207 | Bacon v. Texas | 132 |
| 208–209 | " " | 133 |
| 209–212 | " " | 134 |
| 212–215 | " " | 135 |
| 215–218 | " " | 136 |
| 218–221 | " " | 137 |
| 221–224 | " " | 138 |
| 224–227 | " " | 139 |
| 227–228 | " " | 140 |
| 228–230 | Wong Wing v. United States | 140 |
| 230–232 | " " " | 141 |
| 232–235 | " " " | 142 |
| 235–238 | " " " | 143 |
| 238–241 | " " " | 144 |
| 241–244 | " " " | 145 |
| 244 | United States v. Winchester & P. R. Co. | 145 |
| 244–246 | " " " | 146 |
| 246–249 | " " " | 147 |
| 249–250 | " " " | 148 |
| 251–253 | " " " | 149 |
| 253–256 | " " " | 150 |
| 256–258 | " " " | 151 |
| 258 | United States v. Laws | 151 |
| 258–260 | " " | 152 |
| 260–263 | " " | 153 |
| 263–266 | " " | 154 |
| 266–268 | " " | 155 |
| 269 | Edwards v. Bates County | 155 |
| 269–271 | " " " | 156 |
| 271–273 | " " " | 157 |
| 273–274 | Hanford v. Davies | 157 |
| 274–277 | " " | 158 |
| 277–280 | " " | 159 |
| 280 | " " | 160 |
| 280–282 | Rio Grande W. R. Co. v. Leak | 160 |
| 282–285 | " " " | 161 |
| 285–288 | " " " | 162 |
| 288–289 | " " " | 163 |
| 289–291 | Knights of Pythias v. Kalinski | 163 |
| 291–294 | " " " " | 164 |
| 294–297 | " " " " | 165 |
| 297–299 | " " " " | 166 |
| 299 | Hennington v. Georgia | 166 |
| 300–303 | " " | 168 |
| 303–306 | " " | 169 |
| 306–308 | " " | 170 |
| 308–311 | " " | 171 |
| 311–314 | " " | 172 |
| 314–317 | " " | 173 |
| 317–319 | " " | 174 |
| 319 | Huntington v. Saunders | 174 |
| 319–321 | " " | 175 |
| 321–322 | Burfenning, v. Chicago, St. P. M. & O. R. Co. | 175 |
| 322–325 | " " " " | 176 |
| 325–327 | Union Nat. Bank v. Louisville, N. A. & C. R. Co. | 177 |
| 327–331 | " " " | 178 |
| 331 | " " " | 179 |
| 331–333 | Webster v. Luther | 179 |
| 333–336 | " " | 180 |
| 336–339 | " " | 181 |
| 339–342 | " " | 182 |
| 342 | " " | 183 |
| 342–345 | Hilborn v. United States | 183 |
| 345–346 | Hilborn v. United States | |
| 346–347 | The Coquitlam v. United States | |
| 347–350 | " " | |
| 350–353 | " " | |
| 353 | Texas & P. R. Co. v. Gentry | |
| 354 | " " " | |
| 354–357 | " " " | |
| 357–360 | " " " | |
| 360–363 | " " " | |
| 363–366 | " " " | |
| 366–368 | " " " | |
| 369 | Southern P. Co. v. Tomlinson | |
| 369–372 | " " " | |
| 372–375 | " " " | |
| 375–376 | " " " | |
| 376–377 | Talton v. Mayes | |
| 377–380 | " " | |
| 380–383 | " " | |
| 383–385 | " " | |
| 385 | Meyer v. Richards | |
| 386–389 | " " | |
| 389–391 | " " | |
| 391–394 | " " | |
| 396–398 | " " | |
| 398–401 | " " | |
| 401–404 | " " | |
| 404–407 | " " | |
| 407–410 | " " | |
| 410–413 | " " | |
| 413–415 | " " | |
| 416–417 | Bank of Commerce v. Tennessee, Memphis | |
| 417–420 | " " " | |
| 420–423 | " " " | |
| 423–426 | " " " | |
| 426–429 | United States v. Realty Co. / United States v. Gay | |
| 429–432 | " " | |
| 432–435 | " " | |
| 435–438 | " " | |
| 438–441 | " " | |
| 441–443 | " " | |
| 443–444 | " " | |
| 445–446 | Black v. Elkhorn Min. Co. | |
| 446–449 | " " " | |
| 449–452 | " " " | |
| 452 | " " | |
| 452–454 | Faust v. United States | |
| 454–456 | " " | |
| 456–457 | Eddy v. La Fayette | |
| 457–460 | " " | |
| 460–461 | " " | |
| 461–464 | " " | |
| 464–467 | " " | |
| 467 | " " | |
| 468–469 | Grayson v. Lynch | |
| 469–472 | " " | |
| 472–475 | " " | |
| 475–478 | " " | |
| 478–480 | " " | |
| 480–483 | " " | |
| 483–485 | " " | |
| 485 | Union P. R. Co. v. James | |
| 486–487 | " " " | |
| 487–489 | " " " | |
| 489–491 | " " " | |
| 491 | Missouri, K. & T. R. Co. v. Cook | |
| 491–494 | " " " " | |
| 494–497 | " " " " | |
| 497–498 | " " " " | |
| 499–500 | United States v. Allen | |




Digitized by Google

| Off. Rep. 162 U. S. | Title. | Herein. |
|---|---|---|
| [illegible] | United States v. Allen | 243 |
| [illegible] | " " | 244 |
| [illegible] | Ward v. Race Horse | 244 |
| [illegible] | " " | 245 |
| [illegible] | " " | 246 |
| [illegible] | " " | 247 |
| [illegible] | " " | 248 |
| [illegible] | " " | 249 |
| [illegible] | " " | 250 |
| [illegible] | Indiana v. Kentucky | 250 |
| [illegible] | " " | 251 |
| [illegible] | " " | 252 |
| [illegible] | " " | 253 |
| [illegible] | " " | 254 |
| [illegible] | " " | 255 |
| [illegible] | " " | 256 |
| [illegible] | Plessy v. Ferguson | 256 |
| [illegible] | " " | 257 |
| [illegible] | " " | 258 |
| [illegible] | " " | 259 |
| [illegible] | " " | 260 |
| [illegible] | " " | 261 |
| [illegible] | " " | 262 |
| [illegible] | " " | 263 |
| [illegible] | " " | 264 |
| [illegible] | " " | 265 |
| 564 | Union P. R. Co. v. Chicago, R. I. & P. R. Co. | |
| | Union P. R. Co. v. Chicago, M. & St. P. R. Co. | 265 |
| [illegible] | " " " | 266 |
| [illegible] | " " " | 267 |
| [illegible] | " " " | 268 |
| [illegible] | " " " | 269 |
| [illegible] | " " " | 270 |
| [illegible] | " " " | 271 |
| [illegible] | " " " | 272 |
| [illegible] | " " " | 273 |
| [illegible] | " " " | 274 |
| [illegible] | " " " | 275 |
| [illegible] | " " " | 276 |
| [illegible] | " " " | 277 |

| Off. Rep. 163 U. S. | Title. | Herein. |
|---|---|---|
| 599–602 | Union P. R. Co. v. Chicago, R. I. & P. R. Co. | |
| | Union P. R. Co. v. Chicago, M. & St. P. R. Co. | 278 |
| 602–605 | " " " | 279 |
| 605–608 | " " " | 280 |
| 608–611 | " " " | 281 |
| 611 | Union P. R. Co. v. Chicago, R. I. & P. R. Co. | |
| | Union P. R. Co. v. Chicago, M. & St. P. R. Co. | 282 |
| 612–613 | Lucas v. United States | 282 |
| 613–616 | " " | 283 |
| 616–618 | " " | 284 |
| 618 | Brown v. Wygant | 284 |
| 619–631 | " " | 285 |
| 621–624 | " " | 286 |
| 624 | " " | 287 |
| 625–627 | United States v. Perkins | 287 |
| 627–629 | " " | 288 |
| 629–631 | " " | 289 |
| 631 | United States v. Fitch | 289 |
| 632 | Wiborg v. United States | 289 |
| 633–635 | " " | 290 |
| 635–638 | " " | 291 |
| 638–641 | " " | 292 |
| 641–644 | " " | 293 |
| 644–647 | " " | 294 |
| 647–650 | " " | 295 |
| 650–653 | " " | 296 |
| 653–655 | " " | 297 |
| 655–658 | " " | 298 |
| 658–661 | " " | 299 |
| 661–662 | " " | 300 |
| 662–664 | United States v. Ball ("Ball v. United States") | 300 |
| 664–667 | " " | 301 |
| 667–669 | " " | 302 |
| 669–672 | " " | 303 |
| 672–674 | " " | 304 |
| 675 | Memorandum Cases | 305 |
| 712 | " " | 320 |



Digitized by Google

Digitized by Google

# THE DECISIONS

OF THE

# Supreme Court of the United States

AT

## OCTOBER TERM, 1895.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

1] WESTERN UNION TELEGRAPH COMPANY, *Plf. in Err.*,
v.
THOMAS TAGGART, as Auditor of Marion County, Indiana, ET AL.

(See S. C. Reporter's ed. 1-30.)

*Taxation of telegraph company—burden upon interstate commerce.*

1. A taxation of franchises granted by the United States to a telegraph company, or of its property outside of the state, is not made by assessing for taxation its property within the state at such proportion of the entire value of its property as the length of its lines within the state bears to the total length of its lines, after excluding real estate and machinery subject to local taxation, and by taking the aggregate value of its shares, if they have a market value, or, if not, the actual value thereof, or of the capital of the company, in ascertaining the true cash value of the entire property.
2. An unlawful burden upon interstate commerce is not imposed by taxing property of a telegraph company within the state according to the proportion of its whole property, exclusive of real estate and machinery subject to local taxation, which the length of its lines within the state bears to the total length of its lines, and by taking the market value of shares of its stock in fixing the valuation of its entire property.

[No. 662.]

*Argued January 16, 17, 1896. Decided May 18, 1896.*

IN ERROR to the Supreme Court of the State of Indiana to review a judgment of that court affirming the judgment of the Circuit Court of the County of Marion, Indiana, in favor of the defendants, Thomas Taggart, Auditor of Marion County *et al.*, in an action brought by the Western Union Telegraph Company, plaintiff, to restrain the defendant from apportioning and collecting a tax assessed upon the plaintiff by the tax commissioners of the state of Indiana. *Affirmed.*

See same case affirmed below, 141 Ind. 281.

Statement by Mr. Justice **Gray**:

This was a bill in equity, filed December 19, 1893, in the circuit court of the county of Marion and state of Indiana, by the Western Union Telegraph Company against Thomas Taggart, the auditor of that county, and Sterling R. Holt, its treasurer, and against the auditors and treasurers of other counties in Indiana, to restrain them from apportioning and collecting a tax assessed upon the plaintiff by the board of tax commissioners of the state, under the statute of Indiana of March 6, 1893, chap. 171, the material parts of which are copied in the margin.* The principal allegations of the bill were as follows:

*That the plaintiff was, and for many years[3

NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

*As to power of states to tax*, see note to Dobbins v. Erie County Comrs. 10: 1022.

*As to when taxes illegally assessed can be recovered back*, see note to Erskine v. Van Arsdale, 21: 63.

*As to power of Congress to control commerce; state statute, when valid as being a regulation of commerce; drummers; vessels; railways; telegraph companies; state tax on commerce, when invalid*,—see note to Harmon v. Chicago, 37: 216.

*An Act Supplementary to and Amendatory of an Act Entitled "An Act Concerning Taxation, Repealing all Laws in Conflict therewith, and Declaring an Emergency," Approved March 6, 1891, and Providing for the Taxation of Telegraph, Telephone, Palace Car, Sleeping Car, Drawing-Room Car, Dining Car, Express, and Fast Freight, Joint Stock Associations, Companies, Copartnerships, and Corporations Transacting Business in the State of Indiana. Repealing §§ 68-71 of said Act, and All Laws in Conflict therewith, and Declaring an Emergency.

Sec. 1. Any joint-stock association, company, copartnership, or corporation, whether incorporated under the laws of this state or of any other state or of any foreign nation, engaged in transmitting to, from, through, in, or across the state of Indiana, telegraphic messages, shall be deemed and held to be a telegraph company; and every such telegraph company shall, annually, between the 1st day of April and the 1st day of June, make out and deliver to the auditor of state a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the 1st day of April next preceding, showing:

1st. The total capital stock of such association, company, copartnership, or corporation.



Digitized by Google

had been, a corporation of the state of New York, and "the owner of a large amount and num-
4] ber of telegraph poles, lines, wires, *cables, fixtures, instruments, machinery, appliances, apparatus, and real estate, constituting a plant for the transmission and conveyance of telegraph messages, which said telegraphic plant extends into and through every state and territory of the United States, the Dominion of
5] Canada, and under *the Atlantic ocean to England and to Cuba;" and that the plaintiff, by reason of rights under contracts with various persons and corporations in the United States and in other parts of the world, and under letters patent from the United States, and valuable franchises granted by the United States and by New York and other states of
6]the Union, but not *by Indiana, and by many municipalities in those states, and by the governments of England and Cuba, was "enabled to do a large and profitable business, by and by means of said telegraphic plant, and not only earn an amount which would be equivalent to rent upon said property, in case the same was owned by another corporation and leased by complainant, but also to make a profit for complainant in addition to said amount so applicable as rent of such telegraphic plant."

That the "portion of said telegraphic plant, situated within said state of Indiana, is of the actual cash value of $686,126, the said cash value being ascertained by taking the cost of original construction, as nearly as the same can be ascertained, and deducting therefrom a sum partially equal to the depreciation of the plant; and could be replaced by an entirely new plant of the same extent and location, and of far more valuable and lasting material, for the sum of $1,226,625."

That the pretended statute of March 6, 1893, was not a law of the state of Indiana (for reasons not insisted on in this court), and that on July 11, 1893, the plaintiff, reserving its rights to contest the validity of that statute, filed with the auditor of the state a statement and return, as therein required,—a copy of which was annexed, and which included substantially the same objections as were stated in the bill, and showed that the entire mileage of the company was 189,576 miles, 6,486 of which were in the state of Indiana; that it had no real estate, machinery, and appliances in Indiana subject to local taxation; that the cost of its real estate in other states was $5,013,326, and the amount of its outstanding mortgage bonds was $1,211,000.

That the state board of tax commissioners on August 21, 1893, made its assessment and valuation of the plaintiff's property in Indiana, deducting the real estate, structures, machinery, and apparatus within the state and subject to local taxation, at the sum of $2,297,652, and at the rate of $357 per mile of telegraph line; "and, in fixing said valuation upon complainant's said property in Indiana, acted under and by virtue of the assumed authority of said pretended statute, approved March 6, 1893, and placed upon complainant's said *property [7 additional values, beyond the true cash value of complainant's said property as measured by the cost of replacement of the same, making

---

2d. The number of shares of capital stock issued and outstanding, and the par or face value of each share.

3d. Its principal place of business.

4th. The market value of said shares of stock on the 1st day of April next preceding, and if such shares have no market value, then the actual value thereof.

5th. The real estate, structures, machinery, fixtures, and appliances owned by said association, company, copartnership, or corporation, and subject to local taxation within the state, and the location and assessed value thereof in each county or township where the same is assessed for local taxation.

6th. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership, or corporation, situate outside the state of Indiana and not directly used in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

7th. All mortgages upon the whole or any part of its property, together with the dates and amount thereof.

8th. (a) The total length of the lines of said association or company.

(b) The total length of so much of their lines as is outside the state of Indiana.

(c) The length of the lines within each of the counties and townships within the state of Indiana.

Sec. 5. Upon the filing of such statements, the auditor of state shall examine them, and each of them, and if he shall deem the same insufficient, or in case he shall deem that other information is requisite, he shall require such officer to make such other and further statements as said auditor of state may call for. In case of the failure or refusal of any association, company, copartnership, or corporation to make out and deliver to the auditor of state any statement or statements required by this act, such association, company, copartnership, or corporation shall forfeit and pay to the state of Indiana $100 for each additional day such report is delayed beyond the 1st day of June, to be sued and recovered in any proper form of action, in the name of the state of Indiana, on the relation of the auditor of state, and such penalty, when collected, shall be paid into the general fund of the state.

Sec. 6. Upon the meeting of the state board of tax commissioners for the purpose of assessing railroad and other property, said auditor of state shall lay such statements, with such information as may have been furnished him, before said board of tax commissioners, who shall thereupon value and assess the property of each association, company, copartnership, or corporation in the manner hereinafter set forth, after examining such statements, and after ascertaining the value of such properties therefrom, and from such other information as they may have or obtain. For that purpose they may require the agents or officers of said association, company, copartnership, or corporation to appear before them with such books, papers, or statements as they may require; or they may require additional statements to be made to them, and may compel the attendance of witnesses in case they shall deem it necessary to enable them to ascertain the true cash value of such property.

Sec. 7. Said state board of tax commissioners shall first ascertain the true cash value of the entire property owned by said association, company, copartnership, or corporation from said statements or otherwise, for that purpose taking the aggregate value of all the shares of capital stock, in case said shares have a market value, and in case they have none, taking the actual value thereof or of the capital of said association, company, copartnership, or corporation, in whatever manner the same is divided, in case no shares of capital stock have been issued: Provided, however, that in case the whole or any portion of the property of such association, company, copartnership, or corporation shall be encumbered by a mortgage or mortgages, such board shall ascertain the true cash value of such property by adding to the market value of the aggregate shares of stock, or to the value of the capital, in case there shall be no such shares, the aggregate amounts of such mortgage or mortgages, and the result shall be deemed and treated as the true cash value of the property of such association, company, copartnership, or corporation. Such board of tax



Digitized by Google

reasonable allowances for deterioration, by adding values of complainant's business, property, and goodwill, both in and outside of Indiana, and franchises granted by the state of New York, the United States and foreign countries; and in witness thereof caused to be entered upon the official record of said board, required by law to be kept by said board, on said August 21, 1893, the following statement and certificate:

"'In accordance with the requirements of the act of the general assembly of the state of Indiana, approved March 6, 1893, the state board of tax commissioners, after full consideration, does hereby assess and value telegraph, telephone, palace car, sleeping car, drawing-room car, dining car, express, and fast freight, joint stock associations, companies, copartnerships and corporations transacting business in the state of Indiana, which assessment and valuation are as follows, to wit: Assessment and valuation of telegraph and telephone companies in the state of Indiana by the state board of tax commissioners for the year 1893, exclusive of real estate, structures, machinery, fixtures and appliances subject to local taxation within the state.'" The first line under that heading was: "Western Union Telegraph Company. Miles, 6,436. Per mile, $357. Total, $2,297,652."

"That the state board of tax commissioners, during its said session in the year 1893, did not attempt to specify or describe the property of complainant, falling within the description of real estate, structures, machinery, and appliances subject to local taxation.

"That, in making said assessment, said state board of tax commissioners assumed to take as the basis thereof the value of the entire capital stock of complainant, at a valuation per share based upon the price of the shares of complainant's capital stock dealt in in the stock exchange market of New York city, dividing such aggregate value by the total number of miles of telegraph line of complainant, wherever situated, and both in and outside of Indiana, and thereby obtaining a pretended valuation per mile of the telegraph line of complainant, amounting to the said sum of [8] $357 per mile, which said pretended valuation per mile said board, acting under the authority of said pretended statute, imputed to and imposed upon each mile of the whole number of complainant's telegraph line in Indiana, thereby imputing to and imposing upon the whole telegraph line of complainant in Indiana, which is of the length of 6,436 miles, said pretended valuation of $2,297,652, which said pretended valuation is grossly excessive and far beyond the true cash value of complainant's said property in Indiana.

"That said state board of tax commissioners, in reaching said valuation of complainant's said property in Indiana, did not consider and assess the value of the property of complainant situated in Indiana, otherwise than pursuing the requirements of said pretended statute.

"That neither on April 1, 1893, nor at any time prior or subsequent thereto, was there any market value for all the shares of the capital stock of complainant;" that the whole number of shares was 948,200, of the par value

---

commissioners shall, for the purpose of ascertaining the true cash value of the property within the state of Indiana, next ascertain, from such statements or otherwise, the assessed value for taxation, in the localities where the same is situated, of the several pieces of real estate situate without the state of Indiana and not specifically used in the general business of such associations, companies, copartnerships, or corporations, which said assessed values for taxation shall be by said board deducted from the gross value of the property as above ascertained. Said state board of tax commissioners shall next ascertain and assess the true cash value of the property of such associations, companies, copartnerships, or corporations within the state of Indiana, by taking the proportion of the whole aggregate value of said associations, companies, copartnerships, or corporations, as above ascertained, after deducting the assessed value of such real estate without the state, which the length of the lines of said associations, companies, copartnerships, or corporations in the case of telegraph and telephone companies within the state of Indiana bears to the total length of the lines thereof; and in the case of palace, drawing-room, sleeping, dining, or chair car companies, the proportion shall be the proportion of such aggregate value, after such deductions, which the length of the lines within the state, over which said cars are run, bears to the length of the whole lines over which said cars are run; and in the case of express companies, the proportion shall be the proportion of the whole aggregate value, after such deductions, which the length of the lines or routes within the state of Indiana bears to the whole length of the lines or routes of such associations, companies, copartnerships, or corporations; and such amount so ascertained shall be deemed and held as the entire value of the property of said associations, companies, copartnerships, or corporations within the state of Indiana. From the entire value of the property within the state, so ascertained, there shall be deducted, by said board, the assessed value for taxation of all the real estate, structures, machinery, and appliances within the state and subject to local taxation in the counties and townships as hereinbefore described in item No. 5 of § 1-4 of this act; and the residue of such value so ascertained, after deducting therefrom the assessed value of such local properties, shall be, by said board, assessed to said association.

Sec. 8. Said state board of tax commissioners shall thereupon ascertain the value per mile of the property within the state by dividing the total value, as above ascertained, after deducting the specific properties locally assessed within the state, by the number of miles within the state; and the result shall be deemed and held as the value per mile of the property of such association, company, copartnership, or corporation within the state of Indiana.

Sec. 9. Said state board of tax commissioners shall thereupon, for the purpose of determining what amount shall be assessed by it to said association, company, copartnership, or corporation in each county in the state through, across, into, or over which the line of said association, company, copartnership, or corporation extends, multiply the value per mile, as above ascertained, by the number of miles in each of such counties, as reported in said statements or as otherwise ascertained, and the result thereof shall be, by said board, certified to the auditor of state, who shall thereupon certify the same to the auditors, respectively, of the several counties through, into, over, or across which the lines or routes of said association, company, copartnership, or corporation extend; and such auditors shall apportion the amount certified for their counties, respectively, among the several townships into, through, over, or across which such lines or routes extend, in proportion to the length of the lines in such townships.

Sec. 10. To enable said county auditors to properly apportion the assessments between the several townships, they are authorized to require the agent of said association or company to report to them, respectively, under oath, the length of the lines in each township; and the auditor shall thereupon add to the value so apportioned the assessed valuation of the real estate, structures, machinery, fixtures, and appliances situated in any township, and extend the taxes thereon upon the duplicates, as in other cases.



Digitized by Google

of $100 each; that the number of shares sold or speculated in on April 1, 1893, on the New York stock exchange, was 1,168 shares, at the average price of $94.50, and only a part of those was actually delivered; and that the price so obtained did not fairly represent the actual value of the plaintiff's property.

"That any price at which any or all shares of complainant might be sold, by any holder or holders thereof, whether such price be calculated upon any market value or upon actual value, includes, amongst other things, a consideration of franchises of great value owned or exercised by complainant, granted by the state of New York, by the United States, by Canada, by Great Britain, by Cuba, and by other states, countries, and municipalities; a consideration of complainant's goodwill, its past earnings from every source, its probable future earnings from every source, the business ability, enterprise, and skill of the present managers of complainant's business, the probable continuance of business ability, enterprise, and skill in the future management of complainant's business; the contract and other re-[9] lations of complainant to powerful *railroad, telephone, and cable companies; a consideration of the real estate of complainant situated in the city of New York, which is of great value, to wit, of the value of $3,500,000, and in the city of Chicago, which is of great value, to wit, of the value of $1,700,000, and of the real estate of complainant of great value, situated in many other states and countries, none of which is situated in the state of Indiana; as well as the consideration of the actual value of all complainant's telegraph lines, poles, wires, conduits, instruments, appliances, and office furniture, including that which is situated in Indiana and taxable by the state of Indiana.

"That, in estimating such market or actual value of the shares of the stock of complainant, the values of said intangible franchises, rights, contracts, earnings, business, business ability, enterprise, skill, and management, and goodwill, and of all said real and personal estate of complainant, are blended so as to render it impossible to separate and distinguish the portions of value applicable to any or each of said elements of value of said shares."

That the plaintiff was the owner of many thousand miles of telegraph in the states of Massachusetts, New York, Pennsylvania, and New Jersey, and in other densely populated portions of the United States, of the cost and value of $2,500 per mile on the average, and requiring great expenditures for the maintenance thereof; of many thousand miles of cable under the high seas, of the cost and value of $3,500 per mile on the average; and of many thousands of miles of telegraph in uninhabited or sparsely inhabited portions of the United States and Mexico, which, by reason of the great cost of transportation of material, and cost of maintenance, were of great cost and value; that all the plaintiff's lines in the state of Indiana, by reason of the proximity to supplies of material, and the very cheap transportation, were of minimum value, as compared with the plaintiff's lines situated elsewhere; and that, by reason of these facts, the average mile of the telegraph line of the plaintiff in Indiana was of the value of 40 per cent of the value of the average mile of the whole line situated outside of the state of Indiana, reckoning such value *upon the cost of construction and mainten-[10] ance, and making allowance for deterioration.

That 66 per cent of the plaintiff's whole business in transmitting telegraphic messages, and 60 per cent of its business in the state of Indiana, was interstate and international business; and that the average net earnings of a mile of the line in the state of Indiana amounted to only 60 per cent of the net earnings of the average mile of its line outside of the state.

That the plaintiff duly accepted the provisions of the act of Congress of July 24, 1866, chap. 230, now U. S. Rev. Stat. §§ 5263, 5269; that all the telegraph lines owned or operated by the plaintiff in Indiana were constructed upon railroads, streets, and other post roads of the United States, and thereby the plaintiff was an agent of the United States in the transmission of intelligence by electricity; and that the statute of Indiana of March 6, 1893, and the assessment of the valuation of the plaintiff's property under that statute rendered its property in Indiana substantially valueless, and prevented it from performing its obligations to the United States.

That much of the plaintiff's capital stock, to the amount of $7,633,230, "is invested in and represented by the capital stock and bonds of other telegraph and telephone corporations, whose telegraph or telephone plants are leased to or operated by complainant, which said telegraph or telephone corporations possess no property in the state of Indiana, and do not own or use any franchise granted by the state of Indiana, and are wholly situated outside of the state of Indiana.

"That the attempted and pretended valuation of complainant's said property by said state board of tax commissioners, in manner aforesaid, upon the value of complainant's shares of stock, whether said board pretended to value said property upon a basis which included the consideration or estimation of market value or actual value of the shares of stock of complainant, necessarily includes, and does in fact include, values which are no part of the true cash value of the property of complainant in Indiana; but are imputed and fictitious values *distributed to complainant's [11] said property in Indiana, as portions of the value of the business, business ability, enterprise, and skill of complainant, of the real and personal estate owned and leased by complainant and outside of the state of Indiana, and of complainant's franchises granted by states other than Indiana and municipalities outside of Indiana and by the United States and by foreign states and nations, and of the contract relations and other relations existing between complainant and other corporations, all of which said property, things in action, and other things and matters of value, are beyond the jurisdiction of the state of Indiana, whether for the purpose of taxation or for any other purpose."

That the auditor of the state, on September 15, 1893, certified the valuation aforesaid to the auditors of the counties through which the plaintiffs' telegraph lines extended; and that the



Digitized by Google

county auditors were engaged in apportioning and distributing the same among the townships, and were preparing to deliver tax duplicates to the county treasurers, to the end that they might collect the tax from the plaintiff.

That the statute of 1893, chap. 171, was contrary to the Constitution of Indiana in various particulars pointed out (but not now relied on), and that this statute, and the assessment and valuation of the plaintiff's property by the state board of tax commissioners in compliance with its provisions, levied a tax upon interstate and international commerce, in violation of U. S. Const. art. 1, § 8, and deprived the plaintiff of its property without due process of law, and denied it the equal protection of the laws, in violation of the 14th Amendment to the Constitution.

The defendants demurred generally to the bill. The court sustained the demurrer, and, the plaintiff declining to amend its bill, entered final judgment for the defendants. The plaintiff appealed to the supreme court of Indiana, which affirmed the judgment. 141 Ind. 281. The plaintiff thereupon sued out this writ of error.

*Messrs.* **John F. Dillon,** *Rush Taggart, Alpheus H. Snow, Willard Brown,* and *Charles W. Wells,* for plaintiff in error:

In the method of valuation prescribed by the statute and in the assessment now in question actually made by the board of assessors pursuant to the statute there was necessarily included a valuation of the Federal franchises of the plaintiff in error, which Federal franchises, or the value thereof, are not taxable by the state of Indiana.

*Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1 (24: 708); *California* v. *Central P. R. Co.* 127 U. S. 1 (32: 150), 3 Inters. Com. Rep. 153; *Minot* v. *Philadelphia, W. & B. R. Co.* (*"Delaware R. Tax"*) 85 U. S. 18 Wall. 206 (21: 888); *Taylor* v. *Secor* (*"State R. Tax Cases"*) 92 U. S. 575 (23: 663); *Western U. Teleg. Co.* v. *Massachusetts,* 125 U. S. 530 (31: 790); *Massachusetts* v. *Western U. Teleg. Co.* 141 U. S. 40 (35: 628); *People, Union Trust Co.,* v. *Coleman,* 126 N. Y. 433, 12 L. R. A. 762; *People, Manhattan R. Co.,* v. *Barker,* 146 N. Y. 304; *McCulloch* v. *Maryland,* 17 U. S. 4 Wheat. 316 (4: 579); *Osborn* v. *Bank of United States,* 22 U. S. 9 Wheat. 738 (6: 204); *Brown* v. *Maryland,* 25 U. S. 12 Wheat. 419 (6: 678); *Thomson* v. *Union P. R. Co.* 76 U. S. 9 Wall. 579 (19: 792); *Union P. R. Co.* v. *Peniston,* 85 U. S. 18 Wall. 5 (21: 787); *Pullman Palace Car Co.* v. *Pennsylvania,* 141 U. S. 34 (35: 621), 3 Inters. Com. Rep. 595; *Postal Teleg. Cable Co.* v. *Adams,* 155 U. S. 688 (39: 311), 5 Inters. Com. Rep. 1.

If the tax levied by a state is upon a Federal "franchise" it is settled that it is unconstitutional.

*Weston* v. *Charleston,* 27 U. S. 2 Pet. 449 (7: 481).

Nor is the Western Union Telegraph Company, having accepted the act of Congress of July 24, 1866, subject to have imposed on it a license tax by the state of Indiana.

*Leloup* v. *Port of Mobile,* 127 U. S. 640 (32: 311), 2 Inters. Com. Rep. 134; *Asher* v. *Texas,* 128 U. S. 129 (32: 368), 2 Inters. Com. Rep. 241; *Western U. Teleg. Co.* v. *Seay,* 132 U. S. 472 (33: 409), 2 Inters. Com. Rep. 726; *Lyng* v. *Michigan,* 135 U. S. 165 (34: 153), 3 Inters. Com. Rep. 143.

A state may tax the "property" of a corporation having a Federal franchise, but it cannot tax the "Federal franchises" of a corporation.

*California* v. *Central P. R. Co.* 127 U. S. 1 (32: 150), 2 Inters. Com. Rep. 153.

Clearly such a tax on the Federal franchise of the Western Union Company would be void. Is it any less invalid by being (as in this case) included in a general assessment in which the value of the "franchises" and of the "property" of the company are combined.

None of the cases cited by the attorney general of Indiana so hold.

Such a holding is in conflict with the decisions or the principle of the decisions of this court in the following cases.

*Murray* v. *Charleston,* 96 U. S. 432 (24: 760); *New York* v. *New York Tax Comrs.* 67 U. S. 2 Black, 620 (17: 451); *New York* v. *New York Tax Comrs.* (*"Bank Tax Case"*) 69 U. S. 2 Wall. 200 (17: 793).

The necessary effect of the method of taxation adopted by the taxing authorities of Indiana in this case was to bring within the operation of the statute of Indiana property, or the value of property, of the telegraph company outside of the state of Indiana. Such taxation cannot be deemed due process of law under the 14th Amendment to the Constitution of the United States; and therefore the statute requiring or permitting such a mode of assessment, and the assessment made under it, must be treated as unconstitutional and void.

*Cleveland, C. C. & St. L. R. Co.* v. *Backus,* 154 U. S. 446 (38: 1046), 4 Inters. Com. Rep. 677; *Pittsburg, C. C. & St. L. R. Co.* v. *Backus,* 154 U. S. 431 (38: 1038).

The case at bar is distinguishable from and not controlled by the Indiana railway cases.

*Cleveland, C. C. & St. L. R. Co.* v. *Backus,* and *Pittsburg, C. C. & St. L. R. Co.* v. *Backus, supra.*

The mode prescribed or allowed by the statute (act of March 9, 1893, § 7), *viz.*, the market value of its shares, etc., for ascertaining the true cash valuation of the entire property of the plaintiff in error, which mode it is admitted on the record was followed by the tax commissioners of Indiana in arriving at the assessment now complained of, is a mode under which, as applied to the plaintiff in error, it is legally impossible that it should result in ascertaining the true cash value of the property of the plaintiff in error within the state of Indiana, and therefore such assessment upon the plaintiff in error (which is a Federal agency and engaged in interstate commerce), is in violation of the commerce clause of the Constitution and of the 14th Amendment thereto.

*Messrs* **William A. Ketcham,** Attorney General of Indiana, **Judson Harmon,** and *Alonzo Greene Smith,* for defendants in error:

The act of March 6, 1891, concerning taxation, etc. (Acts of 1891, pp. 199–291; Burns' Anno. Rev. of 1894, §§ 8408 *et seq.*), and the act of March 6, 1893, supplementary to and amendatory thereof (Acts of 1893, pp. 374–383; Burns' Anno. Rev. of 1894, §§ 8494–8506), are *in pari materia* and should be construed to-



Digitized by Google

gether as a homogeneous system providing for the taxation of all property in the state.

*Western U. Teleg. Co.* v. *Taggart*, 141 Ind. 281.

Therefore the constitutionality of the act of March 6, 1893, cannot be considered as providing a separate system entirely distinct from the act of March 6, 1891.

So construed, the legislation attacked in this action is valid and constitutional, and is not subject to the objection tendered by the complaint of the plaintiff in error.

By such legislation and the action of the state board of tax commissioners in compliance therewith the plaintiff in error was deprived of its property without due process of law.

By such legislation and the action of the state board in compliance therewith the plaintiff in error was deprived of the equal protection of the laws.

By such legislation and the action of the state board in compliance therewith the state of Indiana had levied a duty on imports.

By such legislation and the action of the state board in compliance therewith the state of Indiana had levied a tax either upon interstate or foreign commerce.

*Taylor* v. *Secor* (*"State R. Tax Cases"*) 92 U. S. 575 (23: 663); *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky* (*"Kentucky R. Tax Cases"*) 115 U. S. 321 (29: 414); *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 431, 438, 439 (38: 1038, 1040).

The system of assessing and levying a tax upon property that has a unity of character, existence, and operation in several states, based upon the proportion that the mileage within bears to the mileage without the state, is in accord with the requirements of the United States Constitution.

*Western U. Teleg. Co.* v. *Massachusetts*, 125 U. S. 530 (31: 790); *Pullman Palace Car Co.* v. *Hayward*, 131 U. S. 36 (35: 621); *Massachusetts* v. *Western U. Teleg. Co.* 141 U. S. 40 (35: 628); *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 (35:613), 3 Inters. Com. Rep. 595.

Whether it is or not, the statutes of the state of Indiana, providing for the assessment of telegraph, telephone, etc., companies, does not require or permit the state board of tax commissioners to assess a valuation based only on the proportion that the mileage within bears to the mileage without the state, but requires it to assess and determine the true cash value of the property within the state, and in such assessment permits and requires the board to take into consideration such proportion upon the mileage basis, with all other matters that will enable it to ascertain and determine the true cash value of the property to be assessed.

*Western U. Teleg. Co.* v. *Henderson*, 68 Fed. Rep. 589.

The value of any given piece of property is not necessarily properly represented by the cost of construction less the depreciation that has taken place since the original construction.

*Columbus Southern R. Co.* v. *Wright*, 151 U. S. 470 (38: 240).

The value of any given piece of property is not necessarily to be determined by the cost of reproduction or replacement.

Essential ingredients to be considered in determining the value of any property are the uses to which it can be put, its surroundings, whether it can or cannot be made to produce earnings in its ordinary operation, and a valuation made after considering these in connection with such other matters as tend to show the value cannot be said to be a valuation of the earnings, the income, or the surroundings.

*Columbus Southern R. Co.* v. *Wright*, 151 U. S. 470 (38: 240); *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439 (38: 1041), 4 Inters. Com. Rep. 677; *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 133 Ind. 513, 18 L. R. A. 729.

A telegraph company is as essentially and properly a unit in its existence and operation as a railroad company, and in order to properly ascertain the value to be placed thereon it is proper to pursue the same methods and apply the same principles that have been pursued and applied to ascertain the value of railroad property.

*Western U. Teleg. Co.* v. *Poe*, 69 Fed. Rep. 557; *Western U. Teleg. Co.* v. *Taggart*, 141 Ind. 281; *Union P. R. Co.* v. *United States* (*"Sinking Fund Cases"*), 99 U. S. 718 (25: 501).

Mr. Justice **Gray** delivered the opinion of the court:

It is not and cannot be doubted that each state of the Union may tax all property, real and personal, within its borders, belonging to persons or corporations, although employed in interstate or foreign commerce, provided the rights and powers of the national government are not interfered with. *Minot* v. *Philadelphia, W. & B. R. Co.* (*"Delaware R. Tax"*) 85 U. S. 18 Wall. 206, 232 [21: 888, 896]; *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 464 [26: 1067, 1068]; *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530 [31: 790]; *Maryo* v. *Baltimore & O. R. Co.* 127 U. S. 117, 123, 124 [32: 94, 96, 97]; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 649 [32: 311, 314, 2 Inters. Com. Rep. 134]; *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 [35: 613, 3 Inters. Com. Rep. 595]; *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439, 445 [38: 1041, 1046, 4 Inters. Com. Rep. 677].

The principal grounds upon which the plaintiff contends that the statute of Indiana of March 6, 1893, chap. 171, is unconstitutional, and the valuation and assessment of the plaintiff's property under it invalid, are that they necessarily included a taxation of franchises granted to the plaintiff by the United States, as well as of the plaintiff's property outside of the state of Indiana, neither of which was subject to that taxation in that state; and also by taking the market value of shares of the plaintiff's stock, in fixing the valuation of the entire *property of the plaintiff, and by apportion [15 ing that valuation according to the proportion thereof within the state of Indiana, of all the plaintiff's telegraph lines everywhere, adopted an arbitrary rule and imposed an unlawful burden upon interstate commerce.

But in each of these respects the case presented by this record appears to us to be governed by previous decisions of this court. The argument for the plaintiffs in error, in effect, if not in express words, invites the court to modify or to overrule those decisions. It becomes important, therefore, to state somewhat fully the scope and exact of those decisions,



Digitized by Google

the reasons on which they proceeded, and the provisions of the statutes thereby construed.

The statutes of Massachusetts, the constitutionality of which was attacked by the present plaintiff and upheld by this court in the two cases of *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530 [31: 790], and 141 U. S. 40 [35: 628], were undistinguishable in any material respect from the statute of Indiana now before us, and may, as suggested at the bar, have been the model upon which this statute was framed.

The material provisions of those statutes of Massachusetts were as follows: Every corporation chartered or organized in Massachusetts or elsewhere, and owning a telegraph line in Massachusetts, was required to return annually to the tax commissioner of the state a statement of the amount of its capital stock, the par value and market value of its shares, the locality and value of its real estate and machinery subject to local taxation within the state, the whole length of its lines, and the length of so much of its lines as was within the state. The tax commissioner was required to ascertain the true market value of its shares, and to estimate the fair cash valuation of all the shares constituting its capital stock; and the corporation was required to pay annually "a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock," as so determined by the tax commission; deducting, however, from that valuation, such proportion thereof as was proportional to the length of that part of its line lying without the state, and [16] also an amount equal to the value, as determined by the tax commissioner, of its real estate and machinery within the state and subject to local taxation therein. Mass. Pub. Stat. chap. 13, §§ 38-40, 42.

In the first of the Massachusetts cases, Mr. Justice Miller, delivering the opinion of the court, said that "the main ground on which the telegraph company resisted the payment of the tax alleged to be due," was that it was a violation of the rights conferred upon the company by the provisions (which had been accepted by the company) of the act of Congress of July 24, 1866, chap. 230, re-enacted in U. S. Rev. Stat. § 5263, by which it was enacted that any telegraph company organized under the laws of any state, should "have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, . . . and over, under, or across the navigable streams or waters of the United States." U. S. Rev. Stat. § 5263; 14 Stat. at L. 221. The argument then made by counsel and the decision of the court upon this point are shown by the following passages in the opinion:

"The argument is very much pressed that it is a tax upon the franchise of the company, which franchise, being derived from the United States by virtue of the statute above recited, cannot be taxed by a state; and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein." *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 546, 547 [31: 792, 793].

"While the state could not interfere, by any specific statute, to prevent a corporation from placing its lines along these post roads, or [17] stop the use of them after they were placed there, nevertheless the company, receiving the benefits of the laws of the state for the protection of its property and its rights, is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state, and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support." 125 U. S. 548 [31: 793].

"The tax in the present case, though nominally upon the shares of the capital stock of the company, is, in effect, a tax upon that organization on account of property owned and used by it in the state of Massachusetts; and the proportion of the length of its lines in that state to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by U. S. Rev. Stat. § 5263, or by the commerce clause of the Constitution." 125 U. S. 552 [31: 794]. See also *Reagan* v. *Mercantile Trust Co.* No. 1, 154 U. S. 413, 416, 417 [38: 1028-1030]; *Central P. R. Co.* v. *California*, 162 U. S. 91, 123 [40: 908, 914].

It was further argued in that case that the tax was excessive and invalid because, in ascertaining the whole valuation of the stock, no deduction was made on account of the value of real estate and machinery situated, and subject to local taxation, outside of the state of Massachusetts; although it appeared that the company owned lands and buildings outside of the state, the cost of which was more than $3,000,000 and upon which it had been assessed and had paid taxes of more than $48,000. 125 U. S. 542, 544, 552 [31: 790, 792, 794].

The court, notwithstanding, declared that it did not feel called upon to defend all the items and rules by which the authorities of the state arrived at the taxable value on which its ratio of percentage of taxation should be assessed, or to hold the tax void because the court [18] might have adopted a different system had it been called upon to accomplish the same result; and decided that the rule adopted to ascertain the amount of the value of the capital engaged in business within the boundaries of the state, on which the tax should be assessed, was not an unfair or an unjust one, and that the details



Digitized by Google

of the method by which this was determined did not exceed the fair range of legislative discretion. 125 U. S. 553 [31: 795].

The same views were affirmed in the second case between the same parties. 141 U. S. 44, 45 [35: 630].

Those decisions clearly establish that a statute of a state requiring a telegraph company to pay a tax upon its property within the state, valued at such a proportion of the whole value of its capital stock as the length of its lines within the state bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state, is constitutional and valid, notwithstanding that nothing is in terms directed to be deducted from the valuation, either for the value of its franchises from the United States, or for the value of its real estate and machinery situated and taxed in other states, unless there is something more showing that the system of taxation adopted is oppressive and unconstitutional.

We are then brought to a consideration of the statutes of Indiana as construed by the supreme court of the state and by this court.

The statute of Indiana of March 6, 1891, chap. 91, repealed previous laws, and established a comprehensive and complete system of taxation. By § 3 all property within the jurisdiction of the state, not expressly exempted, was declared to be subject to taxation; and by subsequent sections the property of all corporations owning or operating railroads within the state was classified for the purposes of taxation as follows:

By § 78 the "right of way, including the superstructure, main, side, or second track, and turnouts, turntables, telegraph poles, wires, instruments, and other appurtenances, and the stations and improvements of the railroad company on such right of way" (except-
19]ing machinery, fixtures, and stationary *engines) were considered real estate, and denominated "railroad track." By § 79 the value of such "railroad track" was taxed in the several counties, townships, cities, and towns, in the proportion that the length of the main track therein bore to the whole length of the road in the state, except that the value of the side or second track, and of all turnouts, station houses, and other buildings belonging to the railroad, was taxed in the county, township, city, or town in which they were situated. By § 80 the movable property belonging to a railroad company was denominated "rolling stock" and considered personal property and was taxed in the several counties, townsbips, cities, and towns in the proportion that the main track used or operated therein bore to the length of the main track used or operated by the corporation, whether owned by it or not. By § 81 all other personal property, including machinery, fixtures, stationary engines, tools, and materials for repairs, was taxed in the county, township, city, or town in which it was on the 1st day of April in each year; and by § 82 all real estate of any railroad company (other than that denominated "railroad track"), with all improvements thereon, was taxed in the county, township, city, or town where it was situated.

Each railroad corporation was required by § 83 to return annually to the county auditor an inventory of all these kinds of property, except "railroad track;" and by § 85, to return to the auditor of the state, to be laid before the state board of tax commissioners, a statement showing, among other things, "first, the property denominated 'railroad track,' giving the length of the main and side or second tracks and turnouts, and showing the proportions in each county and township, and the total in the state; second, the rolling stock, whether owned or hired, giving the length of the main track in each county, and the entire length of the road in this state;" and also the amount of its capital stock, and the market value, or if no market value, the actual value of its shares, the total amount of its indebtedness except for current expenses, and the total listed valuation of all its tangible property in the state.

*By §§ 129, 137, the state board of tax [20
commissioners was declared not to be bound by these returns; and was required to "appraise and assess all property at its true cash value, as defined by this act, according to their best knowledge and judgment, and so as to equalize the assessment of property throughout the state," and to "assess the railroad property, denominated in this act as 'railroad track' and 'rolling stock,' at its true cash value," and was authorized to examine persons and papers. And by § 130 each member of the board was required to declare, as part of his oath of office, that he would "in no case assess any property at more or less than its true cash value."

This court, at the last term, in several cases affirming judgments of the supreme court of Indiana, held that the statute of 1891 did not, in the case of a railroad partly in that state and partly in another, require that the value of the part in Indiana should be determined absolutely by dividing the whole value upon a mileage basis; but only that the total amount of stock and indebtedness should be taken into consideration in ascertaining the value; and that the statute was constitutional. *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 430, 435 [38: 1031, 1038, 1039], 133 Ind. 625; *Indianapolis & V. R. Co.* v. *Backus*, 154 U. S. 438 [38: 1040], 133 Ind. 609; *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439 [38: 1041, 4 Inters. Com. Rep. 677], 133 Ind. 513 [18 L. R. A. 729].

In those cases, the objections to the constitutionality of that statute were answered by this court, speaking by Mr. Justice Brewer, as follows:

"It is not to be assumed that a state contemplates the taxation of any property outside its territorial limits, or that its statutes are intended to operate otherwise than upon persons and property within the state. It is not necessary that every section of a tax act should in terms declare the scope of its territorial operation. Before any statute will be held to intend to reach outside property, the language expressing such intention must be clear." 154 U. S. 428 [38: 1037].

"It is obvious that the intent of this act was simply to reach the property of the railroad within the state. . . . No intent to the *contrary can be deduced from the pro- [21
vision requiring the corporation to file a state-



Digitized by Google

ment of its total stock and indebtedness; for that is one item of testimony fairly to be considered in determining the value of that portion of the property within the state. The stock and the indebtedness represent the property. As said by Mr. Justice Miller in *Taylor* v. *Secor* ("*State R. Tax Cases*"), 92 U. S. 575, 605 [23: 663, 670]: 'When you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertain the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock.'" 154 U. S. 428, 429 [38: 1037].

"It is not stated in this statute that when the value of a road running in two states is ascertained, the value of that within the state of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis; but only that the total amount of stock and indebtedness shall be presented for consideration by the state board. Nevertheless it is ordinarily true that when a railroad consists of a single continuous line the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair." 154 U. S. 430, 431 [38: 1037, 1038].

In support of the last statement were cited *Taylor* v. *Secor* ("*State R. Tax Cases*"), 92 U. S. 608, 611 [23: 672, 673]; *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware R. Tax*"), 85 U. S. 18 Wall. 206 [21: 888]; *Erie R. Co.* v. *Pennsylvania*, 88 U. S. 21 Wall. 492 [22: 595]; *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530 [31: 790]; *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 [35: 613, 3 Inters. Com. Rep. 595]; *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217 [35: 994, 3 Inters. Com. Rep. 807]; *Charlotte, C. & A. R. Co.* v. *Gibbs*, 142 U. S. 386 [35: 1051]; *Columbus Southern R. Co.* v. *Wright*, 151 U. S. 470 [38: 238].

"The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It 22] is the aggregate of those values plus that arising from a connected operation of the whole; and each part of the road contributes, not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts; because there is a value created by and resulting from the combined operation of all its parts as one continuous line." *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 444 [38. 1045, 4 Inters. Com. Rep. 677].

"Now, when a road runs into two states, each state is entitled to consider, as within its territorial jurisdiction, and subject to the burdens of its taxes, what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road. It is not bound to enter upon a disintegration of values, and attempt to extract from the total value of the entire property that which would exist if the miles of road within the state were operated separately. Take the case of a railroad running from Columbus, Ohio, to Indianapolis, Indiana. Whatever of value there may be resulting from the continuous operation of that road is partly attributable to the portion of the road in Indiana, and partly to that in Ohio; and each state has an equal right to reach after a just proportion of that value, and subject it to its taxing processes. The question is, How can equity be secured between the states? and to that a division of the value of the entire property upon the mileage basis is the legitimate answer. Taking a mileage share of that in Indiana is not taxing property outside of the state." 154 U. S. 444 445 [38: 1046, 4 Inters. Com. Rep. 677].

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determine the value; and if property is taxed at its actual cash value, it is *taxed upon something which is created [23 by the uses to which it is put. In the nature of things, it is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put, and how much by another. Take the case before us; it is impossible to disintegrate the value of that portion of the road within Indiana, and determine how much of that value springs from its use in doing interstate business, and how much from its use in doing business wholly within the state. An attempt to do so would be entering upon a mere field of uncertainty and speculation. And because of this fact it is something which an assessing board is not required to attempt." 154 U. S. 445, 446 [38: 1046, 4 Inters. Com. Rep. 677].

"It is enough for the state that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by state laws, and the rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled, the same as property engaged in commerce within the state. Neither is this an attempt to do by indirection what cannot be done directly—that is, to cast a burden on interstate commerce. It comes, rather, within that large class of state action, like certain police restraints, which, while indirectly affecting, cannot be considered as a regulation of, interstate commerce, or a direct burden upon its free exercise." 154 U. S. 446, 447 [38: 1046, 4 Inters. Com. Rep. 677].

"It is true, there may be exceptional cases . . . as, for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or



Digitized by Google

where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the state board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment of track and rolling stock within the state, took into account the peculiar and large value of such facilities and such extra rolling stock." *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 431 [38: 1038.]

24] *This court further held that the question of the cash valuation of the company's property was a question of fact, the determination of which was committed to the state board of tax commissioners; and that the decision of the board could not be overthrown by evidence going only to show that the fact was otherwise than as so found and determined. 154 U. S. 434, 435 [38: 1039].

By § 69 of the statute of Indiana of 1891, telegraph companies incorporated under the laws of any other state, besides being taxable upon their tangible property in Indiana in the same manner as other tangible property was taxed, were required to make annual returns of their receipts from business in the state, including the proportion of gross receipts for business done in connection with the lines of other companies; and to pay a tax of 1 per cent on such receipts.

The supplemental and amendatory statute of March 6, 1893, chap. 171, now in question, repealed that section of the statute of 1891, and substituted provisions very like those of the statutes of Massachusetts, above considered, for the taxation of the telegraph property, and not essentially different from those of the statute of Indiana of 1891 for the assessment of railroad property, except in being more favorable to the company by expressly providing for a deduction of the value of real property outside the state from the total valuation.

By § 1 of the statute of 1893 every telegraph company, whether incorporated under the laws of Indiana, or of any other state, engaged in telegraph business in Indiana, was required to return annually to the auditor of the state a statement of its whole capital stock, the par value of its shares, their market value, or, if they had no market value, the actual value thereof; its principal place of business; its real estate, machinery, and appliances, subject to local taxation in each county and township within the state; its real estate outside the state and not directly used in the conduct of its business, and the sums at which such real estate was assessed for local taxation; the mortgages upon the whole or any part of its property; the whole length of all its lines, the length of its lines outside the 25]state of Indiana, and the length of its*lines in each county and township within the state. By §§ 6, 7, the state board of tax commissioners, "after examining such statements, and after ascertaining the value of such properties therefrom, and from such other information as they may have or obtain," and requiring books and papers to be produced, and witnesses to be examined "in case they shall deem it necessary to enable them to ascertain the true cash value of such property," were required to value and assess the property of each company by ascertaining the true cash value of its entire property, for that purpose taking the aggregate value of its shares, if they had a market value, or if they had none the actual value thereof or of the capital of the company; then, for the purpose of ascertaining the true cash value of the property within the state (first ascertaining and deducting the assessed value for taxation, in the localities where the same was situated, of its real estate outside the state, and not specifically used in the general business), taking the proportion of the whole aggregate value of its property, as above ascertained, which the length of its lines within the state bore to the total length of its lines; and deducting therefrom the assessed value for taxation of real estate, machinery, and appliances within the state and subject to local taxation in the counties and townships.

The supreme court of Indiana considered the present case to be governed by the decisions of this court in the cases of the *Railroad Companies* v. *Backus*, above cited; and, after referring to some of the passages above quoted from those decisions, added: "All that is thus forcibly and convincingly said as to the taxation of interstate railroad property is equally applicable to the taxation of interstate property. It is not easy to see how one mile of appellant's telegraph line connecting Chicago with New York could be of less value than any other mile of the same line. Cut out one mile, even though it be through a swamp or under a lake, and the value of the whole line is practically destroyed. The property is a unit, valuable as a whole and by reason of its several connections, and not by virtue of any part taken by itself. No way therefore, by which the value of the lines in this state *can be determined seems so just [26 and equitable as to take that proportion of the whole value which the mileage in this state bears to the whole mileage." 141 Ind. 294, 295.

In that court (as now in this) the telegraph company insisted that the statute of 1893, in applying the mileage basis of valuation to the lines of telegraph, compelled the state board of tax commissioners to add large outside values to the values of the Indiana portions of the lines, because the parts of the company's property outside the state were proportionately of greater value than the parts within the state. To which that court answered: "The act, it is true, provides a method of valuation, the mileage method, as a basis for the taxation of certain property within the state of Indiana. But this is simply a means for determining the true cash value of the property within the state; and if in the case of appellant's property, or in any other case, it is shown to the board, or is discovered by them, that still further deductions should be made, on account of larger proportional values outside of the state, or for any other reason, then the board must make such deductions, so that, finally, only the property within the state of Indiana shall be assessed, and that at its true cash value." 141 Ind. 297.

The state court distinctly held that the stat-



Digitized by Google.

ute of 1893, being supplementary to and amendatory of the statute of 1891, must be construed in connection therewith, and be treated as part of one and the same general tax act; that the duties and the powers of the state board of tax commissioners, as defined and prescribed in the statute of 1891, were not abridged or changed, in any respect, by the statute of 1893; and therefore, interpreting the statute of 1893 in the light of the provisions of the statute of 1891 (which have been cited above), concluded "that in the act of 1893 the legislature provided the mileage mentioned as the basis for the assessment of telegraph and other like property, both as to lines situated partly within and partly without this state, and also as to lines running through several counties or other subdivisions of the state; but that it was not the intention of the legislature, nor is it the meaning of that act, that any prop-
27] erty *outside of the state should be assessed by importation of values or otherwise, or that any property should be assessed at more or less than its true cash value. Construing the acts of 1891 and 1893 together, it will therefore be presumed, in the absence of evidence to the contrary, that the state board has deducted from the total valuation of all interstate property such values, if any, of extra-state property as will leave the remaining property, within and without the state, as near as may be, of equal proportional value. . . . The act of 1893 provides, generally, for a mode of ascertaining the true cash value of that part of interstate telegraph and other property which is within the state of Indiana, to wit, the mileage method. But should there be particular cases where that method must be modified in order to reach the necessary result, namely, the true cash value of such part of the property as is within the jurisdiction of the state, the law of 1893 itself supplies the means of doing so." 141 Ind. 285, 297-300.

The statute of Indiana of 1893 regarding telegraph companies, therefore, as construed and applied by the supreme court of the state, like the statute of 1891 regarding railroad companies, while it takes as the basis of valuation of the company's property within the state the proportion of the value of its whole capital stock which the length of its lines within the state bears to the whole length of all its lines, makes it the duty of the state board of tax commissioners to make such deductions, on account of a greater proportional value of the company's property outside the state, or for any other reason, as to assess its property within the state at its true cash value only; and is therefore governed by the same considerations, upon which the provisions of the statute of 1891 for taxing railroad companies were held to be constitutional by the decisions of this court in the *Railroad Companies* v. *Backus*, above cited.

The bill in the present case was filed before those decisions were rendered, and is so drawn as to make it somewhat difficult to distinguish matters of fact alleged with such clearness and precision as to be admitted by the demurrer,
28] from the *argumentative statements and the conclusions of law which are freely scattered throughout the bill.

The bill alleges that the state board of tax commissioners, in fixing the valuation of the plaintiff's property in Indiana (deducting the value of real estate, machinery, and fixtures subject to local taxation within the state), at the sum of $2,297,652, and at the rate of $357 per mile of telegraph line, placed upon that property, beyond its true cash value, as measured by the cost of replacing the same, making reasonable allowances for deterioration, additional values of the plaintiff's business, property, and goodwill, both in and out of the state, and the franchises granted by the United States, by the state of New York, and by foreign countries. This allegation is made by way of preliminary and inducement to the concluding statement of the paragraph, that "in witness thereof" the tax commissioners entered upon their record a certificate and statement, which is set forth, and which has no tendency to prove anything of the kind, but merely shows an assessment and valuation made by the state board of tax commissioners, "after full consideration," and "in accordance with the act of the general assembly of the state of Indiana, approved March 6, 1893." Moreover, the cost of the property, or of its replacement, is by no means a true measure of its value; the bill, while it elsewhere states the value of the plaintiff's real estate in other states, and of its stocks and bonds of other companies, nowhere undertakes to fix the value of its franchises from the United States, the state of New York, and foreign countries; and the tax commissioners, by the authorities already cited, had the right and the duty, in estimating the value of the plaintiff's property in Indiana, to take into consideration those franchises and the other elements mentioned in this paragraph of the bill.

The bill further alleges that the state board of tax commissioners did not attempt to specify or describe the plaintiff's real estate, machinery, and appliances subject to local taxation. But the statute did not require of them any such specification or description; nor does the plaintiff appear to have requested them, or to have done anything towards assisting them to do so.

*The bill then alleges that the commis- [29
sioners took, as a basis of their assessment, the value of the plaintiff's entire capital stock, estimating the value of the shares according to the price of such shares in the stock exchange market in New York city, and dividing such aggregate value by the total number of miles of the plaintiff's telegraph lines, wherever situated, and thereby obtaining a pretended valuation of $357 per mile of its telegraph line in Indiana, which was "grossly excessive and far beyond the true cash value of complainant's said property in Indiana." But the bill immediately proceeds to allege that "said state board of tax commissioners, in reaching said valuation of complainant's said property in Indiana, did not consider and assess the value of the property of complainant situated in Indiana, otherwise than by pursuing the requirements of said pretended statute." And the facts stated elsewhere in the bill demonstrate that the commissioners did not obtain their valuation by merely applying the rule



Digitized by Google

stated in this paragraph. Had they done so, the result would have been that the whole number of shares of stock, being 948,200, at $94.50 a share, would have been $89,594,900, which, divided by 189,576, the whole number of miles of all the plaintiff's lines, would give a value per mile of upwards of $472, or nearly one third more than the valuation adopted.

The bill further alleges that there was no market value for all the shares of the plaintiff's stock; that the price obtained for a very few shares in the New York stock exchange did not fairly represent the actual value of the plaintiff's property; and that any price at which any shares might be sold by holders thereof, whether calculated upon any market value or upon actual value, included a consideration of the plaintiff's franchises, its contracts with other companies, its actual past and probable future earnings from many sources, skill and enterprise of its managers, and all its real and personal estate in Indiana or elsewhere, including real estate of great value in other states, all of which were "blended so as to render it impossible to separate and disintegrate the portions of value applicable to any and each of said 30] elements of value of said *shares." This is hardly more than an argument to show the difficulty of ascertaining the cash value of the plaintiff's property in the state of Indiana. It certainly has no tendency to show that the tax commissioners did not, as they were required to do by the statute as since construed by the supreme court of the state, assess the plaintiff's property in Indiana at its true cash value, according to their best knowledge and judgment, and after making all proper deductions, on account of larger proportional values of its property and business outside of the state, or for any other reason.

The remaining allegations of the bill are either repetitions or amplifications of those already considered, or are averments of conclusions of law. The allegation that "the attempted and pretended valuation of complainant's said property by said state board of tax commissioners, in manner aforesaid, . . . necessarily includes, and does in fact include, values which are no part of the true cash value of the complainant in Indiana," is but equivalent to an assertion that the decision of the tax commissioners upon the question of fact committed by the statute to their determination was erroneous. As said by this court in *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, above cited, "Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact; and if such determination comes into inquiry before the courts, it cannot be overthrown by evidence going only to show that the facts were otherwise than as so found and determined." 154 U. S. 434, 435 [38: 1039].

*Judgment affirmed.*

FARMERS' LOAN & TRUST COMPANY, *Appt.*, [31

*v.*

CHICAGO, PORTAGE, & SUPERIOR RAILWAY COMPANY, CHICAGO, ST. PAUL, MINNEAPOLIS, & OMAHA RAILWAY COMPANY ET AL.

(See S. C. Reporter's ed. 31-43.)

*Stockholder's right to sell stock—creditors of railroad company.*

1. A stockholder is not under any obligation to refrain from selling his shares, at the sacrifice of his personal interests, in order to secure the welfare of the corporation, or to enable another stockholder to make gains and profits.

2. Mortgage creditors of a railroad company having no lien, legal or equitable, upon lands granted to the company, cannot pursue the lands in the hands of another company to which they have been granted after a forfeiture of the prior grant for failure to comply with its conditions.

[No. 60.]

*Argued October 18, 21, 22, 1895. Decided May 4, 1896.*

APPEAL from a decree of the Circuit Court of the United States for the Western District of Wisconsin dismissing a suit in equity brought by the Farmers' Loan & Trust Company against the Chicago, Portage, & Superior Railway Company *et al.* to establish a deed of trust as a lien upon certain lands. *Affirmed.*

See same case below, 39 Fed. Rep. 143.

The facts are stated in the opinion.

*Messrs.* **Thomas Ewing, Milton I. Southard,** and *Herbert B. Turner* for appellant.

*Messrs.* **Thomas Wilson,** *Charles M. Osborn,* and *Samuel A. Lynde* for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

This case comes before us on appeal from a decree of the circuit court for the western district of Wisconsin, of date September 2, 1889, dismissing the bill of plaintiff and appellant for want of equity. The original bill was filed in that court on July 25, 1885. The defendants named therein were *the Chicago, [32 Portage, & Superior Railway Company (to be hereafter called the Portage company), the Chicago, St. Paul, Minneapolis, & Omaha Railway Company (to be hereafter called the Omaha company), Ransom R. Cable, Henry H. Porter, A. A. Jackson, and Charles J. Barnes. After some preliminary pleadings the defendants filed answers, testimony was taken, and the case was submitted for hearing on the pleadings and proofs.

The plaintiff sued as trustee in a deed of trust executed by the Portage company on

NOTE.—*As to land grants to railroads,* see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

*As to right to pledge stock; rights of pledgee of same,* —see note to Anderson v. Philadelphia Warehouse Co. 28: 478.

*As to preferred stock; its issue; rights of holders of,* —see note to Warren v. King, 27: 769.



Digitized by Google

January 1, 1881, to secure a proposed issue of negotiable bonds to the amount of $10,200,000, of which 758 bonds of $1,000 each were claimed to be still outstanding and unpaid. The deed of trust covered all the property of the railway company, including a certain grant of lands made by the United States to the state of Wisconsin and transferred by the state to it. The claim, in a general way, was that these lands had been wrongfully wrested by the Omaha company from the Portage company, and a decree was asked declaring this deed of trust a first lien on such lands. The wrongs specifically charged in the bill are those set forth in the suit of Angle against the same two railway companies, reported in 151 U. S. 1 [38: 55], to which case, therefore, reference may be had for a full statement thereof. That case was disposed of on demurrer, while this is before us upon the proofs; and in view of the opinion there filed the question we have now to consider is whether the testimony sustains the charges.

The plaintiff states three propositions, each of which it claims is established by the evidence, and either one of which it says entitles it to the relief prayed for:

"First. That the Omaha company wrongfully and fraudulently prevented the Portage company from complying with the conditions of the grant, and caused the grant to be transferred to itself.

"Second. That the Omaha company, by its wrongful acts, became the sole stockholder of the Portage Company, and as such stockholder wrongfully and fraudulently used its powers and position to strip the Portage company of its property and transfer it to itself.

33] *"Third. That the act of the legislature of Wisconsin of February 16, 1882, revoking the grant to the Portage company, and the act of March 7, 1883, confirming the revocation, did not devest or attempt to devest the creditors of the Portage company of their legal or equitable rights, nor attempt to prevent them from having these lands appropriated so far as may be necessary to the satisfaction of their debts. Otherwise these acts would be null and void as impairing the obligation of a contract and invading private rights."

Involved in and essential to the plaintiff's case is the specific charge that the Omaha company bribed certain officials of the Portage company (in whose hands was perhaps the only valid outstanding stock of the Portage company, and held by them in trust) to dispose of that stock, so that the Omaha company, with knowledge of the trust attending the stock, and in breach thereof, became the controlling, if not the sole, stockholder in the Portage company. It is true that on January 20, 1882, A. A. Jackson, of Janesville, Wisconsin, C. J. Barnes, of the city of Chicago, Illinois, and J. C. Barnes, of the city of New York, transferred to R. R. Cable, who was acting for the Omaha company, $1,000,000 of the capital stock of the Portage company standing in the name of Jackson, and so much of another $1,000,000 of capital stock standing in the name of J. C. Barnes, as was absolutely valid and full-paid stock, together with 500 shares standing in the name of C. J. Barnes. This transaction is challenged, and its honesty and good faith are primary matters of inquiry.

In order to a clear understanding a brief statement of what had heretofore transpired is essential. Prior to 1880 the Portage company had done a little work in the construction of the line aided by the land grant, and but little. The work had been stopped, and the company was practically a dormant corporation, owning the land grant and subject to certain indebtedness. Its principal, if not sole, creditor was the Chicago & Northern Construction Company, which had done all the work on the road. This construction company, having expended some money in construction, for which the railroad *company was indebted to it, [34 was itself indebted to A. A. Jackson, an attorney of Janesville, in the sum of $18,000; to I. C. Sloan, an attorney of Madison, in the sum of $2,000; and to Edward Ruger, of Janesville, for engineering services, in the sum of $10,000 (for which sums these parties had recovered judgments), and to others in smaller sums, aggregating not exceeding $10,000. At the time of the negotiation hereafter referred to, with Gaylord and others, the railway company had issued $400,000 in bonds and $500,000 stock, of which issue the construction company owned and held all the bonds and $350,000 of the stock. Mr. J. C. Barnes was the individual who had put the most money into the construction company, and was practically its owner. In the summer of 1880 one Willis Gaylord entered into arrangements with Barnes for the reorganization of the railway company, and the securing of means for the construction of the road. The exact terms of the arrangements between Gaylord and Barnes may be open to some question, for Gaylord was not produced as a witness, and Barnes' recollection was not clear. A contract in writing, executed on the 20th of September, 1880, between Gaylord, the New England & Western Investment Company, and William H. Schofield, by which the latter two parties were to render their services in securing funds for the building of the road, throws some light on the question. It recites:

"And whereas, in the securing of said railway company's charter, land grant, rights of way, surveys, about sixty (60) miles of roadbed graded, and other lawful and proper expenses, there has been over $700,000 of money expended, which is represented by the aforesaid charter, land grant, rights of way, and other property, it is to be provided that out of the new series of first-mortgage bonds there is to be set apart and made a special trust seven hundred (700) of said new first-mortgage bonds of $1,000 each; also 10 per cent of the capital stock of the company, and, by the order in writing of said Willis Gaylord, countersigned by the president of said railway company, paid to the persons entitled to receive the same, as designated by the said Gaylord, in full liquidation and satisfaction of all claims and demands (except as *hereinafter stated) of the [35 present owners of said railway, and for all expenditures and claims made and due for said charter, land grant, right of way, surveying, grading, and all and every kind of expense on account of said railway company (not including a certain amount of floating debt now out-



Digitized by Google

standing, which does not exceed $40,000 and to be provided for hereinafter), and the aforesaid $700,000 in first-mortgage bonds are to have the interest coupons for the first two years from their date cut off and canceled, and the said bonds, together with 10 per cent of the capital stock as aforesaid, are to be placed in trust, as a special trust, and be delivered to the parties entitled to receive the same, as designated by the said Gaylord, to be delivered, however, only *pro rata*, as the other bonds and stock are delivered for material or money, and as the road is constructed and put in operation in sections of ten (10) miles each.

"And whereas there is in the form of floating debt, in lawful and proper claims, approximately, but not exceeding, $40,000, it is to be provided that when, through said examination, the enterprise is found to be satisfactory to said investment company, and the proposed new bonds and stock are prepared and deposited as herein provided for, then said investment company will proceed at once to the negotiation of the same, and will, as soon as cash to the amount of $40,000 shall have been procured, pay or cause to be paid said sum to A. S. Barnes & Co., in payment of said floating debt, and on such payment being made, the reorganization or substitution of new directors and officers of said railway company, as herein provided, shall then take place.

"And the said Gaylord shall furnish satisfactory evidence and assurance that the said $700,000 of first-mortgage bonds and 10 per cent of capital stock will pay, cancel, and fully release all claims, demands, and encumbrances against said railway company, except said floating debt, and that the floating debt aforesaid does not and shall not exceed $40,000."

Apparently, from this recital, the $40,000, or such a matter, due by the construction company to Jackson and others, was treated as a debt of the railway company and was to be paid [36] *in cash, leaving the indebtedness of the railway company to the construction company to be satisfied by the $700,000 bonds and the 10 per cent of the stock. It would seem from other evidence that Barnes was to take $350,000 of the bonds and the stock and Gaylord was to take the balance of the bonds, although there is testimony that Gaylord was to receive fifty of the Barnes bonds for personal services and by way of commission. There was a modification of this contract on January 20, 1881, but the change is not material to this controversy. On March 28, 1881, the action of Gaylord in the two contracts of September 20, 1880, and January 20, 1881, was approved by the directors of the railway company, who also, on the same date, passed a resolution as follows:

"*Resolved*, . . . that for all present outstanding stock certificates new certificates of stock for a like amount shall be issued and delivered to the parties entitled to receive the same upon the surrender and cancelation of their old certificates of stock and in exchange therefor."

The second day thereafter, on March 30, a resolution was passed which, after referring to the appropriation of bonds to the amount of $700,000 and stock to the amount of a million for the purpose of discharging the indebtedness of the company, recites the receipt of full value in real property and other valuable consideration for such bonds and stock, and gives the consent of the company to the immediate issue of one half the amount thereof.

Just before the passage of these two resolutions, and on March 26, 1881, the construction company assigned to Jackson its claim against the railway company for bonds and stock, as well as all of its claims and demands of any and every kind against the railway company. Jackson took this assignment really for J. C. Barnes, and was to hold the claim, thus assigned, for him until he should be able to pay the amounts due to Ruger, Sloan, and others. Subsequently, and on May 17, 1881, Jackson forwarded to the president of the railway company a letter, giving notice of the assignment, stating that of the 400 bonds which had belonged to the construction company 361 had been surrendered to the railway company to *be exchanged for new bonds, and that he [37 had in his possession the remaining 39, and proposing to surrender the 39 and release all claims for the 361 upon the issue to him of $650,000 of full-paid stock. Whereupon the board of directors took the following action:

"On motion of Wm. T. Watson, duly seconded, the following resolution was adopted:

"Whereas A. A. Jackson, as the assignee of the Chicago & Northern Pacific Construction Company, holds 39 bonds of this company issued by this company under its former name of the Chicago & Northern Pacific Air Line Railway Company, bearing date July 1, 1872, with the coupons thereto annexed, and as assignee of said construction company he is also entitled to receive from this company 361 bonds of this company of $1,000 each, with interest thereon from the 1st day of July, 1872, at the rate of 7 per cent per annum, amounting in all on the 1st day of June, 1881, to the sum of $649,663; and

"Whereas the said Jackson has made a proposition to this company, in writing, proposing to surrender to this company said 39 bonds so held by him and to release this company from its liability and obligation to deliver to him 361 bonds and interest upon the company issuing and delivering to him 6,500 shares of the capital stock of this company:

"Therefore resolved, That the proposition of A. A. Jackson be, and the same is hereby, accepted, and the president and secretary are hereby authorized and directed to sign, seal, and deliver to said A. A. Jackson certificates of full paid stock of this company of the par value of $650,000, upon said Jackson's delivery to them of said 39 bonds, with the coupons thereto annexed, and a properly executed instrument releasing and discharging this company from its liability and obligation to execute and deliver to him bonds of this company for $361,000 and interest at 7 per cent from July 1, 1872, in pursuance of his proposition; and

"Resolved, That the proposition of A. A. Jackson be entered upon the records of this company in connection with this order."

*In accordance, therefore, with the terms [38 of this resolution and that of March 28, heretofore quoted, Jackson was entitled to receive, on the surrender of the $350,000 of old stock



Digitized by Google

and 39 bonds in his possession and the release of all claim in respect to the 861 theretofore surrendered, the sum of $1,000,000 in full-paid stock of the company. The stock when issued to Jackson would, under the arrangement between him and Barnes, be held by Jackson for the benefit of J. C. Barnes. This stock was in fact issued and delivered to Barnes for Jackson. That this stock was not obtained surreptitiously, but delivered knowingly by the officers of the company to Barnes for Jackson, is evidenced by the following letters and receipt, the letters being signed by the president of the company:

Chicago, Portage, & Superior Railway Company. Wm. H. Schofield, President.
President's Office, 150 Broadway,
New York, June 18, 1881.

R. G. Rolston, Esq'r, President Farmers' Loan & Trust Company, New York.

Dear Sir: I have this day deposited with the Farmers' Loan & Trust Company eight thousand, six hundred and fifty (8,650) shares of $100 each of the capital stock of the Chicago, Portage, & Superior Railway Company to be paid out or delivered by you upon special orders by me prepared and this day left with you for acceptance. Will you please sign the form of acceptance on said stock orders, and when so signed and upon the presentation and surrender to you of this order, deliver to Jno. C. Barnes, Esq'r, the aforesaid special orders representing the said 8,650 shares of stock, and this is your general authority for the delivery of said stock to the persons and at the terms named in said special orders.

Chicago, Portage, & Superior Railway Company,
By Wm. H. Schofield, President.

39] *Office of the Farmers' Loan & Trust Company, 26 Exchange Place, cor. William St.
New York, June 17, 1881.

Received from the Farmers' Loan & Trust Company certificates for the delivery of eighty-six hundred and fifty shares of the capital stock of the Chicago, Portage, & Superior Railway Company in accordance with the terms of said certificates.

J. C. Barnes,
Per E. D. Hotchkiss.

New York, Oct. 22, 1881.

To the Farmers' Loan & Trust Co., New York:

You are hereby authorized and directed to deliver to John C. Barnes, Esq., of the city of New York, all the certificates of the capital stock of the Chicago, Portage, & Superior Railway Company, referred to and described in 90 certain orders signed and accepted by you, on the surrender to you of all said orders, without regard to any of the conditions or limitations contained or specified in said orders.

Chicago, Portage, & Superior Railway Company,
By William H. Schofield, President.

Further, on the stubs of the stock book of the company, in the handwriting of the president, except the signature of J. C. Barnes, appear these entries:

On the stub of certificate numbered 1 (the stubs of certificates from 1 to 90, inclusive, being precisely similar except in number of shares): "On acc't stock, bonds, & interest canceled and returned. No. 1 for 500 shares June 18, 1881. Issued to A. A. Jackson of Janeville, Wisconsin. Received certificate No. 1, as above described, June 18, 1881."

And on stub No. 132: "On account of stock, bonds, & int. canceled & returned. No. 132 for 1,350 shares October 24, 1881. Issued to A. A. Jackson of Janesville, Wisconsin. To make bal. of 1,000,000 June 18, '81. Received certificate No. 132, as above described, Oct. 24, 1881, for A. A. Jackson, $1,000,000 in *ten thousand shares. Dated June 18, '81, [40 and present date. J. C. Barnes."

On the day of receiving the last of these stock certificates, to wit, October 24, Barnes wrote to Jackson, advising him of the issue of the 10,000 shares in his name; that the certificates were in his (Barnes') hands, and that he, Jackson, could vote on that stock. On October 31, Jackson, being in New York, received from Barnes this receipt:

A. S. Barnes & Co., Publishers.
New York, Oct. 31, 1881.

Received from A. A. Jackson ninety-one (91) certificates of stock of the Chicago, Portage, & Superior Railway Company, aggregating ten thousand (10,000) shares, as follows:

| | | | | | |
|---|---|---|---|---|---|
| No. | 1 to 5, | inc., | 500 | sh's ea | 2,500 |
| " | 6 " 55, | " | 100 | " " | 5,000 |
| " | 56 " 75, | " | 50 | " " | 1,000 |
| " | 76 " 90, | " | 10 | " " | 150 |
| " | 132 for | | | | 1,350 |
| | Total shares | | | | 10,000 |

The above certificates are issued to A. A. Jackson and have not been transferred, but are held for his future order.

J. C. Barnes.

Jackson took that receipt, as he testifies, simply because he did not care to carry the certificates home, and wished something to show where they were and that they were held subject to his order. On November 15 thereafter J. C. Barnes transmitted to his nephew, C. J. Barnes, in Chicago, the stock, accompanied by this letter and power of attorney:

New York, Nov. 15, 1881.

Charles J. Barnes:

By express to-day I send you ten thousand shares of C., P. & S. railway stock, issued to A. A. Jackson, and which belonged to him for settlement of construction company's claims, etc. I send these shares at the request of Mr. Jackson. *He will explain why they [41 are sent, and his argument agrees with my own convictions. These shares are not ever to be parted from your custody, except as it shall be deemed necessary to protect the mutual interest of Jackson, yourself, and myself, and are only to be used in extreme case of necessity for our mutual benefit. I also enclose authority to sell the ten thousand shares which stand in my name on the company's book.

J. C. Barnes.

New York, November 15, 1881.

This is to say that Charles J. Barnes is my true and lawful attorney for negotiation and



Digitized by Google

sale of a certain number of certificates of stock standing in my name on the books of the Chicago, Portage, & Superior Railway Co., said certificates dated June, 1881, and aggregating $1,000,000.

J. C. Barnes.

It would seem clear from this evidence, not depending on imperfections of memory, but contained in writings (many of them on the books of the company and made by its officers), that Jackson was the legal holder of this $1,000,000 of stock, free from all obligation to the company, and subject only to the trust in favor of J. C. Barnes. It is difficult to see why Jackson did not have the legal right, with the assent of Barnes, to dispose of this stock to whomsoever he saw fit, and at any price he could obtain. The debt of the railway company to the construction company is not disputed; the documentary evidence establishes that for that debt the company issued this stock as full-paid stock; no limitations are expressed in the proposition of Jackson or the resolution of acceptance, and for aught that these records disclose he had the same right and control over this stock, subject only to his trust in favor of Barnes, that any stockholder in any corporation has over his. It is true that the transaction between Jackson and the railway company seems to involve some departure from the arrangement indicated by the contract between Gaylord and others, of September 20, 1880, for that apparently contemplated the issue of 42] $700,000 of bonds, *$1,000,000 stock, and the payment of $40,000 in cash in satisfaction of all the debts of the railway company; but this transaction was the later one and, in so far as it modified the earlier arrangement, superseded it. It is probable that there was in fact no modification, but only an addition, and that Gaylord and J. C. Barnes still expected to receive $700,000 in bonds and $1,000,000 stock, in addition to this $1,000,000 of stock issued to Jackson, for additional certificates of stock to the amount of $1,000,000 were made out by the officers of the company in the name of J. C. Barnes, though never delivered to him. Apparently they regarded this as a bonus for their services.

It is this last $1,000,000 of stock which is referred to in the authority given by J. C. Barnes to C. J. Barnes of November 15, 1881, heretofore quoted, and also in the following letter of authority given on November 19 by J. C. Barnes to Jackson:

A. A. Jackson, Esq., Janesville, Wis.:

I hereby authorize and empower you to negotiate the sale for me of the certain ten thousand (10,000) shares of stock now standing in my name on the books of the Chicago, Portage, & Superior Railway Company, said shares representing the par value of $1,000,000.

J. C. Barnes.

It was evidently the doubt as to the validity of this latter stock as full-paid stock that induced the parties in making the transfer to Cable to thus describe it in their contract of sale: "And so much of the ten thousand shares of the capital stock standing in the name of John C. Barnes, aforesaid, on the books of said company (which last-named stock said Jackson and C. J. Barnes, as agents of said John C. Barnes, are authorized and empowered to sell upon such terms as they shall see fit, a copy of the said authority from said John C. Barnes to said A. A. Jackson being hereto annexed and made a part hereof) as is absolutely valid and full-paid stock."

We do not deem it necessary to enter into any consideration of the question of its validity, or whether it was full-paid *stock, and only [43 refer to it for the purpose of showing that the transaction with Jackson was independent of the arrangement between Gaylord and Barnes, and was unaccompanied by any conditions which may be claimed to have attached to the stock issued in Barnes' name.

The testimony further discloses that, from some time in the latter part of 1881 until the sale made by Jackson to Cable, Schofield, as the president of the railway company, was negotiating with the officers of the Grand Trunk Railway Company with a view to securing their interest in the Portage company, and their aid in floating its bonds in European markets, and that those negotiations had proceeded finally so far as to disclose a possibility, perhaps a probability, of success. Jackson and J. C. Barnes were aware of the pendency of these negotiations, and of the various steps therein, so far as they were disclosed by the records of the Portage company, and the contracts which were reported by Schofield to the directors of that company. The Grand Trunk company, having secured an entrance into Chicago, evidently saw the possibility of benefit to itself in obtaining control of a road running into the far Northwest, and upon that view entered into these negotiations. It is also true that when the Grand Trunk company found that Cable, acting for the Omaha company, had purchased this Jackson stock, it abandoned all negotiations and gave up the thought of attempting to secure control of the Portage company. It is claimed by Jackson that the delays in negotiations with the Grand Trunk company were such that he had lost all confidence in their success; that he offered the stock to officers of that company at the same price that Cable subsequently paid for it, and that they declined to take it.

Putting the most unfavorable construction upon the testimony, it does not seem to us that either Jackson or Barnes can be condemned of any breach of trust or other obligation, to the Portage company when, having offered the stock to the Grand Trunk company at the price afterwards paid by Cable, and such offer having been declined, they sold it to the Omaha company. It may be that thereby Schofield and *Gaylord were deprived of [44 the profits which they expected to secure by successfully carrying through the negotiations with the Grand Trunk company, but we do not understand that one stockholder is, by virtue of his ownership of stock, bound to continue in the holding of it in order to allow another stockholder to make a profit out of negotiations then pending. Jackson and Barnes had the same right to look after their own interests in the sale of the stock that Schofield and Gaylord had after theirs in the negotiations with the Grand Trunk company. It



Digitized by Google

seems very probable, if we may speculate as to what would have been the result if the negotiations with the Grand Trunk company had been successfully carried to completion, that the $1,000,000 of stock which Jackson held, instead of being worth $200,000, would have been worth little or nothing, and we do not understand that a stockholder is under obligations, legal or moral, to sacrifice his personal interests in order to secure the welfare of the corporation of which he is a stockholder or to enable another stockholder to make gains and profits.

In short, to sum up this branch of the case, from the testimony in this record it is, we think, clear that Jackson was guilty of no breach of trust in selling this stock; that it belonged, both legally and equitably, to J. C. Barnes and himself; that they had a full legal and moral right to sell it to any one who would pay their price, and it equally follows that the Omaha company and Cable, in making the purchase, were themselves guilty of no wrong.

Another claim is that the Omaha company wrongfully prevented the Portage company from earning the land grant. This, it is said, was done by inducing the general manager of the company to withdraw the engineering corps and to stop the contractor from proceeding with the work of construction, and, after all work had in fact been stopped, by false swearing securing an *ex parte* injunction to restrain the officials of the Portage company from any further efforts in its behalf. But the testimony does not make good these charges. It is true Mr. Cable, after his purchase of the stock, asked Mr. Peck, the general manager, [45] to discontinue the work of *construction, but the latter, as he himself testifies, declined to do this, not recognizing Mr. Cable as having any authority in the matter. He did, however, after consultation with the president and learning that negotiations for the assistance of the Grand Trunk company had been abandoned, notify the contractors by telegraph of the fact, and that there seemed to be no immediate prospect of raising money to continue the work. With reference to the alleged obtaining of an *ex parte* injunction on false affidavits, the facts are these: The president of the Portage company, who was a resident of New York, after the giving up of the negotiations with the Grand Trunk company, returned to that city, and there had in his possession the books and papers of the company—indeed, for all practical purposes, the office of the company seems to have been theretofore transferred from Chicago to New York. Mr. Cable sought to have the stock which he had purchased transferred on the stock books of the company, but failed in his efforts. He was informed that the president was calling special meetings of the directors of the company in New York without giving notice to the local directors and without their presence, and by virtue of authority granted at such meetings was disposing of bonds and stock—information which we regret to say had no slight foundation in the actual facts. Whereupon he filed his bill in the circuit court of Cook county, Illinois, which, reciting his purchase and ownership of the stock, the conduct of the president and other officials of the corporation, as above stated, prayed an injunction against the Portage company and its president. In order that the exact scope of this injunction may be apparent we quote from the prayer in the bill, the order of the court being that an injunction issue as prayed for:

"That a preliminary injunction issue restraining the defendants and their officers, directors, agents, and servants from issuing or carrying or allowing to be issued any of the capital stock of said corporation, and from issuing, selling, pledging, or causing to be issued or sold or pledged, any of the mortgage bonds of said corporation until the further order of this court, and also restraining said defendants and their officers, *directors, [46] servants, and agents from transferring or allowing to be transferred upon the books of said corporation any of the capital stock which has been issued by said Schofield as above stated and which is above charged to have been wrongfully, fraudulently, and improperly issued, or any other fraudulent capital stock of said company, and that said defendants, their officers, agents, and servants, be also restrained and prohibited from calling or holding or causing to be called or held any meeting of the directors of said corporation or attempting to transact business at such meeting and from taking part as an officer or director at such meeting unless full notice of such meeting and the time and place of holding the same shall have been given to each of the above-named directors of said corporation, and not in that event unless such meeting and meetings shall be notified to be held and shall be held at the principal office of said corporation, in the city of Chicago, in the state of Illinois.

"And that until such time as said books and papers of said corporation shall be returned to and kept at its office in the city of Chicago aforesaid, open to the inspection of your orator, said defendants will be prohibited and restrained from doing any act or thing concerning or affecting the financial affairs of said corporation for the amount of its liabilities or the amount of its capital stock, and from entering upon the records of said company any statement or record of its actings or doings."

It is true that the temporary restraining order or temporary injunction was granted on the 9th day of February, 1882, without notice, but the defendants were in a few days served with process. They made no attempt to have the order vacated, but, on the contrary, on March 20, 1882, the Portage company filed a cross bill seeking to restrain Cable from disposing of the stock he had purchased, and praying that it be delivered up for cancelation. Nothing, however, came of this litigation, and it was abandoned in consequence of negotiations and a settlement between Cable and the investment company.

Finally, it is insisted that the Omaha company wrongfully *and fraudulently secured [47] through the action of the legislature of the state of Wisconsin a transfer of the land grant to itself, and further that the action of the legislature in making such transfer did not devest, or attempt to devest, the creditors of the Portage company of their legal or equitable rights, nor prevent them from having the lands



Digitized by Google

appropriated so far as was necessary to the satisfaction of their debts.

With reference to the first portion of this charge, it is sufficient to say that there is absolutely no foundation for it in the testimony. It does not appear that there was any corruption or attempted corruption by the Omaha company of any of the members of the legislature, or other officials. Everything it did was open and above board. At the instance of the officials of the Portage company it consented that a stipulation be introduced into the act of forfeiture and transfer that it should pay to the governor of the state the sum of $78,000, to be used in payment of labor claims for work done on the Portage company's line, and after the passage of the act it did pay the stipulated sum. We are left, therefore, to the single question whether the act of the legislature, either in terms or by implication, burdened the transfer with a continuing obligation for the debts of the Portage company. No such burden was in terms imposed. The grant was, so far as the legislative action discloses, simply taken away from the Portage company because of a failure to comply with the conditions under which it had originally been bestowed upon it. On such failure of the Portage company all its right to the lands ceased. Whatever the legislature might thereafter do in its behalf was a mere act of grace. No creditor of the Portage company had any legal or equitable right to any portion of those lands, and if the legislature had simply revoked the grant and resumed possession on behalf of the state there would be no pretense of a claim that any such creditor could subject the lands, or any interest therein, to the satisfaction of his debt. There is no intimation of a contrary doctrine in the opinion filed in *Angle* v. *Chicago, St. P. M. & O. R. Co.* 151 U. S. 1 [38: 55]. All that was there held was that the legislative action did not condone, and was not intended to con-

48] done, *any wrongs done by the Omaha company; and that if the Omaha company had been guilty of any fraudulent conduct, in consequence of which the Portage company had been prevented from earning the grant and the legislature thereby induced to revoke it and bestow it upon the Omaha company, the party wronged by those acts of the Omaha company was entitled to redress. But here, as we have seen, although the charges are the same, yet the testimony fails to make good those charges, or to show any fraudulent or wrongful conduct on the part of the Omaha company. The legislative act condoned no wrong, for there was no wrong to condone. It neither placed nor continued any burden upon the land grant, and hence the mortgage creditors of the Portage company, having no lien, legal or equitable, cannot pursue the lands in the hands of the Omaha company.

There is this substantial difference between the *Angle Case* and the present: While in each are charges of grievous wrong on the part of the Omaha company, in consequence of which property which otherwise would have been subjected to the payment of the plaintiff's claims was obtained by the Omaha company, in the *Angle Case* the Omaha company demurred, saying there was no remedy, notwithstanding the wrongs alleged. We held that if such wrongs as were alleged had been committed, the law did furnish a remedy. In this case the Omaha company took issue upon the charge of having committed such wrongs, and the testimony shows that it did not commit them. So the proof fails to make good the charges, and *the decree of the circuit court was right, and is affirmed.*

Mr. Justice **Harlan** concurs in the result upon the grounds stated in his opinion at the circuit. *Farmers' Loan & T. Co.* v. *Chicago, P. & S. R. Co.* 39 Fed. Rep. 143; *Angle* v. *Chicago, St. P. M. & O. R. Co.* 151 U. S. 1-28 [38: 55].

---

GEORGE E. KIRK, *Appt.*, [49
v.
UNITED STATES.

(See S. C. Reporter's ed. 49-56.)

*Assignee of patent-right to recover royalties.*

A patent for letter boxes already in use by the Postoffice Department, issued against the protest of an agent of the government to a person who was not the inventor of the boxes, but who furnished them to the government under a contract which had expired and which the government had refused to renew, does not give to his assignee any right to recover royalties upon the theory of an implied promise for the previous use of such boxes, in a suit which was pending when the patent was issued.

[No. 214.]

*Argued April 14, 1896. Decided May 4, 1896.*

APPEAL from a judgment of the Court of Claims dismissing a claim by George E. Kirk as assignee of a patent for a street letter box against the United States for royalties for the use of the patent. *Affirmed.*

See same case below, 28 Ct. Cl. 41.

Statement by Mr. Justice **Brown**:

This was a claim by George E. Kirk as assignee of letters patent No. 462,224, for a street letter box, issued October 27, 1891, to

---

NOTE.—*For what patents are granted; when declared void,*—see note to Evans v. Eaton, 4: 433.

*As to patentability of inventions,* see notes to Thompson v. Boisselier, 29: 76, and Corning v. Burden, 14: 683.

*As to when assignee may sue for infringement; when patentee must; when they must join,*—see note to Wilson v. Rousseau, 11: 1141.

*As to damages for infringement of patent; treble damages,*—see note to Hogg v. Emerson, 13: 824.

*As to distinction between inventions of mechanism, articles, or products and processes; when latter patented,*—see note to Corning v. Burden, 14: 683.

*As to anticipation of patents; prior patents and publications; application and issue; claims and specifications,*—see note to Leggett v. Standard Oil Co. 37: 737.

*As to patents for designs, when valid,* see note to Smith v. Whitman Saddle Co. 37: 606.

*As to what constitutes infringement of patent; similarity of devices; designs; combinations; machines; construction of patent,*—see note to Royer v. Coupe, 36: 1073.



Digitized by Google

Samuel Strong, upon an application filed therefor March 9, 1874.

The original petition was filed October 27, 1884, about ten years after the application for the patent was filed, and seven years before it was finally issued.

The case having been tried by the court of claims, that court made a finding of facts, of which the following is an abstract:

On March 30 and August 31, 1869, there were granted to said Samuel Strong two patents, Nos. 88,525, and 94,449, for improvements in street letter boxes, and on the 15th of September of the same year Strong entered into a contract in writing with the defendant through the Postmaster General, whereby Strong contracted to furnish cast-iron street letter boxes for the use of the Postoffice Department, in such numbers and at such times and places as might be ordered by the Postmaster General, up to October 1, 1872. These letter boxes were to be of the size, shape, weight, and model of one deposited by him in the Postoffice Department, the design and construction of which were carefully specified in the contract, the United States on its part agreeing to pay $5.50 for each box furnished and put up, according to order.

A few days after this contract was executed, [50] namely, *September 27, Strong assigned to one Gideon L. Walker all his interest in the two patents above mentioned, as well as his interest in and to a certain invention in street letter boxes for which he claimed he had prepared and filed specifications preparatory to obtaining a patent therefor. But whether such patent was ever issued did not appear.

The letter boxes so contracted to be furnished by Strong were actually furnished by him, and were the letter boxes for which he had secured a patent for what is known as the "flat-top" letter box. But, in consequence of complaints made to the Postmaster General to the effect that such boxes were too wide, unsightly in appearance and unsatisfactory, he called together at Washington a convention of postmasters and other postal officials, to consult with regard to the general good of the service. Before this convention, which met in January, 1870, the Postmaster General laid for inspection several models of letter boxes, including the one then in use, furnished by Strong, under his contract; but the convention rejected all such models, and, endeavoring to avoid conflict with any existing patent, devised a letter box based upon their own experience, and by a communication addressed to the Postmaster General, dated January 15, 1870, recommended the adoption of a box "about 1½ feet in length, about 6 inches in depth and 12 inches in width, with an opening at the top sufficiently large to receive newspapers and magazines, the opening or receptacles especially protected from the weather with a curved top to carry off the water, and a door in the side or front, with side flanges, to take the matter from, and that the hours for collection be distinctly shown upon the outside of the box." At the same time and in the same communication they condemned the street letter box "now furnished the department under the contract known as the Strong patent."

Pursuant to such recommendations, a letter box was devised and adopted by the Postmaster General, known as the "round-top," and Strong was engaged to model, manufacture, and furnish to the Postoffice Department such boxes, with such alterations and improvements therein as the *Postmaster [51 General might suggest; and in pursuance thereof a written contract was entered into between Strong and the defendant on February 18, 1870, to continue in force for four years thereafter. This contract in terms superseded and annulled the contract theretofore made on September 15, 1869. Under this contract of February 18, 1870, Strong modeled and manufactured boxes, with such alterations and improvements therein as were suggested by the Postmaster General, until boxes giving satisfaction to the Postmaster General had been made; and the boxes so modeled and manufactured by said Strong were the boxes furnished by him to and for the use of the Postoffice Department, under and during the existence of his said contract, and none other, for which he was paid $5.50 for each of the small size and $7.50 for each of the large size of said boxes.

A few days prior to the expiration of the said contract, namely, on February 11, 1874, Strong filed in the Patent Office a caveat, and on March 9 an application and specifications, claiming to be the inventor of the cast-iron street letter box so devised and adopted by the Postmaster General as aforesaid; which letter box, so devised and adopted by the Postmaster General, was modeled and manufactured by Strong under the instructions of the Postmaster General, as provided should be done in his contract, and the said boxes so modeled, manufactured, and furnished by said Strong were in public use in the letter-carrier cities of the United States for more than two years prior to March 9, 1874, the date when Strong filed his application for a patent thereon.

Pending such application, and on July 29, 1874, the Postmaster General addressed a letter to the Commissioner of Patents, saying that the department had been informed by Strong that he had taken out two caveats to protect his alleged rights to a certain street letter box now in use by authority of the department, stating that such box had been in use for four years, under contract with Strong of February 18, 1870, and had been recommended by the convention of postmasters, reduced to shape and form by Strong, as described by them, and could in no just sense be considered *as the invention of Strong, [52 he having simply carried out the views of the convention in this respect.

On January 26, 1881, Strong assigned all his interest in the letters patent and the invention to the claimant, but it did not appear that Gideon L. Walker, to whom Strong had theretofore executed an assignment in writing, as before mentioned, consented to such assignment to the claimant or any one else on the application of September 4, 1869, referred to in said written assignment.



Digitized by Google

After the filing of the original petition in this case, to wit, October 27, 1891, there was issued to the claimant, George E. Kirk, assignee of said Samuel Strong, letters patent No. 462,224, which patent covers the same and identical street letter box accepted by the Postmaster General, known as the "round-top," which was modeled and manufactured by Strong, as hereinbefore set forth.

Subsequently to February 18, 1874, the date of the expiration of the contract with Strong, the Postmaster General contracted with the Union Foundry & Manufacturing Company, of Reading, Pennsylvania, and others, at divers times to manufacture and furnish for the use of the Postoffice Department the same and identical kind of street letter box theretofore modeled, manufactured, and furnished by said Strong under his contract, as aforesaid; and it does not appear that the contracts for the boxes to be furnished were with the knowledge or consent of said Strong or claimant.

During the six years prior to the filing of the original petition, and up to the date of filing the last amended petition, January 15, 1892, there were purchased for the use of the Postoffice Department about 35,000 such letter boxes, a reasonable royalty for the use of which would be $1 per box.

Upon the foregoing finding of facts the court of claims decided as a conclusion of law that the claimant was not entitled to recover, and the petition was therefore dismissed. Thereupon petitioner appealed to this court.

*Messrs.* **R. H. Steele, Robert A. Howard,** and *E. H. Holman* for appellant.

*Messrs.* **J. E. Dodge,** Assistant Attorney General, and *Charles C. Binney* for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

In his amended petition of January 26, 1891, claimant asserts himself to be the assignee of the improvements made by Strong, for which the two patents of March 31 and August 31, 1869, were issued; as well as the assignee of another patent, issued February 7, 1882; and also of an application for still another of March 9, 1874. He sets forth the contracts of September 15, 1869, and February 18, 1870, and the performance of the same, and alleges that, "at the termination and expiration of said contract, the said Samuel Strong applied to the Postmaster General of the United States for a renewal of the same; and that, notwithstanding a verbal understanding and promise on the part of the said Postmaster General, made at the time of the execution of the said contract, that there would be such a renewal, said renewal was denied to said Samuel Strong, and no further renewal of said contract has since been made by and between the said parties thereto."

The gist of his complaint is that, after the expiration of the contract, the government continued to use the boxes that had theretofore been manufactured by Strong; that all such letter boxes "were covered by the claims of the aforesaid application for letters patent of March 9, 1874, and included by said contracts, and now owned by said claimant;" that such use was in violation of the rights of claimant, in virtue of his said assignment; that since February 18, 1874, the government has refused to renew this contract with Strong, or to pay him anything for the use of the boxes, and that he is entitled to the sum of $3.50 upon each of said boxes used, under an implied contract to pay for the same. His allegation with regard to the patent for which application was filed March 9, 1874, is that the application therefor was examined by the primary examiner and rejected; that an *appeal was taken to the examiners-in-[54 chief, which reversed the decision of the primary examiner, and held that Strong was entitled to a patent; that, in accordance with such judgment, the Commissioner of Patents allowed the claims, received the final fee, and ordered the patent to issue, but, notwithstanding all that, "still withholds the patent for reasons known only to himself, and entirely contrary to the said express mandate of law."

In an amended petition, filed January 15, 1892, claimant sets forth that a patent was issued to him on October 27, 1891, in pursuance of the application of March 9, 1874, and that on January 15, 1870, a convention of postmasters, which met at Washington, recommended for adoption to the Postmaster General the boxes filed with the board, and known as the Strong boxes, and that it was the intention and understanding of the Postmaster General that the invention so adopted should be used by the government, and a reasonable and just compensation made for the use of the same.

In this connection, however, it is found by the court of claims that the two patents of 1869 were, on the 27th day of September of that year, assigned to Gideon L. Walker, and consequently that Kirk took nothing by the assignment to him of the same patents of January 6, 1881; and that the patent of February 7, 1882, was not included in the assignment to Kirk, but still appeared to be owned by Strong. It follows that the only invention or patent in which claimant appears to have any interest is that known as the "round-top" box, which claimant holds by authority of the assignment of January 6, 1881, for which letters patent were never issued until 1891, seventeen years after Strong's contract with the government had expired. The court further found that the round-top letter box was devised and adopted by the Postmaster General himself; that Strong was employed to model, manufacture, and furnish these boxes for a term of four years, with such alterations and improvements therein as the Postmaster General might suggest; that a few days before the expiration of this contract, Strong filed a caveat in the Patent Office and made application for a patent for the boxes *so devised and adopted by the Post-[55 master General, which letter box had been manufactured by Strong under his instructions; and that they had been in public use for more than two years prior to March 9, 1874, when Strong filed his application therefor; that the Postmaster General protested against the grant of a patent to Strong, and



Digitized by Google

that the same was not granted until seventeen years thereafter.

Discarding, then, the patents of 1869 and 1872 as immaterial, the case resolves itself into the question whether the assignee of a person who did not invent the letter box in dispute, who had no patent for it until after the suit was commenced, who had no contract to manufacture it, and who finally obtained a patent against the protest of the government's agent, can recover of the government a royalty for the use of the device upon the theory of an implied promise to pay for such use. There can be but one answer to this proposition.

The application of Strong to patent a letter box which he did not invent was naturally suggested by the fact that his contract for manufacturing the same was about expiring, and he desired to foreclose others from obtaining a further contract by securing a patent for the box. If a patentee could, under any circumstances, sue to recover for the use of a patent before it was granted (as to which it was held in *Gayler* v. *Wilder*, 51 U. S. 10 How. 477, 493 [13: 504, 511]; *Brown* v. *Duchesne*, 60 U. S. 19 How. 183, 195 [15: 595, 599]; *Marsh* v. *Nichols, S. & Co.* 128 U. S. 605, 612 [32: 538, 541]; *Sargent* v. *Seagrave*, 2 Curt. 553, 555; and *Rein* v. *Clayton*, 37 Fed. Rep. 354, 3 L. R. A. 378, that an inventor has no exclusive right before a patent has been issued), it certainly could not apply to a case where the patentee was not the inventor of the thing patented; where the device had been in public use for more than two years before the patent was applied for; and where the government, so far from agreeing to pay a royalty for it, had protested against any patent being issued for it. We know of no principle upon which a contract can be evoked from a distinct refusal of one party to recognize the rights of the other, and a formal protest against any such rights being granted to him.

56] *Certain criticisms are made in the briefs of counsel upon the findings of fact of the court of claims, but as no exceptions appear to have been taken thereto, and as the testimony is not, and under our rules cannot be, sent up with the record, these findings must be accepted as conclusive, and for the reasons above stated *the judgment of the court below is affirmed.*

---

## ALBERT E. WIGGAN, *Plff. in Err.*, v. ALEXANDER CONOLLY ET AL.

(See S. C. Reporter's ed. 56-63.)

*Treaty with the Ottawa Indians—sale of land by a minor.*

1. The treaty between the United States and the Ottawa Indians completed in 1868 by accepting, with some modifications in matters of detail, a proposition made by the Indians in February, 1867, is not invalid on the ground that the tribal organization of the Ottawas had ceased to exist, although by the treaty of 1862 the tribal organization was to be dissolved July 16, 1867, since the proposition to change this was made by the tribe before that date.

2. The provision in the Ottawa treaty of 1867 for the issue of patents to heads of families and to all who have come of age among the allottees under the treaties of 1862, so that they may sell their lands without restriction in order to remove to new homes, supersedes the provisions in the earlier treaty in reference to patents, and introduces a new limitation upon the alienability of lands patented to a minor allottee,—that is, the limit of the minority,—so that a minor who is not the head of a family cannot make a valid sale of lands even by order of the state probate court.

[No. 225.]

*Submitted April 16, 1896. Decided May 4, 1896.*

IN ERROR to the Supreme Court of the State of Kansas to review a judgment of that court affirming the judgment of the District Court of Franklin County, Kansas, in favor of Alexander Conolly *et al.*, heirs of Esther King, and substituted in her place in an action against Albert E. Wiggan *et al.*, for the recovery of the possession of lands. *Affirmed.*

Statement by Mr. Justice **Brewer**:

By the 1st article of the treaty of 1862, negotiated June 24, ratified July 16, and proclaimed July 28 (12 Stat. at L. 1237), it was provided that—

"The Ottawa Indians of the United Bands of Blanchard's Fork and of Roche de Bœuf, having become sufficiently advanced in civilization, and being desirous of becoming citizens of the United States, it is hereby agreed and stipulated that their organization and their relations with the United States, as an Indian tribe, shall be dissolved and terminated at the expiration of five years from the ratification of this treaty; and from and after that time the said Ottawas, and each and every one of them, shall be deemed and declared to be citizens of the United States, to all intents and purposes, and shall be entitled to all the rights, privileges, and immunities of such citizens, and shall, in all respects, be subject to the laws of the United States, and of the state or states thereof in which they may reside."

*The 7th article reads that— [57

"Proper patents by the United States shall be issued to each individual member of the tribe and person entitled for the lands selected and allotted to them, in which it shall be stipulated that no Indian, except as herein provided, to whom the same may be issued, shall alienate or encumber the land allotted to him or her in any manner until they shall, by the terms of this treaty, become a citizen of the United States; and any conveyance or encumbrance of said lands, done or suffered, except as aforesaid, by any Ottawa Indian, of the lands allotted to him or her, made before they shall become a citizen, shall be null and void.

"And 40 acres, including the houses and improvements of the allottee, shall be in-

NOTE.—*As to Indians and Indian tribes; their status and rights; jurisdiction and control over them,* —see note to Worcester v. Georgia, 8: 483.

*As to construction and operation of treaties,* see note to United States v. The Amistad, 10: 823.



Digitized by Google

alienable during the natural lifetime of the party receiving the title."

Esther Wilson, as appears by the census roll, duly certified by the Commissioner of Indian Affairs and the Secretary of the Interior, of date March 30, 1864, was an allottee under this treaty, and at that time a girl of the age of seven years. On December 1, 1865, a patent was issued to her for the land in controversy, the granting words of which are as follows:

Now know ye, that the United States of America, in consideration of the premises, and pursuant to the 3d and 7th articles of the treaty aforesaid, have given and granted, and by these presents do give and grant, unto the said Esther Wilson and to her heirs the tract of land above described: Provided, however, and these presents are upon the express condition, and with the limitation as required by the treaty aforesaid, that the said Esther Wilson shall not alienate or encumber the aforesaid tracts of land until she shall become, by the terms of said treaty, a citizen of the United States; and any conveyance or encumbrance of said lands, done or suffered by said Esther Wilson, made before she shall become a citizen, shall be null and void; to have and to hold the said tracts of land, with the appurtenances, unto the said Esther Wilson and to her heirs and assigns forever, subject to the limitation and condition aforesaid.

On February 28, 1867, a treaty was negotiated between the United States and several Indian tribes (15 Stat. at L. 513), the [58] scope and purpose of which is disclosed by this recital in the preamble:

Whereas it is desirable that arrangements should be made by which portions of certain tribes, parties hereto, now residing in Kansas, should be enabled to remove to other lands in the Indian country south of that state, while other portions of said tribes desire to dissolve their tribal relations and become citizens.

Among the parties to this treaty were the Ottawa Indians. Certain amendments were suggested by the Senate on June 18, 1868, which were accepted by the Indians September 30, 1868, and the treaty proclaimed October 14 following. The 3d section provides for a cession by the Shawnees of a part of their reservation in the Indian territory to the United States. The 16th recites that this ceded territory "is hereby sold to the Ottawas at $1 per acre;" while the 17th section reads as follows:

"The provisions of the Ottawa treaty of one thousand, eight hundred and sixty-two, under which all the tribe were to become citizens upon the sixteenth of July, one thousand, eight hundred and sixty-seven, are hereby extended for two years, or until July sixteenth, one thousand, eight hundred and sixty-nine; but at any time previous to that date any member of the tribe may appear before the United States district court for Kansas and declare his intention to become a citizen, when he shall receive a certificate of citizenship, which shall include his family, and thereafter be disconnected with the tribe, and shall be entitled to his proportion of the tribal funds; and all who shall not have made such declaration previous to the last-mentioned date shall be still considered members of the tribe. In order to enable the tribe to dispose of their property in Kansas, and remove to their new homes and establish themselves thereon, patents in fee simple shall be given to the heads of families, and to all who have come of age among the allottees under the treaties of one thousand, eight hundred and sixty-two, so that they may sell their lands without restriction, but the said lands shall remain exempt from taxation so long as they may be retained by members of the tribe, down to the said sixteenth of July, [59] one thousand, eight hundred and sixty-nine."

On October 26, 1872, Benjamin Esterly, as the guardian of Esther Wilson, appointed such guardian by the probate court of Franklin county, state of Kansas (in which county the lands in controversy are situated), executed a deed to John Wiggan, which deed recites a sale of the entire 80 acres at private sale for the sum of $60, the confirmation of such sale by the probate court, and an order on the guardian to execute a deed. Subsequently the grantee therein, John Wiggan, conveyed to Horace Wiggan and Albert E. Wiggan. On February 17, 1881, the allottee, she having in the meantime been married, under the name of Esther King, commenced an action in the district court of Franklin county against said last-named grantees for the recovery of the possession of the lands. Trial being had, a judgment was rendered in her favor, which, on June 4, 1886, was affirmed by the supreme court of the state. On May 6, 1891, the death of Esther King was suggested, and an order of revivor entered by the supreme court in the names of her heirs at law, Alexander Conolly and John King, her husband, and only child. On May 26, 1892, a writ of error was allowed by the chief justice of that court, and on June 20, 1892, there was filed an affidavit that one of the defendants, now plaintiff in error, Albert E. Wiggan, was a minor at the time of the judgment of affirmance, and had not maintained his majority until within less than two years prior to the suing out of the writ of error. The case, therefore, in this court is pending between one of the original defendants and the heirs of the original plaintiff.

*Messrs.* **Ben. T. Duval** and **H. C. Mechem** for plaintiff in error.

No counsel for defendants in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The first question presented by counsel for plaintiff in error is whether the treaty of [60] 1867 was of any validity so far as respects the Ottawa Indians. The treaty of 1862 provided that at the expiration of five years from the date of its ratification, that is, on July 16, 1867, the Ottawas should become citizens of the United States, and the tribal organiza-



Digitized by Google

tion and relations with the United States should be dissolved.

The treaty of 1867, though originally negotiated in February, was not concluded in that year, but was amended in 1868, and not ratified and proclaimed until October 14, 1868, and more than five years after the ratification of the treaty of 1862. At the time, therefore, that the later treaty took effect the Ottawa Indians had, it is contended, under and by virtue of the earlier treaty, become citizens not only of the United States but also of the state of Kansas, and hence the United States had no power to enter into treaty with them, citizens of a state, without the consent of that state. The nation could not, without the consent of the state, withdraw citizens of the state from its jurisdiction.

We cannot yield our assent to this contention. The negotiations in February, 1867, were while the tribal organization and relations to the United States continued. They amounted substantially to a proposition by the tribe to change the treaty of 1862, and continue the tribal organization and relations with the United States. This was a valid act on the part of the tribe. And though the proposition was not accepted by the United States until after July 16, 1867, yet, when accepted, the acceptance related back to the date of the proposition. That some modifications were made in matters of detail did not affect the substantial character of the transaction. The tribe proposed to continue its organization and relations to the United States and the government accepted the proposition. The state of Kansas has never objected, even if it had any right to object, and it does not lie in the power of an individual to assert any supposed political rights of the state or challenge the action of the nation and the Indians in this behalf. The treaty of 1867 was valid and determined the status and rights of the Indians politically and in respect to their property.

61] *The second proposition of counsel is that under the treaty of 1867 all the Ottawas became citizens on July 16, 1869, that the allottee Esther Wilson and her property became then subject to the jurisdiction and laws of the state of Kansas, and that a guardian's sale of her property made thereafter in conformity with the provisions of the laws of that state passed a valid title.

If the only provision in the treaty of 1867 affecting this question was the 1st clause of the 17th section there might be force in this contention, for that simply extends to July 16, 1869, the time for terminating the tribal existence and transforming all the members thereof into individual citizens of the United States and of the state in which they reside. Even then we should be confronted with the proposition that under the 7th article of the treaty of 1862 it was provided that 40 acres, including therein the houses and improvements of the allottee, should be inalienable during his or her life. While that provision continued in force it may well be doubted whether a deed of the entire allotment, whether made by the individual or a guardian, would be sufficient to transfer a legal title to any portion of the allotment, and whether, prior to any such deed, there must not be a setting off to the allottee according to the demand of the treaty of the inalienable 40 acres. It must be borne in mind that the proceeding in the state court was not in any sense one in partition, or an equitable suit to determine relative rights in a single tract, but was a legal action to recover possession, against which was set up simply an alleged legal title in defeat thereof.

But we do not care to rest our decision upon this suggestion. We think there is something more vital. The treaty of 1867 must be considered as an entirety in its relations to the treaty of 1862. By the treaty of 1862 the tribal organization was to disappear on July 16, 1867. If nothing had transpired after that, on that date the relations of the tribe to the United States would have ended, the members of the tribe would have had title to their lands, and they would have become, and been treated thereafter, as individual citizens of the United States *and of the[62 state in which they resided. But the treaty of 1867 contemplated a different outcome. It proceeded upon the understanding that some at least of the Ottawas, as of the other tribes, desired to remove from the state of Kansas to the Indian territory, and there continue tribal relations with the national government. That is evidently the thought expressed in the recital to the treaty of 1867. Some of the Indians desired to be citizens; some wanted to retain their tribal relations. In carrying out that express purpose the time for the dissolution of the Ottawa tribe was postponed until July 16, 1869, with the proviso that at any time prior thereto any individual member could become a citizen at his election, and a further provision as to those who did not so elect, as thus expressed in the 17th section, "all who shall not have made such declaration previous to the last-mentioned date shall be still considered members of the tribe." For what purpose "still considered members?" Simply to be at that instant changed into citizens and to lose their tribal relation? Obviously not; but that they might, if they had not elected to become citizens, remove to the Indian territory, and continue their tribal relations. Emphasizing this thought is the subsequent sentence, to the effect that in order to enable the tribe to dispose of their property in Kansas and remove to their new homes patents should be issued under certain conditions. In other words, the idea was that those Indians who did not elect to become citizens should receive patents for their lands under such circumstances and conditions as to enable them to dispose of the lands and remove to the Indian territory, and there, as a fragment of the original Ottawa tribe, continue tribal relations with the government. The provision in reference to patents must be considered as superseding those of the treaty of 1862. And by its terms patents were to issue to the heads of families and to all among the allottees coming of age, in the language of the treaty "so that they may sell their lands without restriction." It does not appear



Digitized by Google

that the allottee in this case was the head of a family, and, according to the testimony, she was a minor. This treaty of 1867 introduced a new limitation upon the alienability of 63] lands patented to a minor *allottee, that is, the limit of minority. And such limit must be applied to sales voluntary and involuntary, and cut off the right of a guardian to dispose of the estate. The fact that the patent to this allottee had already been issued did not abridge the right of the United States to add, with the consent of the tribe, a new limitation to the power of the individual Indian in respect to alienation. The land and the allottee were both still under the charge and care of the nation and the tribe, and they could agree for still further protection, a protection which no individual was at liberty to challenge.

It follows, therefore, that at the time of this assumed power of the guardian of Esther Wilson to dispose of her realty such realty was inalienable, and a deed made by the guardian, though under the authority of the probate court of the county of the state in which the lands were situated, conveyed no title. That this conclusion renders ineffective an attempt to dispose of the lands of an Indian girl, at the price of 75 cents an acre, does not any the less commend it to one's sense of justice.

*The judgment is affirmed.*

---

## CARMI DIBBLE, *Plff. in Err.*,
*v.*
## BELLINGHAM BAY LAND COMPANY.

(See S. C. Reporter's ed. 63-74.)

*Federal question—adverse possession—State construction of statute of limitations—commencement of adverse possession.*

1. A certificate of the presiding judge of a state court is insufficent to show that a Federal question was raised and decided where the recorded opinion of the court shows that the decision was based on a ground that did not involve a Federal question.
2. Color of title is not essential to a claim of adverse possession in Washington.
3. The construction given by the supreme court of a state to a statute of limitations of the state will be followed by this court.
4. Adverse possession of land under a deed from a person who was entitled to a patent may begin, as against other persons claiming under the same grant, before the patent is actually issued.

[No. 230.]

*Argued April 17, 1896. Decided May 4, 1896.*

IN ERROR to the Supreme Court of the State of Washington to review a judgment of that court affirming the decree of the Superior Court of Whatcom County, Washington, in favor of the plaintiff, the Bellingham Bay Land Company against the defendant, Carmi Dibble, decreeing that plaintiff was the owner and entitled to the possession of the land in question, and that the cloud created upon its title by deeds to defendant be removed and plaintiff's title quieted against all claims of defendant, etc. *Dismissed.*

See same case below, 4 Wash. 764.

Statement by Mr. Chief Justice **Fuller:**

This was a complaint filed by the Bellingham Bay Land Company against Carmi Dibble in the superior court of *Whatcom coun- [65 ty, Washington, on June 7, 1891, seeking a decree quieting plaintiff's title to certain lands therein described, and establishing the existence and validity of a certain power of attorney alleged to have been lost without having been ordered. Defendant disclaimed as to the west half of the property in question, and, after demurrer overruled to an amended complaint, answered by way of denial and assertion of defendant's claim set out in the complaint, and also by way of cross-complaint. A trial was had on issues joined and the superior court filed findings of fact and conclusions of law.

The court found that plaintiff was a corporation duly organized and existing under the laws of the state of Washington with full powers to purchase, own, and sell real estate; that on or prior to March 28, 1862, Thomas Jones and Betsy Jones, his wife, were the owners of a certain donation land claim situated in the county of Whatcom and territory of Washington, as particularly described; that these lands were donated to Thomas Jones and his wife, under the donation laws of the United States, and that by virtue of the division which was made of them by the surveyor general, and by the certificate and patent, the west half of the lands was donated to Thomas Jones and the east half to Betsy Jones, his wife. The court further found that on March 28, 1862, for a valuable consideration paid therefor, Thomas Jones for himself and as attorney in fact for his wife, executed good and sufficient deeds of conveyance for all the tract of land to Edward Eldridge, and that since that date Eldridge had duly conveyed the premises to plaintiff, a small parcel excepted; that prior to the execution of the deed by Jones for himself and his wife, Betsy Jones had duly executed and delivered her power of attorney to Thomas, authorizing him to sell and convey the lands; that the power of attorney was executed under the seal of said Betsy, and was duly acknowledged and witnessed and properly certified, but that the same was not placed on the records of the county, but became and still remained lost, and at the date of the execution of the deed had not been revoked. The

NOTE.—*As to what necessary to constitute adverse possession; requisites of,*—see note to Ricard v. Williams, 5: 398.

*As to mortgagor's possession, not adverse,* see note to Higginson v. Mein, 2: 664.

*As to the occupancy necessary to constitute adverse possession,* see note to Ewing v. Burnet, 9: 624.

*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,*—see note to Hamblin v. Western Land Co. 37: 267.

*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution,* see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 554, and Williams v. Norris, 6: 571.



Digitized by Google

court then described the parcel conveyed by Eldridge to other parties than plaintiff.

66] *The court further found that "on the said 28th day of March, 1862, the said Eldridge entered into possession of all of the said donation claim of Thomas Jones and Betsy Jones, and that from that date to the present time the said Edward Eldridge and his grantees, including the plaintiff in this case, have been continuously and now are in the actual, open, notorious, and adverse possession of all of the said property, under claim and color of title, excepting only the small parcels hereinbefore referred to as having been conveyed to other persons by the said Edward Eldridge; . . . that neither the defendant nor his grantors, ancestors, or predecessors had been seised or possessed of the said premises or any part or parcel thereof at any time since the said 28th day of March, 1862, and that the defendant is not now in possession of the said land;" that defendant claimed to be the owner of the premises, and to have procured deeds for the land from persons claiming to be the heirs of Betsy Jones, and had caused these deeds to be recorded in Whatcom county, and had created a cloud upon plaintiff's title; that there was not sufficient evidence to establish the fact that Betsy Jones died intestate, or that the persons under whom defendant claimed, Lovatt and others, were the heirs at law of Betsy Jones; that at the time when defendant claimed to have purchased the property from these alleged heirs he had full notice and knowledge of the conveyance previously made by Thomas Jones for himself and his wife, and that he had notice of the existence of the power of attorney under which Jones conveyed as attorney in fact for his wife, and had notice that plaintiff was in possession of the premises, claiming to be the owner under the Jones' deed; and "that it and its immediate grantors had been in the possession of the said premises for more than ten years last past."

The superior court found as conclusions of law that plaintiff was entitled to the relief prayed (including, among other things, the establishment of "the existence and validity of the said power of attorney"), and entered a decree that plaintiff was the owner and in possession and entitled to the possession of the land in question, excepting the enumerated 67] *parcel; that defendant was not the owner of the premises or any part or parcel thereof; and that the cloud created upon the title of the property by the deeds to defendant from Lovatt and others be removed, and plaintiff's title be quieted against all claims of defendant; and "that the said power of attorney from the said Betsy Jones to Thomas Jones, her husband, be and the same is hereby established;" and for costs.

The cause was then taken on appeal to the supreme court of the state and the decree below affirmed. 4 Wash. 764. Of the four judges of the supreme court, who participated in the decision, all concurred in the judgment, and three, including the chief justice, in the opinion: Thereafter the chief justice signed a certificate and this writ of error was brought.

*Messrs.* **Alfred L. Black** and *E. B. Leaming* for plaintiff in error.

*Messrs.* **J. A. Kerr** and *W. Lair Hill* for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By § 2 of art. 27 of the Constitution of the state, all laws in force in the territory of Washington not repugnant to that Constitution were continued in force until they expired by their own limitation or were altered or repealed by the legislature.

By § 5 of the territorial act of February 2, 1888, brought forward as § 1447 of the General Statutes (1 Hill, Stat. & Codes, 506), it was provided that all powers of attorney theretofore made and executed by any married woman joined with her husband and duly acknowledged and certified, and all powers of attorney theretofore made or executed by husband or wife to the other, authorizing the sale or other disposition of real estate duly *acknowledged, and all con-[68 veyances theretofore and thereafter executed under and by virtue of such powers of attorney and acknowledged and certified as provided, should be valid and binding, but no rights vested in third persons should be affected by anything in the section contained.

Plaintiff in error contends that the validity of that section was drawn in question as repugnant to the 14th article of Amendment to the Constitution, and its validity sustained in that the supreme court of the state held that the power of attorney and deed executed under it were thereby validated.

The certificate of the Chief Justice of that court was to the effect that in the trial by the court below and on the hearing on appeal "the following question was duly and regularly raised, to wit: Whether the power of attorney alleged to exist and to have been made by Betsy Jones to her husband, Thomas Jones, prior to the 28th day of March, A. D. 1862, and a deed executed under it to Edward Eldridge on the 28th day of March, 1862, which said power of attorney and deed, on the respective dates of the execution thereof, were absolutely void, were made valid and effective by the retrospective portion of § 1447 of volume 1 of Hill's Code of this state;" and that the section thus applied was in violation of the 14th Amendment; and, further, that the supreme court "did not express any written opinion on the question so raised as aforesaid, except such as is necessarily involved by the decree of this court in the above-entitled action, dated on the 17th day of September, A. D. 1892, and affirming the whole of the decree of the superior court of Whatcom county, state of Washington, in the above-entitled action, entered and filed in the office of the clerk of the said superior court on the 20th day of February, A. D. 1892; and such opinion as is expressed by the statement of this court in its written opinion in the above-entitled action, that the color of title necessary to support a claim by adverse possession in respondent, the Bellingham Bay Land Company, rests and depends solely upon a warranty deed from the owner,



Digitized by Google

Betsy Jones, executed by her husband, 69] Thomas Jones, by virtue of *the power of attorney urged and alleged by respondent to have been made valid by the retrospective part of the said code section; which said statement, as set forth in the opinion of this court, is an integral and necessary part of the decision by this court rendered in affirming the said decree of the lower court."

In respect of the supreme court, it is provided by § 5 of the Code of Procedure of Washington that "in the determination of causes, all decisions of the court shall be in writing, and the grounds of the decision shall be stated;" and by §§ 68 and 73 it is made the duty of its clerk to record its proceedings and enter its orders, judgments, and decrees. And the 13th rule of the court provides that "all opinions of the court shall be recorded by the clerk in a well-bound volume and the original filed with the papers in the case." 2 Wash. 688.

It is the settled course of decision that this court may examine opinions so delivered and recorded to ascertain the ground of the judgment of the state court. *Kreiger* v. *Shelby R. Co.* 125 U. S. 39, 44 [31: 675, 677].

If the record discloses that a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution of the United States, and another question not Federal has also been raised and decided against such party, and the decision of the latter question is sufficient notwithstanding the Federal question to sustain the decision, this court will not review the judgment. *Eustis* v. *Bolles*, 150 U. S. 361, 366 [37: 1111, 1113].

If it appears that the court did, in fact, base its judgment on such independent ground, or, where it does not appear on which of the two grounds the judgment was based, if the independent ground on which it might have been based was a good and valid one, sufficient in itself to sustain the judgment, this court will not assume jurisdiction. *Klinger* v. *Missouri*, 80 U. S. 13 Wall. 257 [20: 635].

Nor can this result be, in any respect, controlled by the certificate of the presiding judge, for the office of the certificate, as it respects the Federal question, is to make more 70] certain *and specific what is too general and indefinite in the record, but it is incompetent to originate the question. *Parmalee* v. *Lawrence*, 78 U. S. 11 Wall. 36 [20: 48]; *Powell* v. *Brunswick County Supers.* 150 U. S. 433 [37: 1134].

If the conflict of a state law with the Constitution and the decision by the state court in favor of its validity are relied on, this must appear on the face of the record before the decision can be re-examined in this court, and this is equally true where the denial of a title, right, privilege, or immunity under the Constitution and laws of the United States, or the validity of an authority exercised under the United States, is urged as the ground of jurisdiction.

In its opinion the supreme court of Washington, after stating the case, said: "The proof of two facts was attempted by the respondent, the establishment of either of which would be fatal to appellant's claim. The facts attempted to be proved were as follows: (1) That plaintiff's title to the land in controversy had been acquired by adverse possession; (2) that Betsy Jones had executed a power of attorney to her husband, Thomas Jones, authorizing him to sell the disputed premises." Thereupon, after overruling a contention by the appellant that under the pleadings as framed no testimony tending to prove adverse holding was admissible, the court took up the first proposition, and held that plaintiff had established his title by adverse possession during the statutory period; that the adverse possession was actual, notorious, exclusive, and continuous, under claim or color of title; that Eldridge entered into possession under the highest claim of title, to wit, a warranty deed from the owners, and on the day he received the deed, which was recorded the next day, took actual possession of the land, and maintained it for over twenty-nine years before the commencement of the action or any assertion of defendant's claim; and that defendant had knowledge of Eldridge's reputed ownership prior to his acquisition of the rights of the alleged heirs. Having reached this result, the court added: "This renders an investigation of the second proposition discussed unnecessary." Thus it appears that the decision of the court rested on a ground that *did 71 not involve the question of the validity of the power of attorney and deed. As the record disclosed this ground of defense, and as the opinion put the decision solely on that ground, it would be quite inadmissible to allow a certificate of the presiding judge to overthrow that conclusion. This certificate does not have that effect, and we cannot believe that any such result was intended. It was evidently drawn by counsel, as was indeed admitted at the bar, and states that a Federal question was duly raised, but the Chief Justice declined to say that it was decided except as such decision might be involved in the affirmance of the whole of the decree of the superior court, or by the statement of the court in the opinion that "the color of title necessary to support a claim of adverse possession," depended on the deed of Betsy Jones executed by her husband by virtue of the power of attorney.

Although the superior court found as a conclusion of law that plaintiff was entitled "to have the existence and validity of the said power of attorney from Betsy Jones established by decree of the court," yet the terms of the decree in that regard simply established the power of attorney, which might well enough be held to mean the establishment of its existence, it having been lost and not recorded, and not of its validity; but if a broader signification be attributed, still the affirmance of the decree which adjudicated that plaintiff was the owner and that defendant was not, and quieted the title of plaintiff, did not amount to a decision of the alleged question, as the legal efficacy of the power of attorney as a muniment of title became immaterial in view of the ground on which the decision of the supreme court was placed.

Nor was the question of the validity of the



Digitized by Google

act of February 2, 1888, necessarily disposed of by anything stated in the opinion. The judgment proceeded on claim of title as well as color of title. The court held that Eldridge entered into and maintained actual possession under claim of title, and it seems to be settled in Washington that "actual, uninterrupted, and notorious possession, under claim of right, is sufficient without color of title." *Moore* v. *Brownfield*, 7 Wash. 23.

In *Probst* v. *Presbyterian Church Board of Domestic Missions*, 139 U. S. 182 [32: 642], this 72]court *held that it was not necessary that the holder by adverse possession should have a paper title under which he claimed, if he asserted ownership of the land and this assertion was accompanied by an uninterrupted possession. *Ewing* v. *Burnet*, 36 U. S. 11 Pet. 41 [9: 624], and *Harvey* v. *Tyler*, 69 U. S. 2 Wall. 328 [17: 871], were cited, and it was said: "The fair implication in both these cases is that where possession is taken under claim of title, it sufficiently shows the intention of the party to hold adversely within the meaning of the law upon that subject. There is no case to be found which holds that this adverse claim of title must be found in some written instrument." In this case the superior court found that Eldridge and his grantees had been nearly thirty years "continuously and now are in the actual, open, notorious, and adverse possession of all of the said property under claim and color of title," and this finding was reiterated by the supreme court.

"The intention guides the entry and fixes its character," said the court in *Ewing* v. *Burnet*, *supra*, and the state courts had no difficulty as to Eldridge's intention in making the entry. Clearly it was within the province of those courts to determine what constituted a sufficient claim of ownership to set the statute in motion. Eldridge entered with the intention of asserting and did assert ownership and it was for the state courts to say what the effect of that adverse possession was, whether the Jones deed was void or voidable.

Moreover, as to color of title, it is held in Washington that a void deed, accompanied with actual occupancy, is sufficient to set the statute in motion. *Ward* v. *Huggins*, 7 Wash. 624.

This is the usual rule as to general statutes of limitations, though as to short statutes in relation to sales of real estate for taxes a different view has been expressed. *Pillow* v. *Roberts*, 54 U. S. 13 How. 472 [14: 228]; *Hall* v. *Law*, 102 U. S. 466 [26: 219]; *Redfield* v. *Parks*, 132 U. S. 239 [33: 327]; *Hurd* v. *Brisner*, 8 Wash. 1. Prior to December 1, 1881, the limitation of actions for the recovery of real property or the possession thereof was twenty years, and this by the territorial act of that date was reduced to ten years. The general statute of limitations 73]was relied on *here and there was an adverse possession for nearly thirty years.

No rule is more firmly established than that this court will follow the construction given by the supreme court of a state to a statute of limitations of a state (*Bauserman* v. *Blunt*, 147 U. S. 647 [37: 316]), and we perceive no reason for disregarding it in this instance.

We are of opinion that jurisdiction cannot be maintained on the ground that the validity of the act of February 2, 1888, being § 1447 of the General Laws of Washington, was drawn in question and its validity sustained. It is urged that jurisdiction may be sustained on two other grounds, namely, that a right claimed under the Constitution and laws of the United States, or the validity of an authority exercised under the United States, by virtue of the patent issued for these lands, was denied by the decision; and that the validity of the territorial act of December 1, 1881, being § 26 of the Code of 1881, now § 112 of the State Code of Procedure (2 Hill, 37), was drawn in question as contrary to the Constitution, and its validity sustained. We are unable to discover that Federal questions in these particulars were raised or disposed of by the decision. The contention seems to be that the patent for this land was not issued until September 6, 1871; that the statute of limitations did not begin to run until that date; that as the action was commenced June 9, 1891, a period of less than twenty years elapsed between these two dates, and that the decision of the supreme court, if rested on twenty years' adverse possession, held that the bar commenced at a date anterior to that of the patent and in that way denied rights claimed under it; and if rested on ten years, gave a retrospective effect to the act of December 1, 1881, as ten years had not elapsed between that date and the commencement of the action. There does not seem to have been any controversy as to the effect of the issue of the patent. The superior court in its findings simply referred to the fact that by the certificate and the patent the west half of the land was donated to Thomas *and the east half[74 to Betsy Jones, and found nothing as to when the patent issued; and the supreme court made no reference to the matter. If resort be had to the evidence, it appears therefrom that the patent issued September 6, 1871, and that the right to the patent matured prior to 1862 when Mrs. Jones left the territory. The execution and delivery of the patent after the right to it had become complete were the mere ministerial acts of the officers charged with that duty. *Barney* v. *Dolph*, 97 U. S. 652 [24: 1063]; *Simmons* v. *Wagner*, 101 U. S. 260 [25: 910]. The state courts could properly hold under the circumstances of this case that the statute of limitations was set in motion when that right accrued, and was not postponed to the issue of the patent.

Eldridge did not occupy the position of a stranger to the title, not connected therewith by transfer from the original holder. If the Jones deed was sufficient to sustain claim or color of title if the patent had issued March 28, 1862, its sufficiency for that purpose could not be rendered any the less by the issue of the patent at a subsequent time, and, in any view of the alleged infirmities of the deed, the patent would take effect by relation rather than operate extrinsically to the destruction of the claim under the original owners.



Digitized by Google

The judgment of the supreme court was based on twenty years' adverse possession. We presume as § 760 of the Code of 1881 provided that no right accrued before the Code took effect should be affected by its provisions, the court was of opinion that the act of December 1, 1881, could not be availed of to lengthen the time originally prescribed. At all events it was for the state court to determine the applicable bar (*Murray* v. *Gibson*, 56 U. S. 15 How. 421 [14: 755]), and we cannot take jurisdiction to review its judgment.

*Writ of error dismissed.*

---

75] JOHN EVANS CORNELL, *Appt.*,
*v.*
HETTY H. R. GREEN.

(See S. C. Reporter's ed. 75-81.)

*Jurisdiction of this court—due process of law—assignment of error.*

1. A case cannot be brought from the United States circuit court directly to this court upon the single ground that it involves the construction or application of the United States Constitution within the meaning of the judiciary act of March 3, 1891, § 5, when no construction or application of the Constitution was either expressed or asked for in the circuit court, and no question of the jurisdiction of that court is certified to this court.
2. The dismissal of a bill on demurrer for want of equity, holding that in a former suit a person was sufficiently made a party to bind him by the decree in his individual as well as in his representative capacity, cannot be the subject of appeal on the ground that it denied due process of law, if the question of constitutional right was not presented in the lower court.
3. An assignment of errors cannot be availed of to import into a cause questions which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to the Supreme Court of the United States under the act of Congress of March 3, 1891, § 5.

[No. 160.]

*Argued March 18, 19, 1896. Decided May 18, 1896.*

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois dismissing on demurrer a suit in equity brought by John Evans Cornell against Hetty H. R. Green *et al.* to set aside and annul a decree of foreclosure and the deed thereon to defendant upon payment of the sums due upon the mortgages. *Dismissed for want of jurisdiction.*

See same case below, 43 Fed. Rep. 105.

Statement by Mr. Justice **Gray**:

This was a bill in equity filed by John E. Cornell in the circuit court of Cook county in the state of Illinois against Hetty H. R. Green, Julius White, trustee, and Benjamin E. Gallup, trustee, to redeem land in Chicago from two mortgages, and to set aside a decree of foreclosure thereof, and a sale and conveyance under that decree. The case was in substance as follows:

George W. Gage, being the owner in fee simple of the land, mortgaged part of it on July 22, 1871, to White as trustee, and the rest on May 7, 1873, to Gallup as trustee; and on December 18, 1874, conveyed the whole in fee to William F. Tucker by deed duly recorded.

On September 24, 1875, Gage died, leaving a widow, Sarah H. Gage, and six children, two of them minors, and a will by which he appointed William F. Tucker, Lewis L. Coburn, and the widow his executors, and devised to them all his real estate.

On November 27, 1875, Mrs. Green, having become *the owner of the debts secured by [76 both mortgages, filed a bill in equity to foreclose them against Sarah H. Gage, described as widow of George W. Gage, and executrix of his will; his six children, including the two minors; "William F. Tucker, Joseph K. Barry, and John W. Clapp, all of whom are residents of the county of Cook, state of Illinois, and citizens of said last-named state, and guardians of said minor children, the said William F. Tucker being also one of the executors of the last will and testament of the said George W. Gage, deceased;" Coburn, described as an executor of Gage's will; White, Gallup, and other persons. That bill set forth the mortgages, and breaches of the conditions thereof, and Gage's death, family, and will; and alleged that Gage, on December 18, 1874, conveyed to said Tucker all the land in question, subject to said encumbrances; and "that said above-named parties against whom this bill of complaint is brought have, or claim to have, some interest in said premises described in said trust deed, by mortgage, judgment, conveyance, or otherwise; but your oratrix states those interests, whatever they are, are subject to the rights of your oratrix under her securities before mentioned, and cannot be set up against the same, nor in any way interfere therewith;" and prayed for process "directed to the said Sarah H. Gage and the other defendants hereinbefore named." In the subpœna issued upon that bill, and in the officer's return thereon, Tucker was described as guardian and as executor, and not otherwise.

On April 5, 1876, none of the defendants above mentioned having appeared or answered to that bill (except Gage's two minor children, who appeared by a guardian *ad litem*, and submitted their rights to the court), an order was entered that the bill be taken for confessed against them, and the case referred to a master to ascertain the amounts due upon the mortgages. On July 31, 1876, a decree was entered, confirming the report of the master, and ordering a sale of the land by him to satisfy the amounts found due. On December 7, 1876, the land was accordingly sold by auction to Mrs. Green. On February 2, 1877, a final decree was entered, confirming the sale and foreclosing the mortgage; and on February

NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.

*As to parties necessary in equity, want of; when a defense; when objection to be made*,—see notes to Morgan v. Morgan, 4: 242, and Marshall v. Beverley, 5: 97.



Digitized by Google

77] 2, 1877, *pursuant to that decree, a deed of the land was made by the master to Mrs. Green.

On September 13, 1887, Tucker died intestate, leaving a widow and three children, all of age. His widow died before the end of the year, and in January and February, 1890, his three children conveyed to Cornell, by deeds duly recorded, all the land described in the two mortgages.

On April 4, 1890, Cornell filed the present bill against Mrs. Green, and the trustees named in the two mortgages, setting forth his own title, and the mortgages, and a copy of the record of the proceedings upon the bill of foreclosure, alleging "that the said William F. Tucker was the owner, in his own right, of all said property, and so appeared of record at the time said bill for foreclosure was filed as aforesaid, and during the pendency thereof, and at the time of said sale, and still continued to be the owner thereof up to the time of his death; that the said William F. Tucker was not made a party defendant to said foreclosure proceedings, nor was the said William F. Tucker ever in court or subject to the orders, decrees, and judgments of said court; that said decree of foreclosure, so entered as aforesaid, was of no binding force or effect upon said Tucker, nor upon his heirs, nor upon your orator, the grantee of said property as aforesaid;" and praying that, upon payment by the plaintiff of the sums due upon the mortgages, the mortgages might be released, and the decree of foreclosure and the deed to Mrs. Green be set aside and annulled.

On April 21, 1890, this suit was removed into the circuit court of the United States for the northern district of Illinois, upon the petition of Mrs. Green, duly alleging that the plaintiff was a citizen of Illinois, and that she was a citizen of Vermont, and that there was in the suit a controversy which could be fully determined as between them, being citizens of different states.

On May 26, 1890, Mrs. Green demurred generally to this bill, for want of equity. On July 14, 1890, the court sustained the demurrer and dismissed the bill upon the ground, as stated in its opinion, that Tucker in his indi-
78] vidual capacity was *sufficiently made a party to the bill of foreclosure, and was bound by the decree therein. 43 Fed. Rep. 105.

On July 7, 1892, Cornell appealed to this court and assigned as errors the dismissal of his bill for want of equity, the refusal to grant the prayer of his bill, and the decision that his grantor, Tucker, was barred of his equity of redemption by reason of the foreclosure proceedings, "in a case in which Sarah H. Gage, William F. Tucker, executor and guardian, and others, were defendants, the said Tucker never having been personally sued or served with process, or in any way submitted himself to the jurisdiction of said court, and that said finding deprived said complainant of his property without due process of law."

*Messrs.* **Robert Rae, Lyman Trumbull, F. B. Dyche,** and *Richard S. Thompson* for appellant.

*Mr.* **Charles W. Ogden** for appellee.

Mr. Justice **Gray** delivered the opinion of the court:

No question of the jurisdiction of the circuit court has been certified to this court; and the appellate jurisdiction of this court is sought to be maintained upon the single ground that the case "involves the construction or application of the Constitution of the United States," within the meaning of the judiciary act of March 3, 1891, chap. 517, § 5 (26 Stat. at L. 828).

But, in order to bring a case within this clause of the act, the circuit court must have construed the Constitution, or applied it to the case, or must, at least, have been requested and have declined or omitted to construe or apply it. No construction or application of the Constitution can be said to have been involved in the judgment below, when no construction or application thereof was either expressed or asked for.

The case at bar, as shown by the record, was simply this: Gage made two mortgages of land, conveyed the equity of *redemption [79 to Tucker, and died, leaving a widow and minor children, and a will appointing his widow, Tucker, and a third person his executors, and devising all his real estate to them. The mortgages were foreclosed, pursuant to a decree *pro confesso*, upon a bill in equity, which stated the above facts, and in which Tucker was named as a defendant, as executor of Gage, and as guardian of his minor children, but not in his individual capacity, and was described in the same way in the subpœna. Cornell, claiming title by deed from Tucker's heirs, brought the present bill to redeem the land from the mortgages, and to set aside the proceedings for foreclosure; and therein alleged that Tucker owned the land at the time of all those proceedings, and until his death, and was not made a party to those proceedings, nor subject to the orders of the court therein, and that the decree of foreclosure was of no binding force or effect upon Tucker, or upon his heirs, or upon Cornell as their grantee.

The circuit court, upon general demurrer, dismissed this bill for want of equity, holding that in the former suit Tucker was sufficiently made a party to bind him by the decree in his individual as well as in his representative capacity. 43 Fed. Rep. 105.

The Constitution of the United States is not mentioned in the bill of Cornell, or in the demurrer of the defendant, or in the decree or the opinion of the court. The case appears to have been treated throughout as depending upon a question of chancery practice, not of constitutional right. The first indication of anything like an intention on the part of the plaintiff to invoke the protection of the Constitution of the United States is in the suggestion, in the assignment of errors, "that said finding deprived said complainant of his property without due process of law."

The case is governed in every respect by recent decisions construing the same clause of the act of Congress.

In a case decided at this term, it was said by the Chief Justice, in delivering judgment: "A



Digitized by Google

case may be said to involve the construction or application of the Constitution of the United States, when a title, right, privilege, or immunity is *claimed under that instrument; but a definite issue in respect of the possession of the right must be distinctly deducible from the record, before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the 5th section of the act of March 3, 1891." *Anabro* v. *United States*, 159 U. S. 695, 697, 698 [40: 310, 311].

In support of that judgment, several cases were cited, two of them very like the case at bar. *Carey* v. *Houston & T. C. R. Co.* 150 U. S. 170, 181 [37: 1041, 1044]; *Ex parte Lennon*, 150 U. S. 393, 401 [37: 1120, 1123].

*Appeal dismissed for want of jurisdiction.*

Mr. Justice **Brown** dissenting:

Had Tucker not been made a party to the bill at all, and the court had attempted to dispose of his rights to the land in question, upon the sale under the foreclosure proceedings, there could be no doubt that it would be treated as an attempt to deprive him of his property without due process of law, and that such sale would have been invalid as against him, his heirs or vendees, under the 14th Amendment.

This is in substance exactly what is claimed in this case. The bill averred broadly that he was not made a party at all, but the court, putting its own construction upon the foreclosure proceedings, which were made an exhibit to the original bill, decided that he was. Whether he was bound individually by the proceedings against him in his representative capacity—in other words, whether he individually *was* a party defendant to the bill—is beside the question. It is sufficient that he is averred not to have been, that a construction of the Constitution was necessarily involved, and that the [81]*position of the plaintiff in that connection is not a frivolous one, or wholly destitute of foundation. *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574 [28: 1084].

That it requires us to put a construction upon the pleadings in the foreclosure suit does not militate against this position, as we have repeatedly held in analogous cases, where a contract is claimed to have been impaired by state legislation, that we would put our own construction upon such contract, and then inquire whether it had been impaired. *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black, 436, 443 [17: 178, 177]; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18, 33 [31: 607, 615]; *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 279, 293 [36: 972, 978]; *Mobile & O. R. Co.* v. *Tennessee*, 153 U. S. 486, 492 [38: 793, 796].

It seems to me this case should have been determined upon its merits, and I therefore dissent from the opinion of the court.

SANDY LOWE, *Plff. in Err.*,
*v.*
STATE OF KANSAS.

(See S. C. Reporter's ed. 81-82.)

*Due process of law—equal protection of the laws.*

1. Adjudging a prosecutor to be liable for the costs and subject to imprisonment in default of their payment, when the jury finds that he instituted the prosecution without probable cause and from malicious motives, does not deprive him of liberty or property without due process of law, if he is not denied the right to be heard at the trial before the jury upon every question which is to be determined by their verdict.
2. Equal protection of the laws is not denied to any person by a statute which is applicable to all persons under like circumstances, and does not subject the individual to an arbitrary exercise of power.

[No. 174.]

*Submitted March 24, 1896. Decided May 18, 1896.*

IN ERROR to the Supreme Court of the State of Kansas to review a judgment of that court affirming the judgment of the District Court of Elk County, Kansas, adjudging that Sandy Lowe the prosecuting witness, pay all costs in an action or information for a criminal libel upon him brought in the name of the state of Kansas against one F. Keifer, and that said Lowe be committed to the county jail until he pay the costs or give bond to pay them, the jury having found that the prosecution was instituted by said Lowe without probable cause and from malicious motive. *Affirmed.*

See same case below, 47 Kan. 769, 770.

Statement by Mr. Justice **Gray**:

An information, in the name and behalf of the state of Kansas, by J. V. Beekman, the county attorney of Chatauqua county, against one F. Keifer, for a criminal libel upon Sandy *Lowe, was filed September 28, 1889, in the [82] district court of that county and state, and was afterwards, upon the defendant's motion for a change of venue, transferred to the district court of Elk county for trial.

Annexed to the information was the affidavit of Lowe, subscribed and sworn to before the clerk of the court, "that the allegations and averments contained in the foregoing information are true."

The Kansas General Statutes of 1889 contain the following provisions:

By chap. 31, § 309, regulating crimes and punishments, "in all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact."

By chap. 82, § 826, establishing a code of criminal procedure, "whenever it shall appear to the court or jury trying the case that the prosecution has been instituted without probable cause and from malicious motives, the name of the prosecutor shall be ascertained and

NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.



Digitized by Google

stated in the finding: and such prosecutor shall be adjudged to pay the costs, and may be committed to the county jail until the same are paid or secured to be paid."

At the trial of this information, the court, in charging the jury, after reading these statutes, and giving directions as to the law of libel, further instructed the jury as follows:

"You will observe that § 826 aforesaid provides that the jury may in any case find that the prosecution has been instituted without probable cause and from malicious motives, and when the jury do so find it is their duty to state the name of the prosecuting witness in their finding, and in such case the prosecuting witness may be by the court adjudged to pay the costs in the case, and he may be by the court committed to the jail until the same are paid or secured to be paid; and in this case, if you are of the opinion that the provision of said section ought to be enforced, you are at liberty to and ought to enforce the same."

"You will observe from § 809, above quoted, [83] that you *are, in your discretion, the judges of both the law and the fact of this case; and, this being so, we can only direct you as best we may to the law of the case."

The jury returned the following verdict: "We, the jury impaneled and sworn in the above entitled case, do upon our oaths find the defendant not guilty; and we do further find that this prosecution was instituted without probable cause and from malicious motives, and that the name of the prosecuting witness is S. Lowe."

The court, "being satisfied therewith, ordered that the same stand as and for the verdict of the jury;" and thereupon ordered "that the defendant F. Keifer be discharged and go hence without day."

Lowe then moved that so much of the verdict as found "that this prosecution was instituted without probable cause and from malicious motives" be set aside, and that he have a new trial in that respect, for the reasons "that the said S. Lowe, upon the trial already had, has not been heard and could not be heard, either in person or by counsel, in his own defense, touching the matter and things above mentioned as stated and contained in said verdict, being neither plaintiff nor defendant in this prosecution;" and that the verdict was contrary to the law and the evidence; and that the instructions aforesaid were erroneous; and also moved in arrest of judgment, for the same reasons, and because "he has the right, by the law of the land, to be so heard in his own defense, and to a separate trial concerning his liability as prosecuting witness in this action, which separate trial he hereby demands of this court."

The court overruled both motions; and, upon a further hearing on the verdict, adjudged that "the prosecuting witness, S. Lowe, in the above-entitled action, pay all costs of said action, taxed at $1,053.40," and be committed to the county jail until he paid the costs or executed a sufficient bond to pay them within six months.

To all these instructions and rulings and to the judgment aforesaid Lowe excepted and tendered a bill of exceptions, which was allowed by the court.

*Lowe appealed to the supreme court of the state, which affirmed the judgment, upon an opinion of the supreme court commissioners, holding that the constitutionality of chap. 82, § 826, had been settled by the decision of *Re Ebenhack*, 17 Kan. 618 (in which the supreme court upheld the constitutionality of the similar provision of chap. 83, § 18, concerning proceedings before justices of the peace for misdemeanors), and that, according to the decision of the supreme court in *State* v. *Zimmerman*, 31 Kan. 85, as the jury were expressly authorized by the statute to determine both the law and the fact, neither the trial court nor the appellate court of the state had power to interfere with the verdict. 46 Kan. 255. [84]

A motion for a rehearing was overruled by the supreme court of the state in an opinion, which, after citing the decision in *Ebenhack's Case*, proceeded and concluded as follows: "After a defendant is acquitted, the state is not entitled to a new trial before a jury as to which party must pay the costs. The prosecuting witness is so connected with the state in the trial that, after the acquittal of the defendant, he cannot demand a retrial upon the evidence before another jury. If costs are improperly taxed by the court after the acquittal of the defendant, of course a motion can be made for the retaxation, and a proper inquiry may be had thereon. In this case, it appears that the district court approved the verdict of acquittal, and also the finding of the jury against the prosecuting witness; therefore, in this case, the court below pronounced judgment of acquittal, and for the commitment of the prosecuting witness, in accordance with its own opinion—not merely the opinion of the jury." 47 Kan. 769, 770.

Lowe thereupon sued out this writ of error, contending that he had been deprived of his liberty or property without due process of law, and had been denied the equal protection of the laws, contrary to the 14th Amendment of the Constitution of the United States.

*Mr.* **George Chandler** for plaintiff in error.

No counsel for defendant in error.

*Mr. Justice **Gray** delivered the opinion of the court: [85]

The Code of Criminal Procedure of the state of Kansas provides that "whenever it shall appear to the court or jury trying the case that the prosecution has been instituted without probable cause and from malicious motives, the name of the prosecutor shall be ascertained and stated in the finding; and such prosecutor shall be adjudged to pay the costs, and may be committed to the county jail until the same are paid, or secured to be paid." Kan. Gen. Stat. 1889, chap. 82, § 326.

The only question presented by the record for the determination of this court is whether this enactment, as applied by the supreme court of Kansas to this case, contravenes the 14th Amendment of the Constitution of the United States, by depriving Lowe of his liberty or property without due process of law, or by denying him the equal protection of the laws.

Whether the mode of proceeding, prescribed by this statute, and followed in this case, was



Digitized by Google

due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the Declaration of Independence, and in this country since it became a nation, in similar cases. *Den, Murray,* v. *Hoboken Land & Improv. Co.* 59 U. S. 18 How. 272, 277 [15: 372, 374]; *Dent* v. *West Virginia,* 129 U. S. 114, 124 [32: 623, 626].

By the common law, at first, while no costs, *eo nomine,* were awarded to either party, yet a plaintiff who failed to recover in a civil action was amerced *pro falso clamore.* Bac. Abr. *Costs, A; Day* v. *Woodworth,* 54 U. S. 13 How. 363, 372 [13: 181, 185]. And from early times the legislature and the courts, in England and America, in order to put a check on unjust litigation, have not only, as a general rule, awarded costs to the party prevailing in a civil action, but have, not infrequently, required actual payment of costs, or security for their payment, from the plaintiff in a civil action, or even from the prosecutor in a criminal proceeding.

For instance, plaintiffs have been required, by general statute or by special order, to give [86] security for the costs of the *action, or to pay the costs of a former suit before suing again for the same cause. *Shaw* v. *Wallace,* 2 U. S. 2 Dall. 179 [1: 339]; *Hurst* v. *Jones,* 4 U. S. 4 Dall. 353 [1: 864]; *Henderson* v. *Griffin,* 30 U. S. 5 Pet. 151, 159 [8: 79, 82]. Third persons allowed to intervene, on condition of giving bond to pay costs, may be compelled to do so by attachment, without remitting the payee to suit upon the bond. *Craig* v. *Leitensdorfer,* 127 U. S. 764, 771 [32: 322, 323]. And in an information to enforce a charitable trust a relator is required, who may be compelled, if the information is not maintained, to pay the costs. *Atty. Gen.* v. *Smart,* 1 Ves. Sr. 72, and *note; Atty. Gen.* v. *Butler,* 123 Mass. 304, 309.

English statutes, from long before the American Revolution, authorized costs against informers upon a penal statute, or against private prosecutors of an indictment or information, to be awarded by the court, either absolutely, or unless the judge, before whom the trial was had, certified that there was probable cause for the prosecution. Stats. 18 Eliz. chap. 5; 27 Eliz. chap. 10; 4 Wm. & Mary, chap. 18, § 1; 18 Geo. III. chap. 78, § 64; Bac. Abr. *Costs, E; Rex* v. *Heydon,* 1 W. Bl. 356, 3 Burr. 1304; *King* v. *Commerell,* 4 Maule & S. 203; *Queen* v. *Steel,* L. R. 1 Q. B. Div. 482. In like manner by the act of Congress of May 8, 1792, chap. 5, "if any informer or plaintiff on a penal statute, to whose benefit the penalty or any part thereof, if recovered, is directed by law to accrue, shall discontinue his suit or prosecution, or shall be nonsuit in the same, or if upon trial a verdict shall pass for the defendant, the court shall award to the defendant his costs, unless such informer or plaintiff be an officer of the United States specially authorized to commence such prosecution, and the court before whom the action or information shall be tried shall, at the trial in open court, certify upon record that there was reasonable cause for commencing the same, in which case no costs shall be adjudged to the defendant." 1 Stat. at L. 277. And that provision has been substantially reenacted in U. S. Rev. Stat. § 975.

If the statute of Kansas, now in question, had provided that, upon the failure of the prosecution, the prosecutor should be absolutely liable to pay the costs, and should be committed *until he paid or secured them, there could [87] have been no doubt of the validity of the statute. Or if the statute had made him liable for costs, unless the court before which the trial took place certified that there was probable cause for instituting the prosecution, its validity would have been equally clear. The liability imposed upon him by the statute is less than in either of the cases supposed. He is not made absolutely liable for the costs, nor is a certificate of probable cause required to protect him from liability. But the burden is thrown upon the defendant of proving want of probable cause, as well as malicious motives, on the part of the prosecutor, before the latter can be charged with the costs.

In the case at bar, there can be no doubt of the prosecutor's identity, for he signed and made oath to the information, and was named in the verdict. Being the actor in the litigation, he had no right to complain of being obliged, if unsuccessful, to pay the costs upon the conditions previously prescribed by the legislature. Whether the question of probable cause for the prosecution, as affecting the question of costs, should be tried and determined by the court or the jury, and with or after the main question of the guilt of the defendant, is matter of convenient practice, not of constitutional right. A prosecution for libel at least can hardly be tried without exhibiting to the court and jury the motives and grounds of action of the prosecuting witness. It is not to be doubted that, by virtue of the statute, he had the right, if seasonably claimed, to be heard and to introduce evidence, at the trial of the case, upon the question whether he instituted the prosecution without probable cause and from malicious motives. The record transmitted to this court omits all the oral testimony offered at the trial, and contains nothing having any tendency to show that at the trial he was denied the opportunity of offering arguments or evidence in support of his good faith and probable cause, or requested of the court any ruling or instruction upon that subject. It was after the verdict had been rendered in accordance with the statute, and after the trial court, "being satisfied therewith," had approved it, that he appears, for the first time, to have asserted—as a ground for setting aside that *part of the verdict which found [88] "that this prosecution was instituted without probable cause and from malicious motives"—that he had not and could not have been heard upon that matter at the trial.

The supreme court commissioners indeed expressed an opinion, based upon the decision in *State* v. *Zimmerman,* 31 Kan. 85, that the finding of the jury could not be reviewed by the court. 46 Kan. 255. But the supreme court of the state, in its opinion delivered upon denying a motion for a rehearing, put the final judgment upon the grounds that the prosecuting witness was so connected with the state in the trial of the prosecution that he was not entitled to a separate trial by another jury upon the question of his liability for costs; and that "the court below pronounced judgment of acquittal, and for the commitment of the prose-



Digitized by Google

cuting witness, in accordance with its own opinion—not merely the opinion of the jury." 47 Kan. 769, 770. And there is nothing in the statute, or in either of the opinions delivered below, to countenance the theory that the prosecutor had not the right to be heard, at the trial before the jury, upon every question which was to be determined by their verdict. If any evidence, offered upon one of the issues on trial, is incompetent upon the other issue, its effect must be restricted accordingly by the instructions of the court, as is the case of two persons indicted jointly, pleading separately, and tried together. *Sparf* v. *United States*, 156 U. S. 51, 58 [39: 343, 346].

The necessary conclusion is that the proceeding by which judgment for the costs of the prosecution was rendered against the present plaintiff in error was due process of law.

As the statute is applicable to all persons under like circumstances, and does not subject the individual to an arbitrary exercise of power, it has not denied him the equal protection of the laws. *Duncan* v. *Missouri*, 152 U. S. 377 [38: 485].

*Judgment affirmed.*

**Mr. Justice Brown dissenting:**

Did the statute of Kansas require broadly that the prosecutor in every criminal case 89] should be held liable for costs, I *should have felt much less hesitation in acceding to the views of the majority of the court, since the name of the prosecutor can easily be ascertained, either from the original complaint, by an inspection of the record, or from the testimony upon the trial, and I have no doubt that it is within the competency of the legislature to make him responsible for such costs.

But the difficulty with the statute in question is that it makes him responsible only upon the contingency that the prosecution was instituted without probable cause and from malicious motives, and authorizes the jury to find this fact from the testimony introduced upon the trial of the principal case, without giving the prosecutor any opportunity of rebutting such testimony, by proving that the prosecution was instituted in good faith, and with probable cause to believe that the defendant was guilty. Such evidence would be obviously incompetent in the principal case, since the very testimony that would tend to show probable cause and acquit him of malicious motives would also tend to prejudice of the defendant, and would be inadmissible against him. For example, suppose A should make a complaint against B for larceny, and upon the trial, either by reason of the death, illness, or absence of his witnesses, or through the efforts of B and his friends to spirit them away, he might be unable to offer any testimony against him, of course B would be acquitted, and A would be adjudged guilty of having instituted the prosecution maliciously and without probable cause, notwithstanding that he might have been able to show that he had made the complaint upon the statement of these witnesses that they had seen B take the property, and had afterwards seen it in his possession. Such testimony would obviously not have been admissible upon the trial of B, since it would not only have been hearsay, but would have seriously prejudiced him in the eyes of the jury. At the same time, it would be obviously necessary to the exoneration of A.

It is a fatal objection to the statute that it undertakes to settle in one trial the rights of two parties to a criminal cause whose interests are adverse, and to try two distinct and disconnected issues, *viz.*, the guilt of the principal defendant and *the innocence of the pros- [90 ecutor, upon testimony applicable to but one of such issues. It seems to me entirely clear that, if the prosecutor can be subjected to a judgment for costs and to imprisonment, without being able to lay before the jury the testimony which would tend to his acquittal, he is deprived of his liberty and property without due process of law, within the meaning of the 14th Amendment.

Notwithstanding that this was a prosecution for libel, in which it might be expected that the motives of the prosecutor would appear more clearly than in ordinary prosecutions, the statute appears to have worked a peculiar hardship upon the defendant. As stated in the opinion of the court, after the verdict was rendered, Lowe moved to set the same aside so far as it bore against him, upon the ground that he had not been heard, and could not be heard, in his own defense, and also moved in arrest of judgment upon the same ground, but the court denied both motions, and upon appeal to the supreme court that court held, following in that particular *State* v. *Zimmerman*, 31 Kan. 85, that, under § 326 of the Criminal Code, above cited, the court had no power to set aside a verdict of acquittal, and that it was equally powerless to set aside the verdict against the prosecutor, inasmuch as it was a part of the verdict of acquittal. In delivering the opinion, the court says: "The force of another universal practice of courts everywhere ought to be adverted to, and that is that when a jury returns a verdict of not guilty in a criminal case the trial court has no power to set it aside or modify it in any respect. These findings against the prosecuting witness were a part of a verdict of a jury in a criminal case, wherein express power by statutory enactment is given a jury to determine both the law and the facts. The trial court has no power to interfere with that verdict in any prejudicial respect, and this court is as powerless as the court below." In neither the principal opinion nor in the opinion upon motion for a rehearing was there any intimation that the prosecutor had been or could be heard in his own defense, notwithstanding his whole case was rested upon that ground.

It results then that, under the construction given by the *supreme court to this statute, [91 the verdict and judgment against the prosecutor, however unjust it may be, is one which no court has power to set aside, because it is a part of the verdict of acquittal of the defendant in the principal action, and the court cannot set aside one part of the verdict without setting aside the whole. If any further argument were needed to satisfy one of the great injustice of this statute, it would seem that this construction supplied it.

The unnecessary hardship of the statute is the more manifest when compared with certain sections of the Revised Statutes of the



Digitized by Google

United States having a similar object. Thus, by § 970, when, in certain prosecutions instituted by a collector of customs or other officer, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause for the seizure, the court shall cause the proper certificate thereof to be entered, and the claimant shall not be entitled to costs nor the prosecutor be liable to suit. In such case the certificate is granted or refused by the court upon a hearing of both parties subsequent to the trial of the main issue and upon motion of the United States for such certificate. *Averill* v. *Smith*, 84 U. S. 17 Wall. 82 [21: 613]; *United States* v. *Frerichs*, 106 U. S. 160 [27: 128], 16 Blatchf. 547; *The City of Mexico*, 25 Fed. Rep. 924.

A similar procedure is contemplated by § 975, making the informer or plaintiff in a penal statute liable for costs, unless he be an officer of the United States authorized to commence such prosecution, and the court, at the trial in open court, certifies upon the record that there was reasonable cause for commencing the same. So also, by § 989, it is made the duty of the court to certify that there was probable cause for certain acts done by the collector or other officer, under which it has been decided that the certificate may be granted by another judge than the one before whom the verdict was rendered, and after an execution has issued, as well as before. *Cox* v. *Barney*, 14 Blatchf. 289. In all these cases a separate finding by the court is evidently contemplated.

Indeed, in § 327 of the Code of Criminal Procedure of Kansas, immediately following the 92] section by authority of which *judgment was entered in this case, it is provided that "if a person charged with a felony shall be discharged by the officer taking his examination, or if recognized or committed for any such offense, and no indictment or information be preferred against him, the cost shall be paid by the prosecuting witness, unless the court shall find that there was probable cause for instituting the prosecution, and that the same was not instituted for malicious motives." This section is apparently not obnoxious to the objection above made, since it contemplates a hearing by the court upon the question of probable cause and the motive for the prosecution.

In *State, McGraw*, v. *Ensign*, 11 Neb. 529, the supreme court of Nebraska, construing a statute similar to the one in question, held that the legislature had exceeded its power. "The mere failure," said the court, "to prove the charge made in a complaint is not conclusive evidence of the want of probable cause or of malice. A party may be convinced of the existence of a tippling or gambling shop at a certain place, or of other means by which the morals of the community are corrupted or debased, and yet upon the trial, from the peculiar or secret nature of the business, may be unable to prove the charge. Does such a case upon the trial assume the form of a contest between the accused and accuser as to which shall be imprisoned? We think not."

I do not think it constitutional to so frame a criminal law as to make it incumbent upon the prosecutor to enter a complaint at the peril of being mulcted in costs, in case the prosecution was malicious, without giving him an opportunity of showing that the complaint was made in good faith and with probable cause to believe that the defendant was guilty.

For these reasons I am unable to concur in the opinion of the court.

---

## NORTHERN PACIFIC RAILROAD COMPANY, *Plf. in Err.*, [93
*v.*
## OLE J. EGELAND.

(See S. C. Reporter's ed. 93-93.)

*Contributory negligence.*

Contributory negligence of a member of a section crew in jumping from a train going about 4 miles per hour to a station platform in broad daylight, in obedience to the command of the conductor, who was his direct superior, and after fellow laborers had jumped and landed safely, he being injured thereby, is not so obvious as to be a necessary legal conclusion, but is a question for the jury.

[No. 238.]

*Argued and Submitted April 20, 1896. Decided May 18, 1896.*

---

NOTE.—*As to freedom of plaintiff from contributory negligence, necessary to entitle him to recover*, see notes to Stokes v. Saltonstall, 10: 115.

*As to contributory negligence; imputed negligence; negligence of parent or child or husband or driver; intoxication*,—see note to Union P. R. Co. v. Botsford, 35: 734.

*Contributory negligence, when a question for the jury; duty of court as to directing verdict: freedom from contributory negligence, when may be inferred.*

Whether the plaintiff was guilty of contributing to the injury is generally a question for the jury. Brehm v. Great Western R. Co. 34 Barb. 256; Thatcher v. Great Western R. Co. 4 U. C. C. P. 543; Crissey v. Hestonville, M. & F. Pass. R. Co. 75 Pa. 83; Memphis & C. R. Co. v. Whitfield, 44 Miss. 467, 7 Am. Rep. 699; Zemp v. Wilmington & M. R. Co. 9 Rich. L. 84, 64 Am. Dec. 763; Allender v. Chicago, R. I. & P. R. Co. 37 Iowa, 264; Sullivan v. Philadelphia & R. R. Co. 30 Pa. 234, 72 Am. Dec. 698; Thomp. Charging the Jury, 22.

In the view of some courts contributory negligence is a question for the court where there is no conflict as to the evidence. Dublin v. Slattery, L. R. 3 App. Cas. 1201; Dascomb v. Buffalo & S. L. R. Co. 27 Barb. 221; Biles v. Holmes, 11 Ired. L. 16; Thrings v. Central Park R. Co. 7 Robt. 616; Van Lien v. Scoville Mfg. Co. 4 Daly, 554; Flemming v. Western P. R. Co. 49 Cal. 253; Pittsburg, F. W. & C. R. Co. v. Evans, 53 Pa. 250; Grigsby v. Chappell, 5 Rich. L. 446; Castello v. Landwehr, 28 Wis. 522; Louisville & P. Canal Co. v. Murphy, 9 Bush, 522; Gagg v. Vetter, 41 Ind. 228, 13 Am. Rep. 322.

The case must go to the jury, where the facts which if true, would constitute evidence of negligence, are controverted. Saltonstall v. Stockton, Taney, 11; Pittsburg & C. R. Co. v. Andrews, 39 Md. 329, 17 Am. Rep. 568; Chicago City R. Co. v. Young 62 Ill. 238; Bernhardt v. Rensselaer & S. R. Co. 23 Barb. 166.

If it appear that the plaintiff was injured in consequence of having voluntarily put his arm out of the window of a railway coach he cannot recover. Yet, if there is a conflict of testimony as to how his arm came to be thus exposed, the case must go to



Digitized by Google

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that court affirming the judgment of the United States Circuit Court for the District of Minnesota, Fourth Division, in favor of the plaintiff, Ole J. Egeland, in an action brought by him against the Northern Pacific Railroad Company, defendant, for damages sustained by him by reason of the negligence of the agents and servants of the company. *Affirmed.*

See same case below, 12 U. S. App. 271.

The facts are stated in the opinion.

*Mr.* **C. W. Bunn,** for plaintiff in error:

Except in unusual circumstances, it is negligence to jump from a moving train.

*Gavett* v. *Manchester & L. R. Co.* 16 Gray, 501, 77 Am. Dec. 422; *Harvey* v. *Eastern R. Co.* 116 Mass. 269; *Solomon* v. *Manhattan R. Co.* 103 N. Y. 437, 57 Am. Rep. 760; *Jewell* v. *Chicago, St. P. & M. R. Co.* 54 Wis. 610, 41 Am. Rep. 63; *Butler* v. *St. Paul & D. R. Co.* 39 Minn. 135.

The defendant in error must excuse himself for this apparently careless act, or must be held to have assumed all the risks incident to it.

*Baltimore & P. R. Co.* v. *Jones,* 95 U. S. 439, 443 (24: 506, 507).

The knowledge, assent, or direction of the company's agent as to what he did is immaterial.

*Kresanowski* v. *Northern P. R. Co.* 18 Fed. Rep. 229, 233–235.

If the act was dangerous, the danger was known by England, and the direction of the company's agent was immaterial.

*Roul* v *East Tennessee, V. & G. R. Co.* 85 Ga. 197.

*Mr.* **Henry J. Gjertsen,** for defendant in error:

If the master orders his servant into a situation of danger, and he obeys, and he is thereby injured, the law will not deny him a remedy against the master on the ground of contributory negligence unless the danger was so glaring that no prudent man would have entered

---

the jury. Pittsburg & C. R. Co. v. Andrews, 39 Md. 329, 17 Am. Rep. 568.

The case must go to the jury where, although the facts are not controverted, fair-minded men might differ as to whether the inference of negligence should be drawn from them. Gaynor v. Old Colony & N. R. Co. 100 Mass. 208, 97 Am. Dec. 96; Patterson v. Wallace, 1 Macq. H. L. Cas. 748; Johnson v. Hudson River R. Co. 20 N. Y. 65, 75 Am. Dec. 375; Philadelphia & R. R. Co. v. Spearen, 47 Pa. 300, 86 Am. Dec. 544; Seabrook v. Hecker, 2 Robt. 291; Haycroft v. Lake Shore & M. S. R. Co. 64 N. Y. 636.

And where the court directs a verdict for the defendant, the plaintiff is entitled to have everything on which his right to recover depends, and which the proof tended to establish, regarded as proved. Stone v. Chicago & N. W. R. Co. 47 Iowa, 82, 29 Am. Rep. 458; McClenaghan v. Brook, 5 Mich. L. 17.

Where the facts are in dispute and the inferences which fair-minded men would draw from them are doubtful, the case should go to the jury. Nichols v. Sixth Ave. R. Co. 38 N. Y. 131, 97 Am. Dec. 730; Sioux City & St. P. R. Co. v. Stout, 84 U. S. 17 Wall. 657 (21: 745); Fernandes v. Sacramento City R. Co. 52 Cal. 45, 4 Cent. L. J. 82; Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99; State v. Manchester & L. Railroad, 52 N. H. 529; Gaynor v. Old Colony & N. R. Co. 100 Mass. 208, 97 Am. Dec. 96; McGrath v. Hudson River R. Co. 32 Barb. 144; Bridges v. North London R. Co. L. R. 7 H. L. 213; Beers v. Housatonic R. Co. 19 Conn. 566; Vinton v. Schwab, 32 Vt. 612; Pennsylvania Canal Co. v. Bentley, 66 Pa. 34; Wyatt v. Citizens' R. Co. 55 Mo. 485; Jenkins v. Little Miami R. Co. 2 Disney, 49.

The question of negligence is for the jury when there is a substantial doubt as to the facts or as to the inferences to be drawn from them. (Crissey v. Hestonville, M. & F. Pass. R. Co. 75 Pa. 83; Barton v. St. Louis & I. M. R. Co. 52 Mo. 253, 14 Am. Rep. 413); and it is for the court only where the facts are undisputed, and the inference of negligence is clear. Dickens v. New York C. R. Co. 1 Abb. App. Dec. 504.

Where the court can see from the undisputed evidence that the defendant was guilty of negligence, it will set the verdict aside for the defendant and award a *venire de novo.* Derwort v. Loomer, 21 Conn. 245; Thomp. Charging the Jury, 22.

Where there is no evidence having a tendency to prove the issue the court may so instruct the jury. Tison v. Yawn, 15 Ga. 491, 60 Am. Dec. 708; Boland v. Missouri R. Co. 36 Mo. 484; Meyer v. Pacific Railroad, 40 Mo. 151; Vinton v. Schwab, 32 Vt. 612; Thomp. Charging the Jury, 44.

In the Federal courts before the evidence is left to the jury, there is, or may be, in every case, a preliminary question for the judge, not whether there literally is no evidence, but whether there is any evidence upon which the jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Marion County Comrs. v. Clark, 94 U. S. 284 (24: 62); Parks v. Ross, 52 U. S. 11 How. 373 (13: 735); Hickman v. Jones, 76 U. S. 9 Wall. 201 (19: 553); Merchants' Nat. Bank v. State Nat. Bank, 77 U. S. 10 Wall. 637 (19: 1015); Pawling v. United States, 8 U. S. 4 Cranch, 222 (2: 602); Pleasants v. Fant, 89 U. S. 22 Wall. 122 (22: 783); Schuylkill & D. Improv. Co. v. Munson, 81 U. S. 14 Wall. 448 (20: 872); Schuchardt v. Allen, 68 U. S. 1 Wall. 359 (17: 642); Bank of United States v. Smith, 24 U. S. 11 Wheat. 171 (6: 443).

The English courts and some of the state courts hold a similar doctrine to the Federal courts. Jewell v. Parr, 13 C. B. 916; Toomey v. London, B. & S. C. R. Co. 3 C. B. N. S. 150; Whelton v. Hardisty, 8 El. & Bl. 282; Giblin v. McMullen, L. R. 2 P. C. 335; Ryder v. Wombwell, L. R. 4 Exch. 38; Cooper v. Waldron, 50 Me. 80; Morton v. Frankfort, 55 Me. 46; Mason v. Lewis, 1 G. Greene, 494; Bailey v. Kimball, 26 N. H. 351; Colt v. Sixth Ave. R. Co. 49 N. Y. 671.

When the evidence upon an issue is uncontradicted, and no circumstances appear in the case to discredit it, and it appears to the court that a verdict contrary to this evidence could not be supported, an express direction should be given to the jury to find in accordance with such evidence. National Exch. Bank v. White, 30 Fed. Rep. 418.

When the case is such that the court would be compelled to set aside a verdict, if rendered in favor of a party, because not reasonably supported by the evidence, the court may direct a verdict for the opposite party. Thompson v. Pioneer-Press Co. 37 Minn. 285.

Where the evidence which has been offered is not sufficient in law to make out the case of the party who offered it, it is the duty of the judge so to instruct the jury. Thomp. Charging the Jury, 44; Proffat, Jury Trial, §§ 351–354; 11 Am. & Eng. Enc. Law, 242, 246; Nolan v. Shickle, 3 Mo. App. 300; State, Griswold, v. Thayer, 5 Mo. App. 420; Chandler v. Von Roeder, 65 U. S. 24 How. 227 (16: 634).

Where the question of negligence is not wholly free from doubt, or the evidence is conflicting, the jury, not the court, must decide the case. Orange & N. Horse R. Co. v. Ward, 47 N. J. L. 560; Leavitt



Digitized by Google

into it, even where, like the servant, he was not entirely free to choose.

2 Thomp. Neg. 974, 975; Wood, Master & Servant, § 387.

One who obeys the instructions and directions of another upon whose assurance he has a right to rely, cannot be charged with contributory negligence at the instance of such other, in an action against him for injuries sustained in attempting to follow out the instructions.

Shearm. & Redf. Neg. 212; Deering, Neg. § 24; *Patton* v. *Western N. C. R. Co.* 96 N. C. 455; *New York, P. & N. R. Co.* v. *Coulbourn*, 69 Md. 360, 1 L. R. A. 541.

A passenger is warranted in obeying the directions of the agents and servants of the carrier in boarding or alighting from a moving train, unless obedience to such directions exposes him to an obvious risk which a prudent man would not incur, but where there is a doubt whether the speed of the train was so rapid as to render it clearly dangerous to get off, that fact must be left to the jury.

*Kansas & G. S. L. R. Co.* v. *Dorough*, 72 Tex. 108.

The question of negligence in any case is clearly a mixed question of law and fact and is never taken from the jury except in very clear cases.

*Filer* v. *New York R. Co.* 49 N. Y. 47, 10 Am. Rep. 327; *Clark* v. *Eighth Ave. R. Co.* 36 N. Y. 135, 93 Am. Dec. 495; *McIntire* v. *New York C. R. Co.* 37 N. Y. 287; *Stager* v. *Ridge Ave. Pass. R. Co.* 119 Pa. 70; *Conner* v. *Citizens' Street R. Co.* 105 Ind. 63, 55 Am. Rep. 177; *Pennsylvania Co.* v. *Hoagland*, 78 Ind. 203; *Lake Erie & W. R. Co.* v. *Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Terre Haute & I. R. Co.* v. *Buck*, 96 Ind. 346, 49 Am. Rep. 168; *St. Louis, I. M. & S. R. Co.* v. *Cantrell*, 37 Ark. 519, 40 Am. Rep. 105; *Fowler* v. *Baltimore & O. R. Co.* 18 W. Va. 579; *Hickey* v. *Boston & L. R. Co.* 14 Allen, 429; *Pennsylvania R. Co.* v. *Aspell*, 23 Pa. 147, 62 Am. Dec. 323; *Philadelphia & R. R. Co.* v. *Boyer*, 97 Pa. 91; *Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 297 (23: 900); *St. Louis, I. M. & S. R. Co.* v. *Person*, 49 Ark. 183.

---

v. Chicago & N. W. R. Co. 64 Wis. 228; Nusum v. Pittsburg, C. & St. L. R. Co. 30 W. Va. 228; Ferry v. Manhattan R. Co. 23 Jones & S. 325; Drevis v. Woods, 71 Wis. 329; Baldwin v. St. Louis, K. & N. W. R. Co. 72 Iowa, 45; O'Hare v. Chicago & A. R. Co. 95 Mo. 662; Crabell v. Wapello Coal Co. 68 Iowa, 751; Tyler v. New York & N. E. R. Co. 137 Mass. 238; Stoker v. Minneapolis, 28 Minn. 473; Texas & P. R. Co. v. Levi, 59 Tex. 674.

Negligence is ordinarily a question for the jury, but only when the facts would authorize the jury to infer it. Sutton v. New York C. & H. R. R. Co. 66 N. Y. 243.

The doctrine that a mere scintilla of evidence is sufficient to send the case to the jury is now virtually discarded in American courts, and wholly so in the English courts. 11 Am. & Eng. Enc. Law, 242; Shearm. & Redf. Neg. § 56; Schuylkill & D. Improv. Co. v. Munson, 81 U. S. 14 Wall. 442, 448 (20: 867, 872); Smith v. Sioux City & P. R. Co. 15 Neb. 583; Hathaway v. East Tennessee, V. & G. R. Co. 29 Fed. Rep. 491; Parks v. Ross, 52 U. S. 11 How. 373 (13: 735); Pleasants v. Fant, 89 U. S. 22 Wall. 116, 121 (22: 780, 782).

The court cannot take the matter from the jury when there is any evidence tending to prove the issue. Robinson v. Louisville & N. R. Co. 2 Lea, 594; Dick v. Indianapolis, C. & L. R. Co. 38 Ohio St. 389; Shearm. & Redf. Neg. § 56; Mercier v. Mercier, 43 Ga. 323.

When the facts are disputed, or more than one inference can be fairly drawn from them as to the care, or want of care, of the plaintiff, the question of contributory negligence is for the jury. Cooley, Torts, 666-671; Pierce, Railroads, 311 *et seq.*; Wharton, Neg. § 420; Patterson, Railway Accident Law, §§ 382, 384; 2 Thomp. Neg. p. 1178, § 25, p. 1239, § 13; Beach, Contrib. Neg. § 163; Hathaway v. East Tennessee, V. & G. R. Co. 29 Fed. Rep. 489; North Pennsylvania R. Co. v. Heileman, 49 Pa. 60, 88 Am. Dec. 482.

When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided by the court. Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99; Hart v. Hudson River Bridge Co. 80 N. Y. 622; Boss v. Providence & W. R. Co. 15 R. I. 149; Petty v. Hannibal & St. J. R. Co. 88 Mo. 306; Lehigh Valley R. Co. v. Greiner, 113 Pa. 600; Strand v. Chicago & W. M. R. Co. 64 Mich. 216; Fernandes v. Sacremento City R. Co. 52 Cal. 45, 4 Cent. L. J. 82; Jochem v. Robinson, 66 Wis. 638, 57 Am. Rep. 298.

But when the facts are undisputed, and but one inference regarding the care of the plaintiff can be drawn from them, the question is one of law for the court. Beach, Contrib. Neg. § 162; Todd v. Old Colony & F. R. R. Co. 3 Allen, 18, 30 Am. Dec. 49; Merrill v. North Yarmouth, 78 Me. 200, 57 Am. Rep. 794; Larmore v. Crown Point Iron Co. 101 N. Y. 391, 54 Am. Rep. 718; Pierce v. Whitcomb, 48 Vt. 127, 21 Am. Rep. 120; Tolman v. Syracuse, B. & N. Y. R. Co. 98 N. Y. 198, 50 Am. Rep. 649; Schofield v. Chicago, M. & St. P. R. Co. 114 U. S. 615 (29: 234); Indianapolis v. Cook, 99 Ind. 10; Lehigh Valley R. Co. v. Greiner, 113 Pa. 600; Filer v. New York C. R. Co. 49 N. Y. 47, 10 Am. Rep. 327; Reading & C. R. Co. v. Ritchie, 109 Pa. 425.

Freedom from contributory negligence need not be shown by direct testimony, but the absence of any fault on the part of the plaintiff may be inferred from the circumstances of the case in connection with the ordinary habits, conduct, and motives of men. Greany v. Long Island R. Co. 101 N. Y. 423; Eastwood v. Retsof Min. Co. 86 Hun, 91; Boyce v. Manhattan R. Co. 118 N. Y. 314; Johnson v. Hudson River R. Co. 6 Duer, 633; Galvin v. New York, 112 N. Y. 223; Van Tassell v. New York, L. E. & W. R. Co. 1 Misc. 299; Atkinson v. Abraham, 45 Hun, 238; Ford v. Lyons, 41 Hun, 512; Martin v. New York, O. & W. R. Co. 62 Hun, 161; Barry v. New York C. & H. R. R. Co. 92 N. Y. 294, 44 Am. Rep. 377; Gottlieb v. New York, L. E. & W. R. Co. 100 N. Y. 467; Daley v. Schaaf, 28 Hun, 316; Conlin v. Rodgers, 39 N. Y. S. R. 51; Stuber v. McEntee, 142 N. Y. 205; McLean v. Standard Oil Co. 50 N. Y. S. R. 626; Meek v. New York C. & H. R. R. Co. 69 Hun, 488.

The inference that the person injured exercised due care may be inferred from the circumstances of the case. Schwandner v. Birge, 33 Hun, 186; Atkinson v. Abraham, 45 Hun, 238; Ford v. Lyons, 41 Hun, 512; Jones v. New York C. & H. R. R. Co. 28 Hun, 364.

Where the person injured was in the performance of a lawful act or in the line of his duty, the presumption is that at least ordinary care was used. Lansing v. Stone, 37 Barb. 15; Cahill v. Hilton, 106 N. Y. 512.



Digitized by Google

Mr. Justice **Peckham** delivered the opinion of the court:

This action was brought in the United States circuit court for the district of Minnesota, fourth division, by the plaintiff against the railroad company to recover damages which he alleged he had sustained by reason of the neglect of the agents and servants of the company. The plaintiff had a verdict, and the judgment entered thereon was affirmed by the United States circuit court of appeals for the eighth circuit. 12 U. S. App. 271.

The questions in the case arise on the exceptions taken to the refusal of the court to instruct the jury as follows:

"First. That there is no negligence shown 94] on the part of *the defendant which would entitle the plaintiff to recover a verdict against the defendant.

"Second. That even if there should be any negligence shown on the part of the defendant, yet the plaintiff was guilty of such contributory negligence that he could not recover in this action."

The only ground for a new trial urged upon us has been the second of the two just stated, and we shall confine the discussion to that ground alone.

Upon the trial evidence was given upon the part of the plaintiff tending to show that he was one of a section crew going out to work on the defendant's road and coming back daily. He and the rest of the crew were brought to their work and taken back from it by the defendant in a train consisting of a caboose and several flat cars drawn by an engine, all under the control of one Potter, the conductor. Potter controlled all the men, including plaintiff, from the time they boarded the work train in the morning until they left the train in the evening, and during the day directed the men, including the plaintiff, what work to do. Returning on the train from his day's work by daylight on September 18, 1890, plaintiff was in the caboose, as it neared the Lake Park station, where he and some others of the crew were to leave the train. The train slowed down as it came to the station and was running between 4 and 5 miles an hour when Potter, the conductor, gave orders to the men to get off. Three of the crew jumped down upon the platform of the station, which was about a foot below the car step. They landed safely, and plaintiff was then ordered by Potter, the conductor, to jump. He threw his shovel and dinner pail on the platform so that he might more easily get off himself, and then jumped in the direction in which the train was moving, supposing that was the safest way. He landed on the platform, and then in some way fell and hurt himself. He jumped because, as he said, he was told to by the conductor, and because he thought he could do so safely, or the conductor would not have given the order. He relied on the conductor's direction at the time he jumped, and at that time the train, 95] *which had been slowing up, was going not faster than 4 miles an hour.

These are the principal and material points in the case which the plaintiff's evidence tended to establish as facts. It must be upon the assumption that they are facts that the defendant's requests to charge as above set forth are to be treated.

The trial judge, after the refusal to charge as requested by the defendant, did charge, among other things, as follows:

"I instruct you that to jump off a railroad train moving at a rate of speed of 4 or 5 miles an hour is presumably a negligent act *per se*, and that in order to rebut this presumption of negligence and recover for an injury sustained from so jumping the plaintiff must satisfy you that he was ordered and directed to do so by the conductor, Potter, and he must do that by a perponderance of evidence. Plaintiff admits the jumping, and he attempts to excuse the act, and in order to do that he must satisfy you that Potter ordered and directed him so to do, and also that the order was calculated to divert his attention from the danger of jumping, or that the order created a situation which interfered with his free agency to some extent, and such order created a confidence that the attempt could be made with safety.

. . . . . .

"If the danger to be met by jumping was manifestly great, if it was obviously dangerous, so that an ordinarily prudent person in the same situation would not have jumped, then it was contributory negligence to obey the direction of the conductor, if the same was given. But if the danger was not so great under the circumstances but that the plaintiff might reasonably believe that he could obey it by taking proper care, particularly as his superior commanded it, and if his purpose was to obey in pursuance of his sense of duty, and, without waiting to think or consider the risk and danger, he jumped, then it would not be contributory negligence to obey and jump. So the question that presents itself for your determination is whether, under all the circumstances of the case, if you should come to the determination that this instruction or *command was[96 given by Potter to jump when the train was running at the speed testified,—whether the plaintiff under those circumstances had the right to rely upon the order; whether he was justified in reasonably believing that he could make the attempt with safety. If the order was not given and he voluntarily jumped off the train, seeing that the others had done so in safety, and he thought he could do the same, then he took the risk; and if, in consequence of so jumping, he was injured he could not recover because it would be contributory negligence on his part. On the other hand, if the company was negligent and brought this injury upon the plaintiff entirely by its negligence and without any fault on his part,—if you find that from the evidence, then the question would be, What compensation shall he have for the injuries he has sustained, or what amount will remunerate him for the injury he has suffered?"

The charge as above given was duly excepted to by the plaintiff in error, and it is now urged on its behalf that it was erroneous to submit the question of contributory negligence on the part of the plaintiff to the jury, and that the court should have decided as a matter of law that the plaintiff was guilty of such negligence, and should have instructed the jury to



Digitized by Google

return a verdict for the defendant on that ground.

Two cases are cited on behalf of the company as authority for the position taken on its behalf. They are *Baltimore & P. R. Co.* v. *Jones*, 95 U. S. 439 [24: 506]; and *Kresanowski* v. *Northern P. R. Co.* 18 Fed. Rep. 229. The case last cited follows the case in 95 U. S., and both are claimed to be fatal to the right of the plaintiff to recover in this action.

We think the difference between the cases cited and the case at bar is clear and material. The persons injured in those cases were seated, in the first case, on the pilot of the engine, and in the other on the front beam of the engine with his feet over the pilot. The positions were most dangerous, and the danger was plain and obvious at the first sight. No other place on either train was as dangerous, and yet each of the plaintiffs substantially selected his position as a fit and proper place to ride in. The great and obvious danger of the po-
97 ]sitions *in which the plaintiffs voluntarily placed themselves is the material and controlling fact upon which the cases were decided. So great and so obvious was the danger that when it was urged as an argument in this court that the plaintiff in the *Jones Case* had been ordered to ride where he did, and that such order constituted an excuse, the court replied, "as well might he have obeyed a suggestion to ride on the cowcatcher, or put himself on the track before the advancing wheels of the locomotive." In neither of the two cases was there in truth an order to ride on the pilot. In the *Jones Case* the plaintiff had been warned about riding on the pilot and forbidden to do so. There was room for him in the box car which was a part of the train, and he could have gone into it in as little if not less time than it took to climb to the pilot. The only foundation for the claim that he was directed to do as he did is found in the statement that when the party was about to leave on their return that evening the plaintiff was told by Van Ness, who was in charge of the laborers when at work, "to jump on anywhere; that they were behind time and in a hurry." To that the court remarked: "The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late and he must hurry, this was no justification for taking such a risk. . . . His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit."

In the case in 18 Fed. Rep. 229, it simply appeared that there was not room on the engine for all the men who wished to ride upon their return from their work, unless some rode on the pilot. There is no pretense of a direction given to ride there, and even if there had been it would constitute no justification for thus riding, under the rule as given in the *Jones Case*, *supra*. Both these cases, therefore, stand on the same ground, which is the exceedingly dangerous position taken by the plaintiffs upon the engines, the danger of which was open and obvious to everyone, and it was
98 ]therefore held that the *necessary inference or legal conclusion to be drawn from these uncontradicted facts was that the plaintiffs, in their choice of positions on the engines, were guilty of negligence directly contributing to the injury.

In this case the question of negligence depends upon the material difference in the facts, and we are of the opinion that the inference to be drawn from those facts was not so plain as to be a legal conclusion, but was one for the jury to determine. In this case the plaintiff was a servant, a common laborer, in the employment of the company. He was returning from his work on a train provided by the company, and that train was under the command of Potter, the conductor, who was also the direct superior of the plaintiff and the controller of his movements while at work. The plaintiff would naturally, therefore, be inclined to obey the orders of such superior, particularly if they were not of an obviously very dangerous character. Bearing upon the question of danger was the speed of the train at the time the plaintiff jumped. It was then going about 4 miles per hour, quite slowly; the platform of the station was but about a foot lower than the car step; it was broad daylight; three of his fellow laborers, in obedience to the orders of the conductor, had themselves jumped and landed safely upon the platform; the plaintiff states that he jumped because of this order, and he says he relied on it, supposing that he could jump safely or else the order would not have been given. Taking all these facts together, ought it to be said, as a necessary legal inference therefrom, that the plaintiff in obeying this order was guilty of such an obviously dangerous act as to constitute contributory negligence on his part? The act of jumping under such circumstances cannot, with any regard to common sense, be regarded as of the same obviously dangerous character and to as great an extent as that of riding on the pilot of an engine. If plaintiff reasonably thought he could with safety obey the order by taking care and jumping carefully, and if because of the order he did jump, the jury ought to be at liberty to say whether, under such circumstances, he was or was not guilty of negligence. If the train had been going at the rate of 30, or even 15, miles per hour, *the chance [99 of injury resulting from a jump would have been so great that plaintiff would probably have obeyed such an order at his own risk. We think a speed of 4 miles an hour, considering all the facts hereinabove detailed and including the direction to jump, left the question of contributory negligence one for the jury. In this respect we think the trial judge was correct.

This is a different case from one where a would-be passenger at a railroad station attempts to board a passing train while it is in quite rapid motion because of the statement of the conductor on the train that, if he wants to take that train he must jump on, as it would not stop. *Hunter* v. *Cooperstown & S. V. R. Co.* 112 N. Y. 371, 2 L. R. A. 832. Here there is an element of obedience to the command given by the person in charge of the train and of the crew, and given to a common laborer, and upon a matter where the jury might find



Digitized by Google

the danger was not so great and so obvious as to render obedience to the order a risk of the person obeying.

The case was left for the decision of the jury upon all the facts to say: First, whether the defendant was guilty of negligence in not stopping and giving the order referred to; and, second, if it were thus guilty, whether the plaintiff was himself guilty of negligence contributing to the injury. The jury found in favor of the plaintiff on both the above questions, and we do not think that we ought to interfere.

*The judgment should therefore be affirmed.*

---

## 100] COUNT JOSEPH TELFENER v. GEORGE W. RUSS.

(See S. C. Reporter's ed. 100, 101.)

*Texas land — enforcement of contract for purchase.*

1. An office survey constructed by merely copying and adopting the field notes of a previous survey made on the ground for other parties by other surveyors is not sufficient to enable a purchaser to enforce an executory contract for the sale of public lands under the Texas act of July 14, 1879, as amended March 11, 1881.
2. In order to enforce a contract for the purchase of a right in public lands in Texas under an application for their purchase, the vendor must show that he has so far complied with the law as to obtain a vested right to patents as against the state on making the required payments in the required time.

[No. 462.]

*Petition for Rehearing Submitted May 7, 1896. Decided May 18, 1896.*

ON PETITION for rehearing of the above entitled case. See same case, 162 U. S. 170 [40:930]. *Petition for rehearing denied.*

See same case below, 60 Fed. Rep. 228.

*Messrs.* **Clarence H. Miller** and **Joseph Wheeler** for petitioner.

Mr. Justice **Field** delivered the opinion of the court:

It is firmly established that the state of Texas cannot, in opposition to its wishes, be compelled to accept an office survey constructed by merely copying and adopting the field notes of a previous survey made on the ground for other parties by other surveyors, and that such office surveys are not sufficient to enable a purchaser to enforce an executory contract for the sale of public lands under the act of July 14, 1879, as amended March 11, 1881. *Bacon* v. *State*, 2 Tex. Civ. App. 692, and cases cited.

We adhere to the ruling that error was committed by the circuit court in the manner in which this matter of the necessity of surveys on the ground was left to the jury. We also intimated that it seemed from the evidence, so far as before us, that the surveys in this instance were not in fact made on the ground, but that was not essential to the decision.

Some expressions in our former opinion implying that payment was a prerequisite to recovery are complained of. What we intended to say was that under the pleadings, and on plaintiff's contention as it seemed to be pressed, it was necessary that he should show that he had so far complied with the law as to have obtained a vested right to patents as against the state on making the required payments in the required time, and this we thought he had failed to do as to all the tracts, it being borne in mind that each tract must be treated as a [101 separate purchase under the statute, as held in *Bacon* v. *State*, *supra*, though this contract, as between the parties, was an entire contract for the transfer of rights in the many tracts necessary to make up the agreed number of acres.

*Petition denied.*

---

## JAMES MURRAY, *alias* "GREASY JIM," *Plff. in Err.*, v. STATE OF LOUISIANA.

(See S. C. Reporter's ed. 101-109.)

*Removal of criminal prosecution — subpœna duces tecum, when refused — error in admitting evidence — state law as to jury commissioners.*

1. A criminal prosecution is not removable to a Federal court from a state court under U. S. Rev. Stat. § 641, because jury commissioners or other subordinate officers have excluded colored citizens from juries because of their race, if this has been done without authority derived from the Constitution and laws of the state.
2. A *subpœna duces tecum* may be refused by the court when it does not describe or refer to any paper or document which is in the possession of the witness and which is required.
3. Alleged error in admitting evidence will not be presumed to have been injurious, in the absence of a bill of exceptions disclosing at least the substance of the evidence and of an assignment of error.
4. A state law conferring judicial powers on jury commissioners in selecting jurors does not for that reason conflict with the 14th Amendment to the Federal Constitution, where the accused was not subjected to any different treatment than that which prevails in other cases.

[No. 718.]

*Argued April 16, 1896. Decided May 18, 1896.*

---

NOTE.—*That patents for land may be set aside for fraud*, see note to Miller v. Kerr, 5: 381.

*As to errors in surveys and descriptions in patents for lands, how construed*, see note to Watts v. Lindsey, 5: 423.

*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 735.

NOTE.—*As to removal of causes from state to Federal courts where United States Constitution, act of Congress, or treaty comes in question*, see note to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

*As to removal of causes to United States courts for local prejudice*, see notes to Gaines v. Fuentes, 23: 524, and Jefferson v. Driver, 29: 897.

*As to the 15th Amendment to the United States Constitution, its construction and effect*, see note to United States v. Reese, 23: 563.



Digitized by Google

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment of that court affirming the judgment of the Criminal Court for the Parish of Orleans, Louisiana, adjudging Jim Murray, *alias* "Greasy Jim," to be guilty of murder. *Affirmed.*

See same case below, 47 La. Ann. 1424.

Statement by Mr. Justice **Shiras:**

In October, 1894, in the criminal district court for the parish of Orleans, state of Louisiana, an indictment for murder was found against one Jim Murray, *alias* "Greasy Jim." On December 18, 1894, the accused was arraigned, pleaded not guilty, and was remanded for further proceedings.

On January 10, 1895, Thomas F. Maher, as attorney for the accused, challenged the grand jury on the ground that it was not a legally constituted body, because the jury commissioner had discriminated against the prisoner on account of his race and color, by having excluded from the venire from which the grand jury was selected all colored men or negroes, which action was charged to be in conflict with the Constitution and laws of Louisiana and with the Constitution of the United States.

To procure evidence to sustain his said challenge, the accused by his counsel asked for a *subpœna duces tecum* directed to Francis C. Zacharie, registrar of the voters of the parish of Orleans, calling on him to furnish the total number of voters registered in the parish; the total number of white voters registered; the total number of colored voters; the total number of whites and of colored voters who could sign their names at the closing of the registration office of the parish previous to the last Congressional election held on November 6, 1894. Also for a *subpœna duces tecum* addressed to the jury commissioners of the parish, commanding them to furnish the court, on the trial of the challenge to the grand jury, the names and residences of 8,500 citizens who appeared before them in the month of September, 1894, for qualifications as jurors, and the names and residences of the 1,000 citizens whom they qualified and placed in the jury wheel, from which the grand jury, which found the indictment in the present case, was drawn. These motions for subpœnas were indorsed by the minute clerk as follows: "Filed subject to orders."

**103]** *On February 2, 1895, the challenge to the grand jury came on to be heard.

Apparently to save time, the state's attorney offered in evidence and as part of the present record the evidence taken before another section of the court, in the case of the *State of Louisiana* v. *George Heard*, on a challenge to the grand jury, in which similar grounds of challenge had been made. The counsel for the accused, who had also acted as counsel for George Heard, made no objection to the filing of this evidence, but himself filed, as part of the present record, the assignments of error and the bills of exceptions filed by him in the other case.

Among other things there appeared in this evidence in the case of Heard, and was read to the court in the present case, the return of the registry clerk, showing a statement of registered voters of the parish of Orleans after the general election of November, 1892, *viz.*: Total number of voters, 59,262, of whom there were native white who sign, 35,382; native born who make their mark, 4,571; foreign white who sign, 8,283, and who make their mark, 1,672; colored who sign, 5,431, and who make their mark, 4,223. This admitted record contained the testimony of several deputy sheriffs, who served jury summons, and which went to show that few persons of color were so summoned; also the testimony of the three jury commissioners, who testified that colored persons were summoned to appear before the commissioners to qualify as jurors, and that there were names of colored persons in the jury wheel from which this grand jury was drawn. They testified that in taking names from the registration list the commissioners selected them with reference to their qualifications as jurors, without regard to color; that a great many colored men were summoned, and there was no discrimination against colored men.

The court held that the plaintiff's challenge was not sustained by the evidence; that while it was undeniable that the exclusion from the general service of all people of the African race on account of their color would be an unlawful abridgement of the rights of such citizens, yet that the evidence did *not disclose such a case, but showed that the general service was not exclusively made up of the names of white persons, and that it was clearly established that colored people were not excluded on account of their race or color. The challenge was overruled. To which action of the court the accused by his counsel took several exceptions, which were duly allowed and signed. **[104**

The defendant then by his attorney made a motion to quash the indictment, upon the allegation that act No. 170 of the Acts of 1894, under the provisions of which the grand jury which indicted the accused was organized, was unconstitutional because it did not conform to the provisions of the state and Federal Constitutions, which provide that there shall be no discrimination on account of race, color, or previous condition of servitude. The motion to quash was overruled, and thereupon the accused filed an application for the removal of the cause to the circuit court of the United States. The allegations of the petition to remove stated the action of the court in overruling the challenge of the grand jury, and that there was a local prejudice against the accused as a colored man charged with having murdered a white man, which would prevent a fair and impartial trial in any state court. This petition was filed in the state court on February 19, 1895. On February 28, 1895, the trial was commenced, and was so proceeded in that on March 1, 1895, the jury found a verdict of guilty.

On March 7, 1895, a motion for a new trial and a motion in arrest of judgment were filed. In a petition accompanying these motions it was made to appear that on February 26, 1895, the accused had filed in the circuit court of the United States a petition for a writ of habeas corpus and for an injunction forbidding the state court to proceed. No action in the mat-



Digitized by Google

ter appears to have been taken by the United States circuit court.

The motion for a new trial and the motion in arrest of judgment were refused, and on March 7, 1895, sentence of death was pronounced against the accused. Certain bills of exceptions to the charge and rulings of the 105] court were *signed, and an appeal to the supreme court of Louisiana was allowed. On June 3, 1895, the supreme court affirmed the judgment of the trial court, and by a writ of error that judgment of the supreme court of Louisiana was brought to this court.

*Mr.* **Thomas F. Maher** for plaintiff in error.

*Messrs.* **M. J. Cunningham,** Attorney General of Louisiana, and **Alexander Porter Morse** for defendant in error.

**Mr. Justice Shiras** delivered the opinion of the court:

Several of the assignments of error bring into question the correctness of the judgment of the supreme court of the state of Louisiana affirming the action of the trial court in proceeding with the trial in disregard of a petition by the accused to have the cause removed into the circuit court of the United States upon the allegation that the petitioner was a negro, and that persons of African descent were, by reason of their race and color, excluded by the jury commissioners from serving as grand and petit jurors.

To dispose of such assignments it is sufficient to cite *Neal* v. *Delaware*, 103 U. S. 370 [26: 567], and *Gibson* v. *Mississippi*, 162 U. S. 565 [40: 1075], decided at the present term, in which, after careful consideration, it was held that Congress had not, by U. S. Rev. Stat. § 641, authorized a removal of the prosecution from the state court upon an allegation that jury commissioners or other subordinate officers had, without authority derived from the Constitution and laws of the state, excluded colored citizens from juries because of their race; that said section did not embrace a case in which a right is denied by judicial action during a trial, or in the sentence, or in the mode of executing the sentence; that for such denials arising from judicial action after a trial commenced the remedy lay in the revisory power of the higher courts of the state, and ultimately in the power of review which this court 106]*may exercise over their judgments whenever rights, privileges, or immunities claimed under the Constitution or laws of the United States are withheld or violated; and that the denial or inability to enforce, in the judicial tribunals of the states, rights secured by any law providing for the equal civil rights of citizens of the United States, to which § 641 refers, and on account of which a criminal prosecution may be removed from a state court, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the state, rather than a denial first made manifest at and during the trial of the case.

The petition for removal complained of the acts of the jury commissioners in illegally confining their summons to white citizens only, and excluding from the jury service citizens of the race and color of the petitioner, but did not aver that the jury commissioners so acted under or by virtue of the laws or Constitution of the state; nor was there shown, during the course of the trial, that there was any statutory or constitutional enactment of the state of Louisiana which discriminated against persons on account of race, color, or previous condition of servitude, or which denied to them the equal protection of the laws.

Other assignments ask our attention to errors alleged to have been committed in the course of the trial. It is claimed that the rights of the accused were disregarded in the proceedings under his challenge to the grand jury. The principal matters complained of seem to be the action of the court in indorsing on the challenge to the grand jury the words "filed subject to argument on face of papers;" and on the motion for *subpœna duces tecum* directed to the registrar of voters, the words "filed subject to orders," and on the motion for *subpœna duces tecum* addressed to the jury commissioners the words "filed subject to orders;" and it is claimed that such indorsements were irregular, deprived the accused of opportunity to sustain the allegations contained in his written challenge and deprived him of due process of law.

The indorsements or orders made upon the various papers*appear to us to have only [107 signified that the court withheld immediate action on the motions. They evidently were not treated by the court as concluding the accused, because the record shows that subsequently the hearing of the challenged was proceeded in, and that evidence was adduced by both the state and the accused.

An exception was taken to the refusal of the court to grant what was termed a *subpœna duces tecum* directed to Francis E. Zacharie, registrar of voters. The reason given by the court was that the so-called writ of *subpœna duces tecum* did not purport to be such, did not describe or refer to any paper or document which was in the possession of the registrar, and which the defendant required. The court was of opinion that either the defendant should have specified the books or documents required; or, if he wished information from the registrar, he should have subpœnaed him to attend and testify. We perceive no error in this action.

Exception was likewise taken to the refusal of the court to grant a writ of *subpœna duces tecum* on the jury commissioners, not commanding them to produce specified books or papers, but that they should furnish the names and residences of the 3,500 citizens whom they had summoned to qualify as jurors. The court thought that the writ asked for was not a writ of *subpœna duces tecum*, and that the defendant, if he desired information from the commissioners, should have subpœnaed them to attend as witnesses. Besides, the defendant had advantage of their testimony by consenting to the use of their evidence in the *Heard Case*.

At all events, no injury was suffered by the defendant by the refusal of the court to grant him the writs prayed for, because the evidence he desired to get did not tend to show that the rights of the accused were denied by the Constitution or laws of the state, and therefore did



Digitized by Google

not authorize the removal of the prosecution from the state court.

A more serious question is presented by an exception to the action of the trial court in permitting to be read the evidence of one King Jones, which had been taken in the presence of the accused in open court at a preliminary 108] hearing, and read *to and signed by the witness. The reason given by the district attorney for the use of the deposition was that after due diligence he was unable to procure the attendance of the witness, who was not within the jurisdiction of the court.

The record, however, discloses that the bill of exceptions to the allowance of this evidence was not presented for signature to the judge until March 14, 1885, two weeks after the sentence was rendered, and after a new trial had been refused and an appeal allowed. No error was assigned in the supreme court of Louisiana to the admission of this evidence, nor is it made the subject of assignment in this court. Neither does the record disclose the nature or effect of the testimony so admitted. In the absence of a bill of exceptions, disclosing at least the substance of the evidence, and of an assignment of error, we are permitted to suppose that the evidence was trivial, and that it did no injury to the defendant. We certainly have nothing in this record which would authorize us to convict the supreme court of Louisiana of any error in that behalf.

There was a motion to quash the indictment on the ground that act No. 170 of 1894, under the provisions of which the grand jury was drawn, was unconstitutional in that it was alleged to be a local or special law, and not enacted according to a constitutional requirement of previous public notice. This motion was refused by the trial court, and its action was approved by the supreme court of the state. Error is assigned in this court, but no Federal question is thereby presented.

Nor can we perceive any merit in the assignment which avers that this act No. 170 is in conflict with the 14th Amendment to the Constitution of the United States, because such law is alleged to confer on the jury commissioners of the parish of Orleans judicial powers in the selection of citizens for jury services. It is not pretended that the accused was subjected to any other or different treatment, in respect to that feature of the statute, than that which prevails in other cases, or on the trial of white citizens.

A careful inspection of this record has failed 109] to disclose any *particular in which the accused was deprived of any right or immunity secured to him under the laws or Constitution of the United States, and *the judgment of the supreme court of Louisiana is accordingly affirmed.*

## SALINA STOCK COMPANY and ELWIN A. IRELAND, *Appts.*, *v.* SALINA CREEK IRRIGATION COMPANY.

(See S. C. Reporter's ed. 109-113.)

*Review of territorial judgment.*

A modification of the supreme court of Utah of the findings of fact of the court below, without ordering a new trial, cannot be reviewed by the Supreme Court of the United States in the absence of any statement of the facts to show whether they were sufficient to sustain the judgment rendered or not, and of any exceptions as to the admission or rejection of evidence.

[No. 191.]

*Submitted March 31, 1896. Decided May 18, 1896.*

APPEAL from a judgment of the Supreme Court of the Territory of Utah modifying the decree and findings of the District Court of the First Judicial District of that Territory in a suit brought by the Salina Creek Irrigation Company, plaintiff, against the Salina Stock Company *et al.*, defendants, to enjoin the defendants from diverting, appropriating, or in any manner interfering with the waters of Yogo and Neoche creeks. *Affirmed.*

See same case below, 7 Utah, 456.

Statement by Mr. Justice **Shiras:**

The Salina Creek Irrigation Company, a corporation organized under the laws of the territory of Utah for the purpose of controlling and regulating the waters of Salina Creek, in that territory, and of furnishing and distributing the same to and among its stockholders, filed its complaint in the district court of the first judicial district of the said territory on February 11, 1890, against the Salina Stock Company, a Utah corporation engaged in the business of stock raising upon a ranch in Sevier county, about 22 miles east of the town of Salina, in that county, and Elwin A. Ireland, alleging that the stockholders of the plaintiff company were owners in severalty of lands in the said county aggregating 1,862 acres, situated at or near Salina, which lands were valuable for agricultural purposes, but would not produce crops without irrigation; that the greater part of Salina creek, which flowed in a westerly direction to Salina and to the said lands, was supplied by two branches known, respectively, as Yogo creek and Neoche creek; that for more than fifteen years prior to the commission of the injuries complained of, the plaintiff, its *stockholders and grantors, had [110 been diverting and appropriating, at and near Salina, all the waters of Salina creek (the same, as alleged, being otherwise unappropriated), and had been using the same for domestic purposes and for irrigating their lands, and that for

NOTE.—*As to review by United States Supreme Court of territorial decisions; extent and manner of; distinction between an appeal and a writ of error,*—see note to Miners' Bank of Dubuque v. Iowa, 13: 867.

*As to exception, when must be taken to be available on review,* see note to Phelps v. Mayer, 14: 643.



Digitized by Google

these uses all the waters of said creek, when the flow thereof was uninterrupted, were necessary and not more than sufficient. It was averred that at frequent times within the six years next preceding the filing of the complaint the defendants, by means of dams and ditches by them constructed, diverted large quantities of the waters of Yogo and Neoche creeks, and in the years 1888 and 1889 so diverted nearly all the waters thereof, and thereby greatly diminished the flow of water in Salina creek; that these acts had been done without the consent of the plaintiff and greatly to the loss and damage of its stockholders; and that the defendants threatened to continue so to divert the said waters, and would so do, to the great and irreparable injury and loss of the plaintiff and its stockholders, unless restrained by injunction. The plaintiff asked, therefore, that the defendants be perpetually enjoined from diverting, appropriating, or in any manner interfering with the waters of Yogo and Neoche creeks.

The defendants filed their answers on March 27, 1890, averring therein that for more than ten years then last past they and their grantors had been entitled to the use, for agricultural, domestic, and stock-raising purposes, of all the waters of Yogo and Neoche creeks, by virtue of actual diversion thereof and continuous appropriation of the same for the said purposes during the said period, and were so entitled at the time of the filing of their answer, and that neither the plaintiff company nor its stockholders had any rights with relation to the waters of the said two creeks. They asked for a decree quieting their title.

The court tried the case without a jury, and subsequently filed its finding of facts, which was as follows:

"That the said waters of Neoche and Yogo creeks flow into and mingle with the waters of Salina creek, in Sevier county, Utah, and flow down through the bed of said last-mentioned creek to and past the lands of the stockholders 111]*of said plaintiff corporation; that in and during the years 1871, 1872, and 1873 the said stockholders of the plaintiff corporation, their predecessors and grantors, diverted from the natural bed or channel of Salina creek below the confluence of Yogo and Neoche creeks with Salina creek and used and appropriated upon lands adjacent thereto all the waters of said Salina creek during the whole of the period from the 15th day of June until the 1st day of November of each and every year, and that during the period from the 1st day of November until the 1st day of April following the water was by said stockholders, their predecessors and grantors, used for domestic and culinary purposes and for the watering of stock, and that during the period from April 1 until June 15 only a small part of the waters of said creek were used. That all of said water was so, as aforesaid, diverted, used, and appropriated for culinary, domestic, and agricultural purposes, and was necessarily consumed in the households and in the watering of stock and upon agricultural crops. That the waters of said creeks have been continuously since said appropriation so made as aforesaid, up to the time of the filing of the complaint herein, and are now, so diverted, used, and appropriated.

"That during the months of April, May, and one half of the month of June the waters of the said Neoche and Yogo creeks are high and the flow thereof is greater than is necessary for or than has been used or appropriated by plaintiff corporation or its stockholders, and that the waters of said creeks which were so unused and unappropriated by said plaintiff or its stockholders have been used and appropriated by defendants. That whatever rights in and to the waters of said creeks are owned or held by the said defendants, the same are secondary and servient to the rights of plaintiff.

"That before the commencement of this action the stockholders of plaintiff corporation by their several deeds in writing conveyed to plaintiff corporation all their several rights, titles, and interests in and to the waters of Neoche and Yogo creeks in trust, as hereinbefore stated, and the plaintiff corporation is now the legal owner and holder of said waters and of the rights therein and has the primary right to use, control, *and divert the same in [112 the manner and to the extent as hereinbefore set forth."

The court also filed its conclusions of law, and these were embodied, in effect, in the following decree, entered February 14, 1891:

"It is ordered, adjudged, and decreed that the plaintiff, Salina Creek Irrigation Company, is entitled to the use and appropriation of all the waters flowing, or to flow through, or in those certain creeks known as Yogo and Neoche creeks, in Sevier county, Utah territory, during the period from the 15th day of June to the 1st day of November in each and every year; that the said plaintiff is also entitled to the use and appropriation, for culinary and domestic purposes and for the purpose of watering animals, of so much of the waters of said creeks as it may need or require to use during the period from the 1st day of November to the 1st day of April following of each and every year, and that it is entitled to the use and appropriation, for culinary and domestic use, and for the watering of stock and for agricultural purposes, of water from said creeks during the period from April 1st to the 15th of June of each and every year, and that during the last-named period the said defendants are also entitled to the use of a portion of the waters of said creek; and it is further ordered, adjudged, and decreed that the said defendants, Salina Stock Company and E. A. Ireland, and each of them, and their and each of their servants, agents, and employees, be, and they are hereby, perpetually enjoined and forbidden from in any manner using or diverting any of the waters of said Yogo and Neoche creeks during the period from the 15th day of June until the 1st day of November in each and every year, so as in any manner or to any extent to injure the quality or lessen the flow of said streams or either of them into Salina creek; and said defendants and each of them are further restrained and enjoined from in any manner diverting, using, or appropriating the waters of said creeks during the period from the 1st day of November until the 1st day of April following of each and every year so as in any manner to deprive the said plaintiff corporation or its stockholders of the use of sufficient *of [113 the waters of said creeks for culinary and domestic purposes, and for the watering of stock.



Digitized by Google

And said defendants and each of them are further perpetually restrained and enjoined from in any manner using the waters of said creeks or either of them during any portion of the year or at all so as in any manner to lessen, injure, or deteriorate the natural quality thereof."

The defendants moved for a new trial, and, their motio· having been overruled, they appealed to the supreme court of the said territory, assigning as error, among other things, that there was no evidence to justify the finding and decree of the trial court, and that the decree was so uncertain that the rights of neither of the parties could be ascertained under it.

The said supreme court heard and decided the case, and on September 12, 1892, filed its opinion therein, which, after discussing the evidence as it appeared in the defendants' statement on motion for a new trial, observed that it was shown thereby that in the year 1878 the defendants or their grantors diverted a portion of the waters of Yogo and Neoche creeks several miles above Salina, and continued such diversion during the spring, summer, and fall of each year up to the time this action was commenced, for stock-raising and culinary purposes, and for the purpose of irrigating land on those tributaries; that those two streams furnished about one third of the waters of Salina creek, and emptied into it above the land irrigated by the plaintiff; that although a number of the grantors of the plaintiff company were residents of Salina and appropriators of water from Salina creek prior to the time of the appropriation by the defendants' grantors of the waters of Yogo and Neoche creeks, no specific rights with relation to the waters of Salina creek existed in all the grantors of the plaintiff prior to the time when the defendants or their grantors appropriated water from Yogo and Neoche creeks; that the plaintiff's grantors did not make appropriation of all the waters of Salina creek prior to the time when defendants' grantors appropriated nearly all the waters of Yogo and Neoche creeks in 1878. The opinion then proceeded as follows:

114] *"Without entering into a discussion of the other questions presented by the record, we are satisfied from the facts shown that the appellants [defendants] are entitled to the use of more water than is awarded them in the decree of the court below and that said decree, as well as the findings of facts, should be modified and made more certain so as to settle the whole controversy between the parties; settle it so that it may be ascertained with reasonable certainty how much the court has decreed in favor of either party without a resort to further proceedings. This should be done upon the proofs taken in the case without the necessity of awarding a new trial. The respondent [plaintiff] should be entitled to the use and appropriation of all the waters flowing or to flow through or in Yogo and Neoche creeks during the period from and including the 15th day of June to the 1st day of November in each year, except that during twenty-four hours of Monday of each week during that period the appellants should have the exclusive use of one half of the waters flowing through Yogo creek, and that during twenty-four hours of Friday of each week during that period the appellants should have the exclusive use of one half of the water flowing through Neoche creek for farming, grazing, stock raising, and culinary purposes, and that during all such period the appellants should also have the right to use the waters of both such creeks as may be necessary for watering stock and for culinary purposes only, and that from and including the 1st day of November to the 15th day of June in each and every year the said respondent should be entitled to the use and appropriation of such waters of Yogo and Neoche creeks as it may need for culinary and domestic purposes and for watering stock and agricultural purposes, not exceeding one half of the waters flowing through such creeks, and that during the same period last stated the appellants shall be entitled to use and appropriate such waters of Yogo and Neoche creeks as it may need for the same purpose, not exceeding one half of the waters flowing through such creeks, and each party should be enjoined from interfering with the rights of the other under such decree."

The court entered a judgment remanding the case to the said *district court with direc-[115 tions to modify the decree and findings therein in conformity with the foregoing opinion.

The Salina Stock Company and Elwin A. Ireland (defendants in the district court and appellants in the said supreme court) thereupon appealed to this court, alleging that the said supreme court erred in vacating the findings of the district court, and rendering judgment on evidence taken at the trial below.

*Mr.* **C. W. Bennett** for appellants.
*Mr.* **J. L. Rawlins** for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

The single question presented in this record is the regularity of the action of the supreme court of the territory of Utah in rendering judgment as follows:

"This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be and the same is hereby modified and this cause is remanded back to said district court, with directions to modify the decree and findings therein in conformity with the opinion of this court."

That portion of the opinion of the supreme court which was particularly directed to a modification of the decree of the district court was in the following terms:

"Without entering into a discussion of the other questions presented by the record, we are satisfied from the facts shown that the appellants are entitled to the use of more water than is awarded them in the decree of the court below, and that the decree of the court below, as well as the findings of facts, should be modified and made more certain, so as to settle the whole controversy between the parties; settle it so that it may be ascertained with reasonable certainty how much the court has decreed in favor of either party, without a resort to further proceedings. This should be done upon the proofs *taken in the case without the[116 necessity of awarding a new trial."



Digitized by Google

Whether this decree was so far final as to be the subject of an appeal to this court might be questionable. But neither of the parties have suggested such a question, and we shall assume that, reading the decree in the light of the opinion, it may be regarded, if unreversed, as a final disposition of the controversy.

We are therefore asked to reverse a final decree of the supreme court of the territory of Utah, in an equity case, on a question of practice. The act of April 7, 1874 (18 Stat. at L. 27), provides that, on appeal from a territorial court, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the supreme court, together with the transcript of the proceedings and judgment or decree. No such statement is given us in this record, nor are any of the rulings of the trial court, in the admission or rejection of evidence, complained of. But the sole contention is that it was not competent for the supreme court to modify the findings of fact of the court below and enter a judgment on the facts as thus modified—that, if dissatisfied with the findings, the supreme court should have sent the cause back for a new trial. Several California cases are cited, in which it was held that when the findings are erroneous it is not the province of the supreme court, on appeal, to look into the evidence with a view to reform the findings, and then to enter a judgment in accordance with what the findings ought to have been, but that, in such a case, the supreme court will reverse the judgment and remand the cause for a new trial.

While it is true that the Code of Civil Procedure of California is in similar terms to that of Utah, it does not follow that the courts of the latter will be regulated by decisions of California courts in construing the provisions of the Code.

2 Utah Comp. Laws, § 3006, embraced in the Utah Code of Civil Procedure, is as follows:

**117** "The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had."

In the case before us, the supreme court of Utah has practically interpreted the provision as authorizing it to modify the findings of the court below, and to make a corresponding change in the judgment, without awarding a new trial. Those modifications of the findings and judgment were favorable to the defendants in the trial court, who took the appeal to the supreme court of the territory. Yet they are the parties who have appealed to us to say that, instead of amending the decree in the manner it did, the court should have reversed the judgment, and directed a new trial.

A somewhat similar question was raised in the case of *Stringfellow* v. *Cain*, 99 U. S. 610 [25: 421], which was likewise an appeal from the supreme court of Utah. There the supreme court of the territory set aside the findings of the trial court, and directed a decree on the evidence, at the time making its own findings from the evidence; and this court refused to disturb the decree of the supreme court, saying: "Without undertaking to decide what would be the proper practice in an ordinary civil case when the judgment is reversed and a new trial was refused in the district court, we are clearly of the opinion that in a suit like this, when all the evidence is before the supreme court that could be considered by the district court if the case should be sent back, it is proper for the supreme court itself to state the facts established by the evidence, and render the judgment which ought to have been rendered by the district court.

*Gray* v. *Howe*, 108 U. S. 12 [27: 634], was likewise an appeal from the supreme court of the territory of Utah. There the supreme court on appeal had reversed the judgment of a district court, set aside the findings of that court, and, without itself making a new statement of facts in the nature of a special verdict, entered a final judgment; and this court held that such record presented nothing for our examination, and that consequently the judgment of the supreme court of the territory must be affirmed on appeal.

"It has been frequently held that the au-[**118** thority of this court on appeal from the supreme court of a territory is limited to determining whether the court's findings of fact support its judgment or decree, and whether there is any error in rulings duly excepted to in the admission or rejection of evidence. *San Pedro & C. Del. A. Co.* v. *United States*, 146 U. S. 120 [36: 914]; *Mammoth Min. Co.* v. *Salt Lake Foundry & Mach. Co.* 151 U. S. 450 [38: 230]; *Idaho & O. Land Improv. Co.* v. *Bradbury*, 132 U. S. 514 [33: 436]; *Hawe* v. *Victoria Copper Min. Co.* 160 U. S. 312 [40: 439]. Without denying the authority of this court to find error in the judgment of the supreme court of a territory, even in passing on a question of practice, we certainly should not feel inclined to exercise such authority unless we were able to perceive that injustice had been done; and as this record presents us with no statement of the facts to enable us to determine whether the facts found were sufficient to sustain the judgment rendered, and with no exceptions taken to rulings in the admission or rejection of evidence, there is nothing here which we can examine. It follows that *the judgment of the supreme court of the territory of Utah must be and is affirmed.*

---

MARTHA BARNITZ, *Plff. in Err.*,
*v.*
JOHN L. BEVERLY.

(See S. C. Reporter's ed. 118-132.)

*State statute impairing obligation of contract—foreclosure of mortgages—liability for balance.*

1. A state statute which authorizes the redemption of property sold upon foreclosure of a mort-

NOTE.—*As to what laws are void, as impairing obligation of contracts*, see note to Fletcher v. Peck, 3: 162.

*That impairing remedy impairs obligation of contracts*, see note to Louisiana, Ranger, v. New Orleans, 26: 132.



Digitized by Google

gage where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage.

2. A state statute seeking to substitute on the foreclosure of pre-existing mortgages a right to sell the premises subject to an estate or right of possession in the debtor or his alienees for eighteen months, in place of the right to sell them free from redemption, is an impairment of the obligation of the contract.

3. A state statute declaring that real estate sold on foreclosure of a mortgage shall not again be liable for sale, for any balance due upon the judgment or decree under which it was sold, impairs the obligation of the contract of a pre-existing mortgage.

[No. 863.]

*Submitted April 13, 1896. Decided May 18, 1896.*

IN ERROR to the Supreme Court of the State of Kansas to review the judgment of that court reversing the judgment of the District Court of Shawnee County, Kansas, and directing that a sheriff's deed should not be executed to the purchaser at a foreclosure sale, but that a certificate of purchase should be given as provided for by chapter 109 of the Laws of 1893 of Kansas, in an action for the foreclosure of a mortgage brought by Martha Barnitz, plaintiff, against John L. Beverly *et al.*, defendants. *Reversed*, and cause remanded with direction for further proceedings.

See same case below, 55 Kan. 466, 31 L. R. A. 74.

Statement by Mr. Justice **Shiras**:

On November 1, 1885, George A. Kirtland executed to Martha Barnitz several promissory notes, covering a principal debt of $1,500 and interest, payable semi-annually for five years, at the rate of 8 per cent per annum, and after *maturity at the rate of 12 per cent per [119 annum. These notes were secured by a mortgage

---

*As to strict foreclosure of mortgage*, see note to Clark v. Reyburn, 19: 354.

*Retroactive laws, power of states to pass; constitutionality; construction; impairing vested rights; what are vested rights; instances; curative and confirmatory statutes.*

There is nothing in the Constitution of the United States to prohibit the several states from passing retroactive laws so long as they do not impair the obligation of contracts or partake of the nature of *ex post facto* laws or bills of attainder. Satterlee v. Matthewson, 27 U. S. 2 Pet. 380 (7: 458); Watson v. Mercer, 33 U. S. 8 Pet. 88 (8: 876); Charles River Bridge Proprs. v. Warren Bridge Proprs. 36 U. S. 11 Pet. 539 (9: 820); Baltimore & S. R. Co. v. Nesbit, 51 U. S. 10 How. 395 (13: 469); Carpenter v. Pennsylvania, 58 U. S. 17 How. 456 (15: 127); Locke v. New Orleans, 71 U. S. 4 Wall. 172 (18: 334); Drehman v. Stifle, 75 U. S. 8 Wall. 595 (19: 506); Randall v. Krieger, 90 U. S. 23 Wall. 137 (23: 124); Beach v. Woodhull, Pet. C. C. 2; Albee v. May, 2 Paine, 74; People, Pitts, v. Ulster County Supers. 63 Barb. 85; Grim v. Weissenberg School Dist. 57 Pa. 433, 98 Am. Dec. 237; Lane v. Nelson, 79 Pa. 407; Wilson v. Hardesty, 1 Md. Ch. 66; Reed v. Beall, 42 Miss. 472; State, Folsom, v. New Orleans, 32 La. Ann. 709; State v. Squires, 26 Iowa, 340.

But retroactive laws, under that specific name, are forbidden by the constitutions of seven states: Colorado, Louisiana, Missouri, New Hampshire, Ohio, Tennessee, and Texas. See Black, Constitutional Prohibitions, § 172.

In those states where retroactive laws are specifically and formally prohibited there are nevertheless certain classes of statutes of that character which are held valid and constitutional as being salutary and wholesome regulations and not within a just construction of the inhibition. Rich v. Flanders, 39 N. H. 304; Simpson v. City Sav. Bank, 56 N. H. 466; Rairden v. Holden, 15 Ohio St. 207; Cuyahoga Falls Real Estate Trustees v. McCaughy, 2 Ohio St. 152; Butler v. Toledo, 5 Ohio St. 225; Brandon v. Green, 7 Humph. 130; Wynne v. Wynne, 2 Swan, 405, 58 Am. Dec. 66; De Cordova v. Galveston, 4 Tex. 470; Sutherland v. De Leon, 1 Tex. 250, 46 Am. Dec. 100; New Orleans v. Cordeviolle, 13 La. Ann. 268; New Orleans v. Poutz, 14 La. Ann. 866; Hughes v. Cannon, 2 Humph. 589; Morris v. State, Gussett, 62 Tex. 778; Chesnut v. Shane, 16 Ohio, 599, 47 Am. Dec. 387; Jones v. Jones, 2 Overt. 2.

But whether or not retroactive laws are specially prohibited, the legislature cannot pass any law devesting settled rights of property. Benson v. New York, 10 Barb. 223; Kenyon v. Stewart, 44 Pa. 179; Boston Franklinite Co. v. Condit, 19 N. J. Eq. 394; Coffin v. Rich, 45 Me. 507, 71 Am. Dec. 559; Hinton v. Hinton, Phil. L. 410; Houston v. Bogle, 10 Ired. L. 496; Commercial Bank v. Chambers, 8 Smedes & M. 9; Paschal v. Perez, 7 Tex. 348; Wright v. Marsh, 2 G. Greene, 94; Tilton v. Swift, 40 Iowa, 78.

But suppose that a retroactive law, without coming under any of the heads already adverted to, is objected to on the ground that it is contrary to the spirit of the Constitution and the implications necessarily drawn from it, or to the fundamentals of justice and good government, or to those cardinal principles of the social compact which antedate all laws, and enter into the very framework of representative government. If, in the particular state, there exists no prohibition against retroactive laws, is it within the province of the judiciary to declare such an act unconstitutional? This question is by no means free from doubt. But the preponderance of authority returns an affirmative answer. Black, Constitutional Prohibitions, § 177; Regents of the University v. Williams, 9 Gill & J. 365, 31 Am. Dec. 72; Welch v. Wadsworth, 30 Conn. 149, 155, 79 Am. Dec. 239; Goshen v. Stonington, 4 Conn. 225, 10 Am. Dec. 121; Calder v. Bull, 3 U. S. 3 Dall. 386 (1: 648); Wilkinson v. Leland, 27 U. S. 2 Pet. 657 (7: 553); Terrett v. Taylor, 13 U. S. 9 Cranch, 43 (3: 650); Benson v. New York, 10 Barb. 244; Bowman v. Middleton, 1 Bay, 252; Sharpless v. Philadelphia, 21 Pa. 147, 161, 59 Am. Dec. 759; Com. v. McCloskey, 2 Rawle, 369; Bridgeport v. Housatonic R. Co. 15 Conn. 475; Louisville & N. R. Co. v. Davidson County Court, 1 Sneed, 637; Cooley, Const. Lim. 164 *et seq.*

A statute will be construed as prospective and operating *in futuro* only, unless the intention of the legislature to give it a retroactive effect is expressed in language too clear and explicit to admit of a reasonable doubt. Auffmordt v. Rasin, 102 U. S. 620 (26: 262); United States v. Starr, 1 Hemp. 469; Torrey v. Corliss, 33 Me. 333; Coffin v. Rich, 45 Me. 507, 71 Am. Dec. 559; Atkinson v. Dunlap, 50 Me. 111; Colony v. Dublin, 32 N. H. 432; Briggs v. Hubbard, 19 Vt. 86; Hapgood v. Whitman, 13 Mass. 464; Medford v. Learned, 16 Mass. 215; Goshen v. Stonington, 4 Conn. 209, 10 Am. Dec. 121; Perkins v. Perkins, 7 Conn. 558, 18 Am. Dec. 120; Plumb v. Sawyer, 21 Conn. 351; Hubbard v. Brainard, 35 Conn. 576; State v. Smith, 38 Conn. 397; Dash v. Van Kleeck, 7 Johns. 477, 5 Am. Dec. 291; Watkins v. Haight, 16 Johns. 138; Quackenbush v. Danks, 1 Denio, 128; Sayre v. Wisner, 8 Wend. 661; Bay v. Gage, 36 Barb.



Digitized by Google

of the same date upon a quarter section of land in Shawnee county, Kansas. The principal note and the last note for interest not having been paid, an action was commenced, on January 21, 1893, in the district court of Shawnee county by Martha Barnitz to recover on said unpaid notes and to foreclose the mortgage. John L. Beverly and others were made codefendants with Kirtland. On July 7, 1893, a judgment was rendered against Kirtland for the sum of $2,113.46 and costs, and against him and the other defendants for the foreclosure of the mortgage and the sale of the mortgaged premises. Appraisement having been waived, the judgment, pursuing the laws of Kansas, provided for a stay of execution for six months, and that interest should run at the rate of 12 per cent per annum. On January 9, 1894, an order of sale was issued, and on February 12, 1894, the mortgaged property was sold thereunder at sheriff's sale to Martha Barnitz for the sum of $2,000. On February 16, 1894, a motion was filed in the district court for a confirmation of the sale, and this motion came on for hearing on February 26, 1894, when Beverly appeared and claimed to be the owner of the premises by virtue of conveyances since the date of the mortgage, and to be in possession thereof in good faith by a tenant, and asked the court to order the sheriff to execute to the purchaser only a certificate of purchase, as provided for by Kan. Laws of 1893, chap. 109. The sale was confirmed, and Beverly's motion was overruled, and the court ordered that the sheriff should execute to the purchaser, Martha Barnitz, a deed for the premises.

John L. Beverly took the case on error to the supreme court of the state, and that court, on April 30, 1895, affirmed the judgment of the district court. A motion for a rehearing was subsequently allowed—the membership of the supreme court having been in the meantime changed—and on December 7, 1895, the

---

447; New York & O. M. R. Co. v. Van Horn, 57 N. Y. 473; Jarvis v. Jarvis, 3 Edw. Ch. 462; Oliphant v. Smith, 6 Watts, 449; Bedford v. Shilling, 4 Serg. & R. 401, 8 Am. Dec. 718; Ogle v. Somerset & Mt. P. Turnp. Road Co. 13 Serg. & R. 256; Kenyon v. Stewart, 44 Pa. 179; Tyson v. Halifax Twp. School Directors, 51 Pa. 9; Haley v. Philadelphia, 68 Pa. 45, 8 Am. Rep. 153; State, Baker, v. Scudder, 32 N. J. L. 208; Vreeland v. Bramhall, 30 N. J. L. 1; Baugher v. Nelson, 9 Gill, 299, 53 Am. Dec. 694; Clark v. Baltimore, 29 Md. 277; Williams v. Johnson, 30 Md. 500, 96 Am. Dec. 613; Merwin v. Ballard, 66 N. C. 398; *Ex parte* Graham, 13 Rich. L. 277; Davis v. Minor, 1 How. (Miss.) 183, 28 Am. Dec. 325; Garrett v. Beaumont, 24 Miss. 377; Oyon's Succession, 6 Rob. (La.) 504; Slack v. Maysville & L. R. Co. 13 B. Mon. 1; Allbyer v. State, 10 Ohio St. 588; Lewis v. Breckenridge, 1 Blackf. 220, 12 Am. Dec. 228; State v. Barbee, 3 Ind. 258; Aurora & L. Turnp. Co. v. Holthouse, 7 Ind. 59; Garrett v. Doe, Wiggins, 2 Ill. 335, 30 Am. Dec. 653; Guard, Robinson, v. Rowan, 3 Ill. 499; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Thompson v. Alexander, 11 Ill. 54; Conway v. Cable, 37 Ill. 82, 87 Am. Dec. 240; Bartruff v. Remey, 15 Iowa, 257; Bennett v. Fisher, 26 Iowa, 497; State, Parker, v. Thompson, 41 Mo. 25; State, Blakeman, v. Hays, 52 Mo. 578; State, Moberly, v. Ferguson, 62 Mo. 77; State v. Atwood, 11 Wis. 422; Von Schmidt v. Huntington, 1 Cal. 55; Thorne v. San Francisco, 4 Cal. 127; Cooley, Const. Lim. 370.

And where the retroactive character of a statute is clearly indicated on its face, and although it is free from constitutional objections, yet it will always be subjected to the most circumscribing construction that can possibly be made consistent with the intention of the legislature. Hedger v. Remmaker, 3 Met. (Ky.) 255.

To a statute explicitly retroactive to a certain extent and for a certain purpose, the court will not, by construction, give a retroactive operation to any greater extent or for any other purpose. Thames Mfg. Co. v. Lathrop, 7 Conn. 550.

The legislature has no power to pass a law impairing vested rights of property. Benson v. New York, 10 Barb. 223; Boston Franklinite Co. v. Condit, 19 N. J. Eq. 394; Norman v. Heist, 5 Watts & S. 171, 40 Am. Dec. 493; Houston v. Bogle, 10 Ired. L. 486; Commercial Bank v. Chambers, 8 Smedes & M. 9; Paschal v. Perez, 7 Tex. 348; Chesnut v. Shane, 16 Ohio, 599, 47 Am. Dec. 387; Wright v. Marsh, 2 G. Greene, 94.

A statute is not objectionable as retroactive because it purports to operate on prior contingent or qualified rights, but only where it operates to devest settled and vested rights. Clarke v. McCreary, 12 Smedes & M. 347.

A right cannot be regarded as vested, in the constitutional sense, unless it amounts to something more than such a mere expectation of future benefit or interest as may be founded upon an anticipated continuance of the existing general laws. Merrill v. Sherburne, 1 N. H. 213, 8 Am. Dec. 58; Cooley, Const. Lim. 359.

But a statute regulating the descent and distribution of property cannot be so modified by subsequent enactment as to devest estates which have already passed to the heir. Rock Hill College v. Jones, 47 Md. 1.

Construction of a will must depend upon the law as it stands at the time of the death of the testator; hence a statute passed after the making of a will, but before the death of the testator, by which the common law in this respect is changed, will operate upon the will. Loveren v. Lamprey, 22 N. H. 434; Blackman v. Gordon, 2 Rich. Eq. 43, 44 Am. Dec. 241.

The husband's interest in the wife's personalty, owned at the time of marriage, is a vested right which cannot be disturbed by subsequent legislation. National Metropolitan Bank v. Hitz, 1 Mackey, 111; Holmes v. Holmes, 4 Barb. 295; White v. White, 5 Barb. 474; Westervelt v. Gregg, 12 N. Y. 208.

But it is otherwise as to his expectant interest in the after-acquired personalty of the wife; this is not vested until acquisition. Westervelt v. Gregg, *supra;* Norris v. Beyea, 13 N. Y. 273; Dunn v. Sargent, 101 Mass. 336.

Tenancy by the curtesy is not a vested right until it has become initiate by the birth of a possible heir. Cooley, Const. Lim. 361; Strong v. Clem, 12 Ind. 37, 74 Am. Dec. 200; Wyatt v. Smith, 25 W. Va. 813; Tong v. Marvin, 15 Mich. 60.

The wife has no vested right of any kind to dower in the estate of her husband before his decease; and until that event her right may be modified or abolished by the legislature. Barbour v. Barbour, 45 Me. 9; Talbot v. Talbot, 14 R. I. 57.

When a party, by statutory provisions, becomes entitled to recover a judgment, in the nature of a penalty, for a sum greater than that which is justly due to him, the right to the amount which may be recovered does not become a vested right until judgment is obtained; hence a repeal of the statute conferring the right will purge all past transactions of their penal character under it, unless they have already passed to judgment. Oriental Bank v. Freese, 18 Me. 109, 36 Am. Dec. 701; Pierce v.



Digitized by Google

supreme court reversed and set aside its previous decision and judgment, reversed the judgment and ruling of the district court, and directed that a sheriff's deed should not be exe-
120]cuted to the purchaser, but that a *certificate of purchase should be given, as provided for by Kan. Laws of 1893, chap. 109.

To this judgment of the supreme court of Kansas a writ of error was sued out from this court.

Chapter 109 of the Laws of 1893 is as follows:

"Sec. 1. After sale by the sheriff of any real estate on execution, special execution, or order of sale, he shall, if the real estate sold by him is not subject to redemption, at once execute a deed therefor to the purchaser; but if the same is subject to redemption, he shall execute to the purchaser a certificate containing a description of the property and the amount of money paid by such purchaser, together with the amount of costs up to said date, stating that unless redemption is made within eighteen months thereafter, according to law, that the purchaser or his heirs or assigns will be entitled to a deed to the same. *Provided*, That any contract in any mortgage or deed of trust waiving the right of redemption shall be null and void.

"Sec. 2. The defendant owner may redeem any real property sold under execution, special execution, or order of sale, at the amount sold for, together with interest, costs, and taxes, as provided for in this act, at any time within eighteen months from the day of sale as herein provided, and shall in the meantime be entitled to the possession of the property; but where the court or judge shall find that the lands and tenements have been abandoned or are not occupied in good faith, the period of redemption for defendant owner shall be six months from

---

Kimball, 9 Me. 54, 23 Am. Dec. 537; United States v. The Eleanor ("Confiscation Cases"), 74 U. S. 7 Wall. 454 (19: 196); United States v. Tynen, 78 U. S. 11 Wall. 88 (20: 153); West Troy Fire Dept. v. Ogden, 59 How. Pr. 21; Engle v. Shurtz, 1 Mich. 150; Washburn v. Franklin, 35 Barb. 599; Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 239; Bank of St. Mary's v. State, 12 Ga. 475; Dow v. Norris, 4 N. H. 16, 17 Am. Dec. 400; Lakeman v. Moore, 32 N. H. 410.

A right to a threefold forfeiture of all the interest reserved on a contract, on account of usury, is not a vested right. Parmelee v. Lawrence, 44 Ill. 405.

When the period prescribed by the statute of limitations has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title. It is vested as completely and perfectly and is as safe from legislative interference as it would have been if it had been perfected in the owner by grant or any species of assurance. Cooley, Const. Lim. 365.

A statute abolishing tenure in tail, and changing estates so held into estates in fee simple, is valid and constitutional. DeMill v. Lockwood, 3 Blatchf. 56.

And a statute making joint heirs tenants in common may constitutionally embrace estates existing at its passage; it impairs no vested rights, but renders the tenure more beneficial. Stevenson v. Cofferin, 20 N. H. 150; Holbrook v. Finney, 4 Mass. 567, 3 Am. Dec. 243; Annable v. Patch, 3 Pick. 363.

The right of a creditor to any particular remedy is not a vested right. The state is bound to afford substantive and available remedies to the suitors in her courts, but no party can claim a vested right in the permanence of a particular system of courts, or the continuance of a special mode of procedure, or the perpetuation of any remedy or remedial process which can be modified or abolished without impairing or taking away the right itself, when public policy or the convenience of justice demands a change. Black, Constitutional Prohibitions, § 192; De Cordova v. Galveston, 4 Tex. 470; Paschal v. Perez, 7 Tex. 348; Rairden v. Holden, 15 Ohio St. 207; Rich v. Flanders, 39 N. H. 304; Henschall v. Schmidtz, 50 Mo. 454; Bird v. Keller, 77 Me. 270; Searcy v. Stubbs, 12 Ga. 437; Chaffe v. Aaron, 62 Miss. 29.

An act of the legislature declaring the interpretation to be placed upon a previous statute, is not obligatory upon the courts with respect to the application of the first statute to transactions which occurred, or rights of action which accrued, prior to the second. Union Iron Co. v. Pierce, 4 Biss. 327; Kelsey v. Kendall, 45 Vt. 24; Greenough v. Greenough, 11 Pa. 494, 51 Am. Dec. 567; West Branch Boom Co. v. Dodge, 31 Pa. 235; Reiser v. William Tell Sav. Fund Asso. 39 Pa. 137; Dequindre v. Williams, 31 Ind. 444; McManning v. Farrar, 46 Mo. 376; Lincoln Bldg. & Sav. Asso. v. Graham, 7 Neb. 173.

Retroactive declaratory statutes will not be allowed to affect vested rights. Lambertson v. Hogan, 2 Pa. 22; Haley v. Philadelphia, 68 Pa. 45, 8 Am. Rep. 153; McLeod v. Burroughs, 9 Ga. 213.

A statute which, operating upon facts existing at the time of its passage, attempts to impose upon one person a debt or duty to another, where there was no right and no obligation in existence before the passage of the act, is in violation of the constitutional prohibitions. Ryan v. State, Eller, 5 Neb. 276; Towle v. Eastern Railroad, 18 N. H. 547, 47 Am. Dec. 158.

But where a moral obligation exists, the legislature may give it legal effect by a retroactive statute. Lycoming v. Union, 15 Pa. 166, 53 Am. Dec. 575; Jefferson City Gaslight Co. v. Clark ("New Orleans v. Clark"), 95 U. S. 654 (24: 523).

Curative and confirmatory statutes, within certain limits, are valid and constitutional. Cooley, Const. Lim. 371; Green v. Abraham, 43 Ark. 420; Exchange Bank Tax Cases, 21 Fed. Rep. 99.

If the judicial proceedings which the confirmatory act is designed to remedy were absolutely void, for want of jurisdiction or other reason, then the attempted cure cannot be effected, and the rights of the parties must stand as they were. McDaniel v. Correll, 19 Ill. 226, 68 Am. Dec. 587; Denny v. Mattoon, 2 Allen, 361, 79 Am. Dec. 784; Lane v. Nelson, 79 Pa. 407; Richards v. Rote, 68 Pa. 248; Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656; Israel v. Arthur, 7 Colo. 5; Sherwood v. Fleming, 25 Tex. Supp. 408; Wright v. Hawkins, 28 Tex. 452; Yeatman v. Day, 79 Ky. 186; Dupy v. Wickwire, 1 D. Chip. 237, 6 Am. Dec. 729.

But in cases where the jurisdiction has attached and there has been a formal defect in the proceedings, where the equity of the party is complete and all that is wanted is legal form, it is within the recognized power of the legislature to correct such defect and to provide a remedy for the legal right. Lane v. Nelson, 79 Pa. 407; State, Walter, v. Union, 33 N. J. L. 350; Selsby v. Redlon, 19 Wis. 17; Beach v. Walker, 6 Conn. 197; Booth v. Booth, 7 Conn. 350; Mather v. Chapman, 6 Conn. 54; Hannibal & St. J. R. Co. v. Marion County, 36 Mo. 294.

Statutes passed for the purpose of healing defects in the acknowledgments of prior deeds or other



Digitized by Google

the date of sale, and all junior lien holders shall be entitled to three months to redeem after the expiration of said six months."

"Sec. 23. Real estate once sold upon order of sale, special execution, or general execution shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold, or any judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem within the fifteen months hereinbefore provided for.

"Sec. 24. The holder of the certificate of 121 purchase shall be *entitled to prevent any waste or destruction of the premises purchased, and for that purpose the court, on proper showing, may issue an injunction; or when required to protect said premises against waste, appoint and place in charge thereof a receiver, who shall hold said premises until such time as the purchaser is entitled to a deed, and shall be entitled to rent, control, and manage the same; but the income during said time, except what is necessary to keep up repairs and prevent waste, shall go to the owner or defendant in execution, or the owner of its legal title.

"Sec. 25. The provisions of this act shall apply to all sales under foreclosure of mortgage, trust deed, mechanics' lien or other lien, whether special or general, and the terms of redemption shall be the same.

"Sec. 26. The sheriff shall at once make a return of all sales made under this act to the court; and this court, if it finds the proceedings regular and in conformity with law and equity, shall confirm the same and direct that the clerk make an entry upon the journal that the court finds that the sale has in all respects been made in conformity to law, and order that the sheriff make to the purchaser

---

conveyances or excusing other informalities in their execution or registration, are constitutional. Chesnut v. Shane, 16 Ohio, 599, 47 Am. Dec. 387; Ferguson v. Williams, 58 Iowa, 717; Brinton v. Seevers, 12 Iowa, 389; Barton v. Morris, 15 Ohio, 408; Journeay v. Gibson, 56 Pa. 57; Barnet v. Barnet, 15 Serg. & R. 72, 16 Am. Dec. 516; Maxey v. Wise, 25 Ind. 1; Dulany v. Tilghman, 6 Gill & J. 461.

It is said that if the defects in the deed were such as to render it positively ineffectual to convey the grantor's title, a subsequent curative statute would be objectionable as depriving the party of his property without due process of law. Russell v. Rumsey, 35 Ill. 362; Alabama L. Ins. & T. Co. v. Boykin, 38 Ala. 510; Orton v. Noonan, 23 Wis. 102. But see Barnet v. Barnet, *supra*; Watson v. Mercer, 33 U. S. 8 Pet. 88 (8: 876); Davis v. State Bank, 7 Ind. 316; Dentzel v. Waldie, 30 Cal. 138; Goshorn v. Purcell, 11 Ohio St. 641.

But such statutes cannot be allowed to affect the vested rights of the third parties. Cooley, Const. Lim. 378; Meighen v. Strong, 6 Minn. 177, 80 Am. Dec. 441; Green v. Drinker, 7 Watts & S. 440.

Statutes are valid which confirm deeds that are irregular only through an imperfect compliance with the peculiar statutory provisions governing the acknowledgments of married women. Johnson v. Richardson, 44 Ark. 365; Barnet v. Barnet, 15 Serg. & R. 72, 16 Am. Dec. 516; Russell v. Rumsey, 35 Ill. 362; Pearce v. Patton, 7 B. Mon. 162, 45 Am. Dec. 61; Goshorn v. Purcell, 11 Ohio St. 641; Chesnut v. Shane, 16 Ohio, 599, 47 Am. Dec. 387; Dentzel v. Waldie, 30 Cal. 138.

But if the invalidity of the conveyance arises from a want of power in the grantor to convey the particular estate, and not from any informality in its execution, nor merely from a disability imposed by the policy of the law, it is not in the power of the legislature to confer retroactive efficacy on the deed. Black, Constitutional Prohibitions, § 211; Shonk v. Brown, 61 Pa. 320; Routsong v. Wolf, 35 Mo. 174.

Laws passed to remedy the defective execution of powers, when intended to carry out the manifest intention of the parties, and not affecting vested rights, are constitutional. State v. Newark, 27 N. J. L. 185.

The legislature has constitutional authority to pass a statute affecting the execution of wills, and to give it a retrospective effect upon testaments already made at the time of its passage, but which have not yet taken effect by the death of the testator. Long v. Zook, 13 Pa. 400; American Baptist Missionary Union v. Peck, 10 Mich. 341; Loveren v. Lamprey, 22 N. H. 434; McCarty v. Hoffman, 23 Pa. 507; Greenough v. Greenough, 11 Pa. 489, 51 Am. Dec. 567; State, M. E. Church Trustees, v. Warren, 23 Md. 338; Den, Southard, v. Central R. Co. 26 N. J. L. 13.

And to remedy the defective exercise of corporate powers. Syracuse City Bank v. Davis, 16 Barb. 185; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621; Morris v. State, Gussett, 63 Tex. 728; Gardner v. Haney, 36 Ind. 17; Schenley v. Com. 36 Pa. 29, 78 Am. Dec. 359.

And to cure irregularities and defects in the previous assessments of property for taxation and the levy of taxes thereon. Boardman v. Beckwith, 18 Iowa, 292; Musselman v. Logansport, 29 Ind. 533; Chamberlain v. Taylor, 36 Hun, 24; Butler v. Toledo, 5 Ohio St. 220; Strauch v. Shoemaker, 1 Watts & S. 175; Montgomery v. Meredith, 17 Pa. 43; Walter v. Bacon, 8 Mass. 472; Locke v. Dane, 9 Mass. 360; Brevoort v. Detroit, 24 Mich. 322; State, Doyle, v. Newark, 34 N. J. L. 237.

But if the default is in the nature of the tax itself, it cannot be obviated by subsequent act. May v. Holdridge, 23 Wis. 93; Cooley, Const. Lim. 382.

Where a person has designed and attempted to enter into a particular contract, but has failed to bind himself, in the contemplation of the law, either in consequence of a personal disability on his part, or of considerations of a public policy existing at that time, or by reason of the neglect of some legal formality or requirement, he cannot complain of a subsequent statute validating the contract and fixing his liability. Mechanics' & W. Mut. Sav. Bank & Bldg. Asso. v. Allen, 28 Conn. 97; Andrews v. Russell, 7 Blackf. 474; Grimes v. Doe, Shute, 8 Blackf. 371; Thompson v. Morgan, 6 Minn. 292; Parmelee v. Lawrence, 46 Ill. 331; Curtis v. Leavitt, 17 Barb. 309; State v. Norwood, 12 Md. 195; Gibson v. Hibbard, 13 Mich. 215; Harris v. Rutledge, 19 Iowa, 389, 87 Am. Dec. 441; Lewis v. McElvain, 16 Ohio, 347; Estep v. Hutchman, 14 Serg. & R. 435; Jefferson City Gaslight Co. v. Clark, 95 U. S. 644 (24: 521).

Statutes authorizing courts to grant divorces for causes occurring before the passage of the authorizing statutes, and which, at the time of their happening, furnished no ground for the dissolution of the marriage relation, are not objectionable on account of their retroactive operation. Jones v. Jones, 2 Overt. 2; Berthelemy v. Johnson, 3 B. Mon. 90, 38 Am. Dec. 179; Carson v. Carson, 40 Miss. 349; West v. West, 2 Mass. 223; Bigelow v. Bigelow, 108 Mass. 38; 1 Bishop, Mar. & Div. §§ 670, 680, 696, 700. See Clark v. Clark, 10 N. H. 387, 34 Am. Dec. 165; Greenlaw v. Greenlaw, 12 N. H. 200; Jarvis v. Jarvis, 3 Edw. Ch. 462; Given v. Marr, 27 Me. 212; Sherburne v. Sherburne, 6 Me. 210; 3 Am. & Eng. Enc. Law, 761.

A state may constitutionally pass a retroactive law impairing her own rights. Davis v. Dawes, 4 Watts & S. 401; Lewis v. Turner, 40 Ga. 416; Mayers v. Byrne, 19 Ark. 308.



Digitized by Google

the certificate of sale or deed provided for in § 1 of this act."

*Messrs.* **Thomas F. Doran, D. M. Valentine,** *A. A. Godard,* and *Leonard S. Ferry* for plaintiff in error.

*Messrs.* **E. A. McMath** and **William J. Scott** for defendant in error.

**Mr. Justice Shiras** delivered the opinion of the court:

No provision of the Constitution of the United States has received more frequent consideration by this court than that which provides that no state shall pass any law impairing the obligation of contracts. This very frequency would appear to have rendered it difficult to apply the result of the court's deliberations to new cases differing somewhat in their facts from those previously considered.

122] *This record discloses that in the present case the supreme court of Kansas filed two opinions, in which, after elaborate reviews of the decisions of this court, opposite conclusions were reached. The case was twice argued and decided. On the first hearing a majority of that court held, expressing its views in an opinion by Chief Justice Horton, that Kan. Laws of 1893, chap. 109, did not apply to contracts made before its passage, and that, if it did so apply, the law was void as respects prior contracts, because it impaired their obligations.

A change in the membership of the court having taken place, a rehearing was had; and it was held by a majority of the court, speaking through Chief Justice Martin, that the act in question was applicable and valid in the case of contracts made before and after its passage. *Beverly* v. *Barnits*, 55 Kan. 451, 55 Kan. 466, 31 L. R. A. 74.

It is the last decision which is brought before us for review. In so far as it construes the act to be applicable to prior contracts, we are, of course, bound by that decision. Whether, when so construed, the act is valid, is a question open for our consideration.

The decisions of this court are numerous in which it has been held that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the Constitution of the United States. But it will be sufficient for our present purpose to mention a few only.

*Bronson* v. *Kinzie*, 42 U. S. 1 How. 311 [11: 143], holds that a state law, passed subsequently to the execution of a mortgage, which declares that the equitable estate of the mortgage shall not be extinguished for twelve months after a sale under a decree in chancery, and which prevents any sale unless two thirds of the amount at which the property has been valued by appraisers shall be bid therefor, is within the clause of the Constitution of the United States which prohibits a state from passing a law impairing the obligation of con-

123] tracts. In *this case, the court dealt with the contention, usually made on these occasions and which is relied on by the defendants in error in the present case, that the law was a regulation of the remedy and did not directly affect the contract; and Chief Justice Taney said:

"Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution."

And he quoted the language of the court in *Green* v. *Biddle*, 21 U. S. 8 Wheat. 76 [5: 566]:

"It is no answer that the acts of Kentucky now in question are regulations of the remedy and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owners, they are just as much a violation of the compact as if they directly overturned his rights and interests. . . . If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired, and rendered insecure, according to the nature and extent of such restrictions."

Proceeding to apply these principles to the case before him, the Chief Justice further said:

"It is the plaintiff's absolute and undoubted right, under an ordinary mortgage deed, if the money is not paid at the appointed day, to go into the court of chancery and obtain its order for the sale of the whole mortgaged property (if the whole is necessary), free and discharged from the equitable interest of the mortgagor. This is his right by the law of the contract; and it is the duty of the court to maintain and enforce it, without any unreasonable delay.

"When this contract was made, no statute had been passed by the state changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court, and it must therefore be *governed, and the rights of [124 the parties under it measured, by the rules as above stated. They were the laws of Illinois at the time, and therefore entered into the contract, and formed a part of it, without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem by paying the money after the day limited in the deed and before he was foreclosed by the decree of the court of chancery. Yet no one doubts his right or his remedy, for, by the laws of the state then in force, this right and this remedy were a part of the law of the contract, without any express agreement by the parties. So, also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it, and any subsequent law, impairing the rights thus acquired, impairs the obligations which the contract imposed.

"This brings us to examine the statutes of Illinois which have given rise to this controversy. As concerns the law of February 19, 1841, it appears to the court not to act merely



Digitized by Google

on the remedy, but directly upon the contract itself, and to engraft upon it new conditions injurious and unjust to the mortgagee. It declares that, although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security by rendering the property unsalable for anything like its value. This law gives to the mortgagor and to the judgment creditor an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are 125] *directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties unquestionably impairs its obligations, and is prohibited by the Constitution."

In *McCracken* v. *Hayward*, 43 U. S. 2 How. 608 [11: 397], there came for consideration the validity of a law of the state of Illinois, providing that a sale shall not be made of property levied on under an execution, unless it should bring two thirds of its valuation according to the opinion of three householders. The opinion of the court was pronounced by Mr. Justice Baldwin, in the course of which he used the following language:

"In placing the obligation of contracts under the protection of the Constitution, its framers looked to the essentials of the contract more than to the form and modes of proceeding by which it was to be carried into execution; annulling all state legislation which impaired the obligation, it was left to the state to provide and shape the remedy to enforce it.

"The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to preform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning. When it becomes consummated, the law defines the duty and the right, compels one party to preform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution. . . . The obligation of the contract between the parties, in this case, was to perform the promises *and undertak- [126 ings contained therein; the rights of the plaintiff were to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. . . . Any subsequent law which denies, obstructs, or impairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, or any other mode of valuation than a public sale, affects the obligation of the contract as much in the one case as the other, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. The same power in a state legislature may be carried to any extent, if it exists at all; it may prohibit a sale for less than the whole appraised value, or for three fourths, or nine tenths, as well as for two thirds, for if the power can be exercised to any extent, its exercise must be a matter of uncontrollable discretion, in passing laws relating to the remedy which are regardless of the effect on the right of the plaintiff."

In *Howard* v. *Bugbee*, 65 U. S. 24 How. 461 [16: 753], a statute of the state of Alabama authorizing a redemption of mortgaged property in two years after the sale under a decree, by bona fide creditors of the mortgagor, was held unconstitutional and void as to sales made under mortgages executed prior to the enactment. It was contended that the law did not affect the mortgage contract, but only enlarged the time at the completion of which the purchaser at the mortgage sale would acquire an indefeasible title, and that the new law only operated as between the purchaser and bona fide creditors of the mortgagor. But this court, through Mr. Justice Nelson, recognized the cases of *Bronson* v. *Kinzie*, 42 U. S. 1 How. 311 [11: 143], and *McCracken* v. *Hayward*, 43 U. S. 2 How. 608 [11: 397], as applicable to and decisive of the case.

*Brine* v. *Hartford F. Ins. Co.* 96 U. S. 627 [24: 858], is worthy of notice, because in that case the court had occasion to apply the principles of previous cases, announced in protection of the rights of creditors, to the case of a mortgagor whose land had been ordered by the circuit court of the United States for the northern district of Illinois to an immediate sale, in *disregard of a law of a state in ex- [127 istence at the time the mortgage was executed, which allowed to the mortgagor twelve months to redeem after a sale under a decree of foreclosure, and to his judgment creditor three months after that.

The view of the trial court was that remedy of an immediate sale, by decree of the circuit court of the United States sitting in equity, was not affected by the state statute. But this court held, through Mr. Justice Miller, that all the laws of a state existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give a remedy on such contracts—that the construction, validity, and effect of contracts are gov-



Digitized by Google

erned by the place where they are made and are to be performed, if that be the same—that it is therefore said that these laws enter into and become a part of the contract. In the opinion it was said:

"There is no doubt that a distinction has been drawn, or attempted to be drawn, between such laws as regulate the rights of the parties, and such as apply only to the remedy. It may be conceded that in some cases such a distinction exists. In the recent case of *Tennessee* v. *Sneed*, 96 U. S. 69 [24: 610], we held that, so long as there remained a sufficient remedy on the contract, an act of the legislature, changing the form of the remedy, did not impair the obligation of the contract. But this doctrine was said to be subject to the limitation that there remained a remedy which was complete, and which secured all the substantial rights of the party. At all events, the decisions of this court are numerous that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the Constitution of the United States."

The learned justice, in enforcing his argument, quoted largely from the opinion of Chief Justice Taney in the case of *Bronson* v. *Kinzie*, *supra*, as expressing truly "the sentiment of [128] the *court as it was then organized, as it is organized now, and as the law of the case."

These principles were applied in the case of *Seibert* v. *United States*, 122 U. S. 284 [30: 1163], where, after citing *Bronson* v. *Kinzie*, *supra*; *United States* v. *Quincy*, 71 U. S. 4 Wall. 535 [18: 403], and *Louisiana* v. *New Orleans*, 102 U. S. 203 [26: 132], as declaring the settled doctrine of this court that "the remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation," the court, through Mr. Justice Matthews, *held:* That the legislature of Missouri having, by the act of March 23, 1868, to facilitate the construction of railroads, enacted that the county court should, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax in order to pay the interest and principal of any bond which might be issued by a municipal corporation in the state on account of a subscription, authorized by the act, to the stock of a railroad company, which tax should be levied on all the real estate within the township making the subscription, in accordance with the valuation then last made by the county assessor for county purposes, it was a material part of this contract that such creditor should always have the right to a special tax to be levied and collected in the same manner as county taxes at the same time might be levied and collected; that the provisions contained in the subsequent enactments of Missouri, respecting the assessment and collection of such taxes, were not a legal equivalent for the provisions of the act of 1868, and that the law of 1868, although repealed by the legislature of Missouri, was still in force for the purpose of levying and collecting the tax necessary for the payment of a judgment recovered against a municipal corporation in the state upon a debt incurred by subscribing to the stock of a railroad company in accordance with its provisions.

The case of *Connecticut Mut. L. Ins. Co.* v. *Cushman*, 108 U. S. 51 [27: 648], does not collide with the previous and subsequent cases. There the new statute did not lessen the duty of the mortgagor to pay what he had contracted to pay, nor affect the time of payment, nor affect any remedy which *the mort- [129 gagee had by existing law for the enforcement of his contract.

Neither is the case of *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162 [36: 925], in any wise inconsistent with the cases above cited. The holding there was that the rate or amount which was prescribed by the statute of a state, as damages for a failure to pay or satisfy an existing judgment, was a matter within the control of the state, as a matter of public policy, and did not arise out of the contract between the creditor and the debtor.

Without pursuing the subject further, we hold that a statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage.

Let us briefly apply the conclusion thus reached to the facts of the present case.

The plaintiff was the holder of several promissory notes, dated November 1, 1885, secured by a mortgage of the same date upon a tract of land in Shawnee county, Kansas. The mortgage contained an express waiver of an appraisement of the real estate. Default in payment having ensued, the suit was brought, praying that the mortgaged premises should be sold according to law, without appraisement, that the proceeds arising from the sale should be applied to the payment of the indebtedness due the plaintiff, and that the defendants should be forever barred and precluded of any right of redemption.

Under the law as it existed at the time when the mortgage was made, after a foreclosure and sale of the mortgaged premises the purchaser was given actual possession as soon as the sale was confirmed and the sheriff's deed issued. Thereafter the mortgagor or the owner had no possession, title, or right in any way to the premises.

Under the new law the mortgagor shall have eighteen months from date of sale within which to redeem, and, in the meantime, the rents, issues, and profits, except what is necessary to keep up repairs, shall go to the mortgagor or *the owner of the legal title, who [130 in the meantime shall be entitled to the possession of the property. The redemption payment is to consist, not of the mortgage debt, interest, and costs, but of the amount paid by the purchaser, with interest, cost, and taxes.

In other words, the act carves out for the mortgagor or the owner of the mortgage property an estate of several months more than was obtainable by him under the former law, with full right of possession, and without paying rent or accounting for profits in the meantime. What is sold under this act is not the estate pledged (described in the mortgage as a good



Digitized by Google

and indefeasible estate of inheritance, free and clear of all encumbrance), but a remainder—an estate subject to the possession, for eighteen months, of another person who is under no obligation to pay rent or to account for profits.

The 28d section of the act should not be overlooked, providing that real estate once sold upon order of sale, special execution, or general execution, shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold, or any judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem.

Obviously this scheme of foreclosure renders it necessary for the mortgagee to himself bid, or procure others to bid, the entire amount of the mortgage debt, and thus, in effect, release the debtor from his personal obligation.

We, of course, have nothing to do with the fairness of the policy of such enactments as respects those who choose to contract in view of them. But it seems impossible to resist the conviction that such a change in the law is not merely the substitution of one remedy for another, but it is a substantial impairment of the rights of the mortgagee as expressed in the contract. Where, in a mortgage, an entire estate is pledged for the payment of a debt, with right to sell the mortgaged premises free from redemption, can that be valid legislation which would seek to substitute a right to sell the premises subject to an estate or right of possession in the debtor or his alienees for eighteen months?

131] *Martha Barnitz held Kirtland's notes secured by a mortgage. Of course, under the contract thus created, she had a right to resort to other property of the debtor to make up for any deficiency remaining after the sale of the real estate mortgaged. As the law stood at the time the contract was made, if Kirtland, either by purchase at the sale or by subsequent transactions, became the owner of the real estate, Mrs. Barnitz had a legal right to again levy thereon and subject it to the payment of the remnant of her debt. But this law, as we have seen, in express terms declares that this real estate shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold. This cannot be held to mean merely that the land is sold free from existing liens, for such would be the legal effect of the sale at any rate. It plainly means that the balance of the debt shall not be made out of the lands, even if and when they became the property of the debtor. Nor can it be said that such a question is not now before us. What we are now considering is, whether the change of remedy was detrimental to such a degree as to amount to an impairment of the plaintiff's right; and, as this record discloses that the sale left a portion of the plaintiff's judgment unpaid, it may be fairly argued that this provision of the act does deprive the plaintiff of a right inherent in her contract. When we are asked to put this case within the rule of those cases in which we have held that it is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired, we are bound to consider the entire scheme of the new statute, and to have regard to its probable effect on the rights of the parties.

It is contended that the right to redeem, granted by the new statute, only operates on the purchaser and not on the mortgagee as such. This very argument was foreseen and disposed of in *Bronson* v. *Kinzie*, 42 U. S. 1 How. 319 [11: 146], where this court said:

"It [the new act] declares that although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but "shall continue for twelve[132 months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security by rendering the property unsalable for anything like its value. This law gives to the mortgagor and to the judgment creditor [meaning creditors other than the mortgagee] an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the Constitution."

*The judgment of the supreme court of Kansas is reversed*, and the cause remanded to that court with directions for further proceedings not inconsistent with this opinion.

---

UNITED STATES, *Plf.*,

v.

FRANK M. RIDER, JOHN F. BURGESS, and SAMUEL N. RUTLEDGE, Commissioners of Muskingum County, Ohio.

(See S. C. Reporter's ed. 132-140.)

*Certificates of division of opinion in criminal cases.*

The right to certificates of division of opinion in criminal cases under U. S. Rev. Stat. §§ 651, 697, is taken away by the act of March 3, 1891, which impliedly repeals those sections and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error, or certificate.

[No. 197.]

*Argued April 1, 1896. Decided May 18, 1896.*

ON A CERTIFICATE of Division in the opinion between the Judges of the Circuit Court of the United States for the Southern

NOTE.—*As to jurisdiction of United States Supreme Court in cases certified on division of circuit court; on what division should be,*—see note to Webster v. Cooper, 13:335.



Digitized by Google

District of Ohio in a criminal information in the Circuit Court of the United States against Frank M. Rider *et al.*, defendants, charging them as county commissioners of Muskingum county, Ohio, with wilfully and unlawfully failing and refusing to comply with an order of the Secretary of War, requiring them to construct a draw span in a bridge across the Muskingum river. *Certificate dismissed.*

For decision in district court, see 50 Fed. Rep. 406.

**Statement by Mr. Chief Justice Fuller:**

On the 28d day of November, A. D. 1891, the United States district attorney for the southern district of Ohio filed a criminal information in the circuit court of the United States for that district against Frank M. Rider, John F. Burgess, and Samuel N. Rutledge, charging that on October 15, A. D. 1891, defendants "were then and there the county commissioners in Muskingum county, in the state of Ohio, and then and there the persons empowered by the law of Ohio to construct, alter, and keep in repair all necessary bridges over streams and public canals, on all state and county roads, and then and there the persons as such county commissioners controlling the bridge across the Muskingum river between Taylorsville and Duncan's Falls, Muskingum county, Ohio, and the Secretary of War of the United States, having good reason to believe that said bridge was then and there an unreasonable obstruction to the navigation of said Muskingum river, one of the navigable streams over which the United States has jurisdiction, on the 19th day of December, 1890, gave notice in writing to the said defendants, commissioners as aforesaid, setting forth in substance that the said bridge was considered an obstruction to navigation by reason of the fact that it had no draw for the passage of boats desiring to navigate the Muskingum river by way of the new lock just above the south end of the new bridge at Taylorsville, Ohio, and in order to afford said commissioners a reasonable opportunity to be heard and give evidence in regard to said complainant, Tuesday, the 6th of January, 1891, was set and named as the day when such evidence should be heard before Lieut. Col. Wm. E. Merrill, corps of engineers, at the United States Engineer's office in Zanesville, Ohio, and which said day of hearing, at the request of defendants, was extended to the 3d day of February, 1891, and afterwards, to wit, on the 25th day of February, 1891, and after said day of hearing, the Secretary of War gave 134]notice in writing to said defendants, *controlling said bridge as aforesaid, that the said bridge was and is an unreasonable obstruction to the free navigation of the said river, one of the navigable waters of the United States, on account of not being provided with a draw span below the new United States lock No. 9, in said river, and requiring the following change to be made, *viz.*, the construction of a draw span in said bridge below the said lock, in accordance with the plan shown in a map attached to said notice, and served upon said defendants, and prescribing that said alteration shall be made and completed within a reasonable time, to wit, on or before the 30th day of September, 1891, and that the service of said notice as aforesaid was made on the 3d day of March, 1891, by delivering, personally, a copy thereof to said commissioners, at their office in Zanesville, Ohio. And the said Frank M. Rider, John F. Burgess, and Samuel N. Rutledge, county commissioners of Muskingum county, Ohio, as aforesaid, did unlawfully, on, to wit, the 15th day of October, 1891, at the place aforesaid, and after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, wilfully failed and refused to comply with the said order of the Secretary of War, and to make the alterations set forth in said notice, contrary to the form of §§ 4 and 5 of an act of Congress approved September 19, 1890, in such case made and provided, and against the peace and dignity of the United States of America."

The defendants were tried December 11, 1891, and found guilty as charged in the information, whereupon they moved for a new trial.

On the trial before the district judge certain questions on the constitutionality of the sections of the act of September 19, 1890 (26 Stat. at L. 453, chap. 907, §§ 4, 5), under which the information was filed, were reserved for hearing and decision upon a motion for a new trial before the circuit and district judges. The motion coming on to be heard, those judges were divided in opinion, and certified, under U. S. Rev. Stat. § 697, the points of disagreement to this court, the questions upon which such division of opinion took place being as follows:

*"1st. Whether Congress has the power[135 to confer upon the Secretary of War the authority attempted to be conferred by said §§ 4 and 5 of the act of September 19, 1890, to determine when a bridge is an unreasonable obstruction to the free navigation of a river.

"2d. Whether the failure to comply by persons owning and controlling the said bridge with the order of the Secretary of War can lawfully subject them to a prosecution for a misdemeanor."

*Mr.* **J. M. Dickinson,** Assistant Attorney General, for plaintiff.

*Messrs.* **S. M. Winn** and *F. H. Southard* for defendants.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The appellate jurisdiction of this court is defined by the acts of Congress. By the act of April 29, 1802 (2 Stat. at L. 159, chap. 31, § 6), whenever there was a division of opinion in the circuit court upon a question of law, the question might be certified to this court for decision; provided that the case might proceed in the circuit court if in its opinion further proceedings could be had without prejudice to the merits; and that no imprisonment should be allowed or punishment inflicted upon which the judges were divided in opinion.

In *United States* v. *Daniel*, 19 U. S. 6 Wheat. 542, 547 [5: 326, 327], Chief Justice Marshall explained that "previous to the passage of that act the circuit courts were composed of three judges, and the judges of the supreme court changed their circuits. If all



Digitized by Google

the judges were present, no division of opinion could take place. If only one judge of the supreme court should attend, and a division should take place, the cause was continued till the next term, when a different judge would attend. Should the same division continue, there would then be the opinion of two judges against one; and the law provided that in such
136]*case that opinion should be the judgment of the court." Act of March 2, 1793 (1 Stat. at L. 333, chap. 22, § 2); *Davis* v. *Braden*, 35 U. S. 10 Pet. 286 [9: 427]. But, continued the Chief Justice, the act of 1802 made the judges of the supreme court stationary, so that the same judges constantly attended the same circuit and the court being always composed of the same two judges, any division of opinion would remain and the question continue unsettled. "To remedy this inconvenience, the clause under consideration was introduced." 19 U. S. 6 Wheat. 548 [5: 328]; *Ex parte Milligan*, 71 U. S. 4 Wall. 2 [18: 281].

The act of April 10, 1869 (16 Stat. at L. 44, chap. 22), provided for the appointment of a circuit judge in each circuit, but this did not repeal the act of 1802, as the same necessity existed as before for the power to certify questions. *New England M. Ins. Co.* v. *Dunham*, 78 U. S. 11 Wall. 1 [20: 90].

By the act of June 1, 1872 (17 Stat. at L. 196, chap. 255), whenever in any proceedings or suit in a circuit court there occurred any difference of opinion between the judges, the opinion of the presiding judge was to prevail for the time being; but upon the entry of a final judgment, decree, or order, and a certificate of division of opinion as under the act of 1802, either party might remove the case to this court on writ of error or appeal, according to the nature of the case. This act continued in force about two years, when it was supplanted by U.S. Rev. Stat. §§ 650, 652, and 693, by which its provisions were restricted to civil suits and proceedings; and by §§ 651 and 697 the provisions of § 6 of the act of 1802 were reenacted as to criminal cases. *United States* v. *Sanges*, 144 U. S. 310, 321 [36: 445, 450]. These sections are printed in the margin.†

137] *In civil cases, prior to March 3, 1891, the appellate jurisdiction was limited by the sum or value of the matter in dispute, but the jurisdiction on certificate was not dependent thereon, and, after final judgment or decree, if the amount in controversy reached the jurisdictional amount, the whole case was open for consideration on error or appeal, while if it fell below that, only the questions certified could be examined. *Allen* v. *St. Louis Nat. Bank*, 120 U. S. 30 [30: 575]; *Dow* v. *Johnson*, 100 U. S. 158 [25: 632]. It has always been held that the whole case could not be certified. *Jewell* v. *Knight*, 123 U. S. 433 [31: 193].

In short, under the Revised Statutes as to civil cases, the danger of the wheels of justice being blocked by difference *of opinion was en-[138 tirely obviated, and the provision for a certificate operated to give the benefit of review where the amount in controversy was less than that prescribed as essential to our jurisdiction, while as to criminal cases a certificate of division was the only mode in which alleged errors could be reviewed.

The first act of Congress which authorized a criminal case to be brought from the circuit court of the United States to this court, except upon a certificate of division of opinion, was the act of February 6, 1899 (chap. 113, § 6), by which it was enacted that "in all cases of conviction" of a "capital crime in any court of the United States," the final judgment "against the respondent" might, on his application, be re-examined, reversed, or affirmed by this court on writ of error. Up to that time this court had no general authority to review on error or appeal the judgments of the circuit courts of the United States in cases within their criminal jurisdiction. *United States* v. *Sanges*, 144 U. S. 310, 319 [36: 445, 449]; *Cross* v. *United States*, 145 U. S. 571, 574 [36: 821, 822].

By the judiciary act of March 3, 1891 (26 Stat. at L. 826; chap. 517, §4), it was provided that "the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States, or in the circuit courts of appeals hereby established, according to the provisions of this act regulating the same."

By § 5 appeals or writs of error might be

†"Sec. 650. Whenever, in any civil suit or proceeding in a circuit court held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, there occurs any difference of opinion between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or judge shall prevail, and be considered the opinion of the court for the time being.

"Sec. 651. Whenever any question occurs on the trial or hearing of any criminal proceeding before a circuit court upon which the judges are divided in opinion, the point upon which they disagree shall, during the same term, upon the request of either party, or of their counsel, be stated under the direction of the judges, and certified, under the seal of the court, to the supreme court at their next session; but nothing herein contained shall prevent the cause from proceeding if, in the opinion of the court, further proceedings can be had without prejudice to the merits. Imprisonment shall not be allowed nor punishment inflicted in any case where the judges of such court are divided in opinion upon the question touching the said imprisonment or punishment.

"Sec. 652. When a final judgment or decree is entered in any civil suit or proceeding before any circuit court held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, in the trial or hearing whereof any question has occurred upon which the opinions of the judges were opposed, the point upon which they so disagree shall, during the same term, be stated under the direction of the judges, and certified, and such certificate shall be entered of record."

"Sec. 693. Any final judgment or decree, in any civil suit or proceeding before a circuit court which was held, at the time, by a circuit justice and circuit judge or a district judge, or by the circuit judge and a district judge, wherein the said judges certify as provided by law, that their opinions were opposed upon any question which occurred on the trial or hearing of the said suit or proceeding, may be reviewed and affirmed or reversed or modified by the supreme court, on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error or appeals in regard to bail and supersedeas."

"Sec. 697. When any question occurs on the hearing or trial of any criminal proceeding before a circuit court, upon which the judges are divided in opinion, and the point upon which they disagree is certified to the supreme court according to law, such point shall be finally decided by the supreme court; and its decision and order in the premises shall be remitted to such circuit court, and be there entered of record, and shall have effect according to the nature of the said judgment and order."



Digitized by Google

taken from the circuit court directly to this court in certain enumerated classes of cases, including "cases of conviction of a capital or otherwise infamous crime." And by § 6 the judgments or decrees of the circuit courts of appeals were made final "in all cases arising under the criminal laws" and in certain other classes of cases, unless questions were certified to this court, or the whole case ordered up by writ of certiorari, as therein provided. *American Const. Co.* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 380 [37: 486, 490]. Thus, appellate jurisdiction was given in all criminal cases by writ of error either from this court or from the circuit court of appeals, and in all civil cases by

**139]** appeal or error without *regard to the amount in controversy, except as to appeals or writ of error to or from the circuit court of appeals in cases not made final as specified in § 6.

By § 14 it was provided that "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding §§ 5 and 6 of this act are hereby repealed," and the particular question before us is whether U. S. Rev. Stat. §§ 651 and 697, in relation to certificate of division of opinion in criminal cases, though not expressly repealed, still remain in force. If so, and such division of opinion can be certified before final judgment, then all criminal cases, including those in which the judgments and decrees of the circuit court of appeals are made final (of which the case at bar is one), as well as those which may be brought directly to this court, might, at preliminary stages of the proceedings, be brought before us on certificate, and, after judgment, the whole subject be re-examined on writ of error from one or the other court. This result, in itself, we think could not have been intended, and it is wholly inconsistent with the object of the act of March 3, 1891, which was to relieve this court and to distribute between it and the circuit courts of appeals, substantially, the entire appellate jurisdiction over the circuit courts of the United States. *McLish* v. *Roff*, 141 U. S. 661 [35: 893]; *Lau Ow Bew* v. *United States*, 144 U. S. 47 [36: 541]; *American Const. Co.* v. *Jacksonville, T. & K. W. R. Co. supra.*

We are of opinion that the scheme of the act of March 3, 1891, precludes the contention that certificates of division of opinion may still be had under U. S. Rev. Stat. §§ 651, 697.

Review by appeal, by writ of error, or otherwise, must be as prescribed by the act, and review by certificate is limited by the act to the certificate by the circuit courts, made after final judgment, of questions raised as to their own jurisdiction and to the certificate by the circuit courts of appeals of questions of law in relation to which our advice is sought as therein provided, and these certificates are governed by the same general rules as were formerly applied

**140]** to certificates of *division. *Maynard* v. *Hecht*, 151 U. S. 324 [38: 180]; *Columbus Watch Co.* v. *Robbins*, 148 U. S. 266 [37: 445].

It is true that repeals by implication are not favored, but we cannot escape the conclusion that, tested by its scope, its obvious purpose, and its terms, the act of March 3, 1891, covers the whole subject-matter under consideration, and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error, or certificate.

Its provisions and those of the Revised Statutes in this regard cannot stand together, and the argument *ab inconvenienti* that, in cases of doubt below, the remedy by certificate ought to be available, is entitled to no weight in the matter of construction.

*The result is that the certificate must be dismissed, and it is so ordered.*

Mr. Justice **Brewer** did not hear the argument and took no part in the decision of this case.

---

JEFF HARRISON, *Plff. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 140-142.)

*Peremptory challenges in criminal case.*

The offense of robbing a mail carrier and putting his life in jeopardy by the use of dangerous

NOTE.—*As to trial by jury, how affected by 7th Amendment to the Constitution*, see note to New York Sup. Ct. Justices v. United States, Murray, 19: 658.

*As to jury, of what number; practice in regard to; illness or insanity of one; thirteen or eleven jurors; wrong person serving as juror by mistake*,—see note to Silsby v. Foote, 14: 894.

*As to causes of challenge of jurors and their qualifications*, see note to Clinton v. Englebrecht, 20: 659.

*As to discharge or withdrawal of jurors before verdict, effect of*, see note to United States v. Peres, 6: 165.

*As to impeachment of verdict by jurors; affidavits of parties or third persons; affidavits of jury to sustain verdict*,—see note to Doss v. Tyack, 14: 428.

*Challenges to jurors; challenges to the array and to the panel; challenges to individual jurors; peremptory and for cause.*

At common law the only ground of challenges to the array was partiality in the sheriff. 3 Bl. Com. 359; Co. Litt. 156.

A challenge to the panel is an objection made to all the trial jurors returned. The objection that jurors had been discharged from the panel and excused from further service during the term is not one that may be taken on a criminal trial by a challenge to the panel. People v. Packenham, 115 N. Y. 200; People v. Jackson, 111 N. Y. 369.

The title of the summoning or selecting officer is no ground for a challenge to the array. Palmer v. Charlotte, C. & A. R. Co. 3 S. C. 580.

The fact that the jury commissioners are such *de facto* only, no order of their appointment appearing on the minutes, is no cause for a challenge to the array. Gott v. Brigham, 45 Mich. 424; State v. Jenkins, 32 Kan. 477; Cox v. State, 64 Ga. 374, 37 Am. Rep. 76.

The failure of a township to return a list, and a return by a second township after the time fixed by law, and after one jury has been drawn from the list returned by the remaining townships, and the omission of the county clerk on drawing the jury to return the names drawn to the proper packages for each township, until the whole list is exhausted, are not grounds for a challenge to the array. People v. Coffman, 59 Mich. 1; Thomas v. People, 39 Mich. 311.

That the venire describes the action as a "civil" instead of a "criminal" action, the jurors all



Digitized by Google

weapons, in violation of U. S. Rev. Stat. § 5472, is a felony, on the prosecution of which the defendant is entitled to ten peremptory challenges, under U. S. Rev. Stat. § 819.

[No. 294.]

*Argued and Submitted May 6, 1896. Decided May 18, 1896.*

IN ERROR to the District Court of the United States for the Northern District of Alabama to review a judgment convicting Jeff Harrison of the offense of robbing a mail carrier, and putting his life in jeopardy by the use of dangerous weapons. *Reversed, and cause remanded with a direction for a new trial.*

*Messrs.* **Richard B. Kelly** and *John F. Methvin*, for plaintiff in error:

Appellant was entitled to ten peremptory challenges. He was indicted for an offense which was a felony at common law and for which Congress prescribed punishment designating the offense by its common-law name.

U. S. Rev. Stat. § 5472; *United States* v. *Coppersmith*, 4 Fed. Rep. 198; *United States* v. *Wilson*, Baldw. 78-98.

Robbery was a felony at common law.

*United States* v. *Browning*, 1 Cranch, C. C. 330; 4 Cooley's Blackstone, 95-98; 2 Bishop, Crim. Law, 1180; 3 Coke, Inst. 68; Whart. Am. Crim. Law, 4th ed. § 2; Roscoe, Crim. Ev. 91, 892; Bouvier, Law Dict. tit. *Feloniously;* Burrill, Law Dict. tit. *Felony.*

***Mr.* J. M. Dickinson**, Assistant Attorney General, for defendant in error:

The statute does not call this offense a felony, but it, in respect of it, uses the words "rob," "robbery," and "robber."

The word "rob" in the statute was used in its common-law sense.

Whart. Crim. Law, § 1825, citing *United States* v. *Wilson*, Baldw. 78.

At common-law "robbery" was a felony.

2 Stephen, Hist. Crim Law, 193; 3 Stephen, Hist. Crim. Law, 149; Whart. Crim. Law, § 22; Bishop, New Crim. Law, § 1180; 4 Bl. Com. 95; Russell, Crimes, 867.

---

appearing pursuant to it, is no ground. State v. Nerbovig, 33 Minn. 480. Nor the failure of the jury commissioners to sign and certify the jury list. Coker v. State, 7 Tex. App. 83.

Where the statute prescribes the class of persons from which the jurors are to be selected, the failure on the part of the officers to draw the jurors from the class prescribed is a sufficient ground. State v. Jenkins, 32 Kan. 477.

An objection that a juror is drawn from a particular panel is a challenge to the panel and not to his qualification. State v. Dale, 8 Or. 229.

Where the states have statutory enactments as to what are good grounds for challenges to the panel, these grounds are then exclusive. Woodard v. State, 9 Tex. App. 412; Boundtree v. Gilroy, 57 Tex. 176.

Where some of the petit jurors were absent and a jury was called from those who appeared, it was too late for the defendant to challenge the array because it was not made up from all who were summoned to appear. State v. Miller, 53 Iowa, 84.

An irregularity in the drawing of the jurors which cannot affect the right of the prisoner is not ground for challenge to the array. Ferris v. People, 35 N. Y. 125, 48 Barb. 17, 1 Abb. Pr. N. S. 198; Friery v. People, 2 Keyes, 424, 2 Abb. App. Dec. 215, 54 Barb. 319.

Not good ground that the panel was certified by the deputy clerk. People v. Fuller, 2 Park. Crim. Rep. 16. Or on the ground that a certain class of persons were excluded in the selection of grand jurors. People v. Jewett, 3 Wend. 314.

Good ground for challenge, that certain jurors had not been duly summoned. McCloskey v. People, 5 Park. Crim. Rep. 308.

Mode of selecting and relieving jurors when liable to challenge to the array. Gardiner v. People, 6 Park. Crim. Rep. 155.

It is no cause for challenge to the array that two sets of jurors were drawn at the same time from the jury box for two distinct courts, if they be kept entirely separate. Crane v. Dygert, 4 Wend. 675.

Nor that the panel was drawn more than fourteen days before the sitting of the court. Crane v. Dygert, *supra.*

A challenge to the array, if not made before the jurors are sworn, is waived. New York v. Mason, 4 R. D. Smith, 142, 1 Abb. Pr. 344.

The district attorney need not verify his answer to the challenge to the array. Gardiner v. People, 6 Park. Crim. Rep. 155.

The withdrawal of a challenge to the array is a waiver of any irregularity in the drawing of the jury. Pierson v. People, 13 Hun, 239, 79 N. Y. 424, 35 Am. Rep. 524.

The number of peremptory challenges to which an accused person or the prosecution or the parties to a civil action, is entitled, depends, generally, upon the statute relating to crimes. People v. Comstock, 55 Mich. 405.

Whether persons tried together on one indictment must join in their challenges, or are entitled to sever, is a subject of much difference, the right to sever being generally allowed in criminal cases. Savage v. State, 18 Fla. 909; Wiggins v. State, 1 Lea, 738.

And the peremptory challenges of one enure to the benefit of all. State v. Ford, 37 La. Ann. 443; State v. Durein, 29 Kan. 668, a case of misdemeanor; State v. Stoughton, 51 Vt. 352; Cruce v. State, 59 Ga. 83.

In many jurisdictions the matter has been defined by statutes requiring that defendants jointly indicted shall join in their challenges. In others the statute gives the separate number to each defendant. A defendant charged in an indictment, in separate counts, with separate misdemeanors of a kindred character, is not entitled to more challenges than under a single count. State v. Skinner, 34 Ark. 256; Smith v. State, 3 Lea, 366.

Peremptory challenges are not usually allowed in a struck jury. Thomp. Trials, § 43. But in McDermott v. Hoffman, 70 Pa. 31, both challenges for cause and peremptory challenges were held permissible in a struck jury.

Relationship to the ninth degree is good ground for challenge. State v. Walton, 74 Mo. 270; Hardy v. Sprowle, 32 Me. 310; Wirebach v. First Nat. Bank, 97 Pa. 543, 39 Am. Rep. 821; Moody v. Griffin, 65 Ga. 304.

Jurors who would be incompetent because related to the parties are equally incompetent when related to counsel whose conditional fees entitle them by contract to a part of the recovery. Melson v. Dickson, 63 Ga. 682, 36 Am. Rep. 128.

A property holder and resident of a municipality which is a party to the action in general, is not incompetent unless he has a direct pecuniary interest in the result. Omaha v. Cane, 15 Neb. 657; Russel v. Hamilton, 3 Ill. 56; Jefferson County v. Lewis, 20 Fla. 980; Phillips v. State, 29 Ga. 105; Kemper v. Louisville, 14 Bush, 87.

A member of a religious denomination is not thereby precluded from sitting as a juror in a case



Digitized by Google

In *United States* v. *Coppersmith*, 4 Fed. Rep. 198, in which it was held that under U. S. Rev. Stat. § 819, one charged with uttering and passing counterfeit coin was entitled to but three challenges, on the ground that this offense was not a felony within the terms of said section, Judge Hammond said that the defendant is entitled to ten challenges, "where Congress does not define an offense, but simply punishes it by its common-law name, and at common-law it is a felony

This principle was followed in *United States* v. *Daubner*, 17 Fed. Rep. 793, in which it was held that the offenses described in U. S. Rev. Stat. §§ 5438, 4746, are not felonies, and that a defendant charged with them is only entitled to three peremptory challenges.

Investigation has not disclosed any adjudication of this question, but in view of what is above set out we are constrained to the opinion that the trial judge erred, and therefore beg leave to submit the case without argument to the judgment of the court.

*Mr. Chief Justice **Fuller** delivered [141 the opinion of the court:

As stated by counsel for the United States, plaintiff in error was convicted and sentenced to imprisonment for life under an indictment for robbing a mail carrier of the United States of a registered mail package, which charged that in effecting such robbery he put in jeopardy the life of the carrier by the use of dangerous weapons; and was based on the following section of the Revised Statutes:

"Sec. 5472. Any person who shall rob any carrier, agent, or other person intrusted with the mail, of such mail, or any part thereof, shall be punishable by imprisonment at hard labor for not less than five years and not more than ten years; and if convicted a second time of a like offense, or if, in effecting such rob-

---

where a church organization of the same denomination, of which he is not a member, is a party. Barton v. Erickson, 14 Neb. 164; Burdine v. Grand Lodge, 1 Ala. Sel. Cas. 385.

An employee of one of the parties to an action is incompetent to sit as a juror in the trial thereof. Louisville, N. O. & T. R. Co. v. Mask, 64 Miss. 738; Hubbard v. Rutledge, 57 Miss. 7; Gunter v. Graniteville Mfg. Co. 18 S. C. 262, 44 Am. Rep. 573; Central R. Co. v. Mitchell, 63 Ga. 173.

A person who has sat as a juror in a former trial of the same case is thereby rendered incompetent. Dunn v. State, 7 Tex. App. 600; Jacobs v. State, 9 Tex. App. 278.

But in the absence of a statute, prior service in a similar cause involving the same general considerations does not necessarily disqualify. Chariton Plow Co. v. Deusch, 16 Neb. 384.

A grand juror of the panel who found a bill is not a competent juror to try the case. Greenwood v. State, 34 Tex. 334.

It is not ground for rejecting a juror that he has an unfriendly feeling toward one of the attorneys engaged in the trial. Hutchinson v. State, 19 Neb. 262.

A juror in a liquor case is incompetent if he says that he would allow less weight to the testimony of defendant than he would allow to it were he not engaged in that business. Stoots v. State, 108 Ind. 415. *Contra*, see Elliott v. State, 73 Ind. 10; Shields v. State, 96 Ind. 299.

The expression or existence of prejudice against crime is no ground of challenge. State v. Burns, 85 Mo. 47.

A juror cannot be asked, upon his *voire dire*, in a slander suit, whether he has any bias against such suits; as, if so, it does not disqualify him. Young v. Bridges, 34 La. Ann. 333.

Prejudice against the defense of insanity is generally no ground for challenge. People v. Carpenter, 33 Hun, 490, 102 N. Y. 238; Butler v. State, 97 Ind. 378.

In an action on a policy of insurance upon the life of one who committed suicide, a juror having said that he should consider the fact that a man had committed suicide to be some evidence of insanity, was held not to be a ground of challenge. Hagadorn v. Connecticut Mut. L. Ins. Co. 22 Hun, 249.

Persons with conscientious scruples against the death penalty are incompetent jurors in capital cases. People v. Majors, 65 Cal. 138, 52 Am. Rep. 295; State v. Hing, 16 Nev. 307; Kennedy v. State, 19 Tex. App. 618.

A juror who will not, on circumstantial evidence, convict a murderer to be hanged is incompetent. Jones v. State, 57 Miss. 684; Shafer v. State, 7 Tex. App. 239; Clanton v. State, 13 Tex. App. 139; State v. West, 69 Mo. 401, 33 Am. Rep. 506; State v. Leabo, 89 Mo. 247; Cluverius v. Com. 81 Va. 787; Garrett v. State, 76 Ala. 18; Ala. Code, § 4883; People v. Ah Chung, 54 Cal. 398; State v. Pritchard, 15 Nev. 74.

If the juror has found an opinion as to the merits of the case by conversation with witnesses, or by reading reports of testimony or evidence, the juror is incompetent. Brown v. State, 70 Ind. 576; Dugle v. State, 100 Ind. 259; State v. Jackson, 37 La. Ann. 768; State v. Culler, 83 Mo. 623; State v. Core, 70 Mo. 491; State v. Barnes, 34 La. Ann. 395.

But a juror is not incompetent because he is a witness in the case. Bell v. State, 44 Ala. 393.

The expression of an opinion does not disqualify unless it appears that the statement was founded upon what purports to be evidence that has been or will be introduced on the trial, or upon conversation with witnesses. Johnson v. State, 11 Lea. 47; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; Pender v. People, 18 Hun, 560; Waters v. State, 51 Md. 430; Ulrich v. People, 39 Mich. 245; State v. Wilson, 85 Mo. 134; State v. Reed, 89 Mo. 168; State v. Hayden, 51 Vt. 296; State v. Meyer, 58 Vt. 457; 12 Am. & Eng. Enc. Law, 355.

If the crime charged be punishable with death, and the juror entertains such conscientious opinions as would preclude his finding the defendant guilty, he shall neither be permitted nor compelled to serve as a juror. People v. Carolin, 115 N. Y. 658; People v. Damon, 13 Wend. 351; People v. Ryan, 2 Wheel. Crim. Cas. 47; Walter v. People, 32 N. Y. 147, Affirming 6 Park. Crim. Rep. 15; People v. Jones, 1 Edm. Sel. Cas. 112; People v. Thomas, 3 Alb. L. J. 210; Gordon v. People, 33 N. Y. 511, 512; O'Brien v. People, 36 N. Y. 276, 3 Abb. Pr. N. S. 371, affirming 48 Barb. 274; Lowenberg v. People, 5 Park. Crim. Rep. 425; People v. Wilson, 3 Park. Crim. Rep. 199; 1 Thomp. Trials, §§ 74 *et seq.*

That a juror's father had married the defendant's brother's widow is no ground of principal challenge. Cain v. Ingham, 7 Cow. 478; Eggleston v. Smithby, 17 Johns. 133.

Upon a challenge of the district attorney to a juror, the latter said, on his examination, that he would not convict on circumstantial evidence. Held, that the challenge was properly sustained. People v. Ah Chung, 54 Cal. 402.

One who is exempted from jury duty may waive his privilege and legally act as a juror. United States v. Lee, 4 Mackey, 498, 54 Am. Rep. 293; Green v. State, 59 Md. 123, 43 Am. Rep. 542.



Digitized by Google

bery the first time, the robber shall wound the person having custody of the mail, or put his life in jeopardy by the use of dangerous weapons, such offender shall be punishable by imprisonment at hard labor for the term of his natural life."

In the course of impaneling the jury, plaintiff in error challenged three persons peremptorily, and afterwards challenged one Harris peremptorily, but the court held he was entitled to only three peremptory challenges, which he had exhausted, and overruled the challenge, to which action of the court an exception was duly taken. Harris was then sworn on the jury and sat as a member thereof on the trial. Four other persons were likewise separately challenged peremptorily, the challenges overruled, exceptions taken, and they served on the jury.

If plaintiff in error was entitled to ten peremptory challenges, five persons unlawfully took part as jurors in his conviction. U. S. Rev. Stat. § 819, provides:

"When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory chal-142] lenges; and in all *other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purpose of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers."

Counsel concedes that at common law "robbery" was a felony, and that the word "rob" in the statute was used in its common-law sense, and therefore admits that the errors assigned in respect of the action of the court in overruling these challenges are well taken. We concur in this view.

Other rulings of the court are questioned in the brief of plaintiff in error, but it is quite improbable that they will occur on another trial and we need not pass upon them.

*Judgment reversed*, and cause remanded with a direction to set aside the verdict and grant a new trial.

---

## ILLINOIS CENTRAL RAILROAD COMPANY, *Plff. in Err.*, v. PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* W. N. BUTLER.

(See S. C. Reporter's ed. 142-154.)

*Obstruction of interstate commerce and of the mails.*

A state statute requiring a fast mail train carrying interstate passengers and the United States mail over an interstate highway established by authority of Congress, to delay the transportation of such passengers and mails by turning aside from the direct interstate route, and running to a station 8½ miles away from a point on that route and back again to the same point, because such station is the county-seat, for the interstate travel to and from which the railroad company furnishes other and ample accommodation,—is an unconstitutional interference with and obstruction of interstate commerce and of the passage of the mails.

[No. 217.]

*Argued April 14, 15, 1896. Decided May 18, 1896.*

IN ERROR to the Supreme Court of the State of Illinois to review a judgment of that court affirming the judgment of the Circuit Court of Alexander County, Illinois, granting a writ of mandamus in an action by the People of the State of Illinois, *ex rel.* W. N. Butler, against the Illinois Central Railroad Company, defendant, commanding the defendant to cause its south-bound fast mail train and all other passenger trains coming into Cairo to run to its passenger station at the intersection of Ohio Levee and Second streets in Cairo to receive and let off passengers. *Reversed, and cause remanded for further proceedings.*

See same case below, 143 Ill. 434, 19 L. R. A. 119.

Statement by Mr. Justice **Gray**:

This was a petition for a writ of mandamus, based upon Ill. Rev. Stat. 1889, chap. 114, § 88, which is as follows:

"Every railroad corporation shall cause its passenger trains to stop upon its arrival at each station advertised by such corporation as a place for receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety: *Provided*, all regular passenger trains shall stop a sufficient length of time at the railroad station of county-seats to receive and let off passengers with safety."

The petition was filed April 17, 1891, in the circuit court for Alexander county in the state of Illinois, by the county attorney in behalf of the state, alleging that the Illinois Central Railroad Company ran its south bound fast mail train through the city of Cairo, 2 miles north of its station in that city, and over a bridge across the Ohio river connecting its road with other roads south of that river, without stopping at its station in Cairo; and praying for a writ of mandamus to compel it to cause all its passenger trains, coming into Cairo, to be brought down to that station and there stop a sufficient length of time to receive and let off passengers with safety.

The defendant contended that the statute did not require its fast mail train to be run to and stopped at its station in Cairo, and that the statute was contrary to the Constitution of the *United States, as interfering with in-[144 terstate commerce, and with the carrying of the United States mails.

By the act of Congress of September 20, 1850, chap. 61, entitled "An Act Granting the Right of Way and Making a Grant of Land to the

NOTE.—*As to obstructing the mail, what constitutes the offense*, see note to United States v. Kirby, 19: 278.

*As to power of Congress to regulate commerce*, see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

*As to interstate commerce; regulation of; power of Congress, how far exclusive*,—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.



Digitized by Google

States of Illinois, Mississippi, and Alabama, in Aid of the Construction of a Railroad from Chicago to Mobile," the right of way through the public lands, with the right to take earth, stones, and timber necessary for the construction of the road, was "granted to the state of Illinois for the construction of a railroad from the southern terminus of the Illinois & Michigan Canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same to Chicago, on Lake Michigan, and another *via* the town of Galena, in said state to Dubuque, in the state of Iowa;" and a copy of the survey of the road and branches, made under direction of the legislature, was required to be forwarded to the proper land office, and to the general land office in the city of Washington. By §§ 2–4 alternate sections of land on each side of the road were granted to the state of Illinois, "subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other; and the said railroad and branches shall be and remain a public highway, for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States." By § 6 "the United States mail shall at all times be transported on the said railroad, under the direction of the Postoffice Department, at such price as the Congress may by law direct." And by § 7 "in order to aid in the continuation of said Central Railroad from the mouth of the Ohio river to the city of Mobile," similar grants of "rights, privileges, and liabilities," and of lands, were made "to the states of Alabama and Mississippi respectively, for the purpose of aiding in the construction of a railroad from said city of Mobile to a point near the mouth of the Ohio river." 9 Stat. at L. 466.

The legislature of Illinois, by the statute of February 10, 1851, incorporated the Illinois Central Railroad Company, and empowered it "to survey, locate, construct, complete, alter, **145**]*maintain, and operate a railroad, with one or more tracks, from the southern terminus of the Illinois & Michigan Canal to a point at the city of Cairo, with a branch of the same to the city of Chicago, on Lake Michigan, and also a branch *via* the city of Galena to a point on the Mississippi river opposite the town of Dubuque, in the state of Iowa;" and by § 15, for that purpose only, ceded and granted to that corporation the right of way and lands granted to the state by the act of Congress, of September 20, 1850; and required "the main trunk thereof, or central line, to run from the city of Cairo to the southern termination of the Illinois & Michigan Canal," "and nowhere departing more than 17 miles from a straight line between" those two points; and required the corporation to mortgage said right of way and lands to the state of Illinois to secure the application of the proceeds of those lands "to the constructing, completing, equipping, and furnishing said road and branches, in accordance with the terms of this act and said act of Congress;" and by § 19 declared "said road and branches to be free for the use of the United States, and to be employed by the Postoffice Department, as provided in said act of Congress." Ill. Priv. Laws 1851, pp. 61, 66, 68, 71. And by § 8 of the statute of Illinois of February 17, 1851, that act of Congress was expressly "accepted, and the conditions expressed in said act are hereby agreed to and made obligatory upon the state of Illinois." Ill. Gen. Laws 1851, p. 192.

By the statute of Illinois of February 2, 1855, "all railroad companies incorporated or organized under, or which may be incorporated or organized under, the authority of the laws of this state, shall have power to make such contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof; and also to contract for and hold, in fee simple or otherwise, lands or buildings in this or other states for depot purposes; and also to purchase and hold such personal property, as shall be necessary and convenient for carrying into effect the object of this act;" and "shall have the right of connecting with each other, and with the railroads of other *states, [**146** on such terms as shall be mutually agreed upon by the companies interested in such connection." And by the statute of Illinois of February 25, 1867, "railroads terminating or to terminate at any point on any line of continuous railroad thoroughfare, where there now is or shall be a railroad bridge for crossing of passengers and freight in cars over the same as part of such thoroughfare, shall make convenient connections of such railroads, by rail, with the rail of such bridge; and such bridge shall permit and cause such connections of the rail of the same with the rail of such railroads, so that by reason of such railroads and bridge there shall be uninterrupted communication over such railroads and bridge as public thoroughfares; but by such connections no corporate rights shall be impaired." 2 Starr & C. Stat. pp. 1921, 1922.

By the act of Congress of June 15, 1866, chap. 124, entitled "An Act to Facilitate Commercial, Postal, and Military Communication among the Several States," and having this preamble, "Whereas the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several states, to establish post-roads, and to raise and support armies: Therefore" it is enacted "that every railroad company in the United States, whose road is operated by steam, its successors and assigns, be and is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of its destination: Provided, that this act shall not affect any stipulation between the government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road; nor shall it be construed to authorize any railroad company to build any new road, or connection with any other road, without authority from the state in which *said [**147** railroad or connection may be proposed;" and



Digitized by Google

"that Congress may at any time alter, amend, or repeal this act." 14 Stat. at L. 66.

By the act of Congress of December 17, 1872, chap. 4, amended by the supplementary act of February 14, 1888, chap. 44, "any person or corporation, having lawful authority therefor may hereafter erect bridges across the Ohio river, for railroad or other uses, upon compliance with the provisions and requirements of this act," among which are that they shall be built of a certain height above low-water mark, and at places and according to plans approved by the Secretary of War; and any bridge constructed under and according to this act is declared to be a lawful structure, to be recognized and known as a post route, and for the transmission over which of the mails, the troops, and the munitions of war of the United States, no higher charge is to be made than the rate per mile over the railroads or public highways leading to it, and across which the United States are to have the right of way for postal telegraph purposes. 17 Stat. at L. 398; 22 Stat. at L. 414.

The city of Cairo is situated upon the point of land at the junction of the Mississippi and the Ohio rivers, and is surrounded by high levees to protect it from the river floods; and since 1859 has been a county-seat. In 1855, the defendant completed the location and building of its road, and laid and since maintained its track to the bank of the Ohio river, then taking a sharp turn westward, and passing, in the city of Cairo, for the distance of 2 miles along the Ohio levee embankment, to a place, less than half a mile from the junction of the waters of the two rivers, and at the intersection of Second and Ohio Levee streets, where its only passenger station in Cairo was established; and until a few months before the filing of the petition ran all its passenger trains to and from that station, and made it the southern terminus of its railroad.

By the statute of Kentucky of March 29, 1886, chap. 446, the Chicago, St. Louis, & New Orleans Railroad Company and the Illinois Central Railroad Company were authorized "jointly, or either of them separately, to build, erect, construct, and forever maintain, use, 148] and operate a railroad bridge *over and across the Ohio river from the Kentucky shore, in Ballard county, opposite the city of Cairo, to any point in the city of Cairo, Illinois," conformably to the conditions and limitations of the acts of Congress of 1872 and 1883, above cited.

Pursuant to that statute, the Chicago, St. Louis, & New Orleans Railroad Company, into which various railroad corporations had been consolidated by statutes of the states of Louisiana, Mississippi, Tennessee, and Kentucky, and whose line extended from New Orleans to the Ohio river, built a bridge across the Ohio river to low-water mark on the Illinois side, to which the jurisdiction of the state of Kentucky extended. *Indiana* v. *Kentucky*, 136 U. S. 479 [34: 329]. The north end of this bridge was at that part of Cairo about 2 miles north of the defendant's station in that city; and the peculiar conformation of the land and water made it impracticable to put it nearer to the junction of the two rivers. The height at which the bridge had to be built, in order to avoid obstructing navigation, required the approaches on both banks to be graded. The approach on the Illinois side was built by the defendant, upon its own land, at the grade of 85 feet to a mile, and beginning 1¼ miles off, at Bridge Junction, beyond the corporate limits of Cairo.

After this bridge was built, and the defendant's road was thereby connected with the Chicago, St. Louis, & New Orleans Railroad, the defendant put on a daily fast mail train, to run from Chicago to New Orleans, carrying passengers, as well as the United States mail, not going to or stopping at its station in Cairo, but connecting, at a point some 9 miles out on the main line, with a short train from that station.

Trains passing over the through route from Chicago to New Orleans, and stopping at Cairo, are obliged to leave the main line at Bridge Junction, and to run down 8¼ miles to the Cairo station, and back to the same point on the main line. Six regular passenger trains were so run daily, giving adequate accommodations for passengers to or from Cairo.

The defendant offered to prove that the schedule of *running time of the fast mail train[149 had been fixed by the Postoffice Department of the United States, and could not be changed by the defendant. The court excluded the evidence, "for the reason that it is not competent for the defendant to enter into the contract with the government of the United States, whereby it renders itself incapable of complying with the laws of Illinois;" and allowed an exception to this ruling.

The court granted a writ of mandamus, commanding the defendant to cause its south bound fast mail train, and all its other passenger trains coming into Cairo, to be run or brought down to its passenger station at the intersection of Ohio Levee and Second streets, and there to be stopped a sufficient length of time to receive and let off passengers with safety.

The defendant appealed to the supreme court of the state, which affirmed the judgment; and held that the statute of Illinois concerning the stopping of trains obliged the defendant to cause its fast mail train to be taken into its station at Cairo, and to be stopped there long enough to receive and let off passengers with safety; and that the statute so construed, was not an unconstitutional interference with interstate commerce, or with the carrying of the United States mails. 148 Ill. 484, 19 L. R. A. 119. The defendant sued out this writ of error.

*Messrs.* **James Fentress** and **William H. Green** for plaintiff in error.

*Messrs.* **John M. Lansden** and *Angus Leek* for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

The line of railroad communication crossing the Ohio river at Cairo, and of which the Illinois Central Railroad forms part, has been established by Congress as a national highway for the accommodation of interstate commerce and of the mails of the United States, and as such has been recognized and promoted by the



Digitized by Google

150]state of Illinois. This will clearly *appear by a brief recapitulation of the acts of Congress and the statutes of Illinois upon the subject.

Congress, in the act of September 20, 1850, chap. 61, granted a right of way, and sections of the public lands, to the state of Illinois, to aid in the construction of a railroad in that state from the southern termination of the Illinois & Michigan Canal "to a point at or near the junction of the Ohio and Mississippi rivers," with branches to Chicago and Dubuque, "to be and remain a public highway, for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States," and on which the United States mail should "at all times be transported, under the direction of the Postoffice Department, at such price as the Congress may by law direct;" and, in order "to aid in the construction of said Central Railroad," made like grants to the states of Alabama and Mississippi, respectively, for the purpose of aiding in the construction of a railroad from the city of Mobile "to a point near the mouth of the Ohio river." 9 Stat. at L. 466.

The manifest purpose of Congress was to establish a railroad in the center of the Continent, connecting the waters of the Great Lakes with those of the Gulf of Mexico, for the benefit of interstate commerce, as well as of the military and postal departments of the government of the United States.

The state of Illinois, by a statute of February 10, 1851, chartered the Illinois Central Railroad Company, and ceded to it the rights and lands granted to the state by the act of Congress, for the purpose of constructing and maintaining within the state such a trunk line and branches, describing its southern terminus as "a point at the city of Cairo," and declaring "said road and branches to be free for the use of the United States, and to be employed by the Postoffice Department, as provided in said act of Congress;" and (as if that were not sufficient) by another statute, a week later, the state expressly accepted the act of Congress, and agreed to be bound by the conditions expressed therein.

By the statute of Illinois of February 2, 1855, all railroad corporations of the state were em-

151] powered to make contracts *with each other, and with railroad corporations of other states, for leasing or running or connecting their railroads; and by the statute of Illinois of February 25, 1867, railroads terminating at a point at which there was a railroad bridge on a line of continuous railroad thoroughfare were required to be connected by rail, as to make "an uninterrupted communication over such railroads and bridge as public thoroughfares."

By the act of June 15, 1866, chap. 124, Congress, for the declared purpose of facilitating commerce among the several states, and the postal and military communications of the United States, authorized every railroad company in the United States, whose road was operated by steam, to carry over its road, bridges, and ferries, as well passengers and freight, as government mails, troops, and supplies, from one state to another; and to connect, in any state authorizing it to do so, with roads of other states, so as to form continuous lines of transportation. 14 Stat. at L. 66.

By the acts of Congress of December 17, 1872, chap. 4, and February 14, 1883, chap. 44, bridges were authorized to be built across the Ohio river by any person or corporation having lawful authority therefor, and with the approval of the Secretary of War, and were declared to be lawful structures and post routes for the transmission of the mails and the troops and munitions of war of the United States. 17 Stat. at L. 398; 22 Stat. at L. 414.

It is not denied that the bridge across the Ohio river from the Kentucky shore to the Illinois shore, opposite the city of Cairo, was constructed by lawful authority, and as permitted by Congress. Nor is it denied that the Illinois Central Railroad Company had the right, under the acts of Congress and the statutes of Illinois, to connect its road with that bridge, and to run its southward bound trains over that bridge as part of a system of interstate communication.

But it is contended, on behalf of the state of Illinois, that the station of the Illinois Central Railroad Company at the southern terminus of its road in the city of Cairo, having been originally established, and still remaining, at a point some 8¼ miles from so much of its main line as forms *part of the through communica-[152 tion by railroad from the state of Illinois across the Ohio river to the state of Kentucky and other southern states, the corporation is obliged, by a statute of the state of Illinois, to cause all its trains, including the fast-mail train from Chicago to New Orleans, to be brought down to that station, and to stop there long enough to receive and let off passengers with safety.

The statute in question is as follows: "Every railroad corporation shall cause its passenger trains to stop upon its arrival at each station, advertised by such corporation as a place for receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety: *Provided*, all regular passenger trains shall stop a sufficient length of time at the railroad station of county-seats, to receive and let off passengers with safety." Ill. Rev. Stat. 1889, chap. 114, § 88.

It was argued in behalf of the railroad company, that the whole effect of this section was to require each train "to stop, upon its arrival" at a station, long enough to receive and let off passengers with safety; that the first part of the section only required trains to stop upon arrival "at each station advertised as a place for receiving and discharging passengers upon and from such trains;" that the proviso merely required trains to stop, for a like time, on arriving at "the railroad station of county-seats," although not so advertised; and that no part of the section required any train to arrive at, or to go to, any particular station.

The supreme court of the state, however, held that the statute not only required every train to stop at every county-seat at which it arrived, but that, as Cairo was admitted to be a county-seat, the statute required every train passing through the city of Cairo to go to and stop at the station in that city. The construction given to the statute in this particular by



Digitized by Google

the state court does not involve any Federal question, and must be accepted by this court in judging of the constitutionality of the statute. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 456 [33: 970, 980, 3 Inters. Com. Rep. 209].

But the decision that the statute so construed, was not an unconstitutional interference 153] with interstate commerce, or *with the carrying of the mails by the United States, was a decision in favor of the validity of a state statute whose validity was drawn in question on the ground of its being repugnant to the Constitution and laws of the United States, as well as a decision against a right specially set up and claimed under the national Constitution and laws; and is therefore clearly reviewable by this court.

The effect of the statute of Illinois, as construed and applied by the supreme court of the state, is to require a fast mail train, carrying interstate passengers and the United States mail, from Chicago in the state of Illinois to places south of the Ohio river, over an interstate highway established by authority of Congress, to delay the transportation of such passengers and mails, by turning aside from the direct interstate route, and running to a station 3½ miles away from a point on that route, and back again to the same point, and thus traveling 7 miles which form no part of its course, before proceeding on its way; and to do this for the purpose of discharging and receiving passengers at that station, for the interstate travel to and from which, as is admitted in this case, the railroad company furnishes other and ample accommodation.

This court is unanimously of opinion that this requirement is an unconstitutional hindrance and obstruction of interstate commerce and of the passage of the mails of the United States.

Upon the state of facts presented by this record, the duties of the Illinois Central Railroad Company were not confined to those which it owed to the state of Illinois under the charter of the company and other laws of the state; but included distinct duties imposed upon the corporation by the Constitution and laws of the United States.

The state may doubtless compel the railroad company to perform the duty imposed by its charter of carrying passengers and goods between its termini within the state. But so long, at least, as that duty is adequately performed by the company, the state cannot, under the guise of compelling its performance, interfere with the performance of paramount 154] *duties to which the company has been subjected by the Constitution and laws of the United States.

The state may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders. But the state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic. *Dubuque & S. C. R. Co.* v. *Richmond*, 86 U. S. 19 Wall. 584, 589 [22: 173, 176]; *Stone* v. *Farmers' Loan & T. Co.* (*"Railroad Commission Cases"*), 116 U. S. 307, 334 [29: 636, 645]; *Smith* v. *Alabama*, 124 U. S. 465 [31: 508, 1 Inters. Com. Rep. 804].

It may well be, as held by the courts of Illinois, that the arrangements made by the company with the Postoffice Department of the United States cannot have the effect of abrogating a reasonable police regulation of the state. But a statute of the state, which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States, cannot be considered as a reasonable police regulation.

In *Union P. R. Co.* v. *Hall*, 91 U. S. 343 [23: 428], cited by the counsel for the state, the writ of mandamus was issued to promote, not to defeat, interstate transportation.

The question whether a statute which merely required interstate railroad trains, without going out of their course, to stop at county-seats, would be within the constitutional power of the state, is not presented, and cannot be decided, upon this record.

The result is that the *judgment of the supreme court* of the state, which requires the Illinois Central Railroad Company to cause its fast mail train to be brought into and stopped at its station in Cairo, is erroneous, and must be *reversed*, and the cause remanded for further proceedings not inconsistent with this opinion.

---

## GEORGE P. WEBSTER ET AL., [155
*Appts.*,
*v.*
## AUGUSTIN DALY.

(See S. C. Reporter's ed. 155-159.)

*Jurisdiction of this court.*

An appeal from a decree of a circuit court of the United States which affirms its own prior decree in obedience to a mandate, and declares that the decree of the circuit court of appeals is made the decree of that court, is not an appeal from the circuit court of appeals, but is an appeal from the circuit court of which this court has no jurisdiction under the judiciary act of March 3, 1891, § 5.

[No. 265.]

*Argued April 30, 1896. Decided May 18, 1896.*

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York affirming a decree of that court for an injunction, etc., in pursuance of the mandate of the circuit court of appeals, etc. *Dismissed.*

See same case below, 39 Fed. Rep. 265, 47 Fed. Rep. 903, 1 U. S. App. 578, 11 U. S. App. 791.

The facts are stated in the opinion.

*Mr.* **A. J. Dittenhoefer** for appellants.

*Mr.* **Stephen H. Olin** for appellee.

---

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4:97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

*As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws.*—see notes to Hart v. Lamphire, 7: 679, and Commercial Bank v. Buckingham, 12: 169.



Digitized by Google

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Daly filed his bill in the circuit court of the United States against George P. Webster and others for the purpose of enjoining and restraining defendants from performing the scene in the play of "After Dark," known as the "railroad scene," on the ground that it was an imitation of a similar scene in complainant's play, "Under the Gaslight," which complainant alleged he had copyrighted August 1, 1867, under the act of February 3, 1831 (4 Stat. at L. 436), and for an accounting. A motion for a temporary injunction was denied by Judge Wallace, June 19, 1889. 39 Fed. Rep. 265.

The cause having been heard on pleadings and proofs by Judge Coxe the former decision was held controlling, and the bill was dismissed. 47 Fed. Rep. 903.

Thereupon complainant carried the case to the circuit court of appeals for the second circuit, and the decree of the circuit court was reversed, and the cause remanded with instructions to enter the usual decree for account and perpetual injunction. 1 U. S. App. 573.

156] *The mandate of the circuit court of appeals having been sent down to the circuit court, that court, Judge Lacombe presiding, entered a decree, November 5, 1892, in accordance therewith, for perpetual injunction and costs, and referred the case to a master to take and state an account of the number of unauthorized performances. Proceedings were had under the references and a report filed January 17, 1893, to which exceptions were taken, and, on April 1, 1893, Judge Lacombe entered a decree overruling the exceptions, confirming the decree, and for costs.

The case was again appealed to the circuit court of appeals and the decree affirmed, June 7, 1893, with costs. 11 U. S. App. 791.

The mandate of the circuit court of appeals was filed in the circuit court, June 14, 1893, and that court, Judge Lacombe presiding, entered a decree, which, after referring to the appeal and the mandate, continued thus:

"Now, upon the said mandate and upon all the pleadings and proceedings herein and on motion of Olin, Rives, & Montgomery, solicitors for the complainant—

"It is ordered, adjudged, and decreed that the decree of the circuit court of appeals be, and the same hereby is, made a decree of this court, and that the final decree of this court, entered herein on the 1st day of April, 1893, be, and the same hereby is, in all respects affirmed."

July 18, 1893, a petition for the allowance of an appeal was presented, on behalf of defendants below, to Judge Lacombe, who had entered the decrees of the circuit court of November 5, 1892, April 1, 1893, and June 14, 1893.

This petition, after setting forth the proceedings in the case from its commencement, concluded:

"Now, therefore, these defendants, George P. Webster and William A. Brady, feeling aggrieved, do hereby appeal to the Supreme Court of the United States from the order and judgment entered on the 14th day of June, 1893, affirming the final decree entered on the 1st day of April, 1893, and from the order of the United States circuit court of appeals, entered on the 7th day of June, 1893, affirming the final *decree entered April 1, 1893, and [157 directing a mandate to issue affirming the said final decree of April 1, 1893, and also from the mandate issued in accordance therewith, and upon the said appeal defendants intend to bring up for review the order of the United States circuit court of appeals filed on the 5th day of November, 1892, directing that the decree of the United States circuit court entered on the 14th day of November, 1891, be reversed, and directing a mandate to issue to the United States circuit court accordingly, and also the mandate so issued, and also the decree entered in accordance with the said mandate in the United States circuit court on the 5th day of November, 1892, and respectfully pray that the final decree entered on the 1st day of April, 1893, and the interlocutory decree entered on the 5th day of November, 1892, and the bill of complaint, answers, replications, transcript, and mandates of the United States circuit court of appeals and decree entered in accordance therewith, and all the pleadings, depositions, evidence, exhibits, proofs, and proceedings in the said cause, be sent to the Supreme Court of the United States without delay, duly authenticated; that their appeal may be allowed, and that the Supreme Court may proceed to hear the cause anew, and that the decrees of the circuit court entered in accordance with the orders and mandate of the circuit court of appeals may be reversed, and the decree entered herein on the 14th day of November, 1891, dismissing the bill of complaint, may be affirmed or said other decree made as to the said Supreme Court shall seem just."

On the same day Judge Lacombe entered at the foot of the application: "The foregoing appeal is allowed," approved a bond, and signed a citation on appeal. Among the recitals of the bond was: "And whereas the said defendants, George P. Webster and William A. Brady, appealed to the United States circuit court of appeals from the said final decree entered as aforesaid on the 1st day of April, 1893, which said circuit court of appeals affirmed the said final decree, and on the 7th day of June, 1893, entered its order directing a mandate to issue affirming the said final decree accordingly *with costs, and a mandate [158 was issued accordingly to the United States circuit court, and an order of the United States circuit court having been duly made and entered thereon on the 14th day of June, 1893, making the said judgment of the United States circuit court of appeals the judgment of the United States circuit court, and awarding to the said complainant and respondent the sum of $30.25 costs."

The citation was preceded by a recital that it was issued by "one of the judges of the circuit court of the United States for the southern district of New York and of the United States court of appeals for the second circuit," and stated: "Whereas George P. Webster and William A. Brady have appealed to the Supreme Court of the United States from the



Digitized by Google

decree lately rendered in the circuit court of the United States for the southern district of New York made in favor of you, the said Augustin Daly, which decree was affirmed by the United States circuit court of appeals, and the said George P. Webster and William A. Brady have appealed to the said Supreme Court of the United States from the order and mandate directing an affirmance of the said decree and from the decree entered in accordance with the said order and mandate, and filed the security required by law."

These papers, together with an assignment of error, were filed in the circuit court.

Thereafter, and on August 9, 1893, the record was certified by the clerk of the circuit court under the seal thereof "to contain a true and complete transcript of the record and proceedings had in said court in the case of Augustin Daly, complainant and appellee, against George P. Webster and William A. Brady, defendants and appellants, as the same remains of record and on file in said office."

This record embraces the pleadings, evidence, master's report, orders, decrees, and proceedings in the circuit court and the two mandates from the circuit court of appeals, and necessarily does not contain the proceedings in and judgments of the latter court. It does **159** ]not appear and is *not contended that that court ever entered any order allowing an appeal or that any application and allowance were ever filed therein.

The record was filed in this court August 18, 1893, and the cause docketed as an appeal from the circuit court.

The result of all this clearly is that the pending appeal is not an appeal from the circuit court of appeals, and is an appeal from the circuit court.

But under the 5th section of the judiciary act of March 3, 1891, appeals will not lie directly to this court except in cases falling within one or the other of the classes of cases therein enumerated, and the case before us is not one of them.

By the 6th section appeals may be taken from the circuit courts of appeals to this court in all cases in which the judgments and decrees of that court are not therein made final, where the matter in controversy exceeds $1,000 besides costs, and copyright cases are such cases. But this is not an appeal from the circuit court of appeals. Our appellate jurisdiction is defined by that act and we cannot maintain jurisdiction to review the judgments and decrees of the circuit court except as therein prescribed. It does not help the matter that the circuit courts may, by the form of their entries, make the judgments and decrees of the circuit courts of appeals their judgments and decrees. We cannot revise the judgments and decrees of the appellate tribunals except when brought before us by appeal therefrom, writ of error thereto, or by certiorari. *Appeal dismissed.*

Mr. Justice **Brewer** and Mr. Justice **Peckham** did not hear the argument, and took no part in the decision of this case.

## WILLIAM PEREGO, *Appt.*, [160
*v.*
## W. H. DODGE ET AL.

(See S. C. Reporter's ed. 160-168.)

*Remedy at law—cross-complaint—action for mining claim—waiver of jury—U. S. Rev. Stat. § 2326.*

1. One who voluntarily invokes equity jurisdiction cannot urge on appeal that his complaint should have been dismissed because of an adequate remedy at law.
2. A contention that relief was improperly awarded to defendants because no cross-complaint was filed by them cannot be first made on appeal, when an answer by which defendants sought affirmative relief was treated in the court below as equivalent to a cross-pleading.
3. An action at law to recover possession when plaintiff is out of possession, or a suit in equity to quiet title when he is in possession, is an appropriate remedy to determine the right of possession of a mining claim, as between adverse claimants, under U. S. Rev. Stat. § 2326.
4. The provision for a waiver of a jury, in Utah Code, § 3375, does not preclude a waiver of the right in another mode.
5. A trial by jury in a proceeding as to adverse mining claims, under U. S. Rev. Stat. § 2326, is not made necessary by the act of Congress of March 3, 1881 (21 Stat. 505, chap. 140), providing for a finding by jury on a question of title.

[No. 273.]

*Argued May 1, 1896. Decided May 18, 1896.*

NOTE.—*As to what remedy at law will prevent remedy in equity*, see note to Tyler v. Savage, 36: 83.

*Constitutional right of trial by jury; extent of right; in what cases the right exists.*

The provision of the Federal Constitution that, in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, applies only to proceedings in the courts of the United States, and is not a restriction or limitation upon the several states, nor a regulation of the trial of actions in their courts. Twitchell v. Com. 74 U. S. 7 Wall. 321 (19: 223); Edwards v. Elliott, 88 U. S. 21 Wall. 532 (22: 487); Walker v. Sauvinet, 92 U. S. 90 (23: 678); State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; Com. v. Whitney, 108 Mass. 5; Colt v. Eves, 12 Conn. 243; Murphy v. People, 2 Cow. 815; Livingston v. New York, 8 Wend. 85, 23 Am. Dec. 622; Lee v. Tillotson, 24 Wend. 337, 35 Am. Dec. 624; Foster v. Jackson, 57 Ga. 206; Boring v. Williams, 17 Ala. 510; State v. Carro, 26 La. Ann. 377; State v. Anderson, 30 La. Ann. 557; Lake Erie, W. & St. L. R. Co. v. Heath, 9 Ind. 558; Whallon v. Bancroft, 4 Minn. 109; Huston v. Wadsworth, 5 Colo. 218.

The 7th Amendment does not apply to the preliminary examination under the fugitive slave law, such a proceeding not being according to the course of the common law, but statutory. Miller v. McQuerry, 5 McLean, 469.

This clause may, in a just sense, be construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever peculiar form they may assume to settle legal rights. Parsons v. Bedford, 28 U. S. 3 Pet. 447 (7: 737).

The provision of this Amendment, which declares that no fact tried by a jury shall be otherwise reexamined in any court of the United States than



Digitized by Google

APPEAL from a judgment of the Supreme Court of the Territory of Utah affirming the judgment of the District Court for the Third Judicial District of the Territory of Utah, in favor of the defendants, W. H. Dodge *et al.*, and against William Perego, plaintiff, quieting and confirming the title of defendants to a mining claim. *Affirmed.*

See same case below, 9 Utah, 8.

Statement by Mr. Chief Justice **Fuller:**

This was a suit brought by William Perego against W. H. Dodge and others in the district court for the third judicial district of the territory of Utah in pursuance of the provisions of U. S. Rev. Stat. § 2326. The complaint alleged the title of plaintiff to a mining claim, called the Perego, of which he averred he was in possession, described it, and stated the date of location, existence of the vein, and the other facts entitling him to a decree founded upon such title. It was then alleged that defendants had made application for a patent to certain mining claims known as the Mayflower Nos. 4 and 5, and that they had wrongfully surveyed said claims so as to conflict with plaintiff's claim; and after describing the area in conflict, averred that notice of the application for patent by defendants was published; that within the sixty-day period of publication plaintiff filed in the land office his adverse claim, and brought this suit within thirty days thereafter. Plaintiff prayed judgment and relief against defendants, "that the plaintiff is the owner and lawfully in and entitled to the possession of the last above-described premises, the area in conflict between the said Perego mining *claim and the alleged consolidat- [161
ed claim of Wm. H. Dodge *et al.* upon alleged Mayflower No. 4 and Mayflower No. 5 lode locations and the lodes therein, and quieting and confirming plaintiff's title thereto and possession thereof; that the defendants have no title to or right of possession of said conflict area or the lodes therein or any part thereof; that the defendants be restrained pending the action and upon trial perpetually from entering in or upon said conflict area or the lodes thereon or any part thereof, or mining in or extracting any ores or mineral therefrom, and from in any way interfering with the possession thereof; also that the plaintiff have all other and further proper relief, with costs of suit."

Defendants answered denying the material allegations of the complaint, and further affirmatively set up the necessary jurisdictional facts of their location, averred that the required assessment work had been fully performed, claimed a valid location of the Mayflower Nos. 4 and 5, and prayed that defendants be adjudged to be the owners and entitled to the possession of the said Mayflower Nos. 4 and 5 lodes and mining claims, including the area in conflict, and for all other proper relief, and for costs of suit.

The case came on for trial and the parties appeared by their attorneys, as the record states, "present and ready for trial and the case is tried before the court." The trial occupied three days, May 6, 7, and 9, 1891, and on May 11 the following entry was made: "This case hav-

---

accorded to the rules of the common law, applies to the facts tried by a jury in a cause in a state court. New York Sup. Ct. Justices v. United States ("The Justices v. Murray") 76 U. S. 9 Wall. 274 (19: 658).

But in the constitutions of a majority of the states there is found a guaranty that the right of trial by jury shall remain inviolate. Stimson, Am. Stat. Law, §§ 72, 73.

Trial by jury means a trial according to the course of the common law, and the same in substance as that which was in use when the Constitution was adopted. East Kingston v. Towle, 48 N. H. 64; Copp v. Henniker, 55 N. H. 179, 20 Am. Rep. 194; People, Booth, v. Fisher, 20 Barb. 652; Byers v. Com. 42 Pa. 89; Rhines v. Clark, 51 Pa. 96; Howe v. Treasurer of Plainfield, 37 N. J. L. 145; Tims v. State, 26 Ala. 165; Trigally v. Memphis, 6 Coldw. 382; Ross v. Irving, 14 Ill. 171; Whitehurst v. Coleen, 53 Ill. 247; Stilwell v. Kellogg, 14 Wis. 462; Mead v. Walker, 17 Wis. 189; Whallon v. Bancroft, 4 Minn. 109, Koppikus v. State Capital Comrs. 16 Cal. 248.

The right to trial by jury is secured by the Constitution only in cases where a jury trial was customarily used, and could legally be claimed, at the time of the adoption of the Constitution. People v. Phillips, 1 Edm. Sel. Cas. 386; Harper v. Elberton Comrs. 23 Ga. 566; Blanchard v. Rains, 20 Fla. 467; Trigally v. Memphis, 6 Coldw. 382; Kimball v. Connor, 3 Kan. 414; Ross v. Irving, 14 Ill. 171; Mead v. Walker, 17 Wis. 189.

In preserving the trial by jury "as heretofore used," the Constitution does not interfere with those tribunals which, at the time of its adoption, proceeded to judgment without the intervention of a jury. New Town Cut Comrs. v. Seabrook, 2 Strobh. L. 560; Flint River Steamboat Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248.

Not every case which is not a criminal case is a civil one, wherein by the Constitution the right of trial by jury shall remain inviolate, but that term embraces such as were treated as civil cases when the Constitution was adopted. Lake Erie, W. & St. L. R. Co. v. Heath, 9 Ind. 558; Mille Lacs County Comrs. v. Morrison, 23 Minn. 178.

An act of the legislature clogging the right of trial by jury with onerous conditions will not be pronounced unconstitutional unless it totally prostrates the right, or renders it wholly unavailing. Flint River Steamboat Co. v. Foster, 5 Ga. 194, 48 Dec. 248.

In proceedings for the condemnation of property under the power of eminent domain, the property owner has no constitutional right to a trial by jury, unless, as is the case in some states, the Constitution expressly gives it. Backus v. Lebanon, 11 N. H. 19, 35 Am. Dec. 466; Livingston v. New York, 8 Wend. 85, 22 Am. Dec. 622; Pennsylvania R. Co. v. First German Lutheran Congregation, 53 Pa. 445; Scudder v. Trenton & D. Falls Co. 1 N. J. Eq. 694, 23 Am. Dec. 756; Buffalo Bayou, B. & C. R. Co. v. Ferris, 26 Tex. 588; Cairo & F. R. Co. v. Trout, 32 Ark. 17; Dronberger v. Reed, 11 Ind. 420; Hymes v. Aydelott, 26 Ind. 431; Des Moines v. Layman, 21 Iowa, 153; Louisiana & F. Pl. Road Co. v. Pickett, 25 Mo. 535; People, Heyneman, v. Blake, 19 Cal. 579; Kendall v. Post, 8 Or. 141; Lamb v. Lane, 4 Ohio St. 167.

In the assessment and collection of taxes the constitutional provisions relating to jury trial do not apply. Grace v. Newton Bd. of Health, 135 Mass. 490; Cocheco Mfg. Co. v. Strafford, 51 N. H. 455; Harper v. Elberton Comrs. 23 Ga. 566; State, Ferguson, v. Moss, 69 Mo. 495; Cooley, Taxn. 2d ed. 45-50, 432.

In the trial of claims against the government, the claimant has no constitutional right to a trial by jury; he can only establish his claim in the mode pointed out by the statute. McElrath v. United



Digitized by Google

ing been heretofore tried and submitted to the court, and the court, being now fully advised, finds the issues for the defendants, and it is ordered that decree be entered herein in favor of the defendants and against the plaintiff and quieting and confirming the title of the defendants to the area in conflict herein, and plaintiff is allowed thirty days' stay and the same time to file notice of motion and statement on motion for new trial." The district court made findings of fact and conclusions of law, which commenced as follows: "This cause duly coming on for trial on the merits before the court without a jury, and the court having heard the pleadings, evidence, and arguments of the respective counsel, the court now makes and files the following find-
162]ings of fact and *conclusions of law." The court found the claims of defendants valid and that of plaintiff invalid as against defendants, and that defendants were entitled to a decree "adjudging them to be the owners (subject only to a paramount title of the United States) and in and entitled to the possession of the whole and every part of the said Mayflower No. 4 and Mayflower No. 5 lode mining claims, and as part thereof and belonging thereto the conflict areas described in the complaint and the whole thereof, and adjudging that the plaintiff had not at the time he filed his protest and adverse claim, or at any time since, and has not now, any right, title, or interest in or to said or any part of said conflict areas described in the complaint, and forever enjoining, estopping, and debarring the plaintiff and any and all persons claiming by, through, or under him from at any time setting up any claim of right or title to said or any part of said mining claim or conflict area, and forever confirming and quieting the defendants' right and title thereto, and awarding the defendants their costs herein as against the plaintiff."

These findings and the decree in accordance therewith were filed and entered on August 18, 1891. On August 5, 1892, plaintiff, acting through other counsel than appeared at the trial, filed a notice of intention to move the court to set aside and vacate the findings and decision and decree, and for a new trial, on the ground: "1st. Irregularity in the proceedings of the court by which the plaintiff was prevented from having a fair trial; 2d, errors of law occurring at the trial, to wit, the trial of said cause by the court without a waiver of jury by the plaintiff; 3d, because the findings and decree are irregular and void as appears by the record." This notice was accompanied by an affidavit that the value of the property exceeded $1,000; that plaintiff had not by himself in person or by attorney, at any time, orally, or in writing, waived his right of trial by jury in said suit, and that he had at all times desired to have the same tried by a jury; that no notice of the decision of the court in the cause had been served upon him or his attorney.

Notice of appeal to the supreme court of the territory of *Utah was filed August 15, [163
1891, and on August 16 plaintiff was allowed thirty days' time to file an undertaking on appeal. On September 3 a new notice was served on the motion to vacate and set aside the find-

---

States, 102 U. S. 426 (26: 189); Bledsoe v. State, 64 N. C. 262; Pelham v. State, 30 Tex. 422.

A statute authorizing the appointment of a jury of six men to ascertain and determine, out of court, the amount of damage to property done by a mob, is constitutional. *Re* Pennsylvania Hall, 5 Pa. 204.

An act providing for the final determination of the question of the election of public officers, is not unconstitutional in not giving a trial by jury. Ewing v. Filley, 43 Pa. 384; State v. Lewis, 51 Conn. 113; Allison v. State (Ga.) 17 Rep. 393; State v. Gleason, 12 Fla. 190. Compare People v. Albany & S. R. Co. 57 N. Y. 361; State, Hill, v. Burnett, 2 Ala. 140; State v. Head, 22 La. Ann. 54; People v. Cicott, 16 Mich. 309, 97 Am. Dec. 141.

In a quo warranto proceeding, the defendant has no constitutional right to a jury trial. State v. Lupton, 64 Mo. 415, 27 Am. Rep. 253; State v. Vail, 53 Mo. 97; State v. Johnson, 26 Ark. 281.

The act of Congress concerning the practice in territorial courts in recognizing the right of trial by jury in cases cognizable at common law does not include proceedings in mandamus. Chumasero v. Potts, 2 Mont. 242.

The infliction of summary punishment for a contempt of court is not an infringement of the constitutional guaranty of jury trial. State v. Doty, 32 N. J. L. 403, 90 Am. Dec. 671; Garrigus v. State, Moreland, 93 Ind. 239.

Sureties on certain kinds of bonds, such as sheriff's bonds, writ of error bonds, and bonds for costs, may have judgment rendered against them on such bonds without a jury trial. Bank of Columbia v. Okely, 17 U. S. 4 Wheat. 235 (4: 559); Gildersleeve v. People, 10 Barb. 35; Johnston v. Atwood, 2 Stew. (Ala.) 225; Murry v. Askew, 6 J. J. Marsh. 27; Young v. Wise, 45 Ga. 81; Whitehurst v. Coleen, 53 Ill. 247. Compare Hughes v. Hughes, 4 T. B. Mon. 43.

A statute giving to sureties the right to recover, by summary process, money paid by them for their principal, is constitutional. Creighton v. Johnson, Litt. Sel. Cas. 241.

A statute authorizing summary proceedings by motion against a sheriff and his sureties for official misconduct is not a violation of the constitutional guaranty of jury trial. Lewis v. Garrett, 5 How. (Miss.) 434; Lewis v. Fellows, 6 How. (Miss.) 261.

The legislature may give a corporation, created for the public benefit, a summary mode of collecting its debts. Bank of Newbern v. Taylor, 2 Murph. 266.

Upon proceedings supplementary to execution, the debtor is not entitled to a jury trial. Kennesaw Mills Co. v. Walker, 19 S. C. 104.

An action by a judgment creditor to subject property fraudulently sold to the payment of his judgment, which, but for such fraud, would have been subject to levy on execution, is not a proceeding supplementary to execution, and a trial by jury is a matter of right. Scott v. Indianapolis Wagon Works, 48 Ind. 75.

In an action for divorce, or to annul a marriage, a trial by jury is not a constitutional right. Coffin v. Coffin, 55 Me. 361; Leffel v. Leffel, 35 Ind. 76; Cassidy v. Sullivan, 64 Cal. 266.

An inquest of lunacy by a board of commissioners is no violation of the constitutional right of trial by jury. Black Hawk County v. Springer, 58 Iowa, 417; Gaston v. Babcock, 6 Wis. 503.

In an action for admeasurement of dower the defense was that the plaintiff had, by antenuptial agreement, released her claim to dower. Held, that the defendants were entitled to a jury trial. Kinne v. Kinne, 2 Thomp. & C. 398.

The provision of the insolvent laws which authorizes the issuing of a warrant to take possession of all the estate of the debtor, on the petition of a creditor, without a trial by jury on the facts al-



Digitized by Google

ings and decree and for new trial. On September 10 thirty days was allowed plaintiff for an undertaking on appeal. On September 19 the motion to vacate and set aside the decree and grant a new trial was submitted and overruled, and on October 4, 1892, notice of appeal from that order was given, and an undertaking on appeal was subsequently filed. No statement or bill of exceptions appears in the record. The case was brought to a hearing in the supreme court of the territory of Utah, and the judgment of the district court was affirmed with costs. 9 Utah, 3. Affidavits of the value of the matter in dispute were submitted and an appeal allowed to this court.

Errors were assigned to the effect that the supreme court of Utah erred in affirming the decree of the district court in that the district court should have dismissed the complaint because in equity when the remedy was at law, should not have awarded defendants affirmative relief in the absence of a cross-complaint, and should not have tried the case without a jury.

*Messrs.* **Benjamin F. Lee** and *Gerald G. P. Jackson* for appellant.

*Messrs.* **Arthur Brown** and *William H. Dickson* for appellees.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

In the territory of Utah there was but one form of action, legal or equitable, through the intervention of a jury or by the court itself, according to the nature of the relief sought, provided, however, that no party could be "deprived of the right of trial by jury in cases cognizable at common law." U. S. Rev. Stat. § 1868; act of April 7, 1874 (18 Stat. at L. 27, **164**]*chap. 80, § 1); Utah Comp. Laws, § 3126; *Idaho & O. Land Improv. Co.* v. *Bradbury*, 132 U. S. 509, 513 [33: 433, 436].

By Utah Code Civ. Proc. § 3468, an action might be brought by any person against another who claimed an estate or interest in real property adverse to him, for the purpose of determining such adverse claim; and this complaint was, in effect, a bill to quiet title, as against an adverse claim, and prayed accordingly for a decree quieting plaintiff's title, and adjudicating that defendants had no title or right of possession, for injunction, and for general relief.

We are of opinion that it was competent for the district court to grant the relief sought, and that it had jurisdiction of the subject-matter. Plaintiff, having voluntarily invoked the equity jurisdiction of the court, was not in a position to urge, on appeal, that his complaint should have been dismissed because of adequacy of remedy at law. Even a defendant, who answers and submits to the jurisdiction of the court, and enters into his defense at large, is precluded from raising such an objection on appeal for the first time. *Reynes* v. *Dumont*, 130 U. S. 354, 395 [32: 934, 946]; *Kilbourn* v. *Sunderland*, 130 U. S. 505 [32: 1005]; *Brown* v. *Lake Superior Iron Co.* 134 U. S. 530, 536 [33: 1021, 1025]. Nor did the supreme court of Utah err in overruling the contention that affirmative relief was improperly awarded defendants because they had filed no cross-complaint. Such relief was sought by the answer, which was treated by the parties and proceeded on by the court as equivalent to a cross-pleading. The objection came too late in the appellate tribunal. *Coburn* v. *Cedar Valley Land & C. Co.* 138 U. S. 196, 221 [34: 876, 886].

U. S. Rev. Stat. § 2325, points out how patents for mineral lands may be obtained. Application is filed in the proper land office as therein prescribed and notice of such application published, and if no adverse claim is filed at the expiration of sixty days of publication,

---

leged in the petition, is constitutional. O'Neil v. Glover, 5 Gray, 144.

The constitutional right of trial by jury does not extend to equity cases, and the legislature may provide that all suits in equity may be tried by the court without the intervention of a jury. Plimpton v. Somerset, 33 Vt. 283; Goodyear v. Providence Rubber Co. 2 Cliff. 351; Dunnell v. Keteltas, 16 Abb. Pr. 205; McCarty v. Edwards, 24 How. Pr. 236; Wynkoop v. Cooch, 89 Pa. 450; Lucken v. Wichman, 5 S. C. 411; Kimball v. Connor, 3 Kan. 414; Hixon v. George, 18 Kan. 253; Helm v. First Nat. Bank, 91 Ind. 44; Heacock v. Hosmer, 109 Ill. 245; Conran v. Sallew, 22 Mo. 320; Weil v. Kume, 49 Mo. 158; Stilwell v. Kellogg, 14 Wis. 462; Lake v. Tolles, 8 Nev. 285. Compare Marston v. Brackett, 9 N. H. 336; Hoitt v. Burleigh, 18 N. H. 389. See Bellows v. Bellows, 58 N. H. 60.

But the legislature cannot convert a legal right into an equitable one so as to infringe upon the right of jury trial. Norris's Appeal, 64 Pa. 275.

In a suit brought to foreclose a mortgage there is no constitutional right to a trial by jury. Carmichael v. Adams, 91 Ind. 526; Middletown Sav. Bank v. Bacharach, 46 Conn. 513; Stilwell v. Kellogg, 14 Wis. 462; Connecticut Mut. L. Ins. Co. v. Cross, 18 Wis. 109.

Questions concerning trust funds belong to a court of equity, and do not require a jury trial. Sands v. Kimbark, 27 N. Y. 147.

The rule that in equitable suits a jury will not be called as a matter of right, applies to an action alleging the cancelation and delivery of a note by mistake and asking for relief. Weil v. Kume, 49 Mo. 158.

On petition for the allowance of a claim against property in the hands of a receiver, a jury trial is not a matter of right. Kennedy v. Indianapolis, C. & L. R. Co. 2 Flip. 704. See Litchfield v. Desendorf, 11 Hun, 358.

The constitutional right of trial by jury applies to an action to abate a nuisance and recover the damages occasioned thereby, although the complaint is in form as for equitable relief and the prayer for damages may be regarded as incidental thereto. Hudson v. Caryl, 44 N. Y. 553; Hyatt v. Myers, 73 N. C. 232.

A suit on a guardian's bond is not an equitable but a common-law suit, wherein a trial by jury is a matter of right. Galway v. State, Ballow, 93 Ind. 161.

Although an action for partition is an equitable action, yet under the Code, where issues of fact are presented by the pleadings, a jury trial may be demanded. Hewlett v. Wood, 62 N. Y. 75.

Compulsory references, in cases requiring the examination of long accounts, were well known and sanctioned by statutes in some of the states before the adoption of their constitutions; such references may therefore be authorized by their legislatures, without contravening the constitutional right of trial by jury. Lee v. Tillotson, 24



Digitized by Google

it is assumed that the applicant is entitled to a patent, and that no adverse claim exists.

Section 2326 provides as follows:

"Where an adverse claim is filed during the period of publication, it shall be upon oath of 165]the person or persons making *the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

It is then provided that after judgment the party shall file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general as to the requisite amount of labor or improvements, and that the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, whereupon a patent shall issue for the claim.

Thus, the determination of the right of possession as between the parties is referred to a court of competent jurisdiction, in aid of the land office, but the form of action is not provided for by the statute; and apparently an action at law or a suit in equity would lie, as either might be appropriate under the particular circumstances, an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession.

In the case before us plaintiff averred that he was in possession, and framed his complaint in that aspect. Having instituted his suit as an equity cause, issues were made up and the case heard and disposed of and went to decree as in equity, and nearly a year afterwards he carried the case to the supreme court of the territory and complained that the decree was fatally erroneous in that a jury trial was not had. But where a case is one of equitable jurisdiction only, the trial court is not bound to submit any issues of fact to a jury, and, if it does so, is at liberty to disregard the verdict and findings of the jury, "either by setting them or any of them aside, or by letting them stand, and allowing them more or less *weight[166 in its final hearing and decree, according to its own view of the evidence in the cause." *Idaho & O. Land Improv. Co.* v. *Bradbury*, 132 U. S. 515 [33: 437].

By his selection of this form of action, and his proceeding to a hearing and decree without objection, his present contention in respect of deprivation of trial by jury came too late. Even if the action should have been an action at law, still the court had jurisdiction, and a defective exercise of its power would only amount to an irregularity capable of being waived by the parties and susceptible of correction as any other mere errors are corrected. Indeed, if the case were treated as an action at law, the trial by jury might have been waived, and we think was waived in this instance.

By the 4th section of the act of Congress of March 3, 1865 (13 Stat. at L. 500, chap. 86), carried forward into U. S. Rev. Stat. §§ 649, 700, it was enacted that "issues of fact in civil cases in any circuit court of the United States may be tried and determined by the court without the intervention of a jury,

---

Wend. 387, 35 Am. Dec. 624; Mead v. Walker, 17 Wis. 190; Dane County Supers. v. Dunning, 20 Wis. 210; Perkins v. Scott, 57 N. H. 55.

But a law compelling a person to arbitrate upon a claim which properly should be the subject of an action, without his assent, is contrary to the constitutional provision securing him a right to a trial according to the course of the common law. People, Baldwin, v. Hawa, 37 Barb. 440; McMartin v. Bingham, 37 Iowa, 284, 1 Am. Rep. 265.

The legislature has no power, where a claim is made by individuals upon a municipal corporation for damages on account of the failure of the corporation to award a contract to them, to direct that the damages shall be ascertained by arbitrators, to be appointed as prescribed in the act, without requiring the assent of the corporation. Baldwin v. New York, 45 Barb. 359.

But in other states it is held that a compulsory reference of issues of fact to the determination of a single person is a violation of the constitutional rights of the parties. Bernheim v. Waring, 79 N. C. 56; Smith v. Bryce, 17 S. C. 588; Pfeiffer v. Maltby, 38 Tex. 533; Grim v. Norris, 19 Cal. 140, 79 Am. Dec. 206; Graves v. Northern P. R. Co. 5 Mont. 556, 51 Am. Rep. 51.

The courts of the United States cannot deprive either party of the right of trial by jury, by sending the issues of referees, without his explicit consent. United States v. Rathbone, 2 Paine, 578.

A statute authorising actions to be tried by referees upon the consent of the parties is not repugnant to the constitutional provision securing trial by jury. Home Ins. Co. v. Security Ins. Co. 23 Wis. 171.

After the evidence was in, on a trial before a jury, the court ordered a verdict for the plaintiff, subject to the opinion of the the court, whether, on the evidence, the defendant was liable, and then rendered judgment for the defendant. Held, that the plaintiff was unlawfully deprived of his right to a trial by jury. Baylis v. Travelers' Ins. Co. 113 U. S. 316 (28: 989).

The right of trial by jury is not impaired by a law giving to the court the right to assess damages without a jury in case of default. Hopkins v. Ladd, 35 Ill. 178; Raymond v. Danbury & N. R. Co. 43 Conn. 596.

Statutes which authorise a justice of the peace or other inferior court to decide questions without a jury, but which give an appeal from his judgment to a court which tries by jury, are constitutional. Beers v. Beers, 4 Conn. 535, 10 Am. Dec. 186; State v. Brennan's Liquors, 25 Conn. 278; Emerick v. Harris, 1 Binn. 416; Biddle v. Com. 13 Serg. & R. 405; Steuart v. Baltimore, 7 Md. 500; Thomas v. Bibb, 44 Ala. 721; Keddie v. Moore, 2 Murph. 41, 5 Am. Dec. 518; Wilson v. Simonton, 1 Hawks, 482; Morford v. Barnes, 8 Yerg. 444; State v. Beneke, 9 Iowa, 208.

The word "jury," as used in the constitutional guaranties of trial by jury means a jury of twelve men. Opinion of Justices, 41 N. H. 550; People, Murray, v. New York Justices, 74 N. Y. 406; People v. Kennedy, 2 Park. Crim. Rep. 312; Dowling v. State, 5 Smedes & M. 664; Work v. State, 2 Ohio St. 307, 59 Am. Dec. 671; Lamb v. Lane, 4 Ohio St. 167; Vaughn v. Scade, 30 Mo. 600; Campau v. Detroit, 14 Mich. 276; May v. Milwaukee & M. R. Co. 3 Wis. 219.



Digitized by Google

whenever the parties, or their attorneys of record, file a stipulation in writing with the clerk of the court waiving a jury."

In *Kearney* v. *Case*, 79 U. S. 12 Wall. 275 [20: 395], this statute was considered, and it was held that parties might waive a jury, as they could before the act was passed, without filing a written stipulation, but that in such case no error could be considered in the action of the court on such trial, and that parties would be presumed in this court to have waived their right to trial by jury of issues of fact whenever it appeared that they were present at the trial in person or by counsel and made no demand for a jury. See also *Bond* v. *Dustin*, 112 U. S. 604 [28: 885].

By § 3340 of the Code of Utah, issues of fact in actions at law are required to be tried by jury, and by § 3378 provision is made for the waiver of a jury as therein prescribed. But as ruled in *Kearney* v. *Case*, *supra*, the right may be otherwise waived, and such waiver be sufficient to support the judgment, although not sufficient to authorize the review of the rulings of the court at the trial. Tested by any rule, there can be no question that this [167 record shows such waiver here. *It is true that on the motion to vacate the decree and for a new trial an affidavit was filed that there was no waiver orally or in writing, in person or by attorney, but we suppose that to mean a waiver according to § 3378, and that was not material. Moreover, the supreme court held that the notice of intention to move for a new trial, the affidavit and the minutes of the trial court were no part of the record, because not embodied in any statement of case or bill of exceptions, and that appears to be the settled rule in that jurisdiction.

But it is insisted that by force of the act of Congress of March 3, 1881 (21 Stat. at L. 505, chap. 140), this class of cases must be disposed of on trial by jury according to the course of the common law, and that either these entire proceedings were absolutely void, not for want of equity but for want of power, or that, at all events, the requirement of trial by jury is imperative and cannot be waived, and that the 7th article of amendment and the law were violated by proceeding to judgment without it.

The amendatory act provides "that if, in any action brought pursuant to U. S. Rev. Stat. § 2326, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent to the land in controversy until he shall have perfected his title." We do not think the intention of this act was to change the methods of trial. Its manifest object was to provide for an adjudication, in the case supposed, that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed. In other words, the duty was imposed on the court to enter such judgment or decree as would evidence that the applicant had not established the right of possession, and was for that reason not entitled to a patent. The whole proceeding is merely in aid of the land department, and the *object of the [168 amendment was to secure that aid as much in cases where both parties failed to establish title as where judgment was rendered in favor of either, and while the finding by a jury is referred to, we think that, where the adverse claimant chooses to proceed by bill to quiet title, and as between him and the applicant for the patent neither is found entitled to relief, the court can render a decree to that effect, just as it would render a judgment on a verdict if the action were at law. If Congress had intended to provide that litigation of this sort must be at law, or must invariably be tried by a jury, it would have said so. There is nothing to indicate the intention thus to circumscribe resort to the accustomed modes of procedure or to prevent the parties from submitting the determination of their controversies to the court.

It must be remembered that it is "the question of the right of possession" which is to be determined by the courts, and that the United States is not a party to the proceedings. The only jurisdiction which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands as against the government may be determined by the courts in a suit against the latter. *United States* v. *Jones*, 131 U. S. 1 [33: 90]; *Last Chance Min. Co.* v. *Tyler Min. Co.* 157 U. S. 683, 694 [39: 859, 864].

It was held by Mr. Justice Lamar, when Secretary of the Interior, that, notwithstanding the judgment of a court on the question as to the right of possession between two litigants, it still remained for the land department to pass on the sufficiency of the proofs, and to ascertain the character of the land and whether the conditions of the law had been complied with in good faith before the government parted with the title. 4 U. S. Land Dec. 314, 316. But whatever the extent of the conclusiveness of a judgment under the statute, and granting that the government may be said to be interested in respect to the possessory title, we do not regard the act of March 3, 1891, as intended to require or requiring all suits under § 2326 to be actions at law and to be tried by a jury.

*Judgment affirmed.*

---

## SINGER MANUFACTURING COMPANY, *Appt.*, [169

*v.*

## JUNE MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 169-204.)

*Using name of patented article after expiration of the patent—protecting others—attempting to deceive the public.*

1. The right to use the generic name of a patented article in every form passes to the public with the dedication resulting from the expiration of

NOTE.—*As to when an injunction will be granted restraining the unauthorized use of trademarks, see* note to McLean v. Fleming, 24: 828.

*As to trademark, right to; what may be; transfer*



Digitized by Google

the patent, even if the name is the surname of the patentee or original manufacturer.

2. One using the name of another which has become the generic name of a patented article on which the patent has expired must adopt such precautions as will protect the property of others and prevent injury to the public interest, if by so doing no substantial restriction is imposed on the right of freedom of use.

3. An unlawful attempt to deceive the public in the sale of Singer sewing machines by inducing the belief that they were made by the Singer Manufacturing Company is shown where the shape, material, and place of position of the plate upon the machine, as well as the words upon it, were in imitation of the plate used by the Singer Company, while there was also a colorable imitation of the device cast in the legs of the machines, and the numbers used in the machines began in the millions to convey the impression that they were the result of a long-established manufacture, and in addition to this a tension screw on the machine of the Singer Company, which was covered by a subsisting patent, was imitated by a dummy screw on the other machine, which served no mechanical purpose whatever.

[No. 6.]

*Argued January 9, 10, 1894. Ordered for reargument January 15, 1894. Reargued October 16, 17, 1894. Decided May 13, 1895.*

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois dismissing a suit in equity brought by the Singer Manufacturing Company, plaintiff, against the June Manufacturing Company for an injunction to restrain the use by defendant in its business of the word "Singer" as a designation of sewing machines manufactured by it and for an accounting for the profits. *Reversed and cause remanded, with direction to enter a decree in favor of plaintiff, and perpetually enjoining the defendant, and for an account of profits, etc.*

See same case below, 41 Fed. Rep. 208.

Statement by Mr. Justice White:

The Singer Manufacturing Company, a corporation organized under the laws of the 170] state of New Jersey, filed its bill *in equity in the circuit court of the United States for the northern district of Illinois against the June Manufacturing Company, an Illinois corporation.

The bill alleged that the complainant was engaged in the manufacture of sewing machines, and had an exclusive right to the word "Singer" as a tradename and "designation" for such sewing machines; it averred that defendant, for the purpose of inducing the belief that sewing machines manufactured and sold by it were made by the complainant, was making and selling machines of the exact size, shape, ornamentation, and general external appearance as the machines manufactured by complainant; that the defendant was imitating a described trademark which the complainant had for many years placed upon its machines; that it was imitating "devices" cast by complainant in the legs of the stands of the machines manufactured and sold by it; and that the defendant advertised the machines by it made, by means of cuts and prints, imitations of the cuts and prints made by complainant and representations of the machines manufactured by complainant. An accounting for the profits received by defendant was prayed, as also an injunction to restrain the use by defendant in its business of the word "Singer" as a designation of the machines manufactured by it, and to restrain a continuation of its other alleged wrongful practices.

In its answer, the defendant denied that it had attempted to avail itself of the complainant's "representation" and tradename, or that in anything done by it it had sought to induce the belief that the machines manufactured and sold by it were manufactured by the complainant, and alleged that the form, size, shape, and appearance of its machines were public property, and not the exclusive property of the complainant. It was averred that the defendant constructed its machines on the principles of machines which had been protected by letters patent, held by the Singer Company, by license or otherwise, but which patents had long since expired, and that the name "Singer" was the generic name of such machines. The defendant admitted that it affixed an oval plate to its machines, but claimed that the device placed by it thereon *was dissimilar to that [171 used by the complainant, and averred that the words "Improved Singer," stamped on such plate, was the correct name of the machine. It was also averred that while formerly an elaborate monogram was placed on said plate, composed of the letters "S. M. Co.," being the initials of the "Standard Manufacturing Company" (a former corporate name of defendant), that the monogram now placed upon said plate was "J. M. Co." It was also claimed that the device on the legs of the stands of machines manufactured by the defendant was not an imitation of that employed by complainant upon its machines, but that on the contrary the device used by the defendant was adopted by it to prevent confusion in the minds of the public as to the manufacture of the machines.

It appeared from the evidence that the construction of the Singer sewing machines was commenced in 1850, in the latter part of which year the firm of I. M. Singer & Co. was formed. Witnesses testified that the firm named made and introduced the first practical sewing machine. I. M. Singer & Co. continued in the business of manufacturing sewing machines until June, 1863, when that firm transferred all its assets, property, patents, and goodwill to the Singer Manufacturing Company, a corporation formed under the laws of the state of New York, and the manufacture of Singer sewing machines was continued by that corporation. In the year 1873 a new corporation, known also as the

*of; infringement,*—see note to Coats v. Merrick Thread Co. 37: 847.

*As to trademark; right to; what may be; infringement; assignment; when protected; misrepresentation in; use of name; remedy in equity; injunction,*—see note to Lawrence Mfg. Co. v. Tennessee Mfg. Co. 34: 997.



Digitized by Google

Singer Manufacturing Company, was organized under the laws of New Jersey, to which corporation the New York concern transferred its assets. The stockholders in both companies were the same, and the business of the New York corporation has ever since been continued by the New Jersey corporation.

The original members of the firm of I. M. Singer & Co.—I. M. Singer and Edward Clark—were the principal stockholders of both corporations, and on their death, in 1875 and 1882, respectively, their interests passed to their children and grandchildren, who yet are among the principal stockholders of the concern. During the existence of the firm of I. M. Singer & Co., and the life of its 172] successor, the New York *association, the domicil of both was in New York, and after the creation of the New Jersey corporation that company also carried on the business through a general office in New York city.

Machines of various patterns were constructed by the firm and the corporations, intended both for domestic purposes and for use in manufacturing. The differences in the arrangement of varying types of these machines were in some respects essential, and extended to many, but not all, of the mechanical principles employed, although all the machines were in certain particulars covered by a few fundamental patents of which the corporations were owners or licensees. None of the machines, however, were patented as a whole.

The patent to Elias Howe, granted September 10, 1846, and which remained in force until 1867, covered the use of the eye-pointed needle in combination with a shuttle and automatic feed. A patent issued to John Bachelder in 1849, and which remained in force until about 1877, covered the principle of a continuous feed. The firm of I. M. Singer & Co. purchased this patent, and it subsequently passed to their corporate successors. A third important patent utilized in the machines was one issued in 1851 to Allen B. Wilson, for a feeding bar. This extended patent expired in 1872. The Singer Manufacturing Company became a part owner of this latter patent.

The use of the patents of Howe and Bachelder were not confined to the Singer machines, but were employed under license by manufacturers of other sewing machines, where an automatic feed was employed.

Nearly one hundred other patents relating to sewing machine mechanism and attachments to sewing machines were owned or controlled from time to time by the Singer firm or its corporate successors, and among those owned by them were "a vibrating presser, thread guide, binders, embroidery attachments," etc. The use of some of these was early discontinued, and others have been and are still in general use by the Singer Company on machines made by it, and some were used under license by other manufacturers. 173]*Whilst it is true that all the patented inventions owned or controlled by the Singer Company were not all used on every type of Singer machine, it is also true that all Singer sewing machines contained some features of some of these inventions which to that extent distinguished them from machines made by others of a similar class. Among the machines made by the Singer corporation for general domestic use was one by it styled the "Singer New Family Machine."

These Singer "New Family" machines were intended to take the place of a machine which had theretofore been known as Old Family and letter A machines, and were first sold in the spring or winter of 1866. The New Family machine was essentially different in form and appearance and in some of the mechanical principles employed from machines of other manufacturers used for similar purposes, and formed a distinctive Singer machine.

Some of its parts were covered by patents. It passed into very general use, and its sale formed a large part of the business of the corporation.

On the front or top of the arm of the machines made by the Singer firm was marked the name "I. M. Singer & Co.," and on those constructed by the corporations the words "The Singer Mfg. Co." At infrequent periods, prior to 1877, the successors of I. M. Singer & Co. marked upon various styles of their machines, sometimes upon the treadle and again on the arm of the machine, the name "Singer" alone, but even where this was done the corporate name of the company was always somewhere affixed to the machines. Some few years before the Bachelder patent expired the Singer Company began, in addition to the name of the corporation, as above stated, to affix to all its sewing machines, of every grade, a trademark, which device consisted of a shuttle, two needles crossed with a line of cotton in the form of a letter "S," with a bobbin underneath. This device was placed in the center of an ellipse. Surrounding the upper half of the device were the words "The Singer Mfg. Co. N. Y.," and underneath it were the words "Trade Mark;" beneath those words a wreath of flowers. This trademark was stamped on a brass *plate of oval shape, which plate was at-[174 tached at the base of the arm of the machine, so as to be readily seen and to be at once under the eye of a person using or looking at the machine.

The Bachelder patent expired about 1876, and at once on the monopoly which it had created coming to an end, the prices of the Singer machines were very materially reduced, and competitors sprang into existence, who began to manufacture machines which they called Singer sewing machines. Controversies arose between the Singer Manufacturing Company and such persons as to the right of the latter to make machines in the form and appearance of those manufactured by the Singer Company, and their right to style such machines Singer machines. In order to more completely mark the machines made by it, the Singer Company, in 1879, cast their trademark on the side of the legs of the stand of each machine, and at the time this was done the following warning was issued:

Warning! To protect the public against the devices of a swarm of counterfeiters every



Digitized by Google

real Singer Machine is now being made with our trademark Cast into the Stand as in the above cut.

Buy No Machine Without it.

The trademark was registered in July, 1885.

As already stated, some of the machines made by the Singer Company before the expiration of the Bachelder and other patents were sporadically marked "Singer" in addition to the name or initials of the firm or corporation, and to the trademark. After the expiration of the last of the patents the Singer corporation changed its method and put the word "Singer" on the front and rear of the arm of each machine, unaccompanied with the name of the corporation, except in so far as it appeared on the trademark. At all times, also, it was the custom of the Singer Company to mark on its machines the number thereof; these numbers ran consecutively from the beginning, and therefore indicated with substantial accuracy the total number of ma-
175]chines made. In *addition all the machines, during the life of the various patents, were marked with the numbers of the patents by which the mechanism was in part covered.

The commencement of the Singer business was small. Thus, in 1851 the firm of I. M. Singer & Co. employed about twenty-five machinists, and up to that time had only sold about three hundred machines. The proof shows that the business was rapidly pushed, agencies were established in all parts of the world, and the machines became widely known. In the development of the business the Singer Company constantly advertised their machines as "Singers," and they were referred to on the bill heads, circulars, etc., of the company as "*Singers*," or *Singer* sewing machines. The agents of the company in selling the machines spoke of them as *Singer* machines, and the greater part of the business signs in use by the company and its predecessors at its various offices or agencies, as also its wagons, cards, letter heads, bill heads, etc., had upon them the words "Singer Sewing Machines."

The vast increase in the business carried on by the Singer corporation is shown by the fact that in the year 1870, 127,883 Singer machines were sold; in the year 1878, 356,432; whilst in 1882 the sales aggregated 603,292. Of those sold in the year 1882, 451,538 were the New Family Machines.

The defendant started in Chicago in 1879 in the business of manufacturing "sewing machine heads," under the name of the Standard Manufacturing Company, which company purchased a business theretofore carried on by one Hughes, who thereupon entered the employ of the Standard Company as superintendent. A sewing machine head is the mechanical part of a sewing machine ready to be attached to a stand. These heads, thus made, were in all respects similar as to style and pattern with the "New Family Singer."

For some time its entire product was furnished by the Standard Company to one H. B. Goodrich of Chicago, a dealer in sewing machines. In 1880 sales were made to one or two other dealers, and still other customers were supplied in 1881. In the month of June, 1881, the name of the corporation was changed to the June Manufacturing Company. *In the fall of 1881 that company [176 commenced manufacturing the stands as well as heads of machines, and sold its machines direct to dealers throughout the country.

Although the machine heads as stated were in the exact form and shape of the New Family Singer, they contained no mark indicating the source of their manufacture, except an oval brass plate a trifle larger than but of exactly the same shape of the one found on the Singer machines, and attached at the base of the arm in the same position as the Singer Company placed its plates. Upon this plate the Standard Company stamped in circular form, around the upper half, the words "Improved Singer," with the word "Chicago" at the lower part of the plate, and a monogram, "S. M. Co.," with the words "Trade Mark" above such monogram. The oval plate thus used by the Standard Company continued to be used by the June Company after the change of name; this fact being explained by testimony showing that there was a supply of these plates on hand. When the supply was exhausted, the June Company attached an oval plate of exactly the same description, except that the monogram was "J. M. Co.," and the words "J. Mfg. .Co." were placed beneath the monogram. In both of these plates the words "Improved Singer" were cast in prominent lines. The June Company never attempted to register a trademark.

On the bed plate of each machine the defendant stamped or cast a number, and on one of these machines, put in evidence by complainant, the number was 2,543,707. The president of the defendant company gave as an explanation for this method of numbering that he merely followed what he claimed was the custom of other companies, to affix three additional figures to the actual number of the machines manufactured. When the defendant began to make complete machines, that is, including stands, it placed on the latter a device, cast in the legs thereof, in the same relative position as was the trademark device cast in the legs of the stand which had been adopted by the Singer Company, as heretofore stated, in lieu of the plain style of stand used during the life of the patents. This device of the defendant consisted of *the word "Singer" alone, in very [177 large letters; the word "I. S." in monogram form above this word "Singer," and the words "J. Mfg. Co.," in small letters underneath. Concerning this stand, the president of the defendant testified as follows: "The stand being the most prominent and more generally noticed by the public, we adopted as a device . . . the word 'Singer' alone, which, never to our knowledge, had been used by the Singer Manufacturing Company, with the letters 'J. Mfg. Co.' under it, and the large letters 'I. S.' in monogram over it." At the time when the right to make Singer machines vested in the public, the complainant also used a device for regulating the tension, called a tension screw,



Digitized by Google

which it placed upon the top of the face plate of its machines. This improvement continued, however, to be protected by a patent. In precisely the same position upon its machines, the June Company placed a "dummy" screw.

The defendant advertised its machines extensively, and also issued many circulars concerning them, and furnished with their machines a printed warranty. Their machines were referred to as the "Improved Singer Sewing Machine," "June Improved Singer Sewing Machine," "Genuine Improved Singer," "The Improved Singer," "High Grade Singer Sewing Machines," "Improved Singer New Family Sewing Machine," and "The New Greatly Improved Singer Sewing Machine;" but all the circulars offered in evidence contained substantially the statement that the machines referred to in them were manufactured by the June Manufacturing Company.

After hearing there was a decree dismissing the bill for want of equity, the court below substantially concluding, first, that the sewing machine in the form made by the defendant was public property, and therefore no infringement of the rights of the complainant had resulted from its use; second, that the name "Singer" was also public property, and hence no legal injury was caused to the complainant by the use of the name in the manner and form in which it was employed by the defendant; third, that the defendant had not imitated the trademark of the complainant. The opinion is reported in 41 Fed. Rep. 208.

*Messrs.* **Lawrence Maxwell, *Jr.***, and **Charles K. Offield** for appellant.

*Messrs.* **John G. Elliott** and **William Henry Browne** for appellee.

Mr. Justice **White** delivered the opinion of the court:

The facts recapitulated in the statement just made are undisputed. Those which are seriously controverted and upon which the legal issues depend are: First, were the sewing machines made by the Singer Company so, in whole or in part, protected by patents as to cause the name "Singer" to become, during the existence of the monopoly, the generic designation of such machines, as contradistinguished from a name indicating exclusively the source or origin of their manufacture; second, irrespective of the question of patent, was the name "Singer," by the consent and acquiescence of Singer himself and that of the Singer Company, voluntarily used as a generic designation of the class and character of machines manufactured by I. M. Singer & Co. or the Singer Manufacturing Company, so that in consequence of this voluntary action the name became the generic designation of the machines, or was the name solely used by the company as a tradename, a trademark, or one exclusively indicating machines made by I. M. Singer & Co. or the Singer Manufacturing Company?

We will consider these two controverted propositions of facts separately. Before doing so we deem it well to say that on both these questions there are many conflicting and confusing statements in the record, adduced by both parties. Whatever may be their merit, they are not testimony in the proper sense of the word, being rather the expression of the opinion of the witnesses than substantive proof of existing facts. And the testimony of this character in favor of the respective parties, if allowed all possible weight, produces no affirmative result, since it is equally as strong by way of opinion on one side as it is upon the other. We shall therefore rest our conclusions on a consideration of the facts themselves, [179 rather than upon the conflicting and irreconcilable opinions of witnesses.

*First.* It cannot be denied that the Singer machines were covered by patents, some of which were fundamental, some merely accessory. There can also be no doubt that the necessary result of the existence of these patents was to give to the Singer machines, as a whole, a distinctive character and form which caused them to be known as Singer machines, as deviating and separable from the form and character of machines made by other manufacturers. This conclusion is not shaken by the contention that, as many different machines were made by the Singer Manufacturing Company, therefore it was impossible for the name "Singer" to describe them all, because the same designation could not possibly have indicated many different and distinct things. The fallacy in the argument lies in failing to distinguish between genus and species. To say that various types of sewing machines were made by the Singer Manufacturing Company in no way meets the view, borne out by the testimony, that all machines by them constructed were in some particular so made as to cause them all to be embraced under the generic head of Singer, and to be protected in some respects by the patents held by the company. From this fact it resulted that during the life of the patents none of the machines as a whole were open to public competition. Persuasive support of this view is afforded by the fact that in many adjudicated cases, to which we shall have occasion hereafter to advert, where, since the expiration of the patents, the right to the exclusive use of the name "Singer" has been asserted, it has, almost without exception, been found that Singer machines, as a whole, were a distinctive class, preserving a general uniformity of nature however varying may have been the types by which their structure was manifested.

It may be assumed that the proof establishes that for certain classes of the general type of Singer machines, that is, the species used only for particular and exceptional manufacturing purposes, an addition of some other word or description to the generic name "Singer" was necessary to completely convey a perfect indication of the machine [180 referred to, that is, Singer "carpet machine," Singer "leather machine," etc. But this fact does not counterbalance the conclusive proof that, as a whole, the Singer machines represented a general class, and were known to the public under that comprehensive name



Digitized by Google

and no other. Indeed, any probative force which might result from the fact that, as to a particular class of Singer machines, some additional word may have been essential to a perfect designation bears no relation to the variety of the machine which the defendant is averred to have unlawfully imitated. That machine known as the "New Family," intended for general domestic purposes, constituted the larger part of the enormous output of the Singer companies. It was of a uniform type and had no other possible designation, in the mind of the general public, other than the word "Singer." The foregoing views find conclusive support from the unquestioned fact that upon the expiration of the patents held by the Singer company the price of the machines made by that company fell enormously in amount. Thus, to adopt the theory advanced by the complainant we should have to deny the inevitable law of cause and effect.

Abundant corroborative proof that the word "Singer" became generically descriptive of the machines manufactured by the Singer Company is afforded by the conduct of that company. From the beginning every machine made by it had conspicuously marked on it the name of the manufacturer, "I. M. Singer & Co." or the "Singer Mfg. Co.;" only occasionally was the word "Singer" alone attached to any of the machines. This continued until the technical trademark came into play, which was about the time the patents expired. After this the trademark was affixed to the machines, and the name of the manufacturer, except as indicated by the trademark, disappeared, and was regularly supplanted by the word "Singer" alone. The trademark then adopted could not have been essential to designate the source of manufacture, since from the inception the company had subserved that purpose by marking the name of the firm or corporation plainly upon the machines. The omission of the name [181]*indicating the origin of manufacture and the substitution of the word "Singer," just before the expiration of the patents, suggest a coincident relation of purpose which is not explained by any testimony in the record. This coincidence between the expiration of the patents and the appearance of the trademark on the machines and the use of the word "Singer" alone tends to create a strong implication that the company, with the knowledge that the patents which covered their machines were about to expire, substituted the trademark for the plain designation of the source of manufacture theretofore continuously used, and added the word "Singer," which had become the designation by which the public knew the machine, as a distinctive and separate mark, in order thereby to retain in the possession of the company the real fruits of the monopoly when that monopoly had passed away.

*Second.* Irrespective of the patents and the designative significance of the word "Singer," which arose during their life, the proof also clearly establishes that the word "Singer" was adopted by I. M. Singer & Co., or the Singer Manufacturing Company, in their dealings with the general public, as designative of their distinctive style of machines rather than as solely indicating the origin of manufacture. This is demonstrated by the fact that at the inception of the manufacture of the machines the word "Singer" alone was not used on them. The general method then adopted to indicate the source of the manufacture was to mark conspicuously on the machines the name of the firm or corporation. The name "Singer" alone was used by the company on signs, on wagons, on advertisements, on bill heads, accompanied with the name of the firm or corporation. This could have had no other purpose than to denote to the public the corporation's understanding of the general name of the machines made by it. There is no proof that the name thus adopted by the corporation did not subserve this contemplated purpose of designating all the machines of whatever type, or that its inadequacy compelled the corporation to add to it, in particular cases, the word "carpet" or "leather" to describe machines intended for other than general domestic use. The conduct *of the company in adopting the trade [182 mark and first affixing the name at the time of the expiration of the patents, to which we have already adverted, is also of great significance in considering the question of the voluntary previous selection by the corporation of the word "Singer" as a designation.

But the proof renders it unnecessary to base our conclusions upon the deductions to which we have just referred, since it contains affirmative testimony as to the purpose of I. M. Singer & Co. or the Singer Manufacturing Company, in their general use of the word "Singer."

William F. Proctor was sworn for the complainant, and his relations with the Singer Company are shown by the following excerpts from his testimony:

*Q.* State in detail what connection you have had with the sewing machine business.

*A.* I have been connected with the manufacture of sewing machines since 1853 up to the present time. I have been engaged in various capacities, first as a machinist with I. M. Singer & Co. I afterwards went to France for them for the sale of a patent, and established a manufactory of machines there. Since the Singer Manufacturing Company has become established I have been a director since its origin and an officer in various capacities, and am now its vice president.

Continuing his examination-in-chief, the following questions were asked this witness:

*Q.* 72. For what purpose and for what object was the name "Singer" marked upon the machines of the complainant and its predecessors, and applied to them in advertising them?

Objected to by defendant's counsel as being merely accumulative and irrelevant to the issue.

*A.* To designate them and after the formation of the company to gratify the desire of Mr. Singer to perpetuate his name associated with the machine.



Digitized by Google

Q. 73. State what you mean by designating them.

A. As a Singer machine.

Q. 74. State whether the name was con-
183] tinued by the *corporate successors of the firm for any other reason than to gratify the desire of Mr. Singer.

Objected to as suggesting the answer the witness is to make.

A. It was to continue the name.

It is true that this conclusive statement, made by the vice president of the company, is followed in the continuation of his testimony by several leading questions, which could not have failed to suggest to him that it was desired that the statement thus made should be materially qualified. But the result of this effort to lead the witness rather strengthens than weakens the force of the testimony just quoted.

We conclude, then, upon the two pivotal and controverted questions of fact, which we proposed at the outset to consider—

1st. That the Singer sewing machines were covered by patents which gave to the manufacturers a substantial monopoly; that in consequence of the enjoyment of this monopoly by the makers, the name "Singer" came to indicate, in its primary sense, to the public, the class and type of machines made by the Singer Company or corporations, and thus this name constituted their generic description; that also as this name applied to and described machines made alone by the Singer firm or corporations, the use also came in a secondary sense to convey to the public mind the machines made by the firm or corporations.

2d. That the word "Singer" was also voluntarily applied by the Singer firm or companies as a designation of the general type of machines made by them, with the intention that such machines should be accepted by the public under that name; thus the course of the business and the purposes for which the name "Singer" was used brought about results identical with those which sprang from the existence of the monopoly; hence that name became not only the description of the machines, but also, in a subordinate sense, the indication of the source of manufacture.

The case as stated by the appellant in the pleadings and in the argument fails to dis-
184] criminate between distinct and *different causes of action. The right to relief arising from the wrongful use by the defendant of a specific trademark and from the illegal use of a tradename, and also acts asserted to have been done by him which would justify the relief commonly accorded where unfair competition in business has been carried on, are commingled and treated as one. Avoiding, for the sake of brevity, a statement of the elementary grounds upon which rest the law of specific trademark, of tradename, or of unfair competition in business, and the distinction between them, it is sufficient to say that all the relief which complainant seeks is necessarily embraced in the following classification:

1st. Unfair competition in business, resulting from the form in which the defendant makes its machines, and also from the employment by it of the word "Singer" in connection with the marks and devices on the machines, and the use of the same name in circulars and advertisements; 2d, the alleged violation of the specific trademark of the complainant by the devices found on defendant's machines and by the use of the word "Singer." We will examine these contentions.

*First. Unfair competition in business, resulting from the form in which the defendant makes his machines, and also from the use made by him of the word "Singer" in connection with the marks and devices on his machines, and the use of the same in circulars and advertisements.*

This question subdivides itself into two inquiries: Where the name of a patented machine, whether it be an arbitrary one or the surname of the inventor or manufacturer, has become, during the monopoly flowing from the patent, a generic description of such machine, and at the same time in a secondary and relative sense indicates to the public the source of manufacture, has the manufacturer, on the cessation of the monopoly, the right to prevent the making by another of a like machine in the form in which it was made during the life of the patents, and has he also a right to prevent another from calling such machines, by him made, by the generic name attributed to them during the monopoly, and from placing this name on them, and using it in advertisements, in *circulars, and generally for such [185 purposes as his interest may suggest? If no right exist in the original manufacturer to prevent another, under the foregoing circumstances, from making machines of like form and structure and using the name, under the conditions stated, does the one who so makes and uses or sells them enjoy the liberty without any resulting duty whatever, or is it accompanied with the obligation of so exercising the right as not to destroy the property of others, and also in such a manner as not to deceive the public?

It is self-evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property. It is upon this condition that the patent is granted. It follows, as a matter of course, that on the termination of the patent there passes to the public the right to make the machine in the form in which it was constructed during the patent. We may therefore dismiss without further comment the complaint, as to the form in which the defendant made his machines. It equally follows from the cessation of the monopoly and the falling of the patented device into the domain of things public, that along with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing which has arisen during the monopoly, in consequence of the designation having been acquiesced in by the owner, either tacitly, by accepting the benefits of the monopoly, or expressly, by his having so connected the name with the machine as to lend countenance to the re-



Digitized by Google

sulting dedication. To say otherwise would be to hold that, although the public had acquired the device covered by the patent, yet the owner of the patent or the manufacturer of the patented thing had retained the designated name which was essentially necessary to vest the public with the full enjoyment of that which had become theirs by the disappearance of the monopoly. In other words, that the patentee or manufacturer could take the benefit and advantage of the patent upon the condition that at its termination the monopoly should cease, and yet when the 186]end was reached disregard the *public dedication and practically perpetuate indefinitely an exclusive right.

The public having the right on the expiration of the patent to make the patented article and to use its generic name, to restrict this use, either by preventing its being placed upon the articles when manufactured, or by using it in advertisements or circulars, would be to admit the right and at the same time destroy it. It follows, then, that the right to use the name in every form passes to the public with the dedication resulting from the expiration of the patent.

Nor is this right governed by different principles where the name, which has become generic, instead of being an arbitrary one, is the surname of the patentee or original manufacturer. It is elementary that there is a right of property in a name which the courts will protect. But this right, like the right to an arbitrary mark or any other, may become public property by dedication or abandonment. The latter is defined by De Maragy, in his International Dictionary of Industrial Property, as follows:

"Abandonment in industrial property is an act by which the public domain originally enters or re-enters into the possession of the thing (commercial name, mark, or sign), by the will of the legitimate owner. The essential condition to constitute abandonment is that the one having a right should consent to the dispossession. Outside of this there can be no dedication of the right, because there cannot be abandonment in the juridical sense of the word."

But it does not follow, as a consequence of a dedication, that the general power, vested in the public, to make the machine and use the name imports that there is no duty imposed on the one using it to adopt such precautions as will protect the property of others and prevent injury to the public interest, if by doing so no substantial restriction is imposed on the right of freedom of use. This principle is elementary and applies to every form of right, and is generally expressed by the aphorism *Sic utere tuo ut alienum non laedas*. This qualification results from the same principle upon which the dedication rests, that is, a regard for the interest of the public and the rights of individuals.

187]* It is obvious that if the name dedicated to the public, either as a consequence of the monopoly or by the voluntary act of the party, has a two-fold significance, one generic and the other pointing to the origin of manufacture, and the name is availed of by another without clearly indicating that the machine upon which the name is marked is made by him, then the right to use the name because of its generic signification would imply a power to destroy any good-will which belonged to the original maker. It would import, not only this, but also the unrestrained right to deceive and defraud the public by so using the name as to delude them into believing that the machine made by one person was made by another.

To say that a person who has manufactured machines under a patented monopoly can acquire no goodwill, by the excellence of his work or the development of his business during the patent, would be to seriously ignore rights of private property, and would be against public policy, since it would deprive the one enjoying the patent of all incentive to make a machine of a good quality, because at its termination all the reputation or goodwill resulting from meritorious work would be subject to appropriation by everyone. On the other hand, to compel the one who uses the name after the expiration of the patent to indicate that the articles are made by himself in no way impairs the right of use, but simply regulates and prevents wrong to individuals and injury to the public.

This fact is fully recognized by the well-settled doctrine which holds that although "everyone has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right are subjected is *damnum absque injuria*. But although he may thus use his name, he cannot resort to any artifice or to do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name." *Russia Cement Co.* v. *Le Page*, 147 Mass. 206, 208; *Pillsbury* v. *Pills-*[188 *bury*, 24 U. S. App. 395, 404; *Croft* v. *Day*, 7 Beav. 84; *Holloway* v. *Holloway*, 13 Beav. 209; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 408; *Montgomery* v. *Thompson* [1891] App. Cas. 217; *Howard* v. *Henriques*, 3 Sandf. 725; *Meneely* v. *Meneely*, 62 N. Y. 427, 20 Am. Rep. 489; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.* 138 U. S. 537 [34: 998]; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540 [35: 247]; *Coats* v. *Merrick Thead Co.* 149 U. S. 562 [37: 847]. Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, in itself amounts to an artifice calculated to produce the deception alluded to in the foregoing adjudications.

Indeed, the enforcement of the right of the public to use a generic name, dedicated as the results of a monopoly, has always, where the facts required it, gone hand in hand with the necessary regulation to make it accord with the private property of others and the requirements of public policy. The courts have always in every such case, without ex-



Digitized by Google

ception, treated the one as the co-relative or resultant of the other.

In *Fairbanks* v. *Jacobus*, 14 Blatchf. 337 (1877), it was sought to restrain the defendant from making or selling an imitation of Fairbanks' scales and from casting the words "Fairbanks' patent" upon scales so made in imitation of scales of the manufacture of the complainant, Johnson, J., held (p. 341) that, by reason of the expiration of the patents under which plaintiff manufactured his scales, there was not, in the acts complained of, any invasion of the plaintiff's rights. The court said:

"Certainly, if the words 'Fairbanks' patent' do not mean to assert the existence of a patent securing the scales, but only that they are made in conformity with, and embody the invention of, the expired Fairbanks' patent, they are free to all the world. What is not free is to pretend that a scale is made by one person which is, in fact, made by another."

In *Singer Mfg. Co.* v. *Larsen*, 8 Biss. 151 (1878), it was sought to restrain the defendant [189] from the use of the name *"Singer" in connection with machines manufactured or sold by him. Drummond, J., observed (p. 152):

"On a machine called 'The Singer Sewing Machine' there were various patents. These patents have all expired, and nothing can therefore be claimed under them. Other persons cannot be prevented from manufacturing a machine like the Singer sewing machine, and which may be called, to distinguish it from other machines, 'Singer's Sewing Machine.' If a sewing machine has acquired a name which designates a mechanism or peculiar construction, parts of which are protected by patents, other persons, after the expiration of the patents, have the right to construct the machine and call it by that name, because that only expresses the kind and quality of the machine."

But in upholding the right a duty was also enjoined, the court adding:

"While I hold that the defendant is not prevented from constructing a 'Singer Sewing Machine,' still he cannot be permitted to do any act the necessary effect of which will be to intimate or to make anyone believe that the machine which he constructs and sells is manufactured by the plaintiff. Neither has he the right to use any device which may be properly considered a trademark, so as to induce the public to believe that his machine has been manufactured by the plaintiff; and therefore I shall modify the injunction in this case by simply requiring the defendant to refrain from selling any Singer sewing machines manufactured by any person or company other than the plaintiff, without indicating in some distinct manner that the said machines were not manufactured by the Singer Manufacturing Company."

In *Singer Mfg. Co.* v. *Stanage*, 6 Fed. Rep. 279 (1881), Treat, District Judge, said (p. 280):

"The plaintiff and its predecessors had, in connection with others, through patents, a monopoly as to certain sewing machines known as the 'Singer machines.' When these patents expired every one had an equal right to make and vend such machines. If the patentees or their assignees could assert successfully an exclusive right to the name 'Singer' as a *trademark, they would [190] practically extend the patent indefinitely."

The court entered into no discussion of the limitations resting on a party in the use of a name or designation dedicated to public use because the facts rendered it unnecessary, the court saying (p. 282):

"Sixth. The distinctive names and devices of the plaintiff corporation were not used by the defendant, and no one of ordinary intelligence could suppose that the 'Stewart' manufacture was the manufacture of the plaintiff. Each had its distinctive and detailed names and devices, so that there was no probability that the machine made by one would be mistaken for the manufacture of the other."

In *Singer Mfg. Co.* v. *Riley*, 11 Fed. Rep. 706 (1882), where a suit was brought to restrain the use of the word "Singer" by the defendant in connection with sewing machines, the preliminary injunction was refused, following the decision in the *Stanage Case*. The court called attention to the fact that the word "Singer" was not used on defendant's machines. It made no ruling as to the duty of the defendant to so use the name "Singer" as not to deceive, because it found that the defendant's devices were not calculated to mislead.

In *Brill* v. *Singer Mfg. Co.* 41 Ohio St. 127, 52 Am. Rep. 74 (1884), it was held (pp. 187 *et seq.*) that as Singer machines had been protected by patents and during the existence of such patents became known and identified in the trade by their shape, external appearance, or ornamentation, the patentee could not, after the expiration of the patent, prevent others from using the same modes of identification, in machines of the same kind, manufactured and sold by them. It was also held that Singer machines had become known to the public by a distinctive name during the existence of the patent, and that anyone at the expiration of the patent might make and vend such machines and use such name.

It would appear that the name "Singer" had not been, directly or indirectly, marked upon the machines. It might also be inferred from the report of the case that the designation of defendant's machine was accompanied by a statement as to *who was the manufac- [191] turer. At all events, the court did not discuss the obligation of the defendant to avoid misleading since, under the facts, the question did not arise.

In *Gally* v. *Colt's Patent Fire-Arms Mfg. Co.* 30 Fed. Rep. 122 (1887), it was held that the name "Universal," applied by a patentee to his patented printing press, upon the expiration of the patent, could not be appropriated by the inventor as a trademark. Shipman, J., said (p. 122):

"Any manufacturer who uses the name now does so to show that he manufactures the Gally press, which he may rightfully do, and does not represent to the public that it is getting any skill or excellence of work-



Digitized by Google

manship which Gally possessed, and does not induce it to believe that the presses are manufactured by the plaintiff."

The machines manufactured by the defendant, upon which was stamped the name "Universal," also bore the name of their maker.

*Merriam* v. *Holloway Pub. Co.* 43 Fed. Rep. 450 (1890), involved the right of the defendants to use the words "Webster's Dictionary" in connection with a reprint of the 1847 edition of that work upon which the copyright had expired. Mr. Justice Miller, in the opinion delivered by him, said (p. 451):

"I want to say, however, with reference to the main issue in the case, that it occurs to me that this proceeding is an attempt to establish the doctrine that a party who has had the copyright of a book until it has expired may continue that monopoly indefinitely, under the pretense that it is protected by a trademark or something of that sort. I do not believe in any such doctrine, nor do my associates. When a man takes out a copyright for any of his writings or works, he impliedly agrees that, at the expiration of that copyright, such writings or works shall go to the public and become public property. I may be the first to announce that doctrine, but I announce it without any hesitation. If a man is entitled to an extension of his copyright, he may obtain it by the mode pointed out by law. The law provides a method of obtaining such extension. The copyright law gives an author or proprietor a monopoly [192] of the sale of his writings for a definite period, but the grant of a monopoly implies that, after the monopoly has expired, the public shall be entitled ever afterwards to the unrestricted use of the book."

And the justice further observed (p. 452):

"The contention that complainants have any special property in 'Webster's Dictionary' is all nonsense, since the copyright has expired. What do they mean by the expression 'their book,' when they speak of Webster's Dictionary? It may be their book if they have bought it, as a copy of Webster's Dictionary is my book if I have bought it. But in no other sense than that last indicated can the complainants say of Webster's Dictionary that it is their book."

Although the right to use the words was thus adjudged, the duty not to deceive by the method of their employment was upheld and enforced, the court saying (p. 451):

"Now, taking all these allegations together, there may be some evidence of a fraudulent intent on defendants' part to get the benefit of the reputation of the edition of Webster's Dictionary which the complainants are publishing, and it may possibly be that, in consequence of the facts averred, the public are deceived, and that the complainants are damaged to some extent. We think, therefore, that this is one of those cases where, as the facts are stated in the complaint, the interests of justice would be best subserved by requiring the defendants to answer, so that there may be a full and fair investigation of the law and facts upon a final hearing."

In *Merriam* v. *Famous Shoe & C. Co.* 47 Fed. Rep. 411, a ruling similar to that announced by Mr. Justice Miller was made. But although the right to use the words "Webster's Dictionary" was sustained, the obligation to so use as not to mislead was again stated, Thayer, J., saying (p. 414):

"It is unnecessary at this time to determine what form of relief should be administered, if the allegations of the bill are proved on final hearing. It may be that some change in the form of defendant's circulars and advertisements will be all the relief that the circumstances of the case fairly want; or it may be that the proof will warrant an order that the defendant place a notice in their book that it is a reprint of the edition [193] of 1847 of Webster's Dictionary, with such additions as they may have made to it. This is a matter, however, to be considered on final hearing, when the exact nature of the injury and the causes that mislead the public are ascertained. It is sufficient to say at present that, on the showing made, the complainants are entitled to relief, and the demurrer to the bill is accordingly overruled."

The principles thus maintained by the American cases are also supported by the English decisions.

In *Wheeler & Wilson Mfg. Co.* v. *Shakespear*, 39 L. J. Ch. 36 (1869), Vice Chancellor James refused to enjoin the use of the name of Wheeler & Wilson as a designation in advertisements of machines dealt in by the defendant. The advertisements of the defendant clearly indicated, however, that the machines in question were not manufactured by the plaintiffs. He said (p. 40):

"I could not restrain the defendant from using the words 'Wheeler & Wilson' as descriptive of any sewing machine other than the sewing machine manufactured by the plaintiffs. It appeared to me that 'Wheeler & Wilson' was really not the name of the manufacturer or the name of the company, either abbreviated or otherwise, but the name of the thing in particular. As the plaintiffs' bill represents it, it is called 'The Wheeler & Wilson Sewing Machine,' and there being no other designation for this particular machine, one can easily understand that that was the name of the patentee or the person who at one time had the patent, for I take it that Wheeler & Wilson are not really the patentees' names, because the allegation in the bill is that they became entitled to the letters patent. It seems to me that the name 'Wheeler & Wilson' machine has come to signify the thing manufactured according to the principle of that patent. That being so, I cannot restrain anybody, after the expiration of the patent, from representing his article as being the article which was so patented. A man cannot prolong his monopoly by saying 'I have got a trademark in the name of a thing which was the subject of the patent,' and therefore to that extent I think the plaintiffs are not entitled to the relief they ask."

In *Cheavin* v. *Walker*, L. R. 5 Ch. [194] Div. 850 (1877), it was held that the trademark or label of the defendant, which fully stated that a filter to which it was attached, upon which the patent had expired, was made by him, did not infringe the trademark or la-



Digitized by Google

bel of the complainant, who had succeeded to the rights of the original patentee. In the court of appeals James, L. J., said (p. 863):

"It is clear that on the expiration of this patent it was open to all the world to manufacture the article which had been patented; that is the consideration which the inventor gives for the patent. The invention becomes then entirely *publici juris*. The plaintiff, and also the defendants, had a right to tell the world that they were making the article according to the expired patent, and both parties have done this. It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trademark. Whatever is mere description is open to all the world. In the present case the plaintiff's label was nothing more than a description, and he cannot, therefore, have protection for it as a trademark."

Bagalley, L. J., said (p. 865):

"The vice chancellor thought that the words 'Cheavin's patent' were calculated to deceive the public. But 'Cheavin's patent' is a correct description of the principle according to which the article was made, and there follows a distinct statement that it was manufactured by Walker, Brightman, & Co. Therefore on this ground also the case made by the plaintiff's claim fails."

In *Linoleum Mfg. Co.* v. *Nairn*, L. R. 7 Ch. Div. 834 (1878), where the right to the exclusive use of the word "linoleum" was asserted, the substance to which the name was attached having been covered by patents which had expired, Fry, J., said (p. 836):

"In the first place, the plaintiffs have alleged and Mr. Walton has sworn that, having invented a new substance, namely, the solidified or oxidized oil, he gave to it the name of 'linoleum,' and it does not appear that any other name has ever been given to [195] this substance. It appears that *the defendants are now minded to make, as it is admitted they may make, that substance. I want to know what they are to call it. That is a question I have asked, but I have received no answer; and for this simple reason that no answer could be given, except that they must invent a new name. I do not take that to be the law. I think that if 'linoleum' means a substance which may be made by the defendants, the defendants may sell it by the name which that substance bears. . . . In my opinion it would be extremely difficult for a person who has been by right of some monopoly the sole manufacturer of a new article, and has given a new name to the new article, meaning that new article and nothing more, to claim that the name is to be attributed to his manufacture alone after his competitors are at liberty to make the same article."

As the article manufactured by the defendant was clearly marked with the source of manufacture, the case was not one requiring the enforcement of the duty to designate the origin of the manufacture, but the court also said (p. 837):

"If I found they were attempting to use that name in connection with other parts of the trademark, so as to make it appear that the oxidized oil made by the defendants was made by the plaintiffs, of course the case would be entirely different. . . . It appears to me, therefore, that there has been neither infringement of any essential part of the plaintiffs' trademark nor any attempt on the part of the defendants to represent the goods which they intended to sell as goods made by the plaintiffs." (p. 838).

Nor is there anything in the Scotch case of *Singer Mfg. Co.* v. *Kimball*, 11 Ct. Sess. 3d ed. § 267, or the English cases of *Singer Mfg. Co.* v. *Wilson*, L. R. 3 App. Cas. 376, reversing L. R. 2 Ch. Div. 434, and *Singer Mfg. Co.* v. *Loog*, L. R. 8 App. Cas. 15, L. R. 18 Ch. Div. 412, which in any way contravenes the doctrines heretofore stated. In the *Kimball Case* the fact that there had been no patents in England was expressly referred to, the court finding that for many years prior to 1870 machines like Singer machines had been *manufactured under [196 various names in England and Scotland by other parties than the Singer Company. It was upon these facts that the court based the right of the Singer Company to an exclusive trademark in the name. Indeed, Lord Ardmillon (p. 276) expressly declared that he regarded the facts, above stated, as distinguishing the case from *Wheeler & Wilson Mfg. Co.* v. *Shakespear*, 39 L. J. Ch. 36.

This distinction is also true of *Singer Mfg. Co.* v. *Wilson* and *Singer Mfg. Co.* v. *Loog*, *supra*. In neither was there a claim of a generic description as a consequence of a monopoly, and it becomes, therefore, needless to review these cases at length. It may, however, be said that both these cases recognize the right of a party in his advertising matter to state that his machines were constructed upon the Singer system or model.

The contention advanced by the complainant that his right to the exclusive use in the name "Singer," after the expiration of the patents, although that name became the generic description of the machines during the monopoly, is in accord with the law of France, is without foundation. On the contrary, the French writers and courts recognize the doctrine to be substantially like that which is enforced in America and England. Braun, Marques de Fabrique, § 68, p. 232, says:

"The question is not whether an inventor can attribute to his patented invention a particular designation which remains the exclusive property of the patentee by the same title and for as long a time as the invention itself. This is evident, for without this right existing in the patentee his patent would be in certain respects illusory. But at the expiration of the patent does the designation fall into the public domain with the patented invention? Does the patented thing lose the right to be solely individualized in favor of the inventor by the designation which up to that time has served as its mark. Three theories present themselves."

After fully stating these three different points of view the author adds:

"To resume, the three systems may be formulated as follows: 1st. The designation of the thing patented becomes public property on the expiration of the patent. 2d. The patentee retains in every case the



Digitized by Google

sole use to the designation, after the expiration of his monopoly, if he had deposited the name [as a legal trademark] before the expiration of the patent. 3d. The designation continues to belong to the patentee in every case but one, if the name given to the product has become the only and necessary designation of the patented article. We think there can be no hesitation in pronouncing in favor of the third proposition, except, however, that it requires to be completed by a second exception, which is that the name is also public property if, in the interval which has elapsed between the expiration of the patent and the deposit of the trademark, the inventor has allowed the designation to become public property."

Pouillet, Brevets d'Invention, Nos. 327, 328, pp. 278, 279, reviews the opinions of the commentators and the decisions of the courts as follows:

"The expiration of a patent has for its natural effect to permit every one to make and sell the object patented; and it has also for effect to authorize every one to sell it by the designation given it by the inventor, but upon the condition in every case not, in so doing, to carry on unfair competition in business [Concurrence Dé Loyal] against him. Without this, say Pecard & Olin, the monopoly would be indefinitely prolonged because, in commerce, one could not recognize the thing produced by the invention under any other designation than that given during the life of the patent. However, the question is not without difficulty when the name of the inventor enters into the designation of the product. . . . In such case the court should not allow third persons to employ the name of the inventor, but with extreme caution and by taking the most rigorous measures to prevent a confusion as to the origin of the product, which it would be very easy to abuse. It has been adjudged conformably to these principles (Paris, 20th of January (1844), Trib. Comm.; Seine, 22d of December (1853): Trib. Comm.; Seine, 28th of July (1853)): 1st. That the denomination under which a patented article is designated by the inventor falls into the public domain at 198]*the same time as the invention, at least when this denomination has been drawn from common language and does not reproduce the name of the inventor himself, nevertheless the right to announce the product under the same denomination affixed to it by the inventor does not go to the extent of allowing its sale with the plates, or stamps, or metallic paper, or tickets, or the manner of securing it, or the envelopes or form or color analogous to that used in such a way as to cause appearances of deception. Nancy, 7th of July (1854) 2 Verly, Sir. (1855), 581. 2d. That when an invention falls into the public domain, it enters with the name which the inventor has given it, and he cannot prevent a person from employing this designation; thus, the inventor of the 'harmonium' was not allowed after the expiration of his patent to prevent others from making this instrument and selling it under the name which had been given to it. Paris, 30th December (1859); Pattaille (1859), 414. 3d. That the patented invention falling into the public domain can be advertised and sold by the designation given to it by the inventor, even when the name of this last person figures therein. If by usage and by the act of the inventor his name has become the necessary element to designate the product, it is essential, however, that the competitors of the inventor avoid all confusion which can induce the public into error as to the origin of the products." Cassation, 31st of January (1860), Charpentier.

The same author again says:

"In principle a surname is inalienable and each one keeps the imprescriptible ownership in it. We know, however, that when the name of the inventor has become the designation of the thing patented, it belongs to every one, at the expiration of the patent, to make use of this designation." Pouillet, Brevets d'Invention, § 329, p. 280.

The French decision mainly relied on by the plaintiff in error is that relating to the use of the surname Bully in a toilet preparation known as the "Vinegar of Bully," but the facts upon which the case was decided are misapprehended. In that case the sole question was whether the surname "Bully" had been either expressly or tacitly dedicated by *him to the public by connecting it with [199 his preparation. The court of cassation rested its decree upon the finding of fact by the court below, which was conclusive on it, that no such association of the name, by either the express or tacit consent of Bully, had ever taken place. We excerpt, briefly, the language of the court of cassation as reported in the Dictionary of De Marafy, vol. 1, p. 11:

"Whereas, without doubt, the methods of manufacture of a patented product fall into the public domain after the expiration of the patent, but it is otherwise as to the name of the inventor, and that this rule suffers no exception, except in the case where, either by long usage or in consequence of a consent either expressly or tacitly given by the inventor, his surname having become the sole usual designation of his invention, it is employed to indicate the mode or the system of manufacture and not the origin of the particular manufacture. Whereas, it is declared by the judgment appealed from that Claude Bully has never manifested an intention to indissolubly bind up or unite his name for the benefit of his invention," etc., etc.

And the same distinction controlled the case of Howe, where the French courts enjoined the use of that name on a sewing machine. There the court, as a basis of its decree, used the following language: "And whereas, they [Howe and his heirs] did not take patents in France for the invention and their improvements, which have therefore fallen into the public domain," and have "never, either expressly or tacitly, abandoned the right to affix his name [that of Howe] to the products of the invention."

The result, then, of the American, the English, and the French doctrine universally upheld is this, that where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either ex-



Digitized by Google

press or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created. Where another avails himself of this public dedication to make the machine and use the generic desig-
200] nation, he *can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements, and by other means, subject, however, to the condition that the name must be so used as not to deprive others of their rights or to deceive the public, and, therefore, that the name must be accompanied with such indications that the thing manufactured is the work of the one making it as will unmistakably inform the public of that fact.

It remains only to apply these legal conclusions to the facts already recapitulated. Of course, from such application all claim of right, on the part of plaintiff in error, to prevent the use of the name "Singer" is dispelled. This leaves only two questions: First, whether that name as used in the circulars and advertisements of the defendant is accompained with such plain information as to the source of manufacture of the machines by them made as to make these circulars and advertisements lawful; and, second, whether this also is the case with the use of the word "Singer" on the machines which the defendant makes and sells. As to the first of these inquiries, the proof shows that the circulars were so drawn as to adequately indicate to any one in whose hands they may have come that the machines therein referred to were made by the June Manufacturing Company, and not by the Singer Company. We therefore dismiss the circulars from view. As to the advertisements, without going into details, some of those offered in evidence were well calculated to produce the impression on the public that the Singer machines referred to therein were for sale by the June Manufacturing Company, as the agent or representative of the Singer Company.

On the second question the proof also is clear that there was an entire failure on the part of the defendant to accompany the use of the word "Singer," on the machines made and sold by him, with sufficient notice of their source of manufacture, as to prevent them from being bought as machines made by the Singer Manufacturing Company, and thus operate an injury to private rights and a deceit upon the public. Indeed, not only the acts of omission in this regard, but the things actually done, give rise to the over-
201] whelming implication that *the failure to point to the origin of manufacture was intentional, and that the system of marking pursued by the defendant had the purpose of enabling the machines to be sold to the general public as machines made by the Singer Company.

The marks on the machines are found on the oval plate and on the device cast in the leg of the stand. On the first of these (the oval plate) the words "Improved Singer" are found in prominent letters, unaccompanied by anything to indicate that the machines were manufactured by the June Company, except the words "J. M. Co." and the monogram "J. Mfg. Co." The shape of the plate, its material, the position in which it was placed upon the machines, its size, its color, the prominence given to the words "Improved Singer," all could have conveyed but one impression to one not entirely familiar with the exact details of the device upon the Singer Company's plates, and that is that the machine was one coming from the factory of the Singer Company. So, in the second (the device cast in the legs of the stand), the word "Singer" alone without any qualification is there found in bold relief, and above this the words "I. S." and in small letters "J. Mfg. Co." The similarity between the letter J. and the letter S., the failure to state in full the name of the manufacturer, the general resemblance to the device of the Singer Company, the place where it was put, which had no necessary connection with the structure or working capacity of the machines, and the prominence of the casting of the word "Singer" in comparison with the other mark, bring out in the plainest way the purpose of suppressing knowledge of the actual manufacturer and suggesting that it was made by the Singer Company. It is significant of the fraudulent purpose of the defendant that the device which the Singer Company cast in the legs of its machines was only by them adopted after the expiration of the patents and the resulting cessation of the monopoly, and for the avowed purpose of distinguishing their machines from others which had come upon the market, and therefore the colorable imitation which the defendant immediately proceeded to make had no necessary connection with the right to make machines according to the Singer system *and to call and sell [202 them as Singer machines in consequence of their dedication to the public. But there are other circumstances in the record which throw light upon the facts which we have just stated, and lend to them an increased significance. On the plate of the Singer machines there was plainly marked a number, which the proof shows had run with relatively accurate consecutiveness from the beginning. These numbers, as a result of the vast development of the business of the Singer Company and the enormous number of New Family machines sold by them, ran into the millions. The defendant, who was in the commencement of his business, at once began also to number his machines in the millions, thereby conveying the obvious impression that they were the result of a manufacture long established, and as they were marked "Singer" suggesting, by an irresistible implication, that they were machines made by the Singer Company. There is an attempt in the evidence to explain this fact by the statement that it was the habit of sewing machine makers to add three figures to the actual number of machines by them made, but the proof does not sustain the explanation, and if it did, it amounts to but the contention that the commission of a fraud should be condoned because others were guilty of similar attempts to deceive. There is another significant fact. On the machines made by the Singer Company there was a tension screw. This screw on the Singer machines served a



Digitized by Google

useful mechanical purpose, and did not pass in to the public domain with the expiration of the fundamental patents, because specially covered by a subsisting patent. The defendant in making his machines placed thereon a dummy screw, serving no mechanical purpose whatever, and which could have had no object but that of producing the impression that his machine was made by the Singer Company.

There remains only for examination the second proposition, that is:

*Second. The alleged violation of the specific trademark of the complainant by the device found on the defendant's machine and by the use of the word "Singer."*

This question is necessarily involved in and 203]determined by *the foregoing considerations. There can be no doubt, if the right to use the word "Singer" did not exist, that the plate and the device cast in the leg of the defendant's machine would be a plain infringement of the specific trademark of the Singer Company. There can also be no doubt that the marks used by the defendant would not constitute a specific infringement unless they contained the word "Singer" or a representation equivalent in the public mind to that word. It follows that the marks used by the defendant become only an infringement from the fact that each of them contained and embodied the word "Singer." But the word "Singer", as we have seen, had become public property, and the defendant had a right to use it. Clearly, as the word "Singer" was dedicated to the public, it could not be taken by the Singer Company out of the public domain by the mere fact of using that name as one of the constituent elements of a trademark. In speaking of a mark containing composite words, some of which become dedicated to public use, others of which are not, Braun in his Traité des Marques de Fabrique, No. 135, pp. 354, 355, says: "The surname, says a judgment of the court of Paris, is property in the most necessary and in the most imprescriptible sense. Paris, 18th of November (1875) Pattaille. Does this mean that a mark composed of a name can never be lost? The courts, on the contrary, have decided that two elements which compose a name, that is, the surname of the individual or the firm upon the one side and its tracing or distinctive form [in a trademark] are susceptible of falling into the public domain together or separately. In this last case, the exclusive right to the trademark may survive the exclusive right to the name and *vice versa*. Thus one may keep the exclusive right to the use of the name, while the remainder of the mark will belong to every one."

The right to use the word "Singer," which caused the imitative infringement in the device, being lawful, it is plain that the infringement only resulted from the failure to plainly state, along with the use of that word, the source of manufacture, and therefore this branch of the question is covered by the same legal principle by which we have determined the other.

204]*It follows, therefore, that the judgment below, which recognized the right of the defendant to make or vend sewing machines in the form in which they were made by him—that is, like unto the machines made upon the principles of the Singer system—with the use of the word "Singer," without a plain and unequivocal indication of the origin of manufacture, was erroneous.

*Therefore the decree below must be reversed* and the cause be remanded, with directions to enter a decree in favor of complainant, with costs, perpetually enjoining the defendant, its agents, servants, and representatives, first, from using the word "Singer" or any equivalent thereto, in advertisements in relation to sewing machines, without clearly and unmistakably stating in all said advertisements that the machines are made by the defendant, as distinguished from the sewing machines made by the Singer Manufacturing Company; second, also perpetually enjoining the defendant from marking upon sewing machines or upon any plate or device connected therewith or attached thereto the word "Singer," or words or letters equivalent thereto, without clearly and unmistakably specifying in connection therewith that such machines are the product of the defendant or other manufacturer, and therefore not the product of the Singer Manufacturing Company. And the decree so to be entered must also contain a direction for an accounting by the defendant as to any profits which may have been realized by it, because of the wrongful acts by it committed.

And it is so ordered.

---

## SINGER MANUFACTURING COM- [205
## PANY, *Appt.*,
## *v.*
## GEORGE P. BENT.

(See S. C. Reporter's ed. 205-207.)

*Violation of trademark and tradename.*

The lettering "New York S. M. Mfg. Co.," corresponding in size and style of letters with the lettering "The Singer Manfg. Co." on the brass plates of the latter company cannot lawfully be used on sewing machines similar to those of the Singer Company, by a company bearing the former name, although it does not employ the name "Singer," when the position and size, as well as the inscription found on the plate, are imitations of those used by the Singer Company, and are calculated to deceive the public as to the source of the manufacture.

[No. 7.]

*Argued January 9, 10, 1894. Ordered for Reargument January 15, 1894. Reargued October 16, 17, 1894. Decided May 18, 1896.*

NOTE.—*As to when an injunction will be granted restraining the unauthorized use of trademarks*, see note to McLean v. Fleming, 24: 828.

*As to trademark, right to; what may be; transfer of; infringement*,—see note to Coats v. Merrick Thread Co. 37: 847.

*As to trademark, right to; what may be; infringement; assignment; when protested; misrepresentation in; use of name; remedy in equity; injunction*,—see note to Lawrence Mfg. Co. v. Tennessee Mfg. Co. 34: 997.



Digitized by Google

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois in favor of the defendant, George P. Bent, in a suit in equity brought by the Singer Manufacturing Company for an injunction to restrain the use by defendant in its business of a trademark or tradename and for an accounting for the profits received by defendant. *Reversed*, and cause remanded with directions to enter a decree in favor of plaintiff, and perpetually enjoining the defendant, and for an account of the profits, etc.

See same case below, 41 Fed. Rep. 214.

The facts are stated in the opinion.

*Messrs.* **Lawrence Maxwell, Jr.**, and **Charles K. Offield** for appellant.

*Mr.* **Wallace Heckman** for appellee.

Mr. Justice **White** delivered the opinion of the court:

The pleadings here are substantially similar to those in the case of the Singer Manufacturing Company against the June Manufacturing Company, and the testimony in that case, in so far as applicable, was by stipulation used in this. Some additional testimony was, however, introduced bearing upon the particular alleged wrongdoing here complained of. The circuit court rendered a decree in favor of the defendant. 41 Fed. Rep. 214.

There is no difference in legal principle between the two cases. The sewing machines sold by the defendant were made by the June Manufacturing Company, and were in form like those generally made and sold by it. These machines contained the oval plate fixed at the base of the arm, a device cast in the leg of the stand of the machine, the plate and the casting being of the same general shape, size, and appearance as those used by the Singer Manufacturing Company. There was, however, no exact identity between the words and marks used on the brass plates and in the casting of the Singer Company and those placed on the machines of the defendant. The device which the defendant styled his trademark 206] *contained an eagle surrounded with the wording "NEW YORK, S. M. MFG. CO. WARRANTED." The lettering "New York S. M. Mfg. Co." on the brass plate of defendant corresponded in size and style of letters with the lettering "The Singer Manfg. Co." on the brass plates of the latter company. It is plain that the position and size as well as the inscription found on these devices were calculated to deceive by creating the impression on one not familiar with all the details of the marks of the Singer Manufacturing Company that they were the marks of that company. The defendant argued that there is a difference between his devices and those of the June Manufacturing company in that he does not, in so many words, employ the name "Singer." In other words, the contention is that a fraudulent device which is tantamount to a certain word, is not equivalent in law to the word for which it stands. The deceptive purpose of the devices and the lettering or words on them is abundantly established by the proof. The principal business office of the Singer Manufacturing Company is in the city of New York. In the so-called trademark of the defendant the letters "S. M. Mfg. Co." are preceded by the words "New York," although there was no such company, and the defendant had no factory or office there, but did business in Chicago, and bought in that city from the June Manufacturing Company the machines upon which he put the marks in question. There is no doubt that the marks were imitations of those used by the Singer Company and were intended to deceive, and were made only seemingly different to afford a plausible pretext for asserting that they were not illegal imitations, although they were so closely imitative as to deceive the public. The defendant therefore must be treated as if he had actually used the Singer marks. So treating him, however, we should be obliged to allow the use of the name "Singer," since that name, as we have already held in the case just decided, fell into the domain of things public, subject to the condition on the one who used it to make an honest disclosure of the source of manufacture. This rule controls and is applicable to this case, and renders necessary a reversal of the decree below.

*It follows that the decree below must be re- [207
*versed* and the cause be remanded, with directions to enter a decree in favor of complainant, with costs, perpetually enjoining the defendant, his agents, servants, and representatives, from marking upon sewing machines made or sold by him, or upon any plate or device connected therewith or attached thereto, the word "Singer," or words or letters equivalent thereto, without clearly and unmistakably specifying in connection therewith that such machines are the product of the defendant or other manufacturer, and not the manufacture of the Singer Manufacturing Company; and the defendant must be ordered to account as to any profits which may have been realized by him, because of the wrongful acts by him committed.

And it is so ordered.

---

BACON ET AL., *Plffs. in Err.*
*v.*
STATE OF TEXAS.

(See S. C. Reporter's ed. 207-228.)

*Judgment of inferior state court, when reviewed by this court—jurisdiction—impairing obligation of contract—Federal question—independent ground—proper judgment.*

NOTE.—*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,*—see note to Hamblin v. Western Land Co. 37: 267.

*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty or Constitution,* see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

*That impairing remedy impairs obligation of contracts,* see note to Louisiana, Ranger, v. New Orleans, 26: 133.

*As to what laws are void, as impairing obligation of contracts,* see note to Fletcher v. Peck, 3: 162.

*As to review by United States Supreme Court of territorial decisions; extent and manner of; distinction between an appeal and a writ of error,*—see note to Miners' Bank v. Iowa, 12: 867.



Digitized by Google

1. A judgment of an inferior state court which is the highest court of the state in which a decision can be had because a writ of error has been denied by the supreme court of the state can be reviewed, if it involves a Federal question decided against the plaintiff in error, by writ of error from the Supreme Court of the United States.
2. A contract can only be impaired within the meaning of the United States Constitution, so as to give this court jurisdiction on writ of error to a state court, by some subsequent statute of the state which has been upheld or given effect by the state court.
3. The decision by a state court that an alleged contract never existed because of the want of a compliance with a state statute, whereupon judgment is given wholly without reference to a subsequent statute which is alleged to have impaired the obligation of the contract, does not involve a Federal question.
4. A change by a state court of its construction of a state statute, even if its former construction had become a rule of property, cannot constitute a Federal question as to the impairment of the obligation of a contract, for which a writ of error will lie from the Supreme Court of the United States to a state court.
5. A Federal question involved in a decision of a state court will not be looked into by the Supreme Court of the United States, if there is another independent ground of the decision by the state court upon which its judgment can rest.
6. The proper judgment on a decision that no Federal question exists on writ of error from the Supreme Court of the United States to a state court is one of dismissal.

[No. 296.]

*Argued May 6, 7, 1896. Decided May 18, 1896.*

IN ERROR to the court of Civil Appeals for the Second Judicial District of the State of Texas to review a judgment of that court affirming the judgment of the District Court of Mitchell County, Texas, in favor of the plaintiff, the State of Texas, against Bacon *et al.*, defendants, for the possession of certain lands. *Dismissed.*

See same case below, 2 Tex. Civ. App. 692.

Statement by Mr. Justice **Peckham:**

208] *The state of Texas commenced this action against the defendants, Bacon, Graves, and Gibbs, in the district court of the county of Mitchell, in the state of Texas, for the purpose of recovering the possession of a large amount of land,—nearly 300,000 acres,—which it was alleged the defendants had unlawfully entered upon and dispossessed plaintiff from and the possession of which they continued to withhold from plaintiff, the plaintiff being the owner in fee simple of such land at the time when the defendants dispossessed the state therefrom. Plaintiff also sought to recover damages for the use and occupation of such lands, and judgment was demanded for the possession of the land and for damages and for costs of the suit and for general relief.

The answer of the defendants set up several grounds for specially excepting to the plaintiff's petition, upon all of which the defendants prayed the judgment of the court. Joined with the special exceptions the defendants answered and stated that if the defendants' demurrer and special exceptions should be overruled, then they denied each and every allegation in plaintiff's petition contained. They then alleged that they were citizens of the state of Texas and had been at the time of the passage of the act of July 14, 1879, and the act amendatory thereof passed on the 11th day of March, 1881, in relation to the sale of public lands belonging to the state of Texas; and they alleged that they had performed all the requirements spoken of and provided for in those acts for the purpose of purchasing a portion of the public lands of the state, and that by the performance of such conditions they had purchased the lands in question, and had duly tendered payment therefor to the proper officer, which had been refused, and that subsequently they had again tendered payment and that the money had been received, but the plaintiff had refused to convey the title to the defendants as it was under legal obligations to do. They further alleged that having in all respects fully complied with the provisions of the law in respect to the purchase of the lands in question, their rights thereto became and were vested, and the act of the legislature subsequent thereto, passed January 22, 1883, to repeal the law under which the sales were made, was under U. S. Const. [209 art. 2, § 10, subd. 1, null and void as affecting defendant's vested rights. They prayed for judgment, that the plaintiff take nothing by its suit, and that the defendants have and recover from and of the plaintiff the lands as herein claimed by them, and for further relief.

The state filed its reply to the defendants' answer, and after specially excepting to certain of the allegations of the answer as insufficient, it alleged that the defendants were not entitled or authorized to purchase the lands, and had not complied with the law in reference thereto in any particular, and that if the defendants had tendered the treasurer of the state the money for the lands, as alleged, the treasurer properly refused and declined to receive the same, for that the defendants had not purchased the same from the plaintiff by complying fully with any existing law authorizing the purchase or sale thereof, and that if the defendants or any of them ever paid to the treasurer in January, 1891, the sum of money in said answer stated, the treasurer was not authorized by law to receive it, and this defendants well knew, and that the payment was made after full and explicit notice to defendants that plaintiff repudiated and would vigorously contest the claim of the defendants to said lands, and the defendants paid the same at their peril. The court overruled the defendants' exceptions to the plaintiff's petition and the case came on for trial.

The questions sought to be raised herein by the plaintiffs in error are stated by them to arise under the acts of the state of Texas above mentioned, the one known as chapter 52 of the laws of 1879, and entitled "An Act to Provide for the Sale of a Portion of the Unappropriated Public Lands of the State of Texas and the Investment of the Proceeds of Such Sale," which act was approved July 14, 1879, and the other known as chapter 8 of the laws of the same state, passed in 1883, and entitled "An Act to Withdraw the Public Lands of



Digitized by Google

the State of Texas from Sale," approved January 22, 1883. The act of 1881 amending that of 1879 is immaterial to the questions herein arising.

**210**] *Section 1 of the act of 1879 provided for the sale of all the vacant and unappropriated land of the state of Texas in certain named counties thereof. Section 2 provided that any person, firm, or corporation desiring to purchase any of the unappropriated lands therein set apart and reserved for sale might do so by causing the tract or tracts which such person, firm, or corporation desired to purchase to be surveyed by the authorized public surveyor of the county or district in which said land was situated. By § 3 it was made the duty of the surveyor, to whom application was made by responsible parties, to survey the lands designated in the application within three months from the date thereof, and within sixty days after said survey to certify to, record, and map the field notes of said survey, and within said sixty days to return to and file the same in the general land office, as required by law in other cases. Section 5 provided that within sixty days after the return to and filing in the general land office of the surveyor's certificate, map, and field notes of the land desired to be purchased, it should be the right of the person, firm, or corporation who had the same surveyed to pay or cause to be paid into the treasury of the state the purchase money therefor, at the rate of 50 cents per acre, and upon the presentation to the commissioner of the general land office of the receipt of the state treasurer for such purchase money, the commissioner was bound to issue to said person, firm, or corporation a patent for the tract or tracts of land so surveyed and paid for.

By § 1, chap. 3, of the Laws of 1883, it was enacted "that all the public lands heretofore authorized to be sold under an act entitled 'An Act to Provide for the Sale of the Unappropriated Public Lands of the State of Texas and the Investment of the Proceeds of Such Sale,' approved July 14, 1879, be, and the same are hereby, withdrawn from sale." The proviso contained in the section is immaterial. Prior to the adoption of the Revised Statutes of Texas the manner in which surveys of the public domain were to be made had been provided for by law. It was provided that "the courses of the line shall be deter-

**211**] mined by the magnetic needle, and *care shall be taken to determine its variations from the pole in the district where the surveys are made. Each survey shall be made with great caution, with metallic chains made for the purpose, and care shall be taken that the place of beginning of the survey of each parcel of land be established with certainty, taking the bearing and distance of two permanent objects at least." This was long prior to the year 1879. The Revised Statutes of Texas were passed in 1879 and took effect in September of that year, and by art. 3908 it was provided: "The field notes of each survey shall state (1) the county or land district in which the land is situated; (2) the certificate or other authority under or by virtue of which it is made, giving a true description of same by numbers, date where and when issued, name of original grantee and quantity; (3) the land by proper field notes, with the necessary calls and connections for identification (observing the Spanish measurement for *varas*); (4) a diagram of the survey; (5) the variation at which the running was made; (6) it shall show the names of the chain carriers; (7) it shall be dated and signed by the surveyor; (8) the correctness of the survey and that it was made according to law shall be certified to officially by the surveyor who made the same, and also that such survey was actually made in the field, and that the field notes have been duly recorded, giving book and page; (9) when the survey has been made by a deputy the county or district surveyor shall certify officially that he has examined the field notes, has found them correct, and that they are duly recorded, giving the book and page of the record."

The case came on for trial in the district court of Mitchell county in November, 1891. The following among other facts were found by the court: On December 1, 1882, Bacon and Graves made application to the surveyor of the Palo Pinto land district, as such surveyor, to purchase the land in controversy under the above-mentioned act of 1879, as amended March 11, 1881, which application was received and recorded by the surveyor on the first aboved-named date. Bacon and Graves paid the fees for filing the field notes in the general land office entirely within the time required by law. By the *records of the [**212** land office the lands in question appeared to have been surveyed at different times, and the field notes recorded in the surveyor's office in some instances, but not in all. The surveyor of the Palo Pinto land district certified to the respective surveys on the dates the surveys purport to have been made. None of the land included in this suit has ever been patented by the state under the Bacon and Graves purchase, and on the 26th of May, 1890, Bacon and Graves transferred by deed of special warranty 579 sections of land to C. C. Gibbs, who holds the same in trust for E. M. Bacon, E. G. Graves, and others.

It was further found as a matter of fact "that none of the land in suit was actually surveyed upon the ground by the deputy surveyor who purported to have done so, but they merely copied in the office of the surveyor of the Palo Pinto land district the field notes of the Elgin survey." That survey was made in July, 1873, for the Houston & Texas Central Railway Company, and the field notes of such survey were returned to the surveyor's office some time in 1873, and were filed in the general land office November 20, 26, 1873. These field notes were "adopted by the surveyor of the Palo Pinto land district and his deputies in making out the field notes of the land applied to be purchased by Bacon and Graves." The land had been actually surveyed on the ground by Elgin in the manner in which it had been customary for surveyors in Texas to survey large bodies of land, by running the outside boundary lines of the blocks, or parts of them, putting up permanent landmarks, and leaving the interior lines without running. These blocks, in writing up the field notes, were divided into 640-acre surveys, and the interior surveys were made without actually running the lines, and Elgin did not run all the lines of any section, unless, as he says, it was done by



Digitized by Google

accident. It had been found by deputy surveyors prior to the adoption of the field notes for Bacon and Graves that the lines run and ascertained by the Elgin survey were as correct as any work of that character in that part of the state, and the deputy surveyors were satisfied as to their substantial accuracy. The depu-
213] ty surveyors *were deputies under Joel McKee from December, 1882, to March, 1883, and McKee was the surveyor of the Palo Pinto district in which the land in question lay.

On May 16, 1883, the defendants tendered to the treasurer of the state $80,640, and on May 19, 1883, they tendered him the further sum of $104,640, in payment for these lands. These tenders were refused. In January, 1891, Bacon and Graves paid the treasurer $149,280 for said lands, which was received by him "under protest."

The court as conclusions of law found: (1) That Bacon and Graves were not responsible parties, within the meaning of the statute, at the time they applied to purchase this land and could not purchase under the law; (2) that they did not comply with the law by having the lands surveyed as was required by law, and therefore could not purchase it; (3) the survey as adopted was not made in accordance with law—is incorrect, totally so—in having a greater frontage on permanent water than is permitted under the acts of 1879 and 1881; (4) Bacon and Graves have never paid or offered to pay for said land until long after the expiration of the time allowed and required by law. The purported surveys of many of the sections of land for which they tendered payment on May 19, 1883, were made after the 50-cent act was repealed, and Bacon and Graves did not separate or offer to separate in their tender the surveys made before the repeal from those made after, and there was consequently no legal tender; (5) at the time Graves entered into an agreement with Bacon to purchase these lands he was an employee of the general land office, and his action was against the civil and criminal laws of the state; (6) that the state was not bound to return the money paid in January, 1891, to entitle it to judgment for the land.

Judgment for the recovery of the lands was duly entered and the defendants appealed from that judgment to the supreme court of Texas, which court duly ordered the same to be transferred to the court of civil appeals for the second judicial district, before which the case was heard on appeal. That court adopted the findings of fact filed by the court below, excepting it set aside the finding that the defend-
214] ants *were not responsible parties, and so could not purchase any land.

The court also gave an explanation as to the finding of the trial court that the money was received by the state treasurer "under protest," such explanation being that "by the word 'protest' as used in the finding is meant that the treasurer of the state had several times refused to accept this money, and at the time he received it in January, 1891, the parties paying fully understood that the state would contest their claim to the land, and the treasurer did not receive the money as a legal payment therefor."

After argument the court of civil appeals in all things affirmed the judgment of the court below. The appellants duly asked for a rehearing for reasons assigned by them in their amended motion therefor. The motion was denied and judgment duly entered affirming in all things the judgment against the defendants for the recovery of the lands in question. The defendants then presented a petition to the supreme court of the state of Texas for the allowance of a writ of error to enable that court to review the judgment of the court of civil appeals. The application for this writ of error was refused by the supreme court, and an order refusing it was sent to the clerk of the court of civil appeals pursuant to a rule of the supreme court.

The assignments of errors by the defendants on their appeal to the court of civil appeals contain an assignment of error in that they had acquired a vested right to the lands by the survey thereof as made for them, under the act of 1879, prior to the repeal of that act by the repealing act of 1883, and which right could not be affected by such repeal. The court of civil appeals held that there was no contract between the parties because of the failure of the defendants to have such surveys made as were called for under the act of 1879.

The assignment of errors filed on the allowance of the present writ of error contains among other grounds of error the failure of the court to hold that the act of the legislature of Texas, approved January 22, 1883, was repugnant to the Constitution of the United States in that said act impaired the *obligation [215 or validity of the contract for the purchase of said lands between the state of Texas and said appellants arising under and created by said acts of the legislature of Texas, approved July 14, 1879, and March 11, 1881.

*Messrs.* **J. Hubley Ashton, William M. Walton,** *Thomas D. Cobbs, Charles W. Ogden,* and *John W. Maddox,* for plaintiffs in error.

*Messrs.* **M. M. Crane,** Attorney General of the State of Texas, for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

The first question which arises in this case is in regard to our jurisdiction to review the judgment of the court of civil appeals of the state of Texas. Some question was made in regard to the regularity and sufficiency of the writ of error from this court to the court of civil appeals, as that court is not the highest court in the state. We think, however, the criticism is not well founded. So far as this case is concerned that court is the highest court of the state in which a decision in this suit could be had. An application was made to the supreme court of the state of Texas for a writ of error to the court of civil appeals for the second district by the defendants in the court below after judgment in the latter court, for the purpose of reviewing the judgment of that court, but the supreme court denied the application and thus prevented by its action a review by it of the judgment of the court of civil appeals. The judgment of that court has therefore become the judgment of the highest court of the state in which a decision in the suit could be had, and this court may, so far as this point is



Digitized by Google

concerned, re-examine the same on writ of error
216]under the provisions of *U. S. Rev. Stat. § 709. *Gregory* v. *McVeigh*, 90 U. S. 23 Wall. 294 [23: 156]; *Fisher* v. *Carrico* ("*Fisher* v. *Perkins*"), 122 U. S. 522 [30: 1192]; *Stanley* v. *Schwalby*, 162 U. S. 255 [40: 960].

Assuming that the record is properly brought here by virtue of the writ of error granted by this court, the question arises as to what, if any, jurisdiction we have to review the judgment of the state court. Our only right to review it depends upon whether there is a Federal question in the record which has been decided against the plaintiffs in error. U. S. Rev. Stat. § 709.

Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a state court, by some subsequent statute of the state which has been upheld or effect given it by the state court. *Lehigh Water Co.* v. *Easton*, 121 U. S. 388 [30: 1059]; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18 [31: 607]; *Central Land Co.* v. *Laidley*, 159 U. S. 103-109 [40 L. ed. 91-93.] As stated in the case reported in 125 U. S. *supra*, it is not necessary that the law of a state, in order to come within this constitutional prohibition, should be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a Constitution established by the people of the state as their fundamental law. A by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law within the meaning of this article of the Constitution of the United States.

If the judgment of the state court gives no effect to the subsequent law of the state, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of the contract. The above-cited
217]cases announce this principle. *The case of *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 279 [36: 972], decides nothing that is repugnant to it. In that case the jurisdiction of this court was questioned on the ground that the contract of exemption mentioned in the act of 1834 was acknowledged to be valid by the supreme court of North Carolina, and it simply denied that particular property was embraced by its terms, and as a consequence it was claimed that the decision did not involve a Federal question. To which this court replied, speaking by Mr. Chief Justice Fuller, as follows: "In arriving at this conclusion, however, the state court gave effect to the revenue law of 1891, and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by a subsequent law, and as the inquiry, whether it did or not, was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed."*

So, in *Mobile & O. R. Co.* v. *Tennessee*, 153 U. S. 486 [38: 793]. In that case it was contended that this court had no jurisdiction to review the judgment of the supreme court of Tennessee, because the decision of that court proceeded upon the ground that there was no contract in existence between the railroad company and the state to be impaired, and that the supposed contract was in violation of the state Constitution of 1834, and hence not within the power of the legislature to make. In truth, however, the court in its decree gave effect to the subsequent statute of Tennessee, which it was claimed impaired the obligation of the contract entered into between the state and the railroad company, and under those circumstances this court exercised jurisdiction to review the decision of the state court on the question as to whether there was a contract or not, and as to the meaning of the contract if there were one, and whether it had been impaired by the subsequent legislation to which effect had been given.

Both these cases have been cited by the counsel for plaintiffs in error as authorities for the jurisdiction of the court in this case. Inasmuch as the judgments of the state courts, in both cases, gave effect to the later statutes, they are governed by the principle set forth in *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18 [31: 607], and *Central Land Co.* v. *Laidley*, 159 U. S. 103-109 [40 L. ed. 91-93]. *It becomes necessary there- [218 fore in the examination of this case to inquire whether the Federal question has been raised in the courts of the state, and, if so, whether the judgment of the state court is founded upon or in any manner gives the slightest effect to the subsequent act of 1883.

The statement of facts already given shows that the only allusion made to the act of 1883 in the pleadings was made by the defendants. No claim was made by the plaintiff, the state of Texas, by either of its pleadings of any right accruing to it by virtue or under the provisions of the last-named act. The trial court in its findings sets forth at length and in detail the various times in which the surveys were made and the field notes filed of the lands in question, and then states that none of the land in suit was actually surveyed upon the ground by the deputy surveyors who purported to have done so, but they merely copied in the office of the surveyor of the Palo Pinto land district the field notes of the Elgin survey. What that Elgin survey was is also set forth in the foregoing statement, and upon these facts the court found as a conclusion of law that the defendants did not comply with the law by having the land surveyed as was required by it, and therefore could not purchase such land. Assuming there was a Federal question properly raised, we also find in the record a broad and comprehensive holding that the defendants never complied with the act of 1879, and never made the surveys necessary to be made under the law of Texas in order to vest them with any rights whatsoever under that act. This ground of judgment is founded upon a matter of state law and makes no reference whatever to any subsequent act of the legislature, and in no way upholds that act or treats it as of the least force



Digitized by Google

or virtue any more than if the act had never been passed. If it never had been passed, and the defendants had made this same claim of having a contract for the purchase of the lands by reason of the things done under the act of 1879, and the court had decided upon their claim in the same way it has done in this case, it is beyond question that this court would have no jurisdiction to review that decision of the state court however erroneous it might be regarded by us.

219] *The case is not altered by the fact that the state has passed an act which the defendants assert impairs the obligation of their contract, so long as the court, in deciding their case, holds that they never had a contract because they never had complied with the provisions of the original statute, and so long as it gives judgment wholly without reference to the subsequent act, and without upholding or in any manner giving effect to any provision thereof.

Whether the statute of 1879 permitted a survey to be adopted from a survey which had previously been made in the field, or whether it did not, was a case of construction of a state statute by the state court. It is not one of those cases where this court will construe the meaning of a state statute for itself. This court, even on writ of error to a state court, will construe for itself the meaning of a statute as affecting an alleged contract where it is claimed that a subsequent statute passed by the state has impaired the obligations of the contract as claimed by the party, and where such subsequent statute has by the judgment of the state court in some way been brought into play and effect been given to some or all of its provisions. In such a case this court construes the contract in order to determine whether the later statute impairs its obligation. *Louisville Gas Co.* v. *Citizens' Gaslight Co.* 115 U. S. 683, 697 [29: 510, 515]. This is not such a case. The later statute is not given effect to by the judgment of the court.

The state of Texas by the act of 1883 withdrew its public lands from sale. The prior act of 1879 had offered them for sale. Whether the act of 1883 withdrew them or not could have no bearing upon the question whether these defendants had complied with the act of 1879 in relation to having the surveys made of the lands which they applied to purchase. If the lands had not been withdrawn, the parties' rights in them would depend upon whether they had been surveyed, and if they had not, they had no right to them. Whether they had or had not complied with the act of 1879 was not a Federal question. If the court had decided that the survey actually made was a suf-

220] ficient compliance with the act, *but that defendants obtained no vested rights in the land by virtue of such survey, and that the act of 1883 was effectual in withdrawing such lands from market, that decision would have been reviewable here, and in that case this court would determine for itself what rights the parties obtained under the act of 1879, and whether by what they had done they had obtained any rights which could not be unfavorably affected by the act of 1883.

It is, however, urged that the Texas courts for many years had construed the acts passed by the state relating to surveys of its public lands as permitting what are termed "adoptive surveys," *i. e.*, surveys adopted from those which had once been made in the field, and that the act of 1879, in simply providing for surveys of lands for which applications to purchase might be made left it to the general law, which provided the details and manner of carrying out such survey. The construction of the general law which had been thus given by the courts upon the question of what was a sufficient survey, it is claimed, had become a rule of property which parties were entitled to rely upon, and which no court could overturn, and if it did so, a contract was impaired, and the judgment was reviewable by this court The proposition cannot be maintained as a basis for giving this court jurisdiction upon writ of error to the state court. It ignores the limits to our jurisdiction in this regard, which, as has been seen, is confined to legislation which impairs the obligation of a contract. *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18 [31: 607], and *Central Land Co.* v. *Laidley*, 159 U. S. 103-109 [40 L. ed. 91-93].

The argument involves the claim that jurisdiction exists in this court to review a judgment of a state court on writ of error when such jurisdiction is based upon an alleged impairment of a contract by reason of the alteration by a state court of a construction theretofore given by it to such contract or to a particular statute or series of statutes in existence when the contract was entered into. Such a foundation for our jurisdiction does not exist.

It has been held that where a state court has decided in a series of decisions that its legislature had the power to permit municipalities to issue bonds to pay their subscriptions to railroad

221] *companies, and such bonds had been issued accordingly, if in such event suit were brought on the bonds in a United States court, that court would not follow the decision of the state court rendered after the issuing of the bonds and holding that the legislature had no power to permit a municipality to issue them, and that they were therefore void. Such are the cases of *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 175 [17: 520], and *Douglass* v. *Pike County*, 101 U. S. 677 [25: 968]. In cases of that nature there is room for the principle laid down that the construction of a statute and admission as to its validity made by the highest court of a state prior to the issuing of any obligations based upon the statute, enters into and forms a part of the contract and will be given effect to by this court as against a subsequent changing of decision by the state court by which such legislation might be held to be invalid. But effect is given to it by this court only on appeal from a judgment of a United States court and not from that of a state court. This court has no jurisdiction to review a judgment of a state court made under precisely the same circumstances, although such state court thereby decided that the state legislation was void which it had prior thereto held to be valid. It has no such jurisdiction, because of the absence of any legislation subsequent to the issuing of the bonds which had been given effect to by the state court. In other words, we have no jurisdiction, because a state court changes



Digitized by Google

its views in regard to the proper construction of its state statute, although the effect of such judgment may be to impair the value of what the state court had before that held to be a valid contract. When a case is brought in the United States court, comity generally requires of this court that in matters relating to the proper construction of the laws and Constitution of its own state, this court should follow the decisions of the state court; yet in exceptional cases, such as Gelpcke and others, *supra*, it is seen that this court has refused to be bound by such rule, and has refused to follow the later decisions of the state court. A writ of error has been dismissed in this court (*Mississippi & M. R. Co.* v. *McClure*, 77 U. S. 10 Wall. 511 [19:997]), where the judgment sought to be reviewed was that
222] of a state court, holding *that certain bonds were void upon precisely the same facts that this court in the *Gelpcke Case* held were valid. There was no subsequent legislative act impairing the obligation, and hence this court had no jurisdiction to review the judgment of the state court.

Considerable stress has been laid upon the case of *Louisiana* v. *Pilsbury*, 105 U. S. 278 [26: 1090], as an authority for the proposition that this court has jurisdiction even though the judgment of the state court gives no effect to the subsequent state legislation, and also for the proposition that the obligation of a contract may be impaired by a change in the construction given to it by the courts of a state, and that a Federal question under the contract impairment clause of the Constitution is thus presented which may be reviewed in this court. It is stated that the supreme court of Louisiana in that case confined its decision to the unconstitutionality of the act of 1852, under which the bonds were issued, and that its judgment proceeded wholly without reference to the subsequent acts of the legislature which were claimed to impair the obligations of the contract based upon the act of 1852; and it is argued that unless a Federal question were presented, even where no effect was given to subsequent legislation, or by the fact that the state court, in holding the act of 1852 unconstitutional, varied from its former decisions in that regard and thereby impaired the obligation of a contract, this court would have had no jurisdiction to hear and decide the case as it did. A portion of the opinion of one of the judges of the supreme court of Louisiana is quoted, in which it is stated that they find it unnecessary to pass upon the subsequent statute which was alleged to have impaired the contract of 1852, because the views which had already been expressed declaring the act of 1852, under which the bonds were issued, unconstitutional, were sufficient to dispose of the case. An examination of the record in that case shows neither proposition for which it is cited is therein decided.

When the case was brought to this court by writ of error, a motion was made to dismiss the writ on the ground that the case was decided by the state court upon a question of state
223] *law and without reference to any statute which plaintiffs in error alleged impaired their contract. The decision of the motion was postponed to the argument upon the merits, and upon that argument counsel for plaintiffs in error, clearly recognizing the necessity they were under of showing that the state court did give effect to the subsequent legislation in order to show the existence of a Federal question, claimed that it appeared in that record that no judgment could have been given for the defendant in error in the court below without necessarily giving effect to some of the subsequent legislation, and they claimed that an examination of the whole record would show such fact, notwithstanding the statement contained in one of the opinions of the state court, already alluded to. They also alleged there was no question of state law passed on by the court below sufficiently broad to have sustained the decision without passing on this Federal question. The argument in favor of the jurisdiction, as thus placed by the counsel for the plaintiffs in error, seems to have been sufficient to convince the court, for in its opinion the question of jurisdiction is not adverted to in any way and is assumed to exist. Of course, having jurisdiction to review the state court in regard to this Federal question, it then became proper for this court to determine for itself what was the contract and whether it had been impaired by any subsequent legislation of the state. In determining what the contract was, the opinion cites many cases in the state court which had been decided regarding the Constitution of that state of 1845, which was in existence at the time the act of 1852 was passed; and it was stated that the exposition made by the courts of the state in regard to its Constitution or laws in existence at the time when the obligations were issued under them was to be treated as a part of the contract and formed a basis for determining what that contract was.

There is no decision in the case which gives the least support to the proposition that jurisdiction exists in this court to review on writ of error to a state court, its holding as to what the contract was simply because it had changed its construction *thereof, nor that the [224 obligation of a contract may be impaired within the contract clause of a Federal Constitution, unless there has been some subsequent act of the legislative branch of the government to which effect has been given by the judgment of the state court. The case may therefore be regarded as in entire harmony with the later cases on the subject mentioned in *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18 [31:607], and *Central Land Co.* v. *Laidley*, 159 U. S. 103–109 [40 L. ed. 91–93]. The opinion proceeds upon the assumption that effect had been given to this subsequent legislation, and it proves that such legislation impaired the contract as construed here.

This case, however, is not in its facts within the claim made by the counsel for the plaintiffs in error. In this case there has in truth been no change in the construction of the state statute regarding what constitutes a sufficient survey under its provisions as claimed by counsel. The sales act of 1879 provided that surveys should be made, and at that time it is said a statute was in force which provided for making surveys of public lands as follows:

"Sec. 19. The surveyors shall make oath before the respective commissioners, truly and



Digitized by Google

faithfully to discharge the duties of their office.

"Sec. 20. The course of the lines shall be determined by the magnetic needle, and care shall be taken to determine its variations from the pole in the district where the surveys are made.

"Sec. 21. The surveys shall be made with great caution, with metallic chains made for the purpose, and care shall be taken that the place of beginning the survey of each parcel of land be established with certainty, taking the bearing and distance of two permanent objects at least." 1 Sayles, Early Laws, 100.

Under that act and acts similar thereto the supreme court of Texas, as has been stated, had for many years recognized the adoption of surveys previously made as being a legal survey within the spirit of those laws. These surveys were, however, not made under the provisions of the act just quoted. Soon after the passage of the act of 1879, and in that same year, the Revised 225] Statutes of Texas were adopted, *art. 3908 of which has already been given in the above statement of facts, and subd. 8 of that article may be here again set forth. It reads that "the correctness of the survey and that it was made according to law shall be certified to officially by the surveyor who made the same, *and also that such survey was actually made in the field*, and that the field notes have been duly recorded, giving the book and page." Thus it will be seen that the old law had been altered at least three years previous to the application for the purchase of these lands made by the defendants, and the court of civil appeals of Texas in this case has stated in the course of its opinion with reference to § 3908 as follows: "We think the principal object of the legislature in requiring such strictness in the certificate to be made by the surveyor was to correct the abuse to which the previous law had been subjected, as above indicated, and we think it must be conceded, if the legislature had the power to condemn what is commonly known as an office survey or office work, and to require its officer, before parting with the public lands of the state, to have the survey actually done in the field; it has done so by the passage of this statute." The plaintiffs in error claim, however, that the Revised Statutes were but a simple revision of the laws of Texas, not meant to work any change therein, and that the different language in which this article is couched from that existing in the former law ought to be regarded as working no alteration in the meaning of the law, and that it should be construed in the same manner as the law whose place it took. Whether this article in question was or was not a mere revision and continuation of existing law, and whether the changed phraseology properly called for a change of construction, were questions entirely for the state court to determine. The state court, while acknowledging that under the old law an adoptive survey was good, held that under the new law a survey in the field was necessary. This is no change of construction of the same act, and cannot, therefore, form a basis for the argument of counsel for plaintiffs in error, that a change of construction of the same statute may work an impairment of the obligations of the contract *so that a judgment of the state court [226 thereon may be reviewable here. The court is under no obligation to put the same construction upon a later statute that it has placed upon an earlier one, though the language of the two may be similar. *Wood* v. *Brady*, 150 U. S. 13 [37: 981]. But it is unnecessary to dwell upon this difference between the two statutes, because, under such circumstances as exist in this case, the decision of the state court regarding it is not reviewable here on a writ of error to that court.

We have thus far treated this case as if the sole question arising in it were not of a Federal nature. It will be seen, however, that certain tenders were made to the treasurer of the state of Texas in payment for lands claimed by the defendants to have been purchased by them, and some of those tenders were held by the trial court to have been insufficient, because they included tenders of payment for some lands where the surveys had been made after the passage of the act of 1883 repealing the act of 1879, as well as for surveys made before that time, and the defendants did not separate or offer to separate in their tenders the surveys made before the repeal from those made after, and there was consequently, as the trial court held, no legal tender for any of the surveys, and upon these facts the court founded a conclusion of law (No. 4), which is as follows: "Bacon and Graves have never paid or offered to pay for said land until long after the expiration of the time allowed and required by law. The purported surveys of many of the sections of the land for which they tendered payment on May 19, 1883, were made after the 50-cent act was repealed, and Bacon and Graves did not separate or offer to separate in their tender the surveys made before the repeal from those made after, and there was consequently no legal tender." That was one of five different grounds upon which the trial court held that the defendants had not complied with the law and were not entitled to purchase the lands in question. This particular finding is in no way dependent upon the others, and they are all entirely separate and distinct from one another. The finding No. 2, that "they did not comply with the law by having the lands surveyed, *as was required by law, and therefore [227 could not purchase it," is distinct and separate ground for the judgment of the court to rest upon to the same extent as if none other had been stated, and it is entirely sufficient in itself upon which to rest the judgment.

If the 4th finding above set forth had alone been made by the court below, this court, upon writ of error, would have had jurisdiction to review the whole question, because by that finding some effect is given to the subsequent act of the legislature which it is claimed impaired the obligation of defendant's alleged contract with the state; but where there are two grounds for the judgment of the state court, one only of which involves a Federal question, and the other is broad enough to maintain the judgment sought to be reviewed, it is now settled that this court will not look into the Federal question, inasmuch as there is another ground upon which the judgment can rest and it will dismiss the writ for that reason. *Eustis* v. *Bolles*, 150 U. S. 361 [37:



Digitized by Google

1111]. In the course of the opinion in that case, which was delivered by *Mr. Justice* Shiras, the case of *Beaupré* v. *Noyes*, 138 U. S. 397, 401 [37: 991, 992], is cited, and the opinion in the latter case contains the following statement: "Whether the state court so interpreted the territorial statute as to deny such writ to plaintiffs in error we need not inquire, for it proceeds in part upon another and distinct ground, not involving a Federal question, and sufficient in itself to maintain the judgment without reference to that question." The opinion, after stating what that ground was, thus continues: "That view does not involve a Federal question; whether sound or not, we do not inquire. It is broad enough in itself to support the final judgment without reference to the Federal question."

In *Rutland R. Co.* v. *Central Vermont R. Co.* 159 U. S. 630 [40: 284], it is stated "that where a state court, in rendering a judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, this court will dismiss the writ of error without considering the Federal question." **228**] To same effect are *Gillis* *v. *Stinchfield*, 159 U. S. 658, 660 [40: 295, 296], and *Seneca Nation* v. *Christy*, 162 U. S. 283 [40: 970].

In such cases as this it has sometimes been the practice of this court to affirm the judgment and sometimes to dismiss the writ. "An examination of our records will show that in some cases this court has affirmed the judgment of the court below and sometimes has dismissed the writ of error. This discrepancy may have originated in a difference of views as to the precise scope of the questions presented. However that may be, we think that when we find it unnecessary to decide any Federal question, and that when the state court has based its decision on a local or state question, our logical course is to dismiss the writ." *Eustis* v. *Bolles*, *supra*. Accordingly, the judgment in the case last cited was one of dismissal. The same judgment was given in the two cases in 159 U. S. (*Rutland R. Co.* v. *Central Vermont R. Co.* and *Gillis* v. *Stinchfield*), and also in the very latest case on the subject, that of *Seneca Nation* v. *Christy*, 162 U. S. 283 [40: 970].

The proper judgment in this case should therefore be one of dismissal, and *the writ is accordingly dismissed.*

---

## WONG WING, LEE POY, LEE YON TONG, and CHAN WAH DONG, *Appts.*,
*v.*
## UNITED STATES.

(See S. C. Reporter's ed. 228-244.)

*Imprisonment of Chinese persons—due process of law.*

1. Imprisonment of Chinese persons at hard labor under the act of Congress of May 5, 1892, ordered by judgment of a commissioner without trial by jury, is in violation of the constitutional provisions as to presentment or indictment of a grand jury in case of an infamous crime, and as to due process of law.

2. Aliens within the territory of the United States are entitled to the protection of the 5th and 6th Amendments of the Federal Constitution regulating procedure in criminal cases.

[No. 204.]

*Argued April 1, 2, 1896. Decided May 18, 1896.*

APPEAL from a judgment of the Circuit Court of the United States for the Eastern District of Michigan discharging a writ of habeas corpus and remanding Wong Wing *et al.* to the custody of the superintendent of the Detroit House of Correction to serve out a sentence imposed by a commissioner of a circuit court of the United States. *Reversed*, and cause remanded for further proceedings.

Statement by Mr. Justice **Shiras**:

*On July 15, 1892, Wong Wing, Lee **[229** Poy, Lee Yon Tong, and Chan Wah Dong were brought before John Graves, a commissioner of the circuit court of the United States for the eastern district of Michigan, by virtue of a warrant issued upon the complaint of T. E. McDonough, deputy collector of customs, upon a charge of being Chinese persons unlawfully within the United States and not entitled to remain within the same. The commissioner found that said persons were unlawfully within the United States and not entitled to remain within the same, and he adjudged that they be imprisoned at hard labor at and in the Detroit House of Correction for a period of sixty days from and including the day of commitment, and that at the expiration of said time they be removed from the United States to China.

A writ of habeas corpus was sued out of the circuit court of the United States, directed to Joseph Nicholson, superintendent of the Detroit House of Correction, alleging that said persons were by him unlawfully detained; the superintendent made a return setting up the action of the commissioner; and, after argument, the writ of habeas corpus was discharged, and the prisoners were remanded to the custody of said Nicholson, to serve out their original sentence. From this decision an appeal was taken to this court.

*Messrs.* **Frank H. Canfield** and *Frederick W. Fielding* for appellants.

*Mr.* **J. M. Dickinson**, Assistant Attorney General, for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

By the act of September 13, 1888 (25 Stat. at L. 479, § 13), it was provided as follows: "That any Chinese person or person of Chinese descent found unlawfully in the United States or its territories may be arrested upon a warrant issued upon a complaint under oath, filed by any party on behalf of the United States, by any justice, *judge, or commissioner of any **[230** United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found

NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.



Digitized by Google

and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came."

The act of October 1, 1888 (25 Stat. at L. 504, § 1), was in the following terms: "That from and after the passage of this act it shall be unlawful for any Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to or remain in the United States."

The validity of these acts was assailed because they were alleged to be in conflict with existing treaties between the United States and China, and because to deport a Chinaman who had, under previous laws, a right to return to the United States, was a punishment which could not be inflicted except by judicial sentence.

But these contentions were overruled and the validity of the legislation sustained by this court in the case of *Chae Chan Ping* v. *United States* (*"Chinese Exclusion Case"*) 130 U. S. 581 [32: 1069]. In this case it was held, in an elaborate decision by Mr. Justice Field, that the act excluding Chinese laborers from the United States was a constitutional exercise of legislative power; that, so far as it conflicted with existing treaties between the United States and China, it operated to that extent to abrogate them as part of the municipal law of the United States; and that a right conferred upon a Chinese laborer, by a certificate issued in pursuance of previous laws, to return to the United States, could be taken away by a subsequent act of Congress.

On May 5, 1892, by an act of that date (27 Stat. at L. 25), Congress enacted that all laws then in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent should be continued in force for a period of ten years from 231] the passage of the act. The 6th *section of the act was, in part, in the following terms: "And it shall be the duty of all Chinese laborers within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence, and any Chinese laborer, within the limits of the United States, who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States as hereinbefore provided."

As against the validity of this section, it was contended that, whatever might be true as to the power of the United States to exclude aliens, yet there was no power to banish such aliens who had been permitted to become residents, and, that, if such power did exist, it was in the nature of a punishment, and could only be lawfully exercised after a judicial trial.

But this court held, in the case of *Fong Yue Ting* v. *United States*, 149 U. S. 698 [37: 905], that the right to exclude or to expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation; that the power of Congress to expel, like the power to exclude, aliens or any class of aliens from the country may be exercised entirely through executive officers; and that the said 6th section of the act of May 5, 1892, was constitutional and valid.

The act of August 18, 1894 (28 Stat. at L. 390), made provisions for expenses of returning to China all Chinese persons found to be unlawfully in the United States, including the cost of imprisonment and actual expense of conveyance of Chinese persons to the frontier or seaboard for deportation, *and contained the[232 following enactment: "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary of the Treasury."

One Lem Moon Sing, a person of the Chinese race, who claimed to have had a permanent domicil in the United States, and to have carried on business therein as a merchant before the passage of the act of August 18, 1894, and to have gone on a temporary visit to his native land with the intention of returning and continuing his residence in the United States—during which temporary absence in the said act was passed—was, on his return, prevented from landing, and was confined and restrained of his liberty by the collector of the port of San Francisco. He filed in the district court of the United States for the northern district of California a petition for a writ of habeas corpus, wherein he alleged that he had not been apprehended and was not detained by virtue of the judgment, order, decree, or other judicial process of any court, or under any writ or warrant, but under the authority alleged to have been given to the collector of the port of San Francisco by the act of August 18, 1894, and that his detention was without jurisdiction and without due process of law, and against his rights under the Constitution and laws of the United States. The writ of habeas corpus was denied by the court below, and from this judgment an appeal was prosecuted to this court.

The contention on behalf of the appellant in the case was thus stated by Mr. Justice Harlan, who delivered the opinion of the court:

"The contention is that while, generally speaking, immigration officers have jurisdiction under the statute to exclude an alien who is not entitled under some statute or treaty to come into the United States, yet if the alien is entitled, of right, by some law or treaty, to enter this country, but is, nevertheless, excluded by such officers, the latter exceed their jurisdiction, and their illegal action, if it



Digitized by Google

233] results in restraining *the alien of his liberty, presents a judicial question for the decision of which the courts may intervene upon a writ of habeas corpus."

In considering this position the court said:

" That view, if sustained, would bring into the courts every case of an alien who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the executive branch of the government. This would defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the class entitled by some law or treaty to come into the country, or to a class forbidden to enter the United States. Under that interpretation of the act of 1894 the provision that the decision of the appropriate immigration or custom officers should be final, unless reversed on appeal to the Secretary of the Treasury, would be of no practical value.

"The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

Accordingly the judgment of the court below denying the application for the writ of habeas corpus was affirmed. *Lem Moon Sing* v. *United States*, 158 U. S. 538 [39: 1082].

The present appeal presents a different question from those heretofore determined. It is claimed that, even if it be competent for Congress to prevent aliens from coming into the country, or to provide for the deportation of those unlawfully within its borders, and to submit the enforcement of the provisions of such laws to executive officers, yet the 4th section of the act of 1892, which provides that " any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year, and there-

234] after removed from the United *States," inflicts an infamous punishment, and hence conflicts with the 5th and 6th Amendments of the Constitution, which declare that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.

It is argued that, as this court has held, in *Ex parte Wilson*, 114 U. S. 417 [29: 89], and in *Mackin* v. *United States*, 117 U. S. 348 [29:909], that no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may be imposed by the court, and that imprisonment at hard labor for a term of years is an infamous punishment, the detention of the present appellants in the House of Correction at Detroit, at hard labor for a period of sixty days, without having been sentenced thereto upon an indictment by a grand jury and a trial by a jury, is illegal and without jurisdiction.

On the other hand, it is contended on behalf of the government that it has never been decided by this court that in all cases where the punishment may be confinement at hard labor the crime is infamous, and many cases are cited from the reports of the state supreme courts where the constitutionality of statutes providing for summary proceedings, without a jury trial, for the punishment by imprisonment at hard labor of vagrants and disorderly persons has been upheld. These courts have held that the constitutional guaranties refer to such crimes and misdemeanors as have, by the regular course of the law and the established modes of procedure, been the subject of trial by jury, and that they do not embrace every species of accusation involving penal consequences. It is urged that the offense of being and remaining unlawfully within the limits of the United States by an alien is a political offense, and is not within the common-law cases triable only by a jury, and that the Constitution does not apply to such a case.

The Chinese exclusion acts operate upon two classes,—one *consisting of those who [235 came into the country with its consent, the other of those who have come into the United States without their consent and in disregard of the law. Our previous decisions have settled that it is within the constitutional power of Congress to deport both of these classes, and to commit the enforcement of the law to executive officers.

The question now presented is whether Congress can promote its policy in respect to Chinese persons by adding to its provisions for their exclusion and expulsion punishment by imprisonment at hard labor, to be inflicted by the judgment of any justice, judge, or commissioner of the United States, without a trial by jury. In other words, we have to consider the meaning and validity of the 4th section of the act of May 5, 1892, in the following words: "That any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be and remain in the United States, shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States, as hereinbefore provided."

We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation. Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense.

So, too, we think it would be plainly competent for Congress to declare the act of an alien in remaining unlawfully within the United States to be an offense, punishable by fine or imprisonment, if such offense were to be established by a judicial trial.

But the evident meaning of the section in question, and no other is claimed for it by the counsel for the government, is that the deten-



Digitized by Google

tion provided for is an imprisonment at hard labor, which is to be undergone before the sen-
236] tence of *deportation is to be carried into effect, and that such imprisonment is to be adjudged against the accused by a justice, judge, or commissioner, upon a summary hearing. Thus construed, the 4th section comes before this court for the first time for consideration as to its validity.

It is, indeed, obvious, from some expressions used by the court in a previous opinion under the exclusion acts, that it was perceived that the question now presented might arise; but care was taken to reserve any expression of opinion upon it. Thus, in the case of *Fong Yue Ting* v. *United States*, 149 U. S. 730 [37: 919], Mr. Justice Gray used the following significant language:

"The proceeding before a United States judge, as provided for in § 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application."

There is an evident implication, in this language, of a distinction between those provisions of the statute which contemplate only the exclusion or expulsion of Chinese persons and those which provide for their imprisonment at hard labor, pending which their deportation is suspended.

Our views upon the question thus specifi-
237] cally pressed upon *our attention may be briefly expressed thus: We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by Congressional enactment forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.

But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.

No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.

In *Ex parte Wilson*, 114 U. S. 428 [29: 93], this court declares that for more than a century imprisonment at hard labor in the state prison or penitentiary or other similar institution has been considered an infamous punishment in England and America, and that imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, "involuntary servitude for crime," spoken of in the provision of the Ordinance of 1787, and of the 13th Amendment of the Constitution, by which all other slavery was abolished, and which declares *that such slavery or in-
238] voluntary servitude shall not exist within the United States or any place subject to their jurisdiction, except as a punishment for crime whereof the party shall have been duly convicted.

And in the case of *Yick Wo* v. *Hopkins*, 118 U. S. 369 [30: 226], it was said: "The 14th Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws." Applying this reasoning to the 5th and 6th Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.

Our conclusion is that the commissioner, in sentencing the appellants to imprisonment at hard labor at and in the Detroit House of Correction, acted without jurisdiction, and that the circuit court erred in not discharging the prisoners from such imprisonment, without prejudice to their detention according to law for deportation.

*The judgment of the circuit court is reversed*, and the cause remanded to that court with directions to proceed therein in accordance with this opinion.

Mr. Justice **Brewer** took no part in the decision of this case.



Digitized by Google

**Mr. Justice Field** concurring in part and dissenting in part:

The majority of the justices, in this case, hold that whatever might be true as to the power of the United States to exclude aliens, yet there was no power to punish such aliens who had been permitted to become residents, and that, if such power did exist, it could only 239] be lawfully exercised after a *judicial trial, and therefore that the accused were entitled to be discharged from their arrest and imprisonment. To that extent their opinion is concurred in.

But I do not concur, but dissent entirely from what seemed to me to be harsh and illegal assertion made by counsel of the government, on the argument of this case, as to the right of the court to deny to the accused the full protection of the law and Constitution against every form of oppression and cruelty to them.

Wong Wing, one of the petitioners on proceedings to be released from the alleged unlawful imprisonment, is a subject of the Chinese government, with which the government of the United States has relations of peace and amity. This Chinaman and three other persons of the same race and country were in the month of July, 1892, found within the city of Detroit, in the eastern district of Michigan, and upon the complaint of the deputy collector of customs at that place made to a United States circuit court commissioner for that district that they were unlawfully within the limits of the United States, a warrant for their arrest was issued by the commissioner, and they were accordingly arrested and taken before him for inquiry into the correctness of the charge.

Upon examination before the commissioner upon the charge it was held by him that the Chinese persons named were unlawfully within the United States, and his judgment was that they should be imprisoned at hard labor in the House of Correction at Detroit, in the eastern district of Michigan, for a period of sixty days from and including that date, and that at the expiration of that period they should be removed from the United States to China.

The Chinese thus arrested and committed immediately applied to the judges of the United States court for the eastern district of Michigan for a writ of habeas corpus, to be released from their imprisonment and restraint of their liberty, alleging that the same were unlawful, without warrant of law, and contrary to the Constitution and laws of the United States; and that they were made under 240] the act of Congress *approved May 5, 1892, entitled "An Act to Prohibit the Coming of Chinese Persons into the United States."

The petitioners alleged that the proceedings and conviction were wholly without jurisdiction on the part of the commissioner and without warrant and authority of law. They therefore prayed that the writ might issue commanding the superintendent of the Detroit House of Correction to forthwith bring the petitioners before the court and show cause, if any there be, why they should be further detained and deprived of their liberty. The writ was immediately issued and served upon the superintendent, commanding him to have the bodies of the arrested and imprisoned Chinese upon a day and hour designated before the court, together with the time and cause of such imprisonment and detention.

The superintendent immediately appeared before the court and produced the arrested and imprisoned persons with a copy of the commitment issued by the commissioner at a session of the circuit court of the United States for the eastern district of Michigan, held pursuant to adjournment in the district court-room in the city of Detroit on Friday, the 22d day of July, 1892, Honorable Henry H. Swan, District Judge, being present, and after arguments of counsel were heard, the court ordered that the writ of habeas corpus be discharged, and that the persons arrested be remanded to the custody of Nicholson, the keeper of the Detroit House of Correction, to serve their original sentences.

The prisoners now allege that they are aggrieved by the decision of the court, and are advised that the judgment and order are erroneous upon the following among other grounds:

First, because the commitment and imprisonment of the petitioners in the house of correction are unlawful and without warrant of law, and contrary to the Constitution and laws of the United States; that the proceedings and conviction of the petitioners before the commissioner were wholly without jurisdiction on his part, and without warrant or authority of law; that for these and other reasons appearing on the face of the proceedings, the petitioners, feeling themselves aggrieved by the judgment and decision of the circuit court, *appeal 241 therefrom to the Supreme Court of the United States, and pray that the appeal may be allowed, and, in accordance with the rules and practice of that court, pending the appeal they may be admitted to bail, which prayer was granted.

The question involved is whether a Chinese person can be lawfully convicted and sentenced to *imprisonment at hard labor* for a definite period by a commissioner without indictment or trial by jury. The question involves the constitutionality of § 4 of the act of 1892.

It is submitted that this section is invalid because it conflicts with the 5th Amendment of the Constitution, which declares that "no person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, . . . nor be deprived of life, liberty, or property without due process of law," and also conflicts with the 6th Amendment of the Constitution, which provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."

It does not follow that because the government may expel aliens or exclude them from coming to this country that it can confine them at hard labor in a penitentiary before deportation or subject them to any harsh and cruel punishment. If the imprisonment of a human being at hard labor in a penitentiary for any misconduct or offense is not punishment, it is difficult to understand how anything short of the infliction of the death penalty for such misconduct or offense is pun-



Digitized by Google

ishment. It would seem to be not only punishment, but punishment infamous in its character, which, under the provisions of the Constitution of the United States, can only be inflicted upon a person after his due conviction of crime pursuant to the forms and provisions of law.

Section 4 of the act of 1892 provides: "That any Chinese person or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year, and there-
242]after removed from the United *States, as hereinbefore provided," and whenever the law provides that imprisonment shall follow a trial and conviction of the offender, it necessarily intends that such imprisonment shall be inflicted as *punishment*, for the offense of which the person has been convicted. Imprisonment at hard labor for a definite period is not only punishment, but it is punishment of an infamous character.

Imprisonment at hard labor in a state prison is also *servitude*, to which no person under the Constitution can be subjected except as a punishment for crime, whereof he shall have been duly convicted.

In *Ex parte Wilson*, 114 U. S. 417 [29: 89], the court said: "Imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, 'involuntary servitude for crime,' spoken of in the Ordinance of 1787 and of the 13th Amendment of the Constitution, by which all other slavery was abolished."

In 2 Story, Const. § 1924, it is said that this amendment "forbids, not merely the slavery heretofore known to our laws, but all kinds of involuntary servitude not imposed in punishment for a public offense."

The provisions of the 5th, 6th, and 13th Amendments of the Constitution apply as well to Chinese persons who are aliens as to American citizens.

The term "person," used in the 5th Amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.

This has been decided so often that the point does not require argument. *Yick Wo* v. *Hopkins*, 118 U. S. 369 [30: 226]; *Ho Ah Kow* v. *Nunan*, 5 Sawy. 552; *Carlisle* v. *United States*, 83 U. S. 16 Wall. 147 [21: 426]; *Re Lee Tong*, 18 Fed. Rep. 253; *Re Wong Yung Quy*, 6 Sawy. 237; *Re Chow Goo Pooi*, 25 Fed. Rep. 77.

The contention that persons within the ter-
243]ritorial jurisdiction *of this republic might be beyond the protection of the law was heard with pain on the argument at the bar, in face of the great constitutional amendment which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. Far nobler was the boast of the great French Cardinal who exercised power in the public affairs of France for years, that never in all his time did he deny justice to any one. "For fifteen years," such were his words, "while in these hands dwelt empire, the humblest craftsman, the obscurest vassal, the very lepers shrinking from the sun, though loathed by charity, might ask for justice."

It is to be hoped that the poor Chinamen now before us seeking relief from cruel oppression will not find their appeal to our republican institutions and laws a vain and idle proceeding.

But whilst remarking upon and denouncing in the strongest language every form of cruelty and barbarity in the legislation or proceedings adopted for the expulsion or exclusion of Chinese from the country, who do not enter by the permission of the government, in order to avoid a misconception of its authorized action in that respect, the declarations of the court with regard to the aliens named, as to their entrance and as to the time and manner of their departure, are adopted.

And the statement of the court in the present case that the United States can, as a matter of public policy, by congressional legislation, forbid aliens or classes of aliens from their territory, and can, in order to make effectual such legislation for their exclusion or expulsion, devolve the power and duty of identifying and arresting them, and causing their deportation upon executive or subordinate officials, is accepted as sound.

And the further views announced by the court, that when Congress sees fit to promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, such legislation, to be valid, must provide for an arrest and trial to establish the guilt of the accused, are also accepted and adopted. "It is not consistent," as truly said by the court, "with the theory of our government, that the legislature should, after having *defined [244 an offense as an infamous crime, provide that the fact of infamy shall be established by one of its own agents."

---

## UNITED STATES, *Appt.*,
*v.*
## WINCHESTER & POTOMAC RAILROAD COMPANY.

(See S. C. Reporter's ed. 244-258.)

*Seizure and appropriation of a railroad by military authorities—certification of claim—act of officer or governmental department—jurisdiction of court of claims.*

1. The seizure and appropriation of a railroad and its appurtenances during the war by military authorities of the United States, without regard to the assent of the owner and without any understanding that compensation was to be made, is to be regarded as an act of war; and a claim of the owner for the proceeds of the property ap-

NOTE.—*As to levying war; high treason*,—see note to *Ex parte* Bollman, 2: 554.

*That dominion acquired over conquered or ceded territory does not devest vested rights of individuals to property; former laws continue until altered by new sovereign*,—see note to Delassus v. United States, 9: 71.



Digitized by Google

propriated must be deemed a "war claim" within the meaning of the act of Congress of 1887 excluding war claims from the jurisdiction of the court of claims.

2. The certification of a war claim by an executive department to the court of claims under U. S. Rev. Stat. § 1063, cannot give the court jurisdiction.

3. A war claim cannot be devested of that character so as to give jurisdiction to the court of claims by anything done or omitted to be done by any officer or department of the government.

4. The court of claims cannot take judicial cognizance of a "war claim"—that is, one growing out of the appropriation of property by the army while engaged in the late war, and not one arising upon a valid contract, express or implied, made when such appropriation occurred.

[No. 195.]

*Argued March 31 and April 1, 1896. Decided May 18, 1896.*

APPEAL from a judgment of the Court of Claims in favor of the Winchester & Potomac Railroad Company, for the value of certain iron rails removed in 1862 from that railroad by the military authorities of the United States. *Reversed*, and cause remanded with directions to dismiss for want of jurisdiction.

See same case below, 27 Ct. Cl. 494.

Statement by Mr. Justice **Harlan**:

This appeal brings up for review a judgment in favor of the Winchester & Potomac Railroad Company for the sum of $30,340, the value of certain iron rails removed in 1862 from the track of that railroad by the military authorities of the United States.

It seems necessary to a clear understanding of the questions presented that the history of this claim and the circumstances attending its prosecution against the United States should be fully stated.

In 1862 and for many years prior thereto the appellee, a corporation of Virginia, owned and operated the railroad extending from Harper's Ferry to Winchester in the state of Virginia. Its capital stock was largely owned by citizens of loyal states.

In March of that year the military authorities of the United States took possession of the road, which at the time was operated by the company for the use and benefit of the Confederate states in the transportation of troops, munitions of war, and other subjects under a contract made September 11, 1861, between an officer of the Confederate States Army and the president of the railroad company.

245] *The possession of the United States covered substantially the whole time from March, 1862, to the 20th day of January, 1866, and during that period the government had the exclusive use of the road for military purposes, receiving all tolls and revenues and applying the same to its benefit.

The United States, while in possession, repaired the road, and removed from it a quantity of strap rails and substituted T rails taken by it from the Manassas Gap Railroad Company. These T rails were upon the Winchester & Potomac Railroad up to the time possession was surrendered by the United States in 1866. The strap rails or iron so removed from the Winchester & Potomac Railroad were stored at Alexandria, Virginia.

The United States has never paid or accounted to the claimant for the revenues of its road which it collected and appropriated, nor for the rails so removed.

Immediately upon the restoration of the roads of the above companies to their respective owners, the Manassas Gap Railroad Company brought suit against the Winchester & Potomac Railroad Company for the iron taken from its own road and put upon the latter road, or its value, and obtained judgment, which was compromised in 1873 or 1874 by the payment by the Winchester & Potomac Railroad Company of $25,000.

The circumstances under which the appellee's road was surrendered by the United States are fully disclosed in the findings below, and, so far as pertinent to the present inquiry, may be thus summarized.

On the 19th day of May, 1865, the Quartermaster General submitted to the Secretary of War a scheme for the disposition of the railroads in the states then lately in rebellion. That scheme was as follows:

"1. The United States will, as soon as it can dispense with the military occupation and control of any road of which the Quartermaster's Department is now in charge, turn it over to the parties asking to receive it who may appear to have the best claim, and be able to operate it in such manner as to secure the speedy movement of all military stores and troops, *the Quartermaster General, upon the [246 advice of the military commander of the department, to determine when this can be done, subject to the approval of the Secretary of War. 2. No charge to be made against the railroad for expense of material or expense of operation. 3. All materials for permanent way used in the repair and construction of the road, and all damaged material of this class which may be left along its route, having been thrown there during the operation of destruction or repair, to be considered as part of the road and given up with it. 4. No payment or credit to be given to the railroad for its occupation or use by the United States during the continuance of the military necessity which compelled the United States to take possession of it by capture from the public enemy. The recovery of the road from the public enemy and its return to loyal owners, and the vast expenditure of defense and repair, are full equivalent and more than an equivalent for its use. 5. All movable property, including rolling stock of all kinds, the property of the United States, to be sold at auction after full public notice, to the highest bidder. 6. All rolling stock and material, the property before the war, of railroads, and captured by the forces of the United States, to be placed at the disposal of the roads which originally owned it, and to be given up to these roads as soon as it can be spared, and they appear by proper agents authorized to receive it. 7. When a state has a board of public works able and willing to take charge of its railroads, the railroads in the possession of the Quartermaster's Department to be given up to this board of public works, leaving it to the state authorities and the judicial tribunals to regulate all questions of prop-



Digitized by Google

erty between said boards, agents, or stockholders. 8. Roads not being operated by the United States Quartermaster's Department not to be interfered with unless under military necessity. Such roads to be left in possession of such persons as may now have possession, subject only to the removal of every agent, director, president, superintendent, or operator who has not taken the oath of allegiance to the United States, which rule should be rigidly enforced. 9. When the superintendents in actual 247] possession decline to take *such oath, some competent person to be appointed as receiver of the railroad, who shall administer the affairs of the road and account for its receipts to the board of directors, who may be formally recognized as the legal and loyal board of managers. This receiver to be appointed, as in the case of other abandoned property, by the Treasury Department. . . ."

The Secretary of War approved that scheme, and the Quartermaster General was directed to turn over the roads.

Certain regulations were established by the War Department, and promulgated August 8, 1865, and October 14, 1865, for the guidance of the military authorities in relinquishing the control of railroads in the occupancy of the United States.

In reply to an oral application made November 16, 1865, by the Winchester & Potomac Railroad Company to have its road restored upon the terms accorded to other companies, the matter was referred by the Secretary of War to the Quartermaster General for such arrangement and recommendation as he deemed proper. The Quartermaster General recommended that the application be granted, and the officer in charge of military roads was directed to surrender possession—"all rolling stock and railroad materials upon that road, which the company may not elect to purchase, to be sold, as soon as preparation can be made, at public auction."

This order not having been immediately executed, the President of the Winchester & Potomac Railroad Company, December 5, 1865, made a request in writing that his company's road be delivered up to its board of directors. Thereupon, on the 15th of December, 1865, an order for the surrender of the road was issued. That order was executed by the delivering the road, on the 16th day of January, 1866, to the Baltimore & Ohio Railroad Company, as lessees of the Winchester & Potomac Railroad Company.

The facts in relation to the disposition of the iron removed by the military authorities of the United States from the Winchester & Potomac Railroad and stored at Alexandria are as follows:

On the same day on which the president of the 248]Winchester *& Potomac Railroad Company made verbal application for the restoration of the road to his company, he addressed to the director and general manager of military railroads a communication in which he said: "We are informed that a quantity of the iron from our road—flat or strap bar—is now in possession of your department at Alexandria, Virginia, which we are anxious to recover, as we hope the road is about to be returned to the company. We respectfully request that the fact may be inquired into, and, if proper, an order made to return the said iron to my order, as president of the company."

No answer was returned to this application nor were any affidavits or other proof of the ownership or value of the iron mentioned, nor of any of the other facts therein alleged offered to or filed in any Executive Department, prior to May 11, 1885, on which day the Baltimore & Ohio Railroad Company made a written application, to which reference will be presently made. But at or about the date of the above communication of November 16, 1865, the president of the Winchester & Potomac Railroad Company made an application to the Quartermaster General for this iron.

A large quantity of iron stored at Alexandria and in the possession of the United States, and aggregating more than $2,000,000 in value, was sold at public auction on December 13, 1865. The iron taken in 1862 from the appellee's road was part of the iron so disposed of. It sold for $30,340, and was paid for January 9, 1866, the proceeds being used, through the War Department, for the benefit of the United States.

On the 2d day of December, 1875, the president of the Baltimore & Ohio Railroad Company addressed to the Quartermaster General a communication, saying: "Subsequent to the termination of the late war the United States military railroad authorities sold a quantity of old rails in Alexandria, Virginia, which had been taken from the line of the Winchester & Potomac Railroad. I have the honor to request that you will furnish me with the dates the said rails were sold, the quantity sold, the price per ton, the amount realized from the sale of the rails taken from the line of the Winchester & Potomac Railroad, and the disposition made by the U. S. M. R. *R'd [249 managers of the proceeds. You will further oblige me by stating the date on which the Winchester & Potomac Railroad was surrendered by the War Department to its owners."

The Quartermaster General replied, under date of December 11, 1875, giving him exact information touching all the matters about which inquiry was made.

Nothing seems to have been done by the claimant or by any one in its name, until May 11, 1885, when the Baltimore & Ohio Railroad Company, by its president, made to the Quartermaster General a written application or claim for the proceeds of the sale of said iron, as follows:

"*The United States to the Baltimore & Ohio Railroad Company, lessee of the Winchester & Potomac Railroad Company, Dr.*

"For 507 tons 1,940 pounds (2,240 pounds to the ton) of iron rails appertaining to the Winchester & Potomac Railroad Company, and the property of that company, which once formed a part of the superstructure of that road when taken by the United States authorities, and was subsequently sent to Alexandria, Virginia, and sold at auction by the United States Military Railroad Department in December, 1865, for the sum of $30,340."

This application was forwarded to the Secretary of War, and was by him returned to the Quartermaster General. The latter officer made an elaborate report, under date of De-



Digitized by Google

cember 7, 1885, in which, among other things, he said: "The only reason which can be given for the failure of the company to secure possession of its old iron is the fact that the company was not in condition to receive it before its sale. If the transfer of the road to the Winchester & Potomac Railroad company had been authorized and effected before the sale of the iron, it is believed that the company would have been permitted to take possession of it. A denial of this privilege or right would have involved an unjust discrimination by the government between the treatment of this company and that of all other companies whose roads were used for military purposes during the war, and would have been a marked departure from the policy and practice of the government toward such companies upon the 250]restoration of their roads. . . . *But it is not believed to be in the power of the Executive Department to afford relief at this time without the intervention of Congress. . . . It is therefore respectfully recommended, if this report be approved, that this claim, with the papers accompanying it, be referred to the third auditor for adjudication by the accounting officers of the Treasury, with recommendation for such action as the law and facts of the case require."

The Secretary of War approved this report, and "the accompanying papers in the claim of the Baltimore & Ohio Railroad Company for the proceeds of railroad iron, stated by the company at $30,840," were "referred (through the office of the Quartermaster General) to the third auditor of the Treasury for settlement from the appropriation 'Transportation of the Army and its supplies,' the amount found due to be reported to Congress for appropriation."

On the 4th day of March, 1887, the third auditor reported against the claim, but without expressing an opinion on its merits if such claim should ever be presented by the Winchester & Potomac Railroad Company.

Thereupon the Winchester & Potomac Railroad Company was substituted as claimant in interest in place of the Baltimore & Ohio Railroad Company, its lessee, claiming on its behalf.

On the 18th day of April, 1887, the third auditor again recommended the disallowance of the claim and certified the matter to the second comptroller of the Treasury.

The second comptroller, March 9, 1889, sent the claim, with accompanying papers, to the Secretary of the Treasury as one involving disputed facts and controverted questions of law, with a recommendation that the case, vouchers, etc., be transmitted to the court of claims for trial and adjudication. The Secretary, March 12, 1889, sent the claim, with the papers, to the court of claims, under U. S. Rev. Stat. § 1063, for trial and adjudication, expressing, however, doubt whether the Department had jurisdiction of it, but submitting that question to that court for its determination.

*Mr.* **J. M. Dickinson,** Assistant Attorney General, for appellant:

The court of claims was without jurisdiction.

The reference was made by the Secretary of the Treasury in March, 1889, and the petition was filed in the court of claims, in June, 1889.

The jurisdiction of the court of claims was then governed by the Bowman act (22 Stat. at L. 485, chap. 116), the Tucker act of March 3, 1887 (24 Stat. at L. 505, chap. 359), and so much of U. S. Rev. Stat. §§ 1059, 1068, as was not superseded by that act.

*United States* v. *New York*, 160 U. S. 598 (40: 551).

The proviso to the 1st section of the act of March 3, 1887, expressly withheld from the court "jurisdiction to hear and determine claims growing out of the late civil war and commonly known as 'war claims.'"

Before the passage of the act of March 3, 1887, U. S. Rev. Stat. § 1059, excepted from the jurisdiction of the court "any claim against the United States growing out of the destruction or appropriation of or damage to property by the army or navy engaged in the suppression of the rebellion."

This limitation was made by the act of February 18, 1875 (18 Stat. at L. 318, chap. 80), which was passed to amend U. S. Rev. Stat. § 1059, for the purpose of restricting claims for captured or abandoned property under the acts of March 12, 1863, and July 2, 1864.

In *United States* v. *Russell*, 80 U. S. 13 Wall. 624 (20: 474), the question arose as to the meaning of the limitation upon the jurisdiction contained in the words "appropriation of or damage to property by the army or navy."

It was the manifest purpose of the act of March 3, 1887, to further limit the jurisdiction of the court, and therefore more comprehensive language was used, which expressly withheld from the court "jurisdiction to hear and determine claims growing out of the late civil war and commonly known as 'war claims.'"

Even without the limitation of the subsequent act, it seems the court would have no jurisdiction in this case.

*Filor* v. *United States*, 76 U. S. 9 Wall. 46 (19: 549).

There was nothing in the acts attending the appropriation upon which an implied promise could be founded.

*Pugh* v. *United States*, 80 U. S. 13 Wall. 633 (20: 711).

If the court could not take the original jurisdiction of the claim for the reason stated, the fact of its being referred to the court by the Secretary of the Treasury would not enlarge the jurisdiction.

*United States* v. *New York*, 160 U. S. 615 (40: 556).

There was no implied contract.

The findings show that this property was "employed in actual hostilities on land."

Under the authority of *United States* v. *Klein*, 80 U. S. 13 Wall. 136 (20: 522), and *Young* v. *United States*, 97 U. S. 60 (24:997), it became, when taken, the property of the United States.

*Mr.* **Frank P. Clark,** for appellee:

The government on its part was to release "all charges against the railroad for expense of material or expense of operation," to give up "all material used in the repair of the road, etc.," and to surrender "all rolling stock and



Digitized by Google

material, the property before the war of the road and captured by the forces of the United States," there can be no question but that the tender and acceptance of and the compliance with these conditions established a contract between this company and the government.

*Winchester & P. R. Co.* v. *United States*, 27 Ct. Cl. 494; *United States* v. *Speed*, 75 U. S. 8 Wall. 77 (19: 449); *Gibbons* v. *United States*, 75 U. S. 8 Wall. 269 (19: 453); *United States* v. *Smoot*, 82 U. S. 15 Wall. 36 (21: 107).

The same construction and effect must be applied to contracts made by the United States as to those between individuals.

*Salomon* v. *United States*, 7 Ct. Cl. 483, affirmed in 86 U. S. 19 Wall. 17 (22: 46); *United States* v. *Gill*, 87 U. S. 20 Wall. 517 (22: 421); *United States* v. *Smith*, 94 U. S. 214 (24: 115); *United States* v. *Bostwick*, 94 U. S. 53 (24: 65); *Amoskeag Mfg. Co.* v. *United States*, 84 U. S. 17 Wall. 592 (21: 715).

The correspondence under which the United States enters into an occupancy constitutes a contract of letting, and the United States can be held liable for damages for misuse of the leased premises.

*Clark* v. *United States*, 95 U. S. 539 (24: 518).

A parol contract, wholly or partially executed, entitles the party to recover the fair value of his property or services, as upon an implied contract for the *quantum meruit*.

*Knote* v. *United States*, 95 U. S. 149 (24: 442); *United States* v. *State Nat. Bank*, 96 U. S. 30 (24: 647).

When the money or property of an innocent person has gone into the coffers of the nation, such money or property cannot be held against the claim of the wrong and injured party.

*State Nat. Bank* v. *United States*, 114 U. S. 401 (29: 149); *Parish* v. *United States*, 100 U. S. 500 (25: 763); *United States* v. *Peck*, 102 U. S. 64 (26: 46); *Western U. R. Co.* v. *United States*, 101 U. S. 543 (25: 1068).

The government cannot retain the obligation of a contract against a company, and at the same time vary its own.

*Chicago & N. W. R. Co.* v. *United States*, 104 U. S. 680 (26: 891); *Harvey* v. *United States*, 105 U. S. 671 (26: 1206).

A written bid, and acceptance of that bid, constitute "a contract between the parties," which can be enforced.

*Garfields* v. *United States*, 93 U. S. 242 (23: 779); *Swift & C. & B. Co.* v. *United States*, 111 U. S. 22 (28: 341); *United States* v. *Great Falls Mfg. Co.* 112 U. S. 645 (28: 846); *United States* v. *Mueller*, 113 U. S. 153 (28: 946).

The claim in the case at bar was surely duly "presented" and in a form sufficiently intelligible.

*Taylor* v. *United States*, 14 Ct. Cl. 339.

The adjudicated cases sustained the court of claims in this case.

*Warder* v. *United States*, 25 Ct. Cl. 177, 178.

Mr. Justice **Harlan** delivered the opinion of the court:

The United States contends that the claim in question is not one of which the court of claims could take cognizance for purposes of final adjudication; that the case is not one of implied contract; and that the government is protected from any judgment against it by the statutory limitation of six years. The first of these questions does not seem to have been raised in the court below.

The act of February 24, 1855, chap. 122, by which the court of claims was constituted, gave it jurisdiction to hear and determine all claims against the United States "founded upon *any law of Congress, or upon any regu-[252 lation of an executive department, or upon any contract, expressed or implied, with the government of the United States." 10 Stat. at L. 612. But by a subsequent act passed July 4, 1864, chap. 240, it was declared "that the jurisdiction of the court of claims shall not extend to or include any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof." 13 Stat. at L. 381.

By the act of February 21, 1867, chap. 57, it was provided that the act of 1864 should "not be construed to authorize the settlement of any claim for supplies or stores taken or furnished for the use of or used by the armies of the United States, nor for the occupation of, or injury to, real estate, nor for the consumption, appropriation, or destruction of, or damage to, personal property, by the military authorities or troops of the United States, where such claim originated during the war for the suppression of the southern rebellion, in a state, or part of a state, declared in insurrection." 14 Stat. at L. 397.

The Revised Statutes omitted the provisions of the acts of 1864 and 1867. Whether that omission was intentional or not, we need not inquire; for by the act of February 18, 1875, chap. 80, which was passed to correct errors and supply omissions in U. S. Rev. Stat. § 1059, enumerating the matters or cases of which the court of claims could take cognizance, was amended by adding to its fourth paragraph the following additional proviso: "*Provided, also*, That the jurisdiction of the court of claims shall not extend to any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy engaged in the suppression of the rebellion." 18 Stat. at L. 318.

The Tucker act of March 3, 1887, chap. 359, expressly withholds from the court of claims, and from the district and circuit courts of the United States, "jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims.'" 24 Stat. at L. 505.

*It thus appears that at the time the ap-[253 pellee by its president made application to the military authorities to have its road, as well as the iron rails in question, restored to its possession, the court of claims was without authority to adjudicate any claim against the United States "growing out of" the destruction or "appropriation" of or damage to property by the army or navy engaged in the suppression of the rebellion; further, that at the time the appellee's claim was transmitted by the Secretary of the Treasury to the court of claims for adjudication that court was without jurisdiction to hear and determine claims "growing out of the



Digitized by Google

late civil war and commonly known as 'war claims.'" Of course, the "war claims" to which the act of 1887 referred included those described in the previous acts as claims growing out of the destruction or appropriation or damage to property by the army or navy engaged in the suppression of the rebellion.

Is the claim of the appellee a "war claim" within the meaning of the act of 1887? Light will be thrown upon this question by the decisions construing the act of 1864, which excluded from the jurisdiction of the court of claims any claim "growing out of" the destruction or "appropriation" of property, by the army or navy engaged in the suppression of the rebellion.

In *Filor* v. *United States*, 76 U. S. 9 Wall. 45, 48, 49 [19: 549-551], it appeared that a certain wharf and it appurtenances at Key West, Florida, were in the use and occupation of the United States during the civil war under an agreement as to rental between an acting assistant quartermaster, stationed at that place, and the owner of the property, but the agreement was not approved by the Quartermaster General. This court said: "No lease of the premises for the use of the Quartermaster's Department, or any branch of it, could be binding upon the government until approved by the Quartermaster General. Until such approval the action of the officers at Key West was as ineffectual to fix any liability upon the government as if they had been entirely disconnected from the public service. The agreement or lease was, so far as the government is concerned, the work of strangers. The ob-
254] ligation *of the government for the use of the property is exactly what it would have been if the possession had been taken and held without the existence of the agreement. Any obligation of that character cannot be considered by the court of claims." Referring to the provisions of the above act of July 4, 1864, the court proceeded: "The premises of the petitioners were thus appropriated by a portion of the army. It matters not that the petitioners, supposing that the officers at Key West could bind the government to pay a stipulated rent for the premises, consented to such appropriation. The manner of the appropriation, whether made by force or upon the consent of the owner, does not affect the question of jurisdiction. The consideration of *any* claim, whatever its character, growing out of such appropriation, is excluded. The term appropriation is of the broadest import; it includes all taking and use of property by the army and navy, in the course of the war, not authorized by contract with the government. . . . If the petitioners are entitled to compensation for the use of the property they must seek it from Congress."

The case of *United States* v. *Russell*, 80 U. S. 13 Wall. 623, 632 [20: 474, 476], was somewhat different in its facts. That was a suit to recover for the use of certain steamboats used in the public service by the military authorities at St. Louis, Missouri, in 1863. It appeared from the findings of the court of claims that the military officers did not intend to "appropriate" the steamboats to the United States, nor even their services, although they did intend to compel the masters and crews, with the steamers, to perform the services needed, and that the United States should pay a reasonable compensation for such services; that such was the understanding of the owner; and that the steamers, as soon as the services for which they were required had been performed, were returned to the exclusive possession and control of the owner. The steamers were equipped, victualled, and manned by the owner, and he, or persons by him appointed, continued in their command throughout the entire period of the service. "He yielded at once," this court said, "to the military order, and entered into the service of *the government, and the court [255 here fully concur with the court of claims that there was not such an appropriation of the steamboats or of the services of the masters and crews as prohibited the court below from taking jurisdiction of the case. On the contrary, the court is of the opinion that the findings of the court of claims show that the employment and use of the steamboats were such as to raise an implied promise on the part of the United States to reimburse the owner for the services rendered and the expenses incurred, as allowed by the court of claims. Valuable services, it is conceded, were rendered by the appellee, and it is not pretended that the amount allowed is excessive. Neither of the steamers was destroyed, nor is anything claimed as damages, and inasmuch as the findings show that an appropriation of the steamers was not intended, and that both parties understood that a reasonable compensation for the services was to be paid by the United States, the court is of the opinion that the objection to the jurisdiction of the court of claims cannot be sustained, as the claim is not for 'the destruction or appropriation of or damages to property by the army or navy engaged in the suppression of the rebellion.'"

Another case is that of *Pugh* v. *United States*, 80 U. S. 13 Wall. 633-635 [20: 711, 712]. In the petition in that case the claimant averred "that the United States, during the late civil war, illegally, violently, and forcibly took possession of his plantation, in the state of Louisiana, on the false pretext that it had been abandoned by the owner, and held it until January, 1866, during which time the United States, and the agents placed in charge of the plantation, destroyed and carried away the property of the petitioner to the value of $42,508; and that the United States, during the same period, rented the plantation to sundry persons, who made large crops, worth $15,000 or $30,000." Chief Justice Chase, speaking for the court, said: "The destruction of the property complained of was during the war and in one of the states engaged in the rebellion, and the presumption, in the absence of inconsistent allegations, is that it was by the military forces of the United States. It is clear that a petition for compensation for injuries of this character *could not be sustained [256 in the court of claims, for the demand plainly grows 'out of the destruction or appropriation of or damage to property by the army or navy engaged in the suppression of the rebellion,' and is excluded from the cognizance of that court by the express terms of the act of July 4, 1864. . . . It is plain, therefore, that the petition does not state a case within the juris-



Digitized by Google

diction of the court of claims. If the petitioner has any claim upon the government he must seek relief from Congress."

The present case is controlled by the decisions in *Filor* v. *United States* and *Pugh* v. *United States*. It is not a case, like that of *United States* v. *Russell*, of the use of property under a valid implied agreement that the owner should be compensated; but is one of the actual appropriations by the military authorities of the United States, engaged in the suppression of the rebellion, of property which, at the time of such appropriation, was being employed by the Confederate government in hostility to the Union. The transaction had no element of contract, but was wholly military in character. In *Russell's Case* the owner of the property acquiesced in its use by the government, and there was such an understanding between the government and himself as made it, in the opinion of this court, the duty of the former under the Constitution to make just compensation to the latter. In the case now before us, the road and its appurtenances were seized without regard to the assent of the owner and without any understanding that compensation was to be made. Indeed, it would not have been competent for the military authorities of the United States to have bound the government to make compensation to the appellee for the use or for the return of property which, when seized, was being actively employed, under a contract with its owner, to advance the cause of the rebellion. If the appellee's road and the iron upon it were not, under the circumstances which attended their seizure, "appropriated" by the military authorities engaged in the suppression of the rebellion, it is difficult to conceive of a case of an appropriation of property within the meaning of the acts of 1864 and 1875. The road and its appur-
257] tenances *having been thus seized and appropriated for military purposes during the war, what was done by the military authorities of the United States is to be regarded as an act of war, and the claim of the appellee, for the proceeds of the property appropriated, must be deemed a "war claim" within the meaning of the act of 1887, and therefore expressly excluded from the jurisdiction of the court of claims at the time it was transmitted to that court for adjudication. Jurisdiction could not attach by reason simply of the claim having been certified to that court by an executive department under § 1063, as one involving controverted questions of fact and law; for, in *United States* v. *New York*, 160 U. S. 598, 615 [40: 551, 556], the various statutes relating to the jurisdiction of the court of claims were examined, and it was held, upon full consideration, that, notwithstanding the passage of the Bowman and Tucker acts, a claim described in U. S. Rev. Stat. § 1068, could be transmitted to the court of claims for "final adjudication," provided "such claim be not barred by limitation, and be one of which, by reason of its subject-matter and character, that court could take judicial cognizance at the voluntary suit of the claimant."

The appellee insists that its claim is not a "war claim," but is one founded upon contract made after the civil war ended. But in whatever light the matter be viewed, and even if it were held that the military authorities of the United States, after actual hostilities ceased, agreed to return the iron in question to the appellee, its claim is one "growing out of" the appropriation of property by the army engaged in the suppression of the rebellion, and therefore a "war claim" within the meaning of the above act of March 3, 1887. It could not be devested of that character by anything done or omitted to be done by any officer or department of the government. After the suppression of the rebellion the military authorities had no such relations to property appropriated by them during the war as enabled them, by contract or otherwise, to turn a claim growing out of such appropriation into a claim based upon contract, and thereby give to the court of claims a jurisdiction denied to it by Congress. We do not *mean to say that [258
this claim might not have been allowed by the proper executive department, and paid out of moneys at its disposal for such purposes. No such question is now presented, and we therefore express no opinion upon it. We adjudge nothing more than that the court of claims could not take judicial cognizance of this claim because it was and is a "war claim," that is, one growing out of the appropriation of property by the army while engaged in the suppression of the rebellion, and not one arising upon a valid contract, express or implied, made when such appropriation occurred.

These views render it unnecessary to consider any other question in the case, and require a reversal of the judgment.

The judgment is reversed, and the cause remanded with directions to dismiss the action for want of jurisdiction in the court of claims. *Reversed.*

Mr. Justice **Shiras** dissented.

---

## UNITED STATES, *Plff. in Err.*,
*v.*
## HARRY L. LAWS.

(See S. C. Reporter's ed. 258-268.)

*Contract labor act—chemist.*

1. A contract made with an alien in a foreign country to come to this country as a chemist on a sugar plantation in Louisiana, in pursuance of which contract such alien does come to this country and is employed on a sugar plantation in Louisiana and his expenses paid by the defendant, is not a contract to perform labor or service as prohibited in the act of Congress passed February 26, 1885.

2. A chemist employed on a sugar plantation in Louisiana belongs to a "recognized profession" within the exemption made by the proviso of the contract labor act of March 3, 1891.

[No. 248.]

*Submitted April 28, 1896. Decided May 18, 1896.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit certifying a question to be answered in the above-entitled action. *Question answered.*

The facts are stated in the opinion.



Digitized by Google

*Mr.* **Holmes Conrad,** Solicitor General, for plaintiff in error:

A "chemist" on a sugar plantation in Louisiana is a person engaged in labor or service; he does not belong to "any recognized profession."

*United States* v. *Thompson*, 41 Fed. Rep. 28.

The chemist in this case was a mere employee, hired by his employer, to whose will he was subject.

*Vane* v. *Newcombe*, 132 U. S. 220 (33: 310).

Now here this "chemist" was not a free agent. He is not described in the certificate as a "chemist," but as a "chemist on a sugar plantation in Louisiana." He was a chemist only there, and only for the purposes which his employment on that place occasioned. He served his employer and performed the labor prescribed in his contract.

Had he been a professional chemist, offering his services to the public at large, holding himself ready to apply his scientific knowledge and skill to all persons who applied for them, he would be entitled to the claim of "belonging to a recognized profession." But he had contracted to sell his time, his labor, and his skill in his art to one single, narrow, prescribed service.

*Bank of Pennsylvania* v. *Gries*, 35 Pa. 423; *Price* v. *Kirk*, 90 Pa. 47; *Pennock* v. *Fuller*, 41 Mich. 158, 32 Am. Rep. 148.

The act of February 26, 1885, by expressly excepting certain specified classes, has, by every recognized canon of construction, plainly manifested its intent and purpose to reach all classes within the scope of the original act, save those excepted therein and in the amendments.

*Lake County Comrs.* v. *Rollins*, 130 U. S. 670 (32: 1068).

*Mr.* **Lawrence Maxwell,** *Jr.*, for defendant in error:

It is true of this case, as it was of the case of *Church of Holy Trinity* v. *United States*, 143 U. S. 457 (36: 227), that the contract complained of is within the letter of the statute. But it is not within the statute, because not within its spirit nor within the intention of its makers. "The title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal of Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor." p. 465 (230).

A chemist is none the less engaged in a professional labor because he confines his energies to a particular department of chemistry, or in behalf of a particular patron.

The statement that the service was to be performed "on a sugar plantation in Louisiana" does not qualify the character of the service. It indicates merely the place where the service was to be performed. The question certified must therefore be dealt with as one presenting the case of purely professional labor because, according to the definitions of all lexicographers, a chemist is one skilled in the science of chemistry, or a professor of chemistry.

The statute (being criminal and therefore to be strictly construed) was not intended to condemn the act complained of.

Mr. Justice **Peckham** delivered the opinion of the court:

259] *This case comes here upon a certificate from the United States circuit court of appeals for the sixth circuit. The case came before that court by writ of error to the judgment of the circuit court of the United States for the southern district of Ohio, western division. Upon being presented to the circuit court of appeals it appeared from the record that the following question or proposition of law arose in the case concerning which the court desired the instruction of this court as to the proper decision thereof. The following is the question as stated:

"Is a contract made with an alien in a foreign country to come to this country as a chemist on a sugar plantation in Louisiana, in pursurance of which contract such alien does come to this country and is employed on a sugar plantation in Louisiana, and his expenses paid by the defendant, a contract to perform labor or service as prohibited in the act of Congress passed February 26, 1885?"

The court certified the following as being a summarized statement of the facts appearing in the bill of exceptions made under the direction of the judges of the court, *viz.:*

*Statement of Facts.*

A. Seeliger was, on or about July 22, 1889, a citizen of the German Empire, residing at Dormangen, Germany. At that date it is claimed that the defendant made a contract with him to come to the United States as a chemist on a sugar plantation in Louisiana, and and that Seeliger agreed to come to the United States for that purpose, and that the defendant paid his expenses to the United States; that Seeliger paid his expenses to the United States; that Seeliger came to the United States and went to Louisiana, and was there employed on a sugar plantation as chemist under the direction of the defendant.

It will be noticed that in the foregoing statement of facts there is a plain contradiction as to which party paid Seeliger's expenses; whether he paid them himself or whether the defendant paid them, it being stated both ways. This is unquestionably a mere clerical error, because in the question which *is certified [260 to this court the statement is plainly made that the expenses of Seeliger were paid by the defendant. We must assume, therefore, that such is the fact.

The act of Congress under which the question arises, passed February 26, 1885 (23 Stat. at L. 332), is entitled "An Act to Prohibit the Importation and Migration of Foreigners and Aliens under Contract or Agreement to Perform Labor in the United States, Its Territories, and the District of Columbia." The 1st and 2d sections thereof read as follows:

"Sec. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien



Digitized by Google

or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its territories, or the District of Columbia.

"Sec. 2. That all contracts or agreements, express or implied, parol or special, which may hereafter be made by and between any person, company, partnership, or corporation, and any foreigner or foreigners, alien or aliens, to perform labor or service or having reference to the performance of labor or service by any person in the United States, its territories, or the District of Columbia previous to the migration or importation of the person or persons whose labor or service is contracted for into the United States, shall be utterly void and of no effect."

The 3d and 4th sections are not material here. The 5th section, after providing for certain exceptions to the provisions of the first two sections, further enacts that the act shall not apply "to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants."

**261** *While this act was in force a suit was brought in the circuit court for the southern district of New York in favor of the United States against the Rector, etc., of the Church of the Holy Trinity in the city of New York. It was brought to recover the penalty of $1,000, as provided for in the act; and in the course of the trial it appeared that the defendant was a religious corporation, and had engaged a Mr. Warren, an alien residing in England, to come to the city of New York and take charge of its church as pastor. It was claimed on the part of the United States that the church corporation in making that contract with Mr. Warren had violated the 1st section of the act in question. It was held by the circuit court that the contract was within the statute, and that the defendant was liable for the penalty provided for therein. *United States* v. *Church of the Holy Trinity*, 36 Fed. Rep. 303.

In the course of his opinion the learned circuit judge said:

"It was, no doubt, primarily the object of the act to prohibit the introduction of assisted immigrants, brought here under contracts previously made by corporations and capitalists to prepay their passage and obtain their services at low wages for limited periods of time. It was a measure introduced and advocated by the trades union and labor associations, designed to shield the interests represented by such organizations from the effects of the competition in the labor market of foreigners brought here under contracts having a tendency to stimulate immigration and reduce the rates of wages. Except from the language of the statute there is no reason to suppose a contract like the present to be within the evils which the law was designed to suppress; and, indeed, it would not be indulging a violent supposition to assume that no legislative body in this country would have advisedly enacted a law framed so as to cover a case like the present."

Nevertheless the circuit court felt bound by what it regarded the plain terms of the statute to hold that the defendant had violated the act and was therefore amenable to its penalties.

**262** *The court was strengthened in its construction of the statute in question by the terms of the proviso above alluded to, contained in the 5th section, which excepted from the act professional actors, artists, lecturers, and singers. The circuit judge said: "If, without this exemption, the act would apply to this class of persons, because such persons come here under contracts for labor or service, then clearly it must apply to ministers, lawyers, surgeons, architects, and all others who labor in any professional calling. Unless Congress supposed the act to apply to the excepted classes, there was no necessity for the proviso. . . . Giving effect to this well-settled rule of statutory interpretation the proviso is equivalent to a declaration that contracts to perform professional services, except those of actors, artists, lecturers, or singers, are within the prohibition of the preceding sections." p. 305.

The defendant in the action brought the case to this court for review, where the judgment of the circuit court was reversed, and it was held that the statute did not apply to such a contract. The opinion of this court was delivered by Mr. Justice Brewer, and is reported in 143 U. S. 457 [36: 227]. In the course of that opinion the title of the act in question was referred to and commented upon, and it was stated, in speaking of the title, that "obviously the thought expressed in this reaches only to the work of the manual laborer as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain."

It was further stated in the opinion as follows:

"Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and it was pressed upon the attention of the legislative body. *United States* v. *Union P. R. Co.* 91 U. S. 72, 79 [23: 224, 228]. The situation which called for this statute was briefly but fully stated by *Mr. Justice* Brown when, as district judge, he decided the case of *United States* v. *Craig*, 28 Fed. Rep. 795, 798: 'The motives and history of the act *are [**263** matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrants. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage.'"

Allusion is then made to the petitions and testimony presented before the committees of Congress, from which it appears "that it was this cheap, unskilled labor which was making



Digitized by Google

the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition."

Summing up the matter on this branch, it was said in the opinion as follows: "We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all confer in affirming that the intent of Congress was simply to stay the influx of this cheap, unskilled labor."

Beyond that, the opinion proceeded with the statement that no purpose of action against religion could be imputed to any legislation, state or national, because of the fact that this is a religious people, not Christianity with an established church and tithes and spiritual courts; but Christianity with liberty of conscience to all men, as was stated in *Updegraph* v. *Com.* 11 Serg. & R. 394, 400.

264]*Upon the basis, therefore, that it could not be imputed as the intention of Congress, notwithstanding the language used in the act, to prevent the introduction of religious teachers, it was held that the act did not apply to the case before the court. Both grounds were covered in the opinion; the one that the act was clearly intended to apply only to cheap, unskilled labor, and the other that in no event could it be construed as applying to a contract for the services of a rector or a pastor of a religious corporation. The first ground covers the case in hand. The construction given to the words "labor or service" by this court in the above case was neither forced, unnatural, nor unusual. Considering the clear purpose of the act, the construction adopted was a natural and proper one.

The same construction has been adopted in the courts of the state of New York in relation to statutes providing for claims of laborers. In *Ericsson* v. *Brown*, 38 Barb. 390, one of the sections of the act of incorporation rendered the stockholders individually liable for all the debts due and owing by the company to its "laborers and apprentices." The plaintiff, being a consulting engineer, rendered services to the company as such, and he was held not to be within the meaning of the statute, and hence could not recover from a stockholder. The statute was held to refer to unskilled labor, where the individual earned his wages more by the labor of his hands than of his head.

In *Aikin* v. *Wasson*, 24 N. Y. 482, the plaintiff contracted with a railroad company to construct part of its road. Defendant was a stockholder in the company, which became insolvent. It was indebted to plaintiff for the services of himself and his laborers and servants under his contract. Section 10 of the railroad act enacted that "all of the stockholders of every such company shall be jointly and severally liable for all the debts due or owing to any of its laborers and servants for services performed for such corporation." It was held that the plaintiff was neither a laborer nor a servant within the meaning of the act.

In *Coffin* v. *Reynolds*, 37 N. Y. 640, the statute read: "The stockholders of any company organized under the provisions of *this act [265 shall be jointly and severally individually liable for all debts that may be due and owing to all their laborers, servants, and apprentices for services performed for such corporations." The plaintiff was the secretary of the company and commenced an action against the defendant as a stockholder to recover the amount of his salary, the company being insolvent. It was held that he could not recover. He was not a laborer or a servant within the meaning of the statute.

In *Wakefield* v. *Fargo*, 90 N. Y. 213, under the same statute it was held that one who was employed at a yearly salary as bookkeeper and general manager was not a laborer, servant, or apprentice within the meaning of the act, and hence that he could not recover against the stockholders for a balance of salary due him from the insolvent corporation.

These statutes were passed for the protection of laborers, servants, apprentices, and the like, and the opinions of the courts in relation to the class of individuals that would be included within the meaning of those terms are somewhat relevant although not entirely analogous to the case before this court.

Congress, however, a short time after and probably in consequence of the decision of the circuit court in the southern district of New York, amended the 5th section of the statute in question by adding to the proviso therein mentioned the words "nor to ministers of any religious denomination, nor persons belonging to any recognized profession, nor professors for colleges and seminaries," so that the proviso would read that the provisions of this act should not "apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants, nor to ministers of any religious denomination, nor to persons belonging to any recognized profession, nor professors for colleges and seminaries." Act approved March 3, 1891, 26 Stat. at L. 1084, chap. 551.

This amendment to the statute of 1885, although passed subsequently to the decision in the circuit court and prior to the decision of the same case in this court, was not mentioned in the opinion in this court, because the review was had upon the record based upon the act as originally passed in 1885.

*If by the terms of the original act the [266 provisions thereof applied only to unskilled laborers whose presence simply tended to degrade American labor, the meaning of the act as amended by the act of 1891 becomes, if possible, still plainer. Now by its very terms it is not intended to apply to any person belonging to any recognized profession. We think a chemist would be included in that class. Although the study of chemistry is the study of a science, yet a chemist who occupies himself in the practical use of his knowledge of chemistry as his services may be demanded may certainly at this time be fairly regarded as in the practice of a profession. One definition of a profession is an "employment, especially an employment requiring a learned education, as those of divinity, law, and physic." Worcester's Dict. tit. *Profession*. In the Century Dictionary the definition of the word "profession" is given, among others, as "A voca-



Digitized by Google

tion in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either in advising, guiding, or teaching them, or in serving their interests or welfare in the practice of an art founded on it. Formerly, theology, law, and medicine were specifically known as *the professions;* but as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professed attainments in special knowledge as distinguished from mere skill. A practical dealing with affairs as distinguished from mere study or investigation; and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for its own purposes." There are professors of chemistry in all the chief colleges of the country. It is a science the knowledge of which is to be acquired only after patient study and application. The chemist who places his knowledge acquired from a study of the science to the use of others as he may be employed by them, and as a vocation for the purpose of his own maintenance, must certainly be regarded as one engaged in the practice of a profession which is generally recognized in this country.

The question presented to us assumes that the [267 individual is *a chemist, and that he has come to this country for the purpose of pursuing his vocation as a chemist on a sugar plantation in Louisiana. It may be assumed that the branch of chemistry which he will practice will be that which relates to and is connected with the proper manufacture of sugar from the sugar cane, or possibly from sorghum or beets. He is none the less a chemist, and none the less occupied in the practice of his profession because he thus limits himself to that particular branch, which is to be applied in the course of the scientific manufacture of sugar any more than a lawyer would cease to practice his profession by limiting himself to any particular branch thereof or a doctor by confining his practice to some specialty which he particularly favored and was eminent in.

It is not stated what the particular duties of a chemist on a sugar plantation are, but it is quite plain, even to one not engaged in the business, that there would be a necessity for the services of one skilled in the science of chemistry in order to enable a manufacturer to make the most out of his materials and produce a commodity up to the proper standard and of a marketable nature. All sugar cane, for example, is not alike in quality or in the proportions of the ingredients which enter into its composition, and in the course of manufacture these differences must be discovered and determined, and the material must be treated accordingly so that the finished product shall be a commodity which is up to the standard set with reference to the particular grade of sugar which it is claimed to be. In order to determine this difference and to reach this standard, analysis of the different samples of the cane at some period of the process of manufacture ought to and must be made, and these analyses it is the province of a chemist to make. Upon their results depend the future treatment of the article. The samples analyzed will of course differ, to some extent, in their qualities from each other, and each will require different treatment, depending upon the result of the analysis and the directions of the chemist founded thereon. There can be, therefore, no regular or formal rule or method adopted for all cases. It becomes necessary to examine each *sample and decide after such examina- [268 tion what treatment is necessary for that particular lot thus examined. Learning in the science, skill in its practice, experience in results, are all factors going to make up the competent chemist in this particular branch.

The fact that the individual in question, by this contract, had agreed to sell his time, labor, and skill to one employer, and in one prescribed branch of the science, does not in the least militate against his being a professional chemist, nor does it operate as a bar to the claim that while so employed he is nevertheless practicing a recognized profession. It is not necessary that he should offer his services to the public at large nor that he should hold himself ready to apply his scientific knowledge and skill to the business of all persons who applied for them before he would be entitled to claim that he belonged to and was actually practicing a recognized profession. As well might it be said that the lawyer who enters into the service of a corporation and limits his practice to cases in which the corporation is interested thereby ceases to belong to the profession. The chemist may confine his services to one employer so long as the services which he performs are of a professional nature. It is not the fact that the chemist keeps his services open for employment by the public generally which is the criterion by which to determine whether or not he still belongs to or is practicing a recognized profession. So long as he is engaged in the practical application of his knowledge of the science, as a vocation, it is not important whether he holds himself out as ready to make that application in behalf of all persons who desire it, or that he contracts to do it for some particular employer and at some named place.

We have no doubt that the individual named comes within one of the exceptions named in the statute.

*The question certified to this court by the circuit court of appeals for the sixth circuit should be answered in the negative.*

---

JAMES C. EDWARDS, *Plff. in Err.*, [269
*v.*
BATES COUNTY, Impleaded in Behalf of MOUNT PLEASANT TOWNSHIP.

(See S. C. Reporter's ed. 269-273.)

*Jurisdiction of circuit court as to amount.*

The amount of a matured interest coupon which itself bears interest and constitutes a cause of action separate from that on the bond to which the coupon is attached can be added to the amount

NOTE.—*As to amount necessary to give jurisdiction in circuit court cases prior to act of 1875; amount necessary since act of 1875; amount in dispute,*—see note to Schunk v. Moline, M. & S. Co. 37: 256.



Digitized by Google

of the bond in determining the jurisdictional amount of $2,000 "exclusive of interest," in an action brought in a circuit court of the United States.

[No. 259.]

*Submitted April 29, 1896. Decided May 18, 1896.*

IN ERROR to the Circuit Court of the United States for the Western District of Missouri to review a judgment dismissing for want of jurisdiction a suit brought by James C. Edwards, plaintiff, against Bates County, impleaded, etc., to recover the principal of county bonds and the amount of interest coupons on said bonds with interest on the bonds and on the coupons. *Reversed*, and cause remanded for further proceedings.

See same case below, 55 Fed. Rep. 436.

Statement by Mr. Justice **White**:

On October 5, 1891, plaintiff in error filed his petition to recover from the defendant an aggregate alleged indebtedness, consisting of the following items: (1) The principal of two bonds for $1,000 each, issued by the defendant on January 18, 1871, with interest from the date of maturity of the bonds, January 18, 1886; (2) the amount of interest coupons on said bonds, due and payable on the 18th day of January, in the years 1873 to 1886, both inclusive, with interest from the maturity of each coupon; and, (3) the principal of seven funded bonds of said county, each for the sum of $100, dated October 1, 1885, and payable October 1, 1905.

The petition alleged that due notice had been given by the county, pursuant to an option reserved by it, that it would redeem said last-named bonds at a place named on the 1st of July, 1891, and that on that date and at the place designated said bonds had been duly presented and payment thereof demanded and refused.

A plea to the jurisdiction was filed on behalf of the defendant, based upon the claim that the matter in controversy, exclusive of interest and costs, did not exceed the sum or value of $2,000. It was alleged, among other things, that each of the funded bonds provided on its face that the said county of Bates, for and on behalf of the township of Mount Pleasant, reserved the right at its option to redeem the bonds at any time after five years from the first 270]day of October, 1885, in accordance *with the conditions printed on the back, which conditions, among other things, provided for the giving of notice, by advertisement, of the intention to redeem, and further provided that "if any bond be not presented as required in such notice, or within thirty days after the date therein fixed, interest thereon shall cease from said date, but said bond, with interest accrued to said date, shall be payable upon presentment at the office of the treasurer of Bates county at any time thereafter."

It was further alleged that the funding bonds in question had not been presented for payment, and that the purpose of including them in the suit at bar was merely in aid of an attempt to confer jurisdiction upon the court over the claim of plaintiff upon the two $1,000 bonds. The plaintiff filed a reply to the plea to the jurisdiction and the issue thereby raised was heard upon an agreed statement of facts and certain documentary evidence unnecessary to be specifically stated.

In the agreed statement of facts it was admitted that the funding bonds in question had never been presented for payment at the place designated by the contract for the redemption of the same, though said county had on deposit at the depository named in the advertised notice of intention to redeem, on said first day of July, 1891, and for more than thirty days thereafter, sufficient funds to pay said bonds, which funds had been deposited for such special purpose, and that the county of Bates had in the hands of its county treasurer money sufficient belonging to said township to pay said bonds at any and all times after said thirty days from said first day of July, 1891, if they had been presented for payment by the holder thereof.

The trial court sustained the plea, and dismissed the case for want of jurisdiction. 55 Fed. Rep. 436. The case was then brought to this court by writ of error.

*Mr.* **T. K. Skinker** for plaintiff in error.

No counsel for defendant in error.

*Mr. Justice **White** delivered the [271 opinion of the court:

We are solely concerned in this case in determining whether or not the circuit court possessed jurisdiction over the claim asserted in the petition. Act of March 3, 1891, chap. 517, § 5.

From the facts heretofore detailed, the following questions arise:

First. Should the circuit court have taken into consideration, for the purpose of ascertaining the adequacy of the jurisdictional amount, the claim of plaintiff upon the interest coupons attached to the two $1,000 bonds?

Second. Did the court rightly hold that the amount of the claim upon the funding bonds was not an item "in dispute" between the parties, and therefore not proper to be taken into account in determining whether the court possessed jurisdiction?

As to the first point. By the act of Congress of March 3, 1887, as amended August 13, 1888 (25 Stat. at L. 434), original jurisdiction was conferred upon circuit courts of the United States, "concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, . . . in which there shall be a controversy between citizens of different states in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000."

It is contended that an indebtedness for the face amount of coupons is an indebtedness for "interest" within the meaning of the statute.

The nature of a coupon was thus defined in *Aurora* v. *West*, 74 U. S. 7 Wall. 82 [19: 42], where this court said (p. 105 [50]):

"Coupons are written contracts for the payment of a definite sum of money, on a given day, and being drawn and executed in a form and mode for the very purpose that they may be separated from the bonds, it is held that they are negotiable, and that a suit may



Digitized by Google

be maintained on them without the necessity of producing the bonds to which they were attached."

272]*Each matured coupon upon a negotiable bond is a separable promise, distinct from the promises to pay the bond or other coupons, and gives rise to a separate cause of action. *Nesbitt* v. *Riverside Independent Dist.* 144 U. S. 610 [36: 562]. In that case this court said (p. 619 [565]):

"Each matured coupon is a separable promise, and gives rise to a separate cause of action. It may be detached from the bond and sold by itself. Indeed, the title to several matured coupons of the same bond may be in as many different persons, and upon each a distinct and separate action be maintained. So, while the promises of the bond and of the coupons in the first instance are upon the same paper, and the coupons are for interest due upon the bond, yet the promise to pay the coupon is as distinct from that to pay the bond, as though the two promises were placed in different instruments, upon different paper."

Not only may a suit be maintained upon an unpaid coupon in advance of the maturity of the principal debt, but the holder of a coupon is entitled to recover interest thereon from its maturity. *Amy* v. *Dubuque*, 98 U. S. 470, 473 [25: 228, 230]. The logical effect of these rulings is that when the interest evidenced by a coupon has become due and payable the demand based upon the promise contained in such coupon is no longer a mere incident of the principal indebtedness represented by the bond, but becomes really a principal obligation. Clearly, such would be the nature of the claim of one who, as owner of the coupons and not of the bonds, brought his action to enforce payment of the indebtedness evidenced by the coupons. So, also, before maturity of the bonds, their holder could still have sued upon the matured coupons as an independent indebtedness, and not as a mere accessory to a demand for a recovery of the face of the bonds. No good reason, therefore, exists for creating a distinction between such cases and the case at bar in which there is coupled with the demand to recover upon the coupons a demand for judgment upon the bonds. The confusion of thought, to which we alluded, in the case of *Brown* v. *Webster*, 156 U. S. 328 [39: 440], is also involved in the deci-

273]sion below, that is, the failure to *distinguish between a principal and accessory demand. The claim made by the plaintiff on the coupons was in no just sense accessory to any other demand, but was in itself principal and primary. In ascertaining, therefore, the jurisdictional sum in dispute, the sum of the coupons should have been treated as an independent, principal demand, and not as interest; and in holding otherwise the lower court erred to the prejudice of the plaintiff in error.

As the face of the bonds amounted to the sum of $2,000, the addition of the demand based upon the coupons brought the sum in dispute within the jurisdiction of the circuit court. It is therefore unnecessary to consider whether the controversy as to the funding bonds did not involve a real matter "in dispute" between the parties.

*The judgment is reversed*, and the cause is remanded with directions to set aside the order dismissing the action for want of jurisdiction, and for further proceedings in conformity to law.

---

## FRANK HANFORD, *Appt.*,
*v.*
## GRIFFITH DAVIES and ISABELLA DAVIES, His Wife, ET AL.

(See S. C. Reporter's ed. 273-280.)

*Impairing obligation of contract—due process of law.*

1. Judicial decisions or acts of state tribunals or officers under statutes which were in force at the time a contract was made are not within the constitutional prohibition against state laws which impair the obligation of the contract.
2. Want of due process of law in proceedings of a probate court is not sufficiently alleged to show a Federal question by the allegation that the court acted entirely without jurisdiction.

[No. 260.]

*Argued and Submitted April 29, 30, 1896. Decided May 18, 1896.*

APPEAL from a decree of the Circuit Court of the United States for the District of Washington dismissing a suit for want of jurisdiction, brought by Frank Hanford, plaintiff, against Griffith Davies *et al.*, to obtain a decree that the defendants have no title to the land in question, and that the title of the plaintiff is good, and to enjoin defendants from asserting any title thereto, and to declare invalid an administrator's deed. There was also a motion to dismiss. *Affirmed.*

See same case below, 51 Fed. Rep. 258.

Statement by Mr. Justice **Harlan**:

*This cause was determined in the court[274 below upon a demurrer to the bill. The grounds of demurrer were: (1) That the bill did not set forth any case entitling the plaintiff to relief. (2) That the circuit court had no jurisdiction.

It was adjudged that the bill did not state a case within the jurisdiction of the circuit court, and the question of jurisdiction alone has been certified. 51 Fed. Rep. 258.

Taking the case to be as made by the bill, it is substantially as follows:

On October 14, 1878, the territory of Washington, for a valuable consideration, executed to Thaddeus Hanford a deed conveying to him, his heirs and assigns, certain lands in what is now King county, state of Washington. The deed was duly recorded on November 25, 1878. It was executed by the territory in pursuance of a sale made by it of those lands as the property of one Lumley Franklin, for the nonpayment of taxes due from him. The deed contained what the bill describes as "the following contract and agreement" be-

NOTE.—*That impairing remedy impairs obligation of contracts*, see note to Louisiana, Ranger, v. New Orleans, 26: 132.

*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.



Digitized by Google

tween the parties, namely: "Now, therefore, the said party of the first part by virtue of the statute in such case made and provided, for the consideration of the sum of money above mentioned paid to the county treasurer of said county, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, convey, and confirm unto the said Thaddeus Hanford, his heirs and assigns, the said described real estate, together with all and singular the tenements and appurtenances thereto belonging or in any wise appertaining, and the rents, issues, and profits thereof, as well in law as in equity, and the right, title, and interest of the said Lumley Franklin and all owners known or unknown, of, in, or to the above-described premises."

Thaddeus Hanford immediately entered into possession of the premises, paid the taxes thereon, and improved the same, remaining in possession until the 17th day of September, 1885.

The statutes of Washington territory in force at the date of the above tax sale, as well as at the date of the execution of the above deed, prohibited the bringing of any suit or proceeding for the recovery of land sold for taxes after [275] the *expiration of three years from the recording of the tax deed of sale, except in cases where the tax had been paid or the land redeemed, or where such suit was brought by the purchaser at the tax sale. The statute also provided that the tax deed should be presumptive evidence of the regularity of all former proceedings.

On September 17, 1885, Thaddeus Hanford being in possession executed to Frank Hanford a deed of the premises, conveying a title in fee. That deed was duly recorded on the 13th day of March, 1886.

Frank Hanford purchased the premises in good faith for a valuable consideration and without notice of a claim by any other person than his grantor. In making his purchase he relied, the bill alleges, upon the "express contract entered into between the territory of Washington and the said Thaddeus Hanford, above set forth, by virtue of which said land was conveyed to said Thaddeus Hanford and title thereto confirmed in him by said territory and the laws thereof then existing."

Immediately after his purchase the plaintiff entered into possession of and improved the premises, paying taxes, and also erecting a dwelling house in which the property of his agent and employee were kept.

The bill then alleges: "That on the 26th day of July, 1887, the said territory of Washington, by W. Finley Hall, its agent, presented the petition of the said W. Finley Hall to the probate court of King county, alleging the death of said Lumley Franklin above named; that he left no property in Washington territory, except real estate; that there were no general creditors; that said Franklin was a resident of Victoria, British Columbia, and that he died without the territory of Washington, and prayed that letters of administration be granted to said W. Finley Hall upon the estate of said Lumley Franklin, but said W. Finley Hall was not of kin to said Lumley Franklin, neither was he a creditor of said Franklin, nor did he act in presenting said petition at the request of any one of kin to said Lumley Franklin or at the request of any of the creditors of said Lumley Franklin. *That on the 8th day of Au-[276] gust said probate court assumed to appoint said W. Finley Hall administrator of said estate, and on the 26th day of said month he filed his inventory showing that there were no debts against said estate, no personal assets, and that the said land constituted the sole assets of said estate. That thereafter, to wit, on the 26th day of March, 1888, the said territory of Washington, by its agent and organ, the probate court of King county, in violation of the contract above mentioned, entered into between said territory and Thaddeus Hanford, the grantor of your orator, ordered said land above described to be sold as the property of Lumley Franklin to pay a tax claimed by said territory from said Lumley Franklin, and thereafter, in pursuance of said order, made a pretended sale of said land and caused to be executed a deed purporting to convey the same to the defendant Griffith Davies, in violation of the contract above set forth between the said territory of Washington and the said Thaddeus Hanford and the obligation thereof, and in violation of U. S. Const. art. 1, § 10, and of U. S. Rev. Stat. §§ 1851, 1891. That in all of his actions the said W. Finley Hall acted as the agent and instrument of said territory of Washington, and in all of its proceedings the said probate court acted as the agent and organ of said territory for the purpose of collecting said tax claimed by said territory from said Lumley Franklin; that in all of its said proceedings the said probate court acted entirely without jurisdiction and without color of authority save as the agent and organ of said territory, and said probate court and said W. Finley Hall as the agents and organs of said territory were at the time of their said proceedings fully aware that said land had in good faith and for valuable consideration been sold by said territory to said Thaddeus Hanford as the property of said Lumley Franklin, for the nonpayment of taxes thereon by said Lumley Franklin, and that upon the faith of said sale and the deed executed in pursuance thereof your orator had purchased said land in good faith for valuable consideration and without notice of any claim on the part *of said territory or [277] any person whomsoever from the said Thaddeus Hanford."

The sections of the Revised Statutes above referred to are as follows: "Sec 1851. The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." "Sec. 1891. The Constitution and all laws of the United States which are not wholly inapplicable shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere within the United States."

The deed executed in pursuance of the sale ordered by the probate court was taken in the name of the defendant Griffith Davies, but it was in fact for the benefit of himself and his codefendants.

The defendants purchased at the sale ordered by the probate court and received the deed made to Griffith Davies with actual and constructive notice of the plaintiff's title, and of



Digitized by Google

all the facts and circumstances connected therewith. Nevertheless, it is alleged, with the intent to create a cloud upon the plaintiff's title and to force him to buy off their adverse claim, they conspired together to make their said purchase, and in pursuance of that conspiracy bought in the land and procured a deed for it. Subsequently, February 25, 1881, they forcibly entered upon and maintained forcible possession of the land until the 1st day of April, 1891, at which time the premises were vacated and are not now in the actual possession of any one, except so far as the abandonment of possession by the defendants restores the prior possession of the plaintiff.

The bill alleges that the pretended deed of the defendants is of no validity in law or equity and is a cloud upon the title of the plaintiff, and that the defendants have no estate, right, title, or interest in the lands or the possession thereof.

The relief asked is a decree that the defendant's have no title, interest, or estate in or about the land or any part thereof, and that the title of the plaintiff is good and valid; that the defendants and each of them be forever en-[278] joined from *asserting any title or claim adverse to the plaintiff; that said administrator's deed may be declared invalid and the record thereof of no effect; and that the plaintiff have such other and further relief as the equity of the case may require.

*Messrs.* **James B. Howe** and *George Donworth* for appellant.

*Messrs.* **James Hamilton Lewis**, *J. A. Stratton*, and *L. C. Gilman* for appellees.

**Mr. Justice Harlan** delivered the opinion of the court:

As it appears from the bill that the plaintiffs and the defendants are all citizens of the state of Washington, the circuit court was without jurisdiction unless the suit was one arising under the Constitution or laws of the United States.

The bill proceeds upon the ground that the orders of the probate court, resulting in the sale of the lands in controversy as the property of Lumley Franklin, and in the conveyance of 1888 to the defendant Davies, impaired the obligation of the alleged contract with the territory as evidenced by the deed of 1878 to Thaddeus Hanford. But it was not alleged in the bill that the proceedings in the probate court were had under any statute that was repugnant to the Constitution of the United States, or which was enacted after the sale and conveyance of these lands by the territory to Thaddeus Hanford. The prohibition upon the passage of state laws impairing the obligation of contracts has reference only to the laws, that is, to the constitutional provisions or to the legislative enactments, of a state, and not to judicial decisions or the acts of state tribunals or officers under statutes in force at the time of the making of the contract, the obligation of which is alleged to have been impaired. *Mississippi & M. R. Co.* v. *Rock*, 71 U. S. 4 Wall. 177 [18: 881]; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388 [30: 1059]; *Wood* v. *Brady*, 150 U. S. 13 [37: 981]; *Central Land Co.* v. *Laidley*, 159 U. S. 103 [40 L. ed. 91]. Therefore, even if it be assumed that the plaintiff had a contract with the territory, and even if it were *further assumed that the consti-[279] tutional provision in question applied to the legislative enactments of a territory, the court below was without jurisdiction, so far as it depended upon the application of the clause of the Constitution protecting the obligation of contracts against impairment by state laws.

But it is contended that the proceedings in the probate court did not constitute due process of law, and for that reason this suit is one arising under the Constitution of the United States. No such thought was intended to be expressed in the bill, and it is apparent that no such proposition was presented to the circuit court when it determined the question of jurisdiction. The suggestion of the want of due process of law in the proceedings in the probate court first distinctly appears in the assignment of errors filed in the court below long after the final decree was entered.

It is true the bill alleges that the probate court in all of its proceedings acted "entirely without jurisdiction and without color of authority save as the agent and organ of said territory." But this allegation of want of jurisdiction in the probate court is too general and indefinite to show that its proceedings were wanting in due process of law. If the purpose was to present a case under the clause of the Constitution relating to due process of law, the grounds upon which the Federal court could take cognizance of a suit of that character between citizens of the same state should have been clearly and distinctly stated in the bill. It is well settled that, as the jurisdiction of a circuit court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears; and that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings, but the averments should be positive. *Brown* v. *Keene*, 33 U. S. 8 Pet. 112 [8: 885]; *Grace* v. *American Cent. Ins. Co.* 109 U. S. 278, 283 [27: 932, 935], and authorities cited. These principles have been applied in cases where the jurisdiction of the circuit court was invoked upon the ground *of diverse[280] citizenship. But they are equally applicable where its original jurisdiction of a suit between citizens of the same state is invoked upon the ground that the suit is one arising under the Constitution or laws of the United States. We are not required to say that it is essential to the maintenance of the jurisdiction of the circuit court of such a suit that the pleadings should refer, in words, to the particular clause of the Constitution relied on to sustain the claim or immunity in question, but only that the essential facts averred must show, not by inference or argumentatively, but clearly and distinctly, that the suit is one of which the circuit court is entitled to take cognizance. *Ansbro* v. *United States*, 159 U. S. 695 [40: 310].

Without expressing any opinion as to the effect of the proceedings in the probate court and the sale by the administrator Hall upon the rights acquired by the plaintiff under the tax sale at which Thaddeus Hanford pur-



Digitized by Google

chased, we adjudge that the court below properly sustained the demurrer for want of jurisdiction, and therefore did not err in dismissing the bill.

*Judgment affirmed.*

---

## RIO GRANDE WESTERN RAILWAY COMPANY, *Plf. in Err.*,
*v.*
## FRANK LEAK.

(See S. C. Reporter's ed. 280-289.)

*Requested instruction—looking and listening at a railway crossing—partial instruction—charge as to negligence.*

1. A requested instruction is properly refused when all its propositions have been embraced in the charge given by the court.
2. A further instruction as to the duty of a traveler to look and listen at a railway crossing may be refused where the court has charged that the jury must determine whether he looked out, as he should have done, for coming trains, or whether he listened, and added that he must use such care as was proportionate to the danger in crossing the track.
3. An instruction which singles out particular circumstances and omits all reference to others of importance may be refused.
4. A sufficient charge as to negligence in driving so close to a railway as to be injured by passing cars is given by telling the jury to look at all the circumstances in determining whether the person acted with due care or was guilty of negligence, and in approaching was bound to use care proportionate to the danger.

[No 285.]

*Argued and Submitted May 4, 1896. Decided May 18, 1896.*

IN ERROR to the Supreme Court of the Territory of Utah to review a judgment of that court affirming the judgment of the District Court of the Third Judicial District in that Territory in favor of Frank Leak, plaintiff, against the Rio Grande Western Railway Company, defendant, for damages for personal injuries, and for loss of property, through the negligence of defendant. *Affirmed.*

See same case below, 9 Utah, 246.

Statement by Mr. Justice **Harlan:**

This writ of error brings up for review a judgment of the supreme court of the territory of 281] Utah, affirming *a judgment of the district court of the third judicial district in that territory in favor of the defendant in error, based upon the verdict of a jury against the Rio Grande Western Railway Company for the sum of $13,370.

It is averred in the complaint that on or about the 11th day of July, 1891, the plaintiff Leak was engaged in his business of hauling ore to cars of the defendant situated on its track, and was traveling with his team of horses and wagon on a wagon road usually traveled, and provided by defendant to be traveled, in the business of the hauling of ores to its cars; that when he had reached the place or crossing where the wagon road crossed the railroad track, the defendant carelessly and negligently caused a train of cars to approach the crossing and then and there to pass rapidly over its track, and negligently and carelessly omitted its duty whilst approaching that crossing to give any signals or warning whatever of the approach of its cars or to stop or to slacken the speed thereof, by reason whereof the plaintiff, without any fault on his part, was unaware of their approach; that in consequence of this negligence and carelessness of defendant the train of cars struck the plaintiff and his horses and wagon and overset the wagon, whereby he was thrown with great force and violence upon the ground and underneath said wagon and cars, and thereby greatly bruised, crushed, and maimed, insomuch that it became necessary to amputate, and the left leg of the plaintiff was amputated, inflicting upon him lasting and permanent bodily injuries causing him great bodily pain and mental anguish, damaging him in the sum of $25,000, and compelling him to lay out and expend for doctor's medical attendance $105.

The complainant also asserted a claim for the value of his horses and wagon alleged to have been killed and destroyed by reason of the carelessness and negligence of the defendant company as above alleged.

The answer puts in issue the allegations of the complaint, and, in addition, states: "If the plaintiff sustained any injuries or damages whatsoever the same were caused and occasioned solely by reason and because of his own negligence *and carelessness in driving [282 into and remaining in a dangerous place, knowing of the danger, and in negligently and carelessly failing to observe the approach of the cars referred to in the complaint, when the means and opportunity of observation were open to him, and in not removing himself from the place of danger after he knew of the existence thereof and after he had been warned thereof, and not because or by reason of any negligence or carelessness on the part of the defendant, its officers, agents, or servants."

The court, after stating that the action was not to recover damages in consequence of any other negligence than that described in the complaint, and that the negligence complained of was that the defendant carelessly and negligently caused its cars to approach the crossing, and failed to give any signal or warning whatever of their approach, or to stop or to slacken their speed before the injury, said: "The defendant in its answer denies the allegations of the complaint and alleges that the plaintiff was also guilty of negligence that contributed to the injury, and it is for the gentlemen of the jury, in the light of all the evidence, after carefully considering it, to determine, first, whether the defendant was guilty of the neg-

---

NOTE.—*As to care and precaution necessary in crossing a railroad track*, see note to Continental Improv. Co. v. Stead, 24: 408.

*As to damages for personal injuries from negligence*, see note to Pennsylvania Co. v. Roy, 26: 141.

*As to trespassers or persons on track of railroads; duty of railroad company towards them*,—see note to Mitchell v. New York, L. E. & W. R. Co. 26: 1064.



Digitized by Google

ligence described in the complaint; second, if you should find that defendant was guilty of negligence described in the complaint, it is then your duty to consider and determine whether the plaintiff himself was guilty of negligence that contributed to the injury. In determining the question of negligence, both on the part of the plaintiff and defendant, you should consider all the circumstances under which the defendant caused the acts to be performed, as alleged in the complaint, and under which its agents or servants failed to act, if you find they did fail in such respect. You have a right to take into consideration the conditions surrounding the injury, the situation of the parties, the location of both the railroad tracks and the wagon road, if you believe there was a wagon road from the evidence, and their location with respect to each other, and the fact that the plaintiff was hauling ore, if you believe that he was (as to that, I presume, there is no dispute). You have a right to [283] take into *consideration the cars of the defendant and their situation and location upon the ore track. You have a right to take into consideration the crossing, as to whether the defendant placed the crossing there for the plaintiff and others to travel over and upon the wagonway, if you believe there was a wagon [way] on which persons usually traveled, and and that the plaintiff at the time of the injury was traveling upon the wagonway. You have a right to take into consideration the fact that the train of cars, one of which struck plaintiff's wagon (as to that, I presume, there is no dispute)—you have a right to take into consideration the fact that it came down grade without an engine attached to it, and then passed up a slight grade at the time it struck the plaintiff's wagon, if [you] believe from the evidence that it did so pass down and up. It is your duty to take into consideration all of the evidence bearing upon the question of negligence, and, in the light of it all, you must determine whether the defendant was guilty of the negligence charged or whether the plaintiff was guilty of negligence contributing to the injury."

The defendant excepted to that portion of the above instruction in which the court said that the jury "should consider all the circumstances under which the defendant caused the acts to be performed as alleged in the complaint."

The court properly instructed the jury in relation to the degree of care required at the hands of the defendant and its servants, as well as to their right to judge of the credibility of the witnesses. It further said: "It is your duty to weigh the evidence carefully, candidly, and impartially, and in so weighing it you should be careful to draw reasonable inferences, not to pick out any particular fact and give it undue weight, but you should give it such weight as you think it is entitled to as reasonable men looking at it impartially. You should consider the evidence all together. Where there is a conflict in the testimony you should reconcile it if you can upon any reasonable hypothesis. If you cannot reconcile their testimony, then you must determine whom you will believe. You are the sole judges of the facts. If you find the issues for the plaintiff you should consider the extent of the injury *as it appears from the evidence, [284] whether it is permanent or temporary. You have a right also to take into consideration the physical pain and mental anguish caused by the injury and the extent to which the plaintiff has been deprived of the capacity to earn a living or to accumulate money or other property. You have a right to take into consideration the injury to his property, the fact that his horse was killed, the injury to the wagon and the harness, if you believe from the evidence that they were injured, and, so considering all the evidence with respect to the injury of the plaintiff and his property as described in the complaint, you should give him such compensation as will remunerate him for the injury sustained. You must look at it in a pecuniary point of view, estimating his loss in money."

*Mr.* **C. W. Bennett** for plaintiff in error.
*Mr.* **Orlando W. Powers** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

1. At the trial the defendant asked the court to instruct the jury that "it was the duty of the plaintiff before he crossed the line of defendant's railway, or approached it so closely that he might be injured by cars passing thereon, to look and listen up and down the track for approaching cars, and if he failed to so look and listen just prior to and up to the time of the accident, and if by so doing he could have discovered the approaching cars in time to have avoided the accident, his failure to so look and listen was negligence contributing to his injury, and your verdict must be for defendant, unless you believe defendant's servant in charge of said cars discovered plaintiff's danger in time to have avoided the accident by the use of ordinary care."

The refusal to give this instruction was not error, for the reason that all the propositions in it were embraced in the charge to the jury, and it was not necessary to repeat them in special *instructions asked by either party. [285] The court had previously charged the jury as follows: "That though the defendant may have been guilty of negligence that contributed to the injury, yet if the plaintiff was also guilty of negligence that contributed to the injury he cannot recover, and in determining whether he acted with due care you may take into consideration the circumstances under which he was acting. You have a right to take into consideration he was traveling upon the traveled way usually traveled by persons hauling ore to this train. You have a right to take into consideration the observation that he made, so far as the evidence shows it—whether he looked out, as he should have done, for the danger of coming cars or whether he listened. You should take into consideration all of the circumstances—all that he did and all that he failed to do—in order to determine whether he acted with due care or was guilty of negligence. The court further charges you that if the plaintiff attempted to cross defendant's line of railway or to approach so near it as injury might have resulted to him, where he should, by the exercise [of] ordinary care, see that it was especially dangerous, it was



Digitized by Google

plaintiff's duty to use an amount of care proportionate to the danger. Of course, when persons are acting under dangerous circumstances and conditions, it is their duty to act with respect to the danger that surrounds them and to use a greater degree of care where there is much danger than where there is but little."

The jury were also instructed that it was their duty to take into consideration all the evidence bearing upon the question of negligence, and, in the light of it all, determine whether the defendant was guilty of the negligence charged, or whether the plaintiff was guilty of negligence contributing to the injury.

Thus the jury were distinctly told that, taking into consideration all the circumstances, all that the plaintiff did or failed to do, including such observation as the plaintiff made, so far as the evidence showed it, they must determine whether "he looked out, *as he should have done*, for the danger of coming trains, or whether he 286]listened." This is a distinct *affirmation of the duty to look out for the coming of trains. When to this specific reference to the duty of looking and listening for approaching trains was added the general instruction that the plaintiff must have used such care as was proportionate to the danger of injury resulting from the crossing of a railroad track, otherwise he could not recover, no foundation is left upon which to rest the charge of error in refusing the particular instruction asked by the defendant.

2. It is assigned for error that the trial court refused to give the following instruction asked by the defendant: "If before crossing defendant's line of railway or approaching the same so closely that he might be injured by cars passing thereon, the plaintiff did look and listen for approaching cars and ascertained that such cars were approaching, or might have so ascertained if he had looked and listened with ordinary care, then it was negligence for the plaintiff to drive so close to such railway as to be injured by passing cars, although the plaintiff may have believed that he could succeed in crossing said line before the cars reached the place of collision, and your verdict must be for defendant, unless you believe that defendant's servant in charge of said cars discovered plaintiff's danger in time to have avoided the accident by the use of ordinary care."

The only distinct thought in favor of the defendant embodied in this instruction, not covered by the charge of the court, was that it was negligence in the plaintiff to drive so close to the railroad as to be injured by passing cars. But upon this point the charge of the court was full and abundantly explicit; for the jury were told that they must look at all the circumstances in determining whether the plaintiff acted with due care or was guilty of negligence; that if he attempted to cross the railroad or to approach so near to it that injury might have resulted, he was under a duty to use such care as was proportionate to the danger; and generally, that all persons acting under dangerous circumstances and conditions must have due regard to the danger that surrounds them, and use a greater degree of care where there was much danger than where the danger was but little.

*3. It is next assigned for error that the[287 trial court refused the following instruction asked by the defendant: "If the defendant licensed the plaintiff to go with his team in that portion of its yard where plaintiff was injured, yet defendant would not be liable to plaintiff for any injury resulting to him from any condition of the premises known to the plaintiff from the ordinary nature of the business carried on by it there."

This instruction might well have been refused as inapplicable to any issue made by the pleadings. The plaintiff did not ground his action upon any defective condition of the defendant's premises, nor upon the manner in which its business on such premises was ordinarily carried on. His claim for damages was placed solely on the ground of the defendant's negligence in running its cars over its track. Nevertheless the court, out of abundant caution, distinctly charged the jury that the defendant was not liable to the plaintiff for any defect in the manner of locating or in the construction of its tracks or switches; that the location or construction of the switches was not alleged as a cause of action; and that it was the duty of the jury, in order to determine whether the plaintiff or the defendant acted negligently or with due care, to take into consideration the location of the tracks and the whole situation as shown by the evidence in order to determine whether they did act prudently and with good care or, on the contrary, whether they acted with negligence. These instructions meet any possible objection to the refusal of the trial court to give the above instruction asked by the defendant.

4. Another assignment of error relates to the refusal of the trial court to give the following instructions: "If the plaintiff saw the cars coming and knew that there was danger of a collision, or by the use of ordinary care could have so seen and known in time to escape therefrom by leaving his wagon, and if, notwithstanding such danger, he remained in his wagon for the purpose of attempting to save his wagon or horses, then you should not find a verdict in favor of the plaintiff in respect to any injury to his person unless you believe from the evidence that the brakeman in charge of said cars saw *plaintiff's danger[288 in time to have avoided the accident by the use of ordinary care."

It was not an error to refuse this instruction. It was liable to the objection that it singled out particular circumstances and omitted all reference to others of importance. In *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408, 433 [36: 485, 494], it was said that "in determining whether the deceased was guilty of contributory negligence, the jury were bound to consider *all* the facts and circumstances bearing upon that question; and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all the others." If the question of the ability of the plaintiff to have escaped personal injury "by leaving his wagon" was involved in the issue as contributory negligence, the jury were entitled to consider the evidence relating to that matter un-



Digitized by Google

der the general direction to look at all the circumstances in determining whether the plaintiff was injured without fault or negligence on his part. The charge upon that subject was ample for all the purposes of a fair trial, and no injustice was done to the defendant by the refusal of the court to single out the fact that the plaintiff did not jump from or leave his wagon as the defendant's train approached, and take the chances of being personally injured in that way. Besides, the instruction asked by the defendant was so framed as to leave out of view any element of personal danger to the plaintiff by attempting to leave his wagon, provided, by getting out of it or by jumping from it, he could have escaped injury by coming into collision with the defendant's cars. The jury might well have understood the instruction to mean that the possibility or probability of personal injury to the plaintiff by leaving his wagon was an immaterial circumstance if, by adopting that course, he could have escaped injury by actual collision with the cars of the defendant. The railway company could not escape responsibility for the negligence of its servants, resulting in personal injury to the plaintiff, by showing that the latter might not have been so seriously injured if he had left or jumped from his wagon. In the very nature of things it would have been impossible for the jury, under the circum-
289] stances of the accident, to *have determined with any certainty whether the plaintiff could have left his wagon without risk of being injured.

Upon a careful examination of the record, we have no reason to doubt that the case was fairly submitted to the jury; and no error of law to the prejudice of the defendant's rights having occurred, *the judgment of the supreme court of the territory of Utah affirming the judgment of the trial court is affirmed.*

---

## SUPREME LODGE KNIGHTS OF PYTHIAS OF THE WORLD, *Plff. in Err.*,

*v.*

## EUGENIE KALINSKI.

(See S. C. Reporter's ed. 289-299.)

*Certificate holders in benefit society—waiver of forfeiture.*

1. Certificate holders in a benefit society have the right to rely upon a construction given to the rules and regulations of the order by the highest tribunals of the order, and to presume that the supreme lodge will not enforce a forfeiture under circumstances which the board of control has held did not create one.

2. The continued receipt of assessments upon a certificate of membership in an endowment rank of the Knights of Pythias up to the date of the death of the member is a waiver of any technical forfeiture of the certificate by reason of the nonpayment of his lodge dues, for which separate accounts were kept and which formed no part of the consideration for the certificate, where the member had not been suspended but had been told to pay them before the next meeting of the lodge, and died before that time.

[No. 268.]

*Argued May 1, 1896. Decided May 18, 1896.*

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment affirming the judgment of the Circuit Court of the United States for the Eastern District of Louisiana in favor of the plaintiff, Eugenie Kalinski, against the Supreme Lodge Knights of Pythias of the World, for the amount of plaintiff's certificate of membership in said association. *Affirmed.*

See same case below, 57 Fed. Rep. 348.

Statement by Mr. Justice **Brown**:

*This was an action originally begun [290 in the civil district court of the parish of Orleans, in the state of Louisiana, by the defendant in error, Eugenie Kalinski, to recover of the Supreme Lodge Knights of Pythias of the World, an association incorporated under an act of Congress, and domiciled in Washington, the amount of a certain certificate of membership, whereby the defendant contracted and bound itself to pay to petitioner on the death of her husband, Achille Kalinski, the sum of $3,000 —the said certificate being in effect a life insurance policy.

The case was removed, upon the petition of the defendant, to the circuit court of the United States for the eastern district of Louisiana, upon an allegation that the defendant was created by and organized under an act of Congress, approved May 5, 1870; that it was domiciled in Washington, and that the controversy arose under and was to be determined by such act of Congress; that the suit was based upon a beneficial or life certificate issued under authority of such act of Congress, and the defense to said suit arose under the laws of the United States.

The answer admitted that during his lifetime the said Achille Kalinski became a member of the endowment rank of the order of Knights of Pythias, in § 363 thereof, paid the initiation fee, and that there was issued to him the certificate mentioned in the petition. But it denied that Kalinski, during his lifetime, complied with the obligations imposed upon him under such certificate, and averred that, under the terms of his application for membership in said endowment rank, and in the said certificate, and the constitution and by-laws of said endowment rank Knights of Pythias of the World, all being and forming parts of the contracts between them, it was provided that any failure or neglect on the part of said Kalinski to pay assessments or dues as provided by the laws of the rank or order, should work a forfeiture of all his rights and the rights of his heirs and beneficiaries, in the premises, to all benefits and privileges accruing to members of said rank. That by said laws it was, among other things, especially provided that when a member of the endowment rank became in *arrears to his lodge, for an amount [291 equal to one year's dues, he should forfeit his membership in the endowment rank, and his endowment certificate should thereupon become void.

NOTE.—*As to forfeiture of policy for nonpayment of premium; waiver.*—see note to Thompson v. Knickerbocker L. Ins. Co. 28: 765.



Digitized by Google

The answer further averred that, at the time of his death, May 24, 1891, Kalinski was in arrears for, owed, and was indebted to Syracuse Lodge, No. 50, of said order, of which he was a member, or to which he belonged, in an amount in excess of one year's dues, and that he had, at the time of his death, forfeited his membership in the said section and rank, and the said certificate became null and void. It further averred that, after being so in arrears, and the forfeiture of all rights as aforesaid, of which forfeiture, however, your respondent was then, without its fault or negligence, unaware, said Kalinski paid certain assessments under such certificate; but that, as soon as made aware of the forfeiture, heretofore mentioned, respondent made legal tender to the plaintiff of the amount of such assessments so paid, and that she refused the same.

In a supplemental answer defendant deposited in court and tendered back to plaintiff the amount of assessments so paid, namely, $16.20, with 5 per cent interest thereon from April 1, 1891, to date.

The case came on for trial before the district judge and a jury, was tried twice, and resulted each time in a verdict and judgment for plaintiff for the full amount of her certificate or policy, and upon writ of error to the circuit court of appeals that judgment was affirmed. Whereupon defendant sued a writ of error from this court.

*Messrs.* **J. Zach. Spearing**, *Rouse & Grant*, and *C. S. Rice* for plaintiff in error.

*Messrs.* **Morris Marks** and *William Armstrong* for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

It seems that during his lifetime Achille Ka-
292] linski became *a member of section 363 of what is termed the endowment rank of the Knights of Pythias, paid his admission fee, and in consideration thereof, and in compliance with a written application made by him, the defendant, the Supreme Lodge of the order, issued to him a certificate which is in substance a policy of life insurance, wherein it was certified that Kalinski was a member in good standing in the endowment rank, and in consideration of the representations made in his application, which was made a part of the contract, and the payment of the prescribed admission fee, and in consideration of the payment thereafter to said endowment rank of all assessments as required, and "*the full compliance with all the laws governing this rank now in force or that may hereafter be enacted*, and shall be in good standing under said laws," the sum of $3,000 will be paid, etc., to Eugenie Kalinski, his wife, etc. "And it is understood and agreed that any violation of the within-mentioned conditions, or the requirements of the laws in force governing this rank, shall render the certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum, or any part thereof." In his application Kalinski agreed that he would punctually pay all dues and assessments for which he might become liable, and would be governed, "and this contract shall be controlled by all the laws, rules, and regulations of the order governing this rank now in force or that may hereafter be enacted, or submit to the penalties therein contained." One of the laws and regulations adopted by the board of control was that "when a member of the endowment rank becomes in arrears to his lodge for an amount equal to one year's dues he shall forfeit his membership in the section and said rank, and render void his endowment certificate."

It further appeared that Kalinski was a member of Syracuse Lodge, No. 50, and that the books of said lodge, which were produced in evidence, showed that he was indebted to the lodge on the 31st day of March, 1891, and at the date of his death, May 24, 1891, in the sum of $12.50, for dues owing by him to his said lodge, under a by-law, which said sum was in excess of one year's dues he was required to pay, but that *he had not been suspended by his [293 lodge for that reason before his death, under the provisions of § 5 of art. 16 of the constitution of the lodge, and § 8 of art. 14 of the by-laws, although he had received notice from the proper officer of the lodge to pay the same, and had been told to pay the same *before the next meeting of the lodge*, but that he died *before such meeting* without having paid the same.

It further appeared, and was not disputed, that the keeper of the records and seal of Syracuse Lodge, No. 50, had, under § 6, art. 4, of the constitution of the lodge, failed to notify the section of the endowment rank to which Kalinski belonged that he was in arrears, and that the assessments due by Kalinski to the endowment rank were received in ignorance of the fact that he was so in arrears, and had been tendered back after his death, and several months subsequent to the application of his widow for payment of the policy. In this connection the defendant requested the court to charge the jury as follows: "If you find that Kalinski was in arrears and indebted to his lodge for dues at the date of his death in an amount equal in amount to one year's dues, you must find as a conclusion from the fact that he had forfeited his membership in the endowment rank, and that the plaintiff is not entitled to recover in this suit. And the receipt of assessments by the officers of said endowment rank (which dues it is admitted have been tendered back, as hereinbefore set forth) previous thereto, if in ignorance of the fact that he was so in arrears, was not a waiver of said forfeiture."

But the court refused to give the charge as requested, and in lieu thereof charged the jury as follows:

"As to the construction of the meaning as matter of law, of the fundamental law, and of the orders of defendants' organizations, I adopt the views of the board of control of the defendants' order in case of John A. Manikheim, and I instruct the jury that if the jury finds as a fact that the keeper of records and seal of the order to which Mr. Kalinski belonged failed to notify the section of which he was a member of the fact that he was in arrears for dues to said lodge, and also that lodge failed to suspend Mr. Kalinski in accordance with law, and also *the section of the endowment rank [294 had received the monthly assessments of said Kalinski up to the date of his death, then the



Digitized by Google

verdict will be for the plaintiff and against the defendant for the sum of $3,000, with interest from judicial demand."

From a comparison of the instruction as requested with that as given, it is apparent that the case turns upon the question whether the mere nonpayment of lodge dues was sufficient to work a forfeiture of the certificate in view of the fact that the insured kept up his assessment, which the supreme lodge received without inquiring whether the insured was indebted for his lodge dues or not. Broadly construed, the application required that the contract should be controlled by the laws, rules, and regulations of the order governing the rank. The certificate also required "a full compliance with all the laws governing this rank now in force or that may hereafter be enacted," and that the insured should be in good standing under said laws. What other laws governing this rank must have been complied with to prevent a forfeiture of the insurance does not appear; but if the application and certificate be literally construed, it is evident that a breach of any one of the regulations governing the rank, however numerous or unimportant they may have been, or a failure of the insured to remain in good standing under the laws of the order, which certainly opens a wide door to differences of opinion, could be seized upon as an excuse for nonpayment.

It will be observed, however, that the endowment rank or insurance feature of this order was in reality a separate scheme, and had no other apparent connection with the order than in the fact that no one who was not a member of the order could become a member of the endowment rank. Entirely separate accounts were kept with each member as belonging to the lodge, and as a member of the endowment rank or policy-holder. The fees that were due to the lodge as a condition of membership in it do not seem to have formed any part of the consideration for the certificate or policy, which consideration consisted of certain assessments, that appear in this case to have been promptly paid. The provision that [295] the *applicant should comply fully with all the laws governing the endowment rank then in force, or which might thereafter be enacted, and should also maintain a good standing under such laws, is one of a very elastic nature, and one which could not be fully complied with without a thorough knowledge of such laws, and of the requisites of good membership. In this case it is alleged to have been violated by the fact that on March 31, Kalinski became indebted to the lodge of which he was a member in the sum of $12.50, which was an amount in excess of one year's dues. His attention was called to this by the proper officer of the lodge, who told him to pay the sum before the next meeting of the lodge. He died, however, on May 24, and before such meeting was held, leaving this amount unpaid. It might be argued with great plausibility that, in view of the fact that the officers of the lodge told him to pay before the next lodge meeting, the defendant was bound thereby, and must have been held to waive its right to a prompt payment of the lodge dues, and that as Kalinski died before the time allowed had expired, he was not even technically in fault.

But, however this may be, the officials of the order appear to have been guilty of delinquencies of their own, which ought to estop them from insisting upon the failure of Kalinski to comply with the letter of his agreement to abide by the laws and regulations of the rank. Under the laws, rules, and regulations for the government of sections of the endowment rank, it was the duty of the secretary of each section to keep a financial account with each member of the section, and in January of each year to furnish to the master of finance of the lodge to which the members of the section belonged, a list of the names of such members, and to request the officer to promptly inform him whenever a member on said list became in arrears for an amount equal to one year's dues. It was also the duty of the master of finance of Syracuse Lodge, No. 50, to notify in writing all members who were about to become in arrears, and to again notify them on the eve of suspension. It was also his duty to notify his lodge when a member owed to the amount of *twelve months' dues, or its [296] equivalent, after which notification it became the duty of the chancellor commander to suspend him in open lodge, and to keep a record of the same in the minutes. It seems to have been also the duty of the keeper of records and seal of each lodge to notify the proper section of the endowment rank, whenever a member became in arrears for dues to the lodge, when, and not until then, the certificate of membership in the endowment rank became the subject of forfeiture. Indeed the failure to do this, and the continued receipt of the monthly assessments upon the policy or endowment, appear to have been treated by the board of control as a waiver of the right to insist upon the forfeiture of the certificate or policy.

By the constitution of the endowment rank, the entire charge and full control was put in a board of control, which had power to hear and determine all appeals, their findings being final unless reversed by the supreme lodge in session. They also had authority to enact general laws, rules, and regulations in conformity with the constitution, for the government of sections and the membership of the endowment rank, and to alter and amend such laws at their discretion. It seems that, in the case of Manikheim, a member of the endowment rank at Washington, the board of control was called upon, in 1887, to give a construction to the rules and regulations of the endowment rank, upon a state of facts similar in all respects to the facts in this case. From the journal of the supreme lodge, which was put in evidence in this case, it appeared that, at the time of his death, Manikheim was in arrears to his lodge for one year's dues, but had paid all his assessments to his section of the endowment rank.

Upon receipt of this information the supreme secretary refused to furnish a blank proof of death, and instructed the secretary of said section to return to the beneficiaries the monthly assessments, which were erroneously collected from said Manikheim. This was refused by the beneficiaries, who demanded payment in full of the certificate of membership.

Upon the matter being laid before the board of control, it decided, after a very careful consideration of the facts *in the case, that in view [297



Digitized by Google

of the fact that the keeper of records and seal of the lodge to which Manikheim belonged failed to notify the section of which he was a member of the fact that he was in arrears for dues to his lodge, and that the lodge had failed to suspend him in accordance with the law, and that his section of the endowment rank had received his monthly assessments up to the date of his death, the endowment rank was liable for the full amount of the endowment, and the supreme secretary was instructed to pay the beneficiaries the amount due.

In compliance with this ruling, the supreme chancellor of the order appears to have issued a circular letter to the subordinate chancellors to the effect that, in order to carry out the provisions of the law that "when a member of the endowment rank becomes in arrears to his lodge on account of dues for more than six months" (changed from one year) "he shall forfeit his membership in the section and said rank, and render void the endowment certificate," it was necessary that the secretaries of the various sections of the endowment rank be duly notified when members of such rank became in arrears for dues to their respective lodges. And he therefore requested the grand chancellors to instruct their subordinate lodges to forward to the secretary of such sections of the endowment rank as were tributary to their lodges, an official notice of the fact that any member was in arrears for dues, said notice of arrears to be signed by the master of finance and attested by the keeper of the records and seal, with the seal of the lodge attached. And to properly carry this into effect the secretaries of the various sections of the endowment rank were instructed to officially certify to the keeper of records and seal of the respective lodges, to which the members of a section belonged, a full and complete list of the members of said section, etc.

While it is entirely true, as claimed by the plaintiff in error, that this was *res inter alios acta*, and therefore not available by way of estoppel, it is none the less true that it was an interpretation put by the supreme authority of the order upon their somewhat ambiguous and complicated system of rules and regulations, and that it would be unjust to the board of control to assume that Kalinski, who was an ordi [298] nary member of the endowment rank and apparently an unlearned man, was wiser than they, and was bound to put a construction upon these regulations more unfavorable to himself than the board of control had construed them. Upon the contrary, we think that the certificate holders were entitled to rely upon the construction given to these rules and regulations by the highest tribunal of the order, and to presume that the supreme lodge would not enforce a forfeiture under circumstances which the board of control had held did not create one. Although we would not be understood as saying that we should feel bound by the construction put upon the rules and regulations of a private order by the board of control or supreme council of such order, we think that the association has no right to complain if its certificate holders act upon such interpretation, and that it is not in a position to claim that this ruling in their favor was more liberal than the facts of the case or a proper construction of these rules would warrant. Whether the decision were right or wrong it established a course of business on the part of the defendant upon which its certificate holders had a right to rely. *New York L. Ins. Co.* v. *Eggleston*, 96 U. S. 572 [24: 841].

Aside from this, however, we think the continued receipt of assessments upon Kalinski's certificate up to the day of his death was a waiver of any technical forfeiture of the certificate by reason of the nonpayment of the lodge dues. Granting that the continued receipt of premiums or assessments after a forfeiture has occurred will only be construed as a waiver when the facts constituting a forfeiture are known to the company (*New York L. Ins. Co.* v. *Davis*, 95 U. S. 427 [24: 454]; *Bennecke* v. *Connecticut Mut. L. Ins. Co.* 105 U. S. 355 [26: 990]), this is true only of such facts as are peculiarly within the knowledge of the assured. If the company ought to have known of the facts, or with proper attention to its own business would have been apprised of them, it has no right to set up its ignorance as an excuse. In the ordinary course of business between the lodges and the sections of the endowment rank, and under the instructions contained in the circular of the supreme chancellor of May 20, 1887, it became the duty of the keeper of the records and seal of the lodge to which Ka- [299] linski belonged to notify the secretary of the proper section of the endowment rank of the fact that he was in arrears for dues, and his failure to do this should be imputed to the defendant, as representing the order, rather than to Kalinski. It is more than possible that, as the endowment rank was a separate and distinct feature from the lodges, Kalinski was wholly ignorant of the fact that a failure to pay his lodge dues promptly forfeited his certificate; and while, as matter of law, he might be chargeable with notice of this fact, his beneficiary has a perfect right to insist that the defendant was guilty of a technical dereliction of its own duty in the premises. The defense in any aspect does not commend itself highly to one's sense of natural justice, and, for the reasons above stated, we are of *the opinion that the decision of the court below was right, and it is therefore affirmed.*

---

L. F. HENNINGTON, *Plff. in Err.*,

*v.*

STATE OF GEORGIA.

(See S. C. Reporter's ed. 299-319.)

*Running trains on Sunday.*

A state statute making it unlawful to run any freight train on Sunday is not an unconstitutional regulation of interstate commerce as applied to an interstate train in the same way that it applies to domestic trains, in the absence of any congressional legislation upon the subject.

[No. 150.]

*Argued March 17, 18, 1896. Decided May 18, 1896.*

NOTE.—*As to interstate commerce; regulation of power of Congress, how far exclusive,*—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

*As to power of Congress to regulate commerce*, see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.



Digitized by Google

IN ERROR to the Supreme Court of Georgia to review a judgment of that court affirming the judgment of the Superior Court of Dade County, Georgia, convicting the defendant, L. F. Hennington, the superintendent of transportation of the Alabama Great Southern Railroad Company, of unlawfully running a freight train on that road on Sunday. *Affirmed.*

See same case below, 90 Ga. 396.

The facts are stated in the opinion.

*Messrs.* **Edward Colston** and *George Hoadly, Jr.*, for plaintiff in error:

This statute of Georgia is repugnant to that clause of the Constitution of the United States which provides that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

U. S. Const. art. 1, § 8, ¶ 3; *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 231 (6: 78); *Philadelphia & R. R. Co.* v. *Pennsylvania* ("*State Freight Tax*") 82 U. S. 15 Wall. 232 (21: 146); *Cook* v. *Pennsylvania*, 97 U. S. 574 (24: 1018); *Mobile County* v. *Kimball*, 102 U. S. 697 (26: 239); *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 424 (4: 605).

Transportation over lines of railroad passing through several states is commerce among states.

*Hall* v. *DeCuir*, 95 U. S. 497 (24: 551); *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 573 (30: 249), 1 Inters. Com. Rep. 31; *Brown* v. *Houston*, 114 U. S. 630 (29: 260).

The state of Georgia has no right to adopt any police regulation, the effect of which would be to obstruct interstate commerce.

*Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 (24: 527); *Henderson* v. *Wickham*, 92 U. S. 271, 272 (23: 548, 549); *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 494 (30: 696), 1 Inters. Com. Rep. 45; *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 497, 499 (31: 711, 712), 1 Inters. Com. Rep. 823; *Norfolk & W. R. Co.* v. *Com.* 88 Va. 95, 13 L. R. A. 107.

*Mr.* **J. M. Terrell**, for defendant in error:

Section 4578 of the Code of Georgia when applied to freight trains loaded with interstate freight does not conflict with the interstate commerce clause of the Federal Constitution.

Section 4578 seeks only to enforce and render effective, as respects the running of freight trains on Sunday, a scheme of internal police universal throughout the state for all industries and avocations.

It assumes that the running of these trains on Sunday is not a work of necessity; and in express terms it renders the superintendent, or other officer having control of the running of trains, answerable penally for any running which may be done on that day.

*Hennington* v. *State*, 90 Ga. 396, 4 Inters. Com. Rep. 413.

It was enacted for the sole purpose of promoting the mental, moral, and physical well being of the people of Georgia by providing that they should obey one of nature's laws and rest at regular intervals from labor. This statute, as construed by the supreme court of Georgia, is nothing more that a police regulation.

It is within the province of the state legislature to enact Sunday laws, and such laws are a proper exercise of the police powers of a state.

*Bloom* v. *Richards*, 2 Ohio St. 391; *Frolickstein* v. *Mobile*, 40 Ala. 725; *Shover* v. *State*, 10 Ark. 259; *Scales* v. *State*, 47 Ark. 476; *Warner* v. *Smith*, 8 Conn. 14; *Gunn* v. *State*, 89 Ga. 341; *Langabier* v. *Fairbury, P. & N. W. R. Co.* 64 Ill. 248, 16 Am. Rep. 550; *Voglesong* v. *State*, 9 Ind. 112; *Megowan* v. *Com.* 2 Met. (Ky.) 3; *State, Walker*, v. *Judge of Section "A," etc.* 39 La. Ann. 132; *State* v. *Ambs*, 20 Mo. 214; *Lindenmuller* v. *State*, 33 Barb. 548, 21 How. Pr. 156; *Society for Visitation, etc.* v. *Com., Meyer*, 52 Pa. 126, 91 Am. Dec. 139; *Nashville* v. *Linck*, 12 Lea, 499; *Gabel* v. *Houston*, 29 Tex. 335; *Re King*, 46 Fed. Rep. 905; *Ex parte Andrews*, 18 Cal. 685; *Ex parte Burke*, 59 Cal. 19; *Ex parte Koser*, 60 Cal. 202; *State* v. *Baltimore & O. R. Co.* 15 W. Va. 362, 36 Am. Rep. 803; Cooley, Const. Lim. 5th ed. 726; Tiedeman, Limitation of Police Power, 175–188; Cooley, Const. Law, 216.

This statute may indirectly affect interstate commerce, but it is not for that reason a regulation of commerce within the meaning of the Constitution.

*Philadelphia & R. R. Co.* v. *Pennsylvania* ("*State Tax on Railway Gross Receipts*") 82 U. S. 15 Wall. 284 (21: 164); *Butchers' Benev. Asso.* v. *Crescent City L. S. L. & S. H. Co.* ("*Slaughter House Cases*") 83 U. S. 16 Wall. 36 (21: 394); *Chicago & N. W. R. Co.* v. *Fuller*, 84 U. S. 17 Wall. 560 (21: 710); *Smith* v. *Turner*, 48 U. S. 7 How. 283 (12: 702); *Stone* v. *Mississippi*, 101 U. S. 814 (25: 1079); *Barbier* v. *Connolly*, 113 U. S. 27 (28: 923); *New Orleans Gas Light Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650 (29: 516); *Stone* v. *Farmers' Loan & T. Co.* ("*Railroad Commission Cases*") 116 U. S. 307 (29: 636); *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana Bd. of Health*, 118 U. S. 455 (30: 237); *Kimmish* v. *Ball*, 129 U. S. 217 (32: 695), 2 Inters. Com. Rep. 407; *Louisville, N. O. & T. R. Co.* v. *Mississippi*, 133 U. S. 587 (33: 784), 2 Inters. Com. Rep. 801; *New York* v. *Miln*, 36 U. S. 11 Pet. 102 (9: 648); *Smith* v. *Alabama*, 124 U. S. 465 (31: 508), 1 Inters. Com. Rep. 804.

The Sunday law in question is a rule prescribed by the legislature for the management and operation of all railroads within the state of Georgia and designed to protect persons and property by requiring what the wisdom of all ages has declared to be necessary for man's well-being—a rest from labor at regular intervals.

*Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96 (32: 352), 2 Inters. Com. Rep. 238; *Sherlock* v. *Alling*, 93 U. S. 99, 104 (23: 819, 820); *Ficklen* v. *Shelby County Taxing Dist.* 145 U. S. 1 (36: 601), 4 Inters. Com. Rep. 79; *Walling* v. *Michigan*, 116 U. S. 446 (29: 691); *State* v. *Baltimore & O. R. Co.* 24 W. Va. 783; *Norfolk & W. R. Co.* v. *Com.* 88 Va. 95, 13 L. R. A. 107.

The fact that interstate freight is incidentally affected to the extent that it must cease to move within the state of Georgia on Sunday, to the end that the people engaged in the labor of moving such freight may rest, is not unreasonable. The same cessation from labor is required of all people.



Digitized by Google

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff in error, Hennington, superintendent of transportation and having charge of the freight business of the Alabama Great Southern Railroad Company, was indicted in the superior court of Dade county, Georgia, for the offense of having, on the 15th day of March, 1891,—that being the Sabbath Day,—unlawfully run a freight train on the Alabama Great Southern Railroad in that county.

The statute under which the prosecution was instituted is as follows:

"Sec. 4578. If any freight train shall be run on any railroad in this state on the Sabbath Day (known as Sunday), the superintendent of transportation of such railroad company, or the officer having charge of the business of that department of the railroad, shall be liable for indictment for a misdemeanor in each county through which such train shall pass, and, on conviction, shall be for each offense punished as prescribed in § 4310 of this Code. On such trial it shall not be necessary to allege or prove the names of any of the employees engaged on such train, but the simple fact of the train being run. The defendant may justify himself by proof that such employees acted in direct violation of the orders and rules of the defendant: *Provided, always*, That whenever any train on any railroad in this state, having in such train one or more cars loaded with live stock, which train shall be delayed beyond schedule time, shall not be required to lay over on the line of road or route during Sunday, but may run on to the point where, by due course of shipment or consignment, the next stock pen on the route may be, where the said animals may be fed and watered, according to the facilities usually afforded for such transportation. And it shall be lawful for all freight [301] trains on the different *railroads in this state, running over said roads on Saturday night, to run through to destination: *Provided*, The time of arrival, according to the schedule by which the train or trains started on the trip, shall not be later than 8 o'clock on Sunday morning." Ga. Code 1882.

Section 4310, referred to in the section just quoted, is as follows:

"Accessories after the fact, except where it is otherwise ordered in this Code, shall be punished by a fine not to exceed $1,000, imprisonment not to exceed six months, to work in the chain gang on the public works, or on such other works as the county authorities may employ the chain gang, not to exceed twelve months, and any one or more of these punishments may be ordered in the discretion of the judge: *Provided*, That nothing herein contained shall authorize the giving the control of convicts to private persons, or their employment by the county authorities in such mechanical pursuits as will bring the products of their labor into competition with the products of free labor." Ga. Code 1882.

The defendant pleaded not guilty. He also pleaded specially certain facts which, he averred, showed that the statute of Georgia, as applied to this case, was in conflict with the provision of the Constitution of the United States, giving Congress power to regulate commerce among the states.

At the trial the defendant admitted that he was superintendent of transportation of the Alabama Great Southern Railroad, the property of the Alabama Great Southern Railroad Company, a corporation of Alabama; that the line of that railroad began at the city of Chattanooga, Tennessee, extended 9 miles through that state, when it entered the county of Dade, Georgia, and ran through that county and over the line of road constructed and operated originally by the Wills Valley Railroad Company into Alabama; thence through Alabama 245 miles, and into Mississippi, to the city of Meridian, where it connected with other roads; that said company was acting as a common carrier of passengers and freight along its line, using engines and cars propelled by steam; that on the day mentioned in the indictment *the company, by its superin- [302] tendent of transportation, the defendant, ran over its line of road from Chattanooga, Tennessee, through Georgia and Alabama to Meridian, Mississippi, a train of cars laden with freight for points beyond the limits of Georgia, the train having been loaded in Tennessee with freight destined for points outside and beyond the limits of Georgia.

The defendant contended that the statute, if applied to these facts, was repugnant to the Constitution of the United States. This contention was overruled and the jury were instructed that, under the facts admitted, the defendant was guilty. The jury accordingly found him guilty as charged in the indictment.

The case was taken to the supreme court of Georgia, and it was assigned for error that the trial court refused to adjudge § 4578 of the Code of Georgia, when applied to the admitted facts, to be repugnant to the commerce clause of the Constitution.

The supreme court of Georgia held the statute under which the prosecution was instituted to be a regulation of internal police and not a regulation of commerce; that it was not in conflict with the Constitution of the United States even as to freight trains passing through the state from and to adjacent states, and laden exclusively with freight received on board before the trains entered Georgia, and consigned to points beyond its limits.

As the judgment of the supreme court of Georgia denied to the defendant a right or immunity specially set up and claimed by him under the Constitution of the United States, no question is or can be made as to the jurisdiction of this court to review that judgment.

If the statute in question forbidding the running in Georgia of railroad freight trains on the Sabbath Day had been expressly limited to trains laden with domestic freight, it could not be regarded otherwise than as an ordinary police regulation established by the state under its general power to protect the health and morals, and to promote the welfare, of its people.

*From the earliest period in the history [303] of Georgia it has been the policy of that state, as it was the policy of many of the original states, to prohibit all persons, under penalties, from using the Sabbath as a day for labor and for pursuing their ordinary callings. By an act of the colonial legislature of Georgia, approved March 4, 1762, it was provided: "No



Digitized by Google

tradesman, artificer, workman, laborer, or other person whatsoever shall do or exercise any worldly labor, business, or work of their ordinary callings, upon the Lord's Day, or any part thereof (works of necessity or charity only excepted), and that every person being of the age of fifteen years or upwards, offending in the premises, shall, for every such offense, forfeit the sum of 10 shillings. And that no person or persons whatsoever shall publicly cry, show forth, or expose to sale, any wares, merchandise, fruit, herbs, goods, or chattels whatsoever upon the Lord's Day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried or showed forth, or exposed to sale, or pay 10 shillings." 2 Cobb's New Dig. Laws Ga. 853. This act is substantially preserved in § 4579 of the Code of Georgia. And by an act approved February 11, 1850, it was provided: "That from and after the first day of March next it shall not be lawful for any company or individual to run any freight train or any car carrying freight upon any railroad now existing, or that may hereafter be made, in this state, on the Sabbath Day; and any conductor or other person so running or assisting in running any train or car carrying freight on the Sabbath Day shall each be guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not exceeding $500." 1 Cobb's New Dig. Laws Ga. 399. This act was amended by substituting "superintendent of transportation" for "conductor," and in other particulars, not important to be mentioned, and as amended it constitutes § 4578 of the Criminal Code, under the heading of "Offenses against Public Morality, Health, Police," etc. Ga. Code 1882.

In what light is the statute of Georgia to be regarded? The well-settled rule is that if a statute [304] purporting to have *been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution. *Mugler* v. *Kansas*, 123 U. S. 623, 661 [31: 205]; *Minnesota* v. *Barber*, 136 U. S. 313, 320 [34: 455, 458, 3 Inters. Com. Rep. 185].

In our opinion there is nothing in the legislation in question which suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath Day, are within the territorial jurisdiction of the state. It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness, and health of the people, it was within its discretion to fix the day when all labor, within the limits of the state, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor. The fundamental law of the state committed these matters to the determination of the legislature. If the law-making power errs in such matters, its responsibility is to the electors, and not to the judicial branch of the government. The whole theory of our government, Federal and state, is hostile to the idea that questions of legislative authority may depend upon expediency, or upon opinions of judges as to the wisdom or want of wisdom in the enactment of laws under powers clearly conferred upon the legislature. The legislature of Georgia no doubt acted upon the view that the keeping of one day in seven for rest and relaxation was "of admirable service to a state, considered merely as a civil institution." 4 Bl. Com. *63. The same view was expressed by Mr. Justice Field in *Ex parte Newman*, 9 Cal. 502, 520, 529, when, referring to a statute of California relating to the *Sabbath Day, he said: "Its requirement [305] is a cessation of labor. In its enactment, the legislature has given the sanction of law to a rule of conduct which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists, and statesmen of all nations, as on the necessity of periodical cessation of labor. One day in seven is the rule, founded in experience and sustained by science. . . . The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society is promoted."

So, in *Bloom* v *Richards*, 2 Ohio St. 387, 392, Judge Thurman, delivering the unanimous judgment of the supreme court of Ohio, said: "We are, then, to regard the statute under consideration as a mere municipal or police regulation, whose validity is neither strengthened nor weakened by the fact that the day of rest it enjoins is the Sabbath Day. Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regularly recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the general assembly to require the cessation of labor, and to name the day of rest."

To the same general effect are many cases: *Specht* v. *Com.* 8 Pa. 312, 322 [49 Am. Dec. 518]; *Com.* v. *Has*, 122 Mass. 40, 42; *Frolickstein* v. *Mobile*, 40 Ala. 725; *Ex parte Andrews*, 18 Cal. 678, in which the dissenting opinion of Mr. Justice Field in *Ex parte Newman*, 9 Cal. 502, was approved; *State* v. *Baltimore & O. R. Co.* 24 W. Va. 783; *Scales* v. *State*, 47 Ark. 476, 482 [58 Am. Rep. 768]; *State* v. *Ambs*, 20 Mo. 214; *Nashville* v. *Linck*, 12 Lea, 499, 515.

The same principles were announced by the supreme court of Georgia in the present case. As the contention is that that court erred in not adjudging the statute in question to be unconstitutional, it is appropriate that the grounds upon which it proceeded should fully appear in this opinion. That court, speaking by Chief Justice Bleckley, said: "There can be no *well-founded doubt of its being a police [306] regulation, considering it merely as ordaining the cessation of ordinary labor and business during one day in every week; for the frequent



Digitized by Google

and total suspension of the toils, care, and strain of mind or muscle incident to pursuing an occupation or common employment, is beneficial to every individual, and incidentally to the community at large, the general public. Leisure is no less essential than labor to the well-being of man. Short intervals of leisure at stated periods reduce wear and tear, promote health, favor cleanliness, encourage social intercourse, afford opportunity for introspection, and tend in a high degree to expand the thoughts and sympathies of people, enlarge their information, and elevate their morals. They learn how to be, and come to realize that being is quite as important as doing. Without frequent leisure, the process of forming character could only be begun; it could never advance or be completed: people would be mere machines of labor or business,—nothing more. If a law which, in essential respects, betters for all the people the conditions, sanitary, social, and individual, under which their daily life is carried on, and which contributes to insure for each, even against his own will, his minimum allowance of leisure, cannot be rightfully classed as a police regulation, it would be difficult to imagine any law that could."

That court further said: "With respect to the selection of the particular day in each week which has been set apart by our statute as the rest day of the people, religious views and feelings may have had a controlling influence. We doubt not that they did have; and it is probable that the same views and feelings had a very powerful influence in dictating the policy of setting apart any day whatever as a day of enforced rest. But neither of these considerations is destructive of the police nature and character of the statute. If good and sufficient police reasons underlie it, and substantial police purposes are involved in its provisions, these reasons and purposes constitute its civil and legal justification, whether they were or not the direct and immediate motives which induced its passage, and have for so long a 307] *time kept it in force. Courts are not concerned with the mere beliefs and sentiments of legislators, or with the motives which influence them in enacting laws which are within legislative competency. That which is properly made a civil duty by statute is none the less so because it is also a real or supposed religious obligation; nor is the statute vitiated, or in any wise weakened, by the chance, or even the certainty, that in passing it the legislative mind was swayed by the religious rather than by the civil aspect of the measure. Doubtless it is a religious duty to pay debts, but no one supposes that this is any obstacle to its being exacted as a civil duty. With few exceptions, the same may be said of the whole catalogue of duties specified in the Ten Commandments. Those of them which are purely and exclusively religious in their nature cannot be made civil duties, but all the rest of them may be, in so far as they involve conduct as distinguished from mere operations of mind or states of the affections. Opinions may differ, and they really do differ, as to whether abstaining from labor on Sunday is a religious duty; but whether it is or is not, it is certain that the legislature of Georgia has prescribed it as a civil duty. The statute can fairly and rationally be treated as a legitimate police regulation, and thus treated it is a valid law. There is a wide difference between keeping a day holy as a religious observance, and merely forbearing to labor on that day in one's ordinary vocation or business pursuit." *Hennington* v. *State*, 90 Ga. 396, 397-399 [4 Inters. Com. Rep. 418].

Assuming, then, that both upon principle and authority the statute of Georgia is, in every substantial sense, a police regulation established under the general authority possessed by the legislature to provide, by laws, for the well-being of the people, we proceed to consider whether it is in conflict with the Constitution of the United States.

The defendant contends that the running on the Sabbath Day of railroad cars laden with interstate freight is committed exclusively to the control and supervision of the national government; and that, although Congress has not taken any affirmative action upon the subject, state legislation *interrupting, even for a[308 limited time only, interstate commerce, whatever may be its object and however essential such legislation may be for the comfort, peace, and safety of the people of the state, is a regulation of interstate commerce forbidden by the Constitution of the United States. Is this view of the Constitution and of the relations between the state and the general government sustained by the former decisions of this court? Is the admitted general power of a state to provide by legislation for the health, the morals, and the general welfare of its people, so fettered that it may not enact any law whatever that relates to or affects in any degree the conduct of commerce among the states? If the people of a state deem it necessary to their peace, comfort, and happiness, to say nothing of the public health and the public morals, that one day in each week be set apart by law as a day when business of all kinds carried on within the limits of that state shall cease, whereby all persons of every race and condition in life may have an opportunity to enjoy absolute rest and quiet, is that result, so far as interstate freight traffic is concerned, attainable only through an affirmative act of Congress giving its assent to such legislation?

The argument in behalf of the defendants rests upon the erroneous assumption that the statute of Georgia is such a regulation of interstate commerce as is forbidden by the Constitution, without reference to affirmative action by Congress, and not merely a statute enacted by the state under its police power, and which, although in some degree affecting interstate commerce, does not go beyond the necessities of the case, and therefore is valid, at least until Congress interferes.

The distinction here suggested is not new in our jurisprudence. It has been often recognized and enforced by this court. In *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 203, 210 [6: 23, 71, 73], this court recognized the possession by each state of a general power of legislation, that "embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves." Inspection laws, although having, as the court said in that



Digitized by Google

case, "a remote and considerable influence on
309]*commerce," are yet within the authority of the states to enact, because no direct, general power over the objects of such laws was granted to Congress. So, also, quarantine laws of every description, if they have real relation to the objects named in them, are to be referred to the power which the states have to make provision for the health and safety of their people. But neither inspection, quarantine, nor health laws enacted by a state have been adjudged void, by force alone of the Constitution and in the absence of congressional legislation, simply because they remotely, or even directly, affected or temporarily suspended commerce among the states and with foreign nations. Of course, if the inspection, quarantine, or health laws of a state, passed under its reserved power to provide for the health, comfort, and safety of its people, come into conflict with an act of Congress passed under its power to regulate interstate and foreign commerce, such local regulations to the extent of the conflict must give way in order that the supreme law of the land—an act of Congress passed in pursuance of the Constitution—may have unobstructed operation. The possibility of conflict between state and national enactments, each to be referred to the undoubted powers of the state and the nation, respectively, was not overlooked in *Gibbons* v. *Ogden* and Chief Justice Marshall said: "The framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself but of the laws made in pursuance of it. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the state legislatures as do not transcend these powers, but though enacted in the execution of acknowledged state powers, interfere with or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case the act of Congress or the treaty is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."

310] *These principles are illustrated in numerous decisions of this court, to some of which it is proper to refer.

In *Wilson* v. *Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245, 251, 252 [7: 412, 414], it appeared that that company claimed the right, under a statute of Delaware, to place a dam across a navigable creek, up which the tide flowed for some distance, and thereby abridge the rights of those accustomed to use the stream. This court, after observing that the construction of the dam would enhance the value of the adjoining land and probably improve the health of the inhabitants, and that such an abridgment of private rights, unless it came in conflict with the Constitution or a law of the United States, was an affair between the government of Delaware and its citizens, of which this court could not take cognizance, said: "The counsel for plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several states.' If Congress had passed any act which bore upon the case,—any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states,—we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question. We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." Notwithstanding that case has been sometimes criticised, its authority has never been questioned in this court. On the contrary, it was declared in *Pound* v. *Turck*, 95 U. S. 459, 463 [24: 525, 526], that it had never been overruled, but had always been sustained.

*In *Gilman* v. *Philadelphia*, 70 U. S. 3 [311 Wall. 713, 729 [18: 96, 100], the question was as to the validity of an act of the legislature of Pennsylvania authorizing the construction of a bridge over the Schuylkill, "an ancient river and common highway of the state." It appeared that the bridge, if constructed, would prevent the passage up the river of vessels having masts, interfere with commerce, and materially injure the value of certain wharf and dock property on the river. Congress had not passed any act on the subject, but the contention was that such an interference with commerce on a public navigable water was inconsistent with the Constitution of the United States. The court said: "It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The states have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases to the paramount authority of Congress, whenever the power of the states shall be exerted within the sphere of the commercial power which belongs to the nation."

In *Cooley* v. *Board of Wardens of Philadelphia*, 53 U. S. 12 How. 299, 320 [13: 996, 1005], it was adjudged that the mere grant to Congress of the power to regulate commerce did not deprive the states of power to regulate pilots on the public navigable waters of the United States.

In *The James Gray* v. *The John Fraser*, 62 U. S. 21 How. 184, 187 [16: 106, 108], the court held to be valid two ordinances of the



Digitized by Google

city of Charleston, one providing that no vessel should be in the harbor of that city for more than twenty-four hours, and inflicting certain penalties for every disobedience of the ordinance; the other requiring all vessels anchored in the harbor to keep a light burning on board from 312]*dark until daylight, suspended conspicuously admidships, 20 feet high from the deck. The court said: "The power of the city authorities to pass and enforce these two ordinances is disputed by the libelants. But regulations of this kind are necessary and indispensable in every commercial port for the convenience and safety of commerce. And the local authorities have a right to prescribe at what wharf a vessel may lie and how long she may remain there; where she may unload or take on board particular cargoes; where she may anchor in the harbor and for what time; and what description of light she shall display at night to warn the passing vessels of her position, and that she is at anchor and not under sail. They are like to the local usages of navigation in different ports, and every vessel, from whatever part of the world she may come, is bound to take notice of them and conform to them. And there is nothing in the regulations referred to in the port of Charleston which is in conflict with any law of Congress regulating commerce, or with the general admiralty jurisdiction conferred on the courts of the United States."

In *Chicago & N. W. R. Co.* v. *Fuller*, 84 U. S. 17 Wall. 560, 567, 570 [21: 710, 713, 714], the question was as to the validity of a statute of Iowa requiring that each railroad company should, in the month of September annually, fix its rates for the transportation of passengers and of freights of different kinds; that it should put up a printed copy of such rates at all its stations and depots, and cause a copy to remain posted during the year; and that a failure to fulfil these requirements, or the charging of a higher rate than was posted, should subject the offending company to the payment of the penalty prescribed. The court said: "In all other respects there is no interference. No other constraint is imposed. Except in these particulars the company may exercise all its faculties as it shall deem proper. No discrimination is made between local and interstate freights, and no attempt is made to control the rates that may be charged. It is only required that the rates shall be fixed, made public and honestly adhered to. In this there is nothing unreasonable or onerous. The public welfare is promoted without wrong or injury to the company. The statute was doubt-313] less *deemed to be called for by the interests of the community to be affected by it, and rests upon a solid foundation of reason and justice. It is not, in the sense of the Constitution, in any wise a regulation of commerce." Again: "If the requirements of the statute here in question were, as contended by the counsel by the plaintiff in error, *regulations of commerce*, the question would arise whether, regarded in the light of the authorities referred to, and of reason and principle, they are not regulations of such a character as to be valid until superseded by the paramount action of Congress. But, as we are unanimously of the opinion that they are merely police regulations, it is unnecessary to pursue the subject."

In *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 470-473 [24: 527, 529-531], the court, while holding to be invalid under the Constitution of the United States a statute of Missouri, which met at the borders of the state a large and common subject of commerce, and prohibited its crossing the line during two thirds of each year, except subject to onerous conditions, which obstructed interstate commerce, and worked a discrimination between the property of citizens of one state and that of citizens of other states, said that "the deposit in Congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may properly be denominated police power;" that that power extended "to making regulations of domestic order, morals, health, and safety," but could not be exercised over a subject confided exclusively to Congress, nor invade the domain of the national government, nor by any law of a police nature interfere with transportation into or through the state, "beyond what is absolutely necessary for its self-protection." The court, in that case, concluded with these words: "The police power of a state cannot obstruct foreign commerce or interstate commerce *beyond the necessity for its exercise;* and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any *needless intrusion.*

*A leading case upon the subject is that[314 of *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana Board of Health*, 118 U. S. 455, 463-465 [30: 237, 241, 242], which related to certain quarantine laws of Louisiana, the validity of which were questioned partly upon the ground that they were inconsistent with the power of Congress to regulate commerce among the states. This court said: "Is the law under consideration void as a regulation of commerce? Undoubtedly it is in some sense a regulation of commerce. It arrests a vessel on a voyage which may have been a long one. It may affect commerce among the states when the vessel is coming from some other state of the Union than Louisiana, and it may affect commerce with foreign nations when the vessel arrested comes from a foreign port. This interruption of the voyage may be for days or weeks. It extends to the vessel, the cargo, the officers and seamen, and the passengers. In so far as it provides a rule by which this power is exercised, it cannot be denied that it regulates commerce. We do not think it necessary to enter into the inquiry whether, notwithstanding this, it is to be classed among those police powers which were retained by the states as exclusively their own, and therefore not ceded to Congress. For, while it may be a police power in the sense that all provisions for the heath, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within



Digitized by Google

the domain of Federal authority as defined by the Constitution, the latter must prevail. *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 210 [6: 23, 73]; *Henderson* v. *Wickham*, 92 U. S. 259, 272 [23: 543, 549]; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 661 [29: 516, 520]. But it may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a National Board of Health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent. But, until this is done, the laws of the state on the subject are valid." Again: "Quarantine laws belong to that class of state legislation [315] which, whether passed with intent *to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress."

Upon the subject of legislation enacted under the police power of a state, and which, although affecting more or less commerce among the states, was adjudged to be valid until displaced by some act of Congress, the case of *Smith* v. *Alabama*, 124 U. S. 465, 474, 479, 482 [31: 508, 510, 512, 513, 1 Inters. Com. Rep. 804], is instructive. A statute of Alabama made it unlawful for an engineer on a railroad train in that state to operate an engine upon the main line of the road used for the transportation of passengers or freight, without first undergoing an examination and obtaining a license from a state board of examiners. The point was made that the statute, in its application to engineers on interstate trains, was a regulation of commerce among the states, and repugnant to the Constitution. This court referred to and reaffirmed the principle announced in *Sherlock* v. *Alling*, 93 U. S. 99, 102 [23: 819, 820], where it was said: "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution." Referring to the fact that Congress had prescribed the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States, while engaged in commerce among the states, the court, in *Smith* v. *Alabama*, said that the power of Congress "might, with equal authority, be exercised in prescribing the qualifications for locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the states, and in that case would supersede any conflicting provisions on the same subject made by local authority. But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in them-[316] selves they *are parts of that body of the local laws which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the state or in commerce among the states. No objection to the statute, as an impediment on the free transaction of commerce among the states, can be found in any of its special provisions. Again: "We find therefore, first, that the statute of Alabama the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the state to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public safety of persons and property; and, thirdly, that, so far as it affects transactions of commerce among the states, it does so indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

So, in *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96, 99, 101 [32: 352-354], which involved the validity of a state enactment which, for the protection of the traveling public, declared any one disqualified from serving on railroad lines within the state who had color blindness and defective vision, and which statute was equally applicable to domestic and interstate railroad trains, the court said: "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in that commerce; and that such legislation will *supersede any state action on the sub-[317] ject. But until such legislation is had, it is clearly within the competency of the states to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of state and Federal courts that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the states, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable." Referring to some observations made in *Smith* v. *Alabama*, 124 U. S. 465 [31: 508, 1 Inters. Com. Rep. 804], the court said: "The same observations may be made, with respect to the provisions of the state law for the examination of parties to be employed on railways with respect to their powers of vision. Such legislation is not directed against commerce, and only affects it



Digitized by Google

incidentally, and therefore cannot be called, within the meaning of the Constitution, a regulation of commerce."

These authorities make it clear that the legislative enactments of the states passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the states reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, 318] they cover the *field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight. And it places the business of transporting freight in the same category as all other secular business. It simply declares that, on and during the day fixed by law as a day of rest for all the people within the limits of the state from toil and labor incident to their callings, the transportation of freight shall be suspended.

We are of opinion that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well being and to promote the general welfare of the people within the state by which it was established, and therefore not invalid by force alone of the Constitution of the United States.

*The judgment is affirmed.*

The Chief Justice, with whom concurred Mr. Justice **White**, dissenting:

Intercourse and trade between the states by means of railroads passing through several states, is a matter national in its character and admitting of uniform regulation. The power of Congress to regulate it is exclusive, and under the Constitution it is free and untramelled except as Congress otherwise provides. This statute in requiring the suspension of interstate commerce for one day in the week amounts to a regulation of that commerce and is invalid because the power of Congress in that regard is exclusive. But it is said that the act is not a regulation of commerce but a mere regulation of police, and that the so-called police power of a state is plenary. The result, however, is the same. When a power of a state and *a power of the general gov- [319 ernment come into collision, the former must give way; and as the freedom of interstate commerce is secured by the Constitution, except as Congress shall limit it, the act is void because of the violation of that freedom.

Mr. Justice **Brewer** did not hear the argument in this case, and took no part in its decision.

---

JAMES HUNTINGTON, *Petitioner for Revision, Appt.*,
*v.*
WILLIAM A. SAUNDERS.

(See S. C. Reporter's ed. 319-321.)

*Jurisdiction of this court—matter in controversy.*

1. On a contest by a creditor against a bankrupt's right to a discharge, the claim of the creditor is not in controversy nor the amount of it, so as to give this court jurisdiction on the ground that the matter in controversy exceeds $1,000, under the last clause of § 6 of the judiciary act of March 3, 1891, although the creditor's claim amounts to over $5,000.
2. The matter in controversy must have actual value, and that cannot be supplied by speculation on the possibility that if a discharge were refused something might be made out of the bankrupt.

[No. 928.]

*Submitted May 4, 1896. Decided May 25, 1896.*

APPEAL from a decree of the United States Circuit Court of Appeals for the First Circuit dismissing an appeal from a decree of the United States Circuit Court for the District of Massachusetts, which dismissed an application for a review of the decree of the District Court of the United States for the same district dismissing objections to the discharge of William A. Saunders, a bankrupt, and granting to him a bankrupt's discharge. On motion to dismiss. *Appeal dismissed.*

See same case below, 64 Fed. Rep. 476, 33 U. S. App. 416.

The facts are stated in the opinion.

*Mr.* **William B. Durant** for appellee, in favor of motion to dismiss.

*Mr.* **Bancroft Gherardi Davis** for appellant, in opposition to motion.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

William A. Saunders was adjudicated bankrupt by the district court of the United States for the district of Massachusetts, October 1, 1875, on petition of creditors filed July 13,

NOTE.—*As to jurisdiction of United States Supreme Court dependent on amount; interest added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy,*—see note to Gordon v. Ogden, 7: 502.



Digitized by Google

1875. Saunders applied for a discharge by peti-
320]tion filed *July 19, 1876, of which notice was given returnable May 25, 1877. James Huntington objected to the granting of the discharge, and on June 4, 1877, filed written specifications of his objections. Several hearings were had thereon before the register and the hearing was closed in 1878. December 22, 1893, Saunders made an application that the objections to his discharge might be dismissed or heard at an early day. December 23, 1893, the court dismissed Huntington's objections for want of prosecution, and on December 30, 1893, granted the bankrupt's discharge. On January 1, 1894, Huntington gave notice of an application to the circuit court for a review of the dismissal of objections and the granting the discharge, and on January 3, 1894, filed his petition for revision in the circuit court of the United States for the first circuit. Issues were made up and the case heard. The circuit court held that the petition must be dismissed (64 Fed. Rep. 476), and on January 16, 1895, an order to that effect was entered. Thereupon Huntington appealed to the circuit court of appeals for the first circuit, which court dismissed the appeal for want of jurisdiction, February 3, 1896. 33 U. S. App. 416.

It was stipulated that Huntington was a creditor of Saunders, "and that the amount of his claim against the bankrupt, which will be discharged if the discharge granted to the bankrupt shall stand, amounts to over $5,000, exclusive of any interest or costs."

From the final decree of the circuit court of appeals Huntington prayed an appeal to this court, which was allowed, and having been docketed here, a motion to dismiss was made.

This appeal is prosecuted under the last clause of § 6 of the judiciary act of March 3, 1891, providing: "In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1,000 besides costs."

This is not one of the cases in which the decrees or judgments of the circuit courts of appeals are made final by that section, but in our opinion the matter in controversy does not exceed $1,000 besides costs. The proof of
321] *Huntington's claim was not in controversy nor the amount of it. Whether Saunders was entitled to a certificate of discharge was in controversy, but even assuming that the value of this certificate was susceptible of an estimate in money, there was no evidence whatever in the record tending to show this value. *United States, South Carolina*, v. *Seymour*, 153 U. S. 353, 358 [38: 742, 744]. Huntington was entitled to share in whatever assets passed to the assignee, and whether Saunders had acquired new assets after he was put in bankruptcy did not appear.

The matter in controversy must have actual value, and that cannot be supplied by speculation on the possibility that if a discharge were refused something might be made out of the bankrupt. *Durham* v. *Seymour*, 161 U. S. 235 [40: 682].

*Appeal dismissed.*

WILLIAM BURFENNING, *Plff. in Err.*,
*v.*
CHICAGO, ST. PAUL, MINNEAPOLIS, & OMAHA RAILWAY COMPANY.

(See S. C. Reporter's ed. 321-325.)

*Decision of land department—invalid patent for lands.*

1. The action of the land department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof.
2. A homestead patent for lands within the limits of an incorporated city, issued in violation of U. S. Rev. Stat. §§ 2258, 2289, is not a conclusive determination of the land department in favor of the patentee, where the city was incorporated by public act before the patentee's right was initiated by application to enter the lands.

[No. 277.]

*Submitted May 1, 1896. Decided May 18, 1896.*

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment of that court affirming the judgment of the District Court of Hennepin County, Minnesota, in favor of defendant, in an action brought by William Burfenning, plaintiff, against the Chicago, St. Paul, Minneapolis, & Omaha Railway Company, defendant, to recover possession of certain islands in the Mississippi river, and within the territorial limit of the city of Minneapolis. *Affirmed.*

See same case below, 46 Minn. 20.

Statement by Mr. Justice **Brewer**:

On March 20, 1890, plaintiff in error commenced his action in the district court of Hennepin county, Minnesota, to recover possession of certain islands situated in the Mississippi river and within the territorial limits of the city of Minneapolis. After answer and trial had in that court, which resulted in a judgment for the defendant, and which judgment was affirmed by the supreme court, this writ of error was sued out.

*Mr.* **James W. Lawrence** for plaintiff in error.

*Mr.* **Thomas Wilson** for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The title of plaintiff in error, plaintiff below, rests on a patent from the United States, of date June 13, 1884. This patent was issued under U. S. Rev. Stat. § 2306, granting additional homestead lands to soldiers and sailors who served in the war of the rebellion. The record discloses that on April 7, 1873, John Van Anker entered as a homestead at Cawker City, Kansas, the E ½ of N. W. ¼ section 12,

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

*That patents for land may be set aside for fraud*, see note to Miller v. Kerr, 5: 381.

*As to errors in surveys and descriptions in patents for lands, how construed*, see note to Watts v. Lindsey, 5: 423



Digitized by Google

T. 3, R. 12, and W. ½ of N. W. ¼ section 7, T. 3, R. 11, containing 155 11/100 acres. Under the statutes referred to he was entitled to enter 4 99/100 acres as an additional homestead, and this without any previous settlement or occupancy thereof. On August 19, 1882, a certificate of this right was issued to him by the acting Commissioner of the General Land Office. On March 27, 1883, he applied under that section to enter these islands, containing 1 95/100 acres, and paid therefor the sum of $5.20, total of fees and compensation. This application being sustained, the patent was issued. Under a power of attorney, dated June 7, 1882, a date prior to that of the certificate of his right to the additional entry, a deed was made by his attorney in fact, G. M. Smith, to the plaintiff. The averment in the complaint, which was supported by the testimony offered at the trial, was that the value of the land was $20,000.

The invalidity of this patent is alleged, under the second clause of U. S. Rev. Stat. §§ 2258, 2289, by which are excluded from pre-emption and homestead "lands included within the limits of any incorporated town or selected as the site of a city or town." Counsel for plaintiff in error insists that the patentability of all public lands is one for the land department of the United States to determine, and that its determination in this case, evidenced by the issue of the patent, is conclusive 323]upon the question that these *lands were not at the time that the patentee's rights were initiated within the limits of any city and were subject to homestead.

It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other; in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 [20: 485]; *St. Louis Smelt. & Ref. Co.* v. *Kemp*, 104 U. S. 636 [26: 875]; *Steel* v. *St. Louis Smelt. & Ref. Co.* 106 U. S. 447 [27: 226]; *Wright* v. *Roseberry*, 121 U. S. 488 [30: 1039]; *Heath* v. *Wallace*, 138 U. S. 573 [34: 1064]; *McCormick* v. *Hayes*, 159 U. S. 332 [40: 171].

But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the land department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof. *St. Louis Smelt. & Ref. Co.* v. *Kemp*, 104 U. S. 636, 646 [26: 875, 879]; *Wright* v. *Roseberry*, 121 U. S. 488, 519 [30: 1039, 1048]; *Doolan* v. *Carr*, 125 U. S. 618 [31: 844]; *Davis* v. *Wiebbold*, 139 U. S. 507, 529 [35: 238, 246]; *Knight* v. *United Land Asso.* 142 U. S. 161 [35: 974].

The case of *Morton* v. *Nebraska*, 88 U. S. 21 Wall. 660 [22: 639], is very closely in point. In that case the plaintiff held a patent for lands in Nebraska which were saline lands, and noted such on the field books, although the notes thereof had not been transferred to the register's general plats. The pre-emption act of September, 1841 (4 Stat. at L. 556), declared that "no lands on which are situated any known salines or mines shall be *liable [324 to entry." Notwithstanding this prohibition, patents were issued for the lands, and it was held that they were absolutely void, the court saying, page 674 [645]: "It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated, are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law."

In that case it will be observed that the records disclosed that the lands were saline lands when the proceedings in the land department were had. So the case was not one in which the department determined a fact upon parol evidence, but one in which it acted in disregard of an established and recorded fact. In *Root* v. *Shields*, Woolw. 340, decided by Mr. Justice Miller at the circuit, it was held that a patent for lands within the limits of the city of Omaha was void. It is true that case was one in equity and not in law, but so far as respects the decision that the patent was void, it is exactly in point.

Now, applying these authorities to the case at bar, the city of Minneapolis was incorporated by an act of the legislature of that state, declared in its terms to be a public act, which took effect on March 8, 1881. The record of the land department shows that the right of the patentee was initiated on March 27, 1883, for on that date he made his application to enter the lands. This is not a case in which the patent was founded upon actual occupancy for homestead purposes, or in which nothing appearing but the patent itself there might be uncertainty as to the time at which the patentee's rights were initiated,—whether before or after the incorporation of the city. It is one where, affirmatively and by the record, it is disclosed that there was no pretense or semblance of claim on the part of the patentee until two years subsequent to the organization of the city, and in that respect differs *from [325 *Texas & P. R. Co.* v. *Smith*, 159 U. S. 66 [40 L. ed. 77], in which, on account of the absence of all testimony, there was suggested an uncertainty as to the time at which, by way of relation, the patentee's rights took effect. The case therefore comes within the general rule announced as to the invalidity of a patent issued in defiance of the expressed will of Congress.

*The judgment of the supreme court of Minnesota was right, and it is affirmed.*



Digitized by Google

# UNION NATIONAL BANK OF CHICAGO, *Plff. in Err.*,
*v.*
# LOUISVILLE, NEW ALBANY, & CHICAGO RAILWAY COMPANY.

(See S. C. Reporter's ed. 325-331.)

*Federal question.*

**The decision by a state court as to the rights of a national bank as to interest under a state statute, which merely determines the meaning of the state law as applied to all creditors without denying equality of right to the bank or any right given by a Federal statute, does not present a Federal question.**

[No. 254.]

*Submitted April 29, 1896. Decided May 18, 1896.*

IN ERROR to the Supreme Court of the State of Illinois to review a judgment of that court affirming the judgment of the Appellate Court of the State, which affirmed the judgment of the Circuit Court of Cook County, in that State, in favor of defendant, the Louisville, New Albany, & Chicago Railway Company, in an action brought by the Union National Bank of Chicago to recover interest or compensation for a loan of money. There was also a motion to dismiss. *Dismissed.*

See same case below, 145 Ill. 208.

Statement by Mr. Justice **Brewer:**

On September 17, 1890, plaintiff in error, plaintiff below, loaned the defendant $150,000, taking its note therefor, secured by collateral. The note was discounted at the rate of 6 per cent. The note having been paid, the plaintiff, on October 12, 1891, commenced its action in the circuit court of Cook county to recover upon a parol agreement for further compensation. The case came on for trial in that court, and a jury being waived the following facts were admitted by stipulation:

326] *"On or about September 17, 1890, William L. Breyfogle, then president of the Louisville, New Albany, & Chicago Railway Company, verbally arranged with the Union National Bank of Chicago for a loan of $150,000 to said railway company, the repayment thereof to be secured by collateral security in the form of three hundred bonds of the general gold bonds of the Louisville, New Albany, & Chicago Railway Company, said bonds being in the denomination of $1,000 each.

"It was verbally agreed in this arrangement that the bank should discount from this $150,000 interest at the rate of 6 per cent per annum, and that Mr. Breyfogle, president of the railway company, should endeavor to secure the Chicago & Western Indiana Railway Company as a depositor with said Union National Bank, and in case he failed so to do the said bank should have in lieu of such deposit a commission of 2½ per cent upon said $150,000 in addition to said 6 per cent thereon. The deposits of the Chicago & Western Indiana Railway Company would have been valuable to the said bank as a part of its business and it declined to make the said loan, except upon the terms above stated."

The Chicago & Western Indiana Railway Company failed to become a depositor, as contemplated, and the claim of the plaintiff was for the 2½ per cent called in such parol agreement "a commission." The plaintiff asked the court to hold these two propositions of law:

"1. The court finds as a matter of law that no corporation organized under the laws of Illinois can interpose the defense of usury in any action, even though the plaintiff in such action (the lender) be a national bank organized under the act of Congress establishing national banks.

"2. The court finds as a matter of law that if, in consideration of the making of the loan in controversy by the plaintiff to the defendant, the defendant agreed that, in addition to paying 6 per cent interest on said loan, it would secure the Chicago & Western Indiana Railway Company as a depositor of plaintiff, which said deposit account would have been of *value to plaintiff, or, failing to secure [327 such account, would pay plaintiff a commission of 2½ per cent on said loan, in addition to said 6 per cent interest, this would not constitute usury or defeat a recovery by plaintiff, unless it should appear by a preponderance of the evidence that such arrangement was a mere shift or cover or device to evade the statute against usury or the provisions of the national banking act, or that such was the intent or purpose of the parties or one of them."

But it refused to hold either of them, and, on the contrary, ruled at the instance of defendant as follows:

"The court holds as a matter of law that a national bank in Illinois has no legal right or authority to charge or receive interest in this state to exceed the rate of 8 per cent, and that the statute of this state which denies to corporations the right to plead usury cannot expand the authorities of national banks touching this subject as conferred by and fixed in the national banking act."

And thereupon it entered judgment in favor of the defendant. The appellate court of the state affirmed the judgment, on the ground that to sustain a recovery in favor of the plaintiff would involve the admission of a cotemporaneous parol agreement to modify and add to the terms of a written contract. The supreme court of the state, while recognizing fully the proposition that no parol agreement could be admitted in evidence to vary the terms of a written contract, referred to the claim that the stipulation waived defendant's right to object to the introduction of such evidence, and declining to express its opinion as to the effect of such stipulation affirmed the judgment on the ground that the contract, as thus modified by the parol agreement, was forbidden by the laws of Illinois, and could not be enforced.

The plaintiff is a national bank, and U. S. Rev. Stat. § 5197, authorizes such bank to charge and receive "interest at the rate allowed by the laws of the state, territory, or district

NOTE.—*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question.*—see note to Hamblin v. Western Land Co. 37: 267.



Digitized by Google

where the bank is located, and no more." The laws of Illinois in force at the time of this contract authorized parties to stipulate and 328] agree for 8 per cent in all *written contracts, and forbade the acceptance or receiving of any greater rate. Sections 6 and 11 of the statute (Ill. Rev. Stat. 1889, chap. 74) are as follows:

"Sec. 6. If any person or corporation in this state shall contract to receive a greater rate of interest or discount than 8 per cent upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation; and all contracts executed after this act shall take effect, which shall provide for interest or compensation at a greater rate than herein specified, on account of nonpayment at maturity, shall be deemed usurious, and only the principal sum due thereon shall be recoverable.

"Sec. 11. No corporation shall hereafter interpose the defense of usury in any action."

The supreme court held that, while the defendant corporation might not interpose the defense of usury and so avoid the payment of any interest, the contract was, nevertheless, within the prohibitions of the statute, and could not be enforced at the instance of the plaintiff, because it provided for more than 8 per cent. In its opinion it said:

"The theory seems to be that because a corporation cannot set up usury as a defense, any person or corporation dealing with a corporation may lawfully exact such rate of interest as may be agreed upon, whether in excess of the statutory limit or not, so that where a corporation is the debtor no rate of interest is fixed by the laws of this state. To this view we are totally unable to yield our assent. . . . Nor does it follow that because the debtor who has agreed to pay more than the legal rate of interest is a corporation, and therefore incapable of interposing the defense of usury, the law will treat the contract as valid and enforce it according to its terms. . . . In the present case, then, the section of the statute imposing a penalty may be left out of view as inapplicable, but 329] *still the prohibitory part of the statute remains, making it unlawful for any person or corporation to directly or indirectly accept or receive for the loan or forbearance of money any greater rate than 6 per cent by oral agreement or greater than 8 per cent where the contract is in writing. . . . In the present case 6 per cent interest was reserved in the note. Eight per cent might have been lawfully reserved in such written contract, but it was not. After the reservation, however, of 6 per cent by the writing the additional 2 per cent or any other rate could not be lawfully reserved or agreed to be taken or paid by parol. The written agreement having provided for the reservation of all that could be lawfully reserved or agreed to be taken by parol, an oral agreement for any further interest was manifestly in violation of the statute. . . . The loan was only for six months, and 2½ per cent upon the amount loaned was equivalent to interest at the rate of 5 per cent for six months; that added to the interest reserved in the note made 11 per cent, a rate forbidden by the statute of this state and by the act of Congress as well. We are of the opinion that the legal conclusion from the admitted facts is that the agreement to pay the money now sought to be recovered is usurious and void."

To reverse the judgment thus affirmed by the supreme court of the state plaintiff sued out a writ of error from this court.

*Mr.* **Henry S. Robbins** for plaintiff in error.

*Mr.* **Geo. W. Kretzinger** for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

At the outset we are met with the question whether this court has jurisdiction. In *Eustis v. Bolles*, 150 U. S. 361, 366 [37: 1111, 1112], it was held:

*"It is likewise settled law that, where[330 the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

Plaintiff in error does not challenge the rule as thus laid down, but insists that the single question decided by the supreme court of the state was that of usury under the Federal statute; that such decision was that a national bank could not recover from a corporation interest in excess of the statutory rate, although an individual could; or, in other words, that the decision was one making a discrimination against national banks in Illinois.

With this construction of that decision we are unable to concur. If language has any force the opinion of the supreme court is a clear declaration that the statutes of Illinois contain both a prohibition and a penalty; that the prohibition makes void *pro tanto* every contract in violation thereof, and that while § 11, prohibiting corporations from pleading the defense of usury, may prevent any claim to the benefits of the penalty, it does not give to the other party a right to enforce a contract made in violation of the prohibition. Counsel for plaintiff insists that prior decisions of that court in the case of individual creditors are inconsistent with this, and that the language of the court in this opinion is not clear. Even if it be true that a different opinion has been expressed heretofore by that court in reference to individual creditors (and in respect to that matter we have no comments to make) it is obvious that the present decision is that under and by virtue of the statutes of that state the plaintiff, whoever he or it may be, cannot enforce a contract forbidden by the terms of those statutes, and this irrespective of any rights that the defendant may have in respect thereto. Such a decision is one depending solely upon the statutes of the state.

*It may be said that the rights of a na-[331 tional bank as to interest are given by the Federal statute; that the reference to the state law is only for a measure of those rights; that a misconstruction of the state law really works a



Digitized by Google

denial of the rights given by the Federal statute, and thus creates a Federal question. *Miller* v. *Anderson* ("*Miller* v. *Swan*"), 150 U. S. 132 [37: 1028]. A sufficient answer is that the true construction of state legislation is a matter of state jurisprudence, and while the right of the national bank springs from the act of Congress, yet it is only a right to have an equal administration of the rule established by the state law. It does not involve a reservation to the national courts of the authority to determine adversely to the state courts what is the rule as to interest prescribed by the state law, but only to see that such rule is equally enforced in favor of national banks. The decision here was not against any equality of right, but only a determination of the meaning of the state law as applied to all creditors. It therefore denied no rights given by the Federal statute and involved no judgment adverse to plaintiff as to its meaning and effect. It assumed that the plaintiff's interpretation of that statute was correct, and ruled nothing against it. It presents no Federal question. It is broad enough to cover this case. It was relied upon by the supreme court, and therefore the case is, by the settled law as heretofore announced, one which does not come within the jurisdiction of this court.

*The writ of error is dismissed.*

---

ALFRED F. WEBSTER, *Plff. in Err.*,

*v.*

MILO J. LUTHER and LOUIS ROUCHLEAU.

(See S. C. Reporter's ed. 331-342.)

*Construction of law by executive department—soldier's right to public lands, when assignable.*

1. The obvious purpose of an act of Congress will be sustained by the courts, notwithstanding a contrary construction and practice by an executive department.

2. The right to enter "additional" lands, given to an honorably discharged soldier by U. S. Rev. Stat. § 2306, if he has not already entered lands to the extent of 160 acres, is assignable and transferable.

[No. 161.]

*Submitted March 19, 1896. Decided May 18, 1896.*

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment of that court affirming the judgment of the District Court of St. Louis County in that State, that the defendants are the owners of the lands described in the complaint in an action brought by Alfred F. Webster, plaintiff, against Milo J. Luther *et al.*, defendants, to quiet the title of the plaintiffs to lands in said county and state and enjoin defendants from asserting any claim thereto, etc. *Affirmed.*

The facts are stated in the opinion.

See same case below, 50 Minn. 77.

*Messrs.* **Jod L. Washburn** and *Daniel H. Twomey* for plaintiff in error.

*Messrs.* **Cushman K. Davis, Frank B. Kellogg, Cordenio A. Severance, Theodore T. Hudson,** *George P. Wilson, John R. Van Derlip, Alfred Jaques, Daniel G. Cash,* and *John G. Williams* for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This action involves the title to lots 1 and 2, section 18, in township 62, of range 14 west, situated in St. Louis county, Minnesota.

At the trial below, the plaintiff, Webster, read in evidence, without objection—

(1) The application of Mary Robertson, widow of James A. Robertson, deceased, of Benton county, dated April 7, 1887 (together with the receipt of the register of the local land office showing the payment of the fee and commissions prescribed by law), to enter the lands here in dispute, under U. S. Rev. Stat. § 2306, granting *additional* lands to soldiers and sailors who served in the war of the rebellion. (2) The receipt of the proper land office, dated April 7, 1887, showing the payment in full of the balance required by law for the entry of the above lots, under U. S. Rev. Stat. § 2291. (3) A patent from the United States to Mary A. Robertson for these lands, issued September 21, 1888, recorded February 11, 1889, in the office of the register of deeds in St. Louis county, Minnesota, and purporting to have been issued pursuant to the act of Congress approved May 20, 1862, "to secure homesteads to actual settlers on the public domain," 12 Stat. at L. 392, chap. 75, and the acts supplemental thereto. This patent recited that the claim of the patentee to the lots in controversy had been established and duly consummated in conformity to law. (4) A quitclaim deed of bargain and sale of these premises from *Mary A. Robertson, widow, to the [333 plaintiff, Webster, dated October 7, 1890, acknowledged October 17, 1890, and recorded October 22, 1890.

The defendants read in evidence a power of attorney, dated April 28, 1880, and duly recorded April 8, 1887, from Mary A. Robertson to James A. Boggs. This instrument authorized and empowered Boggs, as attorney for his principal, "to sell, upon such terms as to him shall seem meet," any lands which the principal then owned, either in law or equity, and obtained by her as "an additional homestead" under the provisions of U. S. Rev. Stat. § 2306; to sell any such lands as she might thereafter acquire under said acts; to receive the purchase money or other consideration therefor, and to deliver in the name of the principal such deeds or other assurance in the law therefor as to the agent seemed meet and necessary. It contained these additional clauses: "And my said attorney is hereby authorized to sell said lands, or my interest therein, and to make any contract in relation thereto which I might make if present, and to receive for his own use and benefit any moneys or other property the proceeds of the sale of said lands, or any interest

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

*That patents for land may be set aside for fraud*, see note to Miller v. Kerr, 5: 381.

*As to errors in surveys and descriptions in patents for lands, how construed*, see note to Watts v. Lindsey, 5: 423.



Digitized by Google

therein, or arising from any contract in relation thereto, or received or recovered for any injury thereto, and I hereby release to my said attorney all claim to any of the proceeds of any such sale, lease, contract, or damages. And I further authorize my said attorney to appoint a substitute or substitutes to perform any of the foregoing powers, hereby ratifying and confirming all that my said attorney or his substitute may lawfully do or cause to be done by virtue of these presents."

The admission of this power of attorney in evidence was objected to by the plaintiff upon the ground, among others, that it tended to prove a transaction in fraud of and in contravention of the laws of the United States, and that upon its face it was contrary to law, against public policy, fraudulent, and void. This objection was overruled and the plaintiff excepted.

The defendants next read in evidence: (1) Two warranty deeds, each for an undivided one half of these lands, from Mary A. Robertson, by James A. Boggs, her attorney in fact, [334]*one to the defendant Louis Rouchleau and the other to the defendant Milo J. Luther, each dated April 7, 1887, and rcorded April 15, 1887. (2) A warranty deed executed subsequently to the above deeds, by Louis Rouchleau to the defendant Luther, for an undivided one fourth of the lands.

The court adjudged that the title was in the defendants, freed from any claim of the plaintiff.

The question before us is whether the instrument of writing given to Boggs by Mary A. Robertson, under date of April 28, 1880, and which authorized the former to sell upon such terms as he deemed meet, and to convey the title to, and to receive for his own use and benefit the proceeds of the sale of, any lands obtained by the latter as an "additional homestead" under U. S. Rev. Stat. § 2306, was consistent with the acts of Congress relating to such matters. This is a question merely of statutory construction, and is within a very narrow compass.

By the act of May 8, 1862 (12 Stat. at L. 392, chap. 1862), certain persons were given the right, under specified conditions, to enter one quarter-section or a less quantity of unappropriated public lands. The sections of that act, so far as they bear upon the present case, were preserved in U. S. Rev. Stat. §§ 2289-2291, which are as follows:

"Sec. 2289. Every person who is the head of a family or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which such person may have filed a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption at $1.25 per acre; or 80 acres or less of such unappropriated lands, at $2.50 per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have been surveyed. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land *so already [335 owned and occupied, exceed in the aggregate 160 acres.

"Sec. 2290. The person applying for the benefit of the preceding section shall, upon application to the register of the land office in which he is about to make such entry, make affidavit before the register or receiver that he is the head of a family, or is twenty-one years or more of age, or has performed service in the army or navy of the United States, and that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and upon filing such affidavit with the register or receiver on payment of $5 when the entry is of not more than 80 acres, and on payment of $10 when the entry is for more than 80 acres, he shall thereupon be permitted to enter the amount of land specified.

"Sec. 2291. No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within the two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee in case of her death,—proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land had been alienated, except as provided in § 2268, and that he, she, or they will bear true allegiance to the government of the United States: then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law. That the proof of residence, occupation, or cultivation, the affidavit of nonalienation, and the oath of allegiance required to be made by U. S. Rev. Stat. § 2291, may be made before the judge, or, in his absence, before the clerk, of any court of record of the county and *state, or district and [336 territory, in which the lands are situated; and if said lands are situated in any unorganized county, such proof may be made in a similar manner in any adjacent county in said state or territory; and the proof, affidavit, and oath, when so made and duly subscribed, shall have the same force and effect if made before the register or receiver of the proper land district; and the same shall be transmitted by such judge, or the clerk of his court, to the register and receiver, with the fee and charges allowed by law to him; and the register and receiver shall be entitled to the same fees for examining and approving said testimony as are now allowed by law for taking the same. That if any witness making such proof, or the said applicant making such affidavit or oath, swears falsely as to any material matter contained in said proof, affidavits, or oaths, the said false swearing being wilful and corrupt, he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register."

On the 4th day of April, 1872, Congress



Digitized by Google

passed an act entitled "An Act to Enable Honorably Discharged Soldiers and Sailors, Their Widows and Orphan Children, to Acquire Homesteads on the Public Lands of the United States." 17 Stat. at L. 49, chap. 85. The 2d section of that act declared that any person entitled under the provisions of the 1st section "to enter a homestead, who may have heretofore entered under the homestead laws a quantity of land less than 160 acres, shall be permitted to enter under the provisions of this act so much land as, when added to the quantity previously entered, shall not exceed 160 acres." This section, it will be observed, did not require that the additional land allowed to be entered should adjoin or be contiguous to the land originally entered.

But by the act of June 8, 1872 (17 Stat. at L. 333, chap. 338), the act of April 4, 1872, was amended, no substantial change, however, being made in the 1st section of the last-named act. In place of the 2d section of the act of April 4, 1872, the following section was substituted: "That any person entitled, under the provisions of the foregoing section, to enter a [337] *homestead who may have heretofore entered, under the homestead laws, a quantity of land less than 160 acres, shall be permitted to enter, under the provisions of this act, so much land contiguous to the tract embraced in the first entry as, when added to the quantity previously entered, shall not exceed 160 acres." The words "contiguous to the tract embraced in the first entry" clearly indicate that the person who drew the section had in mind to cut off the right to enter additional lands that were not contiguous to those originally entered under the homestead laws.

But the policy indicated by the 2d section of the act of June 8, 1872, was soon reversed. For, by the act of March 3, 1873 (17 Stat. at L. 605, chap. 274), § 2 of the act of June 8, 1872, was amended so as to read as follows: "That any person entitled under the provisions of the foregoing sections to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than 160 acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed 160 acres." This act, it will be observed, omitted the words "under the provisions of this act" and the words "contiguous to the tract embraced in the first entry," that were in the previous act. The effect and, as is manifest, the object of the last act, was to eliminate from the legislation of Congress allowing additional lands to those who had entered less than 160 acres under the homestead laws, the requirement that the additional lands should be contiguous to those originally entered.

This view is not at all affected by the revision, for the sections under which the lands in question were entered make no substantial change in the previous law. Those sections are as follows:

"Sec. 2304. Every private soldier and officer who has served in the Army of the United States during the recent rebellion, for ninety days, and who was honorably discharged, and has remained loyal to the government, including the troops mustered into the service of the United States by virtue of the 8d section of an act approved February *13, 1862, and [338 every seaman, marine, and officer who has served in the Navy of the United States or in the Marine Corps during the rebellion, for ninety days, and who was honorably discharged and has remained loyal to the government, shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding 160 acres, or one quarter-section, to be taken in compact form, according to legal subdivisions, including the alternate reserved sections of public lands along the line of any railroad or other public work, not otherwise reserved or appropriated, and other lands subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead, and filing his declaratory statement, within which to make his entry and commence his settlement and improvement.

"Sec. 2305. The time which the homestead settler has served in the Army, Navy, or Marine Corps shall be deducted from the time heretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title without reference to the length of time he may have served; but no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements.

"Sec. 2306. Every person entitled under the provisions of § 2304 to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than 160 acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed 160 acres."

As the lands in controversy are not contiguous to those originally entered, there would be some ground to contend that the entry made by Mrs. Robertson in 1887 was invalid, but for the omission *ex industria* from the statute of the *requirement, first introduced [339 by the act of June 8, 1872, that the additional lands entered should be contiguous to those entered under the act of 1862, or under the 1st section of the act of June 8, 1872.

If, then, Congress did not burden the right to additional lands with the condition that they should be contiguous to those originally entered, it would seem necessarily to follow that the grant of additional lands was without restrictions, and, consequently, there was no purpose to interfere with the disposition by the homesteader of such additional lands, or of his interest in them, in any mode he deemed proper or that might be adopted in respect of other property owned by him. Any other construction of § 2306 would, we apprehend, defeat the purpose that Congress had in view when it gave additional lands to those who had made entries under the homestead laws of less than 160 acres. We cannot see that any sound policy could have been subserved by restricting the bounty of Congress to those who are able to find additional lands contiguous to



Digitized by Google

those previously entered by them; and we entirely concur in the views expressed by the supreme court of Minnesota. Speaking by Chief Justice Gilfillan, in the present case, it said:

"There being nothing in the terms of the section requiring the things specified in the act of 1862, to wit, the making of proofs, affidavits, etc., is there anything in the policy of the government in respect to the subject-matters of the various acts referred to which raises the presumption that Congress intended any of the requirements of the act of 1862 to apply to the 'additional right?' or intended the feature of inalienability impressed on the homestead entered under the act of 1862, or the 1st section of the act of 1873, should attach to the 'additional right?' The purpose of Congress in giving the right to enter and acquire a homestead under the act of 1862 and the 1st section of the act of 1872, was not merely to confer a benefaction on the citizen, or discharged soldier or sailor. There was also the purpose to secure, so far as possible, a bona fide settler on the public lands, to promote the peopling and [340 cultivation of those lands. *It was to prevent the evasion of this result that the person applying to enter a homestead is required to make affidavit that the application is made for his or her exclusive use and benefit, for the purpose of actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person, and on applying for the patent to make proof of residence on, and cultivation of, the land for five years, and an affidavit that no part of the land has been alienated; and it is provided that the land shall not be taken for debts, and that upon any change of residence or abandonment of the land for more than six months the land shall revert. The end in view was the peopling of vacant public lands with settlers owning and cultivating their own homes. To secure settlers or require residence or cultivation was no part of the end in view in giving the additional right under the section as amended in 1873. No residence on or cultivation of the land as a condition of securing the additional right was intended. It was a mere gratuity. There was no other purpose but to give it as a sort of compensation for the person's failure to get the full quota of 160 acres by his first homestead entry. There is no reason to suppose it was intended to hamper the gift with conditions that would lessen its value, nor that it was intended to be made in any but the most advantageous form to the donee. After the right was conferred it was immaterial to the government whether the original donee should continue to hold it, or should transfer it to another. Or, rather, as policy requires the peopling of the vacant public lands, and as it could not be expected or desired that the homesteader should abandon his first entry to settle upon the additional land, it would be more for the interest of the government that he should be able to assign his additional right, so that it might come to be held by someone who would settle upon the lands." 50 Minn. 77, 83.

Subsequently, the same questions were carefully examined in the circuit court of appeals for the eighth circuit in *Barnes* v. *Poirier*, 27 U. S. App. 500. In that case it was held that the right given by U. S. Rev. Stat. § 2306, to a *soldier who had theretofore entered, un- [341 der the homestead laws, less than 160 acres to enter enough more to make up that quantity, was assignable before entry, there being no restriction as in the homestead act. The judgment in the circuit court for the district of Minnesota, delivered by Judge Nelson (*Poirier* v. *Barnes*, 57 Fed. Rep. 956) was affirmed. Judge Sanborn, speaking for the circuit court of appeals, well said: "The beneficiary was left free to select this additional land from any portion of the vast public domain described in the act, and free to apply it to any beneficial use that he chose. It was an unfettered gift in the nature of compensation for past services. It vested a property right in the donee. The presumption is that Congress intended to make this right as valuable as possible. Its real value was measured by the price that could be obtained by its sale. The prohibition of its sale or disposition would have made it nearly, if not quite, valueless to a beneficiary who had already established his home on the public domain. Any restriction upon its alienation must decrease its value. We are unable to find anything in the acts of Congress or in the dictates of an enlightened public policy that requires the imposition of any such restraint. On the other hand, the general rule of law which discourages all restraints upon alienation, the marked contrast between the purpose and the provisions of the grant of the right of the original homestead and the purposes and provisions of the grant of the right to the additional land, and the history of the legislation which is codified in the existing homestead law, leave us without doubt that the assignment before entry of the right to this additional land granted by U. S. Rev. Stat. § 2306, contravenes no public policy of the nation, violates no statute, and is valid as against the assignor, his heirs and assigns." To the same effect were the following cases: *Knight* v. *Leary*, 54 Wis. 459; *Mullen* v. *Wine*, 26 Fed. Rep. 206; *Rose* v. *Nevada & G. V. Wood & Lumber Co.* 78 Cal. 385; *Montgomery* v. *Pacific Coast Land Bureau*, 94 Cal. 284.

Much stress is placed by the plaintiff in error upon the *practice of the land depart- [342 ment during a certain period, based upon the idea that the right of entry given by the statute of additional lands was entirely personal, and not assignable or transferable. We cannot give to this practice in the land office the effect claimed for it by the plaintiff in error. The practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the executive departments of the government, is always entitled to the highest respect and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. *Bates Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 34 [39: 601, 610]; *United States* v. *Healey*, 160 U. S. 136, 141 [40: 369, 371]. But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute. In the present case it is our duty to adjudge that the right given by the statute in question to enter "additional" lands was assignable and tranferable; consequently the instrument of writing given by Mary J. Robert-



Digitized by Google

son to Boggs was not forbidden by any act of Congress.

*It results that the judgment below must be and is affirmed.*

---

SAMUEL G. HILBORN, *Appt.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 342-346.)

*Fees of district attorney.*

Fees earned by a district attorney by service without special employment in defending habeas corpus cases brought to release Chinese emigrants detained by order of the collector of the port are part of the emoluments of his office for which he must account to the government under U. S. Rev. Stat. § 833.

[No. 267.]

*Submitted May 1, 1896. Decided May 18, 1896.*

APPEAL from a judgment of the Court of Claims in favor of Samuel G. Hilborn, district attorney, against the United States, for $594.60, fees of said district attorney, and dismissing a counterclaim of the defendant. The appellant claimed that the judgment of the court in his favor should have been for a large sum. *Judgment affirmed.*

Statement by Mr. Justice **Brown**:

343] *This was a petition by the district attorney for the district of California for certain fees for services rendered by direction of the Attorney General, in connection with various habeas corpus cases of Chinamen desiring to enter this country; the total amount of disallowances in this connection being in the vicinity of $7,000. Defendants filed a counterclaim for moneys claimed to be erroneously and illegally allowed and paid by the accounting officers of the Treasury Department in the sum of $930, in excess of the fees and compensation prescribed by law.

In this connection the court of claims made a finding of facts to the effect that the claimant appeared and resisted certain proceedings in cases prosecuted in the proper court of the United States, wherein writs of habeas corpus had been issued on behalf of subjects of the Emperor of China, to masters of certain vessels arriving at the port of San Francisco, by whom persons were detained by order of the collector of said port, acting under color of the authority of the act of Congress of May 6, 1882 (22 Stat. at L. 58), and of July 5, 1884 (23 Stat. at L. 115). Judgment was rendered without a jury in each case. For these services, the judge, upon approving claimant's accounts, under the act of February 23, 1875, taxed and allowed him an assimilated fee of $10 in each case, certified it to be a just and reasonable compensation, and that it had been assimilated to such fee as is prescribed by U. S. Rev. Stat. § 824, for similar services in cases in which the United States are a party, and where judgment is rendered without a jury.

The case involved several other points, not questioned upon this appeal, and resulted in a judgment in favor of the petitioner for $594.60 and a dismissal of the counterclaim. From this judgment petitioner appealed, assigning as error that the court of claims erred in holding that the assimilated fees, earned by him in resisting the habeas corpus proceedings, were to be included in his emolument return or counted in making up his maximum compensation, and that the judgment of the court should have been for the sum of $8,230.

*Messrs.* **Charles King** and **William B. King** for appellant.

*Mr.* **J. E. Dodge**, Assistant Attorney General, for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

The only question presented by this appeal is whether the assimilated fee of $10 allowed by the court to the district attorney for his services in defending a large number of habeas corpus cases, brought to release from the custody of masters of vessels certain Chinese emigrants, whom the collector of the port had ordered detained, should be accounted for by him in the returns made by him to the government, of the fees and emoluments of his office. No showing was made of any special employment of the district attorney in these cases, either by the court or by the Attorney General, or any other officer; and apparently his appearance for the United States, and his defense of these proceedings, were construed as a proper part of his duties as district attorney, and were voluntary. The question is whether these services were so far a part of the official duties of the district attorney as to require him to make return to the government of the fees earned therefor as emoluments of his office, within the meaning of U. S. Rev. Stat. § 833, which directs the district attorney to make a return on the 1st days of January and July of each year of all fees and emoluments of his office and of all the necessary expenses. By § 834 "the preceding section shall not apply to fees and compensation allowed to district attorneys by § 825" (a percentage upon moneys collected in suits under the revenue laws) "and § 827" (compensation certified by the court and approved by the Secretary of the Treasury in actions against officers of the revenue). "All other fees, charges, and emoluments to which a district attorney or a marshal may be entitled, by reason of the discharge of the duties of his office, as now or hereafter prescribed by law, or in any case in which the United States will be bound by the judgment rendered therein, whether prescribed by statute or allowed by a court, or any judge thereof, shall be included in the *semiannual return required of [345 said officers by the preceding section."

In determining whether the fees in these cases were earned by reason of the discharge of the duties of his office, we are referred to § 771, in which it is enacted that "it shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United

NOTE.—*As to extra pay or compensation to officers,* see note to United States v. Macdaniel, 8: 587.



Digitized by Google

States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits and proceedings pending in his district against collectors or other officers of the revenue for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the treasury."

It is argued by the petitioner in this connection that these fees were earned, not in the prosecution, but in the defense, of civil actions in which the United States were concerned, and as, at the time when this statute was originally enacted, the United States could not be sued in the circuit or district courts, it was never contemplated that the district attorney would be called upon to defend the United States, except, of course, in suits against officers of the revenue; and hence that the law only imposed on him the duty of prosecuting suits in which the United States were concerned as a party plaintiff. This precise question, however, was considered and passed upon by this court in *United States* v. *Smith*, 158 U. S. 346 [39: 1011], in which we held that the fact that the government was interested as defendant in some of the cases in which fees were claimed was immaterial, and that the words "to prosecute all civil actions" were not to be interpreted in any technical sense, but should be construed as covering any case in which district attorneys are employed to prosecute the interests of the government, whether such interests be the subject of attack or defense. We only desire to add in this connection that it would require a strong case to show that services, for which the district attorney is entitled to charge the government a fee, are not also services for the earnings of which he **346]** *should make return to the government in his emolument account. In § 834 there are two express exceptions to this rule, and the implication from these is that no others should be permitted. We do not mean to say that there may not possibly be others, but we think it should appear by a clear inference that they were not intended to be included. The government can only be called upon to pay for services earned by the district attorney in his official capacity, and for the fees earned in the performance of these services he should account to the government in his fee and emolument returns, unless there be some express exception taking them out of the general rule.

*The judgment of the court below is therefore affirmed.*

Mr. Justice **Field** took no part in the consideration of this case.

---

THE STEAMER COQUITLAM, etc., THOMAS EARLE, and UNION STEAMSHIP COMPANY, Claimants, *Appts.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 346-353.)

*Jurisdiction of circuit court of appeals.*

**The district court of Alaska is to be regarded as the supreme court of that territory within the meaning of the act of March 3, 1891, § 15, and of the order of this court assigning Alaska to the ninth circuit; and the decree of the district court of Alaska is subject to review by the circuit court of appeals of that circuit.**

[No. 804.]

*Submitted April 20, 1896. Decided May 18, 1896.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Ninth Circuit as to its jurisdiction to entertain an appeal from a decree of the District Court of Alaska. *Jurisdiction affirmed.*

For case in district court, see 57 Fed. Rep. 706.

The facts are stated in the opinion.

*Messrs.* **H. G. Struve, J. B. Allen, Maurice McMicken, E. C. Hughes, Calderon Carlisle, James Hamilton Lewis,** *J. A. Stratton*, and *L. C. Gilman* for appellants.

*Mr.* **Holmes Conrad,** Solicitor General, for appellee.

*Mr. Justice **Harlan** delivered the **[347** opinion of the court:

This is a suit in admiralty brought by the United States in the district court of Alaska for the forfeiture of the steamer Coquitlam, because of an alleged violation of the revenue laws of the United States.

A decree having been rendered for the United States on the 18th day of December, 1893, an appeal was prosecuted to the circuit court of appeals for the ninth circuit.

By the 6th section of the act of March 3, 1891, chap. 517, the circuit courts of appeals are given jurisdiction to review by appeal or writ of error the "final decision in the district court and the existing circuit courts in all cases" other than those provided for in the 5th section of the act, "unless otherwise provided by law." And by the 15th section of the same act it is declared: "That the circuit court of appeal in cases in which the judgment of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several territories as by this act they may have to review the judgments, orders, and decrees of the district courts and circuit courts; and for that purpose the several territories shall, by orders of the supreme court to be made from time to time, be assigned to particular circuits." 26 Stat. at L. 826, 830. In execution of the duty imposed by that section, this court, by an order promulgated May 11, 1891, assigned the territory of Alaska to the ninth judicial circuit.

The jurisdiction of the circuit court of appeals for the ninth circuit to hear and determine this cause was disputed by the United States upon these grounds: (1) That the district court of Alaska is not a district court within the meaning of the 6th section of the above act of 1891, and was not a district court belonging to that circuit; (2) that the district court of Alaska is not a supreme court of a territory within the meaning of that act and the above order or rule of this court.

The cause is now before us upon a certifi-



Digitized by Google

348] cate from the *circuit court of appeals as to its jurisdiction to entertain an appeal from the decree of the district court of Alaska.

By the act of July 27, 1868, chap. 278, the laws of the United States relating to customs, commerce, and navigation were extended to and over all the mainland, islands, and waters of the territory ceded to the United States by the treaty with Russia of March 30, 1867, so far as the same were applicable thereto. 15 Stat. at L. 240. The provisions of that act were reproduced in U. S. Rev. Stat. §§ 1954-1976, under the title of "Provisions Relating to the Unorganized Territory of Alaska." Section 1957 provides: "Until otherwise provided by law, all violations of this chapter, and of the several laws hereby extended to the territory of Alaska and the waters thereof, committed within the limits of the same, shall be prosecuted in any district court of the United States in California or Oregon, or in the district courts of Washington; and the collector and deputy collectors appointed for Alaska territory, and any person authorized in writing by either of them, or by the Secretary of the Treasury, shall have power to arrest persons and seize vessels and merchandise liable to fines, penalties, or forfeitures under this and the other laws extended over the territory, and to keep and deliver the same to the marshal of some one of such courts; and such courts shall have original jurisdiction, and may take cognizance of all cases arising under this act and the several laws hereby extended over the territory, and shall proceed therein in the same manner and with the like effect as if such cases had arisen within the district or territory where the proceedings are brought."

By the 1st section of the act of May 17, 1884, chap. 53, providing a civil government for Alaska, it was declared that the territory ceded to the United States by the treaty with Russia should constitute a civil and judicial district, to be organized and administered as provided in that act. The same act established "a district court for said district, with the civil and criminal jurisdiction of district courts of the United States and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, 349] and *such other jurisdiction, not inconsistent with this act, as may be established by law; and a district judge shall be appointed for said district, who shall, during his term of office, reside therein and hold at least two terms of said court therein in each year," etc. 23 Stat. at L. 24.

The 5th section provided for the appointment by the President of four commissioners for the district of Alaska, who should have the jurisdiction and powers of commissioners of the United States circuit courts, and exercise all the duties and powers, civil and criminal, then conferred on justices of the peace under the general laws of Oregon, so far as such laws might be applicable in that district, and not inconsistent with the laws of the United States. They were also given jurisdiction, subject to the supervision of the district judge, of testamentary and probate matters, powers to grant writs of habeas corpus, and keep a record of deeds and other instruments of writing relating to the title or transfer of property.

The 7th section declared that the general laws of Oregon then in force should be the law in said district, so far as the same were applicable and not in conflict with the provisions of that act or the laws of the United States, and that the district court so established "shall have exclusive jurisdiction in all cases in equity or those involving a question of title to land or mining rights or the constitutionality of a law, and in all criminal offenses which are capital." From the judgment of a commissioner in civil or criminal cases of a particular kind a right of appeal was given to the district court. Further, that "writs of error in criminal cases shall issue to the said district court from the United States circuit court for the district of Oregon in the cases provided in chapter one hundred and seventy-six of the laws of eighteen hundred and seventy-nine; and the jurisdiction thereby conferred upon circuit courts is hereby given to the circuit court of Oregon. And the final judgments or decrees of said circuit and district court may be reviewed by the Supreme Court of the United States as in other cases." 23 Stat. at L. 24-26. By the act of 1879 referred to, the circuit courts for each judicial district were given jurisdiction "of writs of error in *all criminal cases tried before [350 the district court where the sentence is imprisonment, or where, if a fine only, the fine shall exceed the sum of $300." 20 Stat. at L. 354, chap. 176, § 1.

Referring to these and the other provisions of the above act of 1884, it was held in *McAllister v. United States*, 141 U. S. 174, 179 [35: 693, 695], that "the district court for Alaska was invested with the powers of a district court and a circuit court of the United States, as well as with general jurisdiction to enforce in Alaska the laws of Oregon, so far as they were applicable and were not inconsistent with the act and the Constitution and laws of the United States." See also *Ex parte Cooper*, 143 U. S. 472, 494 [36: 232, 239].

The act of March 3, 1891, chap. 517, created in each circuit a circuit court of appeals. 26 Stat. at L. 826.

The 4th section provides: "That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error or otherwise from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts, shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same;" the 5th section, that "appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court" in certain enumerated cases; the 6th section, "that the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the



Digitized by Google

existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law." The 15th section, we have seen, gives the circuit courts of appeals, in cases in which their judg-
351] ments are final, *the same jurisdiction to review the judgments of the supreme courts of the territories assigned to the respective circuits as they have "to review the judgments, orders, and decrees of the district courts and circuit courts."

The district and circuit courts mentioned in the act of 1891, and whose final judgments may be reviewed by the circuit courts of appeal, manifestly belong to the class of courts for which provision is made in the third article of the Constitution, namely: constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited, and the judges of which are entitled, by the Constitution, to receive at stated times a compensation for their services that cannot be diminished during their continuance in office, are removable from office only by impeachment, and hold, beyond the power of Congress to provide otherwise, during good behavior. *American Ins. Co.* v. *356 Bales of Cotton*, 26 U. S. 1 Pet. 511, 546 [7: 242, 256]; *Benner* v. *Porter*, 50 U. S. 9 How. 235, 242 [13: 119, 122]; *Clinton* v. *Englebrecht*, 80 U. S. 13 Wall. 434, 447 [20: 659, 663]; *Hornbuckle* v. *Toombs*, 85 U. S. 18 Wall. 648, 655 [21: 966, 968]; *Good* v. *Martin*, 95 U. S. 90, 98 [24: 341, 344]; *Reynolds* v. *United States*, 98 U. S. 145, 154 [25: 244, 246]; *The City of Panama* v. *Phelps*, 101 U. S. 453, 465 [25: 1061, 1065]. And it was adjudged in *McAllister* v. *United States*, 141 U. S. 174, 181 [35: 693, 695], that the district court established in Alaska, although invested with the civil and criminal jurisdiction of a district court of the United States, was a legislative court, created "in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States." It was because the Alaska court was of the latter class that we held in *McAllister* v. *United States*, 141 U. S. 174 [35: 693], that the judge of the district court of that territory could be suspended from office by the President under the authority conferred by U. S. Rev. Stat. § 1768.

It necessarily results that the circuit court of appeals for the ninth circuit cannot review the final judgments or decrees of the Alaska court in virtue of its appellate jurisdiction over the district and circuit courts mentioned in the act of March 3, 1891.

352] *But we are of opinion that such appellate jurisdiction may be exercised in virtue of the general authority conferred by the 15th section of the act of 1891 upon the circuit court of appeals to review the judgments of the supreme court of any territory assigned to such circuit by this court. That act was necessarily so interpreted by this court when, by its order of May 11, 1891 (139 U. S. 707), Alaska was assigned to the ninth circuit. Alaska is one of the territories of the United States. It was so designated in that order and has always been so regarded. And the court established by the act of 1884 is the court of last resort within the limits of that territory. It is, therefore, in every substantial sense the supreme court of that territory. No reason can be suggested why a territory of the United States, in which the court of last resort is called a supreme court, should be assigned to some circuit established by Congress that does not apply with full force to the territory of Alaska, in which the court of last resort is designated as the district court of Alaska. The title of the territorial court is not so material as its character. Looking at the whole scope of the act of 1891, we do not doubt that Congress contemplated that the final orders and decrees of the courts of last resort in the organized territories of the United States—by whatever name those courts were designated in legislative enactments—should be reviewed by the proper circuit court of appeals, leaving to this court the assignment of the respective territories among the existing circuits. The only limitation upon the exercise of this power by this court is found in § 13 of the act of 1891, authorizing appeals and writs of error to be taken and prosecuted to the circuit court of appeals of the eighth circuit from the decisions of the United States court in the Indian territory. But this exception rests upon grounds peculiarly applicable to the Indian territory, because of the character of its population, and its relation to the eighth circuit, and does not at all militate against the conclusion that Congress meant by the words "the supreme courts of the several territories," in the 15th section of the act of 1891, the highest courts or the courts of last resort in the territories, *by what-
353] ever name they happen to be designated in the acts creating them.

Our answer, therefore, to the question certified is, that the district court of Alaska is to be regarded as the supreme court of that territory within the meaning of the 15th section of the act of March 3, 1891, and of the order of this court assigning Alaska to the ninth circuit; and consequently that the decree of the district court of Alaska is subject to review by the circuit court of appeals of that circuit.

---

## TEXAS & PACIFIC RAILWAY COMPANY, *Plff. in Err.*, *v.* MAY GENTRY ET AL.

(See S. C. Reporter's ed. 353–366.)

*Jurisdictional amount—final decree—instruction to jury—safety of appliances and contributory negligence—presumption—questions for jury.*

1. A judgment by a Federal circuit court in an action for death under the Texas statutes, although the recovery is by the jury apportioned among different persons, is not separate and distinct in favor of each of them, but is an entirety

NOTE.—*As to jurisdiction of United States Supreme Court dependent on amount; interest added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy,*—see note to Gordon v. Ogden, 7:502.



Digitized by Google

for the purpose of determining the amount in controversy for review by the supreme court.

2. A decree by a circuit court of appeals affirming a decree of a circuit court without specifying the sum for which it is rendered is final for the purposes of a writ of error.

3. Where the evidence authorized a peremptory instruction that the deceased was killed by being run over by a flat car attached to one of defendant's engines, it was not error for the trial court to instruct the jury to that effect.

4. The reasonable safety of a road engine and flat car for switching purposes, and the question of contributory negligence on the part of a railroad employee killed thereby while crossing a track, are questions for the jury.

5. The presumption is that a railroad employee who was killed at night by a flat car in front of an engine when crossing a track did not expose himself recklessly, but did look and listen for coming trains.

6. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury.

[No. 258.]

*Argued April 29, 1896. Decided May 18, 1896.*

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the Northern District of Texas in favor of the plaintiffs, May Gentry *et al.*, against the Texas & Pacific Railway Company, defendant, for damages by reason of the negligence of the defendant resulting in the death of Louis D. Gentry. There was also a motion to dismiss. *Motion to dismiss denied, and judgment affirmed.*

See same case below, 57 Fed. Rep. 422.

The facts are stated in the opinion.

*Messrs.* **John F. Dillon,** *Winslow S. Pierce,* and *David D. Duncan,* for plaintiff in error:

Plaintiffs utterly failed to prove that Gentry was killed by a flat car, coupled in front of a locomotive, as they alleged in their petition, or that his death was due to any negligence of the defendant. The court should have directed a verdict for defendant.

*Wakelin* v. *London & S. W. R. Co.* L. R. 12 App. Cas. 41; *Missouri P. R. Co.* v. *Porter,* 73 Tex. 304.

The only possible way to construct a theory of the case which would entitle plaintiffs to recover is to deduce one presumption from another, and this the law will not permit. Lawson, Presumptive Ev. rule 118, p. 569. Where there is no eyewitness proof of negligence on part of a railroad company, and of care on part of a person killed at a crossing, the facts may be established by circumstances (*Lehigh Valley R. Co.* v. *Hall,* 61 Pa. 361), but the circumstances themselves must be shown by direct evidence, and cannot be inferred from other circumstances. It is not admissible to go into the domain of conjecture and to pile one presumption upon another.

*Philadelphia City Pass. R. Co.* v. *Henrice,* 92 Pa. 431, 37 Am. Rep. 699; *United States* v. *Ross,* 92 U. S. 284 (23: 708); *Douglass* v. *Mitchell,* 35 Pa. 440.

It was the duty of the trial court to instruct the jury to render a verdict for the defendant, as requested by the defendant, and the court erred in submitting the case to the jury.

*Merchants' Nat. Bank* v. *State Nat. Bank,* 77 U. S. 10 Wall. 687 (19: 1015); *Quebec S. S. Co.* v. *Merchant,* 133 U. S. 375 (33: 656); *Pleasants* v. *Fant,* 89 U. S. 22 Wall. 120 (22: 782); *Parks* v. *Ross,* 52 U. S. 11 How. 362 (13: 730); *Schuchardt* v. *Allen,* 68 U. S. 1 Wall. 359 (17: 642); *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478, 482 (27: 1003, 1005); *Marion County Comrs.* v. *Clark,* 94 U. S. 278, 284 (24: 59, 61); *Delaware, L. & W. R. Co.* v. *Converse,* 139 U. S. 469 (35: 213).

The court clearly erred in instructing the jury that there was no dispute as to the cause of Gentry's death, and in allowing testimony to be introduced on the same assumption.

*Second Nat. Bank* v. *Hunt,* 78 U. S. 11 Wall. 391, 394 (20: 190, 191); *Washington & G. R. Co.* v. *Gladmon,* 82 U. S. 15 Wall. 401, 409 (21: 114, 116).

The court erred in refusing to instruct the jury that it was incumbent upon Gentry to "look and listen" for the approach of the switch engine before crossing the railway track.

*Chicago, R. I. & P. R. Co.* v. *Houston,* 95 U. S. 697 (24: 542); *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615 (29: 224); *Aerkfets* v. *Humphreys,* 145 U. S. 418 (36: 758); *Baltimore & O. R. Co.* v. *Griffith,* 159 U. S. 603 (40: 274); *Houston & T. C. R. Co.* v. *Smith,* 52 Tex. 185; *Galveston, H. & S. A. R. Co.* v. *Bracken,* 59 Tex. 71; *Houston & T. C. R. Co.* v. *Richards,* 59 Tex. 373; *Galveston, H. & S. A. R. Co.* v. *Chambers,* 73 Tex. 296; *Missouri P. R. Co.* v. *Porter,* 73 Tex. 304; *International & G. N. R. Co.* v. *Garcia,* 75 Tex. 583; *Sabine & E. T. R. Co.* v. *Dean,* 76 Tex. 73.

The court erred in refusing to instruct, at defendant's request, that an employee is charged with notice of the dangers incident to his occupation, and, in effect, charging the jury that "full knowledge" only by the employee of defective apparatus exonerates the employer from liability for injuries caused by such apparatus.

*Tuttle* v. *Detroit, G. H. & M. R. Co.* 122 U. S. 189 (30: 1114); *Coyne* v. *Union P. R. Co.* 133 U. S. 370 (33: 651); *Washington & G. R. Co.* v. *McDade,* 135 U. S. 554 (34: 235); *Bunt* v. *Sierra Butte Gold Min. Co.* 138 U. S. 483 (34: 1031); *Kohn* v. *McNulta,* 147 U. S. 238 (37: 150); *Galveston, H. & S. A. R. Co.* v. *Drew,* 59 Tex. 10, 46 Am. Rep. 261; *Galveston, H. & S. A. R. Co.* v. *Lempe,* 59 Tex. 19–24; *Texas & P. R. Co.* v. *Bradford,* 66 Tex. 782, 59 Am. Rep. 739; *Gulf, C. & S. F. R. Co.* v. *Donnelly,* 70 Tex. 373; *Missouri P. R. Co.* v. *Somers,* 71 Tex. 700;

---

*As to what is "final decree" or judgment of state or other court from which appeal lies,* see note to Gibbons v. Ogden, 5: 302.

*As to questions of law and fact for court or jury in civil and criminal cases,* see note to King v. Delaware Ins. Co. 3: 155.

*As to freedom of plaintiff from contributory negligence necessary to entitle him to recover,* see note to Stokes v. Saltonstall, 10: 115.

*As to care and precaution necessary in crossing a railroad track,* see note to Continental Improv. Co. v. Stead, 24: 403.



Digitized by Google

*Rogers* v. *Galveston City R. Co.* 76 Tex. 502; *St. Louis, A. & T. R. Co.* v. *Lemmon*, 83 Tex. 143.

*Messrs.* **R. C. Garland,** *A. H. Garland,* and *Chas. I. Evans,* for defendants in error:

Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury.

*Richmond & D. R. Co.* v. *Powers*, 149 U. S. 43 (37: 642).

If different minds might honestly draw different conclusions from them, the case should properly be left to the jury.

*Sioux City & St. P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657 (21: 745); *Pauling* v. *United States*, 8 U. S. 4 Cranch, 219 (2: 601); *Pennsylvania Canal Co.* v. *Bentley*, 66 Pa. 31; *McCully* v. *Clarke*, 40 Pa. 399, 80 Am. Dec. 584; *West Chester & P. R. Co.* v. *McElvee*, 67 Pa. 315; *Pennsylvania R. Co.* v. *Barnett*, 59 Pa. 264, 98 Am. Dec. 346; *Crissey* v. *Hestonville, M. & F. Pass. R. Co.* 75 Pa. 86; *Philadelphia City Pass. R. Co.* v. *Hassard*, 75 Pa. 376.

The duty of the master in furnishing machinery or appliances is measured by the same rule of ordinary care as in other matters.

Whittaker's Smith, Neg. 126; *Wabash R. Co.* v. *McDaniels*, 107 U. S. 454 (27: 605); *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408 (36: 485).

The jury having passed upon these questions, as it undoubtedly was their province to do, this court will not attempt to review their conclusions.

*Hepburn* v. *DuBois*, 37 U. S. 12 Pet. 376 (9: 1123); *Hill* v. *Portland & R. R. Co.* 55 Me. 438, 92 Am. Dec. 601; *International & G. N. R. Co.* v. *Hinzie*, 82 Tex. 625.

The burden of proof was upon the defendant to show the contributory negligence on the part of the deceased that would exonerate it from liability for his death, and it must have been proved by a preponderance of the evidence.

*Hough* v. *Texas & P. R. Co.* 100 U. S. 213 (25: 612); *Northern P. R. Co.* v. *Mares*, 123 U. S. 710 (31: 296); *Eddy* v. *Wallace*, 1 C. C. A. 440, 4 U. S. App. 264; *Davies* v. *Mann*, 10 Mees. & W. 546; *Inland & S. Coasting Co.* v. *Tolson*, 139 U. S. 551 (35: 270); *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 429 (36: 493).

In the absence of proof that the deceased was guilty of contributory negligence, the jury were authorized to infer the absence of any fault on the part of the deceased, from the circumstances; and the dispositions of men to take care of themselves and keep out of difficulty may properly be taken into consideration by them.

*Washington & G. R. Co.* v. *Gladmon*, 82 U. S. 15 Wall. 401 (21: 114).

The jury may also take into consideration the character and habits of the deceased as proved on the trial.

*Northern C. R. Co.* v. *State, Geis*, 31 Md. 357; *Maryland C. R. Co.* v. *Neubeur*, 62 Md. 402; 2 Thomp. Neg. 1179.

The jury may apply the rule as to what, in their judgment, a man of ordinary prudence would have done under the attendant circumstances.

*Missouri P. R. Co.* v. *Lee*, 70 Tex. 501; *Johnson* v. *Hudson River R. Co.* 20 N. Y. 65; *Gay* v. *Winter*, 34 Cal. 153.

The essence of the fault may lie in omission or commission; and the duty is dictated and measured by the exigencies of the occasion.

*Wabash R. Co.* v. *McDaniels*, 107 U. S. 454 (27: 605); *Baltimore & P. R. Co.* v. *Jones*, 95 U. S. 439 (24: 506).

Where the defendant's negligence is established, and no other proximate or efficient cause being shown, such negligence should be held to be the sole proximate cause of the injury.

*Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469 (24: 256); *Hepburn* v. *DuBois*, 37 U. S. 12 Pet. 376 (9: 1123).

As there was no witness to testify that the deceased did not stop, look, and listen before attempting to cross the track, the presumption is that he did so.

*Schum* v. *Pennsylvania R. Co.* 107 Pa. 8, 52 Am. Rep. 468.

Knowledge of the risk or danger to which he is exposed is not to be presumed in proof of contributory negligence, but must be brought home to the employee.

*Smith* v. *Peninsular Car Works*, 60 Mich. 501; *Colbert* v. *Rankin*, 72 Cal. 197; *Gibson* v. *Pacific R. Co.* 46 Mo. 163, 2 Am. Rep. 497; *Wabash R. Co.* v. *McDaniels*, 107 U. S. 454 (27: 605).

He has a right to presume, without inquiry or investigation, that his employer has discharged his duty in furnishing safe and proper instruments and appliances.

*Missouri P. R. Co.* v. *Lehmberg*, 75 Tex. 67.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an action to recover damages alleged to have been sustained by reason of the negligence of the defendant railway company, the present plaintiff in error, resulting in the death of Louis D. Gentry. It was brought in the circuit court of Dallas county, Texas, and was removed into the circuit court of the United States for the northern district of Texas on the petition of the defendant, a corporation created under acts of Congress.

The deceased left surviving him his mother, the plaintiff Mary A. Gentry, seventy-five years old, and dependent upon him for support; his wife, the plaintiff May Gentry, twenty-six years of age; and two children, the plaintiffs Olive Lee Gentry and Thomas M. Gentry, six and two years of age, respectively.

By the statutes of Texas, in force when the alleged injuries were received, it was provided:

"Art. 2899. An action for actual damages on account of injuries causing the death of any person may be brought in the following cases: (1) When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, or hirer of any railroad, steamboat, stage coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence, or carelessness of their servants or agents. (2) When the death of any person is caused by the wrongful act, negligence, unskilfulness, or default of another."



Digitized by Google

"Art. 2900. The wrongful act, negligence, carelessness, unskilfulness, or default mentioned in the preceding article must be of such a character as would, if death had not ensued, 355]*have entitled the party injured to maintain an action for such injury.

"Art. 2901. When the death is caused by the wilful act or omission or gross negligence of the defendant, exemplary as well as actual damages may be recovered.

"Art. 2902. The action may be commenced and prosecuted, although the death shall have been caused under such circumstances as amounts in law to a felony, and without regard to any criminal proceeding that may or may not be had in relation to the homicide.

"Art. 2903. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased.

"Art. 2904. The action may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all.

"Art. 2905. If the parties entitled to the benefit of the action shall fail to commence the same within three calendar months after the death of the deceased, it shall be the duty of the executor or administrator of the deceased to commence and prosecute the action, unless requested by all of the parties entitled thereto not to prosecute the same.

"Art. 2906. The action shall not abate by the death of either party to the record if any person entitled to the benefit of the action survives. If the plaintiff die pending the suit, when there is only one plaintiff, some one or more of the parties entitled to the money recovered may, by order of the court, be made plaintiff, and the suit be prosecuted to judgment in the name of such plaintiff for the benefit of the persons entitled.

"Art. 2907. If the sole plaintiff die pending the suit, and he is the only party entitled to the money recovered, the suit shall abate.

"Art. 2908. If the defendant die pending the suit, his executor or administrator may be made a party, and the suit be prosecuted to 356] judgment as though such *defendant had continued alive. The judgment in such case, if rendered in favor of the plaintiff, shall be paid in due course of administration.

"Art. 2909. The jury may give such damages as they may think proportioned to the injury resulting from such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict." Sayles's Tex. Civ. Stat.

There was a verdict in favor of the plaintiffs as follows:

"We, the jury, find for the plaintiffs ($10,166 66) ten thousand, one hundred and sixty-six dollars and sixty-six cents, apportioned among plaintiffs as follows:

"May Gentry, four thousand, one hundred and sixty-six dollars and sixty-six cents;

"Olive Lee Gentry, two thousand, five hundred dollars;

"Thos. M. Gentry, two thousand, five hundred dollars;

"Mary A. Gentry, one thousand dollars."

Separate judgments were rendered in favor of each plaintiff for the respective sums awarded by the verdict and for costs, for which execution was directed to issue.

A motion for a new trial having been made and overruled, the case was taken to the circuit court of appeals, and by that court the judgment of the circuit court was affirmed with costs to the plaintiffs.

It was alleged in the complaint that there was evidence tending to show (although this evidence was weakened by that introduced on behalf of the railroad company)—

That the deceased was an engineer on the regular passenger train of the defendant running between Big Springs, in Howard county, Texas, and Toyah, in Reeves county, Texas, and was paid for the number of miles actually run by him as such engineer;

That he had brought his train into Big Springs from Toyah about 6 o'clock on the morning of March 13, 1890, and was off duty that day, the schedule time for his going on duty again being 25 minutes past 9 o'clock in the evening of the day when his train would leave Big Springs for Toyah;

*That at 15 minutes after 8 o'clock on [357 that evening the deceased left his residence for the purpose of going to and taking charge of his engine;

That his train was standing at its usual and customary place on a switch on the north side of the defendant's yards at Big Springs, and in order to reach his engine he was compelled to pass over and across several switches and the main track;

That while so passing across and over the defendant's yards, as he and other employees had been in the habit of doing for the previous nine or ten years, along the usual and customary path, and between the hours of 20 minutes after 8 o'clock and 9 o'clock, he was run down and killed by a flat car coupled in front of a locomotive used by the defendant for switching purposes, and while moving westward on the main track of defendant's road in said yards;

That the defendant failed to place any headlight, lantern, or lights of any kind, or any other signal of danger, or any person to watch for employees on said flat car, to give warning of its character, or to sound a whistle or to ring the bell of the locomotive as it approached the crossing where the deceased was struck down;

That the headlight on the locomotive was so arranged that the rays of light from it passed entirely over and beyond the flat car in front of such locomotive;

That the defendant failed to have any lanterns or lights of any kind in or about its yards or along that crossing;

That the engine used by the company for switching purposes on the occasion referred to was an ordinary heavy road engine with a pilot on in front, and was wholly unsuitable and unfit for such purposes, and that in order to make it useful the defendant coupled an ordinary flat car in front of the engine; and

That the deceased, not knowing of such use of an ordinary road engine, with a flat car coupled in front of it, for switching purposes, and while passing along said usual and customary crossing through the defendant's yards,



Digitized by Google

unable to see the flat car on account of the 358]darkness of the night, and being *blinded by the headlight on the engine, and not hearing the whistle or bell of the locomotive, and not knowing anything of the use and danger of the locomotive and flat car as an appliance for switching purposes, was run over by the flat car and immediately killed.

The action proceeded upon the general ground that the railway company failed in its duty to supply and furnish proper and suitable machinery for switching purposes, so guarded by lights and otherwise as to give warning to its employees who, in the discharge of their duties, were compelled to cross the tracks of the defendant's yards.

At the close of the evidence the company made six requests for instructions, one of which was that, as the plaintiffs had failed to prove their case, and had shown no right to recover, the jury should find for the defendant. These requests were all denied, and the defendant excepted to the action of the court in respect of each request.

The court then charged the jury as follows:

"In this case there is no dispute about the following facts: Louis D. Gentry, on the night of the 13th of March, 1890, was run over and killed by a flat car of the defendant, propelled by a switch engine in its yards at Big Springs, Texas: at the time of his death he was an engineer of defendant, thirty-five years old, and earning from $150 to $160 per month; that he left surviving him his wife, May Gentry, twenty-six years old, and two children, Thomas Gentry, now three years old, and Olive Lee, now seven years old, and his mother, Mary A. Gentry, who is a widow and to whose support he contributed $15 to $25 per month; that his mother was about seventy-five years old at the time of Louis D. Gentry's death.

"Louis D. Gentry, deceased, assumed the risk naturally incident to crossing the railroad track of defendant at Big Springs to reach his car or in crossing said track for any other purpose. You are further instructed that defendant, in switching the cars where said Gentry was killed, was not required to furnish absolutely safe machinery to do switching at that place, but only to use reasonably safe machinery to do said switching, and if you find 359] from the evidence that the *road engine and flat car used on the occasion when said Gentry was killed were reasonably safe and were fairly adapted for switching purposes at Big Springs, then you will find for defendant.

"If, however, you find from the evidence that said road engine and flat car used by the defendant in switching when said Gentry was killed were not adapted to switching purposes, and that as appliances for that purpose they were unsafe by reason of the way the light from the headlight struck the flat car and track of the road, or from other defects disclosed by the evidence, and that said Gentry's death was directly occasioned by said defects, without any fault or negligence on his part, then you will find for plaintiffs.

"In considering whether the road engine and flat car used on defendant's road at the time said Gentry was killed were safe or unsafe appliances to be used in switching, your attention is asked to all the evidence *pro* and *con.* on that subject, such as the opinion of the witnesses, the custom of this particular railroad, the effect of attaching flat cars, the effect of the engine light in lighting up the flat car and track, the effect of the pilot.

"A corporation is liable in damages to its employee who is injured by the use of defective machinery or machinery not adapted to the purposes for which it is used. The master, however, is not responsible if the employee had full knowledge of such defect or want of adaptability of the machinery used to the purpose for which it was used, nor is he liable if deceased contributed by his own neglect to his death.

"Louis D. Gentry was a fellow servant of the employees of defendant operating the switching train that killed him. The defendant is therefore not responsible for any negligence that caused his death, but if responsible at all, it must be under the 3d and 5th charges above."

At the request of the plaintiffs the court gave this special instruction: "The law does not exact of an employee the use of diligence in ascertaining defects in the appliances or instruments furnished by a railroad company, but charges him with knowledge of such only as are open to his observation. *Beyond[360 that he has a right to presume without inquiry or investigation that his employer has discharged its duty of furnishing safe and proper instruments and appliances."

The court then instructed the jury, at the request of the defendant, as follows: "You are further instructed that railway companies are not required to furnish the best and latest appliances, but the appliances and machinery used by them in the carrying out of their business must be reasonably safe, and they are only required to exercise ordinary care to select and keep their appliances and machinery in safe condition. By 'ordinary care' is meant such care as a person of ordinary prudence would exercise under like circumstances. You are therefore instructed that if you find and believe from the evidence that the engine and flat car used for switching purposes were reasonably safe, and that the Texas & Pacific Railway Company exercised ordinary care in the selection of the same, and the injury complained of was not the result of a failure on the part of the Texas & Pacific Railway Company to exercise such ordinary care, then you will find for the defendant."

1. The plaintiff Mary A. Gentry, the mother of the deceased, has moved to dismiss the writ of error as to her upon the ground that, her cause of action being separate and distinct from that of her coplaintiffs, and a separate judgment in her favor for only $1,000 having been entered in the circuit court, this court is without jurisdiction under the 6th section of the act of March 3, 1891, chap. 517, which declares that in all cases not by that section made final "there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1,000 besides costs." 26 Stat. at L. 826.

This motion is overruled. While there was in form a separate judgment in favor of each of the persons for whose benefit the action was



Digitized by Google

brought, the statute of Texas creates a single liability on the part of the defendant, and contemplates but one action for the sole and exclusive benefit of the surviving husband, wife, **361]** children, and parents of the *person whose death was caused in any of the specified modes. The final order in the circuit court was, in legal effect, a judgment for the whole amount of the damages found by the jury. Such an action as this can be brought by all the parties interested, or by any one of them for the benefit of all. If the parties entitled to bring suit fail to do so within the time prescribed, it becomes the duty of the personal representative of the deceased to commence and prosecute it. By whomsoever brought the jury may give such damages as they think proportioned to "the injury" resulting from the death. It is one injury for which damages may be recovered, and "the amount" so recovered is to be "divided" among the persons entitled to the benefit of the action, or such of them as shall then be alive, "in such shares" as the jury shall find by their verdict. The jury found that the damages sustained by the deceased were $10,166.66. That was the amount in dispute. The "matter in controversy" was the liability of the defendant company in that amount by reason of the single injury complained of. If the defendant was liable in that sum—and such liability was fixed upon it by the verdict and final judgment thereon—it was of no concern to it how that amount was divided among the parties entitled to sue on account of the single injury alleged to have been committed.

The case is determined by *Shields* v. *Thomas*, 58 U. S. 17 How. 4, 5 [15:94]. In a proceeding in one of the courts of Kentucky a decree was rendered against the defendant for a large sum of money, "shares of the respective complainants being apportioned to them in the decree," and the defendant being directed "to pay to each the specific sum to which he was entitled, as his proportion of the property misappropriated." A suit was brought in Iowa to enforce the decree of the Kentucky court, and the relief asked was a decree that Shields might be compelled to pay to the plaintiffs, respectively, "the several sums decreed in their favor." A decree of that kind was rendered. This court, speaking by *Chief Justice* Taney, said: "The whole amount recovered against Shields, in the proceedings in Iowa, exceeds $2,000. But the sum allotted to each representative who joined in the bill was less. **362]** And *the motion is made to dismiss, upon the ground that the sum due to each complainant is severally and specifically decreed to him, and that the amount thus decreed is the sum in controversy between each representative and the appellant, and not the whole amount for which he has been held liable. And if this view of the matter in controversy be correct, the sum is undoubtedly below the jurisdiction of the court, and the appeal must be dismissed. But the court thinks the matter in controversy in the Kentucky court was the sum due to the representatives of the deceased collectively, and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the state. They all claimed under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial to the appellant how it was to be shared among them. He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him. . . . This being the controversy in Kentucky, the decree of that court, apportioning the sum recovered among the several representatives, does not alter its character when renewed in Iowa. So far as the appellant is concerned, the entire sum found due by the Kentucky court is in dispute. He disputes the validity of that decree, and denies his obligation to pay any part of the money. And if the appellees maintain their bill, he will be made liable to pay the whole amount decreed to them. This is the controversy on his part, and the amount exceeds $2,000. We think the court, therefore, has jurisdiction on the appeal."

In *Ex parte Baltimore & O. R. Co.* 106 U. S. 5, 6 [27:78], after referring to certain cases in which it had been held that when in admiralty distinct causes of action in favor of distinct parties growing out of the same transaction are united in one suit according to the practice of the courts of that jurisdiction, distinct decrees in favor of or against distinct parties cannot be joined to give this court jurisdiction on appeal, it was said: "The cases of *Shields* v. *Thomas*, 58 U.S. 17 How. 3 [15:93]; *Washington Market* *Co. v. *Hoffman*, 101 U. S. 112 **[363** [25:782], and *Sinclair* v. *Cooper* ("*The Connemara*"), 103 U. S. 754 [26: 322], relied on in support of the present application, stand on an entirely different principle. There the controversies were about matters in which the several claimants were interested collectively under a common title. They each had an undivided interest in the claim, and it was perfectly immaterial to their adversaries how the recovery was shared among them. If a dispute arose about the division, it would be between the claimants themselves, and not with those against whom the claim was made. The distinction between the two classes of cases was clearly stated by *Chief Justice* Taney in *Shields* v. *Thomas*, and that case was held to be within the latter class. It may not always be easy to determine the class to which a particular case belongs, but the rule recognizing the existence of the two classes has been long established."

The rule announced in *Shields* v. *Thomas*, *supra*, has been recognized in later cases. *Estes* v. *Gunter*, 121 U. S. 183, 185 [30: 884, 885]; *Gibson* v. *Shufeldt*, 122 U. S. 27, 33 [30 1083, 1085]; *Clay* v. *Field*, 138 U. S. 464, 479 [34: 1044, 1049]; *New Orleans P. R. Co.* v. *Parker*, 143 U. S. 42, 51 [36: 66, 68].

Another ground of the motion to dismiss is that a decree of affirmance without specifying the sum for which it is rendered is not a final decree of judgment from which an appeal or writ of error will lie. This position is not tenable. For the purpose of a writ of error to the circuit court of appeals the judgment of the circuit court was final, because it terminated the litigation between the parties. The judgment of affirmance in the circuit court of appeals involved the same matter in dispute that was determined by the judgment



Digitized by Google

of the circuit court, and was final for the purposes of a writ of error to this court. Upon the affirmance in the circuit court of appeals of the judgment of the circuit court, the latter court would have nothing to do except to execute its own judgment. And so, upon the affirmance by this court of the final judgment of the circuit court of appeals, the matters in controversy between the parties are concluded, and nothing will stand in the way of the execution of the judgment of the circuit court.

**364]** *2. On the part of the defendant it is contended that the plaintiff utterly failed to prove that Gentry was killed by a flat car coupled in front of a locomotive, as they alleged in their petition, or that his death was due to any negligence of the defendant; consequently, that the court should have directed a verdict for the defendant; that the undisputed facts of the case not only did not establish any actionable negligence on the part of the defendant, but, on the contrary, negatived such negligence; and that the court erred in instructing the jury that there was no dispute as to the cause of Gentry's death, and in allowing testimony to be introduced on that assumption.

The court did not err to the prejudice of the defendant, in saying to the jury that there was no dispute that Gentry was run over and killed by a flat car of the defendant propelled by a switch engine in its yards at Big Springs. Although no one saw the deceased at the moment of his being run over, yet, under the evidence, all of which is before us, it was not possible for the jury to have doubted that the deceased was killed in the way stated by the court. If the jury had returned a verdict upon the theory that the evidence did not show that the deceased was killed by being run over by defendant's flat car coupled to one of its engines, it would have been the duty of the court, on motion, to set aside the verdict and grant a new trial. The fact of death in that mode was so clearly established that, if the case had turned alone upon that point, the court would have been authorized to direct a verdict for the plaintiffs. We think the court meant nothing more than that the fact of death being caused in the mode stated by it was placed by the evidence beyond dispute. If more was intended, if the court erroneously assumed that the defendant admitted the fact to be as stated, no error was committed to the substantial prejudice of the defendant; for, as already said, the evidence authorized a peremptory instruction that Gentry was killed by being run over by a flat car attached to one of defendant's engines.

Equally untenable is the proposition that the evidence did not tend to show actionable negli-**365]**gence on the part of the *defendant, and that the jury should have been so instructed. Whether the road engine and flat car used by the defendant on the occasion of Gentry's death were reasonably safe and fairly adapted for switching purposes, or were unsafe by reason of the way in which the light from the headlight on the engine struck the flat car and track of the road; whether, if the appliances used by the defendant for switching were found to be unsafe for such purposes, the deceased had full knowledge that they were not reasonably adapted to the uses to which they were put; whether the deceased, by his own negligence, contributed to his death—these matters were all submitted to the jury. And they were submitted with the direction to consider all the evidence in the case, and under an injunction that the defendant was not responsible for any negligence on the part of the fellow servants of Gentry operating the switching train that killed him, and was only responsible in the event the jury found from all the evidence on the subject—"such as the opinion of the witnesses, the custom of this particular road, the effect of attaching flat cars, the effect of the engine light in lighting up the flat car and track, the effect of the pilot"—that the switching machinery or appliances furnished and used by the company was unsafe to be used. If, looking at all the evidence and drawing such inferences therefrom as were just and reasonable, the court could have said, as matter of law, that the plaintiffs were not entitled to recover, an instruction to find for the defendant would have been proper. *Pleasants* v. *Fant*, 89 U. S. 22 Wall. 116, 121 [22: 780, 783]; *Montclair Twp.* v. *Dana*, 107 U. S. 162 [27: 436]; *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478 [27: 1003]. If the evidence had been so meagre as not, in law, to justify a verdict for the party upon whom the burden of proof rested, the court would have been in the line of duty if it had so instructed the jury. *Sparf* v. *United States*, 156 U. S. 51, 109 [39: 343, 364]. No such course was proper in this case, which was one peculiarly for the jury under appropriate instructions as to the principles of law by which they were to be guided in reaching a conclusion.

3. One of the assignments of error relates to the refusal of the court to give the following special instructions asked by the defend-**[366** ant: "You are instructed that it is the duty of an employee or any other party, about to cross a railroad track, to look and listen for passing engines, cars, or trains, to ascertain whether or not same are approaching before going upon the track, and if the party fails to exercise such care, he cannot recover. You are therefore instructed that if the deceased, L. D. Gentry, by looking or listening, could have known of the approach of the engine and car and in time to have kept off the track and prevented the injury to himself, and that he failed to do so, you will find for defendant."

It is undoubtedly true, as claimed by the defendant, that the deceased was under a duty not to expose himself recklessly when about to cross the track of a railroad. In *Chicago, R. I. & P. R. Co.* v. *Houston*, 95 U. S. 697, 702 [24: 542, 544], this court, after referring to certain acts of negligence upon the part of a railroad company which were alleged to have caused personal injuries, said: "Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger." To the same effect are *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615, 618 [29: 224, 225], and *Aerkfetz* v. *Humphreys*, 145 U. S. 418 [36: 758]. But the present case did not admit of or require an instruction upon this



Digitized by Google

special subject. There was no evidence upon which to rest such an instruction. As already stated, no one personally witnessed the crossing of the track by the deceased, nor the running of the flat car over him. Whether he did or did not stop, and look and listen for approaching trains, the jury could not tell from the evidence. The presumption is that he did; and if the court had given the special instructions asked, it would have been necessary to accompany it with the statement that there was no evidence upon the point, and that the law presumed that the deceased did look and listen for coming trains before crossing the track.

In *Continental Improv. Co.* v. *Stead*, 95 U. S. 161, 164 [24: 403, 405], the court, speaking by 367]Mr. Justice Bradley upon the subject *of the relative rights and duties of a railroad company and the owner of a vehicle crossing its track, said: "Those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care." This principle was approved in *Baltimore & O. R. Co.* v. *Griffith*, 159 U. S. 603, 609 [40: 274, 277]. Manifestly it was not the duty of the court, when there was no evidence as to the deceased having or not having looked and listened for approaching trains before crossing the railroad track, to do more, touching the question of contributory negligence, than it did, namely: instruct the jury generally that the railroad company was not liable if the deceased by his own neglect contributed to his death, and that they could not find for the plaintiffs unless the death of the deceased was directly caused by unsafe switching appliances used by the defendant, and without fault or negligence on his part.

The counsel for the defendant in their elaborate brief say: "Plaintiffs below cannot claim that the headlight of the engine did not illuminate and make plain to anyone the flat car. They may contend that the headlight blinded the deceased. If this be true, he knew that switch engines with flat cars attached in front and behind them were continuously moving in and about the yard, and if the light did blind him he knew then and there the blinding effects thereof, and it was as careless for him to step upon the track just in front of a car as it would have been for a blind man to have so acted. We submit that if he was blinded by the headlight that he was guilty of the grossest negligence, being blinded, in walking upon the track under the existing circumstances. We submit, however, that the evidence shows without contradiction that, by the exercise of ordinary care, he could have seen the flat car. We submit that a blind man who would attempt to cross the track just in front of the engine, the puffing and blowing of which he could hear, hoping to get across the track before the engine could strike him, would be guilty of the 368]grossest negligence. *In this case the deceased was not blind. He could see the engine with its headlight illuminating 15 or 20 feet of the flat car next to the deceased, and lighting up the track for some distance ahead."

It is sufficient to observe that the evidence touching the matters referred to by counsel was not so clear and satisfactory as to justify the taking of the case from the jury upon the issue whether the deceased exercised due care under the circumstances which attended the occasion. It was properly left to the jury to determine whether, under all the circumstances, the effect of the headlight and flat car combined was to make the situation secure and safe to one who saw the headlight, but did not see the flat car in front of the locomotive. "What may be deemed ordinary care in one case," this court has said, "may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court." *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408, 417 [36: 485, 489].

We find no error of law to the prejudice of the plaintiff in error, and *the judgment is affirmed.*

---

## SOUTHERN PACIFIC COMPANY, [369
*Plff. in Err.*,
*v.*
## BERTHA TOMLINSON.

(See S. C. Reporter's ed. 369-376.)

*Damages for death — remittitur — when new trial awarded.*

1. A widow who brings an action against a railroad company for the death of her husband, under Ariz. Rev. Stat. 1887, §§ 2145-2155, for the benefit of herself and of the children and parents of the deceased, cannot compromise or release by remittitur any part of the shares of the recovery awarded by the jury to such children or parents.
2. The defendant in such action has the right to object to a judgment apportioning the damages not as lawfully divided by the jury, but as unlawfully fixed by the plaintiff of record by filing a remittitur reducing to nominal damages the sums awarded by the jury to some of the other persons entitled, thereby leaving the defendant open to the danger of another suit by those persons.
3. Such a remittitur being invalid, the proper order is to remand the case for a new trial, on reversing the judgment rendered for the reduced sum.

[No. 251.]

*Argued April 28, 1896. Decided May 25, 1896.*

IN ERROR to the Supreme Court of the Territory of Arizona to review a judgment of



Digitized by Google

that court affirming the judgment of the District Court of the Second Judicial District of the said Territory in and for the county of Pima, in favor of the plaintiff, Bertha Tomlinson, against the Southern Pacific Company, a railroad corporation, defendant, for damages for the death of her husband in an action brought by her under the Arizona statute for the benefit of herself and the surviving children and parents of the deceased, said judgment being entered on a verdict of a jury and a remittitur of part of the damages awarded by the jury to the several beneficiaries. *Reversed* and case remanded for a new trial.

See same case below, 33 Pac. 710.

Statement by Mr. Justice Gray:

This was an action brought in the district court of the second judicial district of the territory of Arizona in and for the county of Pima, by Bertha, widow of Thomas Tomlinson, against the Southern Pacific Company, a railroad corporation, under Ariz. Rev. Stat. of 1887, tit. 86, entitled "Injuries Resulting in Death."

The complaint alleged that, while Thomas Tomlinson was walking along a public passageway where it crossed the defendant's railroad, the defendant caused one of its locomotive engines and a train of cars to approach the crossing at a great and unusual rate of speed, negligently and carelessly omitting to give any signal of warning by bell, signal, or otherwise, by reason whereof he was unaware of the approach of the train, and, without any fault or negligence on his part, the cars ran against him, and knocked him down, and wounded and lacerated his head and body, so that he immediately died; and further alleged as follows:

"That the said Thomas Tomlinson left surviving him the plaintiff, who is his widow, and the following children, to wit, Alice Tomlinson, Fenton Tomlinson, Howard Tomlinson, and Baby Tomlinson; and the said [370] Thomas Tomlinson left* Fenton Tomlinson, his father, and Mary Tomlinson, his mother, surviving parents.

"That this action is brought by the said plaintiff, Bertha Tomlinson, for the benefit of herself and her said children, Alice, Fenton, and Howard and Baby, and Fenton Tomlinson, Sen., and Mary Tomlinson, his parents.

"That by reason of the death of the said Thomas Tomlinson, caused and occasioned as aforesaid, damages have resulted to the said parents, surviving widow and children of the said Thomas Tomlinson, to the sum of $50,000.

"Wherefore plaintiff prays judgment, in favor of herself and the other parties for whose benefit this suit is prosecuted, for the sum of $50,000, and for costs of suit."

The defendant answered, denying the allegations of the complaint, and alleging that the accident was caused by the negligence of Thomas Tomlinson.

At the trial, the evidence (except that as to negligence on the part of the defendant, and on the part of the plaintiff), was as follows:

Several witnesses testified that Thomas Tomlinson was knocked down by the defendant's engine, and rendered insensible, his skull broken, and one heel cut off; and that he died two hours afterwards.

The plaintiff testified that Thomas Tomlinson was her husband, and was forty-one years old and in good health at the time of his death, and her own age was thirty-three; that there were living, the issue of the marriage, four children, Alice, aged nine years; Fenton, aged seven years; Howard, aged five years; and Baby, seven months; that her husband's father and mother, Fenton and Mary Tomlinson, were also living; that her husband was a merchant, and that the usual expenses of maintaining their household were perhaps $1,000 a year.

The defendant put in evidence Carlisle's Life Tables, according to which the mean duration of human life at the age of forty years is twenty-seven years and seven months; and at fifty years is twenty-one years and one month.

The jury returned the following verdict, signed by their foreman:

*"We, the jury duly impaneled and [371] sworn in the above-entitled action, find for the plaintiff, and assess damages against the defendant in the sum of $50,000, to be divided as follows: Bertha Tomlinson, $8,000; Fenton Tomlinson (father), $5,000; Mary Tomlinson (mother), $5,000; Alice Tomlinson (child), $8,000; Fenton Tomlinson (child), $8,000; Howard Tomlinson (child), $8,000; Baby Tomlinson (child), $8,000."

The defendant moved the court to set aside the verdict and to grant a new trial, because the verdict was against the law and the evidence, and because the damages assessed by the jury were excessive, unsupported by the evidence, and given under the influence of passion and prejudice.

The plaintiff thereupon filed a remittitur in the following terms:

"Comes now Bertha Tomlinson, on behalf of herself and others interested herein, and remits from the verdict heretofore rendered herein in the sum of $50,000, the following sums:

| | | | |
|---|---|---|---|
| "Bertha Tomlinson | $8,000, | remitted to | $6,000 |
| "Alice Tomlinson | 8,000, | " " | 3,000 |
| "Fenton Tomlinson | 8,000, | " " | 3,000 |
| "Howard Tomlinson | 8,000, | " " | 3,000 |
| "Baby Tomlinson | 8,000, | " " | 3,000 |
| "Fenton Tomlinson, father | 5,000, | " " | 1 |
| "Mary Tomlinson, mother | 5,000, | " " | 1 |

"thereby making a total remittance of $31,998, and allowing the verdict to stand at $18,002."

The court allowed the remittitur, denied the motion for a new trial, and gave judgment for the plaintiff against the defendant for the sum of $18,002, apportioned as in the remittitur.

The defendant excepted, among other things, to the overruling of the motion, and appealed to the supreme court of the territory, which affirmed the judgment, and held that the plaintiff had a right to file the remittitur; and dealt with the question of the damages as follows:

"While the record does not affirmatively show that the *trial court made a remission of [372] a portion of the damages awarded a condition precedent to overruling the motion for a new trial, the damages awarded being clearly excessive, we think it quite evident that, had the remittitur not been filed, the court would



Digitized by Google

have granted the motion. A trial court has the power, where excessive damages have been allowed by the jury, and where the motion to set aside the verdict is based upon this ground, to make a remission a condition precedent to overruling the motion. The exercise of this power rests in the sound discretion of the trial court. This doctrine is affirmed in the case of *Arkansas Valley Land & C. Co.* v. *Mann*, 130 U. S. 74 [32:856]; also in *Northern P. R. Co.* v. *Herbert*, 116 U. S. 642 [29:755]. Of course, if it is apparent to the trial court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside. In passing upon this question, the court should look, not alone to the amount of the damages awarded, but to the whole case, to determine the existence of passion or prejudice, and to determine how far such passion or prejudice may have operated in influencing the finding of any verdict against the defendant. When the circumstances, as they may appear to the trial court, indicate that the jury deliberately disregarded the instructions of the court, or the facts of the case, a remittitur should not be allowed, but a new trial should be granted. If they do not so indicate, and the plaintiff voluntarily remits so much of the damages as may appear to be excessive, the court, in its discretion, may allow the remission, and enter judgment accordingly. *Arkansas Valley Land & C. Co.* v. *Mann*, cited above. From a review of the whole case, we cannot say that the jury, in finding for the plaintiff, in this action, in a sum largely in excess of the damages proved, deliberately disregarded the facts or the instructions of the court. We rather incline to the view that the jury, having found the issues in favor of plaintiff, was then prompted, through sympathy for the widow and children, and out of the enlarged liberality of which juries in such cases are usually possessed, to award damages largely in excess of what the proofs warranted." 33 Pac. 710. The defendant sued out this writ of error.

*Mr.* **J. Hubley Ashton** for plaintiff in error.

*Mr.* **R. C. Garland** for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This action is brought under provisions of a statute of the territory of Arizona, copied from a statute of Texas upon the same subject. Ariz. Rev Stat. of 1887, tit. 36, §§ 2145-2155; Tex. Rev. Stat. of 1879, §§ 2899-2909.

By this statute an action on account of injuries causing the death of any person may be brought against a railroad company, or other carrier of goods or passengers, for actual damages, when the death is caused by its negligence, or by the unfitness or gross negligence of its servants or agents; and for exemplary damages also, when the death is caused by the wilful act or omission or gross negligence of the defendant. Ariz. Rev. Stat. §§ 2145-2147.

The statute provides that "the action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the person whose death shall have been so caused;" and "may be brought by all the parties entitled thereto, or by one or more of them for the benefit of all;" and that, if they fail to bring it within six months after the death, "it shall be the duty of the executor or administrator of the deceased to commence and prosecute the action, unless requested by all of the parties entitled thereto not to prosecute the same." §§ 2149-2151.

If the sole plaintiff dies pending the action, and is the only person entitled to the benefit thereof, the action abates. But if any person so entitled survives, the action does not abate by the death of the plaintiff, but any one or more of the persons so entitled may be made plaintiff, "and the suit be prosecuted to judgment in the name of such plaintiff, for the benefit of the persons entitled." §§ 2153, 2154.

The statute further provides that "the jury may give such damages as they may think proportioned to the injury *resulting from [374 such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict." § 2155.

The obvious intent and effect of these provisions is that the action is to be brought once for all; that it is to be prosecuted for the benefit of all the relatives mentioned, the husband or the wife, the children and the parents, of the deceased; and that any damages recovered are to belong to all those relatives, and to be shared among them in the proportions determined by the verdict of the jury. By the express terms of the statute, the action may be brought by all or any of them, but for the benefit of all; no one or more of them, less than all, can excuse the executor or administrator from bringing and prosecuting the action, if they do not; the action does not abate by the death of the one suing, but may be prosecuted by the survivors, if there are any; and the damages recovered are to be divided among all of them, in such shares as the jury shall fix by their verdict. The authority given for bringing and prosecuting the action, in the name of any one or more of the persons entitled, for the benefit of all, avoids multiplicity of actions, and difficulties arising from nonjoinder of plaintiffs; but it gives the nominal plaintiff or plaintiffs no power to compromise or to release the rights of the other beneficiaries, or to lessen or alter the shares awarded by the jury.

This construction of the statute is in accord with the construction which, before its passage, had been given by the supreme court of Texas to the similar statute of that state. *Houston & T. C. R. Co.* v. *Bradley*, 45 Tex. 171, 176, 179; *March* v. *Walker*, 48 Tex. 372, 376, 377; *Houston & T. C. R. Co.* v. *Moore*, 49 Tex. 31, 45, 46, 30 Am. Rep. 98; *Galveston, H. & S. A. R. Co.* v. *Le Gierse*, 51 Tex. 189, 201; *Houston & T. C. R. Co.* v. *Cowser*, 57 Tex. 293; *East Line & R. R. R. Co.* v. *Culberson*, 68 Tex. 664. See also *St. Louis, I. M. & S. R. Co.* v. *Needham*, 10 U. S. App. 339.

In the present case, the deceased left a widow, four children, and a father and mother. The jury returned a verdict for the plaintiff for $50,000, of which they awarded $8,000 to the widow, *$8,000 to each child, [375



Digitized by Google

and $5,000 to either parent of the deceased. After defendant had moved for a new trial, the widow, in whose name alone the action was brought, filed a remittitur, by which she undertook to reduce her share to $6,000, the share of each child to $3,000, and the shares of the parents to $1 each, and the whole verdict to $18,002.

According to the decisions of the supreme court of Texas, in *Houston & T. C. R. Co.* v. *Bradley* and *Galveston, H. & S. A. R. Co.* v. *Le Gierse*, above cited, the widow could not compromise or release the rights even of her own minor children. She certainly could not release, in whole or in part, the rights of her father-in-law and mother-in-law.

The statute, indeed, as has been seen, creates but a single liability; the matter in controversy, as between the defendant, on the one side, and the plaintiff and the other persons for whose benefit the action is brought, on the other, is the whole amount of the damages found by the jury; and the defendant has no concern in the apportionment of damages among the persons entitled, provided that is done as the statute requires. *Texas & P. R. Co.* v. *Gentry*, 163 U. S. 353 [*ante*, 186].

But the defendant has the right to object to a judgment apportioning the damages, not as lawfully divided by the jury, but as unlawfully fixed by the plaintiff of record, reducing to nominal damages the sums awarded by the jury to some of the persons entitled, and thereby leaving the defendant open to the danger of another suit by those persons to obtain the damages of which the present plaintiff has undertaken to deprive them. *Northern P. R. Co.* v. *Lewis*, 162 U. S. 366, 379 [40: 1002, 1007].

The opinion of the supreme court of the territory of Arizona, which, as required by § 949 of the Revised Statutes of the territory, was in writing and recorded, shows that that court not only "inclined to the view that the jury was prompted, through sympathy for the widow and children, and out of the enlarged liberality of which juries in such cases are usually possessed, to award damages largely in excess of what the proofs warranted;" but that it considered that the damages awarded were clearly excessive and that it was manifest [376] from the record that, but for the remittitur the judge before whom the trial was had would have ordered a new trial.

As this court now holds the remittitur to have been unauthorized and invalid, the proper order, without considering other questions argued at the bar, will be

*Judgment reversed*, and case remanded to the supreme court of the territory, with directions to cause the verdict to be set aside and a new trial had.

BOB TALTON, *Appt.*,
*v.*
WASH. MAYES, High Sheriff of the Cherokee Nation.

(See S. C. Reporter's ed. 376-385).

*Murder by Indian—grand jury—due process of law—repeal of statute of Cherokee Nation.*

1. The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee Nation is not an offense against the United States, but an offense against the local laws of the Cherokee Nation.
2. The provision as to a grand jury, in the 5th Amendment to the Federal Constitution, has no application to criminal procedure in the courts of the Cherokee Nation, whose powers of local self-government were enjoyed before the Constitution was made.
3. The finding of an indictment by a grand jury of less than thirteen does not violate the due process clause of the Constitution.
4. The questions of the repeal of one statute of the Cherokee Nation by another, and as to what is the existing law of that nation as to the constitution of a grand jury, are solely for the courts of that nation to decide, without any right of review in Federal courts by habeas corpus proceedings.

[No. 227.]

*Argued April 16, 17, 1896. Decided May 18, 1896.*

APPEAL from a judgment of the Circuit Court of the United States for the Western District of Arkansas discharging a writ of habeas corpus and remanding the petitioner, Bob Talton, to the custody of the high sheriff of the Cherokee Nation, after conviction of murder in the court of the Cherokee Nation. *Affirmed.*

Statement by Mr. Justice White:

On February 15, 1893, a petition for habeas corpus was filed in the district court of the United States for the western district of Arkansas, setting forth that the plaintiff therein (who is the appellant here) was, on the 31st day of December, 1892, convicted, on a charge [377] of murder, in a special supreme court of the Cherokee Nation, Cooweeskoowee district, and sentenced to be hanged on February 23, 1893, and that petitioner was then held, awaiting the time of execution, in the national jail at Tahlequah, Indian Territory, by Wash. Mayes, high sheriff of the Cherokee Nation. It was further alleged that the petitioner was deprived of his liberty without due process of law; that he was in confinement in contravention to the Constitution and laws of the United States, and also in violation of the Constitution and laws of the Cherokee Nation. These contentions rested upon the averment that the indictment under which he had been tried and convicted was void because returned by a body

NOTE.—*As to Indians and Indian tribes, their status and rights; jurisdiction and control over them;* —see note to Worcester v. Georgia, 8: 483.

*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.



Digitized by Google

consisting of five grand jurors, which was not only an insufficient number to constitute a grand jury under the Constitution and laws of the United States, but also was wholly inadequate to compose such jury under the laws of the Cherokee Nation, which, it was alleged, provided for a grand jury of thirteen, of which number a majority was necessary to find an indictment. The petitioner, moreover, averred that he had not been tried by a fair and impartial jury, and that many gross irregularities and errors to his prejudice had been committed on the trial. The district judge issued the writ, which was duly served upon the high sheriff, who produced the body of the petitioner and made return setting up the conviction and sentence as justifying the detention of the prisoner. Incorporated in the return was a transcript of the proceedings in the Cherokee court had upon the indictment and trial of the petitioner. In the copy of the indictment contained in the original transcript, filed in this court, it was recited that the indictment was found by the grand jury on the 1st day of December, 1892, while the offense therein stated was alleged to have been committed "on or about the 8d day of December, 1892." The evidence contained in the transcript, however, showed that the offense was committed on November 8, 1892, and in a supplement to the transcript, filed in this court, it appears that said date was given in the indictment. No motion or demurrer or other attack upon the sufficiency of the indictment was made upon the
378] trial* in the Cherokee court based upon the ground that the offense was stated in the indictment to have been committed on a date subsequent to the finding of the indictment, nor is there any specification of error of that character contained in the petition for the allowance of the writ of habeas corpus. After hearing, the district judge discharged the writ and remanded the petitioner to the custody of the sheriff, and from this judgment the appeal now under consideration was allowed.

*Messrs.* **Leonidas D. Yarrell,** *Ben. T. Duval,* and *Elijah V. Brookshire* for appellant.
*Messrs.* **R. C. Garland,** *A. H. Garland,* and *Wm. M. Cravens* for appellee.

Mr. Justice **White** delivered the opinion of the court:

Prior to May, 1892, a law enacted by the legislature of the Cherokee Nation made it the duty of the judges of the circuit and district courts of the nation, fourteen days before the commencement of the first regular term of said courts, to furnish to the sheriff a list of the names of five persons who should be summoned by the sheriff to act as grand jurors for that district during the year. The first regular term of the courts named commenced on the 2d Monday in May. On November 28, 1892, a law was enacted providing for the summoning and impaneling of a grand jury of thirteen, the names of the persons to compose such jury to be furnished to the sheriff, as under the previous law, fourteen days before the commencement of the regular term of the circuit and district courts. There was no express repeal of the provisions of the prior law. Under the terms of the act of November 28, 1892, a grand jury could not have been impaneled before the term beginning on the 2d Monday of May, 1893. The indictment in question was returned in December, 1892, by a grand jury consisting of five persons, which grand jury had been impaneled under the prior law, to serve during the year 1892.

*The right of the appellant to the re- [379
lief which he seeks must exist, if at all, by virtue of U. S. Rev. Stat. § 753, which is as follows:

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution, or of a law, or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.

Appellant and the person he was charged with having murdered were both Cherokee Indians, and the crime was committed within the Cherokee territory.

To bring himself within the statute, the appellant asserts, 1st, that the grand jury, consisting only of five persons, was not a grand jury within the contemplation of the 5th Amendment to the Constitution, which it is asserted is operative upon the Cherokee Nation in the exercise of its legislative authority as to purely local matters; 2d, that the indictment by a grand jury thus constituted was not due process of law within the intendment of the 14th Amendment; 3d, even if the law of the Cherokee Nation providing for a grand jury of five was valid under the Constitution of the United States such law had been repealed, and was not therefore in existence at the time the indictment was found. A decision as to the merits of these contentions involves a consideration of the relation of the Cherokee Nation to the United States, and of the operation of the constitutional provisions relied on upon the purely local legislation of that nation.

By treaties and statutes of the United States the right of *the Cherokee Nation to exist [380
as an autonomous body, subject always to the paramount authority of the United States, has been recognized. And from this fact there has consequently been conceded to exist in that nation power to make laws defining offenses and providing for the trial and punishment of those who violate them when the offenses are committed by one member of the tribe against another one of its members within the territory of the nation.

Thus, by the 5th article of the treaty of 1835 (7 Stat. at L. 481), it is provided:

"The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of



Digitized by Google

any state or territory. But they shall secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: Provided always that they shall not be inconsistent with the Constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the government of the same."

This guaranty of self-government was reaffirmed in the treaty of 1866 (14 Stat. at L. 803), the 13th article of which reads as follows:

"Art. 13. The Cherokees also agree that a court or courts may be established by the United States in said territory, with such jurisdiction and organized in such manner as may be prescribed by law: *Provided*, That the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or 381]*adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty."

So, also, in "An Act to Provide a Temporary Government for the Territory of Oklahoma, to Enlarge the Jurisdiction of the United States Court in the Indian Territory, and for Other Purposes," approved May 2, 1890 (26 Stat. at L. 81, § 30), it was provided, as follows:

"That the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases the laws of the state of Arkansas extended over and put in force in said Indian territory by this act shall not apply."

And § 31 of the last-mentioned act closes with the following paragraphs:

"The Constitution of the United States and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States except in the District of Columbia, and all laws relating to national banking associations, shall have the same force and effect in the Indian territory as elsewhere in the United States; but nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood, or adoption, are the sole parties, nor so as to interfere with the right and powers of said civilized nations to punish said members for violation of the statutes and laws enacted by their national councils where such laws are not contrary to the treaties and laws of the United States."

The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee Nation is, therefore, clearly not an offense against the United States, but an offense against the local laws of the Cherokee Nation. Necessarily, the statutes of the United States which provide for an indictment by a grand jury, and the number of persons who shall constitute such a body, have *no application, for[382 such statutes relate only, if not otherwise specially provided, to grand juries impaneled for the courts of and under the laws of the United States.

The question therefore is, Does the 5th Amendment of the Constitution apply to the local legislation of the Cherokee Nation so as to require all prosecutions for offenses committed against the laws of that nation to be initiated by a grand jury organized in accordance with the provisions of that amendment? The solution of this question involves an inquiry as to the nature and origin of the power of local government exercised by the Cherokee Nation and recognized to exist in it by the treaties and statutes above referred to. Since the case of *Barron* v. *Baltimore*, 32 U. S. 7 Pet. 243 [8: 672], it has been settled that the 5th Amendment to the Constitution of the United States is a limitation only upon the powers of the general government, that is, that the amendment operates solely on the Constitution itself by qualifying the powers of the national government which the Constitution called into being. To quote the language of Chief Justice Marshall, this amendment is limitative of the "powers granted in the instrument itself and not of distinct governments framed by different persons and for different purposes. If these propositions be correct, the 5th Amendment must be understood as restraining the power of the general government, not applicable to the states." The cases in this court which have sanctioned this view are too well recognized to render it necessary to do more than merely refer to them. *Fox* v. *Ohio*, 46 U. S. 5 How. 424 [12: 219]; *Withers* v. *Buckley*, 61 U. S. 20 How. 84 [15: 816]; *Twitchell* v. *Pennsylvania*, 74 U. S. 7 Wall. 321 [19: 223]; *Edwards* v. *Elliott*, 88 U. S. 21 Wall. 532, 557 [22: 487, 492]; *Pearson* v. *Yewdall*, 95 U. S. 294, 296 [24: 436, 437]; *Davis* v. *Texas*, 139 U. S. 651 [35: 301].

The case in this regard therefore depends upon whether the powers of local government exercised by the Cherokee Nation are Federal powers created by and springing from the Constitution of the United States, and hence controlled by the 5th Amendment to that Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of *Congress. The[383 repeated adjudications of this court have long since answered the former question in the negative. In *Cherokee Nation* v. *Georgia*, 30 U. S. 5 Pet. 1 [8: 25], which involved the right of the Cherokee Nation to maintain an original bill in this court as a foreign state, which was ruled adversely to that right, speaking through Mr. Chief Justice Marshall, this court said (p. 16 [30]):

"Is the Cherokee nation a foreign state in the sense in which that term is used in the Constitution? The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So



Digitized by Google

much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee Nation as a state, and the courts are bound by those acts."

It cannot be doubted, as said in *Worcester* v. *Georgia*, 31 U. S. 6 Pet. 588 [8: 493], that prior to the formation of the Constitution treaties were made with the Cherokee tribes by which their autonomous existence was recognized, and in that case Chief Justice Marshall also said (p. 559 [500]):

"The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights. . . . The very term 'nation,' so generally applied to them, means a 'people distinct from others.' The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the 384]*Indian nations, and consequently admits their rank among those powers who are capable of making treaties."

In reviewing the whole subject in *United States* v. *Kagama*, 118 U. S. 375 [30: 228], this court said (p. 381 [230]):

"With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union, or of the state within whose limits they resided."

True it is that in many adjudications of this court the fact has been fully recognized that although possessed of these attributes of local self-government when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States. *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641 [34: 295], where the cases are fully reviewed. But the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the 5th Amendment, which as we have said, has for its sole object to control the powers conferred by the Constitution on the national government. The fact that the Indian tribes are subject to the dominant authority of Congress, and that their powers of local self-government are also operated upon and restrained by the general provisions of the Constitution of the United States, completely answers the argument of inconvenience which was pressed in the discussion at bar. The claim that the finding of an indictment by a grand jury of less than thirteen violates the due process clause of the 14th Amendment is conclusively answered by *Hurtado* v. *California*, 110 U. S. 516 [28: 232], and *McNully* v. *California*, 149 U. *S. 645 [37: 882]. The ques- [385 tion whether a statute of the Cherokee Nation which was not repugnant to the Constitution of the United States or in conflict with any treaty or law of the United States had been repealed by another statute of that nation, and the determination of what was the existing law of the Cherokee Nation as to the constitution of the grand jury, was solely a matter within the jurisdiction of the courts of that nation, and the decision of such a question in itself necessarily involves no infraction of the Constitution of the United States. Such has been the decision of this court with reference to similar contentions arising upon an indictment and conviction in a state court. *Duncan* v. *McCall*, 139 U. S. 449 [35: 219]. The ruling in that case is equally applicable to the contentions in this particular arising from the record before us.

The counsel for the appellant has very properly abandoned any claim to relief because of alleged errors occurring subsequent to the finding of the indictment. As to the point raised in reference to the date of the commission of the offense as stated in the indictment, the record as corrected shows that the error in question did not exist. It is therefore unnecessary to notice the argument based upon the assumption that the indictment charged the offense to have been committed subsequent to the finding of the true bill.

*The judgment is affirmed.*

Mr. Justice **Harlan** dissents.

---

VICTOR MEYER ET AL., *Plffs. in Err.*,
v.
WALTER T. RICHARDS.

(See S. C. Reporter's ed. 385-415).

*Implied warranty of validity of state bonds—existing obligations—warranty of identity—judgment.*

1. An implied warranty of the validity of state bonds as existing obligations arises on a sale of such bonds having the genuine signatures of state officers and the seal of the state thereon, and appearing on their face to be valid, and which are believed by both parties to the sale to be valid, but which have been stricken with nullity by the Constitution of the state.

NOTE.—*As to implied warranty against latent defects, and that manufactured article is fit for its purpose,* see note to Bulkley v. Honold, 15: 663.



Digitized by Google

2. The implied warranty of the existence of the thing sold on the sale of a credit or incorporeal right created by La. Civ. Code, § 2646, applies on a sale of bonds negotiable in form, and includes a warranty that they are existing obligations.

3. An implied warranty of identity of the thing sold, which arises at common law on the sale of goods and chattels, applies on the sale of commercial paper without indorsement or without express assumption or liability on the paper itself.

4. Entry of the proper judgment below will be directed on reversing a decision in a case heard upon a stipulation waiving a jury, and upon an agreed statement of facts.

[No. 39.]

*Submitted January 8, 1892. Affirmed by Divided Court January 26, 1892. Reargument ordered April 25, 1892. Submitted October 25, 1894. Decided May 25, 1896.*

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana to review a judgment of that court in favor of the defendant, Walter T. Richards, in an action brought by Victor Meyer *et al.*, plaintiffs, to recover the amount that had been paid as purchase price of certain bonds of the state of Louisiana, sold by defendant to plaintiffs. *Reversed*, and cause remanded, with directions to enter judgment for plaintiffs for the amount paid by them for the bonds, with interest.

See same case below, 46 Fed. Rep. 727.

Statement by Mr. Justice **White**:

Plaintiffs below (plaintiffs in error here) commenced their action to recover the sum of $8,383.75, with interest from judicial demand, the facts averred in the petition being substantially as follows: In February, 1889, the defendant sold to plaintiffs thirteen bonds [387] of the state of Louisiana, which *were described in and annexed to the petition; that the price paid for these bonds was the amount sought to be recovered, and the bonds were (we quote from the petition) "sold and delivered to your petitioners as good, valid, and legal bonds of the state of Louisiana. . . . Petitioners aver that the said Richards delivered to them the above-described bonds . . . as good and legal bonds of the state of Louisiana, and represented them to be such; that petitioners received them as such, and paid for them the market price for valid bonds, and held them for several months without any knowledge or suspicion that the bonds were not such as they were represented to be." The petition then avers that after the sale and delivery of the bonds in September, 1889, it was discovered that they were not valid, that they had never been lawfully issued by the state, and were at the time of the sale declared by the Constitution of the state of Louisiana to be null and void, and that the state through its officials treated them as wholly invalid. The prayer was, as already stated, for a judgment for the amount which had been paid as the purchase price of the bonds.

The answer of the defendant denied all the material allegations contained in the petition, except in so far as the same were admitted or confessed. It averred that on the day of the sale, the 27th of February, 1889, the defendant was the owner of the bonds described in the petition; that they were payable to bearer, and were on the face thereof bonds and obligations of the state of Louisiana, and purporting to be issued under valid acts of the legislature, sanctioned by the Constitution of the state of Louisiana; that when sold to the plaintiffs the bonds were not mature according to their terms, and were so drawn that the title thereof passed by delivery. The answer, moreover, averred that the defendant acquired the bonds long prior to the date of the sale to the plaintiffs, "by purchase in open market for a full and valuable consideration in money, before the maturity thereof, in full and exact good faith, and with no knowledge, suspicion, or belief of any defect in the title or obligation of said bonds or any outstanding equity relating thereto, to change, modify, or *destroy the obligation as written and [388] contained in said bonds severally." After admitting the sale as alleged in the petition for the price therein stated, the answer declared "that it is true that at the time of the delivering of said bonds to the plaintiffs as aforesaid this defendant did represent the same to be good and legal obligations and bonds of the state of Louisiana, and believed then and still believes that the same are in all things valid and legal obligations of the state in the hands of all good faith holders thereof, and that it is true, as stated in said petition, that the plaintiffs received said bonds believing the same valid, and paid therefor the full market value thereof in open market of that day." After making the admission "that if the plaintiffs are entitled to recover anything from this defendant, the amount of such is correctly stated in the prayer of petition herein," the answer concluded by the following: "But as to all other matters and obligations set forth and contained in said petition this defendant specially denies and traverses the same, and avers that the said several bonds so by him sold and delivered to the said plaintiffs are, each and all of them, in the hand of said plaintiffs, good, valid, complete, and existing obligations of the state of Louisiana to pay to the said plaintiffs the sum of money named in said bonds at the time and on the terms and conditions written in the bonds, and that there is and has been no breach of warranty of the title thereof by this defendant."

The cause was submitted to the court without the intervention of a jury, the parties having previously entered into a stipulation in writing, commencing with the following recital: "That the following shall be taken as the statement of facts in this cause, and shall stand and be taken as a special verdict in the cause." The facts embraced in the stipulation relate, on the one hand, to the sale and the title held by the defendant (the vendor) to the bonds at the time of the sale and the representations made when the sale took place, and, on the other hand, to the nature and validity of the bonds sold. As to the first of these questions the stipulation declares:

"1. The defendant, prior to the sale of the bonds to the plaintiffs, as averred in the petition, was the bona fide holder *of each (389) and all of the bonds described in said petition,



Digitized by Google

having acquired each and all of said bonds in open public market for full market value, with no notice whatsoever of any alleged vice or alleged illegality of the bonds, and the statements in that respect, as set forth in defendant's answer herein, are true.

"2. The defendant so acquired said bonds long before he or the public knew that it was charged by any person that said bonds were illegally issued, and the impress of the seal of the state and the signatures of the several officers of the state, whose names appeared on said bonds, are each and all of them genuine and true, and in no manner forgeries."

The facts stated in the stipulation, with reference to the authority under which the bonds were issued and their validity, we summarize as follows:

Under two acts of Congress, the one passed in 1837 (4 Stat. at L. 244), the other in 1862 (12 Stat. at L. 503), the state of Louisiana received from the United States public lands to be applied, as directed in the act first mentioned, to the use of such seminary of learning as the legislature of the state might direct, and in the other to the establishment and support of an agricultural and mechanical college. From the sale of the lands thus received by the state, sums of money came under its control. These sums to the credit of the two educational purposes, that is, the seminary and the agricultural and mechanical college, were invested in bonds of the state of Louisiana, which bonds were held in trust by the state as the property of the two funds in question.

In 1874 the state of Louisiana, by act No. 8 of the session of 1874, adopted a general funding plan for all its outstanding bonds and for certain designated warrants. The law in question provided for the issue of new bonds for the said bonds and debts at the rate of sixty cents on the dollar of new bonds for every dollar of fundable debt. The bonds thus provided to be issued were commonly called consolidated bonds, were negotiable in form, and were all without reference to the debt for which they were exchanged, of like tenor, except as to the serial numbers and amount of the bond, and contained on their face [390]*no indication whatever of the particular debt to retire which they were issued. The statement of facts recites "that the holder or purchaser of such consolidated bonds who purchased the same in the market had no means of ascertaining for what prior obligation of the state said bonds had been given in exchange." The execution of the act of 1874 was confided to a board called the funding board or board of liquidation. The funding law was ratified by a constitutional amendment, which hence made that law a part of the Constitution of the state of Louisiana.

The board of liquidation, at the request of the proper state officers, issued consolidated bonds in exchange for the state bonds held by the state as above stated, in trust for the seminary and the agricultural and mechanical college funds. By this exchange, the sum of money received by the state from the proceeds of the land granted by Congress for the two purposes aforesaid was curtailed 40 per cent as the bonds issued to replace those previously held were in amount equal to only 60 per cent of the retired bonds. The consolidated bonds which were thus issued to retire those theretofore held for account of the two trust funds went into the hands of the state treasurer for the benefit of the respective funds, and these bonds bore on their face no indication of the debt for which they were issued; indeed, they were in form like any other of the bonds issued under the act of 1874.

By the terms of an ordinance adopted by a constitutional convention held in the state of Louisiana in 1879 (which ordinance was approved by the same popular vote which ratified the Constitution), it was provided "that the interest on the consolidated bonds of the state be reduced from 7 per centum to 2 per centum per annum for five years, from the 1st of January, 1880, 3 per centum for fifteen years, and 4 per centum per annum thereafter, the ordinance moreover requiring that the bonds should be presented to the state treasurer or an authorized agent of the state in order to have stamped thereon interest reduced in accordance with the ordinance." The holders of the consolidated bonds were, however, given the right, instead of accepting this reduction, of *applying to the state treasurer to obtain [391 new bonds at the rate of seventy-five cents on the dollar.

An act of the legislature of the state of Louisiana, passed to execute this provision of the Constitution, provided for the printing of the new bonds and for their issue, upon request, in exchange for outstanding consolidated bonds at the reduced rate, and further provided for the cancelation of the consolidated bonds when surrendered for exchange by the following provision found in § 8 of the act in question: "That the governor shall furnish to the state treasurer a large stamp, having on it the words: 'Canceled by the issue of new bonds under the ordinance of the Constitution relative to state debt.' And the treasurer shall stamp the same upon each consolidated bond as soon as it is surrendered to him."

In order to make good the loss to the seminary fund which had been produced by issuing consolidated bonds to that fund, La. Const. art. 238, ¶ 2, provided as follows:

"The debt due by the state to the seminary fund is hereby declared to be $136,000, being the proceeds of sale of lands heretofore granted by the United States to the state for the use of a seminary of learning, and said amount shall be placed to the credit of said fund on the books of the auditor and treasurer of the state as a perpetual loan, and the state shall pay an annual interest of 4 per cent on said amount from January 1, 1880, for the use of said seminary of learning; and the consolidated bonds of the state now held for use of said fund shall be null and void after the 1st day of January, 1880, and the general assembly shall never make any provision for their payment, and they shall be destroyed in such manner as the general assembly may direct."

A like provision as to the agricultural and mechanical college fund was made by the 3d paragraph of the same article of the Constitution. After fixing the amount of the fund, and directing the credit of the same on the books of the state, and the payment of an



Digitized by Google

annual interest for the use of the agricultural and mechanical college, the paragraph provides—

"The consolidated bonds of the state now held 392] by the state *for the use of said fund shall be null and void after the 1st day of January, 1880, and that the general assembly shall never make any provision for their payment and they shall be destroyed in such manner as the general assembly may direct."

At the time of the adoption of the Constitution of 1879, the consolidated bonds, which belonged to the seminary and to the agricultural and mechanical college, were held by the state treasurer for account of the funds in question, and they continued to be so held by him certainly up to the end of June, 1882. In a report made to the governor for the year 1878, Antoine Dubuclet, state treasurer of the state of Louisiana, stated that he had in his possession, representing the investment of the agricultural and mechanical college fund, consolidated bonds of the state numbered from 710 to 905 inclusive. On January 1, 1880, E. A. Burke, the state treasurer of Louisiana, in his official report to the governor, made the following statement of the two funds:

| Mechanical and Agricultural College. | |
|---|---|
| 196 bonds of $1,000 each, issued by the state of Louisiana under act No. 8 of 1879, Nos. 710 to 905, inclusive | $196,000 |
| 2 bonds of $500 each, issued by the state of Louisiana under act No. 8 of 1879, Nos. 42 and 43 | 200 |
| | $196,200 |

The same report also stated the following as regards the seminary fund:

| Louisiana State University or Seminary Fund. | |
|---|---|
| 164 bonds of $500 each, issued by the state of Louisiana under act No. 8 of 1879, Nos. 1902 to 2065 inclusive | $82,000 |
| 8 bonds of $500 each, issued by the state of Louisiana under act No. 8 of 1879, Nos. 4184 and 4185 | 200 |
| 1 bond of $1,000, consolidated debt by city of New Orleans, dated July 1, 1852, No. 492 | 1,000 |
| | $83,200 |

393] *To the extent that these official publications afforded means of ascertaining the particular consolidated bonds which had been issued to and were held by the state treasurer for account of the two trust funds in question, they necessarily qualify the previous statement that there was nothing from which the public could ascertain the particular consolidated bonds which had been issued to and were held by these trust funds. The thirteen bonds covered by the sale from which the controversy results were as follows: Six bearing serial numbers between 710 to 905 were consolidated bonds issued to the mechanical and agricultural college fund. Six bearing numbers between 1902 and 2065 were consolidated bonds issued to the seminary fund. One of the bonds was a consolidated bond issued under the funding act of 1874, which had been surrendered to the state treasurer, E. A. Burke, for exchange for a new bond at the rate of seventy-five cents on a dollar and reduced interest. At the time of this surrender the new bond at the reduced rate was issued, and the bond in question was returned into the treasury for cancelation under the provisions of the Constitution of the state. The whole of the thirteen bonds were fraudulently issued by the state treasurer, who put them on the market surreptitiously and without authority. The precise date at which the bonds were acquired by the defendant below (defendant in error here) is not mentioned in the statement of facts. They must have been so acquired, however, after the end of June, 1882, and before the 27th of February, 1889, since the statement of fact discloses that the bonds were held by the state treasurer up to the first-named date, and that they were sold to the plaintiffs on the second-named date. E. A. Burke, the state treasurer, by whom these acts were done, was treasurer from 1878 to 1888. The statement of facts discloses that during his term of office legislative committees examined his books and made a favorable report, and that at the end of his term of office a committee also examined them with like result. The statement establishes that the public were unaware that the treasurer had unlawfully issued the bonds in question, and after their issue until the discovery of that fact the coupons therefrom were *regularly paid by the state, including the[394 coupons falling due on the 1st day of July, 1889, and after that date, in consequence of the discovery of the wrong, the state officers declined further to pay the coupons of said bonds, and the auditor and treasurer of the state, in September, 1889, gave notice to the world that the bonds above described and issued as above stated were null and void and not legal debts of the state. It was further admitted that E. A. Burke, who was treasurer of the state as above mentioned, and who was charged with the custody of the bonds, had been indicted for their conversion to his own use, and that he is now, and has been since 1889, a fugitive from justice, and that the governor has been authorized by the legislature to issue a reward for his apprehension.

There was judgment for defendant (46 Fed. Rep. 727) and the present writ of error was prosecuted.

*Messrs.* **E. H. Farrar, B. F. Jonas,** and **E. B. Kruttschnitt,** for plaintiffs in error:

The criminal act of a state officer in putting these void and worthless instruments on the market, or the laches of other officers in failing to have them canceled, cannot give them vitality.

The state can be bound by the act of one of its officers only when that act is done in pursuance of some law. The state is not liable nor responsible for an unauthorized or illegal act of one of its officers.

*Moffat* v. *United States*, 112 U. S. 24 (28: 623).

The agents' officers cannot bind the corporation when they transcend their lawful and legitimate powers.

*Clark* v. *Des Moines*, 19 Iowa, 209.

The treasurer not only had no warrant in law to put these bonds on the market, but he so put them in express violation of the law which had ordered their cancelation and destruction.

At the very time that the defendant sold these bonds to plaintiffs, they had already been de-



Digitized by Google

cleared by the Constitution, and they were in fact and in law, "null and void."

*Morgan* v. *United States*, 113 U. S. 497 (28: 1051); *Anthony* v. *Jasper County*, 101 U. S. 697, 699 (25: 1008); *Buchanan* v. *Litchfield*, 102 U. S. 278 (26: 138); *Bayley* v. *Tuber*, 5 Mass. 286, 4 Am. Dec. 57; *Merchants' Exch. Nat. Bank* v. *Bergen County Freeholders*, 115 U. S. 384 (29: 430); *State, Durant*, v. *Board of Liquidators*, 29 La. Ann. 77; *Sun Mut. Ins. Co.* v. *Board of Liquidation*, 31 La. Ann. 175.

The illegal act of an officer in recognizing a debt not due by the state does not amount to a ratification by the state. To ratify an act, one must have been able to perform it originally.

*Marsh* v. *Fulton County Supers.* 77 U. S. 10 Wall. 683 (19: 1042); *Citizens' Sav. & L. Asso.* v. *Topeka*, 87 U. S. 20 Wall. 667 (22: 462); *Merrill* v. *Monticello*, 138 U. S. 693, 694 (34: 1077).

The rule that the silence of the principal is a ratification of the illegal act of its agent does not apply to the state.

*Delafield* v. *Illinois*, 2 Hill, 160.

There is no principle in the law of negotiable instruments which relieves the transferrer of such an instrument from the obligation of warranty.

Benj. Sales, 4th Am. ed. 308, 447, 695.

The vendor of forged school bonds is bound under his warranty to return the price paid for them.

*Smith* v. *McNair*, 19 Kan. 330, 27 Am. Rep. 117.

*Mr.* **Henry L. Lazarus**, for defendant in error:

There is no appreciable difference in character between the bonds issued by the government of the United States, and those issued by the state of Louisiana, or those issued by a municipal corporation. They constitute commercial paper, and are in all respects subject to the general rules of law governing negotiable instruments.

*Pierce* v. *United States* ("*The Floyd Acceptances*") 74 U. S. 7 Wall. 675 (19: 173).

Commercial paper is exempt in the hands of innocent holders from inquiry into the circumstances under which it was put in circulation.

These securities are treated as negotiable by the commercial usages of the whole civilized world.

*Mercer County* v. *Hackett*, 68 U. S. 1 Wall. 95 (17: 550); *Cooke* v. *United States*, 91 U. S. 396 (23: 243); *Louisiana* v. *Jumel*, 107 U. S. 740 (27: 458); *Murray* v. *Charleston*, 96 U. S. 445 (24: 763); *United States* v. *State Nat. Bank*, 96 U. S. 30 (24: 647); *Morgan* v. *United States*, 113 U. S. 483 (28: 1047); *Goodwyn* v. *Roberts*, L. R. 1 App. Cas. 476; *Gorgier* v. *Mieville*, 3 Barn. & C. 45; *Bank of United States* v. *Planters' Bank*, 22 U. S. 9 Wheat. 904 (6: 244); *United States* v. *Bank of Metropolis*, 40 U. S. 15 Pet. 377 (10: 774).

The general commercial law controls the disposition of this controversy. Commercial cases are governed by the laws peculiar to commerce.

*Robertson* v. *Nott*, 2 Mart. N. S. 124; *Barry* v. *Louisiana Ins. Co.* 12 Mart. (La.) 497; *Wagner* v. *Kenner*, 2 Rob. (La.) 122; *Harrod* v. *Lafarge*, 12 Mart. (La.) 21; *Talcott* v. *McKibben*, 2 Mart. (La.) 304; *Durnford* v. *Patterson*, 7 Mart. (La.) 460, 12 Am. Dec. 514; *McDonald* v. *Millaudon*, 5 La. 403; *Thompson* v. *Mylne*, 4 La. Ann. 210.

The plaintiff holds the bonds and the subsequent coupons as his vendor held them, freed from all infirmities attending their original issue.

*Cromwell* v. *Sac County*, 96 U. S. 59 (24: 686); *Murray* v. *Lardner*, 69 U. S. 2 Wall. 110 (17: 857).

It has become the general rule of the commercial world to hold bills of exchange as in some sort sacred instruments in favor of bona fide holders for a valuable consideration without notice.

*Goodman* v. *Harvey*, 4 Ad. & El. 870; *Goodman* v. *Simonds*, 61 U. S. 20 How. 343 (15: 934); *Murray* v. *Lardner*, 69 U. S. 2 Wall. 110 (11: 857); *Matthews* v. *Poythress*, 4 Ga. 287; *Cooke* v. *United States*, 91 U. S. 404 (23: 245).

For a period of time, the coupons upon the bonds in controversy, and bearing their serial numbers, were paid regularly to the holders of the bonds. This was a recognition of the state's liability and the validity of the bonds from which the coupons were cut. In the payment of the interest that was made, the auditor and treasurer represented the state.

*Cooke* v. *United States*, *supra*; *Orleans* v. *Platt*, 99 U. S. 682 (25: 405); *Gloucester Bank* v. *Salem Bank*, 17 Mass. 45.

It would be unjust that the state of Louisiana for a number of years, acting through her legislature and her officers, should recognize the validity of the bonds in question by the payment of the interest upon them, and then suddenly, after they were acquired by innocent holders, undertake to dispute their binding force.

*State* v. *Taylor*, 28 La. Ann. 462; *California* v. *Wells, F. & Co.* 15 Cal. 344.

The state of Louisiana is precluded and estopped from ever asserting as against the bonds in controversy their nonvalidity.

The fact that the auditor and treasurer now refuse to pay the coupons could not in itself affect their validity, nor would it justify the plaintiffs in asserting that the bonds were null and void.

The failure to perform that duty, which the law imposes upon the auditor and treasurer, furnishes no ground for the plaintiff to assert the invalidity of the bonds and seek in this proceeding to rescind the contract of sale.

The bonds on their face import a compliance with the law under which they were issued, and the purchaser was not bound to look further.

*Mercer County* v. *Hackett*, 68 U. S. 1 Wall. 93 (17: 549); *District of Columbia* v. *Cornell*, 130 U. S. 655 (32: 1041); *Citizens' Sav. & L. Asso.* v. *Topeka*, 87 U. S. 20 Wall. 655 (22: 455); *Lambert* v. *Heath*, 15 Mees. & W. 487.

There was no guarantee beyond that which the law implies, and there was no stipulation that the state would pay the interest as stipulated and retire the bonds at their maturity.

*Ætna L. Ins. Co.* v. *Middleport*, 124 U. S. 546 (31: 541); *Orleans* v. *Platt*, 99 U. S. 679 (25: 404).

The bonds in controversy are valid outstanding obligations of the state; their negotiability



Digitized by Google

is unaffected, and the delivery of the same to the plaintiffs was a good delivery.

The defendant is not responsible in the action brought, he having by the sale only warranted the genuineness of the signatures of those upon whom the law imposed the duty of signing.

Mr. Justice White delivered the opinion of the court:

396] *A strict construction of the pleadings would create the impression that the sale out of which the controversy arose was made upon an express oral warranty of the validity of the bonds sold. As, however, the case was submitted upon an agreed statement of facts which does not declare this to be a fact, and as both parties, as well as the court below, assumed such not to be the case, we will pretermit this aspect of the subject and consider the case upon the theory that the only warranty, if any, is one to be implied from the nature of the contract.

It is obvious from the facts thus detailed that the thirteen bonds which were sold by the defendant in error to the plaintiffs in error were at the time of the sale absolutely void. The twelve which originally belonged to the two college funds were in express terms declared by the Constitution of the state to be "null and void," and the general assembly was forbidden to make any provision "for their payment," and they were ordered to be "destroyed in such manner as the general assembly may direct." This provision of the Constitution was in existence while the bonds were in the hands of the state, and before they were fraudulently and surreptitiously sold. Indeed, these bonds were never lawfully put into circulation, because, having been originally issued to represent trust funds belonging to the state, they were held by officers of the state for its account. The remaining bond was also void under the Constitution of the state, since it had been, under the express terms of the instrument, surrendered to the state treasurer for cancelation and another bond issued in its stead.

The bonds were undoubtedly sold by the defendant in error as lawful obligations of the state. Both parties to the contract of sale so considered. The pleadings and the statement of facts leave no question on this subject. The controversy here presented is wholly between the vendor and vendee as to the nature and extent of the obligation of warranty resulting from the sale. We are therefore not concerned with whether the defendant at the time of the sale stood in the attitude of a third holder of negotiable paper for value before maturity. Even if he were in such a condition, and at the 397 ]time of the sale *there was a constitutional provision which rendered the bonds void and incapable of enforcement, it is clear that the delivery by the vendor to the vendee of bonds stricken with constitutional nullity was not the delivery of an existing obligation within the meaning of the contract if it imported a warranty of the existence of the bonds which it covered. The admission being that both parties contemplated the delivery of valid obligations, bonds of that character being outstanding, if warranty of existence was implied by law, such purpose was not fulfilled by the delivery of a mere equity, which one of the parties, the seller, claims was existing in his behalf. Valid bonds and not the mere claim by the seller to enforce invalid bonds was the object of the contract. This is especially true in view of the fact just referred to that at the date of the sale the Constitution of the state in express terms forbade the enforcement of twelve of the bonds and practically stipulated to the same effect as to the other.

The sale was a Louisiana contract. We must consequently determine the rights and obligations of the parties by the law of that state. By the civil law, which prevails in Louisiana, warranty, whilst not of the essence, is yet of the nature, of the contract of sale, and is therefore implied in every such contract unless there be an express stipulation to the contrary. *Bayon* v. *Vavasseur*, 10 Mart. (La.) 61; *Strawbridge* v. *Warfield*, 4 La. 23. The following provisions on the subject of warranty are found in the Louisiana Code: "The seller is bound to two principal obligations, that of delivery and that of warranting the thing which he sells." La. Civ. Code, 2475. "Although at the time of the sale no stipulations have been made respecting the warranty, the seller is obliged, of course, to warrant the buyer against the eviction suffered by him from the totality or part of the thing sold and against the charges claimed on such thing which were not declared at the time of the sale." La. Civ. Code, 2501. "Even in case of stipulation of no warranty, the seller in case of eviction is liable to restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of eviction, and purchased at his risk and peril." La. Civ. Code, 2505.

*These articles of the Louisiana Civil [398 Code, which do but formulate the principles of the civil law as to warranty, are not wholly in accord with the doctrines of the common law. The distinction between the two systems may be briefly summed up by saying that the one, the civil-law doctrine, finds its expression in the maxim *caveat venditor*, whilst the rule of the common law is conveyed by the aphorism *caveat emptor*. It is unnecessary to determine the scope, under the Louisiana law, of the obligation of warranty as to property generally, since we are in this case concerned only with its limit when arising from the sale of a credit or other incorporeal right. The Code of that state contains express provisions defining the extent of the obligations arising in such case. "He who sells a credit or an incorporeal right warrants its existence at the time of the transfer, though no warranty be mentioned in the deed." La. Civ. Code, 2646. "The seller does not warrant the solvency of the debtor unless he has agreed so to do." La. Civ. Code, 2647. These provisions, instead of causing the obligation of warranty in a sale of an incorporeal right to be broader than in the case of tangible property, on the contrary make it narrower.

As, then, under the law of Louisiana the seller under the contract of sale was obliged to warrant the existence of the thing sold, the case of the defendant in error involves the practical contention that a bond which at the time of the sale was declared by the Constitution of the state to be nonexisting, is yet for



Digitized by Google

the purposes of the sale to be treated as an existing obligation. This proposition is an obvious contradiction in terms, and of course refutes itself. In *Knight* v. *Lanfear*, 7 Rob. (La.) 172, where a treasury note had been sold without recourse, and it was found that the note had been redeemed and canceled and thereafter had been purloined and reissued, and the word "canceled" erased, the court held that the seller was bound to return the price.

In *Pugh* v. *Moore*, 44 La. Ann. 211, the plaintiff sought to recover the purchase price of five bonds identical in character with the bonds embraced in the sale here in controversy, **399**]four of them being mechanical and *agricultural college bonds unlawfully issued under similar circumstances to those here presented, and one being a consolidated bond unlawfully issued after its surrender in exchange for another bond. The supreme court of Louisiana, after elaborate consideration, held, for one among other reasons, that the seller having been obligated to the warranty of the existence of the bonds at the time of the sale, and the bonds being void under the Constitution, he was obliged to return the price. This implied obligation to warrant the existence of the claim at the time of the sale has also been frequently recognized in a collateral way by the court of last resort of the state of Louisiana. Thus, where the owner of several notes secured by one mortgage has transferred some of the notes, and where, on a sale of the mortgage property to pay the debt, the proceeds have proved inadequate to pay all the notes, the settled doctrine in Louisiana is that in consequence of the obligation of the seller to warrant the existence of the debt, he cannot take a part of the proceeds of the mortgaged premises to pay the notes retained by him and thus frustrate the right of his transferee to take the entire amount of the security to the extent necessary to pay the notes transferred. *Saleman* v. *His Creditors*, 2 Rob. (La.) 241.

The provision of the civil law of Louisiana, imposing upon the seller of a credit or incorporeal right the obligation of warranting the existence of the debt at the time of the sale, is not original in the Code of that state, but was drawn in so many words from the Code Napoleon, art. 1693. It was not new in that Code, and but expressed the settled rule of the Roman and ancient law. L. L. 4. 5, 7, 10, 11, ff. *de Hæredit vel Act. Vendit.*; L. 68, sec. 1; L. 74, ff. *de Evictionib.*; L. 80, ff. *de Pignor et Hyp.*; 13 Merlin, Rep. *Verbo Garantie des Créances.*

Where the provisions of the Louisiana Code and the Code Napoleon are identical the expositions of the civil-law writers and the adjudications of the French courts are persuasive as to the proper construction of the Louisiana Code. *Viterbo* v. *Friedlander*, 120 U. S. 707, 728, [30: 776, 783]; *Groves* v. *Sentell*, 153 U. S. 465, 478 [38: 785, 790].

**400**] *Marcadé, in his Commentary on the Law of Sale, thus states the rule:

"All sales of a credit subject the seller, unless there be a stipulation to the contrary, to a guaranty of the existence and the validity of the credit, as also of his right of ownership to it. Article 1693 speaks, it is true, only of the guaranty of the existence of the credit. But as the credit existing to-day, if subsequently declared to have been void, would in contemplation of law have never existed, and also as it would be equally immaterial for the buyer if the credit had a real existence, if that existence was available only to some one else, it is evident that by an existing credit is to be understood one which validly exists as the property of him who transfers it. The one who transfers, then, is held to guarantee in three cases: 1. If at the time of the sale the credit did not exist, either because it had never existed or because it was extinguished by compensation, by prescription, or otherwise. 2. If the credit should be declared to have been void, or the obligation be rescinded. 3. If it belonged to another person than the transferrer." Marcadé, De La Vente, 335.

Troplong, in his learned treatise on the same subject, thus expounds the doctrine:

"In the sale of a credit, as in that of every other object, legal warranty is always understood. The vendor guarantees to the vendee the existence of the credit at the moment of the transfer, although there should be no expression in the contract to that effect. It is this which caused Ulpian to say: 'When a credit is sold, Celsus writes in the ninth book of the Digest that the seller is not obliged to guarantee that the debtor is solvent but only that he is really a debtor, unless there has been an express agreement between the parties on this subject.' This guaranty is more strictly obligatory in the sale of a credit than in other matters, because the right to a credit is neither visible nor palpable as it is in the case of other movable or immovable property. . . . And here let there be no misunderstanding. Do not confound the credit with the title by which it is established. Both law and reason exact that the credit should exist at the time of *the sale, and it is not sufficient that a title[**401** should have been delivered to the buyer. The title is not the credit. It can materially subsist, whilst the credit is extinguished. Thus, if the credit had been annihilated by compensation or by prescription it would serve no purpose to deliver to the buyer a title which would have nothing but the appearance of life. The buyer in such case would have a right to avail himself of the warranty." 2 Troplong, De La Vente, §§ 931, 932.

And Laurent, the latest and fullest commentator, says:

"Article 1693 says 'that the seller guarantees the existence of the credit. We must understand this word "existence" in the sense given to it by tradition. Whoever, says Loyseau, sells a debt or a rent guarantees that it is due and lawfully constituted, because, without distinction in all contracts of sale, the seller is bound to three things by the very nature of the contract, (1) that the thing exists; (2) that it belongs to him; and (3) that it had not been engaged to another.' Pothier resumes this doctrine by saying 'that the guaranty of a right consists in the undertaking that the right sold is really due to the vendor,' and the Code is yet more brief since it speaks only of the existence of the debt. We must therefore see what the existence of the debt signifies according to the explanation of Loyseau. Firstly, the



Digitized by Google

vendor is held to guarantee that the debt exists and subsists (*'soit et subsiste'*). If the debt has never existed because one of the conditions necessary for the existence of the contract makes default, the vendor has sold nothing; there is no object; he is held by the guaranty; this is obvious. The same rule would apply if the debt had existed, but was extinguished at the time of the transfer, because it is as if it had never existed. Such would be the case of a credit which was prescribed, or which had been extinguished by compensation. . . . It is necessary, in the second place, that the credit should be as constituted, says Loyseau; if it is stricken with a vice which renders it void the vendee has a right to the warranty. This is not doubtful, since the right is really annulled or rescinded, because the judgment **402**] which has *annulled the credit destroys it as if it had never existed." 24 Laurent, Nos. 540, 541, 542.

The views thus expressed by the foregoing writers are substantially concurred in by the French commentators. 9 Duranton, p. 183; 5 Aubrey & Rau, p. 442. The courts of France from an early day have applied the same principle.

In *Prat* c. *Dervieux* the facts were these: Dervieux transferred the amount of a claim against the government, which by a subsequent liquidation of accounts was compensated by a claim held by the government which resulted from another matter. The Court of Cassation held that under article 1693 of Code Napoleon the obligation to guarantee the existence of the claim at the time of the sale compelled the seller to restore the price. Journal du Palais, 1807, p. 311.

In *Revel* c. *Lippman* a transfer was made of a claim against the government, which was stated to be subject to a future settlement of accounts. On the ultimate liquidation it was found that nothing was due, and the Court of Cassation held that the obligation, therefore, arose to return the price paid on the sale. Journal du Palais, 1825, p. 968.

Of course, this warranty of existence, as established by the law of Louisiana and as found in France and other civil-law countries, does not govern a contract of sale when the object contemplated by a sale is a thing whether existing or not existing; in other words, where the parties buy, not an existing obligation, but the chance of there being one. This is illustrated by *Knight* v. *Lanfear*, 7 Rob. (La.) 172, where the court, per Martin, J., said, in speaking of the thing sold: "Whatever may be its value, if it be not in substance what the purchaser believed he was receiving, his error must invalidate the sale, because it prevented his consent, *non videntur qui errant consentire.*"

And, in speaking of a sale of doubtful or nonexisting things, this great judge said: "This claim was a fair object of sale if its nature had been disclosed, but that was concealed and was probably unknown to them, and what was offered for sale was something quite different from this claim."

**403**] *The same distinction has been considered and applied by the courts of France. *Dulac* c. *Clusel et Co.* (Lyons, Nov. 30, 1849), Journal du Palais, 1, 1852, 82.

The defendant in error does not dispute that the foregoing principles exist in and are controlled under the Louisiana law, under the law of France, and also under the civil law generally from which the law of Louisiana is derived. But whilst thus admitting, he denies that the contract of sale, involved in this case, was governed either by the Louisiana Code or the general principles of civil law. This proposition rests on the contention that when the Civil Code of Louisiana was compiled, its framers contemplated the simultaneous enactment of a Commercial Code which was then drafted, and therefore omitted from the former Code the necessary provisions to govern commercial contracts under the hypothesis that the later would also be enacted; that in consequence of the failure to adopt the Commercial Code, the courts of Louisiana have held that cases arising under the law merchant are governed by that law in the absence of an express statutory requirement to the contrary. From this premise the conclusion is drawn that as the contract in question involved the sale of negotiable bonds, the obligations resulting from the sale are commercial in their nature, and are controlled by the law merchant, by which it is asserted the vendor in such a case, when selling in good faith, warrants only that the signatures to the paper sold are not forgeries. In a restricted sense the part of the proposition relating to the operation of the law merchant, in the state of Louisiana, is well founded. *Harrod* v. *Lafarge*, 12 Mart. (La.) 21; *Wagner* v. *Kenner*, 2 Rob. (La.) 122; *Barry* v. *Louisiana Ins. Co.* 12 Mart. (La.) 498; *McDonald* v. *Millaudon*, 5 La. 403. Whilst this is true, the contention is yet erroneous in a two-fold sense: first, in presupposing that a mere contract of sale of commercial paper, without recourse, is governed, as to the obligations between the vendor and vendee, by the law merchant; second, in assuming that in such a sale, either under the principles of the civil law or what the argument presumes to be the law merchant, the only warranty resting *upon the vendor [**404** is that of the genuineness of the signatures to the paper sold.

In *Pugh* v. *Moore*, 44 La. Ann. 211, the supreme court of Louisiana expressly held that the contract of sale there considered (which was similar to the one here involved) was governed and controlled by the provisions of the Civil Code of Louisiana, and like rulings were previously expressed in *Sun Mut. Ins. Co.* v. *Board of Liquidation*, 31 La. Ann. 176, and in *State, Durant*, v. *Board of Liquidation*, 29 La. Ann. 77. A like rule is maintained in the jurisprudence of France, where, in addition to the Code Napoleon or Civil Code, there is a Commercial Code regulating mercantile contracts. This is shown by the decision in a case where the vendor transferred certain notes without recourse, and in consequence of the forgery of some of them was held liable to return the price. 24 Laurent, 535, thus states the case:

"The Court of Cassation has applied the same principle to commercial matters. The case is worthy of citation. Exchange dealers sold a certain number of notes of the Austrian bank of one hundred florins each. These notes having been presented to the bank of



Digitized by Google

Vienna, by the transferees, twenty-six among them were declared to be forged. From this arose an action in warranty, which was defeated in the first instance by the tribunal of the Seine. The claim was recognized on appeal. When the case came before the Court of Cassation it was contended that the Paris court had made an erroneous application of art. 1698, in declaring an exchange dealer a guarantor of the value of false bank notes which he had delivered in good faith, to a particular person by way of sale or transfer. The guarantee, it was said, by those who transferred a forged bank note, is not different in fact from that which is incurred by a merchant, an exchange broker or banker, who has without intention and without knowledge negotiated in good faith commercial effects, such as bills of exchange or notes to order upon which there are false signatures; the guaranty in such cases is regulated by the commercial law. And it results from arts. 140 and 187 of the Commercial Code that he who has not in-
405]dorsed but *who has delivered from hand to hand, as he has received them, commercial paper, is subject to no guaranty, because the absence of his signature indicates that he has no intention of becoming the guarantor of the sale, and that the buyer has dealt on the faith of the apparent title which he has accepted, and as a consequence has a right to no guaranty. But the Court of Cassation rejected this contention, and decided that the guaranty is of the nature of the sale, and that it would be contrary to both law and equity to hold that the delivery of a forged bank bill, although made in good faith, did not give rise to recovery on the part of him who had paid the price."

None of the authorities referred to by counsel for defendant in error sustain the proposition heretofore stated with reference to the supposed existence and applicability of the law merchant, and the results which it is claimed flow therefrom. On the contrary, both in England and in the United States the doctrine is universally recognized that where commercial paper is sold without indorsement or without express assumption of liability on the paper itself, the contract of sale and the obligations which arise from it, as between vendor and vendee, are governed by the common law relating to the sale of goods and chattels. So, also, the undoubted rule is that in such a sale the obligation of the vendor is not restricted to the mere question of forgery *vel non*, but depends upon whether he has delivered that which he has contracted to sell, this rule being designated, in England, as a condition of the principal contract, as to the essence and substance of the thing agreed to be sold, and in this country being generally termed an implied warranty of identity of the thing sold.

Benjamin on Sales, 4th Am. ed. § 600 says: "When the vendor sells an article by a particular description, it is a condition precedent to his right of action" (to recover the price agreed to be paid by the vendee) "that the thing which he offers to deliver, or has delivered, should answer the description;" and in § 607, the author says:

"Under this head may also properly be included the class of cases in which it has been held that the vendor who sells *bills of[406 exchange, notes, shares, certificates, and other securities, is bound, not by the collateral contract of warranty, but by the principal contract itself, to deliver as a condition precedent that which is genuine, not that which is false, counterfeit, or not marketable by the name or denomination used in describing it."

It is upon this general principle of the common law, not upon any peculiar doctrine of commercial law, that the cases in the common-law courts proceed. Thus, in *Jones* v. *Ryde* (1814) 5 Taunt. 488, where an action was brought to recover the damage sustained by a discount of an altered bill, Gibbs, C. J., said (p. 492):

"Both parties were mistaken in the view they had of this navy bill; the one in representing it to be a navy bill of this description; the other in taking it to be such. Upon its afterwards turning out that this bill was to a certain extent a forgery, we think he who took the money ought to refund it to the extent to which the bill is invalid. The ground of the defendant's resistance is, that the bill is not indorsed; and that whensoever instruments are transferred without indorsement, the negotiator professes not to be answerable for their validity. This question was much mooted in *Fenn* v. *Harrison*, 3 T. R. 757, and it is true to a certain extent, *viz.*, that in the case of a bill, note, or other instrument of the like nature, which passes by indorsement, if he who negotiates it does not indorse it, he does not subject himself to that responsibility which the indorsement would bring on him, *viz.*, to an action to be brought against him as an indorser, but his declining to indorse the bill does not rid him of that responsibility which attaches on him for putting off an instrument as of a certain description which turns out not to be such as he represents it. The defendant has in the present case put off this instrument as a navy bill of a certain description; it turns out not to be a navy bill of that amount, and therefore the money must be recovered back."

Chambre, J., said (p. 494):

"I really cannot entertain a doubt on the question; if the defendant's doctrine could prevail it would very materially *impair the[407 credit of these instruments. They are not in practice indorsed (or not beyond the first taker). A man takes this security looking to the persons who are to pay it; he takes it on the presumption that it is a navy bill; it was once a navy bill, but from the moment wherein it was altered it became of no value whatsoever. It is unnecessary to go into the authorities."

In *Wilkinson* v. *Johnson* (1824) 3 Barn. & C. 428, one who had taken up a bill for honor, subsequently discovered that the signatures were forgeries. He was held entitled to recover, upon the general doctrine of the common law relating to contracts.

In *Young* v. *Cole* (1827) 3 Bing. N. C. 724, recovery was sought for the amount of certain Guatemala bonds which had been sold for account of the defendant, and which after the sale were discovered not to be a marketable commodity on the stock exchange, because not stamped, as required by an advertised



Digitized by Google

notice of the government of Guatemala, given prior to the sale, but subsequent to the time when the bonds had been issued and put into circulation. The claim of the plaintiff was adjudged to be well founded, although there was no question of forgery or alteration, upon the common-law principle already stated.

*Lambert* v. *Heath* (1846), 15 Mees. & W. 486, was an action to recover from the defendant the amount paid him for certain Kentish Coast Railway scrip, which, after delivery to the plaintiff, turned out to have been issued without authority. The defendant was a stock broker, and was employed by the plaintiff to purchase the scrip. A verdict having been returned for the plaintiff a new trial was granted, on the ground that as the proof showed that the article purchased was the only article known in the market as Kentish Coast Railway scrip, the question for the jury was not whether the scrip was genuine scrip, but whether it was the identical thing which the plaintiff contracted to buy. This ruling, therefore, accords with the principles of the former cases and illustrates the distinction between an implied condition of the sale as the essence of the thing sold and the ascertainment [408] of whether the *contract of sale in the purview of the parties embraced a particular object, just as it appeared to be whether existing or not, whether valid or invalid. In this respect this case is entirely in harmony with the opinion of Martin, J., heretofore referred to. It, moreover, very pointedly refutes the contention that a particular state of the law of warranty applies to the transaction of a sale and purchase of negotiable paper without recourse, since the scrip in question was non-negotiable.

In *Gomperts* v. *Bartlett* (1853), 2 El. & Bl. 849, an unstamped bill of exchange indorsed in blank, purporting to be a foreign bill, was sold, without recourse, by the holder, who was not a party to the bill. It proved to have been drawn in England, and was, in consequence, invalid for want of a stamp, and could not be enforced against the parties. The vendor and purchaser at the time of sale were both alike ignorant of this defect. It was held that the purchaser was entitled to recover back the price from the vendor, on the ground that the article sold was a foreign bill, although not forged or altered, did not answer the description by which it was sold. Counsel for defendant contended that "as the bill was sold without recourse, nothing turned on the peculiar character of a bill of exchange, and the case was the same as if the sale had been of any other specific chattel, sold without a warranty, when the maxim *caveat emptor* applies." Lord Campbell, C. J., replied (p. 850):

"If the purchaser receives what answers the description of the article sold he cannot, in the absence of a warranty, recover for a defect in its quality: in such a case *caveat emptor*. But it will be put against you here, that you sold a foreign bill, and that the thing delivered was not a foreign bill at all."

The counsel for plaintiff stated his case in the following words, which, in view of the language previously quoted from the defendant's counsel, makes clear the fact that it was not disputed that the transaction was governed by the common law applicable to sales:

"The plaintiff's proposition is that if a thing was sold as being an article of a specific description, and if, from a latent defect unknown to both parties, it was in substance not an article of that specific description, but an article of no value, *the purchaser is entitled to [409] recover back the price he has paid for it, not on the ground of a breach of warranty, but because he has paid for the thing sold, and what he has received is not the thing sold, but of a different kind."

In *Gurney* v. *Womersley* (1854), 4 El. & Bl. 133, an action was brought by a firm of bill brokers to recover the amount paid on the discount of a bill transferred by mere delivery, where the signatures, with one exception, were forgeries. It was held that, though there was no indorsement or guaranty, and therefore no warranty, of the solvency of the parties to the bill, there was a total failure of consideration, and plaintiffs were entitled to recover back the money paid for the bill from the party with whom the transaction was had. Coleridge, J., observed (p. 141):

"The vendor of a specific chattel, it is not disputed, is responsible if the article be not a genuine article of that kind of which the seller represents it to be. And the question raised really is, What is the extent of the want of genuineness for which he is responsible? Without laying down the limits, it is clear to me that this case fell much within them. In effect here the defendants said to the plaintiffs, Will you take, without recourse to us, this bill which purports to bear the acceptance of P. & C. Van Notten? By doing so they represented it to be their acceptance, as it purported to be, and sold it, as answering their description."

Wightman, J., said (p. 142):

"In considering whether a defect in an article renders it not an article of the kind of which it was represented to be on the sale, or is merely a breach of a collateral warranty, much must depend upon the special circumstances and terms of the rule. Here I think that the bill, not being an acceptance of P. & C. Van Notten, fails in what was the substance of the description by which it was held."

Lord Campbell, C. J., said (p. 143):

"I am of opinion that though the defendants, by not indorsing or guaranteeing the bill, preserved themselves from warranting the solvency of any of the parties, yet they did undertake that the instrument was what it purported to be. *It is not disputed that in fact the [410] discount of their bill by the plaintiffs was solely on the faith of its being an acceptance of P. & C. Van Notten, which it was not; and in consequence of its being so it was valueless. The possibility of recourse against the estate of Anderson, a convict and a bankrupt, did not prevent there being a total failure of consideration."

The cases in the American courts, whilst declaring the same rule as that recognized in England, place it upon a theoretical basis differing somewhat from that announced by the English courts; that is, instead of pronouncing it a condition of the principal contract that the



Digitized by Google

thing sold in its essence and substance must be delivered, declare that there is an implied warranty of identity, or, in other words, that the thing sold is what it purports to be. Daniel, in his treatise on negotiable paper, § 788*a*, calls attention to the different definitions given to the same obligation by the American and English courts, and indicates the view that the form of expression used by Benjamin in the passage already quoted is the more accurate one.

Aside, however, from the mere garb in which the thought is clothed, the American and English courts are in full accord. This is shown by the case of *Ulley* v. *Donaldson*, 94 U. S. 29, 45 [24: 54, 55], where Benjamin on Sales is approvingly referred to, as also *Flynn* v. *Allen*, 57 Pa. 482, and *Webb* v. *Odell*, 49 N. Y. 583, both of which cases, as also the line of American adjudications which enforce the same doctrine, are noted in the margin of this opinion.†

411] *Many of the controversies covered by the cases referred to arose in consequence of the sale of a forged note, but the principles upon which all the authorities proceed do not confine the right of recovery to such a case, but rest upon the general doctrine to which we have already referred. In fact, no case is reported wherein the obligation, as between vendor and vendee, in the sale of negotiable paper, is claimed to be controlled other than by the general principles of the common law, though in three cases, *Baxter* v. *Duren*, 29 Me. 434 [50 Am. Dec. 602]; *Fisher* v. *Rieman*, 12 Md. 497, and *Ellis* v. *Wild*, 6 Mass. 321, the deduction was made from the law respecting the sale of goods that on a sale of negotiable paper there was, under the principle of *caveat emptor*, no implied warranty even that the signatures to the paper were not forged. *Ellis* v. *Wild* was, however, expressly overruled in *Merriman* v. *Wolcott*, 3 Allen, 258, 260 [80 Am. Dec. 69], and from the allusions to *Baxter* v. *Duren*, contained in the later Maine decisions previously noted in the margin, it is doubtful whether the early ruling in Maine would now be followed there. The three cases referred to, it is needless to say, are practically disregarded by the entire current of American and English authority, and stand alone. They are disavowed by the defendant in error here, since his argument admits that there is a warranty of the genuineness of the signatures to an apparent negotiable instrument, thereby conceding the subsistence of the obligation to warrant the existence or identity of the thing sold, and yet seeking to avoid its consequences by limiting it to nonexistence resulting from a particular nullity. There is an exceptional case (*Littauer* v. *Goldman*, (1878) 72 N. Y. 506 [28 Am. Dec. 171]), which holds that the common-law obligation, as to the implied warranty of identity in the thing sold, in the case of commercial paper, extends only to the genuineness of the instrument. The case was one involving the nullity of a usurious note, and, if correctly decided, would be authority for the proposition that there was a peculiar species of warranty in the sale of commercial paper, *differing [412 from all others; in other words, that there was a law merchant of warranty where there was no commercial contract. The opinion in this case illustrates the same contradictory position presented here by the argument of the defendant in error, to which we have just called attention, that is, that it admits the common-law rule and then denies its essential results by eliminating conditions of nonexistence which are necessarily embraced by it. It follows that this New York decision leads logically to the view expressed in the Maine and Maryland cases just referred to, for either the principle of warranty of identity must be accepted or rejected; it cannot be accepted and its legitimate and inevitable results be denied. The rule there announced was in conflict with previous decisions in New York, and the decision is strongly criticized by the court of errors and appeals of New Jersey in *Wood* v. *Sheldon*, 42 N. J. L. 421, 425 [36 Am. Rep. 523].

In *Giffert* v. *West* (1873) 33 Wis. 617, where a note was sold which was void for usury, the vendee was allowed to recover the consideration paid by him, and his right to do so was based upon the general doctrine that one making a sale is bound as a condition of the principal contract to an implied warranty of the existence of the thing sold.

In *Hannum* v. *Richardson* (1875) 48 Vt. 508 [21 Am. Rep. 152], a very clear statement of the doctrine is found. There an indorser sold a negotiable promissory note without recourse. The note had been given for intoxicating liquors sold in Vermont in violation of law, and on that account was void at its inception. It was claimed that the defendant knew of the invalidity of the note when he transferred it. The court, however, held that knowledge on the part of the seller was not necessary to fix his liability, saying (p. 510):

"By indorsing the note 'without recourse,' the defendant refused to assume the responsibility and liability which the law attaches to an unqualified indorsement, so that, in respect to such liability, it may perhaps be regarded as standing without an indorsement. If it be so regarded, then in what position do these parties stand in respect to the transaction? The principle is well settled, that where personal property of any *kind is sold, there is on [413 the part of the seller an implied warranty that he has title to the property, and that it is what it purports to be, and is that for which it was

†Thrall v. Newell (1847) 19 Vt. 202, 206, 47 Am. Dec. 683; Lyons v. Miller (1849) 6 Gratt. 427, 439; Aldrich v. Jackson (1858) 5 R. I. 218; Barton v. Trent, Cope (1859) 3 Head, 167, 169; Delaware Bank v. Jarvis (1859) 20 N. Y. 226, 229; Merriam v. Wolcott (1861) 3 Allen, 258, 80 Am. Dec. 69; Bell v. Cafferty (1863) 21 Ind. 411, 413; Swansey v. Parker (1865) 50 Pa. 441, 450, 88 Am. Dec. 549; Morrison v. Lovell, 4 W. Va. 346, 350; Webb v. Odell (1872) 49 N. Y. 583; Worthington v. Cowles (1873) 112 Mass. 30; Snyder v. Reno (1874) 38 Iowa, 329, 333; Giffert v. West (1873) 33 Wis. 617 (1875) 37 Wis. 115, 117; Hannum v. Richardson (1875) 48 Vt. 508, 21 Am. Rep. 152; Hussey v. Sibley (1876) 66 Me. 192, 23 Am. Rep. 557; Hurst v. Chambers (1876) 12 Bush, 155, 158; Allen v. Clark (1877) 49 Vt. 390; Bankhead v. Owen (1877) 60 Ala. 457, 461; Smith v. McNair (1877) 19 Kan. 330, 27 Am. Rep. 117; Challiss v. McCrum (1879) 22 Kan. 157, 161, 31 Am. Rep. 181; Rogers v. Walsh (1881) 12 Neb. 28; Milliken v. Chapman (1883) 75 Me. 306, 317; Daskam v. Ullman (1889) 74 Wis. 474, 476; Palmer v. Courtney (1891) 32 Neb. 773; Ware v. McCormick (1894) 16 Ky. L. Rep. 385; Brown v. Ames (1894) (Minn.) 61 N. W. 448.



Digitized by Google

sold, as understood by the parties at the time, and in such case knowledge on the part of the seller is not necessary to his liability."

On p. 511 the court further observed:

"The note in question was not a note, it was not what it imported to be, or what it was sold and purchased for; it is of no more effect than if it had been a blank piece of paper for which the plaintiff had paid his $50. In this view of the case we think the defendant is liable upon a warranty that the thing sold was a valid note of hand."

Nor is there any foundation for the assertion that *Otis* v. *Cullum*, 92 U. S. 447 [23: 496], and the cases of *Orleans* v. *Platt*, 99 U. S. 676 [25: 404]; and *Ætna L. Ins. Co.* v. *Middleport*, 124 U. S. 534 [31: 537], both which cite *Otis* v. *Cullum*, support the doctrine that a sale of commercial paper without recourse is not, as between the vendor and vendee, governed by the ordinary rule of the common law. On the contrary, that case expressly rested its conclusion on the decision in *Lamert* v. *Heath*, 15 Mees. & W. 486, which latter case, as we have seen, whilst enforcing the principles of the common law, considered that under the particular facts there presented it was a question for the jury to determine whether the scrip delivered was the kind of scrip which the defendant had ordered purchased. That case not only, as has already been stated, concerned non-negotiable paper, but its decision involved no question of the scope of the warranty, but solely what was the thing bought. Nor does the case of *Otis* v. *Cullum* justify the assumption that this court laid down the rule that a mere sale of commercial paper, as between vendor and vendee, when the sale was made without recourse, creates some peculiar and exceptional warranty to be considered in this particular as the law merchant. It is true that in expressing the general doctrine, Mr. Justice Swayne said: "The seller is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belong to him and are not forgeries. Where there is no express stipulation there is no liability beyond this." 414] But in *using this language, as to the extent of the warranty, the mind was directed to that form of nonexistence which more commonly obtains, and the expression is a mere illustration of the rule of *de eo quod plerumque fit*. If this were a case where a vendee claimed to recover back the price paid by him on a purchase of negotiable securities, which pass by delivery from hand to hand, on the averment that after the sale it had developed that they were not valid (although not forgeries), because the law under which they had been issued was constitutionally void or *ultra vires*, the claim of implied warranty of existence would be without merit, for the reason that such a state of fact would present a case of a sale of securities whether valid or invalid, hence engendering no implication of warranty of existence. Under the state of facts thus supposed, the purpose of the parties to make a contract of that nature would legally result from the fact that they were both necessarily equally chargeable with notice of want of power, and therefore would be both presumed to have acted with reference to such knowledge. This is *Otis* v. *Cullum*. But it is not the case at bar, since it is here admitted that both parties, in entering into the contract of sale, contemplated valid securities, of which there were many outstanding, and those delivered were void, not because of a want of power to enact the law under which they were issued, or because they were *ultra vires* for some other legal cause, but because they were stricken with nullity by a constitutional provision adopted after the act authorizing the issue of the securities, and where nothing on the face of the bonds indicated that they were illegal. The distinction pointed out by the foregoing statement not only illustrates the correctness of the decision in *Otis* v. *Cullum*, but also demonstrates the error of attempting to extend it to the state of facts presented in the case under consideration. Indeed, in examining and applying *Otis* v. *Cullum*, the fact that it does not control a case like this has been recognized. Dan. Neg. Inst. §784*a*; *Rogers* v. *Walsh*, 12 Neb. 28; *Cincinnati, N. O. & T. P. R. Co.* v. *Citizens' Nat. Bank*, 24 Ohio L. J. 198, 211.

The foregoing analysis of the principles and review of the *authorities governing the[415 law of sale of negotiable paper, transferred without recourse, as between vendor and vendee, clearly demonstrates the unsoundness of the positions upon which the defendant in error relies, since it affirmatively establishes that there is no peculiar warranty in a sale of commercial paper, and that the reasoning by which it is attempted to prove its existence is a mere misconception of the principles of the common law relating to the sale of goods and chattels.

In passing, however, it is worthy to note that whilst the civil law enforces in the contract of sale generally the broadest obligation of warranty, it has so narrowed it, when dealing with credits and incorporeal rights, as to confine it to the title of the seller and to the existence of the credit sold, and, *e converso*, the common law, which restricts warranty within a narrow compass, virtually imposes the same duty by broadening the warranty as regards personal property so as to impose the obligation on the vendor to deliver the thing sold as a condition of the principal contract or by implication of warranty as to the identity of the thing sold. By these processes of reason the two great systems, whilst apparently divergent in principle, practically work substantially to the same salutary conclusions.

There are many questions discussed in the brief of the counsel which we do not notice, and which we content ourselves with saying are without merit. The views above stated are controlling and decisive of the case and lead necessarily to the reversal of the judgment. As the case was heard upon a stipulation waiving a jury and upon an agreed statement of facts, it is our duty, in reversing, to direct that the proper judgment be entered below. *Fort Scott* v. *Hickman*, 112 U. S. 150 [28: 686], and cases there cited.

It follows that *the judgment of the circuit court must be reversed*, and the case be remanded with directions to enter judgment for plaintiffs for $8,383.75, with interest from judicial demand and costs. And it is so ordered.



Digitized by Google

416] BANK OF COMMERCE and JAMES A. OMBERG, *Plffs. in Err.*,
*v.*
STATE OF TENNESSEE for the Use of the CITY OF MEMPHIS.

BANK OF COMMERCE and JAMES A. OMBERG, *Plffs. in Err.*,
*v.*
STATE OF TENNESSEE and the COUNTY OF SHELBY.

(See S. C. Reporter's ed. 416-426.)

*Review of state judgment— opinion of court below—taxation of bank stock.*

1. In reviewing a state judgment, if any portion of it is correct, and is separable from another portion found to be erroneous, it is the duty of this court to reverse the erroneous portion and affirm the correct portion, although it is done for a different reason than that which controlled the state court.
2. Where the opinion of the court below is made part of the record this court has a right to look into it to discover the ground upon which the judgment was rendered; but no effect can be given to an abstract portion of the opinion upon which no judgment was rendered.
3. Where in a bank charter its capital stock is made exempt from taxation, and no limitation is prescribed as to its amount, a provision in the charter for the increase of its capital stock by issuing stock to a depositor at his option when his deposit amounts to $50 or more, does not constitute a contract which is impaired by a new state Constitution which renders all shares issued subsequent to its adoption subject to taxation.

[Nos. 668, 669.]

*Petition for Rehearing Submitted May 7, 1896. Decided May 25, 1896.*

IN ERROR to the Supreme Court of the State of Tennessee to review judgments of that court on a petition for a rehearing of questions heretofore decided in these cases, which by the decision of this court were remanded to the Supreme Court of Tennessee for further proceedings therein. Mandate recalled, and so much of the judgment as permits a recovery against the holders of the old shares of stock in the bank is reversed, and so much of the judgment as permits a recovery for taxes assessed against the holders of the new shares in the bank is affirmed, and the cases remanded for further proceedings.

See same case, 161 U. S. 134 [40: 645].

The facts are stated in the opinion.

*Messrs.* **R. J. Morgan, T. B. Turley,** and **William H. Carroll** for plaintiffs in error.

*Messrs.* **S. P. Walker** and **C. W. Metcalf** for defendants in error.

**Mr. Justice Peckham** delivered the opinion of the court:

This is a petition for a rehearing of some of the questions heretofore decided in these cases. A decision was rendered in them a short time ago, and a portion of the judgment in each case was reversed, and the cases remanded to the supreme court of Tennessee for further proceedings therein. 161 U. S. 134 [*ante*, 645]. Application is now made on the part of the defendants in error in each case for a rehearing of the same upon the question of the jurisdiction of this court to review the decision of the state court in regard to the exemption from taxation of the so-called new stock, being stock that was issued since the adoption of the Constitution of 1870. Leave was given both parties to submit briefs upon the question of jurisdiction, as also upon the merits of the question sought to be reviewed. *Such[417 briefs have been received, and we proceed to decide the question.

The bank was chartered in 1856 under the name of the Chattanooga Savings Institution, which name was subsequently changed to the Bank of Commerce, and its place of business moved to Memphis. In the charter was contained the following clause: "Said institution shall have a lien on the stock for debts due it by the stockholders before and in preference to other creditors, except the state for taxes, and shall pay to the state an annual tax of ½ of 1 per cent on each share of the capital stock, which shall be in lieu of all other taxes." On the day of the adoption of the new Constitution, May 5, 1870, the capital stock of this institution was $200,000. The 2d section of the charter contains this provision: "The capital stock of said company shall be divided into shares of $50 each, and when 200 shares have been subscribed and the sum of $1 per share paid therein, the shareholders may meet and elect five directors." By § 4 it is provided that "it may receive on deposit any and all sums not less than $1 per week offered as stock deposits; . . . and when such deposits amount to $50 it may, at the option of the depositor, become stock in the institution."

It appears that on sundry days prior to June 1, 1887, the capital stock of the bank had been regularly increased under this provision in its charter to $600,000, and on the 17th of March, 1890, and on sundry days prior to June 1, 1890, it was again regularly increased to $1,000,000. There was no maximum capital fixed in the charter. In 1870, while the capital stock of the bank stood at $200,000, the new Constitution of the state was adopted, which provided for the taxation of all property, which provision would include the shares issued since 1870, if they are not protected by the exemption clause in the charter above quoted.

These suits were brought by the defendants in error against the bank and the shareholders for the purpose of recovering the amount of taxes which had been assessed for several years then last past against the parties defend-

NOTE.—*As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,*—see notes to Hart v. Lamphire, 7: 879, and Commercial Bank v. Buckingham, 12: 169.

*That taxation of shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations,*—see note to Providence Bank v. Billings, 7: 939.

*As to exemption from taxation: whether a contract or not; not implied,*—see note to Tucker v. Ferguson, 22: 805.



Digitized by Google

418] ant, the bank and the *shareholders. In the action it was sought to recover either against the bank on its capital stock or against the shareholders by virtue of their ownership of the shares of the capital stock. It was not contended that both were liable to pay the tax, but that one or the other should be held liable. A single stockholder was chosen to represent the stockholders generally, and he was one of the holders of what may be termed the new shares—that is, shares issued since the adoption of the Constitution of 1870. This was done under an arrangement between the parties so that all the stockholders need not be made parties to the action.

The answer of the plaintiffs in error, the bank and the stockholders, claimed a total exemption from all taxation, both on the part of the bank and shareholders excepting the tax provided for in the charter. Thus the claim of the state was that the bank or all the shareholders were taxable under the provisions of the general tax laws of the state, and it left it to the court to say which were thus taxable. But the state also claimed that if the old shares of stock were not taxable, the new shares issued after 1870 were taxable as they came into existence after the Constitution provided for the taxation of all property, and they were not subject to the exemption clause contained in the charter of the bank. So the question submitted to the state court was, Which of these two classes shall be taxed; or, if the old shareholders are not to be taxed, can the new shareholders be taxed? The supreme court of the state held that all the shareholders, both old and new, were proper subjects of taxation; that the exemption clause in the charter did not apply to either, but it applied to the capital stock of the bank, and judgment was therefore decreed for a recovery against all the shareholders of both old and new stock for taxes assessed under the general taxation laws of the state. In the course of the opinion delivered by one of the learned judges of the state court, which was concurred in by the majority, it was stated that there was no difference between the rights of the shareholders of the old and the new stock with reference to the right of exemption from taxation under the charter clause; that if the old shares were 419] exempt *the new shares were also exempt, and that the contract covered both classes of stock in the same way and to the same extent, but the judgment of the court was that neither class of stockholders was exempt from taxation on account of the shares of stock held by them; that the exemption clause applied entirely to the capital stock, and that hence the shares of stock were liable to taxation under the general laws of the state, and judgment was ordered against all the shareholders, both of the old and the new stock accordingly. Judgment at the same time went in favor of the bank decreeing its exemption from taxation under those laws of the state.

The bank and the shareholders through Mr. Omberg, their representative, sued out a writ of error from this court, and the judgment of the state court was thereby brought here for review. The claims of the parties upon that writ of error were on the part of the plaintiffs in error that the whole judgment of the state court was wrong; that neither the shareholders of the old nor of the new stock were liable to pay any amount of taxes other than the tax provided for in the charter, and that the same exemption applied to the bank. The defendants in error claimed that the whole judgment of the state court was right; that all the shareholders were properly assessed, but that if this were not so and the holders of old shares were exempt by reason of the clause in the charter, such clause did not apply to the holders of the new shares of stock, and that they were liable in any event, and that, therefore, the judgment as against such new shareholders was right, and to that extent the judgment should be affirmed, even if it should be reversed as to the holders of the old shares of stock. This court held that, as to the holders of the old shares, the judgment was wrong, as the exemption in the charter applied to the holders of the shares of stock, and not to the capital stock itself. Concerning the further question whether the judgment was right as against the holders of the new shares of stock, the court held that it would not review the decision of the state court on that question; that as the state court had granted the exemption claimed by the holders of the new shares by virtue of the contract clause in the charter, this *court had no[420 jurisdiction to review that decision, and, therefore, refused to do so. The whole judgment against all the stockholders, both of the new as well as of the old shares of stock, was reversed. In coming to that conclusion and in reversing the whole judgment we think this court inadvertently fell into error. The error consisted in mistaking a certain statement in a portion of the opinion of the court below for the judgment which it actually rendered. Instead of granting the exemption the court refused it entirely, and the judgment which it actually rendered was against all the shareholders alike, both of the old and of the new shares, but in the opinion the court stated that no difference existed between the holders of the old as compared with those of the new shares of stock, and that the holders of the new shares were entitled to the exemption from the tax to the same extent that the holders of the old shares were, but, as the court determined, neither the old nor the new shareholders were entitled to such exemption.

The material matter in the case was the judgment, and the judgment was against all the shareholders, so when that judgment was brought before this court by writ of error on the part of the shareholders, the question for this court was to determine whether or not there was error in that judgment. In the determination of that question no effect can be given the *opinion* of the state court *in favor* of the plaintiffs in error upon one ground, so long as it is rendered entirely immaterial by the *judgment* of that court *against* the plaintiffs in error upon another ground. It is our duty to look at the whole judgment as it comes before us, and if any portion of it be correct and is so stated as to be separable from and independent of the other portion which we find to be erroneous, it is our duty to affirm that portion in which we find no error and reverse that portion



Digitized by Google

which we decide to be wrong. Therefore we think it is our duty to examine the question whether the judgment brought here for review is not right as against the holders of the new shares on the ground that they were not included in the charter clause providing for exemption from taxation, because their stock 421] was issued since the Constitution *of 1870 was adopted. Even if the opinions of the state court were a part of the record, as is claimed by counsel for the plaintiffs in error, no different result would follow on that account. Being a part of the record merely gives the court a right to look into these opinions for the purpose of discovering the ground upon which the judgment of the court actually proceeded. Looking at them we find, as reasons for the judgment of the state court against all the shareholders, that the exemption clause of the charter applied to the capital stock of the bank, and not to the shareholders in any event. Looking further into the opinion we find the added statement that if the exemption clause had applied to the holders of the old shares it would equally have applied to the holders of the new, as they were both situated alike, and if one class were entitled to exemption the other was also. That opinion upon the latter subject is an abstract one, upon which no judgment was entered, because the state court held that neither class was entitled to exemption and directed judgment against them all. Under these circumstances it seems plain to us that in refusing to look into the question whether the judgment, so far as it affected the holders of the new shares only, was right or wrong, we failed to exercise our appropriate jurisdiction, and it is our duty, upon the question being now brought to our attention, to retrace our steps and examine the question and determine for ourselves whether that portion of the judgment of the state court enforcing taxation of the holders of the new shares of stock ought not to be upheld, although for a different reason than that which controlled the action of that court.

The case of *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590 [22: 429], and other similar cases are not in point. The purpose of examining to see whether there is not some question other than a Federal one, decided in the case, is to *sustain* thereon the judgment under review. In this case the plaintiffs in error are not seeking a question of local law upon which to *sustain* the judgment against them. If we find the Federal questions properly decided as to one class of persons affected by the judgment we must sustain that part of it, although we 422]come *to that conclusion for a different reason from that expressed by the state court, and one which upon that point is in conflict with its opinion but not with its judgment. So in the case suggested by counsel, of separate actions against the stockholders and the bank, and a decision by the state court that the holders of the new shares were exempt under the contract clause. Of course, no decision of that kind could be reviewed here because the claim was allowed by the state court, and judgment went in his favor. To make it parallel with this, the court should have held the holder of the new shares liable and entered judgment against him, while stating in its opinion that if the holders of old shares had been exempt he would have been also exempt, but as they were not, neither was he. Upon his writ of error to this court we could say that the judgment was right, because although the holders of the old shares were exempt, yet the holders of the new shares did not stand in the same position, and they were not exempt. The judgment would be upheld although for a different reason.

We come then to the merits of the subject. In determining the question whether the state court was right in adjudging the holders of the new shares of stock liable to assessment by reason of their ownership of that stock (no matter for what reason such determination was reached), it is necessary to see what the provisions of the charter were in relation to this increase of capital stock. We see by the 2d section, above quoted, that no limitation was therein prescribed of the amount of capital stock of the bank; and the provision for the increase of the capital stock, as mentioned in § 4 of the charter, makes the depositor the person who is to decide whether the stock shall be increased or not, for by that section the depositor when depositing his moneys as a stock depositor in the bank has himself the option when the deposit amounts to $50 or more to call for and to have scrip for stock issued to him therefor. By this provision it cannot be claimed that the state entered into such a contract with future depositors who might choose to demand stock for their deposits, that the provision relating thereto could not be changed by *the legislature. It was [423 a provision in relation to one of the general powers of the corporation to issue stock which might be changed from time to time as the legislature in its discretion might think proper so long as no vested right of property accruing prior to the legislative amendment was unfavorably affected thereby. We think there was no vested right on the part of the future depositor to make a stock deposit, and claim the issuing of a similar amount of stock to him, which a legislature could not cut off. If before making any such deposit the legislature altered that provision in the charter and prohibited any such kind of deposit thereafter, we think it clear that no vested right of a future depositor was thereby interfered with. We have held that the clause in the charter of this bank providing for taxation amounted to a contract that the shares of stock in the hands of the shareholders should be exempt from further taxation than that which is provided in the charter. Is the language in the charter to be extended to the shares of stock issued subsequently to the adoption of the Constitution of 1870? In other words, does the contract obligation attach to and form a part of the stock so issued to the same extent as if the stock had been issued prior to 1870? We are inclined to think not. Full effect can be given to the charter by confining it to the shares of stock that might be issued under its provisions so long as the Constitution of the state was not altered or a provision thereof adopted providing for the taxation of such property. Applying the rule which is always applied by this court in such cases, that the claim for exemption must



Digitized by Google

rest upon language in regard to which there can be no doubt as to its meaning, and that the exemption must be granted in terms too plain to be mistaken, the claim for exemption for this subsequently issued stock cannot be maintained. This rule for the construction of exemption from taxation clauses in acts of the legislature is referred to the opinion in the *Phœnix F. & M. Ins. Co.* v. *Tennessee*, one of these cases, and decided at the same time. 161 U. S. 174 [40: 660].

It is true there is an unlimited right to increase the capital stock of this bank under the 424] fourth clause in question, but *it must be done in a certain way. The bank has no right separate and apart from the depositor to increase its stock, and the depositor's right is based upon his depositing the money in the bank as a stock depositor and calling for an issue of stock when it amounts to $50 or over, for the amount of such deposit. We think that the legislature might prohibit the further issue of capital stock in this corporation under this section. By the enactment of the charter there was no contract therein to forever continue this power to deposit and make such deposits a claim for stock therefor. There is no such language in terms, and none should be implied. It amounted to nothing more than a legislative license, which might be availed of by any depositor, but which the legislature might at any time revoke by thereafter prohibiting the issuing of stock in return for deposits. If the legislature could thus absolutely prohibit the further issuing of stock, could it not also provide that no stock should be thereafter issued unless subject to taxation as other property in the state? We see no reason to doubt the legislative capacity in that respect. Of course, the adoption of a constitutional provision of the same nature would be subject to the same rule. We do not see that by the adoption of the Constitution of Tennessee in 1870, which provided for the taxation of all property, any contract obligation was impaired so far as regards the rights of the bank or the owners of the shares of stock issued subsequent to the adoption of the Constitution. The Constitution impaired no obligation of an existing contract. It prevented the subsequent making of one. No depositor could claim a contract or any vested right to make a deposit under the provision of § 4 of the act, and then claim an exemption from taxation of such stock where the deposit was made and the stock issued after the adoption of the Constitution of 1870.

In *Pearsall* v. *Great Northern R. Co.* 161 U. S. 646 [40: 838], we held that a clause in a charter of a railroad corporation granting it certain powers to consolidate with or become the owner of other railroads was not such a vested 425] right that it *could not be rendered inoperative by a subsequent statute passed before the company had availed itself of this power granted it by a former statute. We held that the power so conferred, so long as it was unexecuted, was within the control of the legislature and might be treated as a license, and be revoked by the legislature if it so chose. Much of the reasoning of that case is applicable here. We think the power of the legislature to alter the terms upon which stock might be subscribed is more clear than was its power in the case of Pearsall, *supra*. We assume in this case the legislative power to grant an unlimited right to increase the capital stock of the bank. That is a question of the power of the legislature of the state, and the decision of the state court in regard to the power of the legislature in such a case is one which we follow. Admitting the right to grant such power, it does not follow that it may not be taken away by a subsequent legislature, and if when the stock is issued there is a provision in force in the state for the taxation of all property, we do not think the clause providing for the exemption of the stock applies to such stock thus issued.

It is urged that this right to issue stock in exchange for deposits is a valuable franchise of the bank given to it by this charter, accepted by it and held as a contract secure from any assault by state legislation. We do not think that it is thus secured, because we are of opinion that it is not of that contractual nature which the Federal Constitution prevents any impairment of by state legislation. As has been seen by reference to the above case of *Pearsall* v. *Great Northern R. Co.* all provisions in a charter granting rights or powers to a corporation do not partake of the nature of a contract, which cannot for that reason be in any respect altered or the power recalled by subsequent legislation. Where no act is done under the provision and no vested right is acquired prior to the time when it was repealed, the provision may be validly recalled, without thereby impairing the obligation of a contract. The power to issue stock in return for deposits is of that kind which we think is subject to legislative power of repeal or of regulation so long as the action of *the [426 legislature interferes with no rights which have become vested before the passage of the act. Many cases bearing upon this subject are to be found cited in the arguments of counsel and in the opinion of this court in the *Pearsall Case*, and it is unnecessary for us to further elaborate the question. Having the power to repeal altogether the grant to issue stock upon the making of stock deposits, as above stated, we think the power to permit it to be issued subject to taxation would be within the power of the legislature. This is in substance the effect of the Constitution of 1870 providing for the taxation of all property. The clause of exemption no longer applies to shares of stock thereafter issued.

We think, therefore, the judgment of the supreme court of Tennessee adjudging a recovery against the shareholders of the new stock issued since 1870 was, to that extent, correct, and our former decision, which reversed the whole judgment of the state court as against the shareholders, must be amended.

The mandate will be recalled; *so much of the judgment of the state court as permits a recovery against the holders of the old shares of stock in the bank is reversed; the judgment so far as it permits a recovery for taxes assessed against the holders of the new shares in the bank is affirmed*, and the cases remanded to the state court for further proceedings not inconsistent with this opinion, and it is so ordered.



Digitized by Google

427] UNITED STATES, *Piff. in Err.*
*v.*
REALTY COMPANY.

UNITED STATES, *Piff. in Err.*,
*v.*
ANDREW H. GAY.

(See S. C. Reporter's ed. 427-444.)

*Sugar bounty act—knowledge of invalidity—claim under—debts of the United States.*

1. The sugar bounty act of Congress of March 2, 1895, appropriating money to pay bounties to persons who had been prevented by the repeal of the act of 1890 from obtaining bounties for the production of sugar before the act was repealed, or for sugar manufactured during the year ending June 30, 1895, after filing notice of application for license and bond under the act of 1890,—is not unconstitutional, even if the act of 1890 should be held unconstitutional.
2. Knowledge of the invalidity of an act of Congress will not be imputed, in advance of any authoritative declaration to that effect, to those who are acting under its provisions, so as to preclude them from having equities based on their reliance upon the act.
3. A moral and honorable claim upon the public treasury, which Congress had the constitutional right to recognize and pay, arose in favor of persons who proceeded to manufacture sugar or make preparations therefor in reliance upon the act of Congress of 1890 providing bounties for such manufacture, even if they may have been engaged in the business before that act was passed.
4. The "debts" of the United States which Congress has power to pay under U. S. Const. art. 1, § 8, include those debts or claims which rest upon a merely equitable or honorary obligation, which would not be recoverable in a court of law if existing against an individual, but which would be binding upon his conscience or honor.

[Nos. 870, 869.]

*Argued April, 22, 23, 24, 1896. Decided May 25, 1896.*

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana to review judgments of that court in favor of the Realty Company and Andrew H. Gay, plaintiffs in above-entitled actions, for moneys claimed by plaintiffs by reason of the legislation of Congress in regard to sugar bounties. *Affirmed.*

The facts are stated in the opinion.

*Messrs.* **Edward B. Whitney,** Assistant Attorney General, **Holmes Conrad,** Solicitor General, and *J. E. Dodge,* Assistant Attorney General, for plaintiff in error.

*Messrs.* **Charles F. Manderson, Joseph H. Choate, Thomas J. Semmes,** *Edward Ham,* and *James D. Hill* for defendants in error.

Mr. Justice **Peckham** delivered the opinion of the court:

These are writs of error to the circuit court of the United States for the eastern district of Louisiana. The actions were brought in that court under the 2d section of the act approved March 3, 1887 (24 Stat. at L. 505, chap. 359), commonly known as the Tucker act. Both actions were brought to*obtain payment of[428 moneys by reason of the legislation of Congress in regard to sugar bounties. The court below in each case gave judgment for the plaintiffs therein, and the government by writ of error brings the cases here for review.

The legislation out of which the question arises is as follows: By the act approved October 1, 1890, known as the tariff act of 1890 (26 Stat. at L. 567, chap. 1244), which act is entitled "An Act to Reduce the Revenue and Equalize Duties on Imports, and for Other Purposes," Congress legislated upon the subject of the tariff, and in that act ¶¶ 231, 232, 233, and 235, "*Schedule E, Sugar*" (on page 583), read as follows:

"231. That on and after July 1, 1891, and until July 1st, nineteen hundred and five, there shall be paid, from any moneys in the Treasury not otherwise appropriated, under the provisions of U. S. Rev. Stat. § 3689, to the producer of sugar, testing not less than 90 degrees by the polariscope, from beets, sorghum, or sugar cane grown within the United States, or from maple sap produced within the United States, a bounty of 2 cents per pound; and upon such sugar testing less than 90 degrees by the polariscope, and not less than 80 degrees, a bounty of 1¾ cents per pound, under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe.

"232. The producer of said sugar to be entitled to said bounty shall have first filed prior to July first of each year with the Commissioner of Internal Revenue a notice of the place of production, with a general description of the machinery and methods to be employed by him, with an estimate of the amount of sugar proposed to be produced in the current or next ensuing year, including the number of maple trees to be tapped, and an appliance for a license to so produce, to be accompanied by a bond in a penalty, and with sureties to be approved by the Commissioner of Internal Revenue, conditioned that he will faithfully observe all rules and regulations that shall be prescribed for such manufacture and production of sugar.

"233. The Commissioner of Internal Revenue, upon*receiving the application and bond[429 hereinbefore provided for, shall issue to the applicant a license to produce sugar from sorghum, beets, or sugar cane grown within the United States, or from maple sap produced within the United States at the place and time with the machinery and by the methods described in the application; but said license shall not extend beyond one year from the date thereof.

"235. And for the payment of these bounties the Secretary of the Treasury is authorized to draw warrants on the Treasurer of the United States for such sums as shall be necessary, which sums shall be certified to him by the Commissioner of Internal Revenue, by whom the bounties shall be disbursed, and no bounty shall be allowed or paid to any person licensed as aforesaid in any one year upon any quantity of sugar less than five hundred pounds."



Digitized by Google

In 1894 Congress passed another act in relation to the tariff, which act was received by the President on the 15th of August, and became a law on the 28th of August, 1894, without his approval. Such act is entitled "An Act to Reduce Taxation, to Provide Revenue for the Government, and for Other Purposes." (26 Stat. at L. 509, chap. 349.) Paragraph 162, "*Schedule E, Sugar*," p. 521, reads as follows:

"Schedule E.—Sugar. 182. That so much of the act entitled 'An Act to Reduce Revenue, Equalize Duties, and for Other Purposes,' approved October first, eighteen hundred and ninety, as provides for and authorizes the issue of licenses to produce sugar, and for the payment of a bounty to the producers of sugar from beets, sorghum, or sugar cane grown in the United States, or from maple sap produced within the United States, be, and the same is hereby, repealed, and hereafter it shall be unlawful to issue any license to produce sugar or to pay any bounty for the production of sugar of any kind under the said act."

By another act of Congress, approved March 2, 1895, entitled "An Act Making Appropriations for Sundry Civil Expenses of the Government for the Fiscal Year Ending June 30, 1896, and for Other Purposes" (28 Stat. at L. 910, 933, chap. 189), Congress enacted as follows:

430] "'Bounty on sugar: That there shall be paid by the Secretary of the Treasury to those producers and manufacturers of sugar in the United States from maple sap, beets, sorghum, or sugar cane grown or produced within the United States who complied with the provisions of the bounty law as contained in schedule E of the tariff act of October first, eighteen hundred and ninety, a bounty of 2 cents a pound on all sugars testing not less than 90 degrees by the polariscope, and 1½ cents per pound on all sugars testing less than 90 and not less than 80 degrees by the polariscope, manufactured and produced by them previous to the twenty-eighth day of August, eighteen hundred and ninety-four, and upon which no bounty has previously been paid; and for this purpose the sum of $238,289.06 is hereby appropriated, or so much thereof as may be necessary.

"That there shall be paid to those producers who complied with the provisions of the bounty law as contained in Schedule E of the tariff act of October first, eighteen hundred and ninety, by filing the notice application for license, and bond therein required, prior to July first, eighteen hundred and ninety-four, and who would have been entitled to receive a license as provided for in said act, a bounty of $\frac{2}{100}$ of a cent per pound on the sugars actually manufactured and produced in the United States testing not less than 80 degrees by the polariscope, from beets, sorghum, or sugar cane grown or produced within the United States during that part of the fiscal year ending June thirtieth, eighteen hundred and ninety-five, comprised in the period commencing August twenty-eighth, eighteen hundred and ninety-four, and ending June thirtieth, eighteen hundred and ninety-five, both days inclusive; and for this purpose the sum of $5,000,000, or so much thereof as may be necessary, is hereby appropriated; provided that no bounty shall be paid to any person engaged in refining sugars which have been imported into the United States, or produced in the United States, upon which the bounty herein provided has already been paid or applied for.

"'The bounty herein authorized to be [431 paid shall be paid upon the presentation of such proofs of manufacture and production as shall be required in each case by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and under such rules and regulations as shall be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

"And for the payment of such bounty the Secretary of the Treasury is authorized to draw warrants on the Treasury of the United States for sums as shall be necessary, which sums shall be certified to him by the Commissioner of Internal Revenue, by whom the bounty shall be disbursed, and no bounty shall be allowed or paid to any person as aforesaid upon any quantity of sugar less than five hundred pounds.'"

Under the provisions of the appropriation made in the last above named act of Congress, the defendant in error in each of the above cases sues for the money claimed by it and him for the manufacture of sugar under the circumstances stated in the petition in each case. They are test cases. The Realty Company is one of a class coming under the terms of the appropriation to those who had manufactured a certain class of sugar previous to the 28th day of August, 1894, and upon which no bounty had previously been paid. The allegation in the petition of the company showed that it had between the 1st day of July, 1893, and the 30th day of June, 1894, under the provisions of the act of 1890, produced and manufactured at the places stated the amount of sugar mentioned in the petition, and that it was entitled to receive from the defendant the bounty thereon mentioned in the act, which it was alleged amounted to the sum of $5,576.97. The repeal of the bounty clause in the act of 1890 by the act which took effect on the 28th of August, 1894, and which prohibited the payment of bounties thereafter, prevented the company from obtaining the money on the warrant which had been issued to it prior to that date. There were comparatively few persons coming under the class in which the company stood, and the appropriation made for the payment of that class was a little less than $250,000.

"The plaintiff in the other suit, Mr. [432 Gay, is one of a class coming under the second portion of the act of 1895, he being among those who complied with the provisions of the bounty act as contained in schedule E of the act of October 1, 1890, by duly filing notice of application for license and bond as therein required, and who would have been entitled to receive a license as provided for in said act, and a bounty of $\frac{2}{100}$ of a cent per pound on the sugars actually manufactured by him according to the provisions of such act during that part of the fiscal year ending June 30, 1895, comprised in the period commencing August 28, 1894, and



Digitized by Google

ending June 30, 1895, both dates inclusive. The amount of bounty claimed by Mr. Gay is between $8,000 and $9,000, and the persons forming this class are quite numerous, and the appropriation for them amounted to the sum of $5,000,000, or so much thereof as might be necessary to make the payments provided for in the act.

Counsel for the government admit that the plaintiff in each case has complied with all the terms and conditions of the act in order to entitle each to recover the moneys demanded in these suits under the act of 1895, provided that act is constitutional and valid. If it be, the judgment in each case must be affirmed.

The proper disbursing officer of the treasury refused to pay the warrants drawn upon the Treasury in these cases upon the sole ground that the act is unconstitutional. He has been fortified in his opinion and action by the views expressed in the court of appeals of the District of Columbia in the case of *United States, Miles Planting & Mfg. Co.* v. *Carlisle*, 5 App. D. C. 188. That company, which was a Louisiana corporation engaged in the sugar business, claimed that the repealing portion of the act of August 28, 1894, was not effective so as to cut off the rights of persons who had, prior to its passage, procured licenses for the fiscal year beginning July 1, 1894, and had expended money thereunder. The company therefore applied to the supreme court of the District of Columbia for a writ of mandamus against the Secretary of the Treasury and the [433] Commissioner of Internal Revenue to compel action on their part under the act of 1890. The application was resisted by the government upon several grounds, among others, that the bounty legislation of 1890 was unconstitutional. The motion was denied upon all the grounds set up by the government, including that of unconstitutionality. Mr. Justice Shepard delivered the opinion of the court and Mr. Justice Morris concurred with him upon all points. Mr. Chief Justice Alvey expressed no opinion upon the constitutional question because the conclusion that Congress had power to repeal the provision giving the bounty for sugar rendered it unnecessary to pass upon the constitutionality of the original bounty clause.

It was by reason of this opinion upon the validity of the bounty legislation of 1890 that the Comptroller of the Treasury re-examined the rulings which had been previously made in approving bounty claims theretofore presented; and he had concluded to and did refer another case involving this question, then before him, to the court of claims for its decision in accordance with the provisions of U. S. Rev. Stat. § 1068, but before that case reached the court of claims the present cases had been commenced and decided in Louisiana.

The question whether the bounty provisions of the act of 1890 were constitutional was raised in the case of *Field* v. *Clark*, 143 U. S. 649 [36: 294]. The contention in that case was that such provisions were unconstitutional, and that therefore the whole tariff act of 1890 was void. This court declined to decide the question as to the constitutionality of those provisions because, as the court held, the rest of the act would be valid even if the bounty provision were void. The question has been again presented to us in this case, and been very ably argued by counsel both for the government and the defendants in error. The question is one of the very gravest importance. It should not be decided without very mature investigation and deliberation, and only when absolutely necessary to the determination of the rights of the parties.

In the view we take of these cases the rights of the parties may be passed upon and [434] the actions finally decided without our entering upon a discussion as to the validity of the bounty legislation contained in the act of 1890, and without deciding that question. For the purpose of the discussion of this case we think it unnecessary to decide whether or not such legislation is beyond the power of Congress. We are of the opinion that in either case the appropriations of money in the act of 1895 to be paid to certain manufacturers and producers of sugar who had complied with the act of 1890 were within the power of Congress to make, and were constitutional and valid.

Without referring to the first three findings of the court below in regard to the general policy of this government in relation to the tariff, and confining our attention to those facts which are matters of history and to the acts of Congress already referred to, and to the facts set forth in the petitions in the two cases and to the admissions of the parties made for the purposes of the trial of these cases, we may briefly describe the condition of affairs existing at the time of the passage of the appropriation act of 1895.

The production and manufacture of sugar in the southern and some portions of the western states from sugar cane and from sorghum and beets had become at the time of the passage of the act of 1890 an industry in which large numbers of the citizens of this country were engaged, and its prosecution involved the use of a very large amount of capital. The tariff theretofore had been very high upon imported sugar and the native industry had thereby been encouraged, fostered, and greatly increased. The subject of how to treat this industry was under discussion in Congress, while the tariff act of 1890 was before it, and it finally decided the question by enacting the bounty clause of that act. Before that time the revenue on imported sugar had amounted to nearly $60,000,000 in one year. To put sugar on the free list would reduce the revenue that amount, but at the same time it might, as was urged in Congress, ruin the persons engaged in the industry in this country. So the tariff on sugar was reduced while at the same time a bounty was placed upon its production there of an amount which it was [435] thought would equal the protection the industry had theretofore enjoyed under the tariff. The act was approved by the President and no question of its validity was made by any officer of the government having any duties to perform under it. The bounty provision was by the terms of the act to remain in force for fifteen years. The citizens who were engaged in the manufacture of sugar prepared to comply with the provisions of the law under which the bounty was to be payable.

Under that act and during its existence large



Digitized by Google

sums of money were paid to sugar manufacturers as a bounty, and all manufacturers continued to manufacture in reliance upon its provisions. During these years no officer of the government questioned the validity of the act, and the bounties earned under it were paid without objection or any hint that objection would thereafter be taken while the law was in force. This condition continued for about three years. In the winter, spring, and summer of 1894 it is matter of history that the discussion of the tariff act, which finally became a law on the 28th of August of that year, was continually going on in Congress and through the public prints of the country. Before the passage of the act it was, of course, wholly uncertain as to what its provisions would be, including the question of the bounty for the manufacture of sugar. No man could predict it. No one could have stated whether the bounty would be taken off entirely or materially reduced, or left as it stood by the act of 1890. The whole question of tariff legislation at that time was full of uncertainty. In the meantime the season was approaching when the manufacturer of sugar must decide what to do. He was confronted with the fact that the act of 1890 was still in existence, and under its provisions he must, if he meant to avail himself of the bounties which might be payable under the act, make his application for and obtain a license prior to July 1 of that year. In his application for a license he was compelled to give a general description of the machinery and the methods to be employed by him, with an estimate of the amount of sugar proposed to be produced in the [436]current year, and his *application would have to be accompanied by a bond, with sureties to be approved by the Commissioner of Internal Revenue, conditioned that he would faithfully observe the rules and regulations that would be prescribed for the manufacture and production of sugar. At the same time, if he made application and obtained his license and commenced the manufacture of sugar under the provisions of the act of 1890, he could not be certain that the Congress might not strike out altogether the provision for the payment of any bounty and he be left in such a condition that he could neither manufacture with profit nor abstain from manufacturing without loss. All this by no fault of his; doing his very best, exerting his every energy, sleeplessly vigilant at all points, it was yet impossible for him to decide what to do in this state of uncertainty, or to even guess which would be the road least liable to lead to great pecuniary loss if not to ruin. Already embarked in the business and in this state of uncertainty, the manufacturer finally concludes to go on as if the act were to remain in existence, feeling probably a firm reliance that the government would not treat its citizens unjustly or unfairly by a sudden repeal of the bounty law without making some temporary provision of another nature by which justice would be done him. He applied for a license and commenced his preparations, as the then existing act of 1890 provided that he might do. Making his arrangements for the prospective year and preparing for the manufacture of sugar during that time, the manufacturer is, subsequently, confronted by the act of Congress taking effect August 28, 1894, totally repealing the provisions of the act of 1890 upon the subject of bounties and prohibiting from that time the payment thereof. This was the position of the plaintiff, Mr. Gay, and of large numbers of other people. The Realty Company occupied a still more unfortunate position. That company had manufactured sugar between the 1st of July, 1893, and the 1st of July, 1894, during the whole of which period the act of 1890 was in full force, and after July 1, 1894, the company obtained the warrants, duly certified and authenticated by the local government officers in Louisiana, *for the payment of [437] its claim to bounty, but before actual payment from the Treasury of the United States could be obtained the act of 1894 came into existence with its provision, directing that no further payment of bounty should thereafter be made. Of course, under the circumstances, as set forth in regard to the plaintiffs in the above suits, there can be and is no question made as to the entire good faith of all parties, and the question presented to this court is one of constitutional power simply.

This condition of affairs confronted the Congress which passed the appropriation in question. It is now argued by counsel for the government that Congress had no valid power to recognize these claims against the United States made by the sugar manufacturers, because the provision in regard to the payment of bounties contained in the act of 1890 is unconstitutional.

Upon this assumption it is said that no claim, legal, moral, equitable, or honorable can be created in favor of the sugar manufacturer and against the government, and that where there is neither legal, moral, nor honorable obligation to pay, Congress has no power to appropriate money.

In our opinion it is not correct to say that no moral, equitable, or honorable obligation can attach in favor of persons situated as were the defendants in error here, when the act of 1895 was passed. We think obligations of that nature may arise out of such circumstances. We regard the question of the unconstitutionality of the bounty provisions of the act of 1890 as entirely immaterial to the discussion here. These parties did not at that time (when manufacturing under its provisions) know that the act was unconstitutional; they could not be regarded as failing to do their whole duty because they proceeded with the manufacture of sugar in reliance upon the bounty promised by the government, under an act recognized by the officers of the government as valid, and which they were at all times executing. But it is said that if the act be unconstitutional the law imputes to these parties at all times a knowledge of its invalidity, and that it is not rendered valid by acquiescence in its provisions for any length of time *even by officers of the government hold- [438] ing the highest places therein and who are charged with its execution and believe in its validity. Being unconstitutional, there never was a moment, it is stated, when there was any valid act, and therefore no equities can arise in their favor because of any acts done by them upon the faith of the act, which they



Digitized by Google

were bound to know was wholly void. This reasoning does not exactly fit the case. It is not a question whether any strictly legal rights can arise out of an unconstitutional act. It is a question whether equitable considerations can attach to a claim which, among other grounds, is based upon an act that was supposed by all the officers of the government to be valid and which was repealed only when the whole taxing act of 1890 was subjected to a careful and comprehensive revision. There are occasions when the presumption that every man knows the law must be enforced for the safety of society itself. An individual on trial for a violation of the criminal law will not be heard to allege as a defense that he did not know the act of which he was guilty was criminal. But in such a case as this, knowledge of the invalidity of the law in advance of any authoritative declaration to that effect will not be imputed to those who are acting under its provisions, and receiving the benefits provided by its terms. These parties cannot be held bound, upon the question of equitable or moral consideration, to know what no one else actually knew, and what no one could know prior to the determination, by some judicial tribunal, that the law was unconstitutional. Although it should finally turn out that the law is invalid, and is so pronounced, yet during all the time of its operation, as has been stated, all the officers of the government united in treating it as a valid act. No court had determined to the contrary. It was a question at least admitting of argument. Under such circumstances can it be said that the plaintiffs in these suits and persons situated like them were bound to know this law was and would be pronounced unconstitutional, and that no rights could be acquired under it, and that they would not be justified in proceeding to manufacture sugar according [439] to its provisions? Could no equities *be built up in their behalf (which the government might subsequently recognize) founded upon the belief that the act was valid, and upon the action of the officers of the government under it, because it was, or subsequently might be pronounced to be, unconstitutional?

We are of the opinion that the parties, situated as were the plaintiffs in these actions, acquired claims upon the government of an equitable, moral, or honorary nature. Could Congress legally recognize and pay them although the act of 1890 as to its bounty provisions might be unconstitutional? It is true that in general an unconstitutional act of Congress is the same as if there were no act. That is regarding it in its purely legal aspect. Being in violation of the Constitution, that instrument must govern, and no one can base any legal claim as arising out of such an act. That is a very different principle, however, from that which we think governs in this case. The persons for whose benefit the appropriation contained in the act of 1895 was made are not, in the view we take, asserting the existence of a legal and valid debt against the United States which is at the same time based upon an unconstitutional act of Congress. No such inconsistent and illogical position is taken. They are asserting that by reason of the occurrences which took place before the appropriation, among which was the passage of the act of 1890, they were so placed before Congress, as to authorize that body to recognize the equities of the situation, and to pay their claims which, while they were not of a legal character, were nevertheless of so meritorious and equitable a nature as to authorize the nation through its Congress to appropriate money to pay them.

It is also true that it does not appear from the terms of the act of appropriation that the parties for whose benefit it is made had commenced the business of sugar manufacturing or enlarged their previous manufacture of sugar by reason of the bounties provided under the act of 1890. That was not necessary. There was enough in the circumstances which are before this court and which have been already in part detailed to make it a question for the decision of Congress, *whether upon [440] the whole the persons so situated were equitably entitled to its consideration and to the appropriation asked for. If Congress possessed the power in any event to recognize equities of such a nature, we think it had enough in the case before it to uphold a favorable decision thereof. It is unnecessary to hold here that Congress has power to appropriate the public money in the treasury to any purpose whatever which it may choose to say is in payment of a debt or for purposes of the general welfare. A decision of that question may be postponed until it arises.

There was enough in the case as presented to Congress upon which to base the assertion that there was a moral and honorable claim upon the public treasury which that body had the constitutional right to recognize and pay.

Under the provisions of the Constitution (art. 1, § 8), Congress has power to lay and collect taxes, etc., "to pay the debts" of the United States. Having power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object. What are the debts of the United States within the meaning of this constitutional provision? It is conceded, and indeed it cannot be questioned, that the debts are not limited to those which are evidenced by some written obligation or to those which are otherwise of a strictly legal character. The term "debts" includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a "debt" to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded. To no other branch of the government than Congress could any application be successfully made on the part of the owners of such claims or debts for *the payment thereof. Their recognition [441] depends solely upon Congress, and whether it will recognize claims thus founded must be



Digitized by Google

left to the discretion of that body. Payments to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity. A long list of acts directing payments of the above general character is appended to the brief of one of the counsel for the defendants in error. The acts are referred to, not for the purpose of asserting their validity in all cases, but as evidence of what has been the practice of Congress since the adoption of the Constitution. See also, among other cases in this court, *Emerson* v. *Hall*, 38 U. S. 13 Pet. 409 [10: 223]; *United States* v. *Price*, 116 U. S. 43 [29: 541]; *Williams* v. *Heard*, 140 U. S. 529 [35: 550]. The last-cited case arose under an act of Congress in relation to the Alabama claims.

The claims presented on the part of the United States against Great Britain, arising out of the depredations committed by the Confederate vessel Alabama and other designated Confederate vessels, which had sailed from British ports, upon the commerce and navy of the United States during the war of the rebellion, were by the treaty of Washington, concluded May 8, 1871, between the United States and Great Britain, submitted to a tribunal of arbitration called to meet at Geneva, in Switzerland. Certain indirect claims or war risks, as they were sometimes called, were included by this government in its claims against Great Britain and were presented to the tribunal above named. Great Britain objected to the submission of those claims on the ground that their consideration was not included in the purview of the treaty. This matter was the subject of some difference of opinion among the representatives of the respective governments, and they were not able to agree upon the subject, when the arbitrators, without expressing any opinion upon the point of difference as to the interpretation of the treaty, stated that these indirect or war claims did not constitute, upon principles of interna-
442] tional *law applicable to such cases, a foundation for an award of compensation or computation of damages between the nations, and should, upon such principles, be wholly excluded from all consideration of the tribunal in making its award, even if there were no disagreement between the two governments as to the competency of the tribunal to decide them. This declaration was accepted by the President, and those claims were not insisted upon before the tribunal and were not taken into consideration in making the award. Thus it is seen that there were no legal claims of the holders of those war risks upon the government for the payment to them of any sum whatever. The award made by the tribunal which was paid to the United States by Great Britain was held to have been made to the United States as a nation (*United States* v. *Weld*, 127 U. S. 51 [32: 62]), and the fund itself came into the treasury as any public moneys of the country.

By the act of June 5, 1882 (22 Stat. at L. 98, chap. 195), the court of commissioners of Alabama claims was re established, and the duty was imposed upon it to receive and examine claims which might be presented, putting them into classes, the second of which was "for the payment of premiums for war risks, whether paid to corporations, agents, or individuals for the sailing of any Confederate cruiser." The Heards were owners of claims for "war risks," and Congress finally appropriated money to pay a portion of them. Congress thus recognized as proper to be paid a class of claims which had not been taken into consideration by the Geneva tribunal, but which had been decided by that tribunal to have no basis in international law. It is a case therefore of the recognition by Congress of what is regarded as an equitable claim on the part of the owners of these "war risks" to be paid some portion of their claims, and the validity of the appropriation was never questioned.

Among the latest examples of payments that are not of right or of any legal claim, but which are in the nature of a gratuity depending upon equitable considerations, are the cases just decided by this court of *Blagge* v. *Balch*, *Brooks* v. *Codman*, and *Foote* v. *Woman's*[443 *Board of Missions*, reported as one case in 162 U. S. 439 [40: 1032]. The claims in those cases are what have been known as the French spoliation claims, being based upon depredations of French cruisers upon our commerce prior to July, 1801. An appropriation for their payment was made by Congress in 1891 upon the conditions and to the class of persons named in the act. Questions arose as to the proper interpretation of the act and as to the character of the payments provided for therein. This court held the payments were purposely brought by Congress within the category of payments that are not of right, but which are in the nature of a gratuity and as an act of grace, though founded upon a prior moral or honorable obligation to pay to some one who might be said in some way to represent the original sufferers. No question of the power of Congress to make such appropriation was raised by any one.

The power to provide for claims upon the state founded in equity and justice has also been recognized as existing in the state governments. For example, in *Guilford* v. *Chenango County Supers.* 13 N. Y. 143, it was held by the New York court of appeals that the legislature was not confined in its appropriation of public moneys to sums to be raised by taxation in favor of individuals to cases in which legal demands existed against the state, but that it could recognize claims founded in equity and justice in the largest sense of these terms or in gratitude or in charity.

Of course, the difference between the powers of the state legislatures and that of the Congress of the United States is not lost sight of, but it is believed that in relation to the power to recognize and to pay obligations resting only upon moral considerations or upon the general principles of right and justice, the Federal Congress stands upon a level with the state legislature.

In truth, the general proposition that Congress can direct the payment of debts which



Digitized by Google

have only a strong moral and honorable obligation for their support is not, as we understand it, denied by the learned counsel for the United States; but it is claimed that in these cases no 444] foundation whatever is laid *for its application, because the claim arises out of the unconstitutional provisions of the act giving bounties in 1890. It is impossible, it is said, to build even an equity out of an act of Congress which is utterly void; that as the original act offering and paying bounties was void, it cannot become legal to pay them because of any alleged equities of those who would suffer from their sudden discontinuance as set forth in these cases. For the reasons already given we do not think, under the circumstances surrounding these cases, that the validity of the act of 1895 can be questioned successfully.

In regard to the question whether the facts existing in any given case bring it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government. Upon the general principle, therefore, that the government of the United States through Congress has the right to pay the debts of the United States, and that the claims in these cases are of a nature which that body might rightfully decide to constitute a debt payable by the United States upon considerations of justice and honor, we think the act of Congress making appropriations for the payment of such claims was valid without reference to the question of the validity or invalidity of the original act providing for the payment of bounties to manufacturers of sugar, as contained in the tariff act of 1890. The judgments in these cases are right, irrespective of how that question might be decided, or of any conclusion that might be reached upon other questions suggested at the bar.

*The judgments are therefore affirmed.*

Mr. Justice **White** did not sit in nor take any part in the decision of these cases.

---

MARY A. BLACK, *Plff. in Err.*,
*v.*
ELKHORN MINING COMPANY, Limited.

(See S. C. Reporter's ed. 445-452.)

*Dower in mining claim—interest in mining claim.*

1. A mere locator of a mining claim in the state of Montana and under the laws of the United States, and having only the possessory rights conferred by those laws, has not such an estate in the property as will sustain a claim by his widow for dower therein as against his grantee.
2. The interest in a mining claim, prior to the payment of any money for the granting of a patent for the land, is nothing more than a right to the exclusive possession of the land based upon conditions subsequent, a failure to fulfil which forfeits the locator's interest in the claim; and by the terms of the Federal statute there is no grant of any right to the wife.

[No. 290.]

*Argued April 15, 16, 1896. Decided May 25, 1896.*

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit, to review a judgment of that court affirming a judgment of the United States Circuit Court for the District of Montana, in favor of the defendant, the Elkhorn Mining Company, in an action brought by Mary A. Black, plaintiff, to recover dower in a mining claim. *Affirmed.*

See same case below, 7 U. S. App. 393.

*Messrs.* **Thomas H. Carter**, *Robert B. Smith*, and *Robert L. Word* for plaintiff in error.

*Messrs.* **W. E. Cullen** and *J. K. Toole* for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

This is a writ of error to the circuit court of appeals for the ninth circuit. The action was brought by the plaintiff in error for the purpose of recovering dower in a mining claim in Montana, a fractional interest in which was owned by her husband during coverture. The question is whether a mere locator of a mining claim in the state of Montana and under the laws of the United States, and having only the possessory rights conferred by those laws, has such an estate in the property as will sustain a claim for dower therein. The claim is made by the plaintiff, as widow, under the statute of Montana relating to dower (1 Mont. Laws 1876, chap. 68), which reads as follows: "A widow shall be entitled to a third part of all lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form. Equitable estates shall be subject to a widow's dower, and all real estate of every description contracted for by the husband during his *lifetime, the title[446 to which may be completed after his decease." Another statute of Montana provides that "the word *'land'* or *'lands'* and the words *'real estate'* shall be construed to include lands, tenements, and hereditaments, and all rights thereto and all interests therein." Mont. Comp. Laws, p. 248, § 202.

The case was commenced in the state court and was subsequently removed, on the petition of the defendant, to the United States circuit court for the district of Montana. The facts upon which the question arises appear

NOTE.—*As to in what lands widow is dowable; what seisin of husband is necessary to confer the right,*—see note to Mayburry v. Brien, 10: 646.

*As to dower, how barred,* see note to Barrett v. Failing, 28: 505.

*As to ownership of mines; United States statute as to; right of support of surface,*—see note to United States v. Castillero, 17: 448.



Digitized by Google

in the pleadings and the question was raised by demurrer.

The plaintiff is the widow of one Leander W. Black, who died intestate in July, 1881. During his lifetime, and while the plaintiff was his wife, Black owned an undivided two fifths of a certain mining claim situate in the then territory of Montana, called the A. M. Holter quartz lode. On the 7th of March, 1879, Black sold and conveyed his interest in this claim to one Burton, who took possession thereof, but the plaintiff did not join in that conveyance. The interest conveyed by him to Burton subsequently passed by various mesne conveyances to the defendant in error. On the 29th of October, 1883, an application was made to the proper United States land office by the immediate predecessor in interest of the defendant in error to enter the claim for patent, and such proceedings were had in the matter of the application that on the 19th of November, 1889, a patent therefor was issued by the United States to the applicant covering the whole interest in the mining claim. No protest or adverse claim or objection of any character was made or filed by the plaintiff in error at any stage of such proceedings in the land department. Upon these facts the circuit court held: That the plaintiff had a contingent dower interest in the mining claim, under the Montana statute, although none in the interest the United States retained in such mining lands prior to the locator becoming entitled to a patent therefor; but that by the granting of a patent by the United States to the defendant's predecessor, the estate or interest in the lands called a mining claim ceased to exist and the title to the whole land [447] passed to the *patentee; the mining claim became merged in the paramount title and perished, and no estate was in the defendant out of which plaintiff could ask to have dower assigned.

Upon writ of error sued out by the plaintiff to review the judgment rendered against her by the circuit court, the case was argued before the United States circuit court of appeals for the ninth circuit, where the judgment was affirmed. That court held that the locator, before he made any application to purchase or paid any of the purchase money, had no such estate in the mining claim or against the government or its grantee, as that a right of dower could be founded thereon by virtue of any state legislation, and it therefore affirmed the judgment of the circuit court. 7 U. S. App. 393. The plaintiff brings the case here for a review of the judgment against her in the court of appeals.

The two courts, while not precisely harmonious in their views as to the principles upon which the judgment should be rested, yet agreed in the result that the plaintiff was not entitled to dower. It was stated on the argument here that there is no decision of the supreme court of the state of Montana construing the state statute on the subject of dower, so far as regards this question.

The first question that presents itself is, What is the character of the interest which a locator has in a mining claim under the Revised Statutes of the United States, and prior to the time that he has made any application to purchase or paid any of the purchase money, and where no patent has been issued to him for the land? Also, what interest does he convey by a conveyance purporting to convey it all, but in which his wife does not join?

The Revised Statutes provide that:

"Sec. 2318. In all cases land valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

"Sec. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States."

*Section 2320 states the conditions gov- [448] erning mining claims already located as to length, etc., and also to those located after the 10th of May, 1872. But it is provided that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

Section 2322 gives to locators of all mining claims and their heirs and assigns, as stated therein, "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies" as described in said statute.

It does not by its terms grant any right to the wife of the locator either present or contingent. Being the owner of the lands, the government could of course impose its own terms upon which to grant any right, whether of possession or of purchase.

By § 2324 certain conditions are imposed upon locators, upon a failure to comply with which the claim is rendered open to a relocation the same as if never before located. One of the conditions is the following: "On each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year." The section also contains a provision that "upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditure."

A patent can be obtained under § 2325, which *provides generally for the filing of an [449] application, under oath, for such patent with the register of the proper land office, and also for the publication of that application, and if no adverse claim is filed with the register within the period stated by the statute, it is to be assumed that the applicant is entitled to a patent upon the terms therein mentioned; and it is then provided in the section that "thereafter no



Digitized by Google

objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 provides for the course to be pursued in case an adverse claim is filed, and for the issuing of a patent after a decision by a court of competent jurisdiction of the question as to which of the parties is entitled thereto. *Perego* v. *Dodge*, 163 U. S. 160 [*ante*, 113].

It has been held that this character of interest thus outlined is property, and it is recognized as such in those states of the west whose inhabitants are interested in mines. These claims are subjects of bargain and sale, and constitute, as it is said, very largely the wealth of the Pacific coast states; and the right to sell, transfer, mortgage, and inherit them is recognized by the courts. *Forbes* v. *Gracey*, 94 U. S. 762-766 [24: 313, 314]; *Belk* v. *Meagher*, 104 U. S. 279, 283 [26: 735, 737]; *Manuel* v. *Wulf*, 152 U. S. 505, 510 [38: 532, 534].

Mr. Justice Miller, in the course of his opinion in *Forbes* v. *Gracey*, *supra*, stated: "It is very true that Congress has by statutes permitted individuals to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the government, without exacting or receiving any compensation for those ores and without requiring the miner to buy or pay for the land. It has gone further, and recognized the possessory rights of these miners, as asserted among themselves by rules, which have become laws of the mining districts as regards mining claims, *but in doing this it has not parted with the title to the land except in cases where the land has been sold in accordance with the provisions of the law upon that subject.*"

450] *The interest in a mining claim, prior to the payment of any money for the granting of a patent for the land, is nothing more than a right to the exclusive possession of the land based upon conditions subsequent, a failure to fulfil which forfeits the locator's interest in the claim. We do not think that under the Federal statute the locator takes such an estate in the claim that dower attaches to it.

To sum up as to the character of the right which is granted by the United States to a locator, we find: (1) That no written instrument is necessary to create it. Locating upon the land and continuing yearly to do the work provided for by the statute gives to and continues in the locator the right of possession as stated in the statute. (2) This right, conditional in its character, may be forfeited by the failure of the locator to do the necessary amount of work, or if, being one among several locators, he neglects to pay his share for the work which has been done by his co-owners, his right and interest in the claim may be forfeited to such co-owners under the provisions of the statute. (3) His interest in the claim may also be forfeited by his abandonment, with an intention to renounce his right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had.

An easement in real estate may be abandoned without any writing to that effect and by any act evincing an intention to give up and renounce the same. *Snell* v. *Levitt*, 110 N. Y. 595, and cases cited at page 603 of opinion of Earl, J. [1 L. R. A. 414]; *White* v. *Manhattan R. Co.* 139 N. Y. 19. If the locator remained in possession and failed to do the work provided for by statute his interest would terminate, and it appears to be equally plain that if he actually abandoned the possession, giving up all claim to it, and left the land, that all the right provided by the statute would terminate under such circumstances. If he convey to another a right which may be thus lost, that conveyance would seem to be equivalent to an abandonment by him of all rights under the statute. What *could be better evidence of an in-[451 tention to abandon than an actual conveyance of his right to another, ceasing to do any work thereon, and the giving up of his possession in accordance with his conveyance. The abandonment by simply leaving the land is no more efficacious than conveying his rights and also leaving possession without any intention of returning. His simple abandonment would leave no right remaining in his wife to claim dower upon his death in the interest thus abandoned. If he add a conveyance as a clearer evidence of abandonment, her alleged right to dower is not strengthened.

By the terms of the statute there is no grant of any right to the wife. It is granted to the locator and to his heirs and assigns, and there is no condition that hampers the right to convey by encumbering it with an inchoate right of dower. And until he does some act towards paying the purchase money he obtains no vested right of purchase or to claim a patent. *Benson Min. & Smelt. Co.* v. *Alta Min. & Smelt. Co.* 145 U. S. 428 [36: 762]; *Shepley* v. *Cowan*, 91 U. S. 330 [23: 424].

The last-cited case arose under the statute in relation to a settler seeking to acquire the right of pre-emption in certain lands, yet the same principle applies to a case of one who had located land and is in possession thereof, but has paid nothing on account of the lands and has made no effort to purchase the same. An abandonment, therefore, by the locator surrenders merely a right to the exclusive possession, as provided for in the statute, which exclusive possession remains during the pleasure of the government. An abandonment of it by leaving it, not intending to return, or a conveyance of his interest to a third party, would seem equally to terminate that interest and effectually to bar all possible future claim, if any ever existed, on the part of his wife to dower in such premises.

By conveying his interest as locator he not only ceases to do any work on the claim as provided for by statute, but he puts another in possession with all his rights to do the work called for by it, and gives him the right to do all that he could have done towards purchasing the land itself. When the grantee does the work and then obtains a patent, it ought not to *be burdened with any right of dower in[452 the widow of his grantor, who had by his conveyance abandoned all his rights and given up the possession upon which they were based. The statute, by expressly providing that the locator and his heirs and assigns should have the rights, clearly meant to provide for a con-



Digitized by Google

veyance thereof to the grantee to the same extent that they were possessed by the grantor.

We are of opinion, therefore, that by the conveyance of Mrs. Black's husband to his grantee of all his interest as locator in the mining claim in question he abandoned all his right and interest in the claim to his grantee, and that interest which thus passed to his grantee was not subject to any possible encumbrance of the wife by way of dower in the premises. The interest granted by the United States was of such a nature that a conveyance of Black's right to the possession terminated it to the same extent as if it had been forfeited by nonperformance of the conditions provided for in the statute, and hence the wife has no claim for dower in the premises.

*The judgment is affirmed.*

---

## W. J. FAUST, *Plf. in Err.*, v. UNITED STATES.

(See S. C. Reporter's ed. 452-456.)

*Indictment, when not defective—transcript of postmaster's account—evidence—allowing witness to be recalled—embezzlement by assistant postmaster.*

1. An indictment is not defective because it spells the name of defendant "Faust," instead of "Foust."
2. A certified transcript of the account of a postmaster from the office of the Auditor of the Treasury at Washington is admissible on trial of an indictment of his assistant postmaster for embezzling money order funds.
3. Evidence that another person had committed another and different offense, and had been indicted and convicted therefor, is not admissible on a prosecution for crime.
4. Allowing a witness to be recalled to change statements made on his cross-examination is in the discretion of the court.
5. Want of consent of a postmaster to embezzlement of money order funds by his assistant is not necessary to make the latter liable for the crime.

[No. 637.]

*Submitted January 9, 1896. Decided May 25, 1896.*

IN ERROR to the District Court of the United States for the Northern District of Texas to review a judgment of that court convicting W. J. Faust of the crime of feloniously embezzling certain money-order funds of the United States. *Affirmed.*

Statement by Mr. Justice **Shiras**:

In the district court of the United States for the northern district of Texas the defendant, plaintiff in error, was indicted, December 21, 1893, and subsequently tried, for feloniously embezzling certain money order funds of the United States. On April 18, 1895, he was found guilty under the 2d count of the indictment, which alleged that on April 6, 1893, he was assistant postmaster at Thornton, in the county of Limestone, within the district aforesaid, and as such assistant postmaster had in his possession and control money order funds to the amount of $400, and did unlawfully and feloniously embezzle and convert the same to his own use. He was sentenced to imprisonment in the penitentiary, and thereupon he applied for and obtained a writ of error from this court.

On the trial the defendant entered a plea of misnomer, as follows:

"And now comes W. J. Foust in his proper person, who is indicted by the name of W. J. Faust, and, having heard the said indictment read, says that he was baptized in the name of W. J. Foust, and by that name always since his baptism hereto has been called and known, and by no other name has he ever been known or called, and this he, the said W. J. Foust, is ready to verify. Wherefore he prays judgment of the said indictment, and that the same may be quashed."

The court overruled this plea, and the defendant took an exception. At the suggestion of the attorney for the United States the de- [454 fendant was requested to suggest his true and proper name, in order that it might be inserted in the indictment and entered on the docket. This the defendant declined to do.

Exceptions were also taken by the defendant to the rejection of certain evidence offered on his behalf, and to the admission of certain evidence introduced by the government; and to the court's refusal to charge the jury as the defendant requested, and to certain portions of the charge which were given.

*Messrs.* **A. H. Garland, R. C. Garland,** *Pearre & Boynton,* and *Richard H. Harrison* for plaintiff in error.

*Mr.* **Edward B. Whitney,** Assistant Attorney General, for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

In the indictment the defendant was described as one "W. J. Faust," whose Christian name was to the grand jurors unknown. There was filed a plea of misnomer, in which the defendant averred that he had been baptized in the name of "W. J. Foust," and that he had always been known and called by that name, and prayed that the indictment might be quashed. This plea was overruled, as was likewise a motion to quash the indictment on the ground that defendant's name was W. J. Foust, and not W. J. Faust, as it appeared in the indictment.

In this we see no error. A name need not be correctly spelled in an indictment, if substantially the same sound is preserved. The following are cases in which the variance between the names as alleged and as proved was at least as great as in the present, and in which it was held that the variance was not material: *Bubb* and *Bobb*, 39 Pa. 429; *Heckman* and

NOTE.—*Omission of or error in middle name or initial, not material or a misnomer; idem sonans; "senior" or "junior" forms no part of name,*—see notes to Kone v. Meade, 7: 561, and Dolton v. Cain, 20: 880.

*As to sufficiency of an initial for a name,* see note to Keene v. Meade, 7: 561.



Digitized by Google

*Hackman*, 88 Pa. 120; *Hutson* and *Hudson*, 7 Mo. 142; *Shaffer* and *Shafer*, 29 Kan. 337; *Woolley* and *Wolley*, 21 Ark. 462; *Penryn* and *Pennyrine*, 14 Md. 121.

455]*The second assignment alleges error in the action of the court in admitting in evidence, on the part of the government, a certified transcript from the office of the Auditor of the Treasury at Washington, showing account of J. E. Foust, postmaster at Thornton, Texas, from October 10, 1891, to May 20, 1893, showing balance due of $744.18.

This was objected to, because said transcript did not purport to be a transcript from the money order account books of the Postoffice Department of the account of W. J. Foust, the defendant, and could not tend to prove any issue in the case against W. J. Foust.

The indictment was against W. J. Faust as assistant postmaster, and it was proved that he was the son and assistant of the principal postmaster, and as such had the sole management and possession of the money order business and money order funds during the entire term. It is scarcely necessary to say that there is no merit in this assignment of error.

The substance of the third assignment is the refusal of the court to admit evidence tending to show that another person than the defendant, at a time anterior to the time of the commission of the offense charged, had committed another and different offense than the one herein charged, and that said other person had been indicted and convicted thereof. This evidence was properly rejected as irrelevant and immaterial.

The fourth assignment complains of the refusal of the trial court to permit a witness who had been examined and cross-examined to be recalled in order to make some change in the statements made by him on cross-examination. This was plainly a matter within the discretion of the court below.

In the fifth assignment the charge as a whole is objected to as misleading, and also because it took from the jury the vital point at issue in the case.

Our reading of the charge does not support either of these objections.

We perceive no misdirection nor any statements calculated to confuse the jury. The jury were explicitly told that they were the judges of what the evidence was and of its weight.

The sixth assignment is based on the refusal 456]of the court to *charge the jury that the embezzlement must be proved to have taken place without the consent of the defendant's principal or employer. It was claimed that as the indictment failed to charge that the defendant embezzled any money without the consent of his principal or employer, and as the postmaster, J. E. Foust, employed the defendant, the defendant's responsibility was to the postmaster, and not to the government. We see no merit in this assignment.

We have examined the remaining assignments and have found nothing therein set up of which the defendant has just reason to complain, and

*The judgment of the court below is accordingly affirmed.*

GEORGE A. EDDY and H. C. CROSS, as Receivers of the Missouri, Kansas, & Texas Railway,

*v.*

BEN. F. LAFAYETTE ET AL.

(See S. C. Reporter's ed. 456, 457.)

*Service of summons—presumption of wrong—negligence of railway company—instructions.*

1. Service of a summons on an agent of the receivers of a railroad appointed by Federal courts is sufficient if made as required for service on an agent of a railroad company.
2. It will not be presumed that persons in possession of hay were guilty of a trespass or of violating a criminal statute in cutting it if it does not appear that it could not have been cut lawfully.
3. Negligence of a railway company in allowing combustible materials to accumulate upon its track and right of way, which are liable to take fire from sparks, is a question for the jury.
4. Instructions that the jury may allow interest are not ground for reversal if they did not allow it.

[No. 130.]

*Submitted March 9, 1896. Decided May 25, 1896.*

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that county affirming the judgment of the United States Court for the Indian Territory in favor of the plaintiffs, Ben. F. Lafayette *et al.*, against the defendants, George A. Eddy *et al.*, receivers of the Missouri, Kansas, & Texas Railway, for the amount of certain quantities of hay burned up and destroyed by sparks and coals of fire emitted from an engine running upon said railroad. *Affirmed.*

See same case below, 4 U. S. App. 247.

Statement by Mr. Justice **Shiras:**

The complaint in this case was filed in the United States court for the Indian territory on March 17, 1890, and on the same day the clerk of that court issued the following summons:

United States of America,
Indian Territory.

The President of the United States of America to the marshal of the Indian Territory:

You are commanded to summon George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas, & Texas Railway, a corporation, to answer, on the 1st day of the next April term of the United States court for the Indian territory, being the 7th day of April, A. D. 1890, a complaint filed against them in said court by Sallie M. Halley and Ben. F. Lafayette, and warn them that upon their failure to answer the complaint will be taken for con-

NOTE.—*As to liability of railroad company for fires set by it along its line; what admissible to prove negligence by company.*—see note to Grand Trunk R. Co. v. Richardson, 23: 357.

*That appearance cures all defects in service of process or its nonservice, except want of jurisdiction of subject-matter; service of summons by party or other improper person is but a mere irregularity.*—see note to Knox v. Summers, 2: 510.



Digitized by Google

fessed; and will make due return of the summons on the first day of the next April term of said court.

Witness the honorable James M. Shackel-
458] ford, judge of *said court, and the seal thereof, at Muscogee, Indian territory, this 17th day of March, A. D. 1890.

Wm. Nelson, Clerk.

The summons bears the following return:

Received this summons at 2 P. M., March 17, 1890, and I certify to having served said summons by leaving a copy thereof with J. W. Williams, the agent of the within-named defendants, at Muscogee, this 17th day of March, 1890.

T. B. Needles, Marshall.

The complaint began as follows: "The plaintiff, Ben. F. Lafayette, white, and residing in the Indian territory, and plaintiff, Sallie M. Hailey, an Indian, and residing in the Indian territory, allege that the defendants George A Eddy and H. C. Cross, white men, were at the time hereinafter mentioned, and are now, the receivers of the Missouri, Kansas, & Texas Railway, a duly incorporated railroad company doing business in the Indian territory, and operating its railroad through the Indian territory under and by virtue of the laws of the United States, and that said George A. Eddy and H. C. Cross were on the — day of — duly appointed as receivers of said railroad by the circuit court of the United States for the eighth judicial district." It proceeded to allege that the said railroad was located near the premises of the plaintiff, Sallie M. Hailey, in the Indian territory; that the defendants had negligently permitted large quantities of dry grass and weeds to accumulate on the railroad right of way, which was 100 feet in width on either side of the track; that the defendants, on August 20, 1889, were operating and running over the road an engine, No. 63, which was not supplied with the best appliances for arresting sparks of fire, and that while using the engine upon the road near the premises of the plaintiff, Sallie M. Hailey, they negligently permitted it to cast sparks and coals of fire into the dry grass on the said right of way, thus starting a fire which spread over the land of the said plaintiff, and
459] there destroyed large quantities of *hay, which she and the plaintiff, Ben. F. Lafayette, had jointly put up and cured, and in the proceeds of the sale of which the plaintiffs were in certain proportions to share. It was averred that the amount of the hay so destroyed was 666⅔ tons, of the value of $2,666, for which sums the plaintiffs asked judgment.

On May 6, 1890, the defendants entered a special appearance in the case, stating that they appeared "specially and only for the purposes of this motion and for no other purpose," and moved the court to quash both the said summons and the said return, upon the grounds that the summons was improperly and illegally issued, did not show the nature of the complaint filed, and did not set forth a cause of action; that the return was untrue; that J. W. Williams, who was designated in the return as "the agent of the within-named defendants," was not on March 17, 1890, such agent; that J. W. Williams was not on that day such a person as could legally have been served with process against the said receivers; and that the return and service were made improperly. In support of this motion the defendants proved that they were receivers of the said Missouri, Kansas, & Texas Railway, duly appointed as such by the circuit court of the United States for the district of Kansas, and by the circuit court of the United States for the western district of Arkansas, prior to the institution of this suit; that as such they were engaged in operating the said railway previously to and at the time of the service of the summons upon J. W. Williams; and that J. W. Williams was, on March 17, 1890, station agent for the said receivers at Muscogee, Indian territory. The defendants filed at the same time the affidavit of J. W. Williams to the effect that since the month of June, 1887, he had been station agent for the said receivers, but that he had never been the agent of "the Missouri, Kansas, & Texas Railway, a corporation" within the Indian territory, and was not such agent on March 17, 1890.

The court, having heard and considered the motion, overruled the same, to which action the defendants excepted. Afterwards, on May 19, 1890, they filed their answer, *denying [460 therein all the essential allegations of the complaint, but protesting that they had not been served with process, and asserting that the court had not acquired jurisdiction over them in the case.

A trial was duly had before the court and a jury. After all the evidence on the part of the plaintiffs had been introduced, the defendants moved to have the same stricken out for the reason that it did not show that the engine which caused the alleged damage was engine No. 63, as alleged in the complaint. The motion was overruled, and the court granted the plaintiffs leave to amend their complaint by striking out of the same the words and figures "No. 63." The defendants excepted, and then moved for a continuance of the case in order to give them time to meet the allegations of the complaint as amended. This motion also was overruled, to which action the defendants excepted.

At the close of all the testimony the defendants moved the court to direct the jury to return a verdict in their favor. The court overruled the motion, and the defendants excepted. They then requested the court to give the jury certain instructions, among which was the following:

"The court instructs the jury that if you find from the evidence in this case that the hay claimed by the plaintiffs to have been burned by sparks cast out from the fire of one of defendants' engines was cut from the public domain or open lands of the Creek nation, and not upon land owned or possessed by plaintiffs or either or both of them, and that said hay was so cut upon the said public domain or open lands of the Creek nation, without the consent of the said Creek nation or its officers or agents, that then the plaintiffs cannot recover in this action."

The court refused to give this instruction, to



Digitized by Google

which refusal the defendants excepted. Among the instructions which the court gave, and to the giving of which the defendants excepted, were the following:

"10. The court further instructs the jury that evidence of a railway company allowing combustible materials to accumulate upon its track and right of way which is liable to take 461] *fire from sparks escaping from passing engines and communicate it to adjacent property, is sufficient to warrant the jury in imputing negligence to the company.

"12. It is the duty of a railroad company to keep its right of way clear of combustible materials, and failure to do so is a circumstance showing negligence.

"13. The court further instructs the jury that if they shall find for the plaintiffs, then the measure of damages is the market value of the hay when burned, together with interest at 6 per cent per annum from the date of the destruction of the hay."

On June 27, 1891, the jury rendered a verdict for the plaintiffs for the sum of $2,664, with interest thereon at 6 per cent, and on July 10, 1891, judgment was entered in favor of the plaintiffs in the said amount, with 6 per cent interest on the same from date until paid. The defendants took the case upon writ of error to the United States court of appeals for the eighth circuit, where, on February 15, 1892, the said judgment was affirmed. They then made a motion for a rehearing in that court, and the same having been denied, they sued out a writ of error bringing the case here.

*Messrs.* **James Hagerman, Clifford L. Jackson,** and **Joseph M. Bryson,** for plaintiff in error:

The petition does not allege facts constituting a cause of action.

It fails to allege that fire was negligently permitted to spread from right of way to plaintiff's hay.

*Louisville, N. A. & C. R. Co.* v. *Ehlert*, 87 Ind. 339; *Indiana, B. & W. R. Co.* v. *Adamson*, 90 Ind. 60; *Pittsburg, C. & St. L. R. Co.* v. *Hixon*, 79 Ill. 111.

The court erred in not directing the jury at close of the evidence to return a verdict for defendant; and further erred in charging the jury that evidence simply showing that the fire originated a short time after a train passed and that sparks were seen escaping from the engine of such train was prima facie proof that the receivers had negligently set out the fire and that the burden of disproving their having negligently set out the fire was thereupon cast upon the receivers.

Pierce, Railroads, 437; Redf. Railway Law, 3d ed. 454; *Flynn* v. *San Francisco & S. J. R. Co.* 40 Cal. 14, 6 Am. Rep. 595; *Rood* v. *New York & E. R. Co.* 18 Barb. 80; *Philadelphia & R. R. Co.* v. *Yeiser*, 8 Pa. 366; *Frankford & B. Turnp. Co.* v. *Philadelphia & T. R. Co.* 54 Pa. 345; *Jefferis* v. *Philadelphia, W. & B. R. Co.* 3 Houst. (Del.) 447; *Baltimore & S. R. Co.* v. *Woodruff*, 4 Md. 242, 59 Am. Dec. 72; *Burroughs* v. *Housatonic R. Co.* 15 Conn. 124, 38 Am. Dec. 64; *Thirteenth & F. St. Pass. R. Co.* v. *Boudrou*, 93 Pa. 475, 37 Am. Rep. 707; *Sheldon* v. *Hudson River R. Co.* 14 N. Y. 218, 67 Am. Dec. 155; *Vaughan* v. *Taff Vale R. Co.* 5 Hurlst. & N. 679; *Hammersmith & C. R. Co.* v. *Brand*, L. R. 4 H. L. 171, 201, 202.

No presumption of negligence arises upon the plaintiff simply showing that fire was set out by an engine, and the plaintiff must go further and show some act of negligence in the construction or operation of the engine.

*Gandy* v. *Chicago & N. W. R. Co.* 30 Iowa, 419, 6 Am. Rep. 682; *Sheldon* v. *Hudson River R. Co.* 14 N. Y. 218, 67 Am. Dec. 155; *Macon & W. R. Co.* v. *McConnell*, 27 Ga. 481; *Hull* v. *Sacramento V. R. Co.* 14 Cal. 387, 73 Am. Dec. 656; *Philadelphia & R. R. Co.* v. *Yerger*, 78 Pa. 121; *Morris & E. R. Co.* v. *State*, 36 N. J. L. 553; *Indianapolis & C. R. Co.* v. *Paramore*, 31 Ind. 143; *Kansas P. R. Co.* v. *Butts*, 7 Kan. 308; *Burroughs* v. *Housatonic R. Co.* 15 Conn. 127, 38 Am. Dec. 64; *Jeffries* v. *Philadelphia, W. & B. R. Co.* 3 Houst. (Del.) 447; *Ruffner* v. *Cincinnati, H. & D. R. Co.* 34 Ohio St. 96; *Ellis* v. *Portsmouth & R. R. Co.* 2 Ired. L. 138; *Jacksonville, T. & K. W. R. Co.* v. *Peninsular Land, T. & Mfg. Co.* 27 Fla. 1, 157, 17 L. R. A. 33; *Henderson* v. *Philadelphia & R. R. Co.* 141 Pa. 461, 16 L. R. A. 299; *Edrington* v. *Louisville, N. O. & T. R. Co.* 41 La. Ann. 96; *Lowney* v. *New Brunswick R. Co.* 78 Me. 479; *Lyndsay* v. *Connecticut & P. R. R. Co.* 27 Vt. 643.

The mere setting out a fire does not raise a presumption of negligence.

*Parrott* v. *Wells* ("*Nitro-Glycerine Case*") 82 U. S. 15 Wall. 537 (21: 211).

The trial court erred in charging the jury that the action of the receivers in allowing their right of way and track to be and remain in condition shown by testimony was sufficient to warrant the jury in imputing negligence to the company, and showed negligence.

*White* v. *Missouri P. R. Co.* 31 Kan. 280; *Gibbons* v. *Wisconsin V. R. Co.* 58 Wis. 335; *Benson* v. *Gulf, C. & S. F. R. Co.* 69 Tex. 407; *Kesee* v. *Chicago & N. W. R. Co.* 30 Iowa, 80, 6 Am. Rep. 643; *Bass* v. *Chicago, B. & Q. R. Co.* 28 Ill. 90, 81 Am. Dec. 254; *Delaware, L. & W. R. Co.* v. *Salmon*, 39 N. J. L. 299, 23 Am. Rep. 214; *Flynn* v. *San Francisco & S. J. R. Co.* 40 Cal. 14, 6 Am. Rep. 595; *Perry* v. *Southern P. R. Co.* 50 Cal. 578; *Troxler* v. *Richmond & D. R. Co.* 74 N. C. 377; *Snyder* v. *Pittsburg, C. & St. L. R. Co.* 11 W. Va. 14; *Jones* v. *Michigan C. R. Co.* 59 Mich. 437.

*Mr.* **William T. Hutchings,** for defendants in error:

The complaint states a good cause of action.

If the complaint is defective in the particular urged, it was cured by the verdict.

*Lassiter* v. *Jackman*, 88 Ind. 118.

But the complaint charges actionable negligence against the defendants. The only cases holding the contrary, even when the question was raised in the lower court, are those from Indiana cited in brief of plaintiffs in error.

Those cases are discussed and distinguished in *Haugen* v. *Chicago, M. & St. P. R. Co.* 3 S. D. 394.

Similar allegations in complaints have been held good in *Black* v. *Aberdeen & W. E. R. Co.* 115 N. C. 667; *Louisville, N. A. & C. R. Co.* v. *Hanmann*, 87 Ind. 422.

The direction in which the engine was going, the character of the train it pulled, and its number are not material allegations.

*Hoskison* v. *Central Vermont R. Co.* 66 Vt.



Digitized by Google

618; *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454 (23: 356); *Pittsburg, C. & St. L. R. Co.* v *Noel*, 77 Ind. 110; 8 Am. & Eng. Enc. Law, 7, 9.

It was the duty of the receivers to keep their right of way and track clear of combustible materials.

The instruction to the jury that evidence of the railway company allowing combustible materials to accumulate upon its track and right of way, which is liable to take fire from sparks escaping from passing engines and communicate it to adjacent property, is sufficient to warrant the jury's imputing negligence to the company, correctly states the law.

*Pittsburg, C. & St. L. R. Co.* v. *Jones*, 86 Ind. 496, 44 Am. Rep. 334; *Tilley* v. *St. Louis & S. F. R. Co.* 49 Ark. 536; *Black* v. *Aberdeen & W. E. R. Co.* 115 N. C. 667.

Mr. Justice **Shiras** delivered the opinion of the court:

This was an action brought in the United States court in the Indian territory to recover for damages caused to the property of the plaintiffs by the negligent management of the railroad of the Missouri, Kansas, & Texas Railway Company, a corporation created by the laws of the United States, and, at the time of the accident, in the control and management of George A. Eddy and Harrison C. Cross, receivers, who had been appointed such by the United States circuit court for the district of Kansas and by the United States circuit court [462] for *the district of Arkansas. Both of those districts and the Indian territory constitute a portion of the eighth judicial circuit of the United States, and the railroad in question traverses the states of Arkansas, Kansas, and the Indian territory.

The first question presented is whether the trial court acquired jurisdiction to try the case against Eddy and Cross, receivers of the Missouri, Kansas, & Texas Railway, by virtue of the summons served on one Williams as agent of said receivers in charge of their station at Muscogee in the Indian territory.

The return of the marshal was that he had served the summons by leaving a copy thereof with J. W. Williams, the agent of the defendants at Muscogee, on March 17, 1890.

On April 8, 1890, the defendants entered a special appearance by attorney, and moved to quash the return of the marshal, for four reasons: "First, because on the day alleged in said return as the day of the service of said summons, to wit, March 17, 1890, J. W. Williams, styled in the marshal's return on said writ of summons as the agent of the within-named defendants, was not such agent; second, because said J. W. Williams, on the 17th day of March, 1890, was not such a person upon whom process against the said George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas, & Texas Railway, could legally have been served; third, because said return was untrue; fourth, because said service and said return were illegally and improperly made."

On May 6, 1890, the defendants, appearing specially, withdrew the motion theretofore filed by them to quash the return of the writ of summons, and, again appearing specially, and only for the purposes of a motion to quash writ of summons and return thereon, and, by leave of court, filed such motion, and in support thereof filed an affidavit of J. W. Williams and a certified copy of the order appointing receivers. The reasons filed in support of the second motion to quash were as follows: "First, because said writ of summons is improperly and illegally issued; second, because the writ of summons in this cause does not show the nature of the complaint filed therein; third, because no cause of action is set forth in the *writ of summons issued [463 herein; fourth, because said return on said writ is untrue; fifth, because said J. W. Williams, who is designated in said return as the agent of George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas, & Texas Railway, a corporation, was not on the day alleged in said return as the day of the service of said summons, to wit, said 17th day of March, 1890, such agent; sixth, because said J. W. Williams was not on said 17th day of March, 1890, such a person upon whom process against George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas, & Texas Railway, could legally have been served; seventh, because said return and such service were illegally and improperly made."

The affidavit of J. W. Williams was to the effect that, at no time, was he ever the agent of the Missouri, Kansas, & Texas Railway, a corporation within the Indian territory, but that since the month of June, 1887, he has been station agent for George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas, & Texas Railway Company, and has been such agent at said town of Muscogee in the Indian territory.

It therefore appears by the affidavit of J. W. Williams that the allegation, in the reasons filed, that said Williams was *not* the agent of the said receivers, was untrue, and that Williams *was* their agent at the time and place named in the return.

So far, then, as the objection to the service and return of the summons depended on the allegation that Williams was not the agent of the receivers, it goes for naught, but the question remains whether he was such a person or agent on whom process against the receivers could be validly served.

In and by the act of Congress of May 2, 1890 (26 Stat. at L. p. 94, § 31), it was provided that certain general laws of the state of Arkansas, in force at the close of the session of the general assembly of that state of 1883, as published in 1884 in the volume known as Mansfield's Digest of the Statutes of Arkansas, should be extended and put in force in the Indian territory until Congress should otherwise provide; and among those laws, so extended, were those relating to *questions of prac-[464 tice and procedure; and it is alleged, in the opinion of the circuit court of appeals in the present case, that it is conceded that under the laws of the state of Arkansas, which have been made applicable to the Indian territory, such service as was had in the present case is sufficient to confer jurisdiction, when the defendant is a railway company or a foreign corporation.

The trial court and also the circuit court of



Digitized by Google

appeals were of opinion that the 3d section of the judiciary act of March 3, 1887 (24 Stat. at L. 554), authorizing suits to be brought against receivers of railroads, without special leave of the court by which they were appointed, was intended to place receivers upon the same plane with railroad companies, both as respects their liability to be sued for acts done while operating a railroad and as respects the mode of service. We concur in that view and in the conclusion reached, that the service in the present case, on an agent of the receivers, was sufficient to bring them into court in a suit arising within the Indian territory.

This conclusion renders it unnecessary to consider the soundness of the further view of the circuit court of appeals that the receivers waived their objections to the service of the summons by pleading to the merits and going to trial, although having excepted to the rulings of the trial court sustaining the regularity of the service. Such is certainly not the general rule. The court below thought the rule in Arkansas is that mere defects in the service of process may be waived by appearance after a motion has been overruled to set aside the service in cases where the court has jurisdiction of the subject-matter of the controversy and the defect in the service only impairs the jurisdiction over the person of the defendant, citing several decisions of the supreme court of Arkansas to that effect. As already said, however, we do not deem it necessary for us to consider that ground of the decision upholding the validity of the service in the present case.

Another objection argued in the court below and in this to the summons was that it did not sufficiently set forth the nature of the complaint. 465] *The circuit court and the circuit court of appeals were of opinion that the terms of the summons were in accordance with the provisions of Mansfield's Dig. Ark. Stat. § 4868, under which this summons was issued, and we see no reason why we should not agree with them.

Coming to the case on its merits we are met by the contention that the plaintiffs failed to show such title to the hay destroyed as entitled them to recover its value. The title to the land from which this hay was cut is in the Creek nation, and it is claimed that the nation alone is in possession of the land and entitled to maintain an action for trespass or injury to the same. The view taken of this contention by the circuit court of appeals was that the record failed to show whether the hay was cut on the common pasturage of the nation or on lands at the time occupied and held by Mrs. Hailey individually, according to the customs and usages of the nation, and that court declined to presume that either of the plaintiffs were guilty of a trespass, much less that in cutting the hay either of them violated a criminal statute.

The latter observation, as to a violation of a criminal statute, was occasioned by the putting in evidence by the defendants of a statute of the Creek nation, as contained in the compilation of their laws of March 1, 1890, which was in force at the time the hay in question was cut and burned, and was in the following words:

"No noncitizen licensed trader, who has not intermarried with a citizen of this nation, shall be allowed to enclose more than 2 acres of our own public domain, nor be allowed to cut and put up hay from one common pasturage, and any noncitizen, not intermarried, licensed trader found cutting and putting up hay from the common pasturage shall be fined $10 per acre for each acre so cut and put up."

And as it was shown that B. F. Lafayette, one of the plaintiffs, was a noncitizen licensed trader, not intermarried with a citizen of the nation, it was urged that he, as a trespasser, could not recover for the hay. But the evidence for the plaintiff tended to show that the hay in question was cut and put up for Mrs. Sarah M. Hailey, a citizen of the *Creek [466 nation, who had contracted with Lafayette to cut and put the hay, and that Lafayette was to have an interest in the proceeds of the hay, in consideration of his services.

There was no evidence tending to show that Mrs. Hailey, in procuring the hay in question to be cut and put up, was acting illegally or was in any wise a trespasser. And the statute above quoted implies that citizens of the nation might cut hay without limit from the common pasturage, as it forbids only noncitizen traders from cutting hay from the common pasturage; and we agree with the court below that there is nothing in the present record that would authorize us to say that the hay was gathered on the public domain without license. No law of the nation was shown forbidding Mrs. Hailey from cutting hay on land which she occupied in common with other members of the Creek nation.

The trial court charged the jury as follows: "The court further instructs the jury that evidence showing that the fire originated from sparks of a passing engine is prima facie proof of negligence, and the burden shifts on the railway company to show that it was guilty of no negligence," and it is assigned for error in this court that the circuit court of appeals erred in not correcting this error. It is sufficient to say that no exception was taken to this part of the charge in the trial court, nor was it assigned for error in the circuit court of appeals.

Exception was taken in the trial court to the following part of the charge: "The court further instructs the jury that evidence of a railroad company allowing combustible materials to accumulate upon its track and right of way which is liable to take fire from sparks escaping from passing engines and communicate it to adjacent property, is sufficient to warrant the jury in imputing negligence to the company;" and that instruction was assigned for error in the circuit court of appeals whose refusal to hold the same to have been erroneous is complained of here.

We think that part of the charge was plainly correct, and no error was committed by the circuit court of appeals in sustaining it. As we read the instructions given by the trial court, *the jury were not told that the action [467 of the railway company in allowing combustible materials to accumulate upon its track and right of way, which was liable to take fire from sparks and communicate it to adjacent property, was negligence of itself, but was a fact from which, in the circumstances shown, the jury might infer negligence.



Digitized by Google

Nor do we find any error in the treatment given by the circuit court of appeals to the several assignments respecting the trial court's instructions on the subject of the respective duties of the railroad company and of the plaintiffs.

The court instructed the jury that the measure of damages was the market value of the hay burned together with interest at 6 per cent per annum from the date of the destruction of the hay, and to this instruction exception was duly taken.

Undoubtedly the rule, in cases of tort, is to leave the question of interest as damages to the discretion of the jury. The circuit court of appeals, while saying that the better, though not the invariable, practice is to leave the allowance of interest in cases of tort, to the discretion of the jury, regarded it as quite evident from the record that, in point of fact, the jury did not allow interest, but based their verdict entirely upon the number of tons of hay destroyed at the market value per ton. Regarding the error, if such it was, as immaterial, the circuit court of appeals declined to disturb the judgment of the trial court, and we acquiesce in that disposition of the question.

*The judgment of the circuit court of appeals is affirmed.*

---

## 468] GEORGE W. GRAYSON ET AL., *Appts.*, v. GEORGE LYNCH ET AL.

(See S. C. Reporter's ed. 468-485.)

*Laws of New Mexico—trial by court without a jury—variance—allowing cattle to communicate disease — place — variances, when not misleading — expert testimony — evidence — symptoms of disease—districts infected—contributory negligence—duty of owners of cattle.*

1. The laws of the territory of New Mexico do not require this court, in passing upon cases tried in a court of that territory without a jury, to retry the case upon the law and facts as though it were an appeal in equity.

2. The statute of New Mexico requiring that where the cause is tried by the court without a jury the supreme court shall review it in the same manner and to the same extent as if it had been tried by a jury, does not take the case out of the general rule in cases where a jury is waived, that the appellate court will not order a new trial for the admission of incompetent evidence if there be other competent evidence to support its decision.

3. A variance between an allegation in a declaration that cattle communicated "Texas cattle fever," and a finding of the court that the disease was "Texas fever," is immaterial where it appears that the same disease was known by these names and others.

4. A variance between an allegation that Texas fever is a "contagious" disease of cattle and a finding that it is an "infectious" disease, where the words were not used in any technical sense, and where the question is merely as to liability for negligence in allowing cattle to communicate the disease, and no medical question is involved as to the strict use of those terms,—is immaterial.

5. A variance between an allegation that cattle communicated Texas fever on plaintiff's range, and a finding by the court that it could not be determined whether it was on that range or on defendant's range or in the road, is immaterial where the cattle were indiscriminately mixed on both ranges, which were unfenced.

6. Variances will not be held material on the ground that they were misleading, where no question as to them was raised at the trial court or in the court to which appeal was first taken.

7. Statements that a certain cattle disease is ordinarily called "Texas fever," made by witnesses who have testified fully to the symptoms of the disease, are not improper, although the witnesses are not experts.

8. An objection to the admission of a certain document, tending to show title to lands in the plaintiffs, is untenable, when there was no finding of title in them, and their rights as against the defendants did not even depend upon the lawfulness of their possession.

9. Men employed by the Department of Agriculture to investigate diseases of animals, and who have investigated Texas fever, may testify as experts to the nature and symptoms of that disease.

10. The fact that certain districts of Texas are infected with Texas fever may be stated by experts familiar with that disease who knew the districts where the disease prevailed, though they have never visited those districts in person.

11. Failure of the owner of cattle to prevent them from being intermingled with those of other owners whose cattle are infected with Texas fever is not so clearly contributory negligence, where the cattle ranges are unfenced, that it must be so held on appeal where the trial court has held to the contrary.

12. The duty devolves upon the owners of the cattle affected with a contagious disease to use all necessary care to prevent such cattle from communicating the disease to healthy cattle of others, and the contributory negligence of the latter depends upon circumstances and is a proper question for the court.

[No. 290.]

*Argued May 4, 5, 1896, Decided May 25, 1896.*

APPEAL from a judgment of the Supreme Court of the Territory of New Mexico to review a judgment of that court affirming the judgment of the District Court for the Third Judicial District of the County of Dona Ana, New Mexico, in favor of the plaintiffs, George Lynch *et al.*, against George W. Grayson *et al.*, defendants, for the amount of loss and damage to a herd of cattle by a disease known as "Texas cattle fever" communicated to them by certain cattle owned by defendant, which had been shipped from infected districts in Texas and permitted to roam over plaintiffs' range. *Affirmed.*

See same case below, 25 Pac. 992.

Statement by Mr. Justice **Brown**:

This was an action originally begun in the district court for the third judicial district, for the county of Dona Ana, New Mexico, by the appellees, constituting the firm of Lynch Bros., against the appellants, who are members of the firm of Grayson & Co., for loss and

NOTE.—*As to freedom of plaintiff from contributory negligence necessary to entitle him to recover*, see note to Stokes v. Saltonstall, 10: 115.



Digitized by Google

damage to a herd of cattle by a disease known as "Texas cattle fever," claimed to have been communicated to them by certain cattle owned by defendants, which had been shipped from infected districts in Texas, and permitted to roam over plaintiffs' range. There were two counts in the declaration, alleging the communication of the disease in two different counties, but in other respects the two counts were alike.

The declaration alleged in substance that plaintiffs, being in peaceable possession of a certain cattle range suitable for pasturage, watering and raising cattle, had pastured and grazed on said lands a large number of meat cattle, which were entirely healthy and free from any contagious or infectious disease, all of which the defendants knew, and that defendants negligently and wilfully, against the remonstrance of the plaintiffs, turned in upon said lands and premises, among plaintiffs' cattle, a large number of their cattle infected with a contagious and fatal disease known as Texas cattle fever. That defendants knew that their cattle were so infected, and were liable to communicate the disease to plaintiffs' cattle; by reason whereof and through the carelessness and negligence of the defendants the disease [470] was communicated to plaintiffs' *cattle, four hundred of which died and the remainder, namely, one hundred head, were rendered worthless in consequence of such disease.

Defendants interposed a general plea of not guilty, and a jury being waived by an agreement in writing, the case was tried by the district court, which, having heard the evidence and arguments of counsel, found the issue in favor of the plaintiffs, and entered a judgment against the defendants for the sum of $5,200 damages, together with their costs.

Thereupon defendants, after unsuccessfully moving for a new trial, prayed an appeal to the supreme court of the territory, which made a finding of facts substantially to the effect that there were in the state of Texas certain districts which were permanently infected with germs of splenetic fever, Texas fever, or Texas cattle fever, and that Oak and Bee counties were a part of such infected districts; that a part of defendants' cattle were shipped by them from Oak and Bee counties, and unloaded at Hatch station in the territory of New Mexico, and were from there driven on foot, along the public road, across the range of the plaintiffs to the range of the defendants, adjoining plaintiffs' range; where they were turned loose to graze with other cattle upon defendants' range; that defendants were notified by plaintiffs, and thus had knowledge of the probable existence of such disease in said infected districts and said counties at the time they drove their said cattle from said counties across plaintiffs' range; that defendants' cattle brought with them the germs of an infectious and communicable disease known as splenetic or Texas fever, and communicated such disease to plaintiffs' cattle, either on the public road on plaintiffs' range or on defendants' range, and plaintiffs' cattle became infected with the germs of such disease, and thereby sickened, and many of them died, and the plaintiffs sustained damage thereby to the amount of $5,200; that before defendants' cattle were driven across plaintiffs' range, plaintiffs notified defendants that their cattle would be liable to communicate Texas fever to plaintiffs, and requested them to abstain from driving their cattle across plaintiffs' range; that afterwards and notwithstanding plaintiffs' request *defendants drove their said [471] cattle across plaintiffs' range, in the manner heretofore stated, by reason of which said disease became communicated to plaintiffs' cattle.

Upon this finding, the court ordered a judgment to be entered affirming the judgment of the court below, and allowed an appeal to this court.

*Mr.* **T. B. Catron** for appellants.

*Messrs.* **S. B. Newcomb** and **Samuel M. Arnel** for appellees.

Mr. Justice **Brown** delivered the opinion of the court:

In this case, which was tried by the court without a jury, there are fifty-three assignments of error taken to the introduction of much of the testimony and to the finding of the principal facts. As usual, when the assignments are so numerous, it will be necessary to consider but few of them.

1. Thirteen of these assignments are taken in different form to the action of the court in holding that, upon a trial by the court, the admission of improper, incompetent, irrelevant, or immaterial evidence was no cause for reversal; that in such case, on appeal, the court will give no weight to such testimony in the determination of such appeal, but will not reverse the judgment because it was admitted, unless it appears that the court, in making its decision, relied upon such irrelevant evidence; that a finding of facts in a case at law, tried without a jury, is conclusive where there is sufficient evidence to found it upon, even though the evidence be conflicting; in refusing to pass upon questions of law and fact apparent upon the face of the record, and in refusing to review the cause and pass upon the evidence as upon a hearing *de novo*.

The position of the defendants in this connection is that whatever may be the practice in the Federal courts under the Revised Statutes, or of the courts in other territories, the laws of New Mexico require the supreme court, in passing upon cases tried in a court below without a jury, practically *to retry the [472] case upon the law and facts, as though it were an appeal in equity.

In support of this, our attention is called to three statutes upon the subject of hearings in the supreme court, by one of which (N. M. Comp. Laws, § 2060) "trial by jury may be waived by the several parties to any issue of fact in the following cases: (1) By suffering default by failing to appear at the trial. (2) By written consent in person or by attorney, filed with the clerk," and by the second of which (§ 2190) the supreme court, in appeals or writs of error, shall examine the record, and on the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the district court, or give such other judgment as shall be agreeable to law." There is clearly nothing in these statutes which lays down a different rule from that ordinarily pursued in



Digitized by Google

appellate courts. If the case be tried by jury and reviewed upon writ of error, the power of the appellate court is limited to affirming the judgment or reversing it for errors apparent upon the record, and remanding it for a new trial, as specified in this section. If it be an appeal in equity, the court retries the case upon the evidence in the court below, and gives such judgment as may be agreeable to law. No mention is made in this section of common-law cases tried without a jury, and we perceive no necessity for our supplying the omission. So far as this class of cases is concerned, they are left to be determined by the legal principles applicable to them in other jurisdictions, and as regards the Federal practice, this court has held in a series of cases that the special findings of facts referred to in the acts allowing parties to submit issues of facts in civil cases to be tried and determined by the court, is not a mere report of the evidence, but a finding of those ultimate facts upon which the law must determine the rights of the parties; and, if the findings of fact be general, only such rulings of the court in the progress of the trial can be reversed as are presented by a bill of exceptions, and that in such cases a bill of exceptions cannot be used to bring up the whole testimony, for review any more than in a trial by jury. *Norris* v. *Jackson*, 76 U. S. 9 Wall. 125 [19: 608]; **473**] *Kearney* v. *Case*, 79 U. S. 12 Wall. *275 [20:395]; *Brooklyn L. Ins. Co.* v. *Miller*, 79 U. S. 12 Wall. 285 [20: 398]; *Mercantile Mut. Ins. Co.* v. *Folsom*, 85 U. S. 18 Wall. 237 [21: 827]; *Springfield F. & M. Ins. Co.* v. *Sea*, 88 U. S. 21 Wall. 158 [22: 511]; *Jennison* v. *Leonard*, 88 U. S. 21 Wall. 302 [22: 539]; *Tyng* v. *Grinnell*, 92 U. S. 467 [23: 733]; *Ætna Ins. Co.* v. *Boon*, 95 U. S. 117 [24:395]; *The Abbotsford* v. *Johnson* (*"The Abbotsford"*), 98 U. S. 440 [25: 168].

So, too, in cases brought here by appeal from the supreme courts of the territories, we have several times held that we cannot consider the weight or the sufficiency of the evidence, but only whether the facts found by the court below support the judgment, and whether there was any error in rulings, duly excepted to, upon the admission or rejection of evidence. *Idaho & O. Land Improv. Co.* v. *Bradbury*, 132 U. S. 509 [33:438]; *San Pedro & C. d. A. Co.* v. *United States*, 146 U. S. 120 [36:911]; *Smith* v. *Gale*, 144 U. S. 509 [36: 521]; *Mammoth Min. Co.* v. *Salt Lake Foundry & M. Co.* 151 U. S. 447 [38: 229].

By the act of April 7, 1874 (18 Stat. at L. 27), the appellate jurisdiction of this court "over the judgments and decrees of the territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal," with a proviso "that on appeal, instead of the evidence at large, a statement of the facts in the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence, when excepted to, shall be made and certified by the court below, and transmitted to the supreme court, together with a transcript of the proceedings and judgment or decree." It was said in *Idaho & O. Land Improv. Co.* v. *Bradbury*, 132 U. S. 509, 513 [33: 438, 436], that the necessary effect of this enactment was that no judgment or decree of the highest court of a territory could be reviewed by this court in matter of fact, but only in matter of law, or, as was said by Chief Justice Waite in *Hecht* v. *Boughton*, 105 U. S. 235, 236 [26:1018]: "We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement, which must come up with the appeal, are conclusive on us. Under these circumstances, the form of proceeding to get a *review is not of so much importance [**474** as certainty about what is to be done."

Indeed, no great stress was laid by the plaintiffs in error upon the above section of the Compiled Laws, their principal reliance being upon N. M. Laws 1889, chap. 1, § 4, which reads as follows:

"Sec. 4. In all cases now pending in the supreme court, or which may hereafter be pending in the supreme court, and which may have been tried by the equity side of the court, or which may have been tried by a jury on the common-law side of the court, or in which a jury may have been waived, and the cause tried by the court or the judge thereof, it shall be the duty of the supreme court to look into all the rulings and decisions of the court which may be apparent upon the records, or which may be incorporated in a bill of exceptions, and pass upon all of them, and upon the errors, if any shall be found therein, in the rulings and decisions of the court below, grant a new trial, or render such other judgment as may be right and just and in accordance with law; and said supreme court shall not decline to pass upon any question of law or fact which may appear in the record, either upon the face of the record or in the bill of exceptions, because the cause was tried by the court or by the judge thereof without a jury, but shall review said cause in the same manner and to the same extent as if it had been tried by a jury."

By this statute it is made the duty of the supreme court of the territory to look into and pass upon all the rulings and decisions of the court below, which may be apparent upon the record; or which may be incorporated into a bill of exceptions, and, if any error be found, grant a new trial or render such other judgment as may be right and just and in accordance with law. And the supreme court must not decline so to do because the case was tried by the court without a jury, but must review said cause *in the same manner and to the same extent as if it had been tried by a jury.*

It is difficult to perceive wherein this statute makes any essential change in the previous practice, or even if it did, how it could affect the power of this court under the statute of 1874, *above cited. It certainly does not, in [**475** terms, require that the court shall rehear the case upon the testimony, as if it were an appeal in equity, but limits its powers of review to such questions as are apparent upon the record, or incorporated in a bill of exceptions. And in cases where the cause is tried by the court without a jury it can only review it in the same manner and to the same extent as



Digitized by Google

if it had been tried by a jury. Now the 7th Amendment to the Constitution expressly provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, and in *Parsons* v. *Bedford*, 28 U. S. 3 Pet. 443, 448 [7:785, 787], it was said that "the only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings." See also *Lincoln* v. *Power*, 151 U. S. 436, 438 [38:224, 225]; *New York C. & H. R. R. Co.* v. *Fraloff*, 100 U. S. 24, 31 [25:531, 535].

The 17th section of the act creating New Mexico a territory (9 Stat. at L. 446, 452) provides "that the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory of New Mexico as elsewhere within the United States." It would seem, then, to be entirely clear that, if a court can only review cases tried without a jury, as it would review cases tried by a jury, it can only review them for errors apparent upon the record, or incorporated in a bill of exceptions. If the statute had said that the supreme court should review the cause in the same manner and to the same extent as if it were a suit in equity, there would be room to contend that the case should be retried upon the testimony, although even in such case the power of this court would be limited by the act of 1874. But if this power be limited to a review in the same manner and to the same extent as if the case had been tried by jury, its powers are only such as could be exercised upon a writ of error.

476] *We think there is nothing in this statute to take this case out of the general rule, so frequently announced, that in cases where a jury is waived the findings of fact by the court have the same force and effect as the verdict of a jury, and that the appellate court will not set aside the findings and order a new trial for the admission of incompetent evidence if there be other competent evidence to support the conclusion. The evident purpose of N. M. Comp. Laws, § 2060, was to give to litigants the option of having their causes tried by jury or by the court, and we think there is nothing in these statutes to indicate that the findings of the court were not intended to have the same force and effect as a special verdict of a jury, and that, where there is any testimony to support such findings, the power of the appellate court is limited to determine whether the facts so found are sufficient to support the judgment.

2. Ten assignments are addressed to questions of variance between the declaration and the facts, as specifically found by the court.

(*a*) The first of these questions relates to the allegation in the declaration that the disease of which the plaintiffs' cattle died, and which was communicated by the defendants' cattle, was known as "Texas cattle fever," whereas the finding of the court was that plaintiffs' cattle died of "Texas fever." In other portions of the finding, however, the disease is spoken of as commonly called splenetic fever, southern cattle fever, Texas fever, or Texas cattle fever, and it would appear that it was known by all these names, although the witnesses spoke of it generally as Texas fever. Assuming that to be its proper designation, defendants could not possibly have been misled, since the introduction of the word "cattle" was evidently intended to indicate merely that it was a fever originating in Texas, and prevailing among cattle. While cases may doubtless be found to the effect that descriptive allegations of this kind must be proved with great strictness, the tendency of modern authorities is to hold that "no variance between the allegations of a pleading and the proofs offered to sustain it shall be deemed material unless it be of a character to *mislead [477 the opposite party in maintaining his action or defense on the merits." *Nash* v. *Towne*, 72 U. S. 5 Wall. 689, 698 [18: 527, 529]; *Robbins* v. *Chicago*, 71 U. S. 4 Wall. 657 [18: 427]; *Catlin* v. *Gunter*, 11 N. Y. 368 [62 Am. Dec. 113].

(*b*) A variance is also claimed between the allegation that the disease was a "contagious" one, and the finding of the court that Texas fever is not communicated by contact, but is an "infectious" disease. There is doubtless a technical distinction between the two in the fact that a contagious disease is communicable by contact, or by bodily exhalation, while an infectious disease presupposes a cause acting by hidden influences, like the miasma of prison ships or marshes, etc., or through the pollution of water or the atmosphere, or from the various dejections from animals. The word "contagious," however, is often used in a similar sense of pestilential or poisonous, and is not strictly confined to influences emanating directly from the body. As applied to Texas fever the difference would be that if the word were strictly construed, it would follow that the disease must be communicated directly from one animal to another, while if it were infectious it would be communicated by cattle carrying the germs of the disease from the infected district, and depositing the same upon the range and waters occupied by other cattle susceptible to the infection, so that they would become infected therefrom. This was the finding of the court with respect to the disease in question. The difference is quite immaterial in this case, however, as the allegation of the second count is that plaintiffs' cattle were healthy, and were "especially free from a certain contagious, noxious, dangerous, infectious, and fatal disease commonly known as the Texas cattle fever;" that with knowledge of this fact defendants turned upon plaintiffs' land and premises his own cattle, which were "infected with a noxious, dangerous, and fatal disease, commonly known as the Texas cattle fever." And elsewhere defendants' cattle are spoken of as infected with "the said contagious disease," which they communicated to plaintiffs' cattle. It is evident that the words "infectious" and "contagious" were not used in any technical sense, or with any intention of averring that plaintiffs' cattle became ill from any contagious, as distinguished from an infectious, disease; and that, reasonably construed, *it was only intended to aver that [478



Digitized by Google

defendants' cattle were afflicted with the Texas cattle fever, and that by the negligence of the defendants they communicated it to the plaintiffs' cattle. The general words "contagious," "noxious," "dangerous," "infectious," and "fatal" are evidently intended to be limited by the specific words "Texas cattle fever," and not to raise a medical question whether Texas cattle fever is, strictly speaking, contagious or infectious.

(6) There is also an allegation in the second count that the plaintiffs kept and grazed their cattle on certain lands of which they were possessed in the county of Sierra; that while so grazing upon said lands, defendants drove and pastured their cattle upon these lands, and *there* communicated to them the disease in question; while the finding of the court in that connection was, that it could not be determined "whether Lynch Bros.' cattle contracted the disease on the road, or on their own range, or on Grayson's range, owing to the indiscriminate mixing of them with Grayson & Co.'s cattle on both ranges." It certainly would not be claimed that the fact that plaintiffs could not prove whether the disease was communicated to their cattle while upon their own lands or elsewhere would prevent their recovery, if the disease were communicated either in one place or the other. In such case, if the description be wholly immaterial, it may be averred to have happened either in one place or the other, and the fact that it was impossible to tell exactly where the tort took place would not constitute a variance. It is said by Chitty (Pleading, 410) that "where the place of doing an act is precisely alleged, if the description be wholly immaterial, the ground of charge or of complaint not being local, the description may perhaps be rejected as surplusage; as if in trespass for taking goods, the declaration were to allege that they were taken 'in a house' it would seem to be sufficient to prove that they were taken elsewhere, unless indeed a local trespass as to the house be laid in the same court." In *United States* v. *Le Baron*, 71 U. S. 4 Wall. 642, 648 [18: 309, 310], it is said that allegations of time, quantity, value, etc., need not be proved 479] with precision, but that a large *departure from the same is allowable. The same rule also applies to allegations of place. See also *Pope* v. *Allis*, 115 U. S. 363 [29: 393], where proof of the delivery of iron at a different place from that alleged in the complaint was held to have been properly admitted, defendants having failed to prove that they were misled by the variance between the averment and the proof. *Peck* v. *Waters*, 104 Mass. 345, 351.

Besides this, however, none of the alleged variances appear to have been called to the attention of the district court at any time during the trial, or in any of defendants' numerous objections to the introduction of testimony, or otherwise, nor are they noticed in any one of the fifty assignments of error filed in the supreme court of the territory. If it were not too late to raise any of these questions at this time, the fact that they were never raised before would be a complete answer to any claim that defendants could have been misled by such variances. *Liverpool & L. & G. Ins. Co.* v. *Gunther*, 116 U. S. 113 [29: 575]; *Bell* v. *Knowles*, 45 Cal. 193; *Gifford* v. *West*, 33 Wis. 617.

3. Objections were taken to the testimony of three witnesses, Speed, Halleck, and Hargrave, upon the ground that, not being experts, they were permitted to say that the disease with which plaintiffs' cattle became affected was ordinarily called Texas fever. These witnesses, however, were not called as experts, nor did they purport to testify in that capacity. They testified fully as to the symptoms of the disease with which plaintiffs' cattle were afflicted, the resemblance of these symptoms to such as they had previously observed in other cattle, stating that the disease was generally called Texas fever. These were evidently matters of common observation. These witnesses did not claim to testify of their own knowledge as to the name of the disease, but merely as to the symptoms they observed, and that cattle so afflicted were ordinarily spoken of as having Texas fever.

4. The objection to the admission of a certain document, tending to show title to some of the lands in the plaintiffs, is obviously untenable, inasmuch as there was no finding of title in them, and the document appears to have been admitted *simply for the purpose of 480] showing that plaintiffs were not mere trespassers upon the property. The fact that they were in possession was not controverted, and their rights as against the defendants did not even depend upon the lawfulness of such possession. The manner in which they took possession, or the validity of their title, was wholly immaterial.

5. Fourteen assignments of error are addressed to the admission of the depositions of Salmon and Detmers, who testified as experts to the nature and symptoms of the disease, and to the fact that there were certain districts infected with the fever. Salmon resided in Washington, was a professor of veterinary medicine, chief of the United States Bureau of Animal Industry, and at the time in the service of the United States government. He had held this position for more than ten years; had been chief of the veterinary division of the Department of Agriculture; had been in the employ of the Department of Agriculture, investigating the disease of animals, for over fifteen years, and was called to Washington about 1883 in the discharge of his duties. He had investigated the disease known as the Texas fever. Detmers resided in Illinois, was a veterinary surgeon, and had been in the employ of the Department of Agriculture for the purpose of investigating contagious, infectious, and epizootic diseases of horses, cattle, and swine, and had investigated the disease known as Texas fever, and was acquainted with its symptoms and diagnosis; had made a good many post mortem examinations of cattle that had died with it, and was familiar with the disease. If these gentlemen, who were connected with the Department of Agriculture and made a specialty of investigating animal diseases, were not competent to speak upon the subject as experts, it would probably be impossible to obtain the testimony of witnesses who were. The fact that they spoke of certain districts of Texas as being infected with that disease was perfectly competent, though they may never have visited those districts in person. In the nature of their business, in the corres-



Digitized by Google

pondence of the department and in the investigation of such diseases, they would naturally become much better acquainted with the dis-
**481]** tricts where such diseases *originated or were prevalent, than if they had been merely local physicians and testified as to what came within their personal observation. The knowledge thus gained cannot properly be spoken of as hearsay, since it was a part of their official duty to obtain such knowledge, and learn where such diseases originated or were prevalent, and how they became disseminated throughout the country. *Congress & E. Spring Co.* v. *Edgar*, 99 U. S. 645 [25: 487]; *State* v. *Wood*, 53 N. H. 484; *Dole* v. *Johnson*, 50 N. H. 452; *Emerson* v. *Lowell Gaslight Co.* 6 Allen, 148 [83 Am. Dec. 621]. While it is possible that some questions may have been asked of these witnesses which were irrelevant, immaterial, and incompetent, the reception of such evidence, as already observed, does not vitiate the findings of the court, or entitle the party to a new trial.

The objections to the testimony of these witnesses are so numerous we have not deemed it necessary to examine them in detail. We are satisfied that there was nothing that went to to their competency as experts.

As one of these witnesses testified that Oak and Bee counties in Texas were known to be permanently infected with the fever, and as the court found that these counties were a part of the infected district, and also found that the cattle in question were shipped from those counties into the territory of New Mexico, and that the defendants were notified by the plaintiffs of the existence of such disease in these counties at the time they drove their cattle across plaintiffs' range, and as there was evidence tending to show notice to the defendants of the disease in their own cattle, and of the liability to communicate the same to plaintiffs' cattle, and that they were requested to abstain from driving them over plaintiffs' range, we see no reason for attacking the findings of the court in this connection, and none that would authorize us to infer that defendants did not have the requisite notice to render them chargeable.

6. Error is also assigned upon the ground that it appears from the special finding of fact that plaintiffs were guilty of contributory negligence in allowing their cattle to range, graze, and water on defendants' range with their cattle,
**482]** and *made no effort to prevent them from doing so, or to aid in keeping defendants' cattle off their range. In this connection the court found that the cattle of defendants, Grayson & Co., were driven from the railway station along the public road, through the range where the plaintiffs' cattle grazed, by eighteen men. "They were driven straight on the road, and were strung out and men placed on each side of them, to keep them in the road, and one or two ahead to keep the herd on the road and drive away any other cattle that might be in the way, and keep them back from the herd. They were generally kept within 20 yards of the road on either side, and often in less space. They were kept as close together as possible. They did not get outside of that space. Only a few other cattle were seen along the road while driving, and such were driven away. No cattle not belonging to the herd got into it, or mixed up with it, while crossing plaintiffs', Lynch Bros'., range. They were driven without stopping from the time they got within sight of where Lynch Bros. claimed their cattle range, to the Percha river, inside of the defendants', Graysons', range, where about four hundred were stopped and others taken on to other parts of the range of defendants. Grayson & Co.'s range extended south of the Percha river ¼ or ½ of a mile."

"Plaintiffs were informed by the man who was in charge of defendants' cattle when they came up that they came from San Antonio, Texas. Neither plaintiffs' nor defendants' range was fenced, but the cattle ranged at will, except that defendants, Grayson & Company, placed men at the Percha river, near the dividing line between the two ranges, and tried to keep the cattle back on each range and requested plaintiffs, Lynch Brothers, to do the same, and put a number of men there to help them; but Lynch Brothers declined to do so, saying they were there first; so it was impossible to keep the cattle of the two ranges from going from the one to the other. Lynch Brothers' cattle in large numbers went up onto Grayson & Company's range, and Graysons' cattle in large numbers went down onto Lynch Brothers' range. Grayson & Company at times rounded up their cattle and *drove them **[483** off of Lynch's range, but Lynch Brothers did not drive their cattle back off Graysons', nor do anything to prevent their going there. When the cattle passed from one range to the other they mixed with the cattle on the range to which they went, and grazed on the same pasture and drank of the same water. Defendants from time to time drove their cattle back from plaintiffs' range to their own, the last time just prior to September 8, 1884. Lynch Brothers made no effort to prevent their cattle from going on Grayson & Company's range or from watering at the same holes and grazing and feeding on the same pastures and ranging with Grayson & Company's cattle which came from Texas in 1884, but allowed them to do so in large numbers.

"Lynch Brothers made no effort to keep Grayson & Company's cattle off their range and from grazing and feeding on the same grasses and ranging with their cattle and watering at the same watering holes with them, but when Lynch Brothers' cattle went on to Grayson & Company's range they would drift back to Lynch Brothers' range, carrying with them large numbers of Grayson & Company's new cattle, which had not become so thoroughly located as to keep them on their own range."

While the court, from this testimony, might have found that the plaintiffs did not use all the precautions that were possible to prevent the infection of their own cattle, it was not bound to find that they were guilty of contributory negligence in this connection. It did not seem to be the custom in that part of the country to fence the ranges, and the plaintiffs were not bound to put themselves to the sole expense of preventing their cattle from being intermingled with those of the defendants, in order to escape the possibility of infection; since in doing this they might be put to a very



Digitized by Google

large expense without the possibility of recovering the same from the defendants, unless they could prove that defendants' cattle were in fact diseased, and that the precautions taken by them had in fact saved their own from infection. Upon the contrary, the defendants having been apprised of the fact that their cattle were or might be infected were bound to prevent
484] such *infection being communicated to the plaintiffs' cattle. By the 6th section of the act of Congress of May 29, 1884, for the establishment of a Bureau of Animal Industry (23 Stat. at L. 51), it is provided that no railroad company shall receive for transportation, or transport, from one state or territory to another, any live stock affected by any contagious, infectious, or communicable disease. "Nor shall any person, company, or corporation deliver for such transportation to any railway company . . . any live stock, knowing them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance from one state or territory to another . . . any live stock, knowing them to be affected with any contagious, infectious, or communicable disease," etc. If defendants had knowledge of the fact that their cattle were infected with Texas fever, they were guilty of a violation of the statute in delivering them to the railway company for transportation to New Mexico, and the duty devolved upon them of using all necessary care to prevent their communicating the disease to healthy cattle. What care it was necessary for the plaintiffs to take in that connection depended upon circumstances, and was a proper question for the court.

In one view of the case it might be said that the plaintiffs, having knowledge that defendants' cattle were or might be diseased, were guilty of contributory negligence if they did not use every possible precaution to prevent the spread of the disease to their own cattle. This, however, might be an unjust rule applicable to a particular case, since it would shift upon the plaintiffs the entire duty and expense of avoiding the contagion when the defendants were the sole cause of the disease being introduced into that neighborhood. It was for the court to judge from the testimony what precautions the plaintiffs, in the reasonable and proper care of their own cattle, were bound to take, and it is evident, from the ultimate finding of the liability on the part of the defendants, that the court must have found that, under the circumstances of the case, the plaintiffs were not guilty of contributory negli-
485] gence. There *are in reality two entirely separate findings of facts in the case, the first one of which is much more specific than the other, but contains evidence of facts as well as the facts themselves, but is less complete than the "statement of further findings of facts and conclusions of law," which is practically a finding of the ultimate facts of the case, and of the conclusion that, from the facts so found, the plaintiffs are entitled to judgment. There is no finding of contributory negligence on the part of the plaintiffs, nor do we think that the facts as found compel the conclusion that the plaintiffs were guilty of such negligence.

Other errors are assigned which it is unnecessary to notice in detail. Most of them are covered by those already discussed, and some of them are so obviously frivolous as to require no discussion.

It is to be regretted that defendants found it necessary to multiply their assignments to such an extent, as there is always a possibility that, in the very abundance of alleged errors, a substantial one may be lost sight of. This is a comment which courts have frequent occasion to make, and one which is too frequently disregarded by the profession.

There is no error in this case of which the defendants are entitled to complain, and *the judgment of the court below is accordingly affirmed.*

Mr. Justice **Field** dissented.

---

## UNION PACIFIC RAILWAY COMPANY, *Piff. in Err.*, v. GRANVILLE J. JAMES.

(See S. C. Reporter's ed. 485–491.)

*Charge to jury.*

A charge to the jury that the single question is whether or not a frog was blocked at the time a railroad employee was injured by catching his foot in it is not improper, when the pleadings and evidence have narrowed the inquiry to this single matter.

[No. 270.]

*Argued May 4, 1896. Decided May 25, 1896.*

---

NOTE.—*As to questions of law and fact for court or jury in civil and criminal cases*, see note to King v. Delaware Ins. Co. 8: 155.

*As to damages for personal injury from negligence*, see note to Pennsylvania Co. v. Roy, 28: 141.

*Liability of a railroad company for injury to an employee or to another from an unblocked frog or switch; injuries from projections or structures dangerously near the track.*

A railroad company has been held not to be guilty of negligence in failing to block its switches or frogs, particularly if it does not appear that in doing so it would not entail greater dangers than it would avert. McGinnis v. Canada Southern Bridge Co. 49 Mich. 466. And see Griffith v. Burlington, C. R. & N. R. Co. 72 Iowa, 645; Mayes v Chicago, R. I. & P. R. Co. 63 Iowa, 563; Rush v. Missouri P. R. Co. 36 Kan. 129; Burlington, C. R. & N. R. Co. v. Coates, 62 Iowa, 486; Huhn v. Missouri P. R. Co. 92 Mo. 440.

Where an action for damages was based upon the fact that a switch at the junction in which plaintiff's feet were caught was unblocked, it was held, the evidence showing that unblocked switches had been in use on the various railroads all over the country for years, that a failure to use a new device for blocking did not render the company liable for injury caused thereby. Chicago, R. I. & P. R. Co. v. Lonergan, 118 Ill. 41.

And it has been held in Michigan that a railroad company is under no legal obligation to maintain a station agent at a flag station where there is an unblocked siding for the protection of its employees. Hewitt v. Flint & P. M. R. Co. 67 Mich. 61.

It is not negligence *per se* to fail to block frogs and switches. To make it negligence, there must be proof that they are inherently unsafe and dan-



Digitized by Google

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment affirming the judgment of the Circuit Court of the United States for the Southern District of Iowa in favor of the plaintiff, Granville J. James, against the Union Pacific Railway Company, defendant, for damages for personal injuries. *Affirmed.*

See same case below, 56 Fed. Rep. 1001.

Statement by Mr. Justice **Brewer**:

On April 12, 1890, defendant in error filed his petition in the district court of Pottowattamie county, Iowa, to recover of plaintiff in error $20,000 for personal injuries. From the petition it appears that he was a brakeman in the employ of the railway company; that the injury occurred at the town of North Bend, in the state of Nebraska, and that it was caused by reason of his catching his foot in the narrow angle or frog made by the junction of the main and side tracks at that place, from which frog he was unable to extricate himself until an engine had passed over him. It was alleged that the blocking of such frog is the proper duty of every railway company, upon the performance of which every employee has a right to rely; and, further, "that in fact said angle or frog was not then, and had not been, blocked or filled, but was in a very dangerous and hazardous condition by reason of not being blocked or filled, all of which the said defendant then and there knew, but of which said plaintiff had no knowledge whatever."

The defendant answered with a general denial, and by amendment that the plaintiff was entirely familiar with the condition of the tracks at North Bend, and by virtue of such knowledge waived the right to take advantage of any alleged defect in their condition. The case was removed on application of the railway company to the circuit court of the United *States for the southern dis-[487 trict of Iowa. Trial being had it resulted in a verdict and judgment for the plaintiff, which was affirmed by the court of appeals of the eighth circuit, to reverse which judgment the railway company sued out this writ of error.

*Messrs.* **John M. Thurston** and *John F. Dillon* for plaintiff in error.

*Messrs.* **Francis A. Brogan** and *Michael J. Colbert* for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The issues in this case were made up by the charge in the petition that the frog was not and had not been blocked, which charge was denied, and which denial was supplemented by the further allegation on the part of the railway company that the plaintiff knew the condition of the tracks and continued in defendant's employ with full knowledge of the same, waiving thereby the right to complain of any supposed defect.

The testimony of plaintiff was that at the time of the accident, about 1 o'clock in the morning, the frog was unblocked. In addition he called five witnesses, who testified that

---

gerous when carefully used, and so generally known by those engaged in operation of railroads. Missouri P. R. Co. v. Lewis, 24 Neb. 848, 2 L. R. A. 67.

Ordinarily, a servant who has knowledge that frogs or switches are not blocked is precluded from predicating negligence in that respect. He assumes the risk of dangers reasonably expected to flow from the character of such appliances. Lake Shore & M. S. R. Co. v. McCormick, 74 Ind. 440; Wilson v. Winona & St. P. R. Co. 37 Minn. 328; Little Rock & Ft. S. R. Co. v. Eubanks, 48 Ark. 460.

It was held in Mayes v. Chicago, R. I. & P. R. Co. 63 Iowa, 562, "if an experienced servant did not know the danger caused by absence of said blocks, he will not be held to have waived the company's neglect in this respect."

In the absence of evidence that blocks were in general use on defendant's tracks, or on those of other roads, the failure to provide a block for the frog at which the accident occurred was not negligence; and where it appears that the plaintiff knew, from his long period of service, that the larger portion of frogs on defendant's road was not blocked, he must be held to have assumed the risk incident to the use of the frog. Spencer v. New York C. & H. R. R. Co. 67 Hun, 196.

In an action to recover from a railroad company damages for the death of an employee by catching his foot in an unblocked frog while coupling cars, and while in that condition being run over by a car, where the evidence showed that he had been in the employ of the defendant for several years as brakeman and as conductor of freight trains; that his duty brought him frequently into the yard in question to make up his trains; that he necessarily knew of the form of frog there in use; and it is not shown that he ever complained to his employers of the character of frogs used by them,—he must be assumed to have entered and continued in the employ of the defendant with full knowledge of the dangers arising out of the use of unblocked frogs, and cannot recover. Southern Pac. Co. v. Seley, 152 U. S. 145 (38: 391).

In an action against a railroad company, brought to recover the damages resulting from a personal injury alleged to have been sustained by a pedestrian through catching his foot in a frog maintained by the company on its track in the sidewalk of a city street crossed by the track, the evidence showed that the frog was an open one, so constructed that the foot of a passer-by was liable to be caught therein, and was used without being blocked or its opening in any manner filled, or any other means being adopted to render it safe for persons crossing the track on the sidewalk, that blocks were extensively used for that purpose, and that there were other means by which, if adopted by the defendant, danger from such frogs could have been easily prevented, and was coupled with evidence tending to show that the plaintiff, a boy twelve years of age, was not familiar with the crossing, nor with the operation of trains at that point, nor with the purpose and construction of a frog, and was not aware of any danger to be apprehended from passing over it. Held that the evidence was sufficient to take the case to the jury on the question of the defendant's negligence. Friess v. New York C. & H. R. R. Co. 67 Hun, 205, 206.

A switch signal placed so near the track as to scrape the sides of cars is a defective appliance. Boss v. Northern P. R. Co. 5 Dak. 308.

A switch stand within 9 or 10 inches of cars was held a defective appliance; but other circumstances entered into consideration, among which was that plaintiff had worked in the yard but seven or eight days, and had not noticed the switch stand. A ground switch would have answered every purpose. Pidcock v. Union P. R. Co. 5 Utah, 612, 1 L. R. A. 131.



Digitized by Google

on the next morning they examined the track and that there was no blocking in the frog; or, as one of them said, "the same as no blocking at all." On the other hand, the defendant introduced the testimony of seven witnesses, who examined the track either the next morning, or soon thereafter, and each of whom found the frog properly blocked—one of them, the section foreman, testifying that before the accident he had himself put the blocking in.

Obviously the question which the parties submitted to the jury was that of the existence or nonexistence of a block in the frog at the time of the accident. It is contended by the railway company that the court erred in failing to give a peremptory instruction to find a verdict for the defendant. The only witness who testified to the condition of the frog at the [488]*time of the accident was the plaintiff, and he testified that it was an unblocked frog, and while the section foreman testified that it was blocked before, and that he found it the Sunday after in the same condition that he had originally placed it, and while there was testimony of several witnesses that immediately after the accident the frog was found to be properly blocked, yet there was also equally satisfactory testimony to the contrary. As this latter testimony obviously contradicts that of the section foreman as to the condition of the frog after the accident, it tends to impeach it as to placing blocking in the frog prior thereto. At any rate, in view of the plaintiff's personal testimony, there was certainly a question of fact to be submitted to the jury as to whether the frog was or was not blocked at the time of the accident, and their conclusion in that respect cannot be challenged, and it would have been error for the court to have given a peremptory instruction, based either way, upon this disputed question of fact.

Again, it is said that the only testimony as to the condition of the frog prior to the accident was that of the section foreman, who testified that he had properly blocked it, and that if that be ignored there was no testimony tending to show that it was not at some time properly blocked and the block removed without the knowledge of or notice to the railroad company. The statement of the section foreman may be considered as challenged by the counter testimony of plaintiff and his witnesses, and in the absence of any testimony as to the condition of the frog prior to the accident the jury were not bound to assume that the frog had once been properly blocked and the blocking thereafter removed or destroyed. They were at liberty to infer that it never had been blocked, that the track as originally constructed at this place was as it was found to be at the time of the accident, and so a case was presented of the absolute omission of the railroad company to discharge its duty of providing a safe place for the movement of its trains and the work of its employees.

It is earnestly insisted by counsel for the railroad company that the court improperly narrowed the issues submitted to *the jury by [489 charging that the single question was whether the frog was blocked or not at the time of the injury, and it is urged that the true rule is, that if the railroad company had once properly

---

Where it is customary for brakemen, in the performance of their duties, to ascend and descend from the tops of cars by side ladders when the train is in motion, the company is bound to maintain its roadway free from projections which endanger them while so doing. Georgia P. R. Co. v. Davis, 92 Ala. 300.

Railroad companies are under an obligation to all persons who have a right to be on top of their trains, in the discharge of any duty, to so construct their overhead bridges or other overhanging structures adjacent to their tracks that they will not expose such persons to unnecessary risks, or to perils that can easily and without any great outlay be avoided. If, for any reason, structures of the kind last mentioned are maintained which do expose persons who have a right to be on the top of moving freight trains to unusual risks (such as a liability to be knocked off), then the exercise of ordinary care requires some warning to be given, either verbally or by whip lashes, to all those persons who, in the discharge of their duties, are liable to sustain injury in consequence of such structures. Chicago, M. & St. P. R. Co. v. Carpenter, 56 Fed. Rep. 452; St. Louis, Ft. S. & W. R. Co. v. Irwin, 37 Kan. 701; Baltimore, O. & C. R. Co. v. Rowan, 104 Ind. 88; Chicago & A. R. Co. v. Johnson, 116 Ill. 206; Louisville, N. A. & C. R. Co. v. Wright, 115 Ind. 378; Clark v. St. Paul & S. C. R. Co. 28 Minn. 128; Flanders v. Chicago, St. P. M. & O. R. Co. 51 Minn. 193.

Placing structures unnecessarily close to the track, where it is to be naturally and reasonably anticipated that employees, in the performance of their duties, might come in contact with them, is negligence; and it cannot be said that the place where the servant is required to perform his duties is reasonably safe. It was held that where a section house was placed near a side track, if the company was, from the nature of its servants' duties and the customary way its trainmen performed them, bound to anticipate that they would have occasion to descend on the sides of the cars, it was negligence to so place such section house in close proximity to the track. Flanders v. Chicago, St. P. M. & O. R. Co. 51 Minn. 193; Dorsey v. Phillips & C. Const. Co. 42 Wis. 583.

A railroad company is not to be regarded as negligent because contrivances maintained in operation of its road are necessarily dangerous to employees engaged in operating trains. So held where an engineer was injured, while leaning out of his cab looking for signals from the conductor, by coming in contact with a water crane near the track. Gould v. Chicago, B. & Q. R. Co. 66 Iowa, 590. Yet the same court held that a cattle chute constructed so near the track as to endanger servants operating its trains was a defect for which the company might be liable for injuries caused to its servants thereby. Allen v. Burlington, C. R. & N. R. Co. 57 Iowa, 623. And in Kearns v. Chicago, M. & St. P. R. Co. 66 Iowa, 590, it was held that the company was negligent in allowing a post to be erected in dangerous proximity to the track.

It was held in Bessex v. Chicago & N. W. R. Co. 45 Wis. 477, that lumber piled near the track was such neglect and defect as rendered the company liable to an employee injured thereby; while in Gaffney v. New York & N. E. R. Co. 15 R. I. 456, it was held that it was not an act of actionable negligence, under the circumstances.

A switch stand projecting near the track, under the circumstances, did not permit a recovery (Ryan v. Canada S. R. Co. 10 Ont. Rep. 745); nor the position of a water tank (Davis v. Columbia & G. R. Co. 21 S. C. 93); nor the position of a platform, Chicago, R. I. & P. R. Co. v. Clark, 108 Ill. 113.



Digitized by Google

blocked the frog it incurred no liability to its employees by reason of the subsequent displacement of the blocking unless such displacement was with its knowledge or had continued for such a length of time as to impute notice to it. We do not question the proposition of law as thus stated, but the difficulty is that no such issue was tendered by the pleadings, and the parties evidently went to trial upon the single question whether the frog was or was not blocked at the time of the accident. The charge in the petition was that the frog was not and had never been blocked. The answer denied this fact, and did not assume to set forth as a defense that it had once been blocked and the block displaced without the knowledge of or notice to the railroad company. The railroad company was apparently content to rest its defense upon the single question of the existence of blocking at the time of the injury. The testimony went to that alone. In respect to this matter the trial judge in overruling the motion for a new trial observed as follows:

"The argument now advanced by defendant in support of his motion is, that even if the frog was unblocked, that fact of itself would not make defendant liable for the injury resulting therefrom; that the proof must go farther, and bring to defendant knowledge of such unblocked condition; either defendant must be proved to have had actual notice of such unblocked condition, or such condition must be proved to have existed so long as that, in the exercise of ordinary care, defendant should have discovered it. Defendant contends the proof did not fulfil these requisites as to notice, and that the jury were not instructed with reference to applying these requisites to the evidence.

"Neither in the opening statement to the jury, nor in the argument to the jury after the evidence had closed, did counsel for defendant lay his case on the line of these requisites. Throughout the trial, the position of defendant was that the frog was blocked at the time of the injury. Both in opening state-
490] ment *and in closing argument defendant's counsel insisted the frog was blocked at the time of the injury. To this, defendant's evidence was pointed, and in fact limited, so far as it tended to refute the charge of negligence alleged and attempted to be proved by plaintiff. Defendant did not attempt to escape or avoid, by any showing of sudden tearing out of the frog, whatever force attended plaintiff's evidence as to an unblocked condition of the frog. On neither side was any testimony introduced tending to show any sudden destruction of blocking at this frog. But on either side the contest was as to whether the frog was in fact blocked at the time of the injury. Plaintiff rested his claim, touching the cause of the injury, on the attempt to prove such injury was caused by the frog being unblocked at time of injury. And defendant was equally content, as to evidence introduced, in attempting to prove the frog was then blocked. And defendant's counsel limited his argument to the jury upon the evidence to this same line of defense."

Yet notwithstanding the pleadings and the testimony seemed to narrow the issue to this particular matter, the court in its instruction discussed the further question of the liability of the company in case of an original proper blocking of the frog and its subsequent displacement. It said, among other things, on this matter:

"If evidence had been introduced to show that suddenly, by some disarrangement of the machinery of the train, the wooden part of the frog or blocking had been pulled out of the frog at the time so near the injury as that the company could not have been charged with negligence in not having found it out reasonably by inspection, through its workmen or otherwise, before the injury, then in an accident of that kind the company would not be liable for the injury to plaintiff, because the company would not have been negligent in not ascertaining that the block had been thus removed."

So that it cannot be said that the proposition of law upon which counsel for the railroad company so strenuously insists was wholly ignored on the trial. It was in fact presented by the court to the jury, although it is true coupled with the *statement that the is- [491
sues made by the pleadings and the silence of the testimony in respect to the prior situation narrowed their inquiry to the single matter of the condition at the time of the accident.

It must be confessed that this case is not entirely clear, and yet, considering the entire record, we are not prepared to hold that there was error such as would justify this court in disturbing the judgment. *It is therefore affirmed.*

---

## MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Piff. in Err.*,
*v.*
## J. B. COOK *et al.*

(See S. C. Reporter's ed. 491-496.)

*Rights of settler as against railroad.*

The location of the Missouri, Kansas, & Texas Railway was definitely fixed and its right of way limited by the filing of the map of the line surveyed for its route, under the railroad land grant to Kansas of July 26, 1866; and the rights of a settler thereafter acquired to land not touched by such line are not affected by a subsequent change in the location of the route of such road; the land claimed by the settler not being within the right of way actually occupied by the railroad company.

[No. 178.]

*Argued and Submitted March 24, 1896. Decided May 25, 1896.*

IN ERROR to the Supreme Court of the State of Kansas to review a judgment of that court affirming the judgment of the Dis-

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 75.

*That patents for land may be set aside for fraud*, see note to Miller v. Kerr, 5: 331.

*As to errors in surveys and descriptions in patents for lands, how construed*, see note to Watts v. Lindsey, 5: 423.

*As to land grants to railroads*, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.



Digitized by Google

trict Court of Labette County, Kansas, in favor of the defendants, J. B. Cook *et al.*, in an action of ejectment brought by the Missouri, Kansas, & Texas Railway Company *et al.*, plaintiffs, for the recovery of real estate in the city of Chetopa, in that county. *Affirmed.*

See same case below, 47 Kan. 216.

Statement by Mr. Chief Justice **Fuller**:

This was an action of ejectment brought by the Missouri, Kansas, & Texas Railway Company, a corporation of the state of Kansas, and the Missouri Pacific Railway Company, a corporation of Missouri, in the district court of Labette county, Kansas, August 17, 1887, against J. B. Cook and L. H. Printz, to recover **492]** possession of certain real estate *situated in the city of Chetopa in that county, and described in the petition. Defendants filed a general denial. The case was tried by the court on an agreed statement of facts, and judgment rendered for defendants. Plaintiffs thereupon took the case on error to the supreme court of Kansas, by which the judgment of the district court was affirmed. 47 Kan. 216. Thereupon a writ of error was taken out from this court.

The agreed statement was as follows:

"1. The Missouri, Kansas, & Texas Railway Company was, on the 25th day of September, 1865, duly organized as a corporation under the name of the Union Pacific Railway Company, Southern Branch, and on the 3d day of February, A. D. 1870, its name was duly changed and made the Missouri, Kansas, & Texas Railway Company, and it is the railway company referred to in the act of Congress, approved July 26, 1866, entitled 'An Act Granting Lands to the State of Kansas to Aid in the Construction of a Southern Branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas.'

"2. The acceptance of the terms, conditions, and impositions of said act by the said Union Pacific Railway Company, Southern Branch, was signified in writing, under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance was made and deposited with the Secretary of the Interior within one year after the passage of said act.

"3. The land in the petition described is a part of the lands known as the Osage ceded lands granted to the United States by the treaty between the United States of America and the Great and Little Osage Indians proclaimed January 21, 1867.

"4. Prior to the 24th day of December, 1867, a line was surveyed for the route of said railroad by G. M. Walker, then chief engineer of said company, which was the line from which the lands mentioned in stipulation No. 7 herein were withdrawn from market, but that line did not touch the southwest quarter of section thirty-four (34), township thirty-four (34), range twenty-one (21), which includes the land described in plaintiffs' petition **493]** in this case, and afterwards and *between May 1, 1870, and June 6, 1870, said company located its road on the line where now operated, and built same in substantial compliance with said act of Congress, but the route of said road on its present location has never been approved by the President of the United States, unless such approval is shown by the other facts herein admitted.

"5. The premises in plaintiffs' petition demanded lie wholly within 100 feet of the center line of the main track of the railway so built and constructed as aforesaid, the center line of said main track being the center of the right of way of the railroad company.

"6. On the 1st day of December, 1880, the said Missouri, Kansas, & Texas Railway Company leased said railway to said Missouri Pacific Railway Company, which has since possessed and operated the same as such lessee.

"7. Upon the completion of said railway through said Osage ceded land the President of the United States issued to said Missouri, Kansas, & Texas Railway Company patents under said act of Congress, approved July 26, 1866, for the alternate sections of land designated by odd numbers to the extent of five alternate sections per mile on each side of said railroad, which are the same patents set aside in the case of *Missouri, K. & T. R. Co.* v. *United States*, 92 U. S. 733, 760 [23:634, 645].

"8. The quarter section, including the land in question, was entered and purchased by one W. A. Hodges from the government of the United States on October 9, 1869, and a certificate in due form was on that day, by the proper officers, issued to him therefor, and thereafter and on November 1, 1870, a patent in due form was issued therefor pursuant to the said entry, by the government of the United States to said patentee, Hodges, which was duly signed and executed, and a perfect chain of title from said Hodges, patentee, now runs to and terminates in said defendant, J. B. Cook, and he is the owner thereof, unless the same is owned by plaintiffs by virtue of the facts herein admitted and the law governing the same. Defendant Printz is in possession of the premises in controversy as the tenant of defendant Cook.

*"9. None of the land in dispute lies **[494** within 50 feet of the line of the center of the main track of said railroad, nor does defendant claim any part of the strip of land within 50 feet on either side of the center of said track.

"The plaintiff, at the time of constructing said road, erected a depot building on its right of way, and the land on which said building stands is adjacent to the land in dispute, which said depot has been used all the time since its erection for the purpose of receiving freight and passengers for shipment, nor does defendant claim any ground on which side tracks of said railroads are now located."

*Messrs.* **James Hagerman** and **T. N. Sedgwick** for plaintiff in error.

*Mr.* **Nelson Case** for defendants in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Plaintiff claimed the premises in question as a part of its right of way, under and by virtue of the act of Congress approved July 26, 1866, entitled "An Act Granting Lands to the State of Kansas to Aid in the Construction of a



Digitized by Google

Southern Branch of the Union Pacific Railway and Telegraph, from Fort Riley, Kansas, to Fort Smith, Arkansas." 14 Stat. at L. 289.

By this act five alternate sections of land per mile on each side of the road were granted to the state of Kansas for the use and benefit of the railroad company, and in case it appeared that the United States had "when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purposes whatever," then other lands might be selected in lieu thereof: "*Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by 495]*competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, 200 feet in width, is hereby granted, subject to the approval of the President of the United States."

The 4th section read: "That as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

By the 6th section it was provided: "That the right of way through the public lands be, and the same is hereby, granted to said Pacific Railroad Company, Southern Branch, its successors and assigns, for the construction of a railroad as proposed: . . . Said way is granted to said railroad to the extent of 100 feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables and water stations."

The land in question was a part of the land ceded to the United States by the Great and Little Osage Indians by the treaty proclaimed January 21, 1867. 14 Stat. at L. 687.

From the statement of facts it appears that prior to December 24, 1867, a line was surveyed for the route of the railroad by the chief engineer of the company, which was the line from which the granted lands were withdrawn from market, but that line did not touch the quarter section embracing the land described in the petition. The precise date of the filing of the map and profile of this survey does not appear, but this is not material.

In the instances of many of the land grants, the acts contemplated a preliminary designation of the general route by map filed in the Department of the Interior, upon which the lands 496]*were withdrawn, but the grants only took effect on a subsequent designation of the definite location of the line of the road. *Kansas & P. R. Co.* v. *Dunmeyer*, 113 U. S. 629 [28: 1122]; *United States* v. *Southern P. R. Co.* 146 U. S. 570 [36: 1091]. But this grant made no provision for any preliminary surveys and maps, and the only map provided for was that mentioned in § 4, being, as stated, a map of "its line designating the route thereof." We think that by the filing of the map of the line surveyed the route was definitely fixed, within the intent and meaning of the act, and while the principal object in filing the map was to secure the withdrawal of the lands granted, it also operated, and could not otherwise than operate, to definitely locate the line and limits of the right of way. And this view is sustained by previous adjudications of this court.

By the act of Congress of July 23, 1866, entitled "An Act for a Grant of Lands to the State of Kansas to Aid in the Construction of the Northern Kansas Railroad and Telegraph" (14 Stat. at L. 210), a grant of lands to the state of Kansas for the benefit of the St. Joseph & Denver City Railroad Company was made in substantially the same terms as those of the grant of July 26, 1866, under consideration.

In *Van Wyck* v. *Knevals*, 106 U. S. 360 [27: 201], this act came before this court for construction, and the rights of the parties depended on the time of the definite location of the road. Knevals, the complainant below, claimed through the company, and contended that the filing of the map with the Secretary of the Interior was the location of the road, and Mr. Justice Field, speaking for the court, said: "We are of opinion that the position of the complainant is the correct one. The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior and *accepted by that officer, the [497 route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required of the company to establish the route." *Walden* v. *Knevals*, 114 U. S. 378 [29: 167]. And this was in accordance with the ruling of Mr. Justice Miller, on circuit, in *Knevals* v. *Hyde*, 6 Fed. Rep. 651.

The same conclusion necessarily followed in respect of the right of way. The grant of the lands and the grant of the right of way were alike grants *in præsenti* and stood on the same footing, so that, before definite location, all persons acquiring any portion of the public lands after the passage of the act took the same subject to the right of way for the proposed road. The easment and the lands were afloat until by definite location precision was given to the grant and they became permanently fixed. *St. Joseph & D. C. R. Co.* v. *Baldwin*, 103 U. S. 426 [26: 578].

After the line had thus been definitely located, on October 9, 1869, the quarter section containing the real estate in controversy was entered at the government land office by W. A. Hodges; to whom the proper certificate was that day issued, under a resolution of Congress, approved April 10, 1869 (16 Stat. at L. 55), in favor of bona fide settlers residing on



Digitized by Google

any portion of the land acquired from the Osage Indians by the treaty proclaimed January 21, 1867. Between May 1 and June 6, 1870, the railroad company ran a second line, on which it built its road between those two dates, and entered into occupancy of a right of way 100 feet in width. This line ran something like a mile east of that of definite location and through the quarter section in question, but none of the real estate in dispute lies within the right of way so occupied. On November 1, 1870, a patent was issued in due form to Hodges pursuant to his entry, and defendant Cook (under whom defendant Printz was in possession as tenant) holds by a perfect chain of title from Hodges. The issuing of the patent shows that the land department had found the existence of all the conditions, such 498] as actual occupancy of *and residence on the premises and like matters, requisite thereto, and it took effect by relation as of the date of the certificate. It follows that as the rights of the settler were acquired after the right of way of the road had been definitely located, he was not subject to any risk which others may incur who purchase while the location remains floating and uncertain, and he could not be deprived of rights which had thus attached by the subsequent action of the company. And his grantees stand in his shoes.

We need not consider what effect, if any, deviations of the kind in question might have upon the grant (*Van Wyck* v. *Knevals*, 106 U. S. 360 [27: 201]; 16 Ops. Atty. Gen. 457; 6 U. S. Land Dec. 209); nor is it necessary to discuss the contention that a railroad company, by once locating its road, has exhausted its authority and cannot relocate it on a new line without additional legislative permission so to do, or the effect of the statute of Kansas, which allows railroad companies to change the location of their tracks. Whatever the rights of the company in this regard, such a change could not affect the rights of third parties, which had in the meantime lawfully intervened. *Washington & I. R. Co.* v. *Cœur D' Alene R. & Nav. Co.* (No. 1) 160 U. S. 77 [40:346].

The inquiry does not arise as to how the railroad company acquired the 100 feet which it occupies for right of way. It may have been purchased, or acquired by condemnation or by gift. We dispose of the case on the ground that on the record before us the state courts did not err in holding that plaintiff was not entitled to recover the premises in controversy, which do not embrace the right of way actually occupied by the company.

*Judgment affirmed.*

---

499] UNITED STATES, *Plff. in Err.*,
v.
CHARLES R. ALLEN.

(See S. C. Reporter's ed. 499-504.)

*Drawback on imported coal—exceptional privilege.*

1 The drawback on imported bituminous coal afterwards used for fuel by coasting vessels given by the tariff act of 1883 is not preserved in the act of 1890, § 25, by the provision continuing any drawback allowed "under existing law," as the former act was superseded by the latter, which embodied all the provisions of the former not repealed.

2. A claim for a drawback of duty on imports is within the rule that exceptional privileges or exemptions from the general operation of a law must be strictly construed and doubts resolved against the claim.

[No. 337.]

*Submitted May 8, 1896. Decided May 25, 1896.*

ON A WRIT of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment affirming the judgment of the District Court of the United States for the Northern District of California in favor of the plaintiff, Charles R. Allen, against the United States, defendant, for the recovery of the amounts of certain drawbacks of duty on importations of bituminous coal. *Reversed*, and cause remanded, with directions to enter judgment in favor of the United States.

See same case below, 52 Fed. Rep. 575, 15 U. S. App. 252.

The facts are stated in the opinion.

*Mr.* **Edward B. Whitney**, Assistant Attorney General, for plaintiff in error.

*Messrs.* **L. E. Payson, J. F. Evans,** and *Page & Eells* for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

The defendant in error brought his action against the United States in the district court of the United States for the northern district of California to recover the amounts of certain alleged drawbacks of duty on importations of bituminous coal, which, in February, 1891, were supplied as fuel to the steamer Humboldt, a vessel of the United States regularly engaged in the coasting trade between sundry ports in northern California. Tender of compliance with the regulations promulgated by the Secretary of the Treasury, under the authority of the tariff act of March 3, 1883, to obtain the allowance and payment of such drawbacks, was averred, and it was alleged that the surveyor of the port and other government officials declined to recognize the existence of a right thereto. A demurrer to the complaint was overruled (52 Fed. Rep. 575) and, subsequently, an answer was filed taking issue thereon. Upon hearing on the merits a judgment was rendered in favor of the *plain- [500 tiff, which judgment was subsequently affirmed by the circuit court of appeals for the ninth circuit. 15 U. S. App. 252. Thereupon a writ of certiorari was allowed and the cause was brought here for review.

The right to the alleged drawbacks is grounded upon the 2d proviso of § 25 of the tariff act of 1890, which it was alleged continued in force the following provision of the tariff act of 1890, which it was alleged con-

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

*As to action to recover back duties paid under protest; protest, how made, and its effect*,—see note to Greely v. Thompson, 13: 397.



Digitized by Google

tinued in force the following provision of the tariff act of 1883 (22 Stat. at L. 511):

"Coal, bituminous and shale, 75 cents per ton of 28 bushels, 80 pounds to the bushel. A drawback of 75 cents per ton shall be allowed on all bituminous coal imported into the United States which is afterwards used for fuel on board vessels propelled by steam which are engaged in the coasting trade of the United States, or in the trade with foreign countries, to be allowed and paid under such regulations as the Secretary of the Treasury shall prescribe."

By § 10 of the shipping act of June 19, 1886, chap. 421 (24 Stat. at L. 81), the benefits of this provision were limited to vessels of the United States.

Section 25 of the tariff act of 1890 (26 Stat. at L. 617), above referred to, reads as follows:

"25. That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less 1 per centum of such duties: *Provided*, That when the articles exported are made in part from domestic materials the imported materials, or the parts of the articles made from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained: *And provided further*, That the drawback on any article allowed under existing law shall be continued at the rate herein provided. That the imported materials used in the manufacture or production of articles entitled to drawback of customs duties when exported shall in all cases where drawback of duties paid on such materials is claimed, be [501] identified, the quantity of such *materials used and the amount of duties paid thereon shall be ascertained, the fact of the manufacture or production of such articles in the United States and their exportation therefrom shall be determined, and the drawback due thereon shall be paid to the manufacturer, producer, or exporter, to the agent of either or to the person to whom such manufacturer, producer, exporter, or agent shall in writing order such drawback paid under such regulations as the Secretary of the Treasury shall prescribe."

The tariff act of 1890 combined two paragraphs of the act of 1883 relating to coal, into one (No. 432), and omitted the drawback provision above referred to. Said ¶ 432 reads as follows (26 Stat. at L. 600):

"432. Coal, bituminous and shale, 75 cents per ton of 28 bushels, 80 pounds to the bushel; coal slack or culm, such as will pass through a half-inch screen, 30 cents per ton of 28 bushels, 80 pounds to the bushel."

It is necessarily conceded that the omission of the drawback provision of the act of 1883 from this special paragraph obviously meant either that the drawback allowance was intended to be taken away, or that the intent was to provide for it elsewhere. If such provision is not found elsewhere in the act of 1890 it is clear, from the character of that act, that there was a repeal by implication of the drawback allowed by the earlier act, for, as was said by this court, speaking through Mr. Justice Harlan, in *Tracy* v. *Tuffly*, 134 U. S. 206, 223 [33:879, 884]: "While it is true that repeals by implication are not favored by the courts, it is settled that, without express words of repeal, a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern."

Is the contention of the defendant in error well founded that the drawback provision actually omitted in the act of 1890 was yet saved by the second proviso to § 25 of that act?

The trial court and the circuit court of appeals held that this section provided in distinct terms for a drawback, first *on all articles [502] wholly manufactured from imported materials and thereafter exported; and, second, for a drawback on all articles made partly from imported materials and thereafter exported, thus covering every possible manufacture made in this country of foreign materials and subsequently exported, and that the proviso following, to wit: "That the drawback on any article allowed under existing law shall be continued at the rate herein provided," recognized the continued right to the drawback here claimed, as it was then allowed by an existing law.

But this construction is faulty. It necessarily has, as its basis, the assumption that the act of 1883 was considered by Congress in passing the act of 1890, as an "existing law" within the purview of these words as used in the act of 1890. But the act of 1883 was clearly superseded in all its parts, and intended so to be, by the latter act. A comparison of the two acts will make manifest the fact that Congress sought and designed to embody in the act of 1890 all the provisions of the act of 1883 which it was not intended should be eliminated and repealed. Thus, § 2503 *et seq.* of the act of 1883 (22 Stat. at L. 522) embody lengthy provisions regarding special exemptions of merchandise, works of art, imported materials intended for particular purposes, etc. All such provisions will be found re-enacted in the act of 1890. 26 Stat. at L. 609, 611, 613, 616, 648, etc.

The act of 1883, in so far as it related to duties on imports, contained only two provisions for drawback, one on salt, the other on bituminous coal. The drawback on salt was re-enacted in the act of 1890 in the same situation as found in the act of 1883, but the provision as to bituminous coal, as already stated, was omitted and no substitute appears. Under the circumstances, the act of 1883 cannot be regarded as "existing law," as that expression is employed in the proviso in question. Congress having altered the form of the paragraph of the act of 1883 relating to bituminous coal, not only by omitting the provision as to drawback, but by combining two paragraphs of the act of 1883 into one in the act of 1890, its attention was necessarily directed to the necessity *of providing else- [503] where for the drawback if it was designed to retain it. It made special provision (¶ 828) for a 99 per cent drawback on imported tin plate used in the manufacture of cans, etc., for



Digitized by Google

export, and certainly the necessity for an equally unambiguous provision with reference to bituminous coal would have suggested itself if it was contemplated that such drawback should continue. It is altogether improbable that Congress couched an intention to continue a drawback on coal in the ambiguous language employed in the proviso which is relied on.

An added circumstance weighing against the construction that the proviso was intended to continue the drawback in question is the fact that the rule laid down in the proviso for determining the amount of drawback evidently had relation to articles manufactured from "materials," and not to a raw material like coal, in the production of which no materials are used which enter into and form a part of the product. The proviso requires that the drawback shall be continued "at the rate herein provided," and that rate is a sum "equal in amount to the duties paid on the 'material used,' less 1 per centum of such duties."

We are not called on now to determine whether the proviso in question should be limited solely to export articles of domestic manufacture composed in whole or in part of foreign materials, or whether the provision has reference to the general and specific sections authorizing drawbacks contained in U. S. Rev. Stat. chap. 9, tit. 34, or to special acts authorizing drawbacks, if any such there be. The argument that the language of the proviso which is here relied on must be held to mean nothing unless it be considered as continuing the drawback on coal, is without merit, for *non constat* that the language was employed, from abundance of precaution, to deny, in advance, the theory that the proviso repealed every drawback arising from general legislation outside the act of 1883. It is, moreover, apparent, taking the most favorable view of the claim asserted, that it is extremely doubtful whether the construction of this second provison of the tariff act of 1890, upon **504** which the finding in *favor of the defendant in error was predicated, was justified. Such being the case, it results that the doubts engendered must be resolved against him. The claim advanced is that an exceptional privilege or exemption from the general operation of a law exists in favor of the defendant in error. Such a claim is within the general principle that exemptions must be strictly construed, and that doubt must be resolved against the one asserting the exemption. *New York, Schurz*, v. *Cook*, 148 U. S. 397 [37: 498]; *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S. 301, 306 [38: 450, 453].

It results from these considerations that the judgments of both the district court of the United States for the northern district of California and the circuit court of appeals for the ninth circuit were erroneous. *Both the judgments must therefore be reversed* and the cause be remanded to the district court of the United States for the northern district of California, with directions to enter judgment in favor of the United States, with costs.

And it is so ordered.

**Mr. Justice Peckham dissents.**

JOHN H. WARD, Sheriff of the County of Uinta, in the State of Wyoming, *Appt.*,
*v.*
RACE HORSE.

(See S. C. Reporter's ed. 504-520.)

*Jurisdiction of this court—privilege of hunting by Indians.*

1. An imprisonment complained of as in violation of the United States Constitution and laws, and in disregard of a right guaranteed by a treaty made by the United States with a tribe of Indians, is a subject of jurisdiction of and may be reviewed by this court.
2. The treaty made by the United States with the Bannock Indians did not give them the right to exercise the hunting privilege therein referred to within the limits of the state of Wyoming in violation of its laws, after the admission of Wyoming into the Union as a state.

[No. 841.]

*Argued March 11, 12, 1896. Decided May 25, 1896.*

APPEAL from a judgment of the Circuit Court of the United States for the District of Wyoming rendered in a habeas corpus proceeding, discharging Race Horse, a member of the Bannock tribe of Indians, from custody.

*Reversed*, and case remanded with directions to discharge the writ and remand the prisoner to the custody of the sheriff.

See same case below, 70 Fed. Rep. 598.

Statement by Mr. Justice **White:**

This appeal was taken from an order of the court below, rendered in a habeas corpus proceeding, discharging the *appellee from [**505** custody. 70 Fed. Rep. 598. The petition for the writ based the right to the relief, which it prayed and which the court below granted, on the ground that the detention complained of was in violation of the Constitution and laws of the United States, and in disregard of a right arising from and guaranteed by a treaty made by the United States with the Bannock Indians. Because of these grounds the jurisdiction below existed, and the right to review here obtains. U. S. Rev. Stat. § 753; Act of March 3, 1891 (26 Stat. at L. 826, chap. 517). The record shows the following material facts: The appellee, the plaintiff below, was a member of the Bannock tribe of Indians, retaining his tribal relations and residing with it in the Fort Hall Indian reservation. This reservation was created by the United States in compliance with a treaty entered into between the United States and the eastern band of Shoshonees and the Bannock tribe of Indians, which took effect February 24, 1869. 15 Stat. at L. 673. Article 2 of this treaty, besides setting apart a reservation for the use of the Shoshonees, provided:

"It is agreed that whenever the Bannocks

NOTE.—*As to Indians and Indian tribes, their status and rights; jurisdiction and control over them,* —see note to Worcester v. Georgia, 8: 483.

*As to jurisdiction of the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty or Constitution,* see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.



Digitized by Google

desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the 'Port Neuf' and 'Kansas Prairie' countries."

In pursuance of the foregoing stipulation the Fort Hall Indian reservation was set apart for the use of the Bannock tribe.

Article 4 of the treaty provided as follows:

"The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

In July, 1868, an act had been passed erect-[506]ing a temporary *government for the territory of Wyoming (15 Stat. at L. 178), and in this act it was provided as follows:

"That nothing in this act shall be construed to impair the rights of persons or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians."

Wyoming was admitted into the Union on July 10, 1890. 26 Stat. at L. 222. Section 1 of that act provides as follows:

"That the state of Wyoming is hereby declared to be a state of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original states in all respects whatever; and that the Constitution which the people of Wyoming have formed for themselves be, and the same is hereby accepted, ratified, and confirmed."

The act contains no exception or reservation in favor of or for the benefit of Indians.

The legislature of Wyoming on July 20, 1895 (Wyo. Laws 1895, chap. 98, p. 225), passed an act regulating the killing of game within the state. In October, 1895, the district attorney of Uinta county, state of Wyoming, filed an information against the appellee (Race Horse) for having killed in that county seven elk in violation of the law of the state. He was taken into custody by the sheriff, and it was to obtain a release from imprisonment authorized by a commitment issued under these proceedings that the writ of habeas corpus was sued out. The following facts are unquestioned: 1st. That the elk were killed in Uinta county, Wyoming, at a point about 100 miles from the Fort Hall Indian reservation, which is situated in the state of Idaho; 2d, that the killing was in violation of the laws of the state of Wyoming; 3d, that the place where the killing took place was unoccupied public land of the United States, in the sense that the United States was the owner of the fee of the land; 4th, that the place where the elk were killed was in a mountainous region some distance removed from settlements, but was used by the settlers as a range for cattle, and was within election and school districts of the state of Wyoming.

*Messrs.* **Benjamin F. Fowler** and **Willis Van Devanter** for appellant.

*Mr.* **Judson Harmon,** Attorney General, for appellee.

Mr. Justice **White** delivered the opinion of the court:

It is wholly immaterial, for the purpose of the legal issue here presented, to consider whether the place where the elk were killed is in the vicinage of white settlements. It is also equally irrelevant to ascertain how far the land was used for a cattle range, since the sole question which the case presents is whether the treaty made by the United States with the Bannock Indians gave them the right to exercise the hunting privilege, therein referred to, within the limits of the state of Wyoming in violation of its laws. If it gave such right, the mere fact that the state had created school districts or election districts, and had provided for pasturage on the lands, could no more efficaciously operate to destroy the right of the Indian to hunt on the lands than could the passage of the game law. If, on the other hand, the terms of the treaty did not refer to lands within a state, which were subject to the legislative power of the state, then it is equally clear that, although the lands were not in school and election districts and were not near settlements, the right conferred on the Indians by the treaty would be of no avail to justify a violation of the state law.

The power of a state to control and regulate the taking of game cannot be questioned. *Geer v. Connecticut*, 161 U. S. 519 [40; 793]. The text of article 4 of the treaty, relied on as giving the right to kill game within the state of Wyoming, in violation of its laws, is as follows:

"But they shall have the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

It may at once be conceded that the words "unoccupied *lands of the United States" if[508] they stood alone, and were detached from the other provisions of the treaty on the same subject, would convey the meaning of lands owned by the United States, and the title to or occupancy of which had not been disposed of. But in interpreting these words in the treaty, they cannot be considered alone, but must be construed with reference to the context in which they are found. Adopting this elementary method, it becomes at once clear that the unoccupied lands contemplated were not all such lands of the United States wherever situated, but were only lands of that character embraced within what the treaty denominates as hunting districts. This view follows as a necessary result from the provision which says that the right to hunt on the unoccupied lands shall only be availed of as long as peace subsists on the borders of the hunting districts. Unless the districts thus referred to be taken as controlling the words "unoccupied lands," then the



Digitized by Google

reference to the hunting districts would become wholly meaningless, and the cardinal rule of interpretation would be violated, which ordains that such construction be adopted as gives effect to all the language of the statute. Nor can this consequence be avoided by saying that the words "hunting districts" simply signified places where game was to be found, for this would read out of the treaty the provision as "to peace on the borders" of such districts, which clearly pointed to the fact that the territory referred to was one beyond the borders of the white settlements. The unoccupied lands referred to, being therefore contained within the hunting districts, by the ascertainment of the latter the former will be necessarily determined, as the less is contained in the greater. The elucidation of this issue will be made plain by an appreciation of the situation existing at the time of the adoption of the treaty, of the necessities which brought it into being and of the purposes intended to be by it accomplished.

When in 1868 the treaty was framed the progress of the white settlements westward had hardly, except in a very scattered way, reached the confines of the place selected for the Indian reservation. Whilst this was true, the march of advancing civilization foreshad-[509]owed the fact that the *wilderness, which lay on all sides of the point selected for the reservation, was destined to be occupied and settled by the white man, hence interfering with the hitherto untrammeled right of occupancy of the Indian. For this reason, to protect his rights and to preserve for him a home where his tribal relations might be enjoyed under the shelter of the authority of the United States, the reservation was created. Whilst confining him to the reservation, and in order to give him the privilege of hunting in the designated districts, so long as the necessities of civilization did not require otherwise, the provision in question was doubtless adopted, care being, however, taken to make the whole enjoyment in this regard dependent absolutely upon the will of Congress. To prevent this privilege from becoming dangerous to the peace of the new settlements as they advanced, the provision allowing the Indian to avail himself of it only whilst peace reigned on the borders was inserted. To suppose that the words of the treaty intended to give to the Indian the right to enter into already established states and seek out every portion of unoccupied government land and there exercise the right of hunting, in violation of the municipal law, would be to presume that the treaty was so drawn as to frustrate the very object it had in view. It would also render necessary the assumption that Congress whilst preparing the way, by the treaty, for new settlements and new states, yet created a provision not only detrimental to their future well-being, but also irreconcilably in conflict with the powers of the states already existing. It is undoubted that the place in the state of Wyoming, where the game in question was killed, was at the time of the treaty, in 1868, embraced within the hunting districts therein referred to. But this fact does not justify the implication that the treaty authorized the continued enjoyment of the right of killing game therein, when the territory ceased to be a part of the hunting districts and came within the authority and jurisdiction of a state. The right to hunt given by the treaty clearly contemplated the disappearance of the conditions therein specified. Indeed, it made the right depend on whether the land in the hunting districts was unoccupied *public land of the United States. [510] This, as we have said, left the whole question subject entirely to the will of the United States, since it provided, in effect, that the right to hunt should cease the moment the United States parted with the title to its land in the hunting districts. No restraint was imposed by the treaty on the power of the United States to sell, although such sale, under the settled policy of the government, was a result naturally to come from the advance of the white settlements in the hunting districts to which the treaty referred. And this view of the temporary and precarious nature of the right reserved, in the hunting districts, is manifest by the act of Congress creating the Yellowstone Park Reservation, for it was subsequently carved out of what constituted the hunting districts at the time of the adoption of the treaty, and is a clear indication of the sense of Congress on the subject. 17 Stat. at L. 32; 28 Stat. at L. 73. The construction which would affix to the language of the treaty any other meaning than that which we have above indicated would necessarily imply that Congress had violated the faith of the government and defrauded the Indians by proceeding immediately to forbid hunting in a large portion of the territory, where it is now asserted there was a contract right to kill game, created by the treaty in favor of the Indians.

The argument, now advanced, in favor of the continued existence of the right to hunt over the land mentioned in the treaty, after it had become subject to state authority, admits that the privilege would cease by the mere fact that the United States disposed of its title to any of the land, although such disposition, when made to an individual, would give him no authority over game, and yet that the privilege continued when the United States had called into being a sovereign state, a necessary incident of whose authority was the complete power to regulate the killing of game within its borders. This argument indicates at once the conflict between the right to hunt in the unoccupied lands, within the hunting districts, and the assertion of the power to continue the exercise of the privilege in question in the state of Wyoming in defiance *of [511] its laws. That "a treaty may supersede a prior act of Congress, and an act of Congress supersede a prior treaty," is elementary. *Fong Yue Ting* v. *United States*, 149 U. S. 698 [37: 905]; *207¼ lb. Papers Tobacco* v. *United States* ("*The Cherokee Tobacco*"), 78 U. S. 11 Wall. 621 [20: 229]. In the last case it was held that a law of Congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was paramount to the treaty. Of course the settled rule undoubtedly is that repeals by implication are not favored, and will not be held to exist if there be any other reasonable construction. *Cope* v. *Cope*, 137 U. S. 682 [34: 832], and authorities there cited. But in ascertaining whether both statutes can be main-



Digitized by Google

tained it is not to be considered that any possible theory, by which both can be enforced, must be adopted, but only that repeal by implication must be held not to have taken place if there be a reasonable construction by which both laws can coexist consistently with the intention of Congress. *United States* v. *67 Packages Dry Goods*, 58 U. S. 17 How. 87 [15: 54]; *District of Columbia* v. *Hutton*, 143 U. S. 18 [36: 60]; *Frost* v. *Wenie*, 157 U. S. 46 [39: 614]. The act which admitted Wyoming into the Union, as we have said, expressly declared that that state should have all the powers of the other states of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule.

In *Pollard* v. *Hagan* (1845), 44 U. S. 3 How. 212 [11: 565], the controversy was as to the validity of a patent from the United States to lands situate in Alabama, which at the date of the formation of that state were part of the shore of the Mobile river between high and low water mark. It was held that the shores of navigable waters and the soil under them were not granted by the Constitution of the United States, and hence the jurisdiction exercised thereover by the Federal government, before the formation of the new state, was held tem-[512] porarily *and in trust for the new state to be thereafter created, and that such state when created, by virtue of its being, possessed the same rights and jurisdiction as had the original states. And, replying to an argument based upon the assumption that the United States had acquired the whole of Alabama from Spain, the court observed that the United States would then have held it subject to the Constitution and laws of its own government. The court declared (p. 229 [573]) that to refuse to concede to Alabama sovereignty and jurisdiction over all the territory within her limits would be to "deny that Alabama has been admitted into the Union on an equal footing with the original states." The same principles were applied in *Per Moli* v. *Municipality No. 1 of New Orleans*, 44 U. S. 3 How. 589 [11: 739].

In *Withers* v. *Buckley* (1857), 61 U. S. 20 How. 84 [15: 816], it was held that a statute of Mississippi creating commissioners for a river within the state and prescribing their powers and duties, was within the legitimate and essential powers of the state. In answer to the contention that the statute conflicted with the act of Congress which authorized the people of Mississippi territory to form a Constitution, in that it was inconsistent with the provision in the act that "the navigable rivers and waters leading into the same shall be common highways, and forever free, as well to the inhabitants of the state of Mississippi as to other citizens of the United States," the court said (p. 92 [820]):

"In considering this act of Congress of March 1, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new state in any of its necessary attributes as an independent sovereign government, nor to inhibit or diminish its perfect equality with the other members of the confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the confederacy, from the language of the Constitution adopted by the states, and from the rule of interpretation pronounced by this court in the case of *Pollard* v. *Hagan*, 44 U. S 3 How. 228 [11: 570]."

*A like ruling was made in *Escanaba* [513 *& L. M. Transp. Co.* v. *Chicago* (1882), 107 U. S. 678 [27:442], where provisions of the ordinance of 1787 were claimed to operate to deprive the state of Illinois of the power to authorize the construction of bridges over navigable rivers within the state. The court, through Mr. Justice Field, said (p. 683 [445]):

"But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people."

And it was further added (p. 688 [447]):

"Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. . . . Equality of the constitutional right and power is the condition of all the states of the Union, old and new."

In *Cardwell* v. *American River Bridge Co.* (1884), 113 U. S. 205 [28: 959], *Escanaba & L. M. Transp. Co.* v. *Chicago*, *supra*, was followed, and it was held that a clause in the act admitting California into the Union, which provided that the navigable waters within the state shall be free to citizens of the United States, in no way impaired the power which the state could exercise over the subject if the clause in question had no existence. Mr. Justice Field concluded the opinion of the court as follows (p. 212 [962]):

"The act admitting California declares that she is 'admitted into the Union on an equal footing with the original states in all respects whatever.' She was not, therefore, shorn by the clause as to navigable water, within her limits, of any of the powers which the original states possessed over such waters within their limits."

A like conclusion was applied in the case of *Willamette Iron* *Bridge Co.* v. *Hatch*, 125 [514] U. S. 1 [31: 629], where the act admitting the state of Oregon into the Union was construed.

Determining, by the light of these principles, the question whether the provision of the treaty giving the right to hunt on unoccupied lands of the United States in the hunting districts is repealed, in so far as the lands in such districts are now embraced within the limits



Digitized by Google

of the state of Wyoming, it becomes plain that the repeal results from the conflict between the treaty and the act admitting that state into the Union. The two facts, the privilege conferred and the act of admission, are irreconcilable in the sense that the two under no reasonable hypothesis can be construed as coexisting.

The power of all the states to regulate the killing of game within their border will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the state of Wyoming, that state would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the state. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other states of the Union, a power resulting from the fact of statehood and incident to its plenary existence. Nor need we stop to consider the argument advanced at bar, that as the United States, under the authority delegated to it by the Constitution in relation to Indian tribes, has a right to deal with that subject, therefore it has the power to exempt from the operation of state game laws each particular piece of land owned by it in private ownership within a state, for nothing in this case shows that this power has been exerted by Congress. The enabling act declares that the state of Wyoming is admitted on equal terms with the other states, and this declaration, which is simply an expression of the general rule, which presupposes that states, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the states already admitted, repels any presumption that in this particular case
515]Congress intended to admit the *state of Wyoming with diminished governmental authority. The silence of the act admitting Wyoming into the Union, as to the reservation of rights in favor of the Indians, is given increased significance by the fact that Congress in creating the territory expressly reserved such rights. Nor would this case be affected by conceding that Congress, during the existence of the territory, had full authority in the exercise of its treaty-making power to charge the territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a territory it would be also within the power of Congress to continue them in the state, on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the state, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission. Indeed, it may be further, for the sake of the argument, conceded that where there are rights created by Congress, during the existence of a territory which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the state, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since by its terms, it shows that the burden imposed on the territory was essentially perishable and intended to be of a limited duration. Indeed, the whole argument of the defendant in error rests on the assumption that there was a perpetual right conveyed by the treaty, when in fact the privilege given was temporary and precarious. But the argument goes further than this, since it insists that, although by the treaty the hunting privilege was to cease whenever the United States parted merely with the title to any of its lands, yet that privilege was to continue, although the United States parted with its entire authority over the capture and killing of game. Nor is there force in the suggestion that the cases of *Blue Jacket* v. *Johnson County Comrs.* (*"The Kansas Indians"*) 72 U. S. 5 Wall. 737[18: 667], and *Fellows* v. *Denniston* (*"The New York Indians"*) 72 U. S. 5 Wall. 761 [18: 708], are in conflict with these *views. The first case[516 (that of the Kansas Indians) involved the right of the state to tax the land of Indians owned under patents issued to them in consequence of treaties made with their respective tribes. The court held that the power of the state to tax was expressly excluded by the enabling act. The second case (that of the New York Indians) involved the right of the state to tax land embraced in an Indian reservation, which existed prior to the adoption of the Constitution of the United States. Thus these two cases involved the authority of the state to exert its taxing power on lands embraced within an Indian reservation, that is to say, the authority of the state to extend its powers to lands not within the scope of its jurisdiction, whilst this case involves a question of whether where no reservation exists a state can be stripped by implication and deduction of an essential attribute of its governmental existence. Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the states. To refer to the limitation contained in the territorial act and disregard the terms of the enabling act would be to destroy and obliterate the express will of Congress.

*For these reasons the judgment below was erroneous, and must therefore be reversed*, and the case must be remanded to the court below with directions to discharge the writ and remand the prisoner to the custody of the sheriff. And it is so ordered.

Mr. Justice **Brewer**, not having heard the argument, takes no part in this decision.

Mr. Justice **Brown** dissenting:

As the opinion of the court seems to me to imply and to sanction a distinct repudiation by Congress of a treaty with the Bannock Indians, I am unable to give my assent to it. The facts are in a nutshell.



Digitized by Google

517]*On July 3, 1868, the United States entered into a treaty (15 Stat. at L. 673) with the Shoshonees and Bannock tribes of Indians, by which the latter agreed to accept and settle upon certain reservations, and the former agreed that the Indians should have "the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

A few days thereafter, and on July 25, 1868, Congress passed an act "to provide a temporary government for the territory of Wyoming" (15 Stat. at L. 178), within which the Bannock reservation was situated, with a proviso "that nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians."

So far as it appears, the above treaty still remains in force, but the position of the majority of the court is that the admission of the territory of Wyoming as a state abrogated it *pro tanto*, and put the power of the Indians to hunt on the unoccupied lands of the United States completely at the mercy of the state government.

Conceding at once that it is within the power of Congress to abrogate a treaty, or rather that the exercise of such power raises an issue, which the other party to the treaty is alone competent to deal with, it will be also conceded that the abrogation of a public treaty ought not to be inferred from doubtful language, but that the intention of Congress to repudiate its obligation ought clearly to appear. As we said in *Hauenstein* v. *Lynham*, 100 U. S. 488 [25: 628], "where a treaty admits of two constructions, one restricted as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. Such is the settled rule of this court." See also *Chew Heong* v. *United States*, 112 U. S. 536, 549 [28: 770, 773].

It appears from the 1st article that this treaty was entered into at the close of a war between the two contracting parties; that the Indians agreed to accept certain reservations of land, and the United States, on its part, "sol-
518]emnly agreed" that no *persons, with certain designated exceptions, "shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and . . . they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists between the whites and the Indians on the borders of the hunting districts." The fact that the territory of Wyoming would ultimately be admitted as a state must have been anticipated by Congress, yet the right to hunt was assurred to the Indians, not until this should take place, but so long as game may be found upon the lands, and so long as peace should subsist on the borders of the hunting districts. Not only this, but the territory was created with the distinct reservation that the rights of the Indian should not be construed to be impaired so long as they remained unextinguished by further treaty. The right to hunt was not one secured to them for sporting purposes, but as a means of subsistence. It is a fact so well known that we may take judicial notice of it, that the Indians have never been an industrial people; that even their agriculture was of the rudest description, and that their chief reliance for food has been upon the chase. The right to hunt on the unoccupied lands of the United States was a matter of supreme importance to them, and as a result of being deprived of it they can hardly escape becoming a burden upon the public. It is now proposed to take it away from them, not because they have violated the treaty, but because the state of Wyoming desires to preserve its game. Not doubting for a moment that the preservation of game is a matter of great importance, I regard the preservation of the public faith, even to the helpless Indian, as a matter of much greater importance. If the position of the court be sound, this treaty might have been abrogated the next day by the admission of Wyoming as a state, and what might have been done in this case might be done in the case of every Indian tribe within our boundaries. There is no limit to the right of the state, which may in its discretion prohibit the killing of all game, and thus practically deprive the Indians of their principal means of subsistence.

*I am not impressed with the theory [519
that the act admitting Wyoming into the Union upon an equal footing with the original states authorized them to impair or abrogate rights previously granted by the sovereign power by treaty, or to discharge itself of burdens which the United States had assumed before her admission into the Union. In the cases of *Blue Jacket* v. *Johnson County Comrs.* ("*The Kansas Indians*"), 72 U. S. 5 Wall. 737 [18: 667], we held that a state, when admitted into the Union, was bound to respect an exemption from taxation which had been previously granted to tribes of Indians within its borders, because, as the court said, the state of Kansas "accepted this status when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or by a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of the treaties and laws of Congress, and their property is withdrawn from the operation of state laws."

It is true that the act admitting the state of Kansas into the Union contained a proviso similar to that in the act erecting a government for the territory of Wyoming, *viz.*: "That nothing contained in this said Constitution respecting the boundaries of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty with such Indians." In this particular the cases differ from each other only in the fact that the proviso in the one case is inserted in the act creating the territory, and in the other in the act admitting the territory as a state; and unless we are to say that the act admitting the territory of



Digitized by Google

Wyoming as a state absolved it from its liabilities as a territory, it would seem that the treaty applied as much in the one case as in the other. But however this may be, the proviso in the territorial act exhibited a clear intention on the part of Congress to continue in force the stipulation of the treaty, and there is nothing in the act admitting the territory as a 520]state which manifests an intention to *repudiate them. I think, therefore, the rights of these Indians could only be extinguished by purchase, or by a new arrangement with the United States.

I understand the words "unoccupied lands of the United States" to refer not only to lands which have not been patented, but also to those which have not been settled upon, fenced, or otherwise appropriated to private ownership, but I am quite unable to see how the admission of a territory into the Union changes their character from that of unoccupied to that of occupied lands.

---

## STATE OF INDIANA, *Complainant*, v. STATE OF KENTUCKY.

(See S. C. Reporter's ed. 520-527.)

*Boundary line between Indiana and Kentucky —commission continued — decree without prejudice.*

1. The boundary line between the states of Indiana and Kentucky, in controversy in this action, is established and declared to be as delineated and set forth in the report of the commissioners and the map accompanying and referred to in said report.
2. The commission for running said boundary line is continued for the purpose of permanently marking said line, with directions to report to this court.
3. This decree is without prejudice to further proceedings, as either of the parties may be advised, for the determination of such part of the boundary line between said states as may not have been settled by this decree.

[No. 2, Original.]

*Argued April 27, 1896. Decided May 18, 1896.*

IN EQUITY. On motion to confirm the report of the commissioners heretofore appointed to ascertain and run the boundary line between the states of Kentucky and Indiana as designated in the opinion of this court heretofore filed and judgment and decree heretofore entered herein. *Report of commissioners confirmed.*

*Mr.* **William A. Ketcham,** Attorney General of Indiana, for complainant.

*Mr.* **R. H. Cunningham** for defendant.

PER MR. CHIEF JUSTICE FULLER:

This cause came on to be heard on the report of Gustavus V. Menzies, Gaston M. Alves, 521]and Amos Stickney, *commissioners appointed herein at this term, on October 21, 1895, to ascertain and run the boundary line between the states of Kentucky and Indiana as designated in the opinion of this court heretofore filed and judgment and decree heretofore entered herein, May 19, 1890, filed April 27, 1896; the exceptions of the state of Kentucky thereto and the motion of the state of Indiana for the confirmation thereof; and which report is as follows:

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

Indiana vs. Kentucky

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States.

The undersigned commissioners appointed by this honorable court in the above-entitled cause, to ascertain and run the boundary line between the states of Indiana and Kentucky, north of the tract known as Green River Island, have the honor to present the following report:

The first meeting of the commission was held at Evansville, Indiana, on December 7, 1895, all the commissioners being present, and each commissioner having been sworn according to the order of the court, the commission organized by electing Lieut. Col. Amos Stickney, U. S. army, as chairman.

At this meeting there were present Mr. R. H. Cunningham, of Henderson, Kentucky, representing the state of Kentucky; Mr. Merril Moores, deputy attorney general of the state of Indiana, representing that state, and Mr. J. E. Williamson, of Evansville, Indiana, representing a number of land owners along the line where the boundary is to be ascertained and run.

The above-mentioned gentlemen being invited thereto, expressed their views in a general way as to a proper method of determining the boundary line to be run between the states of Indiana and Kentucky to accord with the decision of this court. Neither in the order of your honorable court *appointing the [522 commissioners, nor subsequently, were your commissioners instructed as to the methods they should pursue in ascertaining the boundary line to be run. They therefore assumed that it was the intention of the court to leave them untrammeled with instructions other than such as were to be inferred, first, from the decision of the court, and, second, from the testimony upon which that decision was made.

Your commissioners then proceeded to and made a personal examination of the grounds where the boundary line was to be ascertained and run. After this examination, and a consideration of the subject in the light of the court's decision, and the testimony, it was concluded that a determination of a proper location of the boundary line would require the marking out upon the ground as nearly as possible of the meandered river bank lines of the survey of Jacob Fowler, made in 1805 and 1806, the oldest survey of record, copies of the map and notes of which were incorporated and unchallenged in the testimony in the case.

A competent surveyor was employed in the

NOTE.—*As to judicial settlement of state boundaries,* see note to Nebraska v. Iowa, 36: 798.



Digitized by Google

person of Mr. C. C. Genung, surveyor of Vanderburgh county, Indiana, who was familiar with the county records and the landmarks in the vicinity of the proposed line. Mr. Genung was instructed to proceed as soon as possible under the direction of the chairman, to re-establish upon the ground as nearly as practicable the aforesaid meander line of the survey of 1805 and 1806, using every precaution to determine said line as acurately as might be, from the notes of the survey, and such marks referred to in the notes, and other authenticated marks, as might be found.

He was also directed to make cross sections at intervals, by leveling across the depression now existing, where the island chute once was, and determine the present crests of the banks.

Mr. Genung performed the duty allotted to him, and made a map exhibiting the result of his surveys.

Your commissioners, after verifying his work on the ground, then held another meeting at [523] Evansville, Indiana, January *22, 1896, and made a careful study of the information obtained by the survey. An examination of the map presented by Mr. Genung, giving the results of his survey, with a report upon the same, satisfied your commissioners on three points. The close accord of the re-established meander line with the existing crest of the high bank was strong proof that the line as re-established was in fact a very close approximation in location to the location of the line as originally run; it also indicated that the original meander line was practically along the crest of the high-water bank, and not along the low-water line; and further, that the crest of the bank along the Indiana side of the depression as it exists to-day must be nearly as it was at the time of the original survey.

It will be noticed from the topography on the map that the crest of the high-water bank on the Indiana side of the depression is quite regular, while the crest of the bank on the island side, especially above the railroad crossing, is irregular, indicating, probably, extensive deposits since the time when there was a free flowing stream around the island. In the testimony there are mentions of drift piles in the upper part of the chute causing deposits.

Below the railroad crossing the crests of the two banks are nearly parallel, and as scaled on the map where most nearly parallel, are about eight chains apart. It would seem probable that the chute before it was choked up by drifts and deposits had a width more or less uniform of about eight chains between crests of the high bank. During low-water stages the part of the chute covered by water was probably nearly in the center of the chute. Just how far the low-water surface extended towards the Indiana side, it is impossible at this time to determine accurately, but it would seem that a close approximation to the water line would be a line equidistant from the Indiana bank crest line and the central line of the chute. Upon this assumption, the water of a low stage would have covered the middle half of the space between the crest of the high banks, and a fair allowance should be made for the space covered by the bank slopes extending from the crests of the high banks to the low-water line.

*It was decided then to lay out as a trial [524] line a line parallel to the meander line of the survey of 1805 and 1806, as re-established, and at a distance of two chains from it, measured towards the island. This was done, and notification was sent to Hon. W. A. Ketcham, attorney general of the state of Indiana, Mr. R. H. Cunningham, representing the state of Kentucky, and Mr. J. E. Williamson, representing land owners. The above-mentioned gentlemen were invited to present in writing, if they so desired, any statements to prove that such line was not approximately the low-water line in the year 1792. They were also invited to make any oral argument relating thereto to your commissioners at their next meeting.

On February 8, 1896, your commissioners again met at Evansville, Indiana, and proceeded to inspect the trial line as laid out and marked upon the ground. After their inspection they held a meeting, due notice of which had been given to the aforementioned gentlemen representing the different interests.

Mr. R. H. Cunningham on behalf of the state of Kentucky appeared, and had no particular objections to urge against the approximate line, but filed a request which is herewith transmitted, marked Exhibit "A." Mr. J. E. Williamson sent a communication, which is transmitted with this report and marked Exhibit "B."

After further consideration of the subject it was decided that your commissioners were not authorized to lay down any line beyond the upper and lower limits of Green River island as it existed in 1792, and it was decided to adopt for recommendation the trial line within those limits as marked, with a slight change at the extreme upper end, to allow for what was undoubtedly a flat bank slope, it being upon a point.

Your commissioners would therefore respectfully state that they have now ascertained and run, according to their best judgment, the boundary line between Indiana and Kentucky, north of tract known as Green River island as it existed when Kentucky became a state, which is described as follows, to wit:

*Commencing at a point on the line [525] between sections fifteen (15) and fourteen (14), township seven (7) south, range ten (10) west, and 67.25 chains south of the northeast corner of section fifteen (15). The post set at this point is witnessed by a sycamore tree 36 inches, S. 1° 55′ E. 43.8 ft.; and also by a honey locust 32 inches, S. 6° 50′ E. 24.1 ft., and is at the head of Green River island, and also assumed low-water mark in 1792. From this point going down stream and making an angle to the left from the east line of section fifteen (15) of 50° 26′, and on a course of N. 49° 16′ W., a distance of 1098.55 ft. to a post witnessed by a cottonwood 48 inches, N. 79° 45′ W. 163 ft.

Angle to right 0° 45′ 15″, course N. 48° 30′ 45″ W. 1171.45 ft. to a post, witnessed by a sycamore 22 inches, S. 66° 50′ E. 398 ft.

Angle to left 6° 50′, course N. 55° 20′ 45″ W. 1432.35 ft. to a post, witnessed by a red



Digitized by Google

elm 48 inches, S. 81° 40′ E. 150.5 ft. And also a red elm 60 inches, S. 83° 20′ E. 160 ft.

Angle to left 18° 43′ 15″ course N. 69° 04′ W. 1187.2 ft. to a post, witnessed by a sycamore 41 inches, S. 87° 15′ E. 149.7 ft.; and also a sycamore 48 inches, S. 88° 20′ E. 156.2 ft.

Angle to right 0° 42′ course N. 68° 22′ W. 1312.6 ft. to a post witnessed by a sycamore 15 inches, south 16° 15′ E. 80.5 ft. And a sycamore 11 inches, S. 18° 00′ E. 79.6 ft.

Thence on same tangent and course 520.55 ft. to a post, witnessed by a cottonwood 16 inches, S. 8° 45′ E. 61.4 feet.

Angle to right 9° 01′ 30″, course N. 59° 20′ 30″ W. 1735 ft. to a post, witnessed by a sycamore 64 inches, N. 13° 40′ W. 130 ft.

Angle to left 2° 37′, course N. 61° 57′ 30″ W. 964.6 ft. to a post, witnessed by a cottonwood 30 inches, S. 44° 00′ W. 67 ft. and a cottonwood 37 inches, S. 34° 40′ W. 70.3 ft.

Angle to right 2° 06′, course N. 59° 51′ 30″ W. 2926.5 ft. to a post, witnessed by a sycamore 48 inches, N. 74° 50′ E. 146.5 ft. and a sycamore 56 inches, N. 27° 30′ E. 94.8 ft., and a stone on section line, between sections eight (8) and nine (9), N. 32° 30′ E. 132.6 ft.

Angle to right 4° 36′ 30″, course N. 55° 15′ [526] W. 1659.6 ft. to *a post, witnessed by a cotton-wood 22 inches, S. 17° 15′ W. 141.7 ft.

Angle to right 3° 05′ 30″, course N. 52° 09′ 30″ W. 952 ft. to a post, witnessed by a sycamore 60 inches, S. 88° 05′ E. 254 ft. and a sycamore snag 31 inches, N. 49° 25′ E. 164.4 ft.

Angle to right 7° 56′ 30″, course N. 44° 13′ W. 2004.1 ft. to a post, witnessed by an elm 60 inches, N. 2° 35′ E. 230.5 ft.

Angle to right 5° 58′, course N. 38° 15′ W. 477.65 ft. to a post, witnessed by a sycamore 56 inches, N. 29° 45′ E. 115 ft.

Angle to left 0° 40′, course N. 38° 55′ W. 1259 ft. to a post, witnessed by a sycamore 36 inches, S. 44° 55′ E. 131.8 ft., and a cottonwood 40 inches, S. 42° 50′ W. 155 ft.

Angle to right 6° 07′, course N. 32° 58′ W. 1257 ft. to a post, witnessed by an elm 53 inches, S. 43° 25′ E. 578 ft. and the stump of the original maple witness tree of 1806, 65 inches, N. 49° 55′ E. 126 ft.

Angle to right 2° 42′, course N. 30° 06′ W. 1186.6 ft. to a post, witnessed by a sycamore snag 28 inches, N. 69° 15′ E. 102.7 ft.

Angle to right 7° 03′ 30″, course N. 23° 42′ 30″ W. 2735.7 ft. to a post, witnessed by a maple 36 inches, N. 78° 00′ E. 165.3 ft.

Angle to right 12° 17′ 30″, course N. 10° 45′ W. 1202.12 ft. to a post opposite the lower end of Green River island, and at low water as it was in 1792, witnessed by a sycamore 52 inches, N. 65° 35′ E. 363.45 ft.

The above courses are run from the true meridian as ascertained by observation at the point on the map marked "W" on the line between townships six (6) and seven (7).

The above-described line is indicated by the red line on the map transmitted herewith, marked Exhibit "C." We also transmit the preliminary and final reports of the surveyor, Mr. C. C. Genung, marked Exhibits "D" and "E," also a sheet of cross sections marked Exhibit "F."

The above-described line is now marked by cedar posts, set at the initial and terminal points, and points where changes in direction occur, and it is recommended that it should be permanently marked as follows:

*Three suitable points should be select- [527
ed upon the line, one near the upper end, one near the middle, and one near the lower end. At each of these points a monument should be erected which should consist of a stone of durable quality 6 feet long, and 18 inches square in cross section. This stone should be imbedded in a well-made foundation of concrete. The concrete should be 6 feet square and 4 feet deep, the upper surface being at the surface of the ground. The stone should be placed upright so as to extend 3 feet into the concrete, and have 3 feet above the ground. Upon one side of the stone should be cut the word "Indiana," and upon the opposite side the word "Kentucky." Between the stone monuments, at each turning point of the line, there should be placed an iron post 6 feet long, and 6 inches in diameter of cross section. The iron post to be imbedded in a foundation of concrete 2 feet square and 3½ feet deep; top of the concrete to be at the surface of the ground, and the post standing upright in the concrete, the top of the post being 3 feet above the ground.

The estimated cost of the above described monuments, including placing the same, is $600.

We herewith file, as a part of our report, two certified copies of the original map, which we recommend be furnished the respective states, as may be directed by the court.

We herewith attach an itemized statement of costs and expenses incurred by the commissioners, marked Exhibit "G," which, if approved, we recommend be adjudged equally against the parties to the suit.

Respectfully submitted,

Amos Stickney,
Lt. Col. of Engrs., U. S. A.
Gustavus V. Menzies,
Gaston M. Alves,
Commissioners.

*EXHIBIT "A." [528

Honorable Commissioners of U. S. Supreme Court to ascertain and run the boundary line between Indiana and Kentucky at and near Green River island.

Gentlemen: While I have no special objection to the test line you have tentatively adopted, although it does not seem to make allowance for any accretion to the Indiana bank of the river between June 1, 1792, and the date of the Congressional survey in 1806, I suggest and request that such line as you may finally adopt be extended upon such course and for such distance as you find correct until it intersects the present low-water line of the Ohio river both at the upper and lower ends. In other words that you run at each end to the points where low-water mark in 1792 coincides with low-water mark at the present time.

Very respectfully,

R. H. Cunningham,
For the Commonwealth of Kentucky.

February 3, 1896.



Digitized by Google

EXHIBIT "B."

Evansville, Ind., Feb. 2, 1896.

Col. Amos Stickney, Evansville, Ind.

Dear Sir: I was shown a sketch by Capt. Genung, of the line as staked off. Capt. Genung said to me that he had a letter from you stating that you would be in the city to-morrow, and that the commission would meet to-morrow night. I am compelled to leave home to-night, and will probably not be at home for a day or two. Capt. Genung will explain fully.

The line as staked off in the main will be satisfactory. I desire to call the attention of the commission to the two termini. I understand the controlling fact has been the survey of 1806, and the notes of this survey show that stakes were driven at several points on the bank of the river. If we take the dividing line between sections 14 and 15 as a sample, the notes show that a stake was driven on the bank of the river. Between the point where the [529] stake was driven and the *present bank of the river is a very considerable distance, and the evidence shows that a great deal of land has been made by accretion opposite the mouth of Green river. If we take an east and west line, or, say, the northern boundary line of section 14, and measure off the full length of the east side, we have the distance shown by the stake driven. If we were to go one section still further east, a point which nobody has ever claimed was reached by Green River island, we will have exactly the same thing, a stake on the bank of the Ohio river, and I assume the same notes would show stakes on the Ohio river up to the Ohio line. It does not follow, therefore, that all the land that has been made south of these stakes is in Kentucky. The same thing holds good at the lower end of the line. Only sixty days ago I passed on an abstract of title for a tract of land belonging to the Smiths immediately down the river from the present site owned by the city for its waterworks. We commenced on a line back from the river and the calls in the deed were so many feet to the Ohio river. When we measured for the number of feet, we found that it did not reach the Ohio river by one hundred or two hundred feet. I thought at first there was a mistake in the deed, but when we came to ascertain the facts more definitely, it was learned that the difference in feet was accounted for by the accretion. I am confident that the same will hold at many other points along the river. It seems, therefore, to me that we cannot rely on calls of the survey of 1806 to locate the upper and lower ends of the island, as there have been accretions at both points.

Yours respectfully,

J. E. Williamson.

EXHIBIT "D."

To the Honorable Board of Commissioners of the Indiana and Kentucky Boundary Line at Green River island.

Gentlemen: In accordance with your instructions I have re-established the sectional and meander lines of fractional sections 5, 6, 8, 9, 15, 16 and a part of 14 T. 7 S., R. 10 W., and also a part of section 31, T. 6 S., R. 10 W. following the notes of the original United States surveys as made by Jacob Fowler in *1805 and 1806, as closely as possible. I [530] found, however, that his work had not been very carefully nor accurately done, his lines not having all been run with the same variation, nor his distances always accurately chained.

I first sought to locate his original corners, the posts set by him having long since disappeared. I found a mulberry stub standing on the line between sections 15 and 16, and 16.28 chains south of the northwest corner of section 15, which is an original witness tree, as noted by him. At the termination of the section line between sections 5 and 6 a maple tree witnessed by him has been standing, up to about one year ago, but the stump, now 5 feet in diameter, with witness marks on it, is still there. Each of these points so located are also points on the meander line, and the surveyor's records in my office, as well as oral testimony of the old inhabitants, go to show beyond question that these are corners established by Mr. Fowler.

In 1856, A. T. Whittlesey, who was surveyor of Vanderburgh county, re-established the northwest corner of section 14, putting down a cypress post, which he afterwards replaced by a stone, which now marks the corner. One of the original witness trees was then standing. At the same time he re-established a point on this line between sections 14 and 15 and 40 chains south of the northwest corner of section 14, by a cedar post which is still standing. At that point one of the original witness trees was then standing. The distance was by close measurement 39.91 chains. This line produced south from said northwest corner of section 14, 64.25 chains, the distance given by Mr. Fowler, fixes its termination and also a point on the meander line. The variation is 2° 30′.

The northeast corner of section 16 was re-established by A. T. Whittlesey, surveyor of Vanderburgh county, in 1856. The box elder witness tree noted by Mr. Fowler was standing at that time. From that corner running west 29.67 chains the distance given by Mr. Fowler, gives the termination of the section line between sections 9 and 16, which is also a point on the meander line. The northeast corner of section 16 is also 16.28 chains north of the corner by the mulberry stub, this being *the distance given by Mr. Fowler, and [531] has a variation of 3° 40′.

At the northwest corner of section 9, J. Lindsley, surveyor of Vanderburgh county, in 1837, set a white oak post to re-establish the corner, the original witness trees being then standing. In 1855 C. G. Olmstead, surveyor of Vanderburgh county, replaced the oak post by a mulberry post, and in 1874 this was replaced by a limestone, set by August Pfaffiin, surveyor of Vanderburgh county, which stone is still there. Commencing at that point and running south 49.84 chains, the distance given by Mr. Fowler, I found the termination of the line between sections 8 and 9, which is also a point on the meander line. This variation is 3° 30′.

Running west from the northwest corner of section 9, 58.00 chains, the distance given by Mr. Fowler, gives the termination of the line between sections 5 and 8, and also a point on the meander line.



Digitized by Google

The southwest corner of section 32, T. 6 S., R. 10 W. I established from two old monuments, one at the northwest corner, and the other at the southeast corner of said section. This line between the southeast and southwest corners had a variation of 2° 50′. From this corner so established, I ran south 51.72 chains to a post near the maple stump, original witness tree, Mr. Fowler giving the distance as 51.50 chains. This line had a variation of 3° 00′, and its termination is also a point on the meander line. From the southwest corner of section 32 I ran west 25.70 chains, the distance given by Mr. Fowler, which is the termination of the line between section 31, T. 6 S., R. 10 W., and section 6, T. 7 S., R. 10 W., and also a point on the meander line.

In this way I found seven points which are as closely absolutely correct as it is possible to locate them after a lapse of ninety years. Primarily fixed points, if correct, must govern as against distances or compass variations, secondly, distances, and lastly, courses. Upon this basis I ran the meander line, following Mr. Fowler's notes as closely as possible, and making such corrections as were necessary. It was impossible to follow them exactly, for the rea-
[532 sons already stated, that the *compass variations on the lines between section corners established by Mr. Fowler vary from one to two degrees, and in only one instance has a line the correct variation, and in 28 distances given by him, which I remeasured, 12 of them varied from two to seventy-four links each.

The following are the field notes for the meander line:

Commencing at a post at a point on the bank between fractional sections 9 and 16, T. 7 S., R. 10 W., running thence up stream as corrected. Witnessed sycamore, 6′ N. 82° W. 1.31 chains S. 60° E. 26.31 chains. Variation 3° 05′.

Post witnessed, sycamore S. 12° 50′ E. 4 links S. 69° E. 7.78, var. 3° 05′ to a post between secs. 15 and 16.

Witnessed by stub of original mulberry S. 66° W. 4 links S. 69° E. 19.84, var. 3° 15′.

Post witnessed, stake N. 43° 30′ E. 25 links, and stake N. 36° 30′ W. 25 links. S. 70° E. 18.38, var. 3° 15′.

Post witnessed, stake N. 44° 30′ E. 45½ links and apple tree S. 63° W. 28 links. S. 56° E. 22.01, var. 3° 15′.

Post witnessed, stake, N. 43° 30′ E. 50 links, and stake N. 36° 30′ W. 50 links. S. 49° E. 17.91 var. 3° 15.′

Post witnessed, stake, N. 40° 50′ E. 65 links and stake N. 66° 30′ W. 50 links. S. 45° E. 9.92, var. 3° 15′.

Post witnessed, stake, N. 40° 20′ E. 68 links and stake N. 66° 30′ W. 50 links. S. 63° E. 5.00 var. 3° 15′ to a post between secs. 15 and 14.

Witnessed, honey locust 24′ S. 8° 15′ W. 78 links. Sec. line S. 6.37 ch. to water's edge of Ohio river. S. 78° E. 5.50, var. 3° 15′.

Post witnessed, cottonwood, 16′ S. 14° 50′ W. 1.71 ch. S. 82° E. 16.00, var. 3° 15′.

Post witnessed, osage orange 6′ S. 54° 45′ E. 26½ links and osage orange 8′ S. 62° W. 36½ links. S. 3.88 ch. to water's edge, Ohio river.

From the post between secs. 9 and 16 running down stream: N. 63° W. 14.60 chains, var. 2° 45′.

Post witnessed, sycamore snag, 36′ N. 81° 55′ E. 86½ links N. 61° W. 44.00 to a post between secs. 8 and 9, var. 2° 45′.

Post witnessed, sycamore 48′ S. 45° 30′ W. 54 links N. 57° W. 25.00, var. 2° 00′.

*Post, sycamore stump 40′ S. 42° 30′ [533
E. 72 links N. 54° W. 14.20 var. 2° 00′.

Post witnessed, sycamore snag, N. 78° E. 56 links N. 46° W. 30.00, var. 2° 00′.

Post witnessed, elm, 38′ N. 31° 40′ W. 2.53 chains N. 40° W. 7.12, var. 2° 00′. Posts between secs. 5 and 8.

Witnessed, sycamore, 40′ S. 74° 50′ W. 21½ links, and cottonwood snag 21′ N. 40° 30′ W. 80 links. N. 40° W. 19.00, var. 2° 30′.

Post witnessed, sycamore, 32′ S. 4° 15′ W. 2.56 ch. N. 34° W. 18.84 to a post between secs. 5 and 6, var. 2° 30′.

Post witnessed, maple, 60′ N. 65° W. 27 links, original witness tree. N. 32° W. 17.75 to a post var. 2° 00′.

Post witnessed, sycamore snag 45′ S. 43° 15′ W. 16 links N. 25° W. 40.00 to a post between sec. 6, T. 7 S., R. 10 W., and sec. 31, T. 6 S., R. 10 W. var. 2° 00′.

Post witnessed, maple snag, 20′ N. 66° 30′ E. 53 links, and maple 24′ S. 88° 30′ E. 52 links. N. 12° W. 36.00 to a post, var. 2° 30′.

Witness stake on river bank S. 78° W. 4.70 ch. and post N. 78° E. 4.00. Distance 5 chains S. 78° W. to water's edge, Ohio river.

At points marked A, B, C, etc., corresponding to the same letters on the map, cross section levels were taken across the meander line to the bank on the southwest side of the slough, taking low-water mark on the gauge at Evansville as the base, and from the section line between sections 14 and 15 to the point where meander line ends in section 31, T. 6 S. R. 10 W. The difference of elevation in the water surface at those extreme points is 16 inches.

Accompanying this report is a map of the lands lying between Evansville and a point opposite the mouth of Green river on a scale of 10 chains to an inch, showing section and meander lines, and the topography near the meander line, and marked Exhibit "C." Also a cross section of the levels taken, marked Exhibit "F."

Respectfully submitted.

C. C. Genung,
Jan'y 22, 1896. C. E. and S. C. V.

*EXHIBIT "E." [534

To the Honorable Board of Commissioners, on the Indiana and Kentucky Boundary Line at Green River island.

Gentlemen: The line of the low-water mark of 1792, from the head to the foot of Green River island, has been located as ordered by you, and the commencement, terminus, and each intermediate angle marked by planting a cedar post 5 inches square and 7 feet in length in the ground to the depth of 4½ feet. The line is, except at the commencement and ending, two chains (132 feet) to the left of the meander line going down stream, and parallel thereto. The angles, checked by the needle, were taken twice, and each distance carefully measured twice to avoid the possibility of errors. The line is laid down on the map marked Exhibit "C" in red ink, and the distances are given in feet.



Digitized by Google

The true meridian was obtained by observation of Polaris on two different nights.

The following are the notes of the location:

Commencing at a point on the line between sections fifteen (15) and fourteen (14), township seven (7) south, range ten (10) west, and 67.25 chains south of the northeast corner of section fifteen (15). The post set at this point is witnessed by a sycamore tree 36 inches, S. 1° 55′ E. 43.8 ft.; and also by a honey locust 32 inches S. 67° 50′ E. 24. ft., and is at the head of Green River island, and also assumed low-water mark in 1792. From this point going down stream and making an angle to the left from the east line of section fifteen (15) of 50° 26′, and on a course of N. 49° 16′ W., a distance of 1098.55 ft. to a post witnessed by a cottonwood 48 inches, N. 79° 45′ W. 168 ft.

Angle to right 0° 45′ 15″, course N. 48° 30′ 45″ W. 1171.45 ft. to a post, witnessed by a sycamore 22 inches, S. 66° 50′ E. 398 ft.

Angle to left 6° 50′, course N. 55° 20′ 45″ W. 1482.35 ft. to a post, witnessed by a red elm 48 inches S. 81° 40′ E. 150.5 ft. And also a red elm 60 inches, S. 83° 20′ E. 160 ft.

Angle to left 13° 43′ 15″, course N. 69° 04′ W. 1187.2 ft. to a post witnessed by a sycamore 41 inches, S. 87° 15′ E. 149.7 ft.; and also a sycamore 48 inches, S. 88° 20′ E. 156.2 ft.

535] *Angle to right 0° 42′, course N. 68° 22′ W. 1312.6 ft. to a post, witnessed by a sycamore 15 inches, S. 16° 15′ E. 80.5 ft. and a sycamore 11 inches S. 18° 00′ E. 79.6 ft.

Thence on same tangent and course 520.55 ft. to a post, witnessed by a cottonwood 16 inches, S. 8° 45′ E. 61.4 ft.

Angle to right 9° 01′ 30″, course N. 59° 20′ 30″ W. 1735 ft. to a post witnessed by a sycamore 64 inches N. 18° 40′ W. 180 ft.

Angle to left 2° 37′, course N. 61° 57′ 30″ W. 964.6 ft. to a post, witnessed by a cottonwood 30 inches S. 44° 00′ W. 67 ft., and a cottonwood 37 inches, S. 34° 40′ W. 70.3 ft.

Angle to right 2° 06′, course N. 59° 51′ 30″ W. 2926.5 ft. to a post, witnessed by a cycamore 48 inches, N. 74° 50′ E. 146.5 ft. Also a sycamore 56 inches, N. 27° 30′ E. 94.8 ft., and a stone on section line, between sections eight (8) and nine (9) N. 32° 30′ E. 132.6 ft.

Angle to right 4° 36′ 30″, course N. 55° 15′ W. 1659.6 ft. to a post, witnessed by a cottonwood 22 inches, S. 17° 15′ W. 141.7 ft.

Angle to right 3° 05′ 30″, course N. 52° 09′ 30″ W. 952 ft. to a post, witnessed by a sycamore 60 inches, S. 88° 05′ E. 254 ft. and a sycamore snag 31 inches, N. 49° 25′ E. 164.4 ft.

Angle to right 7° 56′ 30″, course N. 44° 18′ W. 2004.1 ft. to a post, witnessed by an elm 60 inches, N. 2° 35′ E. 230.5 ft.

Angle to right 5° 58′, course N. 38° 15′ W. 477.65 ft. to a post, witnessed by a sycamore 56 inches, N. 29° 45′ E. 115 ft.

Angle to left 0° 40′, course N. 38° 55′ W. 1259 ft. to a post, witnessed by a sycamore 36 inches, S. 44° 55′ E. 131.3 ft., and a cottonwood 40 inches, S. 42° 50′ W. 155 ft.

Angle to right 6° 07′ course N. 32° 58′ W. 1257 ft. to a post, witnessed by an elm 53 inches, S. 43° 25′ E. 573 ft. and the stump of the original maple witness tree of 1806, 65 inches, N. 49° 55′ E. 126 ft.

Angle to right 2° 42′, course N. 30° 06′ W. 1186.6 ft. to a post, witnessed by a sycamore snag 28 inches, N. 69° 15′ E. 102.7 ft.

Angle to right 7° 03′ 30″, course N. 23° 42′ 30″ W. 2785.7 ft. to a post, witnessed by a maple 36 inches, N. 78° 00′ E. 165.8 ft.

*Angle to right 12° 17′ 30″, course N. [536 end 10° 45′ W. 1202.12 ft. to a post opposite the lower end of Green River island, and at low water as it was in 1792, witnessed by a sycamore 52 inches, N. 65° 35′ E. 368.45 ft. The above courses are run from the true meridian as ascertained by observation at the point on the map marked "W" on the line between township six (6) and seven (7). Respectfully submitted.

C. C. Genung,
Feb'y 8, 1896. C. E. and S. V. C.

EXHIBIT "G."

*Statement of Costs and Expenses.*

| | | |
|---|---|---|
| C. C. Genung, civil engineer, services rendered by order of the commission | | $575 75 |
| Expenses of Lieut. Col. Amos Stickney, U. S. A., commissioner | $ 64 60 | |
| Services as member of the commission | 500 00 | 564 60 |
| Expenses of Gaston M. Alves, commissioner | 20 00 | |
| Services as member of the commission | 500 00 | 520 00 |
| Expenses of Gustavus V. Menzies, commissioner | 20 00 | |
| Services as member of the commission | 500 00 | 520 00 |
| F. A. Guthrie, typewriter | | 15 00 |
| Kellar Printing Company | | 41 25 |
| Total | | $2,236 60 |

And the court being now fully advised in the premises:

It is ordered that the exceptions to the report of said commissioners be overruled and that the report of said commissioners be, and the same is hereby, confirmed.

And it is ordered, adjudged, and decreed that the boundary line between said states of Indiana and Kentucky in controversy herein be, and it is hereby, established and declared to be as delineated and set forth in said report and the map accompanying the same and referred to therein, which map is hereby directed to be filed as a part of this decree.

It is further ordered, adjudged, and decreed that the said *boundary line as described [537 in said report and as delineated on said map, and now marked by cedar posts, be permanently marked as recommended in said report, with all convenient speed, and that said commission be continued for that purpose, and make report thereon to this court, and that this cause be retained until such report is made.

It is further ordered, adjudged, and decreed that the compensation and expenses of the commissioners and the expenses attendant on the discharge of their duties, up to this time, be, and they are hereby, allowed at the sum of $2,236.60 in accordance with their report, and that said charges and expenses and the costs of this suit to be taxed be equally divided between the parties hereto.

And it is further ordered, adjudged, and de-



Digitized by Google

creed that this decree is without prejudice to further proceedings as either of the parties may be advised for the determination of such part of the boundary line between said states as may not have been settled by this decree under the pleadings in this case.

And it is further ordered, adjudged, and decreed that the clerk of this court do forthwith transmit to the chief magistrates of the states of Kentucky and Indiana copies of this decree duly authenticated under the seal of this court.

May 18, 1896.

---

HOMER ADOLPH PLESSY, *Plff. in Err.*,
*v.*
JOHN H. FERGUSON.

(See S. C. Reporter's ed. 537-564.)

*State statute requiring separate accommodations for white and colored persons in coaches on railroads—13th and 14th Constitutional Amendments — interstate commerce — police power—denying compensation.*

1. The 13th Amendment to the United States Constitution, abolishing slavery and involuntary servitude, is not violated by a state statute requiring separate accommodations for white and colored persons on railroads.
2. A state statute providing for separate railway carriages for the white and colored races by railway companies carrying passengers in their coaches in the state, and the assignment of passengers to the coaches according to their race by conductors does not deprive a colored person of any rights under the 14th Amendment of the Federal Constitution.
3. No question of interference with interstate commerce arises under such statute, in a case where the railway company enforcing it is a purely local line, with both its termini within the state.
4. A law which requires the separation of the white and colored races in public conveyances is a reasonable exercise of the police power of a state.
5. Whether the 2d section of such statute, denying to the passenger compensation in damages for a refusal to receive him into the coach in which he properly belongs, is a valid exercise of the legislative power, this court does not decide.

[No. 210.]

*Argued April 13, 1896. Decided May 18, 1896.*

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment of that court, denying the petition of Homer Adolph Plessy for writs of prohibition and certiorari against John H. Ferguson, judge of the criminal court for the parish of Orleans prohibiting him from further proceeding in a trial on the information filed against said Plessy for a criminal violation of the Louisiana statute of July 10, 1890. *Affirmed.*

See same case below, 45 La. Ann. 80, 18 L. R. A. 639.

Statement by Mr. Justice **Brown:**

This was a petition for writs of prohibition and certiorari, originally filed in the supreme court of the state by Plessy, the plaintiff in error, against the Hon. John H. Ferguson, judge of the criminal district court for the parish of Orleans, and setting forth in substance the following facts:

That petitioner was a citizen of the United States and a resident of the state of Louisiana, of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege, and immunity secured to the citizens of the United States of the white race by its Constitution and laws; that on June 7, 1892, he engaged and paid for a first-class passage on the East Louisiana Railway from New Orleans to Covington, in the same state, and thereupon entered a passenger train and took possession of a vacant seat in a coach where passengers of the white race were accommodated; that such railroad company was incorporated by the laws of Louisiana as a common carrier, and was not authorized to distinguish between citizens according to their race. But, notwithstanding this, petitioner was required by the conductor, under penalty of ejection from said train and imprisonment, to vacate said coach and occupy another seat in a coach assigned by said company for persons not of the white race, and for no other reason than that petitioner was of the colored race; that upon petitioner's refusal to comply with such order, he was, with the aid of a police officer, forcibly ejected from said coach and hurried off to and imprisoned in the parish jail of *New Orleans, and there held to answer [539 a charge made by such officer to the effect that he was guilty of having criminally violated an act of the general assembly of the state, approved July 10, 1890, in such case made and provided.

That petitioner was subsequently brought before the recorder of the city for preliminary examination and committed for trial to the criminal district court for the parish of Orleans, where an information was filed against him in the matter above set forth, for a violation of the above act, which act the petitioner affirmed to be null and void, because in conflict with the Constitution of the United States; that petitioner interposed a plea to such information, based upon the unconstitutionality of the act of the general assembly, to which the district attorney, on behalf of the state, filed a demurrer; that, upon issue being joined by such demurrer and plea, the court sustained the demurrer, overruled the plea, and ordered petitioner to plead over to the facts set forth in the information, and that,

---

NOTE.—*As to police power of states; instance of its exercise,*—see note to Barbier v. Connolly, 28: 923.

*As to state control over railroads,* see note to Baltimore & O. R. Co. v. Maryland, 22: 678.

*As to power of Congress to regulate commerce,* see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

*As to interstate commerce; regulation of; power of Congress, how far exclusive,*—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.



Digitized by Google

unless the judge of the said court be enjoined by a writ of prohibition from further proceeding in such case, the court will proceed to fine and sentence petitioner to imprisonment, and thus deprive him of his constitutional rights set forth in his said plea, notwithstanding the unconstitutionality of the act under which he was being prosecuted; that no appeal lay from such sentence, and petitioner was without relief or remedy except by writs of prohibition and certiorari. Copies of the information and other proceedings in the criminal district court were annexed to the petition as an exhibit.

Upon the filing of this petition, an order was issued upon the respondent to show cause why a writ of prohibition should not issue and be made perpetual, and a further order that the record of the proceedings had in the criminal cause be certified and transmitted to the supreme court.

To this order the respondent made answer, transmitting a certified copy of the proceedings, asserting the constitutionality of the law, and averring that, instead of pleading or admitting that he belonged to the colored race, the said Plessy declined and refused, either by pleading 540] or otherwise, to *admit that he was in any sense or in any proportion a colored man.

The case coming on for a hearing before the supreme court, that court was of opinion that the law under which the prosecution was had was constitutional, and denied the relief prayed for by the petitioner. *Ex parte Plessy*, 45 La. Ann. 80 [18 L. R. A. 639]. Whereupon petitioner prayed for a writ of error from this court, which was allowed by the chief justice of the supreme court of Louisiana.

*Messrs.* **A. W. Tourgee, S. F. Phillips,** *F. D. McKenney*, and *James C. Walker* for plaintiff in error.

*Messrs.* **Alexander Porter Morse,** *M. J. Cunningham*, Attorney General of Louisiana, and *Lional Adams*, for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

This case turns upon the constitutionality of an act of the general assembly of the state of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152.

The 1st section of the statute enacts "that all railway companies carrying passengers in their coaches in this state shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: *Provided*, That this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches other than the ones assigned to them, on account of the race they belong to."

By the 2d section it was enacted "that the officers of such passenger trains shall have power 541] and are hereby required *to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of $25 or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of $25, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this state."

The 3d section provides penalties for the refusal or neglect of the officers, directors, conductors, and employees of railway companies to comply with the act, with a proviso that "nothing in this act shall be construed as applying to nurses attending children of the other race." The 4th section is immaterial.

The information filed in the criminal district court charged in substance that Plessy, being a passenger between two stations within the state of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred.

The petition for the writ of prohibition averred that petitioner was seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege, and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to *vacate said coach [542 and take a seat in another assigned to persons of the colored race, and having refused to comply with such demand he was forcibly ejected with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.

The constitutionality of this act is attacked upon the ground that it conflicts both with the 13th Amendment of the Constitution, abolishing slavery, and the 14th Amendment, which prohibits certain restrictive legislation on the part of the states.

1. That it does not conflict with the 13th Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services. This amendment was said in *Butcher's Benev. Asso.* v. *Crescent City L. S. L. & S. H. Co.* (*"Slaughter-House Cases"*), 83 U. S. 16 Wall. 36 [21: 394], to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexi-



Digitized by Google

can peonage or the Chinese coolie trade when they amounted to slavery or involuntary servitude, and that the use of the word "servitude" was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated, however, in that case, that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the southern states, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value; and that the 14th Amendment was devised to meet this exigency.

So, too, in *United States* v. *Stanley* (*"Civil Rights Cases"*), 109 U. S. 8 [27: 835], it was said that the act of a mere individual, the owner of an inn, a public conveyance, or place of amusement, refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the [543] applicant, but *only as involving an ordinary civil injury, properly cognizable by the laws of the state, and presumably subject to redress by those laws until the contrary appears. "It would be running the slavery argument into the ground," said Mr. Justice Bradley, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business."

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude. Indeed, we do not understand that the 13th Amendment is strenuously relied upon by the plaintiff in error in this connection.

2. By the 14th Amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the state wherein they reside; and the states are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The proper construction of this amendment was first called to the attention of this court in *Butchers' Benev. Asso.* v. *Crescent City L. S. L. & S. H. Co.* (*"Slaughter-House Cases"*), 83 U. S. 16 Wall. 36 [21: 394], which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the states, and to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the states.

*The object of the amendment was undoubtedly to enforce the absolute equality of the [544] two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of *Roberts* v. *Boston*, 5 Cush. 198, in which the supreme judicial court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. "The great principle," said Chief Justice Shaw, "advanced by the learned and eloquent advocate of the plaintiff [Mr. Charles Sumner] is, that by the Constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. . . . But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security." It was held that the powers of the committee extended to the *establishment of separate schools [545] for children of different ages, sexes, and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and yet have not acquired the rudiments of learning, to enable them to enter the ordinary schools. Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia (D. C. Rev. Stat. §§ 281 283, 310, 319) as well as by the legislatures of many of the states, and have been generally, if not uniformly, sustained by the courts. *State, Garnes,* v. *McCann*, 21 Ohio St. 210; *Lehew* v. *Brummell*, 103 Mo. 546 [11 L. R. A. 828]; *Ward* v. *Flood*, 48 Cal. 36 [17 Am. Rep. 405]; *Bertonneau* v. *Directors of City Schools*, 3 Woods, 177; *People* v. *Gallagher*, 93 N. Y. 438 [45 Am. Rep. 232]; *Cory* v. *Carter*, 48 Ind. 337 [17 Am. Rep. 738]; *Dawson* v. *Lee*, 83 Ky. 49.



Digitized by Google

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state. *State* v. *Gibson*, 36 Ind. 389 [10 Am. Rep. 42].

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages, has been frequently drawn by this court. Thus, in *Strauder* v. *West Virginia*, 100 U. S. 303 [25: 664], it was held that a law of West Virginia limiting to white male persons, twenty-one years of age and citizens of the state, the right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step towards reducing them to a condition of servility. Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty, and property, there shall be no exclusion of his race and no discrimination against them because of color, has been asserted in a number of cases. *Ex parte Virginia* ("*Virginia* v. *Rives*"), 100 U. S. 313 [25: 697]; *Neal* v. *Delaware*, 103 U. S. 370 [26:567]; *Bush* v. *Kentucky*, 107 U. S. 110 [27: 354]; *Gibson* v. *Mississippi*, 162 U. S. 565 [40: 1075]. So, where the laws of a particular locality or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of color, we 546] *have held that this meant that persons of color should travel in the same car as white ones, and that the enactment was not satisfied by the company providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively to white persons. *Washington, A. & G. R. Co.* v. *Brown*, 84 U. S. 17 Wall. 445 [21. 675].

Upon the other hand, where a statute of Louisiana required those engaged in the transportation of passengers among the states to give to all persons traveling within that state, upon vessels employed in that business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and subjected to an action for damages, the owner of such a vessel, who excluded colored passengers on account of their color from the cabin set aside by him for the use of whites, it was held to be, so far as it applied to interstate commerce, unconstitutional and void. *Hall* v. *De Cuir*, 95 U. S. 485 [24: 547]. The court in this case, however, expressly disclaimed that it had anything whatever to do with the statute as a regulation of internal commerce, or affecting anything else than commerce among the states.

In *United States* v. *Stanley* ("*Civil Rights Cases*") 109 U. S. 3 [27: 835], it was held that an act of Congress, entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude, was unconstitutional and void upon the ground that the 14th Amendment was prohibitory upon the states only, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on matters respecting which the states were prohibited from making or enforcing certain laws or doing certain acts, but was corrective legislation such as might be necessary or proper for counteracting and redressing the effect of such laws or acts. In delivering the opinion of the court Mr. Justice Bradley observed that the 14th Amendment "does not invest Congress with power to legislate upon subjects that are within the *domain of state legislation; [547 but to provide modes of relief against state legislation or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the 14th Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect."

Much nearer, and, indeed, almost directly in point, is the case of the *Louisville, N. O. & T. R. Co.* v. *Mississippi*, 133 U. S. 587 [33: 784, 2 Inters. Com. Rep. 801], wherein the railway company was indicted for a violation of a statute of Mississippi, enacting that all railroads carrying passengers should provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations. The case was presented in a different aspect from the one under consideration, inasmuch as it was an indictment against the railway company for failing to provide the separate accommodations, but the question considered was the constitutionality of the law. In that case, the supreme court of Mississippi, 66 Miss. 662 [5 L. R. A. 132, 2 Inters. Com. Rep. 615], had held that the statute applied solely to commerce within the state, and, that being the construction of the state statute by its highest court, was accepted as conclusive. "If it be a matter," said the court, p. 591 [785], "respecting commerce wholly within a state, and not interfering with commerce between the states, then, obviously, there is no violation of the commerce clause of the Federal Constitution. . . . No question arises under this section as to the power of the state to separate in different compartments interstate *passengers, or to affect, [548 in any manner, the privileges and rights of such passengers. All that we can consider is, whether the state has the power to require that railroad trains within her limits shall have separate accommodations for the two races; that affecting only commerce within the state is no invasion of the powers given to Congress by the commerce clause."

A like course of reasoning applies to the case under consideration, since the supreme court of Louisiana in the case of *State, Abbott*, v.



Digitized by Google

*Hicks*, 44 La. Ann. 770, held that the statute in question did not apply to interstate passengers, but was confined in its application to passengers traveling exclusively within the borders of the state. The case was decided largely upon the authority of *Louisville, N. O. & T. R. Co.* v. *State*, 66 Miss. 662 [5 L. R. A. 132, 2 Inters. Com. Rep. 615], and affirmed by this court in 133 U. S. 587 [33: 784, 2 Inters. Com. Rep. 801]. In the present case no question of interference with interstate commerce can possibly arise, since the East Louisiana Railway appears to have been purely a local line, with both its termini within the state of Louisiana. Similar statutes for the separation of the two races upon public conveyances were held to be constitutional in *West Chester & P. R. Co.* v. *Miles*, 55 Pa. 209 [93 Am. Dec. 744]; *Day* v. *Owen*, 5 Mich. 520 [72 Am. Dec. 62]; *Chicago & N. W. R. Co.* v. *Williams*, 55 Ill. 185 [8 Am. Rep. 641]; *Chesapeake, O. & S. R. Co.* v. *Wells*, 85 Tenn. 613; *Memphis & C. R. Co.* v. *Benson*, 85 Tenn. 627; *The Sue*, 22 Fed. Rep. 843; *Logwood* v. *Memphis & C. R. Co.* 23 Fed. Rep. 318; *McGuinn* v. *Forbes*, 37 Fed. Rep. 639; *People* v. *King*, 110 N. Y. 418 [1 L. R. A. 293]; *Houck* v. *Southern P. R. Co.* 38 Fed. Rep. 226 [4 Inters. Com. Rep. 441]; *Heard* v. *Georgia R. Co.* 3 I. C. C. Rep. 111 [2 Inters. Com. Rep. 508], 1 I. C. C. Rep. 428 [1 Inters. Com. Rep. 719].

While we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the 14th Amendment, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the 2d section of the act that denies to the passenger compen-
549] sation *in damages for a refusal to receive him into the coach in which he properly belongs, is a valid exercise of the legislative power. Indeeed, we understand it to be conceded by the state's attorney that such part of the act that exempts from liability the railway company and its officers is unconstitutional. The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular state, is to be deemed a white and who a colored person. This question, though indicated in the brief of the plaintiff in error, does not properly arise in the record of this case, since the only issue made is as to the unconstitutionality of the act, so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race.

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is *property*, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

In this connection it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the *street is as good as the other, or that a [550 house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. Thus in *Yick Wo* v. *Hopkins*, 118 U. S. 356 [30: 220], it was held by this court that a municipal ordinance of the city of San Francisco to regulate the carrying on of public laundries within the limits of the municipality violated the provisions of the Constitution of the United States if it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. While this was the case of a municipal ordinance a like principle has been held to apply to acts of a state legislature passed in the exercise of the police power. *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 [24: 527]; *Louisville & N. R. Co.* v. *Kentucky*, 161 U. S. 677 [40: 849], and cases cited on page 700 [859]; *Daggett* v. *Hudson*, 43 Ohio St. 548 [54 Am. Rep. 832]; *Capen* v. *Foster*, 12 Pick. 485 [23 Am. Dec. 632]; *State, Wood*, v. *Baker*, 38 Wis. 71; *Monroe* v. *Collins*, 17 Ohio St. 665; *Hulseman* v. *Rems*, 41 Pa. 396; *Osman* v. *Riley*, 15 Cal. 48.

So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the



Digitized by Google

551] two races in public conveyances *is unreasonable or more obnoxious to the 14th Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race choses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the court of appeals of New York in *People* v. *Gallagher*, 93 N. Y. 438, 448 [45 Am. Rep. 232], "this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it is organized and performed all of the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be in-552] ferior to the other civilly *or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states, some holding that any visible admixture of black blood stamps the person as belonging to the colored race (*State* v. *Chavers*, 5 Jones, L. 11); others that it depends upon the preponderance of blood (*Gray* v. *State*, 4 Ohio, 354; *Monroe* v. *Collins*, 17 Ohio St. 665); and still others that the predominance of white blood must only be in the proportion of three fourths. *People* v. *Dean*, 14 Mich. 406; *Jones* v. *Com.* 80 Va. 544. But these are questions to be determined under the laws of each state and are not properly put in issue in this case. Under the allegation of his petition it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

*The judgment of the court below is therefore affirmed.*

Mr. Justice **Brewer** did not hear the argument or participate in the decision of this case.

Mr. Justice **Harlan** dissenting:

By the Louisiana statute, the validity of which is here involved, all railway companies (other than street railway companies) carrying passengers in that state are required to have separate but equal accommodations for white and colored persons, "by providing two or more passenger coaches for each passenger train, *or* by dividing the passenger coaches by *partition* so as to secure separate accommodations." Under this statute, no colored person is permitted to occupy a seat in a coach assigned to white persons; nor any white person to occupy a seat in the coach assigned to colored persons. The managers of the railroad are not allowed to exercise any discretion in the premises, but are required to assign each passenger to some coach or compartment set apart for the exclusive use of his race. If a passenger insists upon going into a coach or compartment not set apart for persons of his race, *he is subject to be fined, or to be [553 imprisoned in the parish jail. Penalties are prescribed for the refusal or neglect of the officers, directors, conductors, and employees of railroad companies to comply with the provisions of the act.

Only "nurses attending children of the other race" are excepted from the operation of the statute. No exception is made of colored attendants traveling with adults. A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant personal assistance of such servant. If a colored maid insists upon riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while traveling, she is subject to be fined or imprisoned for such an exhibition of zeal in the discharge of duty.

While there may be in Louisiana persons of different races who are not citizens of the United States, the words in the act, "white and colored races" necessarily include all citizens of the United States of both races residing in that state. So that we have before us a state enactment that compels, under penalties, the separation of the two races in railroad passenger coaches, and makes it a crime for a citizen of either race to enter a coach that has been assigned to citizens of the other race.

Thus the state regulates the use of a public highway by citizens of the United States solely upon the basis of race.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States.

That a railroad is a public highway, and that the corporation which owns or operates it is in the exercise of public functions, is not, at this day, to be disputed. Mr. Justice Nelson, speaking for this court in *New Jersey Steam*



Digitized by Google

*Nav. Co.* v. *Merchants' Bank*, 47 U. S. 6 How. 344, 382 [12: 465, 482], said that a common carrier was in the exercise "of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned." Mr. Justice Strong, delivering the 554] judgment of *this court in *Olcott* v. *Fond du Lac County Supers.* 83 U. S. 16 Wall. 678, 694 [21:382, 388], said: "That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveyances for passage and transportation have had any existence. Very early the question arose whether a state's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that the state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use?" So, in *Pine Grove Twp.* v. *Talcott*, 86 U. S. 19 Wall. 666, 676 [22: 227, 233]: "Though the corporation [a railroad company] was private, its work was public, as much so as if it were to be constructed by the state." So, in *Worcester* v. *Western R. Corp.* 4 Met. 564: "The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes therefore, like a canal, turnpike, or highway, a public easement. . . . It is true that the real and personal property necessary to the establishment and management of the railroad is vested in the corporation; but it is in trust for the public."

In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race 555]*of citizens when the civil rights of those citizens are involved. Indeed such legislation as that here in question is inconsistent, not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States.

The 13th Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the 14th Amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," and that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the 15th Amendment that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely, to secure "to a race recently emancipated, a race that through *many generations [556 have been held in slavery, all the civil rights that the superior race enjoy." They declared, in legal effect, this court has further said, "that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." We also said: "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." It was consequently adjudged that a state law that excluded citizens of the colored race from juries because of their race and however well qualified in other respects to discharge the duties of jurymen was repugnant to the 14th Amendment. *Strauder* v. *West Virginia*, 100 U. S. 303, 306, 307 [25: 664, 665]; *Ex parte Virginia* ("*Virginia* v. *Rives*"), 100 U. S. 318 [25: 667]; *Ex parte Virginia*, 100 U. S. 339 [25: 676], *Neal* v. *Delaware*, 103 U. S. 370, 386 [26: 567, 570]; *Bush* v. *Kentucky*, 107 U. S. 110, 116 ]27: 354, 356]. At the present term, referring to the previous adjudications, this court declared that "underlying all of



Digitized by Google

those decisions is the principle that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government or the states against any citizen because of his race. All citizens are equal before the law." *Gibson* v. *Mississippi*, 162 U. S. 565 [40: 1075].

The decisions referred to show the scope of the recent amendments of the Constitution. They also show that it is not within the power of a state to prohibit colored citizens, because of their race, from participating as jurors in the administration of justice.

It was said in argument that the statute of 557] Louisiana does *not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute, is that it interferes with the personal freedom of citizens. "Personal liberty," it has been well said, "consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Bl. Com. *134. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from traveling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a state can prescribe as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of the street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in 558] open vehicles on a public road *or street? Why may it not require sheriffs to assign whites to one side of a court-room and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the state require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given at the argument to these questions was that regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the law. Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet upon grounds of public policy may well be characterized as unreasonable. Mr. Sedgwick correctly states the rule when he says that the legislative intention being clearly ascertained, "the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment." Sedgw. Stat. & Const. L. 324. There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are co-ordinate and separate. Each must keep within the limits defined by the Constitution. And the courts best discharge their duty by executing the will of the lawmaking power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives. Statutes must always have a reasonable construction. Sometimes they are to be construed strictly; sometimes literally, in order to carry out the *legis- [559 lative will. But however construed, the intent of the legislature is to be respected, if the particular statute in question is valid, although the courts, looking at the public interests, may conceive the statute to be both unreasonable and impolitic. If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void, because unreasonable, are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not that it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of



Digitized by Google

his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*. It was adjudged in that case that the deseendants of Africans who were imported into this country and sold as slaves were not included nor intended to be included under the word "citizens" in the Constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that at the time of the adoption of the Constitution they were "considered as a subordinate and inferior class of beings, who had [560] been subjugated by the dominant *race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them." 60 U. S. 19 How. 393, 404 [15: 691, 700]. The recent amendments of the Constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the states, a dominant race, a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the states in which they respectively reside and whose privileges and immunities, as citizens, the states are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which in fact proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration, for social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot-box in order to exercise the high privilege of voting. [561]

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled by law to participate in the political control of the state and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race. It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to separate coaches for his race, if his rights under the law were recognized. But he does object, and he ought never to cease objecting, that citizens of the white and black races can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway.

The arbitrary separation of citizens, on [562] the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in



Digitized by Google

railroad coaches will not mislead anyone, or atone for the wrong this day done.

The result of the whole matter is that while this court has frequently adjudged, and at the present term has recognized the doctrine, that a state cannot, consistently with the Constitution of the United States, prevent white and black citizens, having the required qualifications for jury service, from sitting in the same jury box, it is now solemnly held that a state may prohibit white and black citizens from sitting in the same passenger coach on a public highway, or may require that they be separated by a "partition," when in the same passenger coach. May it not now be reasonably expected that astute men of the dominant race, who affect to be disturbed at the possibility that the integrity of the white race may be corrupted, or that its supremacy will be imperiled, by contact on public highways with black people, will endeavor to procure statutes requiring white and black jurors to be separated in the jury box by a "partition," and that, upon retiring from the court room to consult as to their verdict, such partition, if it be a movable one, shall be taken to their consultation room, and set up in such way as to prevent black jurors from coming too close to their brother jurors of the white race. If the "partition" used in the court room happens to be stationary, provision could be made for screens [563] with openings through which jurors of the two races could confer as to their verdict without coming into personal contact with each other. I cannot see but that, according to the principles this day announced, such state legislation, although conceived in hostility to, and enacted for the purpose of humiliating, citizens of the United States of a particular race, would be held to be consistent with the Constitution.

I do not deem it necessary to review the decisions of state courts to which reference was made in argument. Some, and the most important, of them are wholly inapplicable, because rendered prior to the adoption of the last amendments of the Constitution, when colored people had very few rights which the dominant race felt obliged to respect. Others were made at a time when public opinion, in many localities, was dominated by the institution of slavery; when it would not have been safe to do justice to the black man; and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land. Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States and residing here, obliterated the race line from our systems of governments, national and state, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.

I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that state, and hostile to both the spirit and letter of the Constitution of the United States. If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous. Slavery as an institution tolerated by law would, it is true, have disappeared from our country, but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the *people of the United States, [564] for whom and by whom, through representatives, our government is administered. Such a system is inconsistent with the guarantee given by the Constitution to each state of a republican form of government, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding.

For the reasons stated, I am constrained to withhold my assent from the opinion and judgment of the majority.

---

## UNION PACIFIC RAILWAY COMPANY and OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY, *Appts.*,

*v.*

## CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY.

## UNION PACIFIC RAILWAY COMPANY, *Appt.*,

*v.*

## CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY.

(See S. C. Reporter's ed. 564-611.)

*Contract between railroad companies,—construction of contract—expiration of charter—running trains for agreed compensation—ratification—stockholders' right to manage corporate affairs—government directors—specific performance.*

1. A contract by a railroad company to let another company run trains over its tracks in a city and vicinity, with full, equal, and joint possession and use of the tracks, but subject to the orders of the officers of the former company, being really an agreement for trackage rights with compensation on a mileage or wheelage basis, although it is called a lease and the so-called lessee is to haul its trains with its own engines,—is not *ultra vires* because not expressly authorized by statute.

2. The power of the Union Pacific Railway Company to grant to the Chicago, Rock Island, & Pacific Railway Company the right to run trains with engines over the bridge between Council Bluffs and Omaha extends to the use of

NOTE.—*As to what acts and contracts of a corporation are ultra vires; contracts in violation of statute or public policy; executed contracts; instances; estoppel or ratification of transactions ultra vires,*—see note to Central Transp. Co. v. Pullman's Palace Car Co. 35: 55.

*As to when specific performance decreed and when refused,* see notes to Hepburn v. Dunlop, 4: 65, Colson v. Thompson, 4: 253, and Brashier v. Gratz, 5: 322.



Digitized by Google

the approaches and terminal facilities in those cities, with a track about 4 miles long to South Omaha, where the tracks of the companies connect.

3. A contract between railroads, extending beyond the time when the charter of one company will expire by its terms, is not for that reason invalid, when it is drawn carefully in view of that fact, binding the parties to take such steps as may be necessary to continue it in force.

4. A restriction on the power of the Union Pacific Railway Company to operate any line of road other than that which Congress had specifically authorized it to construct does not prevent it from making a valid contract to run trains for an agreed compensation by mileage for 45 miles over another railroad.

5. Ratification of a contract of a corporation by a board of directors appears without any affirmative action on their part, when the execution of the contract is entered upon with full knowledge of the directors.

6. The ultimate determination of the management of corporate affairs rests with the stockholders when by the charter the powers of the corporation are vested in them or when it is silent on that question and does not commit the exclusive control to the directors.

7. A provision for government directors of the Pacific Railroad Company does not take that corporation out of the general rule giving stockholders final control of corporate affairs in the absence of a charter limitation.

8. Specific performance may be decreed of a contract by one railroad company to give to another the right to run trains over the road of the former subject to the orders of its officers.

[Nos. 157, 158.]

*Argued April 21, 22, 1896. Decided May 25, 1896.*

APPEALS from decrees of the United States Circuit Court of Appeals for the Eighth Circuit affirming the decrees of the United States Circuit Court for the District of Nebraska in favor of complainant, the Chicago, Rock Island, & Pacific Railway Company against the Union Pacific Railway Company *et al.*, defendants, and in favor of the complainant, the Chicago, Milwaukee, & St. Paul Railway Company against the Union Pacific Railway Company, defendant, for the specific performance of certain contracts. *Affirmed.*

Statement by Mr. Chief Justice Fuller:

These were petitions in equity filed by the Chicago, Rock Island, & Pacific Railway Company against the Union Pacific Railway Company and the Omaha & Republican Valley Railway Company; and by the Chicago, Milwaukee, & St. Paul Railway Company against the Union Pacific Railway Company in the district court of Douglas county, Nebraska, January 2, 1891, to compel the specific performance of two contracts dated May 1, 1890, and April 30, 1890, respectively, and removed on petition of the Union Pacific Railway Company to the United States circuit court for the district of Nebraska, where they were heard by Mr. Justice Brewer, and decrees rendered in favor of complainants. 47 Fed. Rep. 15. From these decrees defendants appealed to the United States circuit court of appeals for the eighth circuit, by which they were affirmed. 10 U. S. App. 98. Thereupon these appeals were prosecuted.

To the contract of May 1, 1890, the Union Pacific Railway Company, the Omaha & Republican Valley Railway Company and the Salina & Southwestern Railway Company *were parties on one side and the Chi- [567 cago, Rock Island, & Pacific Railway Company and the Chicago, Kansas, & Nebraska Railway Company on the other; and the contract of April 30 was between the Union Pacific Railway Company and the Chicago, Milwaukee, & St. Paul Railway Company.

The Union Pacific Railway Company controlled and operated more than 5,000 miles of railroad, and, among others, a main line extending from Council Bluffs, Iowa, by way of Omaha & Valley Station, Nebraska, to Ogden in Utah territory, a distance of about 11,000 miles; a main line from Kansas City, Missouri, by way of Topeka and Salina, Kansas, to Denver, Colorado; the Republican Valley railroad extending from Valley Station, Nebraska, by way of Lincoln and Beatrice, in that state, to Manhattan, Kansas; the Salina railroad extending from Salina to McPherson, in Kansas; and a railroad extending from Hutchinson, in Kansas, to the southern border of that state; and other auxiliary roads.

The Rock Island Company owned and operated a line of railway extending from Chicago by way of Davenport to Council Bluffs, Iowa, and from Davenport to St. Joseph, Missouri. As the owner of the latter line and lessee of the Chicago, Kansas, & Nebraska Railway Company and other corporations, it controlled and operated a through line of railway from Chicago by way of Davenport, St. Joseph, and Beatrice, Nebraska, to Colorado Springs and Denver, Colorado; and a line from St. Joseph, Missouri, by way of Horton, Topeka, and Hutchinson to Liberal, Kansas, and other lines, amounting in the aggregate to more than 3,000 miles of railway.

The Union Pacific railroad owned nearly all of the stock and bonds, elected the directors, and built, controlled, and operated the railroads of the Republican Valley and Salina Companies, and the Rock Island Company owned and operated the roads of the Kansas Company under a lease for nine hundred and ninety-nine years, so that the Pacific Company and the Rock Island Company were practically the real parties in interest to the contract of May 1.

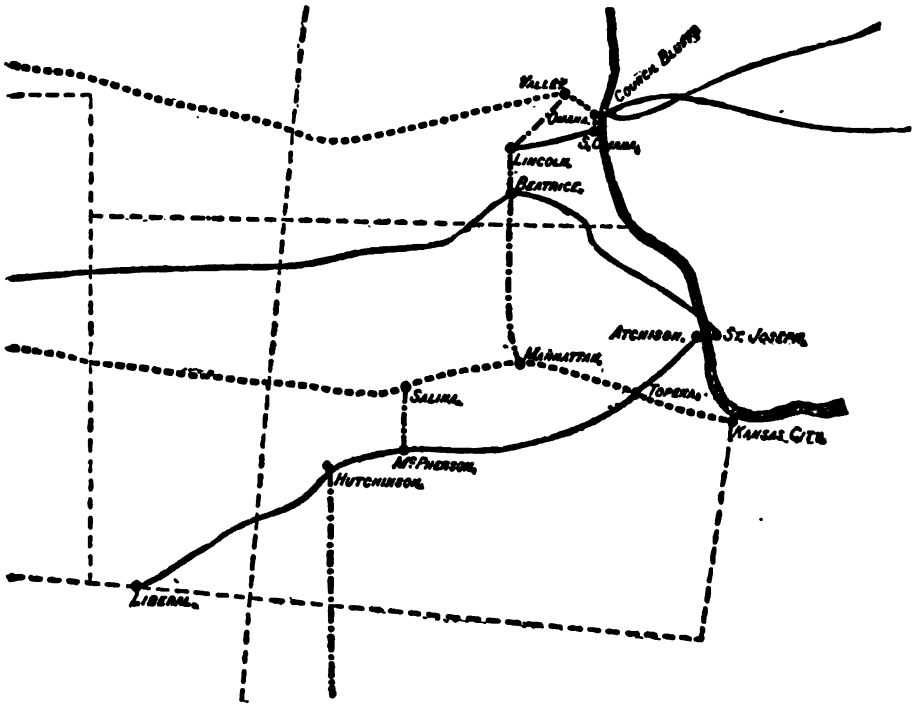
*The St. Paul Company was operating [568 more than 6,000 miles of railroad, and one of its lines extended from Chicago to Council Bluffs, Iowa.

The sketch on the opposite page roughly indicates the domain of the contracts.

*Early in 1890 the Rock Island Compa- [569 ny determined to connect its lines from Chicago to Council Bluffs with its southerly line to Colorado Springs by constructing a bridge across the Missouri river at Council Bluffs and a railroad from that terminus, by way of Omaha and South Omaha and Lincoln to Beatrice, Nebraska, thereby shortening its line from Chicago to Denver and Colorado Springs; and the St. Paul Company joined in the undertaking in order to extend its line from Council Bluffs on to Omaha and South Omaha. Acting in concert the two companies caused a cor-



Digitized by Google




poration to be created under the laws of the state of Iowa by the name and style of the Nebraska Central Railway Company, with power to build a bridge across the river at Omaha and one or more lines from that city west. Congress granted to this corporation the necessary franchise for the bridge. 23 Stat. at L. 48. Preliminary surveys and estimates were made which showed that the entire cost of the bridge and tracks to South Omaha would be about two and one half million dollars. In February, 1890, the presidents of the St. Paul and Rock Island companies visited New York for the purpose of arranging for the construction of the proposed work, when the Pacific Company requested them to suspend operations, and proposed to make a trackage arrangement with them by which they could use the bridge and tracks of the Pacific Company between Council Bluffs and South Omaha for their terminal facilities in Omaha and South Omaha, and the continuous line desired by the Rock Island Company could be completed. By direction of the president and at least two directors of the Pacific Company, its chief of construction and two of its directors obtained a meeting with the presidents of the St. Paul and Rock Island companies and agreed with them upon the terms of the contracts in question. From the memoranda then made by the chief of construction of the Pacific Company the contracts were subsequently drawn. They were examined and approved by the general solicitor of the company at Omaha. The executive committee of the board of directors of the Pacific Company at a meeting on April 22, 1890, at which six of the seven members of that company were [570 present (five in person and one by proxy) considered and unanimously voted to approve of the contracts and authorized the president to execute them. The custom of the secretary had been not to specify in the notice of the meetings of the executive committee the subjects to be considered, and the notice of this meeting did not state that the subject-matter of these contracts would be considered. The member of the executive committee who was absent and not represented was a government director.

At the annual meeting of the stockholders of the company held April 30, 1890, at which more than two thirds of the stock was represented, these contracts and the action of the executive committee thereon were considered and resolutions passed by an unanimous vote of that stock, approving and ratifying the contracts and the action of the committee authorizing their execution. The call of the annual meeting did not state that the subject-matter of these contracts would be considered, but that certain other subjects would be, and that the meeting was for the selection of directors for the coming year and the transaction of any other business which might legally come before the meeting. The record of the meeting of the executive committee April 22, 1890, reads thus:

The President submitted Vice-President Holcomb's letter No. 1,139, dated April 18, 1890, enclosing an agreement between this company and the Chicago, Milwaukee, & St. Paul Railway Company, and an agreement between this company, the Omaha & Republi-



Digitized by Google

can Valley Railway Company, the Salina & Southwestern Railway Company, the Chicago, Rock Island, & Pacific Railway Company, and the Chicago, Kansas, & Nebraska Railway Company, dated May 1, 1890.

Whereupon, after consideration, it was, on motion of Mr. Spaulding, voted unanimously that the agreement submitted to the committee between this company and the Chicago, Milwaukee, & St. Paul Railway Company, granting trackage rights to the latter company over this company's lines between Council Bluffs, Oma-
571] ha, and South Omaha, for a period *of 999 years from May 1, 1890, at a monthly rental of $3,750, is approved, subject to the ratification of the stockholders, and the president is hereby authorized to execute the same on behalf of this company;

Voted, unanimously, that the agreement submitted to the committee dated May 1, 1890, between this company, the Omaha & Republican Valley Railway Company, the Salina & Southwestern Railway Company, the Chicago Rock Island, & Pacific Railway Company, and the Chicago, Kansas, & Nebraska Railway Company, providing for the use of this company's lines from Council Bluffs to Omaha, including the bridge over the Missouri river and the lines of this company's Omaha & Republican Valley branch from Lincoln to Beatrice, Nebraska, and for the use by this company of the Chicago, Kansas, & Nebraska Railway Company's lines between McPherson, Kansas, and South Hutchinson, Kansas, for a period of 999 years from May 1, 1890, and for the use of the line between the cities of South Omaha and Lincoln, Nebraska, for a period of 999 years from October 1, 1890, at the rentals severally provided for therein, is approved, subject to the ratification of the stockholders, and the president is hereby authorized to execute the same on behalf of the company.

The following are the resolutions severally adopted by a separate vote, of the entire stock represented, in favor of each:

*Resolved*, That the agreement between the company and the Chicago, Milwaukee, & St. Paul Railway Company, dated May 1, 1890, granting trackage rights to the latter company over this company's lines, between Council Bluffs, Iowa, and Omaha and South Omaha, Nebraska, a copy of which is herewith submitted, be and is hereby approved, and the action of the executive committee in authorizing its execution is hereby ratified, approved, and confirmed.

*Resolved*, That the agreement between the Union Pacific Railway Company, the Omaha & Republican Valley Railway Company, the Salina & Southwestern Railway Company, the Chicago,
572] Rock Island, & Pacific Railway *Company, and the Chicago, Kansas, & Nebraska Railway Company, dated May 1, 1890, a copy of which is herewith submitted, granting to the latter companies trackage rights over this company's lines from Council Bluffs to Omaha, including the Omaha bridge, and the lines of this company's Omaha & Republican Valley branch from Lincoln to Beatrice, Nebraska, and providing further for the use by this company of the Chicago, Kansas, & Nebraska Railway Company's line between McPherson and South Hutchinson, Kansas, and the line from South Omaha to Lincoln, Nebraska, on the terms therein provided for, be and is hereby approved, and the action of the executive committee in authorizing the execution thereof is hereby ratified, approved, and confirmed.

At this time the whole number of shares was 608,685, and 437,376 shares were voted.

It is not disputed that the board of directors and the body of the stockholders of the other corporations, parties to the contracts, took proper action to authorize and ratify the execution thereof by their respective corporations, and that the formal execution of the contracts by the parties to them was sufficient.

The preamble to the Rock Island contract described the several railways owned by the parties, and recited that the Rock Island Company had become a domestic corporation of the state of Nebraska, and proposed to extend its railway from its terminus at Council Bluffs to a connection with its leased line, the Chicago, Kansas, & Nebraska Railway, at the city of Beatrice; that the parties to the contract believed that the interests of all would be promoted by using for a part of said extension the main tracks of the Union Pacific Railway Company in the cities of Council Bluffs and Omaha, the bridge over the Missouri river, and that portion of the Omaha & Republican Valley Company, owned by the Union Pacific Company, between Lincoln and the point of junction at the city of Beatrice; by a lease from the Rock Island Company to the Union Pacific Company of a portion of the railroad controlled by it, between McPherson and *Hutchinson, Kansas, a distance of about [573
30 miles; and a lease of the right of the Union Pacific Company to operate its trains over the road which the Rock Island Company was about to build between the cities of South Omaha and Lincoln.

The contract provided: "The Pacific Company hereby lets the Rock Island Company into the full, equal, and joint possession and use of its main and passing tracks, now located and established, or which may be hereafter located and established, between the terminus of such tracks in the city of Council Bluffs, in the state of Iowa, and a line drawn at a right angle across said tracks within 1½ miles southerly from the present passenger station of South Omaha, in the state of Nebraska, including the bridge on which said tracks extend across the Missouri river, between said cities of Council Bluffs and Omaha; connections with Union depot tracks in Omaha, the side or spur track leading from its main tracks to the lower grade of the Pacific Company's sidings and spur tracks in Omaha, and such extensions thereof as may be hereafter made; side tracks in Omaha on which to receive from and deliver to the Rock Island Company freight that may be handled through the warehouses or switched by the Pacific Company; the connections with the Union Stock Yards tracks in South Omaha, and conveniently located grounds in South Omaha, on which the Rock Island Company may construct, maintain, and exclusively use a track or tracks, aggregating 2,000 feet in length, for the storage of cars and other purposes, for the term of 999 years, commencing on the 1st day of May, in the current



Digitized by Google

year; for which possession and use the Rock Island Company covenants, promises, and agrees to pay to the order of the said Pacific Company, monthly, during the continuance of said term, the sum of $3,750 and a certain portion of the expense incurred in maintaining and operating the property between Council Bluffs and South Omaha; and of the assessments and taxes levied thereon in proportion as its wheelage should be to the entire wheelage
574] *over the same; and also a reasonable compensation for handling its traffic in Omaha; and that the Pacific Company lets the Rock Island Company into the full, joint, and equal possession and use of its tracks, stations, and appurtenances along the line of the railway of the Republican Valley Company from a point near the northern boundary of the city of Lincoln to the point where its tracks connect with those of the Kansas Company at Beatrice, Nebraska, for the same length of time, for which the Rock Island Company agrees to pay the Pacific Company a certain rental computed on a percentage of the value of the main track, and a proportion of the cost of maintenance; that the Rock Island Company lets the Pacific Company into the full, joint, and equal possession and use of its tracks and stations along the lines of the Kansas Company from McPherson to Hutchinson for the same length of time, for a rental to be computed in the same way; that the Rock Island Company lets, leases, and demises to the Pacific Company for a like term, commencing October 1, 1890, the right to move and operate over the tracks of the railway it proposes to construct between the cities of South Omaha and Lincoln in the state of Nebraska its freight and passenger trains, engines, and cars of all classes for a rental based upon a mileage of the trains; that each of the parties to the contract shall take such steps as will be necessary to continue all the stipulations of the contract in force; that each contract or lease shall attach to that portion of the railway leased during the corporate existence of the owner thereof and all extensions of such existences by renewal or otherwise, and that the contract shall bind the parties thereto, their successors, grantees, and assigns; that "schedules of rules and regulations for the movement of engines and trains over the several railways hereby let and demised shall be made for each railway by the duly authorized officers of the lessor and lessee companies by which such railways shall at the time be operated. Such schedules shall, as nearly as may be practicable, accord equality of right, privilege, and advantage to trains of the same class operated by the lessor and lessee, and to trains of a superior class operated by
575] either a preference over trains of an *inferior class operated by the other. All rules and regulations shall be reasonable and just to both lessor and lessee, and shall secure to neither any preference or discrimination against the other. They shall be executed and all trains moved under the immediate direction of the superintendent or other officer of the lessor company. If the parties cannot agree upon the adoption of any schedule, rule, or regulation, or as to the modification of any one existing, either party may demand a decision of such controversy by referees as hereinafter provided. The referees are hereby invested with power to prescribe schedules, rules, and regulations and to modify existing ones; and in case of wilful disregard by either party of the rights of the other to award damages to the party injured for injuries sustained because of such wilful act;" and that the referees shall be appointed when needed by the selection of one by each party, and the appointment of a third by the two so chosen, with further provision for their action in cases of disagreement in other particulars.

It was also agreed that the Pacific Company might admit any other company to the joint use and possession of the same tracks and property upon substantially the same terms, provided such additional burden did not interfere with the Rock Island Company. Another provision was as follows: "If for any reason any of the covenants, promises, and agreements in any of these articles expressed, and not material to the right of the lessee to use the property leased and demised, shall be adjudged void, such adjudication shall not affect the validity or obligation of any other covenant, promise, or agreement which is in itself valid. In the event of a failure in law of any of the covenants, promises, and agreements herein contained, such steps shall be taken and contracts made as shall be advised by counsel to carry into effect the purpose and intent herein expressed."

The Rock Island Company was chartered to exist until 1930, but the charter provided that its existence might "be renewed from time to time as may be provided by the laws of the states of Illinois and Iowa."

The Rock Island Company upon the construction of its *proposed line from South[576
Omaha to Lincoln obtained by the agreement access to Omaha and South Omaha, and a shorter continuous line from Chicago to Denver by way of Council Bluffs, Lincoln, and Beatrice than by its southerly route; while by the use of the proposed road from South Omaha to Lincoln the Pacific Company obtained a line from Omaha to Lincoln and Beatrice, about 40 miles shorter than its former route by way of Valley Station; and, by its use of the road from McPherson to Hutchinson, it filled the gap between its line there and obtained a continuous line by way of Salina to the southern boundary of Kansas; and a rental of $45,000 a year and other compensation as provided.

The contract with the St. Paul Company let it into the joint and equal use of the tracks and bridge between Council Bluffs and South Omaha for the same time and on the same terms named in the contract with the Rock Island Company. The main tracks of the Pacific Company to be used under this contract were two, extending a distance of about 7 miles from Council Bluffs across the bridge and through the city of Omaha to South Omaha.

On the 17th of May the superintendent of the Pacific Company addressed a letter to the superintendent of the Rock Island Company, requesting the construction of the connecting track which would enable it to use the Kansas Railway between McPherson and Hutchinson. The Rock Island immediately constructed the track, and the Pacific Company at once began to use it, and continued to use it until Jan. 12, 1891.

The Rock Island proceeded with the con-



Digitized by Google

struction of its road from South Omaha to a connection with the tracks of the Republican Valley in Lincoln, and secured depots and yards in Omaha and South Omaha, and made an arrangement with the Pacific Company for the construction of freight and passenger stations and a yard on the ground of the Republican Valley road in Lincoln to be used by the Rock Island and Pacific companies jointly. Prior to December 1, 1890, it had expended in such construction between South Omaha and Lincoln over $1,400,000. All this was done in reliance upon the contract, and the railway
577] and buildings erected could be used *for the principal purpose for which they had been constructed only in connection with the tracks of the Union Pacific at and between Council Bluffs and South Omaha and at and between Lincoln and Beatrice. The work at Lincoln had commenced on December 1, when the Pacific Company notified the Missouri & Burlington Company, whose depot it had theretofore been using, that after December 31 it would abandon such use. This notice was given with the intention of entering into the joint use of the Rock Island depots and tracks.

About June 1, 1890, the St. Paul Company entered upon the use and possession of the bridge and the tracks between the points named in its contract.

November 26, 1890, a change of management in the Union Pacific took place and opposition to the contracts developed. Early in January, 1891, the Pacific Company forcibly prevented the use by the Rock Island & St. Paul companies of its tracks at Omaha, which they were entitled to use under the contracts, and absolutely refused to perform the contracts. Thereupon these suits were commenced, one by the Rock Island Company against the Pacific Company and the Republican Valley Company, and the other by the St. Paul Company against the Pacific Company. The Pacific Company set up by way of defense that the use of this road as claimed would deprive it of the means granted to it under the act of Congress to earn moneys with which to maintain its corporate existence, perform the duties of a common carrier, and meet the demands of the government; that the officers of the Pacific Company were not so authorized to execute the contracts as to make it competent for them to do so and that they were not so entered into as to bind the company to the performance thereof; that the contracts were unjust and inequitable, and were improvidently made, and ought not to be sanctioned and enforced by a court of equity; that the government directors of the Pacific Company did not authorize or sanction the contracts; that the contracts were *ultra vires*, and that that company did not have any right, power, or authority to enter into them; and that the contracts were not such as a court of equity could or should specifically enforce.

578] *In the Rock Island case, the circuit court decreed that the contract was "the valid obligation of the parties thereto, and should be performed in good faith by each of them;" that it secured the several rights embraced thereby, all of which are specifically set forth, subject to the following limitations:

"1. That the engines, cars, and trains of complainant shall be moved on said tracks under rules and regulations to be agreed upon by and between the parties, or ordained by referees selected and appointed in the manner provided by said contract, and securing equality of right, privilege, and advantage to trains of the same class operated by both parties, and to trains of a superior class operated by either a preference over trains of an inferior class operated by the other; which rules and regulations shall be executed and all engines, cars, and trains moved under the immediate direction of the superintendent or other officers of the defendant, the Union Pacific Railway Company.

"2. That the Union Pacific Railway Company may admit any other company or companies operating a connecting railway or railways to the joint possession and use of the railway, or any part thereof, at and between Council Bluffs and South Omaha, upon substantially the same terms as those granted to the complainant; and apply the compensation which it may receive from such additional company or companies to its own use, without accounting for the same or any part thereof to the complainant.

"3. The complainant shall not do any business as a common carrier of persons or property to or from any stations on said line between said cities of Lincoln and Beatrice.

"4. That complainant shall make compensation for such possession and use as provided by said contract."

The decree then continued:

"III. That the defendants, the Union Pacific Railway Company and the Omaha & Republican Valley Railway Company, are commanded severally to specifically perform, keep, and observe the several covenants, promises, and agreements in said contract set out, to be by them either jointly or severally observed, kept, or performed; and that said *rail- [579 way companies and the officers, agents, attorneys, and employees of each are hereby commanded and enjoined to wholly refrain from directly or indirectly interposing any obstacle, interference, hindrance, or delay to the performance of the several promises, covenants, and agreements in said contract set out, or to the enjoyment of any of the rights or privileges by said contract granted, concerning the railway and railway property above described, by any and all of the parties to said contract, or by any of the officers, agents, attorneys, or employees of said parties, or any of them; and especially from in any manner obstructing or interfering with said complainant in restoring and maintaining the connections which have heretofore been constructed, or in constructing and maintaining at such point or points as may be determined under the contract, additional necessary connections between the railways of the Chicago, Kansas, & Nebraska Railway Company and the Omaha & Republican Valley Railway Company at Beatrice, and between the railway of complainant and that of the Omaha & Republican Valley Railway Company at Lincoln, in the state of Nebraska, and between the railway of complainant and the railway of said Union Pacific Railway Company, at South Omaha and



Digitized by Google

Omaha, in the state of Nebraska, and the city of Council Bluffs, in the state of Iowa; and from doing any act or thing, or permitting the doing of any act or thing, if it shall have power to prevent the same, whereby said complainant may be prevented from enjoying any and all of the benefits and advantages secured to it by said contract, or doing any act or thing which the complainant by the terms of said contract is authorized to do; from interfering with the use of, and from removing, injuring, or destroying buildings or other structures erected by the complainant upon the grounds of the defendant, the Omaha & Republican Valley Railway Company, in the city of Lincoln, in the state of Nebraska, without the consent of said complainant.

"IV. That each and every party hereto is commanded to refrain from interposing any obstacle or hindrance to the establishment or alteration or amendment in the manner provided 580] *by said contract, of time cards, rules, and regulations governing the operations of engines, cars, and trains over said railways and every part thereof; or to the execution and enforcement of such time cards, rules, and regulations when so established, altered, or amended, otherwise than by apt proceedings in a court having competent jurisdiction.

"V. That nothing in this decree contained shall operate to estop any party hereto from recovering against another party or parties by appropriate proceedings in law or equity, the compensation to which it is now or may be hereafter entitled, for the use of any of the railway and appurtenant property between and at Council Bluffs and South Omaha, between and at South Omaha and Lincoln, between and at Lincoln and Beatrice, and between McPherson and South Hutchinson, or from recovering in such proceedings damages which it has sustained, or may sustain, because of any breach or violation of said contract.

"VI. That while this decree is final in determining the rights of the parties under said contract, the court reserves the power to make additional orders from time to time, as may be necessary to enforce such rights."

The decree in favor of the St. Paul Company was to the same effect, *mutatis mutandis*.

*Messrs.* **John F. Dillon, John M. Thurston,** and *Harry Hubbard* for appellants.

*Messrs.* **J. M. Woolworth,** *M. A. Low,* and *R. Mather* for the Chicago, Rock Island, & Pacific Railway Company, appellee.

*Messrs.* **George R. Peck** and *Burton Hanson* for the Chicago, Milwaukee, & St. Paul Railway Company, appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The questions to be considered are whether these contracts were within the corporate pow- 581] ers of the parties, were duly *authorized as respects the Union Pacific Railway Company, were such contracts as a court of equity can specifically enforce, and were properly enforced on the merits.

It will be most convenient to consider the appeal in the case of the Rock Island Company. If the decree in favor of that company is affirmed, a like result must follow on the appeal in the case of the St. Paul Company. And we may remark in the outset that the main contention of the Pacific Company concerns the tracks between Council Bluffs and South Omaha, including the bridge.

1. Railroad corporations possess the powers which are expressly conferred by their charters, together with such powers as are fairly incidental thereto; and they cannot, except with the consent of the state, disable themselves from the discharge of the functions, duties, and obligations which they have assumed. Can it be held that the contract with the Rock Island Company, judged by its terms, construed in the light of matters of common knowledge of the evidence and of applicable legislation, was made in the assumption of powers not granted, or amounted to the surrender of powers that were?

The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public or attempts to absolve itself from those obligations without the consent of the state, or a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel. *Thomas* v. *West Jersey R. Co.* 101 U. S. 71 [25: 950]; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24 [35: 55].

But where the subject matter of the contract is not foreign to the purposes for which the corporation is created, a contract embracing "whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires.*" *Jacksonville, M. P. R. & Nav. Co.* v. *Hooper,* 160 U. S. 514, 525 [40: 515, 523]; *Atty. *Gen.* v. [582 *Great Eastern R. Co.* L. R. 5 App. Cas. 473, 478; *Brown* v. *Winnisimmet Co.* 11 Allen, 326, 334.

Taking up the contract with the Rock Island Company, what is the nature of the undertaking of the Pacific Company? In several places in this instrument it is called a "lease" and the parties are called "lessor" and "lessee;" while, on the other hand, in the record of the proceedings of the executive committee of the Pacific Company and of its stockholders, it is called an agreement "granting trackage rights" between Council Bluffs and South Omaha. But what it was styled by the parties does not determine its character or their legal relations, and in its interpretation the rule applies that "the court is not only at liberty but required to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was signed." *Chicago, R. I. & P. R. Co.* v. *Denver & R. G. R. Co.* 143 U. S. 596, 609 [36: 277, 281].

In *Thomas* v. *West Jersey R. Co.* 101 U. S. 71, 79 [25: 950, 951], Mr. Justice Miller stated the real question to be "whether the railroad company exceeded its powers in making the



Digitized by Google

contract, by whatever name it may be called, so that it is void."

And Mr. Justice Brewer, in his opinion on circuit, observed: "Neither the form of expression on the one hand, nor the name on the other, is conclusive. We must see what rights and privileges were in fact granted, what burdens and obligations assumed."

The contract provided that the Pacific Company hereby "lets the Rock Island Company into the full, equal, and joint possession and use of its main and passing tracks." The possession here spoken of was such possession as the Rock Island Company would have when its engines, cars, and trains were running over the tracks. The company had no possession before its trains came on the tracks or after they had run off of them, and while its trains were on the tracks its possession was only of the particular part occupied temporarily while running over them. Moreover, all trains were to be moved under the direction of an officer of [583 the Pacific Company. *The Rock Island trains coming upon a Pacific track immediately passed from the control of the Rock Island Company into that of the Pacific, and its officials were subjected to the orders of the Pacific's officers. And throughout the whole contract there does not appear to be a single provision which looks to any actual possession by the Rock Island of any of the Pacific property beyond that which was involved in its trains being run over the tracks under the direction of the other company. The contract in this regard was merely an agreement for trackage rights, for running arrangements, a "terminal contract" with compensation on a "mileage or wheelage basis," rather than a lease.

The Pacific Company in its answer said that it had offered and now offered "to accept and transport all the cars and trains of the complainant, freight and passenger, to and from all points on the line of the said defendant described in said supposed contract, and thereby enable the complainant to maintain its business at Omaha and South Omaha, and to carry on exactly the same business that it could have carried on by the operation of its own trains, by its own engines and by its own employees, as provided for in said supposed contract; and it says that it has offered, in the utmost good faith, to perform this service immediately and at all times, for the said complainant, at a reasonable compensation, to be fixed in any fair, usual, and ordinary manner." It thus appears that the Pacific Company could do what it had contracted to do, and that the contention resolves itself into the proposition that there is a fundamental legal difference between authorizing the Rock Island to haul its trains with its own engines, and agreeing to haul them with the Pacific Company's engines, though in either event they were to be moved under the train dispatchers of the Pacific Company—a difference we find ourselves unable to admit.

In *Chicago, R. I. & P. R. Co.* v. *Denver & R. G. R. Co.* 143 U. S. 596, 618 [36:277, 284], the Rio Grande Company had granted to the Rock Island Company the use of its terminal facilities at Denver, and it insisted that it could more conveniently handle the Rock Island trains with its own *engines and crews [584 than with those of the Rock Island. But this court, speaking through Mr. Justice Brown, said: "It is obviously necessary to the harmonious working of the two systems that the general control and management of the yard should remain with the defendant; but it is not easy to see why that control may not be as well exercised over two switching crews belonging to two different companies as over two crews belonging to the same company. . . . It occurs to us that it would cause fully as much inconvenience to transfer the control of trains from the employees of one company to those of another, as such trains entered or left the terminal yard, as it would to permit the switching of such trains within the yard by the hands that brought them in or were to take them out. It appears that yards are jointly operated in this manner in such large railway centers as Kansas City, Toledo, and Chicago without serious difficulty. We think the same rule should also be applied to those employed in handling the freight. With reference to this, the decree of the court below provided that the plaintiff had a right at its option to employ its separate switching crews and operate its own switching engines in the yards of the defendant company under the sole and absolute supervision, direction, and control, however, of the yardmaster or other properly constituted officer or agent of the defendant, and subject to the orders and instructions of such yardmaster, etc., and in this there was no error."

Such being the nature of the contract, a contract frequently made between railroad companies, upon what reasonable ground should it be held invalid as an unlawful assumption of power?

The evidence shows that between the bridge and South Omaha some of the most thickly populated and densely settled portions of the city of Omaha are situated; that five railroads engaged in transcontinental traffic do their terminal business there, taking up and setting down passengers, collecting, unloading, and delivering freight; that a large part of the territory is filled with the tracks of the Union Pacific and Burlington companies, and that there is scant room, if *any, for another com-[585 pany with the many tracks required for terminal business; that the whole territory is very valuable, densely populated, and filled with tracks; and that at South Omaha are stockyards and packing industries of great extent, furnishing the companies a vast volume of freight and compelling the building of many tracks. If it were true that railroad companies could not, ordinarily, without the aid of a statute, grant running facilities over their tracks even when such an arrangement would not interfere with their business, the application of so rigorous a rule to defeat a contract as between the parties, in respect of tracks in the congested parts of large cities, where the entire use of them is not required by their owners, does not seem reasonable. It is well said by Sanborn, J., speaking for the circuit court of appeals: "Courts cannot be blind to the fact that every railroad company cannot have entrance to our great cities over tracks of its own, or to the fact that railroad companies



Digitized by Google

ls, and every public interest requires that they should, make proper contracts for terminal facilities over the roads of each other."

We think that it would be carrying the doctrine of *ultra vires* much too far to deny absolutely the competency of a railroad company, being a public highway, whose use is common to all citizens, to contract to give another running rights over its tracks without express statutory authority; and that under proper circumstances such a contract may well be held within its implied powers.

In *Lake Superior & M. R. Co.* v. *United States*, 93 U. S. 442 [23: 965], Mr. Justice Bradley adverts to and comments on the fact that in England and in this country railroads when first constructed were by the legislatures and the people regarded and treated as public highways for the use of all who had occasion to run their vehicles thereon; and this is certainly so far true, in modern acceptation, that, being for the common use of the public, their owners are ordinarily competent to make contracts which will subserve such use.

But the determination of the existence of the power to grant running rights in this instance [586] does not rest on these *considerations alone. For the provisions of the Pacific Railroad acts relating to the bridge over the Missouri river, its construction and operation imposed on the Pacific Company the duty of permitting the Rock Island Company to run its engines, cars, and trains over the bridge and the tracks between Council Bluffs and Omaha, and we think that South Omaha was included.

The original charter of 1862 required the construction of the Pacific road from the east bank of the river, and so impliedly authorized the company to bridge it, and the amendatory act of 1864 expressly gave the corporation authority "to construct bridges over said Missouri river." The bridge contemplated was for the company's use as a part of its road, and no provision was made for other roads or other business, nor were any special means provided for the construction of the bridge.

In 1871 several roads had been built from the east to Council Bluffs, and others were building and roads were in process of construction in Nebraska with Omaha as their termini.

The Omaha Bridge act (16 Stat. at L. 430) was then passed, by which, "for the more perfect connection of any railroads that are or shall be constructed to the Missouri river, at or near Council Bluffs, Iowa, and Omaha, Nebraska," the company was authorized to issue bonds not exceeding two and one half million dollars, and to "secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and the tracks and depots required to perfect the same, as now authorized by law of Congress." The bridge was "to be so constructed as to provide for ordinary vehicles and travel;" and the company was authorized "to levy and collect tolls for the use of the same." The act further provided "for the use and protection of said bridge and property, the Union Pacific Railway Company shall be empowered, governed, and limited by the provisions of the act entitled 'An Act to Authorize the Construction of Certain Bridges and to Establish Them as Post Roads,' approved July twenty-five, eighteen hundred and sixty-six, so far as the same *is ap- [587 plicable thereto." The act of 1866 thus referred to (14 Stat. at L. 244) is entitled "An Act to Authorize the Construction of Certain Bridges and to Establish Them as Post Roads." It authorized the construction of nine different bridges, eight across the Mississippi river and one across the Missouri river. The first bridge provided for was to be constructed at Quincy, Illinois, and by the 1st section it was made lawful for any person or persons, company or corporation, having authority from the states of Illinois and Missouri for that purpose, "to build a bridge across the Mississippi river at Quincy, Illinois, and to lay on and over said bridge railway tracks, for the more perfect connection with any railroads that are or shall be constructed to the said river at or opposite said point, and that when constructed the trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation, to be made to the owners of said bridge under the limitations and conditions hereinafter provided."

The common object of both these acts plainly was the more perfect connection of roads running to the bridges on either side of the river. And this is in harmony with numerous acts of Congress referred to in the opinion of the circuit court of appeals (15 Stat. at L. 87; 16 Stat. at L. 121, 173, 185, 473, 599); and many others, all of them indicating a settled policy that all structures of this character should allow connecting roads to cross them with their cars, trains, and engines. It is said that the reference to the act of 1866 should be confined to its 2d and 3d sections; but as the matters provided for in those sections were fully otherwise covered in the Pacific railroad acts, that does not commend itself to us as a reasonable construction. But it is argued that even if the Pacific Company were authorized to grant to the Rock Island Company the right to run its trains with its engines over the bridge, it was not empowered to grant the same rights over the tracks. The evidence shows *that the tracks east of the bridge were [588 upon the approach to the structure proper, and it appears from the maps that the depot at the west end of the bridge was more than half a mile distant. The act of 1871 provided that for the more perfect connection of the roads east of the river with those west of it the company might issue bonds and secure the same by mortgage "on the bridge and approaches and appurtenances," and it would seem to be clear that the approaches on the west side, as well as on the east, must be regarded as part of the structure. Moreover, the act refers to "the tracks and depots required to perfect the same." A railroad bridge can be of no use to the public unless united with necessary appurtenances, such as approaches, tracks, depots, and other facilities for the public accommodation. And we consider Council Bluffs, Omaha, and South Omaha, under the facts, as necessarily embraced in the intention of Congress. It is true that it appears that from the depot to the point in South Omaha where the tracks of the companies connected is about 4 miles; but the



Digitized by Google

scheme of Congress was to accomplish the more perfect connection "at or near Council Bluffs, Iowa, and Omaha, Nebraska," and we think this distance reasonably within the terms of the act of 1871, liberally construed, as the act should be.

The legislation of 1862 and 1864 in respect of the Union Pacific Railway Company was under consideration in *Union P. R. Co.* v. *Hall*, 91 U. S. 343, 345 [23:428,429], and it was said by Mr. Justice Strong: "The scheme of the act of Congress, then, is very apparent. It was to secure the connection of the main line by at least three branches, with the Missouri and Iowa railroads, and with a railroad running eastwardly from Sioux City in Iowa, either through that state or through Minnesota. An observance of this scheme, we think, will aid in considering the inquiry at what place the act of Congress, and the orders of the President made in pursuance thereof, established the eastern terminus of the Iowa branch. From it may reasonably be inferred that the purpose of Congress was to provide for connections of the branches of the main line of the Union Pacific road with railroads running through the states on the east of the territory, [589] and to provide for those *connections within those states at points at or near their western boundaries."

On June 15, 1866, an act was approved (14 Stat. at L. 66) "to facilitate commercial, postal, and military communication among the several states," carried forward as U. S. Rev. Stat. § 5258, which provided that "every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries all passengers, troops, government supplies, mails, freights, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination."

It is impossible for us to ignore the great public policy in favor of continuous lines thus declared by Congress, and that it is in effectuation of that policy that such business arrangements as will make such connections effective are made.

We are of the opinion that it was within the powers of the Pacific Company to enter into contracts for running arrangements, including the use of its tracks, and the connections and accommodations provided for, and we cannot perceive that this particular contract was open to the objection that it disabled the Pacific Company from discharging its duties to the public. By the contract the Pacific Company parted with no franchise, and was not excluded from any part of its property or the full enjoyment of it. What it agreed to do was to let the Rock Island into such use of the bridge and tracks as it did not need for its own purposes. This did not alien any property or right necessary to the discharge of its public obligations and duties, but simply widened the extent of the use of its property for the same purposes for which that property was acquired, to its own profit so far as that use was concerned, and in the furtherance of the demands of a wise public policy. If, by so doing, it may have assisted a competitor, it does not lie in its mouth to urge that as rendering its contract illegal as opposed to public policy. Ability to perform its own immediate duties to the public is the limitation on its *jus *disponendi*, we are considering, and that [590 limitation had no application to such a use as that in question.

The leading cases of *Thomas* v. *West Jersey R. Co.* 101 U. S. 71 [25:950]; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 290 [30: 83]; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1 [32:837]; *Central Transp. Co.* v. *Pullman Palace Car Co.* 139 U. S. 24 [35:55]; *St. Louis, V. & T. H. R. Co.* v. *Terre Haute & I. R. Co.* 145 U. S. 393 [36: 748]; *United States* v. *Union P. R. Co.* 160 U. S. 1 [40: 319], arose upon instruments which dispossessed the corporations of all of their property and of all capacity to perform their public duties. But we have no such case here.

The argument is pressed that the Pacific Company might become disabled by reason of the increase of business in the future, but the defendant asserts in its answer that it is able to carry on the business of hauling complainant's cars "immediately and at all times," if it may do so with its own engines and on its own terms, and be permitted in the meantime to repudiate this contract. The proof wholly fails to establish that the contract involves any present inability or any existing ground for apprehension in that regard, and shows that the bridge and tracks of the Pacific Company are fully adequate to meet much larger demands than are now, or within any reasonable time can be expected to be, made upon them under the contract. The country, as was said below, will grow in population and business, and the business of this particular corporation will increase, but with the increased volume of business come increased facilities for its transaction. Moreover, increase in the same ratio for the future as in the past is not to be expected, for new roads are constantly being built and other channels of transportation opened; and it cannot be conclusively assumed that the common means of transportation twenty years hence may not be quite different from what they are at present. It will not do to hold this contract void and allow defendant to escape from the obligations it assumed on the mere suggestion that at some time in the remote future there is a possibility that the suggested contingency might arise. Should it happen, however, the courts are competent *to relieve from the consequences of so [591 radical a change of condition.

Objection is made that by reason of the provision for referees in case of difference between the two companies as to the operation of trains, the full control of the Pacific Company of its road and franchises is taken away. If that stipulation were stricken out, the right of the Rock Island Company to use the tracks, subject to the reasonable management of the Pacific Company's officers, would still remain, and the contract itself contained a provision contemplating the possible invalidity of some one of the stipulations not of the essence of the contract. There does not appear to have been any specific contention in the circuit



Digitized by Google

court or in the court of appeals that that particular clause was invalid; and, if it were, the power reserved in the decree was sufficient to permit an application to the court for its modification and the substitution of the judgment of the court. We cannot hold that if the particular clause were objectionable the contract would be invalidated as a whole, and it is too late to ask a reversal on the ground that the clause itself is not enforceable.

We do not feel called upon to enter at length upon other objections urged by appellants' counsel. One of them was that the Rock Island and St. Paul companies derived no power from the laws of Nebraska to enter into the alleged contract because they had not complied with the statutes of the state in that behalf. After the testimony was closed, and as the final hearing commenced, defendants moved the court to permit the introduction of the evidence upon which this contention is based. This was objected to by complainants, the objection sustained and defendants excepted. We concur in the view of the circuit court of appeals, which held that there was no abuse of discretion in the court below in denying the motion, and did not consider the rejected evidence or the argument based upon it. The Rock Island Company built its road from South Omaha to Lincoln as vested with the corporate power to do so, and it contracted as in the possession of the power as a corpora-
592] tion existing in *and under the laws of Nebraska. The state appears to have been content, and the contract, not being necessarily beyond the scope of the powers of the corporation, must, in the absence of proof to the contrary, be deemed valid.

Nor can the contract be held invalid because within its prescribed duration the charter of the Rock Island Company expired by its terms. The contract was carefully drawn in view of such expiration of the several corporate existences of the parties to it, who bound themselves to take such steps as might be necessary to continue the contract in force. And, as observed by the court of appeals, the contingency that the Rock Island Company "will cease to exist and leave neither assigns nor successors is far too remote to have any influence upon the validity of this contract." 10 U. S. App. 192.

It is also said that the contract was void so far as the Republican Valley Railroad Company was concerned, because without consideration, inasmuch as the Rock Island Company was to pay the Pacific Company for the possession and use of the railway and appurtenant property between Lincoln and Beatrice to the Pacific Company, and so the Valley Company, as an independent corporation, received no compensation; but the stockholders of the Valley Company entered into the covenants in question, and as each of its incorporators was an officer or employee of the Union Pacific Company, its road was built with the funds of that company; every share of its stock ever issued was taken, held, or voted by some officer or employee of that company in trust for it; the officers of the two companies had always been the same, and in their operation no distinction had ever been made between the two roads; and their earnings had gone into and their expenditures been paid from a common treasury. We think there is no merit in the objection that for the reason given the Valley company was not bound by its covenants.

But it is earnestly contended that the Pacific Company had no power under its charter as a Federal corporation to operate any other line of road than those lines which it was specifically authorized by Congress to construct, and that it was prohibited under the Constitution and laws of Nebraska from *doing [593 so, and therefore that it could not obligate itself to use, and to pay to the Rock Island Company compensation for the use of, the road between South Omaha and Lincoln.

It does not appear that this point was called to the attention of the circuit court or decided by it, nor in the errors assigned to the decree of the circuit court in the circuit court of appeals was there any error attributed to the decree in this particular; nor did that court pass upon any such question. It is indeed admitted that the point is raised for the first time in this court. We have to determine on this appeal whether in our judgment the circuit court of appeals did or did not err, and affirm or reverse accordingly. It is true that our decision necessarily reviews the decree of the circuit court in reviewing the action of the court of appeals upon it, and, under the statute, our mandate goes to the circuit court directly, but it is, notwithstanding, the judgment of the circuit court of appeals that we are called on primarily to revise. It will be seen then that the judgments of the courts of appeals should not ordinarily be re-examined on the suggestion of error in that court in that it did not hold action of the circuit court erroneous which was not complained of. We will, however, make a few observations on the point thus tardily presented.

The 8th section of the 11th article of the Constitution of that state provided that no railroad corporation of any other state or of the United States, doing business in Nebraska, should be entitled to exercise the right of eminent domain or have power to acquire right of way or real estate for depot or other uses until it should have become a corporation of the state pursuant to the Constitution, but we do not see what that provision has to do with this question. The stipulations of the contract relating to the use of the Rock Island tracks between South Omaha and Lincoln by the Pacific Company did not embrace the acquisition of right of way or real estate, or the exercise of the power of eminent domain by the latter.

By the contract the Rock Island Company gave the Pacific Company "the right and privilege to move and operate its *trains over [594 the tracks" and nothing more, and it was provided that the Pacific Company should do no business at intermediate points. The Pacific Company was to run its trains over the Rock Island tracks 45 miles, and it agreed to pay a fair compensation for doing so. It was perfectly competent for the Pacific Company to contract to deliver at Lincoln freight and passengers taken up at Omaha, and in carrying out such contract it could make deliveries in car loads just as well as in small parcels. It



Digitized by Google

follows that its cars might be run through, and the fact that under this contract the Pacific Company would haul its cars with its own engines amounts to no more than a mere method of doing the business. And as, when it contracts for deliveries beyond its own line, it must pay the connecting company for its services, that compensation might be fixed by the parties upon any basis they agreed to. Here it agreed to pay a certain sum per mile for the mileage over which its trains run, and the difference between that and any other mode of payment did not go to the powers of the company. Where a corporate contract is forbidden by a statute or is obviously hostile to the public advantage or convenience, the courts disapprove of it, but when there is no express prohibition and it is obvious that the contract is one of advantage to the public, the rule is otherwise. As remarked in *Jacksonville, M. P. R. & Nav. Co.* v. *Hooper*, 160 U. S. 514 [40: 515]: "Although the contract power of railroad companies is to be restricted to the general purposes for which they are designed, yet there are many transactions which are incidental or auxiliary to its main business, or which may be useful in the care and management of the property which it is authorized to hold, and in the safety and comfort of the passengers whom it is its duty to transport. Courts may be permitted, where there is no legislative prohibition shown, to put a favorable construction upon such exercise of power by railroad companies as is necessary to promote the success of the company within its chartered powers and to contribute to the comfort of those who travel thereon." And that principle is applicable to the transportation of through freight and passengers over connecting lines.

595] *Under the laws of Nebraska railroad companies are clothed with ample power to make leases or any arrangements for their common benefit consistent with and calculated to promote the objects for which they are created. Neb. Comp. Stat. (1887), 248, chap. 16, § 94. There is nothing in the charter of the Pacific Company that prevents such an arrangement as this in controversy, unless by implication, and as by it the public interest was subserved, that company reached its own lines by a shorter route, and accommodated its own through freight and travel, we are not prepared to hold that it was invalid.

These observations also apply to the clause of the contract in respect of the road between McPherson and Hutchinson, but it should be added that that reach of road was held and operated by the Kansas company, which was a Kansas corporation. The Union Pacific Railway Company was formed by the consolidation of the Union Pacific Railway Company, a Federal corporation, the Denver Company, a Colorado corporation, and a corporation originally named the Leavenworth, Pawnee, & Western Railway, afterwards called the Union Pacific Railway, eastern division, and lastly the Kansas Pacific Railway. The latter company by its first name was incorporated under the laws of the territory of Kansas, and upon the admission of Kansas into the Union became a corporation of that state. The acts of Congress of 1862 and 1864 clothed it with new franchises, but did not deprive it of its powers as a state corporation, which could be exercised by the consolidated company in Kansas, so far as not in derogation of its Federal powers. And Kansas corporations were duly empowered to enter into leases and the like by the state laws. 1 Kan. Gen. Stat. 443, chap. 23, § 112.

2. Was the contract, if within its powers, duly authorized by the Pacific Company? No question arises but that the contract was executed in due form, and, as to the manner in which its execution was authorized, the facts appear to be: On April 22, 1890, the executive committee passed the resolution approving the contract and authorizing the president of the company to execute it, and on the 30th of the same *month the stockholders at their [596 regular annual meeting voted to approve the contract and the action of the executive committee relative thereto. The board of directors never formally acted. As soon as the contract was executed, the Pacific Company required the Rock Island Company to make proper connections between McPherson and Hutchinson, which was done, and the Pacific Company commenced to run over those tracks, and continued to do so until after the disputes between the two companies became flagrant. On the other hand, the Rock Island Company commenced the construction of its road between South Omaha and Lincoln and of the stations and yards at Lincoln on the lands of the Republican Valley Company. Appellants contend that the action of the stockholders and the executive committee was ineffectual because the board of directors was the only body that could authorize the president and secretary to make the contract. The contract appearing on its face to have been duly executed, and the parties having entered upon its execution, necessarily with full knowledge on the part of the board of directors of the Pacific Company, the board would be presumed to have ratified it, although it in fact took no affirmative action in the matter. *Pittsburg, C. & St. L. R. Co.* v. *Keokuk & H. Bridge Co.* 131 U. S. 371, 381 [33: 157, 160].

When by the charter of a corporation its powers are vested in its stockholders, and this was the common-law rule when the charter was silent, the ultimate determination of the management of the corporate affairs rests with its stockholders; and the charter of the Pacific Company did not commit the exclusive control to the board of directors.

By the 1st section of the act certain persons named, together with five commissioners to be appointed by the Secretary of the Interior, were with their successors created a body corporate and politic with certain powers, which were to determine after the company was fully organized, "and thereafter the stockholders shall constitute said body politic and corporate." It was further provided: "Said company, at any regular meeting of the stockholders called for that purpose, shall have power to make by-laws, rules, and regulations *as [597 they shall deem needful and proper, touching the disposition of the stock, property, estate, and effects of the company not inconsistent herewith, the transfer of shares, the terms of office, duties, and conduct of their officers and serv-



Digitized by Google

ants, and all matters whatsoever which may appertain to the affairs of said company." The same section provided that the directors "shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of this act, and to do all acts and things touching the location and construction of said road and telegraph. Said directors may require payment of subscriptions to the capital stock after due notice, at such times and in such proportions as they may deem necessary to complete the road and telegraph within the time in this act prescribed."

Acting under the authority conferred upon them by the charter, the stockholders of the Pacific Company adopted by-laws for the government of the corporation and for the regulation of its business affairs. By § 2 of art. 4 of the by-laws it was provided: "The board of directors shall have the whole charge and management of the property and effects of the company and they may delegate power to the executive committee to do any and all of the acts which the board is authorized to do except such acts as by law and these by-laws must be done by the board itself." Thus the stockholders authorized the board of directors to delegate the power to the executive committee to do any and all acts which the board itself was authorized to do. The executive committee derived its authority from the stockholders through the board of directors. By § 2 of art. 5 of the by-laws it was provided: "The executive committee shall have, and may exercise by a majority of its members, all the powers and authority which from time to time may be delegated to said committee by the board of directors." As early as March 15, 1877, the board of directors adopted a resolution, "that while the board of directors is not in session the full power thereof, under the charter and by-laws, is hereby conferred upon the executive committee, and the proceedings of said committee at its last meeting are hereby ratified 598] and *confirmed." In 1879 the form of resolution adopted by the board was as follows: "Resolved, that while the board of directors is not in session, the full power under the charter and by-laws be and it is hereby conferred upon the executive committee." Similar resolutions were passed every year up to April 30, 1890, when the board of directors passed substantially the same resolution which they had been in the habit of adopting from year to year. It was shown that the meetings of the executive committee were frequent, but that the board usually met only twice a year, the business of the company being more conveniently transacted by the committee.

The contracts in question were in the proper form, signed and executed by the proper executive officers and attested by the corporate seal, they were approved and authorized by the executive committee, which committee had all the powers of the board, and were ratified, approved, and confirmed by the stockholders at their regular annual meeting. This was sufficient to bind the Pacific Company although no formal action by the board was had. But it is argued that this cannot be so because of the peculiar relation which the government directors of the Pacific Company bore to the corporation, differing from that of other directors; and the absence of the government director, who was a member of the executive committee, from the meeting which approved and authorized the contract, is also commented on as if thereby the action of the executive committee in that behalf was rendered ineffective.

By the 1st section of the act of 1862 not less than thirteen directors were to be elected and two to be appointed by the President of the United States, "who shall act with the body of directors, and be denominated directors on the part of the government."

The 13th section of the act of 1864 is as follows:

"That at and after the next election of directors, the number of directors to be elected by the stockholders shall be fifteen; and the number of directors to be appointed by the President shall be five; and the President shall appoint three additional directors to serve until the next regular election, and *thereafter [599 five directors. At least one of said government directors shall be placed on each of the standing committees of said company, and at least one on every special committee that may be appointed. The government directors shall, from time to time, report to the Secretary of the Interior in answer to any inquiries he may make of them, touching the condition, management, and progress of the work, and shall communicate to the Secretary of the Interior at any time such information as should be in the possession of the department. They shall, as often as may be necessary to a full knowledge of the condition and management of the line, visit all portions of the line of road, whether built or surveyed; and while absent from home, attending to their duties as directors, shall be paid their actual traveling expenses, and be allowed and paid such reasonable compensation for their time actually employed as the board of directors may decide."

We see nothing in the provisions relating to government directors which makes it indispensable that the board should formally authorize such contracts as the one under consideration. Congress did not vest in the government directors any peculiar powers. They had the same powers as other directors and no more, but as government directors they were to make reports to the Secretary of the Interior in respect of the affairs and matters mentioned in the act of 1864. They could not either by a negative vote or by absenting themselves from the meetings prevent the transaction of the necessary business of the company, in which they were entitled to participate on the same terms as their associates. Congress did not look to any action of theirs for the protection of the public interests but sought to secure those interests by specific legislation. Thus it was provided by the act of 1862 that patents for lands and government bonds should not be issued to the company until the road had been constructed, examined, and approved by the commissioners and the facts certified to the President and Secretary of the Treasury; and a forfeiture of the rights belonging to the company and the lands granted to it in case of default on its part to redeem the bonds or any of



Digitized by Google

them when required to do so by the Secretary 600] of the Treasury in *accordance with the provisions of the act, was also provided for.

The joint resolution for the protection of the interests of the United States (16 Stat. at L. 56); the appropriation act of March 3, 1873 (17 Stat. at L. 485, 508); the Thurman act (20 Stat. at L. 56); the act amendatory of the 15th section of the act of 1862 (18 Stat. at L. 111); the act providing for a commission to investigate the transactions of the company (24 Stat. at L. 488),—are examples of such legislation, and it was through them, and not through the agency of the government directors, that Congress sought to protect the interests of the government and the public. We regard the position as wholly untenable that this provision for government directors took the corporation out of the general rule that except in cases where the charter imposes a limitation the stockholders are the proper parties to take final action in the management of the corporate affairs.

3. The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach.

It is not contended that multiplicity of suits to recover damages for the refusal of defendants to perform would afford adequate relief, nor could it be, for such a remedy under the circumstances would neither be plain nor complete, nor a sufficient substitute for the remedy in equity, nor would the interests of the public be subserved thereby. But it is objected that equity will not decree specific performance of a contract requiring continuous acts involving skill, judgment, and technical knowledge, nor enforce agreements to arbitrate, and that this case occupies that attitude. We do not think so. The decree is complete in itself, is self-operating and self-executing, and the provision for referees in certain contingencies is a mere matter of detail, and not of the essence of the contract.

It must not be forgotten that in the increasing 601] complexities *of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies "so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated;" and "has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed." Pom. Eq. Jur. § 111.

We regard the case of *Joy* v. *St. Louis*, 138 U. S. 1 [34: 843], as determining that this contract was one within the control of a court of equity to specifically enforce. In that case the St. Louis, Kansas City, & Colorado Railroad Company acquired by succession, under a contract, the right of running its trains over the line of the Wabash Company from a point on the northern line of Forest Park, through the park and into the Union Depot at St. Louis, together with the right to use side tracks, switches, turnouts, and other terminal facilities. It was a continuing right and unlimited in time, and the contract contained provisions regulating the running of trains and prescribing the duties of superintendents, trainmasters, and other officers. The objections that are urged against the specific performance of the contract under consideration were urged against the specific performance of that contract and were severally overruled, and it was held that nothing short of the interposition of a court of equity would provide for the exigencies of the situation.

This case was cited with approval in *Franklin Teleg. Co.* v. *Harrison*, 145 U. S. 459 [36: 776]. The contract there was one for the use by Harrison Brothers & Co. of a wire of the Franklin Telegraph Company between Philadelphia and New York. It appeared that Harrison Brothers & Co. had been in possession of a certain valuable contract with the Insulated Lines Telegraph Company, to the rights of which company the Franklin Telegraph Company had succeeded. Desiring to *have that contract terminated, the [602 Franklin Company entered into a new contract with Harrison Brothers, by which the Franklin Company agreed to allow Harrison Brothers the right to put up, maintain, and use a telegraph wire on the poles of the Franklin Company. At the expiration of ten years thereafter the wires were to become the property of the telegraph company, after which time the telegraph company was to lease the same to Harrison Brothers for $600 per annum, payable quarterly, and with all the other terms and conditions as they existed before. The ten years having expired, Harrison Brothers continued to use the wire, paying the stipulated sum of $600 per annum therefor, but after this had gone on for about three years the telegraph company served notice on Harrison Brothers putting an end to the agreement, whereupon Harrison Brothers filed a bill to restrain the telegraph company from terminating the contract and to have the same specifically enforced, and this court held that the contract was one proper for specific performance.

The same rule was laid down in *Prospect Park & C. I. R. Co.* v. *Coney Island & B. R. Co.* 144 N. Y. 152 [26 L. R. A. 610], where many authorities are cited.

In *Denver & R. G. R. Co.* v. *Alling*, 99 U. S. 463 [25: 438], this court directed an injunction against the Cañon City Railway Company from preventing the Denver road from using the right of way through the Grand Cañon, and said: "If, in any portion of the Grand Cañon, it is impracticable or impossible to lay down more than one roadbed and track, the court, while recognizing the prior right of the Denver Company to construct and operate that track for its own business, should, by proper orders, and upon such terms as may be just and equitable, establish and secure the right of the Cañon City Company, conferred by the



Digitized by Google

act of March 3, 1875, to use the same roadbed and track, after completion, in common with the Denver Company."

In *Memphis & L. R. R. Co.* v. *Southern Exp. Co.* ("*Express Cases*"), 117 U. S. 1 [29: 791], the express companies sought to restrain the railway companies from refusing to carry express matter on the terms of contracts which had expired, which the court held could not be [603] done, and it was *said: "The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts; but, unless a duty has been created either by usage, or by contract, or by statute, courts cannot be called on to give it effect."

It was objected in *Joy's Case* that the court was proposing to assume the management of the railroad "to the end of time," but Mr. Justice Blatchford, speaking for the court, responded that the decree was complete in itself, and that it was "not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances." And the court applied the principle that considerations of the interests of the public must be given due weight by a court of equity, when a public means of transportation, such as a railroad, comes under its jurisdiction. "Railroads are common carriers and owe duties to the public," said Mr. Justice Blatchford. "The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation. The present case is a striking illustration. Here is a great public park, one of the lungs of an important city, which, in order to maintain its usefulness as a park, must be as free as possible from being serrated by railroads; and yet the interests of the public demand that it shall be crossed by a railroad. But the evil consequences of such crossing are to be reduced to a minimum by having a single right of way, and a single set of tracks, to be used by all the railroads which desire to cross the park. These two antagonisms must be reconciled, and that can be done only by the interposition of a court of equity, which thus will be exercising one of its most beneficent functions."

Clearly the public interests involved in the contracts before us demand that they should be upheld and enforced.

4. Doubtless a court of equity may refuse to decree the specific performance of a contract, if [604] it be unconscionable; *or bad faith in the parties seeking its enforcement be shown; or duress or fraud appear; or if it be unjust or inequitable; or if the decree would produce results so inequitable as to be incompatible with the proper exercise of the jurisdiction. But here it appears that the contracts were solicited by the Pacific Company; were fairly made on terms substantially proposed by itself; and that their violation by that company was unjustifiable. The contracts were approved promptly and with unanimity; the consideration appears to have been fair and reasonable; the St. Paul and Rock Island Companies abandoned their previous enterprise in reliance on them; they entered upon the performance of the contracts, and large sums of money were expended in carrying them out. The conduct of the Pacific Company was not such as to commend itself to a court of equity, and we can do no better than to quote from the opinion of Mr. Justice Brewer, in deciding the case on circuit: "It is to the higher interests of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations; that no change of interest or change of management can disturb their sanctity or break their force; but that the law which gives to corporations their rights, their capacities for large accummulations, and all their faculties, is potent to hold them to all their obligations, and so make right and justice the measure of all corporate as well as individual action."

*Decrees affirmed.*

Mr. Justice **Shiras** dissenting:

To make arrangements with other railroad companies whereby they are permitted to make use of the Missouri river bridge and of the tracks and station houses within the cities of Omaha and South Omaha may be fairly held to be within the range of the general authority of the Union Pacific Railway Company. Such contracts are not unusual, and are calculated to promote the convenience of the public and the welfare of the railroad companies which enter into them. And if the contracts in question presented such a case, I should have no difficulty in affirming their validity. But, as I read *them, they go far beyond such [605 supposed arrangements, and contain covenants and stipulations which bring them within the condemnation of our previous decisions.

What is granted to the Rock Island Railway Company and to the St. Paul Railway Company is not a mere right or privilege, for a reasonable compensation, and subject to the rules and regulations of the Union Pacific, to run their trains over the bridge and into and out of the city stations, but "the full, equal, and joint possession and use of the main and passing tracks" belonging to the lessor company, and extending from Council Bluffs on the east side of the Missouri river to the town of South Omaha, a distance of — miles. Nor is the power of control and management reserved to the Union Pacific Railway Company. The words of the contract, in that particular, are as follows:

"Schedules of rules and regulations for the movement of engines and trains over the several railways hereby let and demised shall be made for each railway by the duly authorized officers of the lessor and lessee companies by which such railways shall at the time be operated. Such schedules shall, as nearly as may be practicable, accord equality of right, privilege, and advantage to trains of the same class operated by the lessor and lessee, and shall secure to neither any preference or discrimination against the other. They shall be executed and all trains moved under the immediate direction of the superintendent or the officer of the lessor company. If the parties



Digitized by Google

cannot agree upon the adoption of any schedule, rules, or regulation, or as to the modification of any one existing, either party may demand a decision of such controversy by referees as hereinafter directed. The referees are hereby invested with power to prescribe schedules, rules, and regulations, and to modify existing ones; and, in case of wilful disregard by either party of the rights of the other, to award damages to the party injured for injuries sustained because of such wilful act."

The legal effect of these contracts is to create a joint ownership, for 999 years, of an important portion of the Union Pacific's railroad and appurtenances, "a full, equal, and joint pos-
606] session *of its tracks," and a subjection to rules and regulations prescribed by the duly authorized officers of the lessor and lessee companies, and, in case of disagreement, subjection to the decision of referees, mutually appointed, invested with power to prescribe schedules, rules, and regulations, and to modify existing ones.

These contracts, in my opinion, are plainly void within the principles of the following cases: *Thomas* v. *West Jersey R. Co.* 101 U. S. 71 [25: 950]; *Branch* v. *Jesup*, 106 U. S. 468 [27: 279]; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 290 [30: 83]; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1 [32: 837]; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24 [35: 55]. The doctrine of those cases may be sufficiently expressed by the following paragraph taken from the opinion of Mr. Justice Miller in the case of *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 309 [30: 92].

"We think it may be stated, as the just result of these cases and on sound principle, that, unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company without similar authority make a contract to receive and operate such road, franchises, and property of the first corporation, and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter."

To which may be added the following observations of Mr. Justice Gray in the very recent case of *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 48 [35: 64].

"The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers; and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon
607] them in the *courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

In commenting upon that clause of the contracts in which the Union Pacific Company "lets the Rock Island Company into the full, equal, and joint possession and use of its main and passing tracks," the opinion of the court states that "the possession here spoken of was such possession as the Rock Island Company would have when its engines, cars, and trains were running over the tracks. The company had no possession before its trains came on the tracks or after they had run off of them, and while its trains were on the tracks its possession was only of the particular part occupied temporarily while running over them."

But this view, I submit, overlooks the necessary meaning of the language of the contracts. The possession, whose right is given, is described as full—that is, entire, not imperfect or insufficient; as equal—that is, as great as that of the lessor company; as joint—that is, united in interest and obligation with the other party. If doubt could be entertained of the meaning of language so explicit, such doubt would be removed by the other express provisions that the "schedule of rules and regulations shall, as nearly as may be practicable, accord equality of right, privilege, and advantage to trains of the same class operated by the lessor and lessee, and to trains of a superior class operated by either a preference over trains of an inferior class operated by the other—all rules and regulations shall be reasonable and just to both lessor and lessee, and shall secure to neither any preference or discrimination against the other."

Again, the opinion states that "morever, all trains were to be moved under the direction of an officer of the Pacific Company. The Rock Island trains coming upon a Pacific track immediately passed from the control of the *Rock Island Company into that of [608
the Pacific, and its officials were subject to the orders of the Pacific's officers."

I am unable to so read any provision of the contract. On the contrary, as already stated, it is expressly stipulated that "the schedules of rules and regulations for the movement of engines and trains over the several railways hereby let and demised shall be made for each railway by the duly authorized officers of the lessor and lessee companies by which such railways shall at the time be operated;" and if the parties cannot agree upon such rules and regulations, then mutually appointed referees shall exercise authority to "prescribe schedules, rules, and regulations and to modify existing ones." The plain meaning, as I think, of these contracts is that the Union Pacific Railway Company has thereby parted with its sole and absolute control of those portions of its road and tracks that are embraced within the scope of the contracts, and with the sole and absolute power to exercise its franchises to occupy, possess, and operate such portions of its road, and has agreed to participate, for a period of 999 years, with other railway companies, in the full, joint, and equal possession of those portions of its road, in their physical aspect, and to confer upon such other companies the right to join, on equal terms, in the making



Digitized by Google

of all rules and regulations pertaining to the use and management thereof. When a contract provides for the possession of a railroad and for its operation by rules and regulations it has covered everything that exists—the road as a physical structure, and the franchises to operate it by rules and regulations.

It is true that the contract provides that the rules and regulations "shall be executed and all trains moved under the immediate direction of the superintendent or other officer of the lessor company." But the duties of such an officer are subordinate. He is to carry out the rules and regulations prescribed jointly and equally by the lessor and the lessee companies, and the meaning and effect of the provision in question is to prevent the confusion that would result if there were two superintendents to enforce the same rules over the same portions of railroad.

609]*The opinion of the court disposes of the cases hereinbefore cited, by the observation that they arose upon instruments which dispossessed the corporations of all their property and of all capacity to perform their public duties, and that such is not the case here.

But the reason why the contracts in those cases were held void was not because they embraced all the property of corporations, but because the companies sought to part with the possession and control of their property without legislative authority for doing so. Can that be a sound view which, while admitting that the Union Pacific Railway Company is forbidden to lease the possession and control of its road to another company without authority expressly given, yet would hold that that company may, without such authority, part with the possession and control of one half or of any appreciable part of its road? Can it be maintained that, while the Union Pacific Railway Company cannot lease its railroad from Council Bluffs to Ogden, it may contract with the Rock Island Railway Company to give it joint and equal possession and management of its road between those points? And, in point of principle, if such a contract would be void if embracing the road between Council Bluffs and Ogden, how could it be declared valid if embracing the road between Council Bluffs and South Omaha?

The views of the majority seem to me to overlook the essential question, and that is, the power of the Union Pacific Railway Company to part with its road and franchises, temporarily or forever, in whole or in part. A contract by that company to share its road and those powers, called franchises, which are necessary to operate it, is just as much forbidden by the principle of the cases as a contract to lease its road as an entirety. The objection to an irrevocable contract for 999 years that the Union Pacific Railway Company may hereafter need to use its tracks and franchises in their entirety, is not satisfactorily met by the suggestion that, in such event, the courts can, in some way, relieve the company from the contract. It is not easy to see how an engagement now held valid can be hereafter dispensed with.

The Union Pacific Railway does not hold and exercise the *powers conferred on it by [610 Congress, subject to the control and approval of the courts. Nor is it competent for the courts to enforce or relax, at their will and according to their views of expediency, the obligations of contracts into which the railway company may have entered.

Other provisions of these contracts which seek to subject the Omaha & Republican Valley Railway Company and the Salina & Southwestern Railway Company to the use of the Rock Island & St. Paul Companies, and which renders the Union Pacific Railway Company liable as lessee of railroads owned by the Rock Island Company, are, in my judgment, equally without authority of law. But it is scarcely worth while to consider them minutely. As this is a proceeding to enforce specific performance of the entire contract, invalidity of any important part of the contract, but for which it would not have been entered into at all, is enough to defeat the bill.

It is scarcely necessary to say that if these contracts were void for the reasons given, no action taken under them would justify a court of equity in enforcing them. As was said in *Thomas* v. *West Jersey R. Co.* 101 U. S. 71 [25: 950], in the case of a contract forbidden by public policy and beyond the powers of the defendant corporation, it was its legal duty—a duty both to the stockholders and the public—to rescind and abandon the contract at the earliest moment; and the performance of that duty, though delayed for several years, was a rightful act when done, and could give the other party no right of action, and that to hold otherwise would be to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts.

A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, as far as could be done consistently with adherence to law, by *permitting property or money, parted [611 with on the faith of the unlawful contract, to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, to nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, money or property which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.

I think that the judgment of the circuit court of appeals should be reversed and the cause remanded to the circuit court, with directions to set aside its decree and dismiss the bill.

Mr. Justice **Gray** likewise dissented.



Digitized by Google

UNION PACIFIC RAILWAY COMPANY *et al.*, *Appts.*,
*v.*
CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY.

UNION PACIFIC RAILWAY COMPANY, *Appt.*,
*v.*
CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY.

[Nos. 41, 42.]

*Argued April 21, 22, 1896. Decided May 25, 1896.*

APPEALS from the Circuit Court of the United States for the District of Nebraska. *Dismissed.*

*Messrs.* **John F. Dillon** and **John M. Thurston** for appellants.

*Mr.* **J. M. Woolworth** for Chicago, Rock Island, & Pacific Railway Company, appellee.

*Mr.* **George R. Peck** for Chicago, Milwaukee, & St. Paul Railway Company, appellee.

THE CHIEF JUSTICE: These appeals were from the circuit court, and the cases have just been disposed of on appeals from the circuit court of appeals. *Appeals dismissed.*

---

612] ELI LUCAS, *Plff. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 612-613.)

*Act of May 2, 1890—indictment for murder—charge to jury—hearsay evidence—objection.*

1. The act of May 2, 1890, which provides that the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or adoption shall be the only parties, is to be construed as meaning the parties to a crime, as well as parties to a civil controversy.

2. An averment in an indictment for murder in the Indian country by a Choctaw Indian, that the murdered man was "a negro and not an Indian," is the averment of a jurisdictional fact necessary to be proved on the trial in order to sustain the jurisdiction of the circuit court of the United States.

3. On the trial of such case an instruction to the jury that they have a right to find that the person murdered was not a member of the Indian nation from the mere fact that he was a negro, because of a presumption arising from his race, which as a rule are not of the Indian race, and only become so by adoption, is erroneous where he was found in the Indian territory associating with the Indians; and the fact that there was other evidence given tending to show that he was not a member of the tribe does not cure such error.

4. On such trial, statements of the deceased to a witness that he did not belong to the Indian country, but had come from Arkansas, offered on the question of the jurisdiction of the Federal court, are inadmissible and not within the rule as to declarations by deceased persons against their interest, although the adoption of a colored man into the Indian tribe gives him certain benefits, rights, and privileges.

5. An objection to hearsay evidence, although first made after the question was put and answered, with a request to exclude it, is sufficient to present the error on appeal, where the judge overruled it because he deemed the evidence competent, and not because it was not made in time.

[No. 692.]

*Submitted October 19, 1895. Decided May 25, 1896.*

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment of that court convicting Eli Lucas of murder, at the Choctaw Nation in the Indian country, of one Levy Kemp. *Reversed,* and case remanded with instructions for a new trial.

Statement by Mr. Justice **Shiras**:

Defendant was indicted in the circuit court of the United States for the western district of Arkansas, February 15, 1895, for the murder, at the Choctaw Nation, in the Indian country, of one Levy Kemp, who was alleged in the indictment to have been "a negro and not an Indian." Having been tried and convicted, he was sentenced to death. He then sued out a writ of error from this court.

It was proved at the trial that defendant was a Choctaw Indian, and that Kemp was by blood a negro. The crime was alleged to have been committed in the fall of 1894.

The Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of any one of the states, Congress may, by law, punish any offense there committed. See *Re Mayfield*, 141 U. S. 107, 112 [35: 635, 637], and cases there cited. By § 8 of art. 18 of the treaty between the Choctaw and Chickasaw Indians, concluded April 28, 1866 (14 Stat. at L. 769, 773), it was agreed by those Indians that a court or courts might be established in the Indian territory with such jurisdiction and organization as Congress might prescribe, provided that the same should not interfere with the local judiciary of said nations.

The jurisdiction of the circuit court of the United States for the western district of Arkansas was made to extend, by U. S. Rev. Stat. § 533, to "the county lying west of Missouri and Arkansas, known as the 'Indian Territory.'" *Subsequently, by the act of [613 Congress of January 6, 1883 (22 Stat. at L. 400, chap. 13, § 2), and the act of March 1, 1889 (25 Stat. at L. 786, chap. 333, § 17), certain parts of the territory were annexed, respectively, to the district of Kansas and the eastern district of Texas, leaving that part of the territory which includes the portion of the Choctaw Nation in which this case arose, to remain within the western district of Arkansas.

U. S. Rev. Stat. § 2145, provides that, except as regards certain crimes, "the general laws of the United States as to the punishment of crimes committed within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country:" and by U. S. Rev. Stat.



Digitized by Google

§ 2146, it is provided that "the preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian."

And by the act of May 2, 1890, "to provide a temporary government for the territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian territory, and for other purposes," it is provided "that the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties," etc.

By the 3d article of the above-mentioned treaty with the Choctaws and Chickasaws they, in consideration of the sum of $300,000, ceded to the United States certain territory, with the provision that the said sum should be invested and held in trust for the said nations by the United States, at interest, until the legislatures of the Choctaw and Chickasaw nations, respectively, should have made such laws, rules, and regulations as might be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, held in slavery among the said nations previously to the date of the treaty, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, etc. The 2d article provided that slavery in the said two nations should be at once abolished.

Previously to the year 1879 the Choctaw Na-[614] tion had *manifested a willingness to adopt its freedmen, but the question seems to have arisen whether the joint or concurrent action of both nations was not required to make the adoption by either nation valid. It is understood that the Chickasaws, for some reason, refused to agree to any plan of adoption into their nation of the freedmen belonging therein; and that, therefore, the Choctaw National Council, on November 2, 1880, sent a memorial to Congress expressing their willingness to accept their freedmen as citizens, and asking for legislation that would enable them to do so. The only result of this memorial seems to have been the introduction of a Senate bill which was never reported. Two years later, however, in 1882, a clause was inserted in the Indian appropriation bill, act of May 17, of that year (22 Stat. at L. 68, 72), providing for the appropriation of the sum of $10,000 out of the $300,000 reserved by the 3d article of the treaty above referred to, for the purpose of educating the freedmen of the Choctaw and Chickasaw nations, to be expended in the manner directed by the act, and providing further that either of said nations might, before the expenditure of the money so appropriated, adopt and provide for the freedmen of said nations, respectively, and that in such case its proportion of the money appropriated should be paid over to such nation. Under this provision the Choctaw Nation adopted its freedmen as citizens by an act of its legislature of May 21, 1883. This action of the Choctaw Nation is referred to in the Indian appropriation act of March 3, 1885 (23 Stat. at L. 362, 366).

No counsel for plaintiff in error.

*Mr.* **J. M. Dickinson,** Assistant Attorney General, for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

It has recently been decided by this court in the case of *Alberty* v. *United States*, 162 U. S. 499 [40: 1051], that the act of May 2, 1890, wherein it provides that the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil *and criminal cases[615] arising in the country in which members of the nation by nativity or by adoption shall be the only parties, is to be construed as meaning the parties to a crime as well as parties to a civil controversy, and as, under the present condition of the laws pertaining to the Choctaw tribe, negroes who have been adopted into the tribe are within the jurisdiction of its judicial tribunals, it follows that the averment in the indictment in the present case that Levy Kemp, the murdered man, was a negro and not an Indian, was the averment of a jurisdictional fact, which it was necessary for the prosecution to sustain by competent evidence. Such averment implied that there were negroes who were and those who were not Indians in a jurisdictional sense.

As the accused was a Choctaw Indian, as the killing took place in the Indian territory, and as Kemp was alleged and conceded to be a negro, the question arises, What was the legal presumption as to the latter's citizenship? Is it to be presumed that he was a citizen of the United States, or that he was a member and a citizen of the Choctaw tribe?

We understand the learned judge to have assumed that the presumption was that Kemp was not a member of the Choctaw tribe, and to have so instructed the jury. His language on this subject was as follows:

"In the first place, you are required to find that Kemp, the man killed, or the unknown man, if you should believe his name has not been established, was a negro and not an Indian. That means he was a citizen of the United States; that means that the court has jurisdiction of the case under the law. You may find that proposition by circumstances as well as by what is called positive proof."

In disposing of the motion for a new trial, the judge said:

"Now it may be said that there are some people who are negroes who are adopted into that nation, but that is the exception to the rule. That is an exception to the general rule. The proof in this case, as we find by proceeding further on, shows that the deceased in this case was not one of that class. It is certainly a correct rule of law when you come to an exception of that character, when you find a man who is a *negro by blood said to be[616] such, and there was no controversy over that, and the government proves that fact, that makes a prima facie case of jurisdiction, because it shows that he belonged to a race that, as a rule, are not of the Indian race, and they are only of such Indian race by adoption. When that fact is proved it makes a prima facie case of jurisdiction."

The view of the trial judge, therefore, seems to have been that a finding of the fact that the deceased was a negro established the jurisdiction of the court by reason of a presumption that a negro, though found within the Indian territory, was not a member of the tribe.



Digitized by Google

In so holding we think the court erred. If there is any presumption in such a case, it rather is that a negro found within the Indian territory, associating with the Indians, is a member of the tribe by adoption. But we prefer, in the present case, not to invoke such a presumption, but to regard the status of the deceased as a question of fact, to be determined by the evidence. This was the theory of the indictment, as the allegation concerning Kemp's citizenship was not restricted to his being a negro, but added the averment, "not an Indian."

So, too, it is obvious that the attorney for the government did not rely upon a presumption that a negro, found in the Indian country, was not a member of the tribe, but undertook to sustain the jurisdictional averment of the indictment by affirmative evidence. John le Flore was called by the government to prove that Kemp was not a resident of the Indian country, but had come from a place named Mount Kemp, near Little Rock, Arkansas. It is scarcely necessary to observe that, in the case of *United States* v. *Rogers*, 45 U. S. 4 How. 567 [11:1105], where it was held that Rogers, a white man, was indictable in the circuit court of the United States for an offense committed in the Indian territory, although he had become a member of the Cherokee tribe, there was no statute in terms extending jurisdiction of the Indian courts in civil and criminal cases over their adopted citizens.

Assuming that the government adduced competent evidence tending to show that Kemp was not a member of the tribe, still the admission of such evidence would not cure the 617] error* of the instruction as to the presumption. The burden of proof was on the government to sustain the jurisdiction of the court by evidence as to the status of the deceased, and the question should have gone to the jury as one of fact and not of presumption.

But we are of opinion that the evidence put in by the government on this question was not competent. It consisted of statements alleged to have been made by the deceased, in his lifetime, to le Flore, the witness, that he did not belong to the Indian country, but had come from Arkansas. Such statements do not come within any rule permitting hearsay evidence. The trial judge appears to have regarded the testimony as within the rule that declarations of deceased persons made against their interest are admissible—that as a colored man adopted in the Choctaw Nation gets benefits, rights, and privileges, a declaration made by him against that interest would be competent. It may be that, in a controversy on behalf of a deceased negro's right, or that of his representatives, to participate in the property of the nation, such admissions might be competent. But this case is not within any such rule. The object of the evidence here was not to enforce any rights or claims of the deceased against the Choctaw Nation, but was to sustain an allegation in an indictment, upon which the jurisdiction of the United States court depended.

It is contended in this court, on behalf of the government, that exception to this evidence was not sufficiently taken. The record, however, discloses that the counsel for the defendant, at the trial, objected to the questions put to the witness le Flore to elicit the statements made by Kemp. It is true that the question had been put and answered before the objection was made, but the defendant's counsel asked that the testimony should be excluded, and that an objection should be noted, and thereupon the judge declared the evidence competent. It is therefore apparent that the objection was made in time to enable the government to introduce other and more competent evidence, and that the judge did not overrule the objection because it was not taken in time, but because he *deemed the evidence competent. More- [618 over, in the charge, the judge instructed the jury that they had a right to take into consideration the facts that had gone to them for the purpose of showing who Kemp was and where he came from, and as there was no other evidence on this topic than that of le Flore, it is plain that the judge submitted to the jury the evidence of le Flore as to the statements, as competent. To this portion of the charge the defendant excepted before the jury retired and in their presence. It is, indeed, now contended that the exception was too indefinite; but we think that the exception was sufficient to enable the trial court to perceive the particular matter objected to.

We think, therefore, that the court erred in instructing the jury that they had a right to find that the deceased was not a member of the Choctaw Nation from the mere fact that he was a negro, and also in admitting evidence of the statements of the deceased and in instructing the jury that such statements were competent evidence as to his citizenship.

*The judgment is reversed*, and the case remanded with instructions to set aside the verdict and grant a new trial.

---

JOSEPH M. BROWN, *Appt.*,
*v.*
GRACE T. WYGANT, Executrix of STEPHEN I. WYGANT, Deceased, and HENRY LEEDS, Assignee in Bankruptcy of STEPHEN I. WYGANT, Deceased.

(See S. C. Reporter's ed. 618-624.)

*Jurisdiction to render judgment—bankruptcy—equitable relief.*

1. Jurisdiction to render judgment of *fiat executio* on the return of *nihil* to two successive writs of scire facias on the original judgment is obtained in accordance with the rule that the return of two *nihils* is equivalent to a service.
2. The bankruptcy of the plaintiff cannot be set up by a defendant to show error in reviving a judgment in favor of plaintiff's executrix, especially when the assignee in bankruptcy has ratified the action of the executrix by becoming a party to the proceedings.
3. Equity refuses to relieve from a judgment unless substantial merits are shown.

[No. 209.]

*Submitted April 2, 1896. Decided May 25, 1896.*



Digitized by Google

APPEAL from a decree of the Supreme Court of the District of Columbia reversing the decree of the Special Term and dismissing a suit brought by Joseph M. Brown, and adjudging that the judgment in controversy was the property of Henry Leeds as assignee in bankruptcy, and that said executrix convey to said assignee all her apparent rights in said judgment. *Affirmed.*

See same case below, 21 D. C. 16.

Statement by Mr. Justice **Shiras**:

On June 22, 1887, Joseph M. Brown, a citizen of the United States, residing in the District of Columbia filed in the supreme court of the District of Columbia a bill in equity against Grace Wygant, executrix of Stephen I. Wygant, deceased, a resident of the state of New Jersey, seeking to enjoin the collection of a judgment of the supreme court of the District of Columbia in favor of the said Grace Wygant, executrix, against the said Joseph M. Brown, dated March 8, 1886.

The bill alleged that on the 9th day of February, 1874, one Thomas L. Raymond obtained a judgment against the complainant Brown, on the law side of the supreme court of the District of Columbia, for the sum of $5,000; that on May 14, 1874, said Raymond assigned said judgment upon the records of the court to Stephen I. Wygant, the testator of said Grace Wygant; that on February 23, 1878, the said Stephen I. Wygant was adjudged a bankrupt by the district court of the United States for the southern district of New York, and on that day duly surrendered all his property, including said judgment for $5,000; that on March 20, 1878, one Henry T. Godet was appointed assignee in bankruptcy; that said judgment for $5,000 was in terms included in the schedule of assets filed by Stephen I. Wygant; that claims aggregating more than $12 000 were proved in said bankruptcy proceedings; that the said judgment for $5,000 was the principal asset, and that the aggregate value of the assets was much less than the claims; that the estate of said bankrupt had never been settled, and that the said judgment for $5,000 still belonged to Henry T. Godet, as assignee; that the defendant, Grace Wygant, had full knowledge of the bankruptcy proceedings, [620] *and relying upon complainant's ignorance thereof and for the purpose of harassing him, on January 12, 1886, applied for and procured letters testamentary from the supreme court of the District of Columbia on the estate of Stephen I. Wygant, then deceased; that said Grace Wygant, after receiving such letters testamentary, and on February 1, 1886, caused the clerk of said supreme court of the District of Columbia to enter upon the docket of said court a suggestion of the death of Stephen I. Wygant, and to issue a writ of scire facias to revive said judgment, and upon the return by the marshal of the District of "*nihil*," the said Grace Wygant, on the 4th day of February, 1886, caused an alias writ of scire facias to be issued, which writ was, on the same day, returned by the marshal endorsed "*nihil;*" that the said Grace Wygant obtained, upon the issuance and return of such writs of scire facias, a "*fiat*" from the justice holding said circuit court of the supreme court of the District of Columbia on the 3d day of March, 1886, for the purpose of reviving said judgment; that the complainant had no knowledge of such proceedings in the said special terms of said supreme court of the District of Columbia for probate and circuit court business until a long time after the rendition of said "*fiat;*" that as soon as he received notice of said proceedings he filed a motion to set them aside and for the vacating of the "*fiat*," but that the justice holding such circuit court overruled said motion, reserving to appellant his rights to proceed in equity for relief; that after the rendition of the "*fiat*" aforesaid, Grace Wygant, as such executrix, brought an action for the enforcement of such judgment against the complainant in the supreme court of the county of New York on December 28, 1885; and thereupon the complainant prayed for both a temporary and final injunction against Grace Wygant, as such executrix, and for general relief.

A demurrer was sustained to the bill on the ground that the assignee in bankruptcy was not made a party, but leave was given to amend by making the assignee a party. On January 10, 1888, the complainant amended by adding the name of Henry T. Godet, assignee in bankruptcy of *Stephen I. Wygant, deceased, [621 as an additional defendant, and by filing as an exhibit the assignment conveying to Godet, assignee, the entire estate of the said bankrupt, executed March 8, 1878, by the register in bankruptcy. After a general demurrer to the bill as thus amended had been overruled, Grace Wygant, executrix, filed an answer, and issue was joined June 26, 1888, by replication. On February 5, 1888, an injunction *pendente lite* was allowed as prayed in the bill. On September 11, 1888, on motion of solicitor of defendant, the death of Godet, assignee, was entered of record. On September 29, 1890, Henry Leeds, as successor to Godet, was, on his own petition, admitted to become a party defendant, and on November 4, 1890, Leeds, as assignee, filed his separate answer, substantially admitting the allegations of the amended bill, to which complainant filed a replication. On November 10, 1890, leave was given defendant Leeds to file a cross bill, which he did, alleging that he, as assignee, was entitled to the judgment, and praying that it might be decreed to be an asset of the bankrupt's estate and of full force and vigor against the complainant, and that the defendant, Grace Wygant, should be decreed to assign to him such judgment and her apparent rights thereto.

On November 25, 1890, the complainant filed an answer to the cross bill. In this answer he denied that the supreme court of the District of Columbia had jurisdiction to issue the letters testamentary to the defendant, Grace Wygant; denied that the "*fiat*" of the circuit court of the supreme court of the District of Columbia was pronounced by lawful authority, and denied that the judgment in controversy was still in force—pleaded the statute of limitations. He also averred that Godet, the original assignee, had actual notice of the pendency of this suit, but had refused and declined to become a party thereto.

On the 14th day of January, 1891, Grace Wygant, as executrix, filed an answer to the



Digitized by Google

cross bill denying that Leeds was invested with title to the judgment as assignee, and likewise averring that since the filing of the original bill she had become the lawful assignee of all the 622]claims of the creditors *against the bankrupt's estate except one owned by the city of New York.

On February 14, 1891, the supreme court of the District of Columbia, at special term, filed a decree dismissing the cross bill and granting a final injunction against Grace Wygant, enjoining her as executrix from further prosecuting the judgment obtained by her against the complainant in respect to the said judgment for $5,000 in the supreme court of the county of New York.

From this decree Grace Wygant, executrix, and Henry Leeds, assignee, appealed to the supreme court of the District of Columbia at general term, and that court, on April 4, 1892, reversed the decree of the special term, dismissed the bill of complaint of Joseph M. Brown, adjudged that the judgment in controversy was the property of Henry Leeds as assignee in bankruptcy of Stephen I. Wygant, deceased, as an asset of said estate, and decreed that said Grace Wygant, executrix, should convey and assign to said Henry Leeds, assignee, all her apparent rights in said judgment.

On April 16, 1892, the complainant filed a petition asking the court to vacate its said decree and to remand the cause to the special term, in order that evidence might be taken, for reasons set forth in said petition. On November 21, 1892, this motion was refused, and on December 20, 1892, an appeal was taken to this court.

*Mr.* **Robert Christy** for appellant.
*Mr.* **A. A. Birney** for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

In dismissing the appellant's bill of complaint and sustaining the cross bills the supreme court of the District evidently proceeded on the view that it was competent for the circuit court to render judgment of "*fiat executio*" on the return of the "*nihil*" to two successive writs of scire facias on the original judgment. That the return of two *nihils* is equivalent to a service has been a rule of practice of long standing in England and in most of the states of this Union.

623]*The writ of *scire facias quare executio non* is defined to be a writ issued out of the court wherein a judgment has been entered, reciting such judgment, suggesting the grounds requisite to entitle plaintiff to execution, and requiring the defendant to make known the reason, if any there be, why such execution should not issue. Bingham, Executions & Judgments, 123; Freem. Executions, § 81.

"On the return day of the writ the sheriff either returns 'scire feci,' that is, that he has warned the party, or '*nihil*,' that is, that the party has nothing by which he can warn him. When the sheriff returns '*nihil*,' the party must sue out a second or *alias* writ of scire facias, and if the sheriff returns '*nihil*' also to the second writ, and the defendant do not appear, there shall be judgment against him. In other words, two returns of '*nihil*' are equivalent to one return of 'scire feci.'" Bingham, Executions & Judgments, 124; *Andrews* v. *Harper*, 8 Mod. 227; *Chambers* v. *Carson*, 2 Whart. 9; *Choate* v. *People*, 19 Ill. 63; *Kearns* v. *State*, 3 Blackf. 335; *Barrow* v. *Bailey*, 5 Fla. 9; *Cummings* v. *Eden*, 1 Cow. 70.

And as the supreme court of the District of Columbia has, in the present case, recognized the regularity of the proceedings to revive the judgment against the appellant, no reason is seen why this court should take a different view. *Owens* v. *Henry*, 161 U. S. 642 [*ante*, 753], is distinguishable from this case, because there the defendant had ceased to be a resident of Pennsylvania, where the original judgment had been entered, years before the writ of scire facias was sued out, and had become a citizen of Louisiana, in which state the statute of limitations had run.

It is urged on behalf of the appellant that as Wygant, the original owner of the judgment, had been declared a bankrupt, and as the judgment, as an asset of his estate, had become the property of the assignee in bankruptcy, it was not competent for Grace Wygant, as his executrix, to revive the judgment by proceeding in the supreme court of the District of Columbia. A sufficient answer to this is that Brown, as the judgment debtor, was not injured, and could not have *successfully [624 set up that matter by plea to the scire facias. *Thatcher* v. *Rockwell*, 105 U. S. 467 [26: 949], was a case where, after suit brought, the plaintiff was adjudged to be a bankrupt, and assignees were appointed, and it was held that the bankruptcy of the plaintiff could not be set up by the defendants to bar its further prosecution in his name, this court saying: "It is no defense to the debt that the creditor has become a bankrupt; and if an assignee, after notice, permits a pending suit to proceed in the name of the bankrupt for its recovery, he is bound by any judgment that may be rendered. This is a sufficient protection for the debtor."

In the present case, Leeds, the assignee in bankruptcy, ratified the action of the executrix, by making himself a party to the proceedings and procuring a decree compelling her to transfer the judgment to him as an asset of the bankrupt's estate. By that feature of the decree Brown is protected from any danger of being compelled to pay twice.

If, then, the original judgment was regularly obtained, was duly revived by lawful proceedings, and is now made payable, by the decree of the court below, to the party legally entitled to receive the same, no reason is presented by this record why this court should disturb that decree. Equity refuses to relieve from a judgment unless substantial merits are shown.

It is true that the appellant undertook to show that he had a meritorious defense to the suit as originally brought, by certain allegations made in a petition to the supreme court of the District of Columbia filed after the final decree had been entered against him. We are not obliged to notice allegations made at such a late period in the proceedings—not made, indeed, till the controversy has been finally closed. However, we have read this petition,



Digitized by Google

and it is sufficient to say that it contains nothing which, even if true and if made to appear during the trial of the present case, would have justified any change in the decree.

*The decree of the supreme court of the District of Columbia is affirmed.*

---

625] UNITED STATES, *Plff. in Err.*,
v.
J. HENRY PERKINS.

(See S. C. Reporter's ed. 625-631.)

*New York inheritance tax—United States not exempted—property—corporations.*

1. Personal property bequeathed by will to the United States is subject to an inheritance tax under the laws of New York.
2. An inheritance tax imposed upon a legacy to the United States by the laws of a state is not invalid as an attempt to tax the property of the United States, since it is imposed upon the legacy before it reaches the hands of the government.
3. The United States is not a corporation exempted by law from taxation, within the meaning of the New York inheritance tax law.
4. The corporations to which the exemption was intended to apply in the inheritance tax laws of New York are confined to those of a religious, educational, charitable, or reformatory purpose.

[No. 422.]

*Submitted May 8, 1896. Decided May 25, 1896.*

IN ERROR to the Supreme Court of the State of New York to review a judgment of that court, affirming an order of the Surrogate Court of Suffolk County, New York, assessing an inheritance tax upon property bequeathed by William W. Merriam to the United States. *Affirmed.*

See same case below, 141 N. Y. 479.

Statement by Mr. Justice **Brown**:

This was a writ of error to an order of the general term of the supreme court, affirming an order of the surrogate's court of Suffolk county, assessing an inheritance tax of $3,964.28 upon the personal property of William W. Merriam, bequeathed by him to the United States.

It appeared that Merriam, who was a resident of Suffolk county, died on January 30, 1889, leaving a last will and testament, by which he devised and bequeathed all his estate, both real and personal, to the United States government. Upon the petition of the executor an appraiser was appointed, and upon his report the surrogate fixed the tax at the above amount. On appeal to the general term of the supreme court the order of the surrogate's court was affirmed, and upon a further appeal to the court of appeals the order of the supreme court was affirmed, and the case remanded to that court for final judgment, which was entered against the United States March 31, 1894. Whereupon the United States and the executor joined in suing out this writ of error. Defendant in error is the county treasurer of Suffolk county.

*Mr.* **Holmes Conrad,** Solicitor General, for plaintiff in error.

*Mr.* **Timothy M. Griffing** for defendant in error.

*Mr. Justice* **Brown** delivered the opinion of the court:

This case raises the single question whether personal *property bequeathed by will [626 to the United States is subject to an inheritance tax under the laws of New York.

By Laws of 1885, chap. 483, as amended by Laws of 1891, chap. 215, it was enacted as follows: "Sec. 1. After the passage of this act, all property which shall pass by will or by the intestate laws of this state, from any person who may die seised or possessed of the same while a resident of this state, . . . to any person or persons, or to any body politic or corporate, in trust or otherwise, . . . other than to or for societies, corporations, and institutions now exempted by law from taxation, or from collateral inheritance tax, shall be and is subject to a tax at the rate hereinafter specified," etc.

By Laws of 1892, chap. 399, entitled "An Act in Relation to Taxable Transfers of Property," (§ 1) "a tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of $500 or over . . . . to persons or corporations not exempt by law from taxation on real or personal property." By § 23 of this law certain previous acts were repealed, subject to a saving clause contained in § 24, to the effect that the repeal should not affect or impair any act done, or right accruing, accrued or acquired, or liability, penalty, forfeiture, or punishment incurred prior to the passage of this act. The 25th section also provided that the provisions of this act, so far as they were substantially the same as those of the laws existing April 30, 1892, should be construed as a continuation of such laws, modified or amended according to the language employed in this act, and not as new enactments.

The testator Merriam died January 30, 1889, but the tax was not assessed until February 16, 1893, after the act of 1892 had taken effect. Upon this state of facts, the court of appeals of New York was of opinion that the case was covered by the act of 1892, although it was thought that the legacy was subject to taxation whether it was taxed under that or the previous acts. This ruling as to the applicability of the act of 1892 seems to conflict with *Re Seaman's Estate*, 147 N. Y. 69, but the difference is not material in this case.

*The case really presents two questions: [627

1. Whether it is within the power of the state to tax bequests to the United States.

---

NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

*As to exemption from taxation; whether a contract or not; not implied*,—see note to Tucker v. Ferguson, 22: 805.

*As to when an injunction to restrain the collection of a tax will be granted*, see note to Dows v. Chicago, 20: 65.

*As to when taxes illegally assessed can be recovered back*, see note to Erskine v. Van Arsdale, 21: 63.



Digitized by Google

2. Whether, under these statutes, the United States are a corporation exempted by law from taxation.

1. While the laws of all civilized states recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the state may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control. "By the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and a third was at his own disposal; or if he died without a wife he might then dispose of one moiety, and the other went to his children; and so, *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal." 2 Bl. Com. 492. Prior to the statute of wills, enacted in the reign of Henry VIII., the right to a testamentary disposition of property did not extend to real estate at all, and as to personal estate was limited as above stated. Although these restrictions have long since been abolished in England, and never existed in this country, except in Louisiana, the right of a widow to her dower and to a share in the personal estate is ordinarily secured to her by statute.

By the Code Napoleon, gifts of property, whether by acts *inter vivos* or by will, must not exceed one half the estate if the testator leave but one child; one third, if he leaves two children; one fourth, if he leaves three or more. If he have no children, but leaves ancestors, both in the paternal and maternal line, he may give away but one half of his property, and but three fourths if he have ancestors in but one line. By the law of Italy, one half a testator's property must be distributed equally among all his children; the other [628]half he may leave to his eldest son or to whomsoever he pleases. Similar restrictions upon the power of disposition by will are found in the codes of other continental countries, as well as in the state of Louisiana. Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good.

In this view, the so-called inheritance tax of the state of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the state has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee. This was the view taken of a similar tax by the court of appeals of Maryland in *State* v. *Dalrymple*, 70 Md. 294, 299 [3 L. R. A. 372], in which the court observed: "Possessing, then, the plenary power indicated, it necessarily follows that the state in allowing property . . . to be disposed of by will, and in designating who shall take such property when there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law, as the legislature may deem expedient. These conditions, subject to the limitation named, are consequently wholly within the discretion of the general assembly. The act we are now considering plainly intended to require that a person taking the benefit of a civil right secured to him under our laws should pay a certain premium for its enjoyment. In other words, one of the conditions upon which strangers *and [629 collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is, that there shall be paid out of such property a tax of 2½ per cent into the treasury of the state. This therefore is not a tax upon the property itself, but is merely the price exacted by the state for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution."

That the tax is not a tax upon the property itself, but upon its transmission by will or by descent, is also held both in New York and in several other states. *Re Swift's Estate*, 137 N. Y. 77 [18 L. R. A. 709], in which it is said, page 85, that "the effect of this special tax is to take from the property a portion, or a percentage of it, for the use of the state, and I think it quite immaterial whether the tax can be precisely classified with a taxation of property or not. It is not a tax upon persons." *Re Hoffman's Estate*, 143 N. Y. 327; *Schoolfield* v. *Lynchburg*, 78 Va. 366; *Strode* v. *Com.* 52 Pa. 181; *Re Cullum's Will*, 145 N. Y. 593. In this last case, as well as in *Wallace* v. *Myers*, 38 Fed. Rep. 184 [4 L. R. A. 171], it was held that, although the property of the decedent included United States bonds, the tax might be assessed upon the basis of their value, because the tax was not imposed upon the bonds themselves, but upon the *estate* of the decedent, or the privilege of acquiring property by inheritance. *Eyre* v. *Jacob*, 14 Gratt. 427; Dos Passos, Inheritance Tax Law, chap. 2, § 8, and cases cited. Such a tax was also held by this court to be free from any constitutional objection in *Mager* v. *Grima*, 49 U. S. 8 How. 490, 493 [12: 1168, 1170]. Mr. Chief Justice Taney, remarking that "the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and terms within which property, real and personal, within its dominion may be transferred by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. . . . If a state may deny the privilege altogether, it follows that when it



Digitized by Google

grants it, it may annex to the grant any conditions which it supposes to be required by its in-
630]terests or *policy." To the same effect is *United States* v. *Fox*, 94 U. S. 315 [24: 192].

We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it.

2. Whether the United States are a corporation "exempt by law from taxation," within the meaning of the New York statutes, is the remaining question in the case. The court of appeals has held that this exemption was applicable only to domestic corporations declared by the laws of New York to be exempt from taxation. Thus in *Re Prime's Estate*, 136 N. Y. 347 [18 L. R. A. 713], it was held that foreign religious and charitable corporations were not exempt from the payment of a legacy tax, Chief Judge Andrews observing (p. 360): "We are of opinion that a statute of a state granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the state and over which it has power of visitation and control. . . . The legislature in such cases is dealing with its own creations, whose rights and obligations it may limit, define, and control." To the same effect are *Catlin* v. *Trinity College*, 113 N. Y. 133 [3 L. R. A. 206]; *White* v. *Howard*, 46 N. Y. 144; *Re Balleis's Estate*, 144 N. Y. 132; *Minot* v. *Winthrop*, 162 Mass. 113 [26 L. R. A. 259]; Dos Passos, Inheritance Tax Law, chap. 3, § 34. If the ruling of the court of appeals of New York in this particular case be not absolutely binding upon us, we think that, having regard to the purpose of the law to impose a tax generally upon inheritances, the legislature intended to allow an exemption only in favor of such corporations as it had itself created, and which might reasonably be supposed to be the special objects of its solicitude and bounty.

In addition to this, however, the United States are not one of the class of corporations
631]intended by law to be exempt *from taxation. What the corporations are to which the exemption was intended to apply are indicated by the tax laws of New York, and are confined to those of a religious, educational, charitable, or reformatory purpose. We think it was not intended to apply it to a purely political or governmental corporation like the United States. *Catlin* v. *Trinity College*, 113 N. Y. 133 [3 L. R. A. 206]; *Re Van Kleeck's Estate*, 121 N. Y. 701; Dos Passos, Inheritance Tax Law, chap. 3, § 34. In *Re Hamilton*, 148 N. Y. 310, it was held that the execution did not apply to a municipality, even though created by the state itself.

Upon the whole, we think the construction put upon the statute by the court of appeals was correct, and *the judgment of the supreme court is therefore affirmed.*

Mr. Justice **Harlan** dissents.

UNITED STATES, *Piff. in Err.*,
*v.*
ASHBEL P. FITCH.

[No. 828.]

*Submitted with No. 422, May 8, 1896. Decided May 25, 1896.*

IN ERROR to the Supreme Court of the State of New York.

*Mr.* **Holmes Conrad**, Solicitor General, for plaintiff in error.

*Messrs.* **Benjamin F. Dos Passos** and **Edgar J. Levey** for defendant in error.

Mr. Justice **Brown**: In this case George W. Cullum, a resident of the state of New York, died in the city of New York on February 28, 1892, leaving a last will and testament, which, on the 30th day of April, 1892, was duly admitted to probate. By this will the testator bequeathed to the United States government the sum of $175,100, upon which, by order of the surrogate's court, there was assessed an inheritance tax of $8,755.

The case does not differ in principle from the one above decided, and *the judgment of the court below is therefore affirmed.*

Mr. Justice **Harlan** dissents.

---

J. H. S. WIBORG *et al.*, *Piffs. in Err.*,
632]*v.*
UNITED STATES.

(See S. C. Reporter's ed. 632-663.)

*Military expedition—statement by judge—charge to jury—evidence—ground of reversal—mates of the vessel.*

1. A military expedition or enterprise prohibited by U. S. Rev. Stat. § 5286, is entered upon when men, with knowledge of the enterprise, combine and organize in this country and are carried, with arms and ammunition under their control, by a tug 30 or 40 miles out to sea to a steamer on which they embark and drill and by which they are taken to Cuba, where they disembark to effect an armed landing on the coast, with intent to make war against the government, with which the United States is at peace.

2. A statement of fact based on uncontradicted testimony, made in a recapitulation of the evidence by the judge, who specifically submitted the matters of fact to the jury, is not error.

3. The opinion of the court, expressed to the jury, that a question of fact is free from reasonable doubt, is not ground of reversal if he expressly tells them that it is a question for their determination alone.

4. On the question whether a combination was lawful or not, declarations of those engaged in it, explanatory of acts done in furtherance of its object, are competent evidence after the combination has been proved.

5. Want of evidence to sustain a verdict against some of the defendants in a criminal case may

NOTE.—*That where an illegal combination is proved, declarations of one about the enterprise are evidence against co-conspirators,*—see note to Lincoln v. Claflin, 19: 106.



Digitized by Google

be considered as ground for reversal, although no motion or request was made in the lower court to instruct the jury to find for them.

6. Mates of the vessel who proceeded on the voyage under the captain's orders are not guilty of assisting a military expedition by reason of the fact that the vessel carried the persons engaged in such expedition, in the absence of proof of guilty knowledge of, or participation in, such expedition before they left port.

[No. 986.]

*Submitted May 18, 1896. Decided May 25, 1896.*

IN ERROR to the District Court of the United States for the Eastern District of Pennsylvania to review a judgment of that court convicting J. H. S. Wiborg *et al.* of setting on foot and preparing a certain military expedition and enterprise against Cuba, a territory of Spain, against the provision of the act of Congress. *Affirmed as to Wiborg and reversed as to Petersen and Johansen*, and case remanded with instructions for a new trial as to them.

See same case below, 73 Fed. Rep. 159.

Statement by Mr. Chief Justice **Fuller**:

Wiborg, the captain, and Petersen and Johansen, the mates, of the steamer Horsa, were indicted in the district court of the United States for the eastern district of Pennsylvania under U. S. Rev. Stat. § 5286. The indictment charged that defendants, "mariners, at the district aforesaid and within the jurisdiction of this court, did, within the territory and jurisdiction of the United States, to wit, at the port of Philadelphia, Pennsylvania, within the district aforesaid, begin, set on foot, and provide and prepare the means for a certain military expedition and enterprise to be carried on from thence against the territory and dominions of a foreign prince, to wit, against the island of Cuba, the said island of Cuba being then and there the territory and dominions of the King of Spain, the said United States being then and there at peace with the King of Spain, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America." They were tried before Judge Butler and a jury, and convicted. Motions in arrest of judgment and for a new trial were severally made and overruled, and defendants were sentenced to pay fines and to serve terms in the state penitentiary. This writ of error was thereupon sued out and defendants admitted to bail.

The Horsa was a Danish steamer, sailing under the Danish flag, and defendant Wiborg, its captain, was a subject of the King of Denmark, as were also his codefendants, as claimed by their counsel.

634] *The Horsa was engaged in the fruit business for John D. Hart & Company, of Philadelphia, and on November 9, 1895, cleared from Philadelphia for Port Antonio, Jamaica. She had on board but little cargo, consisting of two life boats, a lot of empty boxes and barrels, two horses, some horse feed, bales of hay and boxes of corn, all of which were entered on her manifest. Just before sailing, Captain Wiborg received a message (in writing but not produced), which, he said, was: "After I passed the Breakwater to proceed north near Barnegat and await further orders." The Horsa sailed between 6 and 7 P. M., and, after passing the Delaware Breakwater, her proper course would be southward. She turned, however, to the northward, went up the Jersey coast to Barnegat light and anchored on the high seas between 3 and 4 miles off the shore. Between 10 and 11 the same evening the steam lighter J. S. Stranahan sailed from Brooklyn, carrying some cases of goods and two life boats, which had been put on board by the crew of the lighter during the evening. On the lower bay of New York, below Staten Island, during the night she took on board between thirty and forty passengers, mostly dark complexioned men speaking a foreign language, apparently Cubans or Spaniards. The lighter then ran down to Barnegat, where she saw the Horsa under a white flag. She also ran up a white flag, went alongside, and put aboard her passengers with the cases of goods and the life boats. They brought authority in writing from John D. Hart & Co., which was not produced. Captain Wiborg saw the transfer made, and assented to it. His fireman complaining, he answered: "I told them if anybody had to hang for this I would be the man to hang for it." He testified that the man on the lighter brought him a message from John D. Hart & Company. "He told me to take those men and luggage and whatever they had aboard the Horsa, and let them off whenever they called for it to be let off. I shipped two boats at the same time, and the order of my message was to deliver those two boats to those men and the two boats that I had shipped here in Philadelphia. . . . The only order was they had a colored man there that they *called [635 the pilot, and whenever he called for them to be let off I should let them off and give them the boats." As to the boats taken on at Philadelphia and those taken on off Barnegat, he was "to deliver them to these men as soon as they called for them. . . . The pilot did not tell me where he was going. I did talk to him, but he could talk very little English." The captain testified that the writing from J. D. Hart & Co., "to take whatever was in the tug, the men and their luggage and boxes, and let them off whenever they called for it to be let off," did not strike him as an unusual thing; it did not strike him as unusual "that these men were to be taken on board and turned out on the sea with the boats." It appeared and was admitted that there was an insurrection in Cuba. The captain was informed that the party was going to Cuba, and believed the men were going to fight for Cuba, but was careful to ask no questions, and testified that he considered his own part in the affair to be lawful. The charter party was not produced.

After boarding the Horsa, these persons broke open the boxes which they had brought with them, and took out rifles, swords, and machetes, and one cannon. They also had cartridge belts, medicines, and bandages with them. They were not in uniform, but there was evidence that some of them had caps with a little flag, which they said was a Cuban



Digitized by Google

flag. They brought their own food with them. The evidence tended to show that when these men divided up the arms, every man had a rifle; that certain of them, understood to be officers, had swords and revolvers; that one seemed to be in command of them; and that this commander asked some of the crew whether they would fight if attacked by a Spanish gunboat. There was also some evidence that there were military exercises in the nature of drilling by from three to seven men at a time; that these persons stated that they were going to Cuba to fight the Spaniards; that on the second day out they made small canvas bags to put cartridges in, and unpacked a bale of blankets which they had brought with them, wrapped one hundred and fifty square rifles in these blankets in small bundles, **636**]about five in each, and threw the *boxes overboard in which the rifles had come, taking a rifle, sword, and machete apiece, and practising with them and the cannon. There were three kinds of cartridges and two kinds of rifles. One witness stated that, as he was informed by them, there were small Winchesters for the cavalry and big rifles for the infantry; big revolvers for the officers; and that the cannon was a Maxim gun, in charge of a French Canadian. This machine gun was worked with a slot and a crank, and had its own cartridges. The witness saw it worked, and saw them practising with it, and the man in charge showed him how they were doing it. Some testimony was introduced on behalf of defendants to the effect that a machete is generally carried by the inhabitants of the West Indies, and has many peaceful uses. One of the defendants' witnesses admitted that it was a formidable weapon, and, moreover, that he had never seen citizens carry guns in Cuba. It is unquestioned that the machete is used for both war and peace, it being described in the Century Dictionary as a "heavy knife or cutlass, used among Spanish colonists and Spanish-American countries, both as a tool and as a weapon," and by Webster as "a large, heavy knife, resembling a broadsword, often 2 or 3 feet in length, used by the inhabitants of Spanish America as a hatchet to cut their way through thickets, and for various other purposes."

After leaving Barnegat, the Horsa took the usual course for Jamaica, which follows the Cuban coast for about six hours. The usual color of her funnel was yellow below with red above and black on top, and it was so painted when she left Philadelphia. While she was at sea the funnel was repainted red and black, and when she returned to Philadelphia it was black, red, and yellow. The name of the Horsa was painted out amidships, but her name was on the stern in brass letters and on the bow, and those letters were not painted over to the captain's knowledge. About 6 miles off the coast of Cuba the colored pilot gave orders to disembark. This was about 11 o'clock at night, and the disembarkation was conducted under the supervision of Captain Wiborg, who had the lights of the vessel put out. The two boats were launched **637**] *which had come on board at Philadelphia and also those which had come with the lighter, and Captain Wiborg sold the men one of the ship's boats. As one of the boats leaked, another was lowered from the ship. The passengers took to the boats, taking with them all the ammunition and arms they could carry. The steamer then undertook to tow the boats, but a strange light was seen in the distance, and at the request of the men the captain cut the boats loose and started away at full speed. Some forty boxes of cartridges had been left on the Horsa because there was no room for them on the boats, and Captain Wiborg directed that these should be thrown overboard. He said this was to avoid getting into trouble at Port Antonio, since the boxes were not manifested for that port. The Horsa then completed her voyage to Port Antonio. The captain said he told the collector there he had lost two boats, "to put him off his guard."

Defendants' counsel requested the court to give to the jury thirteen points or instructions, of which the fourth, fifth, sixth, seventh, eighth, ninth, and eleventh were as follows:

"4. That the laws of the United States and the section under which the defendants are indicted do not prohibit transporting of arms or of military equipments to a foreign country or forbid one or more individuals, singly or in unarmed association, from leaving the United States for the purpose of joining in any military operations which are being carried on between other countries or between different parties in the same country.

"5. That before the jury can find the defendants guilty under this indictment they must first find that there was a 'military expedition or enterprise' against the territory of the King of Spain. A military expedition or enterprise does not exist unless there is a military organization of some kind designated as infantry, cavalry, or artillery, and officered and equipped for active hostile operations.

"6. That if the jury find that there were transported on board of the 'Horsa' arms and men, but the same were not a 'military organization as infantry, cavalry, or artillery, and *officered and equipped, or in readiness [**638** to be officered and equipped,' then the jury must find the defendants not guilty.

"7. That it is not an offense against the laws of the United States for a shipper to ship arms to a foreign country or for volunteers to go to a foreign country for the purpose of joining in military operations which are being carried on between other countries or between different parties in the same country; in such cases the shipper and volunteer would run the risk, the one of capture of his property, and the other of the capture of his person by the foreign power; but the master of the ship transporting such arms and volunteers, not being a military expedition or enterprise, would not commit any offense against the laws of the United States and would not be liable under this indictment.

"8. That if the jury find from the evidence in this case that the officers of the steamship Horsa took on board, off the coast of New Jersey, on the high seas, a number of men, all dressed as citizens, without arms and equipments on their persons, and at the same time took on board certain boxes of arms and ammunition and munitions of war, but that the said men were not organized as infantry, cav-



Digitized by Google

alry or artillery or ready for such organization, the jury are instructed that they must find the defendants not guilty, even if the jury believe that the passengers on board intended to enlist, on arrival in Cuba, in the Cuban army.

"9. That if the jury find from the evidence that the defendants took on board their vessel, off the New Jersey coast, a number of men, unarmed and not organized, either as infantry, cavalry, or artillery, and at the same time took on board boxes of ammunition and arms, the jury are instructed that they must find the defendants not guilty, even if the jury should believe that the men intended upon arrival in Cuba to enlist in the Cuban army, and that the boxes of arms were intended for use in the Cuban army."

"11. That if the jury find from the evidence that the passengers and boxes of arms did not constitute a military expedition or enterprise, but that the said passengers were simply going to Cuba to enlist in either army, and the said
639] *arms and ammunition were being conveyed to Cuba to be used by either army, then the jury are instructed that the defendants in transporting them in due course of their business committed no offense against the laws of the United States; and the jury are further instructed that all evidence of secrecy, such as taking on the passengers and boxes of arms on the high seas and putting out the lights off the coast of Cuba, were acts which the defendants might lawfully do to avoid the capture of the passengers and the capture of the property from off their ship by Spanish men-of-war; but under such circumstances, if the jury find there was no military expedition or enterprise, such acts would not of themselves be evidence of any intent to violate the statute of the United States under which the defendants are indicted."

The court charged the jury, explaining the indictment, and then continued as follows:

"The evidence heard would not justify a conviction of anything more than providing the means for or aiding such military expedition by furnishing transportation for the men, their arms, baggage, etc. To convict them, you must be fully satisfied by the evidence that a military expedition was organized in this country, to be carried out as and with the object charged in the indictment, and that the defendants, with knowledge of this, provided means for its assistance and assisted it as before stated.

"Thus you observe the case presents two questions: First, Was such military expedition organized here in the United States? Secondly, Did the defendants render the assistance stated here with knowledge of the facts?

"In passing on the first question, it is necessary to understand what constitutes a military expedition, within the meaning of the statute. For the purposes of this case, it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniforms, or prepared for efficient service, nor that they shall have been organized as, or *according to the tactics or rules which[640 relate to, what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on the foreign government, and have provided themselves with the means of doing so. I say 'provided themselves with the means of doing so,' because the evidence here shows that the men were so provided. Whether such provision, as by arming, etc., is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided, I should hold that it is not necessary.

"Nor is it important that they intended to make war as an independent body or in connection with others. Where men go without combination and organization to enlist as individuals in a foreign army, they do not constitute such military expedition, and the fact that the vessel carrying them might carry arms as merchandise would not be important."

Taking up defendants' thirteen points, the court disposed of them as follows:

"'1. It is not a crime or offense against the United States, under the neutrality laws of this country, for individuals to leave this country with intent to enlist in foreign military service, nor is it an offense against the United States to transport persons out of this country and to land them in foreign countries when such persons have an intention to enlist in foreign armies.'

"As a general proposition this is true, and the point is affirmed.

"'2. It is no offense against the laws of the United States to transport arms, ammunition, and munitions of war from this country to any other foreign country, whether they are to be used in war or not; that in such case the shipper and transporter of the arms, ammunition, and munitions of war only run the risk of the capture and seizure of such arms and contraband of war by the foreign power against whom they are intended to be used; but this does not make it an offense against the laws of the United States, and for such cause the defendants cannot be held guilty.'

"This is also true. No military expedition would exist in such case.

*"'3. That it is no offense against the[641 laws of the United States to transport persons intending to enlist in foreign armies, and arms and munitions of war, on the same ship; that in such case the persons transported and the shipper and transporter of the arms run the risk of seizure and capture by the foreign power against whom the arms were to be used and against whom the persons and passengers intended to enlist; but such cause did not constitute an offense against the laws of the United States, and for such cause the defendants cannot be found guilty.'

"This is true, provided the persons referred to herein had not combined and organized themselves in this country to go to Cuba and there make war on the government. If they had so combined and organized, and yet intended when they reached Cuba to join the insurgent army and thus enlist in its service, and the arms were taken along for their use, they would constitute a military expedition, as



Digitized by Google

before described, and the transportation of such body of persons from this country for such a purpose would be an offense against the statute.

"The fourth, fifth, sixth, seventh, eighth, and ninth points are fully answered by what has been said.

"'10. Even if the jury do find that the men taken on board were an organized military force with officers, as infantry, cavalry, or artillery, the jury cannot find the defendants guilty unless the jury also find that the defendants knew that they were such a military organization as infantry, cavalry, or artillery, constituting a military expedition or enterprise against the kingdom of Spain.'

"As before stated, to justify conviction of the defendants, the jury must be fully satisfied that the defendants knew that the men constituted a military expedition such as I have described.

"The eleventh point has been fully answered by what the court has said.

"The twelfth point is a very important point, and is as follows:

"'12. If the jury find that when the defend-[642] ants left *Philadelphia, and until after they had passed beyond the jurisdiction of the United States, they were ignorant of the fact that they were to transport the men in question, with their arms and provisions, and find that the point off Barnegat where the men in question were taken aboard was beyond the jurisdiction of the United States,—in other words beyond the 3-mile limit,—and find that the vessel was sailing under a Danish flag, then and in that case they will find the defendants not guilty.'

"This point raises the question whether the defendants committed an offense against the statute, if the only aid which they furnished the expedition was furnished out at sea, beyond the jurisdiction of this country; and I instruct you that if the only aid furnished the vessel, being a foreign vessel, was so beyond our jurisdiction they did not commit an offense, and must consequently be acquitted. They allege that the point off Barnegat where the men were taken on board was not within 3 miles of our shore. If this is true, and the defendants did not start from our shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they cannot be convicted.

"If, however, they entered into an arrangement here to furnish and provide the means of transportation, and provided it, they are guilty, if this was a military expedition, although the men were not taken aboard and the transportation did not commence until the ship anchored off Barnegat.

"'13. It is the duty of the government to satisfy the jury beyond a reasonable doubt that the men and arms and ammunition taken on board the steamship Horsa was a military expedition or enterprise from the United States against the Kingdom of Spain, and also that the defendants knew or shut their eyes to the fact that it was a military expedition or enterprise from the United States against the Kingdom of Spain: and if the jury have from the testimony any reasonable doubt upon either of these questions or facts, the jury will find the defendants not guilty.'

*"This point is affirmed. I trust the [643 jury understand it. To convict the defendants it is necessary that the government shall have satisfied your minds beyond a reasonable doubt that this was a military enterprise, and that the defendants when they started knew it. Otherwise they are not guilty."

The court then further recapitulated and commented on the evidence, and, in the course of doing so, said:

"Some of them who were able to speak English declared that they were Cubans going to Cuba to fight the Spanish; and if these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition. . . .

"That this was a military expedition designed to make war against the government of Spain would seem to the court to be free from reasonable doubt. The question, however, is one for your determination alone, and I submit it to you as such, reminding you that the responsibility of deciding it rests upon you only. If you find that this was not a military expedition, or, rather, if you are not fully satisfied that it was, your verdict will be for the defendants, without going further. If, on the other hand, you find that it was a military expedition intended to make war against the government of Cuba, then you must pass upon the second question stated, to wit, Did the defendants, with knowledge of the facts, aid in carrying out its purpose in going to Cuba? They transported the men with the arms, ammunition, and provisions. Did they enter upon this service here with the knowledge of the fact that the men constituted a military expedition, to fight against the government of Cuba? . . . From this and any other testimony bearing on this subject you must determine whether they understood what the expedition and its objects were, and had arranged and provided for its transportation when they left Philadelphia or left our shores within the 3-mile limit stated. If they were ignorant on this subject until they anchored off Barnegat light, the point being according to the testimony beyond the jurisdictional limits of the United States, *no offense[644 was committed, as I have before stated, against the laws of this country.

"The question therefore is, Did the defendants understand they were to carry this expedition, and had provided for it, and understand what the expedition was before leaving here? As you have seen, they took on two extra boats before starting, and cleared for Port Antonio, Jamaica, and turned off of their course at the Breakwater (the captain explaining this, to which explanation you will give whatever weight you deem it to be worth). When the men came to the ship off of Barnegat there is no evidence that the captain or any one of the defendants expressed or exhibited any surprise. It was then manifest that the service required was to carry men and arms to Cuba (the captain says he then so understood it), a most hazardous undertaking. Is it probable that the defendants would have risked themselves and



Digitized by Google

their ship in this service if they had not been prepared for it by previous arrangement, and have done it without demurring or hesitating? Again, is it likely that those in charge of the expedition would have risked bringing the men and the property to that point on the mere chance that the defendant would take the risk of carrying them and the property to Cuba without arranging for it beforehand? If the defendants had refused, as it was their right to refuse, and it would seem certain or at least extremely probable that they would refuse this most hazardous service if previous arrangement had not been made, what would have been the situation of the men and the property? The expedition would have failed. The men would have been subject to arrest, and the property to sacrifice. Is it probable that those in charge of such an enterprise would take the men and property to this point, without having secured certain means of transportation for it in advance? The captain says he was ignorant of the service required of him until he reached the point near Barnegat. You must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with knowledge of and provision for what they were about to do.

"I now submit the case to you, reminding [645] you of its *importance. If the evidence of the defendants' guilt is not entirely clear, they should be acquitted. If it is thus clear, they should certainly be convicted. No sympathy or prejudice must be allowed to influence your minds in passing on this case. We have nothing to do with the controversies between the people of Cuba and the government of that island. We are concerned only with the execution of the law in this case. We have only to consider whether the statute to which your attention has been called has been violated. It is our duty to see that the law is honestly and justly executed; that is all. The peace and safety of the community so manifestly depend upon the faithful and honest administration of the law, that no man can fail to see it. We are suffering to-day, as probably no other people suffers, from lawlessness, from mobs, lynch law, murder, violation of trusts, as the result of want of faithfulness in executing the law.

"You will take the case and decide it with a careful regard to the rights of the defendants." 73 Fed. Rep. 159.

No motion or request was made that the jury be instructed to find for defendants or either of them.

Defendants excepted "to that part of the charge of the court giving the definition of a military expedition;" to the refusal of the court "to read the points that were not read to the jury;" "to affirm all the points without qualification," and "to affirm each point without qualification;" to "the statement of the court that in its opinion this was a military expedition;" and "that the men were armed;" to "the failure of the court to comment on the evidence on behalf of the defendants;" to the statements "of the court in reference to the reasons, motives, purposes, and acts of the defendants;" "that the defendants did not express surprise that the men came on the vessel off Barnegat;" and "that the declarations of the men on the ship to the witnesses for the government were evidence against the defendants;" also to the statements "that even if an agreement to furnish and provide the means of transportation was made within the jurisdiction of the United States to carry on a military expedition which was not consummated until they got outside of the 3-mile *limit, that constituted an [646] offense against the laws of the United States;" and "that the acts and declarations of the Cubans themselves were evidence against them all as to the nature of the expedition."

The motion in arrest was based on the alleged want of jurisdiction of the court. Errors were assigned to the giving, refusing, and qualification of instructions; to the admission in evidence of declarations of some of the party, during the voyage, as to their destination; and to the overruling of defendants' motion in arrest of judgment for want of jurisdiction.

*Messrs.* **William W. Ker** and **W. Hallett Phillips** for plaintiffs in error.

*Messrs.* **Judson Harmon**, Attorney General, **Holmes Conrad**, Solicitor General, and **Edward B. Whitney**, Assistant Attorney General, for defendant in error.

**Mr. Chief Justice Fuller** delivered the opinion of the court:

U. S. Rev. Stat. tit. 67, headed "*Neutrality*," embraces eleven sections, from 5281 to 5291, inclusive. Section 5281 prohibits the acceptance of commissions from a foreign power by citizens of the United States within our territory to serve against any sovereign with whom we are at peace. Section 5282 prohibits any person from enlisting in this country as a soldier in the service of any foreign power and from hiring or retaining any other person to enlist or to go abroad for the purpose of enlisting. Section 5283 deals with fitting out and arming vessels in this country in favor of one foreign power as against another foreign power with which we are at peace. Section 5284 prohibits citizens from the fitting out or arming, without the United States, of vessels to cruise against citizens of the United States; and § 5285, the augmenting of the force of a foreign vessel of war serving against a friendly sovereign. Sections 5287 to 5290 provide for the enforcement of the preceding sections, and § 5291, that the provisions set forth shall not be construed to prevent the enlistment of certain foreign citizens in the United States.

*Section 5286 is as follows: [647

"Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding $3,000, and imprisoned not more than three years."

This section was originally § 5 of an act approved June 5, 1794 (1 Stat. at L. 381, chap. 50), carried forward as § 6 of an act of April 20, 1818 (3 Stat. at L. 447, chap. 88), and differs therefrom in no respect material here. The



Digitized by Google

language of the section closely follows the recommendation of President Washington in his annual address December 8, 1793, when he said: "Where individuals shall . . . enter upon military expeditions or enterprises within the jurisdiction of the United States . . . these offenses cannot receive too early and close an attention, and require prompt and decisive remedies." Annals 1793-95, p. 11. The legislation is historically considered in Dana's Wheaton, § 439, *note*. The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency. 13 Ops. Atty. Gen. 177, 178. Section 5286 defines certain offenses against the United States and denounces the punishment therefor, but, although a penal statute, it must be reasonably construed, and not so as to defeat the obvious intention of the legislature. *United States* v. *Lacher*, 134 U. S. 624, 628 [33: 1080, 1083].

The offense is defined disjunctively as committed by every person who, within our territory or jurisdiction, "begins, *or* sets on foot, *or* provides *or* prepares the means for, any military expedition *or* enterprise, to be carried on from thence."

This indictment charged that defendants did [648] "begin, set on *foot, *and* provide *and* prepare the means for a certain military expedition *and* enterprise."

Defendants' counsel did not seek to compel an election, nor in any manner, by their motion in arrest or otherwise, to raise the question of duplicity, nor do they now make objections to the proceedings on this ground. The district judge instructed the jury that the evidence would not justify a conviction "of anything more than providing the means for or aiding such military expedition by furnishing transportation for their men, their arms, baggage," etc. Under these circumstances, the verdict cannot be disturbed on the ground that more than one offense was included in the same count of the indictment, but it must be applied to the offense to which the jury were confined by the court. *Crain* v. *United States*, 162 U. S. 625 [40: 1097].

We think that it does not admit of serious question that providing or preparing the means of transportation for such a military expedition or enterprise as is referred to in the statute is one of the forms of provision or preparation therein denounced. Nor can there be any doubt that a hostile expedition dispatched from our ports is within the words "carried on from thence." The officers of the Horsa were concerned in providing the means of transportation.

1. The first and the main question in the present case is whether the trial judge erred in his instructions to the jury in respect of what constitutes a "military expedition or enterprise" under the statute. The question is one of municipal law, and the writers on international law afford no controlling aid in its solution. They deal principally with the status of belligerents, and the rights and obligations of neutral nations when the existence of such a status is formally recognized or accepted as existing *de facto*.

Calvo defines a military expedition as being an armed enterprise against a country, and he gives the expedition of Xerxes as an illustration. Dict. de Droit Int. verbo, *Expedition Militaire*.

Professor Lawrence (Prin. Int. Law, 1895, p. 508) is quoted by counsel to the effect that, to constitute a warlike *expedition, [649] "it must go forth with a present purpose of engaging in hostilities; it must be under military or naval command; and it must be organized with a view to proximate acts of war. But it need not be in a position to commence fighting the moment it leaves the shelter of neutral territory; nor is it necessary that its individual members should carry with them the arms they hope soon to use. When a belligerent attempts to organize portions of his combatant forces on neutral soil or in neutral waters, he commits thereby a gross offense against the sovereignty of the neutral government, and probably involves it in difficulties with the other belligerent, who suffers in proportion to his success in his unlawful enterprise."

In Hall's International Law, § 222, it is said: "In the case of an expedition being organized in and starting from neutral ground, a violation of neutrality may take place without the men of whom it is composed being armed at the moment of leaving. . . . On the other hand, the uncombined elements of an expedition may leave a neutral state in company with one another, provided they are incapable of proximate combination into an organized whole."

Boyd in his edition of Wheaton's International Law, § 439*aa*, says: "It is impossible to lay down any hard and fast line separating commercial transactions in munitions of war, and the organizing of hostile expeditions. International law is necessarily incapable of being defined and laid down with the precision attainable by municipal law. The question is one of intent, and it is the duty of a neutral government to exercise due diligence in ascertaining what the real character of the transaction may be. The elements of a hostile expedition are thus described by Professor Bernard: 'If at the time of departure there be the means of doing any act of war,—if those means, or any of them, have been procured and put together, in the neutral port,— and if there be the intention to use them (which may always be taken for granted when they are in the hands of the belligerents), the neutral port may be justly said to serve as a base or point of departure for a hostile expedition.' Montague Bernard, Neutrality of Great Britain, p. 399."

*But this statute is to be construed as [650] other domestic legislation is, and its meaning is to be found in the ordinary meaning of the terms used. The definitions of the lexicographers substantially agree that a military expedition is a journey or voyage by a company or body of persons, having the position or character of soldiers, for a specific warlike purpose; also the body and its outfit; and that a military enterprise is a martial undertaking, involving



Digitized by Google

the idea of a bold, arduous, and hazardous attempt. The word "enterprise" is somewhat broader than the word "expedition;" and although the words are synonymously used it would seem that under the rule that its every word should be presumed to have some force and effect, the word "enterprise" was employed to give a slightly wider scope to the statute.

The phrase "military expedition or enterprise" has been variously construed by the district courts, but apparent differences in expression may be largely attributable to the differences in the facts under consideration in the particular case.

In *United States* v. *O'Sullivan*, 2 Whart. Crim. Law, § 2802, *note*, Judge Judson charged the jury that before they could "convict on this indictment, it must be proved to their satisfaction that the expedition or enterprise was in its character military; or, in other words, it must have been shown by competent proof that the design, the end, the aim, and the purpose of the expedition or enterprise was some military service, some attack or invasion of another people or country, state or colony, as a military force. . . . But any expedition or enterprise in matters of commerce or of business of a civil nature, unattended by a design of an attack, invasion, or conquest, is wholly legal, and is not an expedition or an enterprise within this act. . . . The term 'expedition' is used to signify a march or voyage with martial or hostile intentions. The term 'enterprise' means an undertaking of hazard, an arduous attempt."

Judge Maxey in *United States* v. *Ybanes*, 53 Fed. Rep. 536, concurred in this view and further said: "This statute does not require any particular number of men to band together to constitute the expedition or enterprise one of [651] a *military character. There may be divisions, brigades, and regiments, or there may be companies or squads of men. Mere numbers do not conclusively fix and stamp the character of the expedition as military or otherwise. A few men may be deluded with the belief of their ability to overturn an existing government or empire, and laboring under such delusion, they may enter upon the enterprise. . . . The proof must establish in your minds the fact that the expedition or enterprise was of a military character; and when the evidence shows that the end and object were hostile to or forcible against the Republic of Mexico, then it would be to all intents and purposes, a military expedition. . . . Evidence showing that the end and objects were hostile to or forcible against a nation at peace with the United States characterizes it, to all intents and purposes, as a military expedition or enterprise."

Judge Brawley in *United States* v. *Hughes*, 70 Fed. Rep. 972, applied the test suggested by Mr. Hall as to capability of proximate combination of the uncombined elements of an expedition into an organized whole; and he said in reference to the passengers in that case. "But if after they got aboard they took the arms from the boxes, and organized into a company or organization, if they were drilled or went through the manual of arms under the leadership or direction of one man or more, if they themselves became a military organization by reason of such coming together, and of such drill or instruction, then from that time forth they would be a military organization or enterprise within the meaning of this statute."

In *United States* v. *Pena*, 69 Fed. Rep. 983, Judge Wales, and in *United States* v. *Hart*, not yet reported, Judge Brown, of the southern district of New York, considered the statute as exacting a high degree of organization, but Judge Brown said: "I do not say that in order to constitute a military expedition to be 'carried on from this country,' as the statute reads, it must be complete at the start, or possess all the elements of a military body. It is sufficient if there was a combination by the men for that purpose, with the agreement and *the intention of the body that embarks [652 that it should become a military body before reaching the scene of action. Such a combination and agreement, if means for effecting it were provided, followed by embarkation in pursuance of the agreement, would show such a partial execution of the design on our soil as to bring the case within our statute, as 'a military enterprise begun and carried on from the United States.'"

It is argued that as persons are not prohibited from going abroad for the purpose of enlisting in the service of a foreign army; and as the transportation of arms, ammunition, and munitions of war from this country to any other foreign country is not unlawful (3 Whart. Int. Law Dig. § 388 *et seq.*; *The Itata*, 15 U. S. App. 1, and authorities cited), therefore no offense was committed in the transportation of these men, the arms and munitions; and reference is made to an opinion of Mr. Secretary Fish on this subject during the Franco-German war of 1870. A statement of that matter is given in Hall's International Law, § 222, and in a letter of Sir Edward Thornton to Lord Granville, dated September 26, 1870 (61 State Papers, 1870-71, p. 822), and elsewhere. It seems to have been an informal communication to the Prussian Minister, who had complained of the fact that the transatlantic steamer Lafayette was carrying a large cargo of arms and ammunition for sale to the French, while at the same time she was carrying several hundred French passengers, all of whom, as was generally supposed, intended to enlist in the army of France on their arrival. These passengers, however, appear to have been all traveling as individuals without any concert of action, and they had no access to the arms and ammunition any more than an ordinary passenger on an ocean steamer has access to any part of her cargo. Sir Edward Thornton wrote that "Mr. Fish replied to the district attorney that he was to be guided by the neutrality laws of the United States, and that with regard to the ship it could not be alleged that she was intended for hostile purposes against North Germany. As for the arms and ammunition, they were articles of a legitimate commerce, with which the United States would not interfere, although the vessel might run *the risk of being detained by the cruisers [653 of North Germany on her voyage to France."

The district judge ruled nothing to the contrary and charged the jury in this case that it was not a crime or offense against the United



Digitized by Google

States under the neutrality laws of this country for individuals to leave the country with intent to enlist in foreign military service, nor was it an offense against the United States to transport persons out of this country and to land them in foreign countries when such persons had an intent to enlist in foreign armies; that it was not an offense against the laws of the United States to transport arms, ammunition, and munitions of war from this country to any foreign country, whether they were to be used in war or not; and that it was not an offense against the laws of the United States to transport persons intending to enlist in foreign armies and munitions of war on the same trip. But he said that if the persons referred to had combined and organized in this country to go to Cuba and there make war on the government, and intended when they reached Cuba to join the insurgent army and thus enlist in its service, and the arms were taken along for their use, that would constitute a military expedition, and the transporting of such a body from this country for such a purpose would be an offense against the statute. The judge also charged the jury as follows:

"In passing on the first question, it is necessary to understand what constitutes a military expedition within the meaning of this statute. For the purposes of this case, it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on a foreign government, and to have provided themselves with the means of doing so. I say 'pro-
[654] vided themselves with the *means' of doing so,' because the evidence here shows that the men were so provided. Whether such provision, as by arming and so forth, is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided I should hold that it is not necessary.

"Nor is it important that they intended to make war as an independent body or in connection with others. Where men go without combination and organization to enlist as individuals in a foreign army, they do not constitute such military expedition, and the fact that the vessel carrying them might carry arms as merchandise would not be important."

It appears to us that these views of the district judge were correct as applied to the evidence before him. This body of men went on board a tug loaded with arms; were taken by it 30 or 40 miles and out to sea; met a steamer outside the 3-mile limit by prior arrangement; boarded her with the arms, opened the boxes and distributed the arms among themselves; drilled to some extent; were apparently officered; and then, as preconcerted, disembarked to effect an armed landing on the coast of Cuba. The men and the arms and ammunition came together; the arms and ammunition were under the control of the men; the elements of the expedition were not only "capable of proximate combination into an organized whole," but were combined or in process of combination; there was concert of action; they had their own pilot to the common destination; they landed themselves and their munitions of war together by their own efforts. It may be that they intended to separate when they reached the insurgent headquarters, but the evidence tended to show that until that time they intended to stand together and defend themselves if necessary. From that evidence the jury had a right to find that this was a military expedition or enterprise under the statute, and we think the court properly instructed them on the subject. This conclusion disposes of most of the errors assigned to the instructions given, qualified, or refused. Some of the points requested on defendants' behalf were incorrect; some were covered by the general charge, and others were properly qualified.

*2. The second material question is, [655 whether if a military expedition or enterprise was made out, the court erred in its instructions in respect of defendants' knowledge or notice of the facts. And this involves the jurisdictional question which is raised by the exception to the qualification of the twelfth point. In that qualification and elsewhere, the district judge specifically and clearly instructed the jury that although this was a military expedition or enterprise, nevertheless the defendants were not criminally responsible unless they were aware of its nature before they sailed from Philadelphia. "To convict the defendants," said the district judge, "it is necessary that the government shall have satisfied your minds beyond a reasonable doubt that this was a military enterprise, and that the defendants when they started knew it. Otherwise they are not guilty. . . . The question therefore is: Did the defendants understand that they were to carry this expedition, and had provided for it, and understand what the expedition was before leaving *here* [Philadelphia]?" It is true that the expedition started in the southern district of New York, and did not come into immediate contact with defendants at any point within the jurisdiction of the United States as the Horsa was a foreign vessel; but the Horsa's preparation for sailing and the taking aboard of the two boats at Philadelphia constituted a preparation of means for the expedition or enterprise and if defendants knew of the enterprise when they participated in such preparation, then they committed the statutory crime upon American soil, and in the eastern district of Pennsylvania, where they were indicted and tried.

The jurisdictional point was again presented by the motion in arrest, but its disposition calls for no further observations.

We repeat that on the second material question, namely, whether the defendants aided the expedition with knowledge of the facts, the jury were instructed that they must acquit unless satisfied beyond reasonable doubt that defendants, when they left Philadelphia, had knowledge of the expedition and its objects, and had arranged and provided for its trans-



Digitized by Google

656] portation. *We hold that the defendants have no adequate ground of complaint on this branch of the case.

3. An exception was taken to the statement of the court that the men were armed. The court said: "They were armed, having rifles and cannon, and were provided with ammunition and other supplies." This statement was based on uncontradicted testimony, and occurring as it did in a recapitulation of the evidence, no rule of law being incorrectly stated and the matters of fact being specifically submitted to the determination of the jury, we do not regard the exception as tenable. *Baltimore & P. R. Co.* v. *Fifth Baptist Church*, 137 U. S. 568, 574 [34: 784, 787].

4. Objection is also made because the court expressed its opinion that this was a military expedition. But what the court said was that this "would seem to the court to be free from reasonable doubt. The question, however, is one for your determination alone, and I submit it to you as such, reminding you that the responsibility of deciding it rests upon you only. If you find that this was not a military expedition, or, rather, if you are not fully satisfied that it was, your verdict will be for defendants without going further." Clearly the observation of the court thus guarded did not so trespass on the province of the jury as to constitute reversible error. *Simmons* v. *United States*, 142 U. S. 148, 155 [35: 968, 971].

5. Again, it is urged that the court erred, when referring to the captain's testimony that "he was ignorant of the service required of him until he reached the point near Barnegat;" in saying: "You must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with the knowledge of, and provision for, what they were about to do." No exception was taken to this part of the charge; but if there had been, we cannot say that the trial judge was not justified in that remark in view of all the facts and circumstances.

Nor was any exception taken to the closing observations by the court as to the importance of faithfulness in the execution of the law, although they are now assigned for error. We see 657] *in them nothing which could properly be regarded as prejudicial to the defendants.

6. Other assignments of error relate to the admissibility of declarations of members of the party, during the voyage, as to their destination. One of the witnesses for the prosecution testified on cross-examination "that he had spoken to a couple of those young fellows there, and they said they were going to Cuba." On redirect examination he was asked: "Did they tell you where they were going?" The answer, which was objected to, was: "They told me they were going to Cuba. They did not say what they were going to do." It was uncontroverted in the case that the party meant to go and did go to Cuba, and the evidence was not material. Another witness for the government was asked: "Q. Did you have any talk with any of those men?" Objected to unless it was in the presence of these defendants. Objection overruled. Exception by defendants. A. "Yes, sir. I was going in the forecastle one night and he told us, 'I go down to Cuba to fight.' Q. To fight who? A. The Spanish."

There was no objection to the second question, or to either answer, and no motion to strike out. It does not appear who made the statement or how many persons were present, or that defendants were not present. These assignments are without merit.

There was other evidence of declarations of members of the party as to their purposes, and the district judge in commenting thereon said that, "if these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition," and to this an exception was taken. The general rule was stated in *Sundry Goods, Wares, and Merchandises* v. *United States*, 27 U. S. 2 Pet. 358, 365 [7: 450, 453], by Mr. Justice Washington, speaking for the court, that "where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the others." The declarations must be made in furtherance of the common object, or must constitute a part of *the *res gestæ* of acts done in such further- [658 ance. Assuming a secret combination between the party and the captain or officers of the Horsa had been proved, then, on the question whether such combination was lawful or not, the motive and intention, declarations of those engaged in it explanatory of acts done in furtherance of its object came within the general rule and were competent. *St. Clair* v. *United States*, 154 U. S. 134 [38: 936]; *People* v. *Davis*, 56 N. Y. 102; *Lincoln* v. *Claflin*, 74 U. S. 7 Wall. 132, 139 [19: 106, 109]; 1 Greenl. Ev. § 111; Starkie, Ev. 466.

The extent to which evidence of this kind is admissible is much in the discretion of the trial court, and we do not consider that that discretion was abused in this instance. *Clune* v. *United States*, 159 U. S. 590, 592 [40: 269, 270].

7. No motion or request was made that the jury be instructed to find for defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it.

The Horsa was bound for Jamaica, and her course carried her along the coast of Cuba for about six hours. She took on board at Philadelphia two boats entered on the manifest as for Port Antonio, but intended for and ultimately devoted to the use of the party she transported. The captain received at the wharf written instructions, which he did not produce on the trial, and says he did not keep when he left the vessel, but in accordance with which he went north off Barnegat, anchored outside the 3-mile limit, and awaited orders. The inference was not unjustifiable that he was thus and then informed that safety required that whatever was to take place off



Digitized by Google

arnegat should take place beyond the jurisdiction of the United States; in other words, that a transgression of the laws of the United States was contemplated. The Horsa was boarded on the high seas off Barnegat as hereinbefore described, and the captain testified that [659]he did not regard the occurrence *as anything unusual or important. But the firemen said that they went to the chief engineer, when these men came aboard, and told him they would not go along. "We won't go down there and get shot. . . . We did not sign for that." The chief engineer bade them keep quiet, and the captain told them "if anybody had to hang for this I would be the man to hang for it. I told them they had better go below and mind their own business." The written instructions the captain there received were not produced, but he said he was to take the men and whatever they had and let them off when told to do so, delivering the two boats shipped at Philadelphia, and the two shipped from the tug, to them as soon as called for; and that this did not strike him as singular. The evidence shows that the nature of the enterprise was apparent at this time, and the jury may not unreasonably have inferred that the captain received the men and their arms, entered upon the hazards of the voyage, and quieted the complaints of the firemen, with an equanimity springing from a mind previously made up on the subject. We deem it unnecessary to go over the evidence. We cannot say as matter of law that there was no evidence tending to sustain the verdict against the captain.

But we think the case as to Petersen and Johansen stands on different ground, and that we may properly take notice of what we believe to be a plain error, although it was not duly excepted to. These men were the mates of the vessel, and they proceeded on the voyage under the captain's orders. This would not excuse them if there were proof of guilty knowledge or participation on their part in assisting a military expedition or enterprise when they left Philadelphia. We are of opinion that adequate proof to that effect is not shown by the record, and that as the case stood the jury should have been instructed to acquit them. The captain testified that the mates "had nothing to do with this ship or with its business. They listened to my orders; they were under my orders. I was the master of that vessel. I am responsible for all that was done." The order he received to go north and await orders beyond the 3-mile limit does not [660] *appear to have been communicated to them; and whatever they must have known after the Horsa was boarded off Barnegat, there is nothing sufficiently justifying a presumption of knowledge when the vessel left the wharf.

It is not necessary to enlarge upon the public importance of the neutrality laws. This case is a criminal case arising on an indictment under a section of the Revised Statutes, and we dispose of it on what we deem to be the proper construction of that section, and after subjecting the correctness of the rulings of the court below to that careful examination which the discharge of our duty required.

*The judgment against defendant Wiborg is affirmed; the judgment against defendants Petersen and Johansen is reversed*, and the cause remanded with instructions to set aside the verdict and grant a new trial as to them.

Mr. Justice **Harlan** dissenting:

I concur with my brethren in holding that the judgment against Petersen and Johansen should be reversed, and a new trial ordered as to them.

But I am of opinion that the judgment against Wiborg should also be reversed. It is conceded that the men on the tug were received on board the Horsa at a point off Barnegat which was more than 3 miles from our shore. It is clear from the evidence that at the time his vessel left Philadelphia, and previous to his receiving those men on board, Wiborg had no knowledge of the purpose for which the charterer ordered him, after he passed the Breakwater, "to proceed north near Barnegat and wait further orders." The movements of the vessel were under the control of the charterer. Wiborg was under no legal obligation to inquire from the charterer why the Horsa was ordered to that point, or what were the orders he was likely to receive after arriving there. His duty was to obey the orders of the charterer, unless such orders obviously contemplated a breach of the laws of this country. The only evidence in the case bearing upon the question whether Wiborg knew, when he left Philadelphia, of any *arrangement for his vessel, after it pass- [661] ed beyond the territory and jurisdiction of the United States, to receive men destined for Cuba, was that given by himself. And he distinctly swore that when he started from Philadelphia he did not know that "we were going to take these people and their goods on the Horsa." There was not the slightest ground in the evidence to suppose that he ever had any communication with those people, or that he ever saw them, before they came on his vessel. Those persons had, of course, arranged with the charterer for passage on the Horsa. But the charterer did not communicate the fact of such an arrangement to the captain of the vessel while he was within the territory and jurisdiction of the United States. The direction that he should receive the men and their goods on board came to him, from the charterer, when he was not within the territory or jurisdiction of the United States. He cannot therefore be said to have provided or prepared, "within the territory or jurisdiction of the United States," any means for the expedition or enterprise against the territory or dominion of Spain. Under the interpretation placed upon the statute by the government, the charterer did provide for such means. But, curiously enough, the charterer was not indicted. The prosecution is against the officers of the vessel, no one of whom, according to the proof, had any knowledge, at the time the Horsa left Philadelphia, nor while it was within the jurisdiction of the United States, that the charterer had arranged that the vessel, after it got beyond the jurisdiction of the United States, should receive on board individuals destined for Cuba, and who intended, after they arrived there, to engage in the struggle to overthrow the authority of Spain in that island.



Digitized by Google

Independently of the view just expressed, this was not, I think, a military expedition or enterprise within the meaning of the statute. It had none of the features of such an expedition or enterprise. There was no commanding officer whose orders were recognized and enforced. It was, at most, a small company of persons, no one of whom recognized the authority of another, although all desired the independence of Cuba, and had the purpose to 662]reach that island, and engage, *not as a body, but as individuals, in some form, in the civil war there pending—a loose, unorganized body, of very small dimensions, and without any surroundings that would justify its being regarded as a military expedition or enterprise to be carried on from this country.

---

MILLARD F. BALL, JOHN C. BALL, and ROBERT E. BOUTWELL, *Piffs. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed., "*United States* v. *Ball*," 662-674.)

*Verdict of acquittal, when bar to a second indictment—reversal against other defendants—when verdict may be received on Sunday—reversal of judgment—joint trial—evidence—discretion in refusing—sufficiency of indictment—oath of deputy marshal.*

1. A general verdict of acquittal upon the issue of not guilty under an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing.
2. A verdict of acquittal by the jury of one of three defendants jointly indicted for murder is final, and cannot be deprived of its legitimate effect by the subsequent reversal by this court of the judgment of conviction against the other two defendants for the insufficiency of the indictment upon a writ of error sued out by them only.
3. When a case is committed to the jury on Saturday, their verdict may be received, and the jury discharged, on Sunday.
4. Defendants who obtain the reversal of a judgment and sentence against themselves by a writ of error on the ground of defects in the indictment cannot afterwards set up such conviction as a bar to a new indictment.
5. The discretion of the court in ordering several defendants to be tried together, if not abused, will not be reviewed on writ of error.
6. On cross-examination of a witness for the prosecution, who admits that he employed counsel to aid the district attorney, a question as to what he paid him is properly excluded.
7. The granting or refusal of a request first made in the midst of a trial for murder by the defendant, that he may shoot off a gun in the presence of a deputy marshal to test the truth of evidence that it scattered shot, is within the discretion of the court, which will not be disturbed on writ of error.
8. An indictment sufficiently alleges that a person shot by defendant died of the wound inflicted by him and at the time and place at which the wound was inflicted by alleging the infliction at a place certain, of a mortal wound upon such person, of which "he did languish and languishing did then and there instantly die."
9. A verdict of conviction is not invalid because the jury were in charge of the deputy marshal who had taken no oath except his oath of office, where no special oath was at any time requested or any objection made during the trial that it was not taken.

[No. 461.]

*Argued March 26, 1896. Decided May 25, 1896.*

IN ERROR to the Circuit Court of the United States for the Eastern District of Texas to review a judgment of that court convicting Millard F. Ball, John C. Ball, and Robert E. Boutwell of the murder of William T. Box. *Reversed as to Millard F. Ball and affirmed as to the other defendants.*

The facts are stated in the opinion.

*Messrs.* **C. H. Smith**, *J. C. Hodges*, and *A. J. Nichols*, for plaintiffs in error.

*Mr.* **J. M. Dickinson**, Assistant Attorney General, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

At October term, 1889, of the circuit court of the United States for the eastern district of Texas, the grand jury returned an indictment against Millard Fillmore Ball, John C. Ball, and Robert E. Boutwell for the murder of William T. Box, alleging that the defendants, being white men and not Indians, on June 26, 1889, in Pickens county, in the Chickasaw Nation, in the Indian territory, did unlawfully, and feloniously, and with their malice aforethought, and with a deadly weapon, to wit, a gun, held in their hands, and loaded and charged with gunpowder and leaden balls, make an assault upon the body of William T. Box, and "did shoot off and discharge the contents of said gun in and upon the body of said William T. Box, inflicting thereon ten mortal wounds, of which mortal wounds the said William T. Box did languish, and languishing did die."

Upon that indictment, the three defendants were arraigned, and pleaded not guilty, and were tried together upon the issue so joined. The trial began on Wednesday, October 30, *1889, and proceeded from day to day [664 until Saturday, November 2, when the jury retired to consider of their verdict, and no verdict having been returned at the usual hour of adjournment, the court was kept open to receive the verdict. On Sunday, November 3, 1889, the jury returned a verdict as follows: "We, the jury, find the defendants J. C. Ball and R. E. Boutwell guilty, as charged in this indictment; and we find M. Fillmore Ball not guilty." The court, on the same day, made the following order: "It is therefore con-

NOTE.—*As to when person is in jeopardy; when jury may be discharged without a verdict; former acquittal or conviction,*—see note to *Ex parte* Lange, 21: 872, and United States v. Perez, 6: 165.

*As to effect of general verdict*, see note to Snyder v. United States, 28: 637.

*As to criminal law; correction of sentence and resentence,*—see note to *Ex parte* Cross, 36: 989.



Digitized by Google

sidered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty, as charged in the indictment herein, and as found by the jury; and it is ordered that they be remanded to the custody of the marshal, and be by him committed to the county jail of Lamar county, to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day."

Afterwards, at the same term, John C. Ball and Robert E. Boutwell were adjudged guilty and sentenced to death, and sued out a writ of error from this court; and in the assignment of errors filed by them in the circuit court (as appears by the record transmitted to this court in that case), specified, among other things, "because no legal indictment was returned into court against respondents," in that the indictment on which they were tried "nowhere alleges when and where said William T. Box died;" and "for the errors stated and apparent upon the record herein, respondents pray that the judgment be reversed, and the cause remanded for a new trial." And the brief then filed in their behalf concluded by submitting that the judgment ought to be reversed, and the indictment dismissed.

Upon that writ of error, this court, at October term, 1890, held that that indictment, although sufficiently charging an assault, yet, by reason of failing to aver either the time or the place of the death of Box, was fatally defective, and would not support a sentence for murder; and therefore reversed the judgment against John C. Ball and Robert E. Boutwell, and remanded the case with directions to quash the indictment, and to take such further pro-[665]ceedings in relation to them as to *justice might appertain. *Ball* v. *United States*, 140 U. S. 118, 136 [35: 377, 385].

At April term, 1891, of the circuit court, that indictment was dismissed; and the grand jury returned against all three defendants a new indictment (being the one now before the court), like the former one, except that, after charging the assault, with malice aforethought, and with a loaded gun, upon Box on June 26, 1889, in Pickens county in the Indian territory, it went on to charge that the three defendants "did then and there shoot off and discharge the contents of said gun at, in, and upon the body of said William T. Box, inflicting thereon a mortal wound, of which mortal wound the said William T. Box did languish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid."

To this indictment the defendant Millard F. Ball filed a plea of former jeopardy and former acquittal, relying, upon the trial, the verdict of acquittal, and the order of the court for his discharge, upon the former indictment, a certified copy of the record of the proceedings upon which was annexed to and made part of his plea.

The defendants John C. Ball and Boutwell filed a plea of former jeopardy, by reason of their trial and conviction upon the former indictment, and of the dismissal of that indictment.

Both those pleas were overruled by the court, and the three defendants then severally pleaded not guilty.

At the trial, it appeared that William T. Box was killed on June 26, 1889; the defendants offered in evidence the record of the proceedings upon the former indictment; and it was admitted by all parties that the offense charged in the former indictment and that charged in the present indictment was one and the same transaction and offense, to wit, the killing of Box by the three defendants; that the defendants in the two indictments were the same persons; and that no writ of error was ever sued out upon the judgment or order entered upon the former indictment as to Millard F. Ball.

The circuit court, among other instructions, instructed the jury to find against both pleas of former jeopardy, because *this court had [666 decided that the former indictment was insufficient as an indictment for murder. The jury returned a verdict of guilty of murder against all three defendants; each of them was adjudged guilty accordingly, and sentenced to death; and thereupon they sued out this writ of error.

The first matter to be considered is the effect of the acquittal of Millard F. Ball by the jury upon the trial of the former indictment.

In England, an acquittal upon an indictment so defective that, if it had been objected to at the trial, or by motion in arrest of judgment, or by writ of error, it would not have supported any conviction or sentence, has generally been considered as sufficient to support a plea of former acquittal. 2 Hale, P. C. 248, 394; 2 Hawk. P. C. chap. 35, § 8; 1 Stark. Crim. Pl. 2d ed. 320; 1 Chitty, Crim. Law, 458; Archb. Crim. Pl. & Ev. 19th ed. 143; 1 Russell, Crimes, 6th ed. 48. And the general tendency of opinion in this country has been to the same effect. 3 Greenl. Ev. § 35; 1 Bishop, Crim. Law, § 1021, and cases there cited.

The foundation of that doctrine is *Vaux's Case*, 4 Coke, 44, in which William Vaux, being duly indicted for the murder of Nicholas Ridley by persuading him to drink a poisoned potion, pleaded a former acquittal, the record of which set forth a similar indictment alleging that Ridley, not knowing that the potion was poisoned, but confiding in the persuasion of Vaux, took and drank (without saying "took and drank said potion"); a plea of not guilty; a special verdict, finding that Ridley was killed by taking the poison, and that Vaux was not present when he took it; and a judgment rendered thereon that the poisoning of Ridley and persuading him to take the poison, as found by the verdict, was not murder, and that the defendant go without day—*eat sine die*. Upon a hearing on the plea of *autrefois acquit*, the court of Queen's bench was of opinion that Vaux was a principal, although not present when Ridley took the poison; but that the indictment was insufficient, for not expressly alleging that Ridley drank the poison; and that "because the indictment in this case was insufficient, for this reason he was not *legitimo *modo aquietatus*, . . . nor [667 was the life of the party, in the judgment of the law, ever in jeopardy."



Digitized by Google

Yet the decision in *Vaux's Case* was treated, both by Lord Coke and by Lord Hale, as maintainable only upon the ground that the judgment upon the first indictment was *quod eat sine die*, which might be given as well for the insufficiency of the indictment, as for the defendant's not being guilty of the offense; and Lord Hale was clearly of opinion that a judgment *quod eat inde quietus* could not go to the insufficiency of the indictment, but must go to the matter of the verdict, and would be a perpetual discharge. 3 Coke, Inst. 214; 2 Hale, P. C. 394, 395. And Mr. Starkie has observed: "The doctrine expounded in this case does not appear to consist with the general principle on which the plea of *autrefois acquit* is said to depend, since an acquittal upon a special verdict would leave the defendant exposed to a second prosecution, whenever a formal flaw could be detected in the first indictment at any subsequent period." 1 Stark. Crim. Pl. 320 note.

In the leading American case of *People* v. *Barrett*, 1 Johns. 66, while a majority of the court, consisting of Chief Justice Kent and Justices Thompson and Spencer, followed the English authorities, Justices Livingston and Tompkins strongly dissented, and their reasons were fully stated by Mr. Justice Livingston, who, after distinguishing cases in which upon the first trial there had been no general verdict of acquittal by the jury, but only a special verdict, upon which the court had discharged the defendant, as well as cases in which the defendant himself had suggested the imperfection in the first indictment, and thereupon obtained judgment in his favor, said: "These defendants have availed themselves of no such imperfection, if any there were, nor has any judgment to that effect been pronounced. This case, in short, presents the novel and unheard-of spectacle of a public officer, whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect, as a reason for a second trial, when it is not pretended that the merits were not fairly in issue on the first. That a party shall be deprived of the benefit of an acquittal by a jury, on a suggestion of this [668] kind, coming, too, from the officer * who drew the indictment, seems not to comport with that universal and humane principle of criminal law, 'that no man shall be brought into danger more than once for the same offense.' It is very like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end? If a conviction take place, whether an indictment be good, or otherwise, it is ten to one that judgment passes; for, if he read the bill, it is not probable he will have penetration enough to discern its defects. His counsel, if any be assigned to him, will be content with hearing the substance of the charge without looking farther; and the court will hardly, of its own accord, think it a duty to examine the indictment to detect errors in it. Many hundreds, perhaps, are now in the state prison on erroneous indictments, who, however, have been fairly tried on the merits. But reverse the case, and suppose an acquittal to take place, the prosecutor, if he be dissatisfied and bent on conviction, has nothing to do but to tell the court that his own indictment was good for nothing; that it has no venue, or is deficient in other particulars, and that, therefore, he has a right to a second chance of convicting the prisoner, and so on, *toties quoties*." 1 Johns. 74.

In *Com.* v. *Purchase*, 2 Pick. 521, 526 [13 Am. Dec. 452], Chief Justice Parker, speaking of the doctrine which allows a man to be tried again after being acquitted on an indictment substantially bad, said that "ingenuity has suggested that he never was in jeopardy, because it is to be presumed that the court will discover the defect in time to prevent judgment;" but that this "is bottomed upon an assumed infallibility of the courts, which is not admitted in any other case."

In Mass. Rev. Stat. 1836, chap. 123, §§ 4, 5, provisions were inserted, which, as the commissioners who reported them said, were "intended to define and determine, as far as may be, the cases in which a former acquittal shall, or shall not, be a bar to a subsequent prosecution for the same offense;" and were as follows: "No person shall be held to answer on a second indictment, for any offense of which he has been acquitted by the jury upon the facts and *merits, on a former trial; but such ac- [669] quittal may be pleaded by him in bar of any subsequent prosecution for the same offense, notwithstanding any defect in the form or in the substance of the indictment on which he was acquitted. If any person, who is indicted for an offense, shall on his trial be acquitted upon the ground of a variance between the indictment and the proof, or upon any exception to the form or to the substance of the indictment, he may be arraigned again on a new indictment, and may be tried and convicted for the same offense, notwithstanding such former acquittal." Similar statutes have been passed in other states. 1 Lead. Crim. Cas. 2d ed. 582.

The American decisions in which the English doctrine has been followed have been based upon the English authorities, with nothing added by way of reasoning.

After the full consideration which the importance of the question demands, that doctrine appears to us to be unsatisfactory in the grounds on which it proceeds, as well as unjust in its operation upon those accused of crime; and the question being now for the first time presented to this court, we are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing.

The Constitution of the United States, in the 5th Amendment, declares: "Nor shall any person be subject to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. An acquittal before a court having no jurisdiction is, of course, like all proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. *Com.* v. *Peters*, 12 Met. 387; 2 Hawk. P. C. chap. 35, § 3; 1



Digitized by Google

Bishop, Crim. Law, § 1028. But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the 670]party, its judgment *is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly, and he could not be discharged by writ of habeas corpus. *Ex parte Parks*, 93 U. S. 18 [23: 787]. If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed, and the government cannot. *United States* v. *Sanges*, 144 U. S. 310 [36: 446]. But the fact that the judgment of a court having jurisdiction of the case is practically final affords no reason for allowing its validity and conclusiveness to be impugned in another case.

The former indictment set forth a charge of murder, although lacking the requisite fullness and precision. The verdict of the jury, after a trial upon the issue of guilty or not guilty, acquitted Millard F. Ball of the whole charge of murder, as well as of any less offense included therein. U. S. Rev. Stat. § 1035. That he was thereupon discharged by the circuit court by reason of his acquittal by the jury, and not by reason of any insufficiency in the indictment, is clearly shown by the fact that the court, by the same order which discharged him, committed the other defendants, found guilty by the same verdict, to custody to await sentence, and afterwards adjudged them guilty and sentenced them to death upon that indictment. Millard F. Ball's acquittal by the verdict of the jury could not be deprived of its legitimate effect by the subsequent reversal by this court of the judgment against the other defendants upon the writ of error sued out by them only.

It is true that the verdict finding John C. Ball and Robert E. Boutwell guilty as charged in the indictment, and finding Millard F. Ball not guilty, was returned on Sunday; as well as that the order thereupon made by the court, by which it was considered that the first two defendants were guilty as charged in the indictment and found by the jury, and be remanded to custody to await the judgment and sentence of the court, and that Millard F. Ball be discharged and go without day was made on the same day. That order, indeed, as 671] *already adjudged by this court, could not have effect as a judgment against the two defendants who had been convicted, because no judgment can lawfully be entered on Sunday. *Ball* v. *United States*, 140 U. S. 118, 131 [35: 377, 383]; 3 Bl. Com. 277. But when a case is committed to the jury on Saturday, their verdict may be received and the jury discharged on Sunday. This has been generally put upon the ground that the reception of the verdict and discharge of the jury is but a ministerial act, involving no judicial discretion; or that it is an act of necessity; and it certainly tends to promote the observance of the day more than would keeping the jury together until Monday. *Hoghtaling* v. *Osborn*, 15 Johns. 119; *Van Riper* v. *Van Riper*, 4 N. J. L. 156 [7 Am. Dec. 576]; *Huidekoper* v. *Cotton*, 3 Watts, 56; *Baxter* v. *People*, 3 Gilm. 368, 385, *Hiller* v. *English*, 4 Strobh. L. 486; *Cory* v. *Silcox*, 5 Ind. 370; *Webber* v. *Merrill*, 34 N. H. 202; *Reid* v. *State*, 53 Ala. 402 [25 Am. Rep. 627]; *Meece* v. *Com.* 78 Ky. 586, 588; *State* v. *Ford*, 37 La. Ann. 443, 466.

As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense. *United States* v. *Sanges*, 144 U. S. 310 [36:446]; *Com.* v. *Tuck*, 20 Pick. 356, 365; *West* v. *State*, 22 N. J. L. 212, 231; 1 Lead. Crim. Cas. 2d ed. 532.

For these reasons, the verdict of acquittal was conclusive in favor of Millard F. Ball; and as to him the judgment must be reversed, and judgment rendered for him upon his plea of former acquittal.

It therefore becomes unnecessary to consider any of the other questions raised at the trial which affect Millard F. Ball only; and we proceed to consider those affecting the other defendants, John C. Ball and Robert E. Boutwell.

Their plea of former conviction cannot be sustained, because *upon a writ of error[672 sued out by themselves the judgment and sentence against them were reversed, and the indictment ordered to be dismissed. How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held to bar a new indictment against them need not be considered, because it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted. *Hopt* v. *Utah*, 104 U. S. 631 [26: 873], 110 U. S. 574 [28: 262], 114 U. S. 488 [29: 183], 120 U. S. 430 [30: 708]; *Reg.* v. *Drury*, 3 Cox, C. C. 544, 3 Car. & K. 193; *Com.* v. *Gould*, 12 Gray, 171. The court therefore rightly overruled their plea of former jeopardy; and cannot have prejudiced them by afterwards permitting them to put in evidence the former conviction, and instructing the jury that the plea was bad.

These two defendants moved that they be tried separately from Millard F. Ball, because he had been previously acquitted; because the government relied on his acts and declarations made after the killing and not in their presence or hearing; and because he was a material witness in their behalf. But the question whether defendants jointly indicted should be tried together or separately was a question resting in the sound discretion of the court below. *United States* v. *Marchant*, 25 U. S. 12 Wheat. 480 [6: 700]. It does not appear that there was any abuse of that discretion in ordering the three defendants to be tried together, or that the court did not duly limit the effect of any evidence introduced which was competent against one defendant and in-



Digitized by Google

competent against the others. See *Sparf* v. *United States*, 156 U. S. 51, 58 [39:343, 346]. On the contrary, upon the offer by the United States of evidence of declarations made by Millard F. Ball after the killing and not in the presence of the other defendants, and upon an objection to its admissibility against them, the court at once said, in the presence of the jury, that, of course, it would be only evidence against him, if he said anything; and the court was not afterwards requested to make any further ruling upon this point.

673] *The exception to the restriction of the cross-examination of Cross and Berney, two material witnesses for the prosecution, cannot be sustained. The court permitted the defendants' counsel, for the purpose of showing bias and prejudice on the part of these witnesses, to ask them whether they had, at their own expense, employed another attorney to assist the district attorney in the prosecution of this case; and they frankly answered that they had. That fact having been thus proved and admitted, the further question to one of them, "How much do you pay him?" might properly be excluded by the presiding judge as immaterial.

The government introduced evidence tending to show that Box was killed with low-mould buckshot, as he was going home through a cornfield late at night; that he had twelve wounds on his breast, collar bone, and hips; that gun wadding was found close to his body; that he was shot with a double-barreled, muzzle-loading gun, belonging to the defendant John C. Ball, and which had been in the marshal's exclusive control since the arrest of the defendants; and that this gun scattered low-mould buckshot badly. The defendants introduced evidence that the gun did not scatter such shot; and requested permission of the court to take the gun out and shoot it off in the presence of a deputy marshal, in order to test how it threw such shot. The court denied the request; and the defendants excepted to the denial. The granting or refusal of such a request, first made in the midst of the trial, was clearly within the discretion of the court.

The only grounds of the motion in arrest of judgment, which were argued in this court, were that the indictment did not allege that Box died of the wound charged to have been inflicted upon his body by the defendants; nor that he died at a place within the jurisdiction of the court. But the indictment alleged that the defendants, in Pickens county in the Indian territory, on June 26, 1889, by shooting with a loaded gun, inflicted upon the body of Box "a mortal wound, of which mortal wound the said William T. Box did languish, and languishing did then and there instantly die." It was thus distinctly and unequivocally alleged that Box died of the *mortal [674 wound alleged to have been inflicted by the defendants, and that he died at the time and place at which the mortal wound was inflicted.

The court overruled a motion of the defendants for a new trial, made upon the ground that the jury, from the time they were impaneled until they returned their verdict, were not in charge of a proper officer. At the hearing of this motion, it was admitted that the jury, during all the trial, were in charge of a deputy marshal of the United States for the district, who was not sworn as bailiff of this jury, and the only oath ever administered to whom was as deputy marshal many months before the trial; and "that the court instructed the jury in this case that they must not separate, must not talk to each other, and must not allow themselves to be talked to by any party on the outside, about this case." It would have been according to the more usual and regular practice, to administer a special oath to the officer put in charge of a jury. But the jury were in charge of a deputy marshal, who had, as such, taken an oath that he would "in all things well and truly, and without malice or impartiality, perform the duties of the office of marshal's deputy." U. S. Rev. Stat. § 782. No objection to his taking charge of the jury without a new oath was made at any stage of the trial; the jury were duly cautioned by the court not to separate, nor to allow any other person to talk to them about the case; and there was nothing tending to show that the jury were exposed to any influence that might interfere with the impartial performance of their duties, or in any way prejudice the defendant. Such being the facts, the court was not obliged, as matter of law, to set aside the verdict, because no special oath had been administered to the officer in charge of the jury.

No other question of law affecting the defendants John C. Ball and Robert E. Boutwell is presented by the copy of record submitted to this court, and which, by stipulation of counsel, has been agreed to contain everything that is material.

*Judgment reversed as to Millard F. Ball, and affirmed as to the other defendants.*



Digitized by Google

# FOLLOWING ARE MEMORANDA

OF

# ALL CASES DISPOSED OF AT OCTOBER TERM, 1895,

WITHOUT OPINIONS, AND NOT ELSEWHERE OR OTHERWISE REPORTED IN THIS EDITION.

## TENTH RULE.

P. F. DUFFY, Auditor, etc., *et al.*, *Appts.*, v. ALEXANDER B. GREEN *et al.* [No. 27.]

Appeal from the Circuit Court of the United States for the District of West Virginia.

*Messrs. Alfred Caldwell* and *T. S. Riley* for appellants. *Mr. Wm. J. Robertson* for appellees.

*October 16, 1895.* Dismissed with costs, pursuant to the 10th Rule.

---

F. M. THORP *et al.*, *Appts.*, v. TENAM DITCH COMPANY. [No. 69.]

Appeal from the Supreme Court of the State of Washington.

*Messrs. A. H. Garland* and *H. J. May* for appellants. No counsel for appellee.

*October 18, 1895.* Dismissed with costs, pursuant to the 10th Rule.

---

CLAY PETERS, *Plf. in Err.*, v. UNITED STATES. [No. 479.]

In Error to the Supreme Court of the Territory of Oklahoma.

*Mr. Fred. Beall* for plaintiff in error. *The Attorney General* for defendant in error.

*October 22, 1895.* Dismissed pursuant to the 10th Rule.

---

FLOURNOY LIVE STOCK & REAL ESTATE COMPANY, *Appt.*, v. WILLIAM H. BECK. [No. 514.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. Wm. V. Allen* for appellant. *The Attorney General* for appellee.

*October 23, 1895.* Dismissed with costs, pursuant to the 10th Rule, and cause remanded to the circuit court of the United States for the District of Nebraska.

---

MICHIGAN DAIRY COMPANY *et al.*, *Appts.*, v. C. C. CONVERSE, Executor, etc. [No. 77.]

Appeal from the Circuit Court of the United States for the Western District of Michigan.

*Mr. E. S. Eggleston* for appellants. *Messrs. N. A. Fletcher* and *Geo. P. Wanty* for appellee.

*November 15, 1895.* Dismissed with costs, pursuant to the 10th Rule.

JOHN G. LYBARGER, *Plf. in Err.*, v. STATE OF WASHINGTON. [No. 84.]

In Error to the Supreme Court of the State of Washington.

*Mr. Ben. Sheeks* for plaintiff in error. *Mr. W. C. Jones* for defendant in error.

*November 21, 1895.* Dismissed with costs, pursuant to the 10th Rule.

---

JOHN J. SHIPMAN *et al.*, *Plfs. in Err.*, v. JAMES W. MAGARITY. [No. 90.]

In Error to the Supreme Court of the District of Columbia.

*Mr. W. Willoughby* for plaintiffs in error. *Mr. S. S. Henkle* for defendant in error.

*November 22, 1895.* Dismissed with costs, pursuant to the 10th Rule.

---

CITY OF NEW ORLEANS, *Plf. in Err.*, v. UNITED STATES, *ex rel.* WILLIAM W. WHITNEY, Administrator, etc. [No. 92.]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

*Mr. Henry C. Miller* for plaintiff in error. No counsel for defendant in error.

*November 22, 1895.* Dismissed with costs, pursuant to the 10th Rule.

---

JOHN PITTS, *Plf. in Err.*, v. UNITED STATES. [No. 102.]

In Error to the Circuit Court of the United States for the Northern District of Florida.

*Mr. Jas. N. Castle* for plaintiff in error. *The Attorney General* for defendant in error.

*December 3, 1895.* Dismissed pursuant to the 10th Rule.

---

JAMES ALLEN, *Appt.*, v. FRANK J. CANNON *et al.* [No. 109.]

Appeal from the Supreme Court of the Territory of Utah.

*Mr. Charles H. Armes* for appellant. No counsel for appellees.

*December 4, 1895.* Dismissed with costs, pursuant to the 10th Rule.

---

ROBERT R. WILLIAMS, *Plf. in Err.*, v. JAMES B. WILBUR. [No. 128.]

In Error to the Circuit Court of the United States for the District of Kansas.

*Mr. C. O. Tichenor* for plaintiff in error. *Mr. Willard Teller* for defendant in error.

*December 11, 1895.* Dismissed with costs, pursuant to the 10th Rule.



Digitized by Google

E. M. HUKILL, *Plff. in Err.*, v. JAMES M. GUFFEY *et al.* [No. 125.]
In Error to the Supreme Court of Appeals of the State of West Virginia.
*Mr. W. P. Hubbard* for plaintiff in error. No counsel for defendants in error.
*December 12, 1895.* Dismissed with costs, pursuant to the 10th Rule.

---

JOHN G. GOHLMAN *et al.*, *Plffs. in Err.*, v. WILLIAM BARTON *et al.* [No. 145.]
In Error to the United States Court for the Indian Territory.
*Mr. Robert E. Collins* for plaintiffs in error. No counsel for defendants in error.
*December 20, 1895.* Dismissed with costs, pursuant to the 10th Rule.

---

CHIN YUEN SING, *Appt.*, v. JAMES T. KILBRETH, Collector, etc. [No. 551.]
Appeal from the Circuit Court of the United States for the Southern District of New York.
*Mr. B. C. Chetwood* for appellant. *The Attorney General* for appellee.
*March 2, 1896.* Dismissed pursuant to the 10th Rule.

---

MARY B. CAMPBELL, Administratrix, etc., *et al.*, *Plffs. in Err.*, v. I. E. THAMES. [No. 154.]
In Error to the Court of Common Pleas of Charleston County, South Carolina.
*Mr. Wm. E. Earle* for plaintiffs in error. No counsel for defendant in error.
*March 12, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

MARY B. CAMPBELL, Administratrix, etc., *et al.*, *Plffs. in Err.*, v. J. O. SCHACHTE, Executor, etc. [No. 155.]
In Error to the Court of Common Pleas of Charleston County, South Carolina.
*Mr. Wm. E. Earle* for plaintiffs in error. No counsel for defendant in error.
*March 13, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

MARY B. CAMPBELL, Administratrix, etc., *et al.*, *Plffs. in Err.*, v. D. J. QUIGLEY, Executor, etc. [No. 167.]
In Error to the Court of Common Pleas of Charleston County, South Carolina.
*Mr. Wm. E. Earle* for plaintiffs in error. No counsel for defendant in error.
*March 19, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

JOSEPH C. MITCHELL, *Plff. in Err.*, v. STATE OF SOUTH DAKOTA. [No. 181.]
In Error to the Supreme Court of the State of South Dakota.
*Mr. Thomas B. McMartin* for plaintiff in error. No counsel for defendant in error.
*March 24, 1896.* Dismissed with costs, pursuant to the 10th Rule.

CHARLES M. MCCLELLAN *et al.*, *Plffs. in Err.*, v. HENRY C. PYEATT *et al.* [No. 188.]
In Error to the United States Circuit Court of Appeals for the Eighth Circuit.
*Mr. A. H. Garland* for plaintiffs in error. *Mr. John H. Rogers* for defendants in error.
*March 25, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

JOHN S. DENNIS, *Appt.*, v. HUGH A. DE LACEY, Chief of Police of the City of San José, County of Santa Clara, State of California. [No. 190.]
Appeal from the Circuit Court of the United States for the Northern District of California.
*Mr. J. C. Campbell* for appellant. No counsel for appellee.
*March 25, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

FREDERICK N. DU BOIS, *Appt.*, v. COMMISSIONER OF PATENTS. [No. 193.]
Appeal from the Supreme Court of the District of Columbia.
*Mr. Rodney Mason* for appellant. No counsel for appellee.
*March 26, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

A. C. EPPERSON, Administrator, etc., *Plff. in Err.*, v. CARTER BROTHERS & COMPANY. [No. 211.]
In Error to the Supreme Court of the State of Tennessee.
*Mr. W. W. Upton* for plaintiff in error. *Mr. Henry W. McCorry* for defendant in error.
*April 1, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

D. FRANK GUNN, *Plff. in Err.*, v. STATE OF GEORGIA. [No. 213.]
In Error to the Supreme Court of the State of Georgia.
*Mr. R. F. Lyon* for plaintiff in error. *Mr. J. M. Terrell* for defendant in error.
*April 1, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

CHARLES M. MATTHEWS *et al.*, etc., *Appts.*, v. WILLIAM W. SCOTT, Trustee, *et al.* [No. 231.]
Appeal from the Supreme Court of the District of Columbia.
*Mr. C. M. Matthews* for appellants. No counsel for appellees.
*April 13, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

NEW YORK & NEW ENGLAND RAILROAD COMPANY, *Plff. in Err.*, v. HARRIET S. RUMSEY *et al.* [No. 223.]
In Error to the Supreme Court of the State of New York.
*Mr. W. C. Anthony* for plaintiff in error. *Mr. Lawrence Godkin* for defendants in error.
*April 13, 1896.* Dismissed with costs, pursuant to the 10th Rule.



Digitized by Google

GEORGE F. PIPER, *Plff. in Err.*, v. CHIPPEWA IRON COMPANY. [No. 231.]

In Error to the Supreme Court of the State of Minnesota.

*Mr. Jed. L. Washburn* for plaintiff in error. No counsel for defendant in error.

*April 16, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

CHARLES W. PIPER, *Plff. in Err.* v. CHIPPEWA IRON COMPANY. [No. 232.]

In Error to the Supreme Court of the State of Minnesota.

*Mr. Jed. L. Washburn* for plaintiff in error. No counsel for defendant in error.

*April 17, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

CHARLESTON BRIDGE COMPANY, *Appt.*, v. DANIEL E. HIGBEE, Master, etc., *et al.* [No. 239.]

Appeal from the District Court of the United States for the District of South Carolina.

*Mr. John F. Ficken* for appellant. *Mr. J. P. Kennedy Bryan* for appellees.

*April 20, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

CECILIA F. LINE, *Plff. in Err.*, v. UNION PACIFIC RAILWAY COMPANY. [No. 243.]

In Error to the Supreme Court of the State of Wyoming.

*Messrs. A. T. Britton* and *A. B. Browne* for plaintiff in error. *Messrs. John F. Dillon* and *John M. Thurston* for defendant in error.

*April 20, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

UNION PACIFIC RAILWAY COMPANY, *Plff. in Err.*, v. JOHN T. REESE. [No. 245.]

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

*Messrs. Samuel Shellabarger, J. M. Wilson,* and *John M. Thurston* for plaintiff in error. *Messrs. S. M. Stockslager* and *George O. Heard* for defendant in error.

*April 20, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

ANNIE COMITIZ, Widow, etc., *Plff. in Err.*, v. W. S. PARKERSON *et al.* [No. 263.]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

*Mr. E. Howard McCaleb* for plaintiff in error. No counsel for defendants in error.

*April 29, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

STATE OF WASHINGTON, *ex rel.* P. S. BATTERSBY *et al.*, *Plffs. in Err.*, v. BOARD OF TIDE LAND APPRAISERS OF WHATCOM COUNTY *et al.* [No. 264.]

In Error to the Supreme Court of the State of Washington.

*Mr. W. H. Calkins* for plaintiffs in error. *Mr. A. L. Black* for defendants in error.

*April 29, 1896.* Dismissed with costs, pursuant to the 10th Rule.

THOMAS FOSTER, *Plff. in Err.*, v. DILLWYN WISTAR *et al.* [No. 272.]

In Error to the Supreme Court of the State of Minnesota.

*Mr. James Spencer* for plaintiff in error. *Mr. W. W. Billson* for defendants in error.

*April 30, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

W. W. BAUGHN, Next Friend of ELIZABETH NOBLES, *Appt.*, v. HINES MILLIRONS, Jailer, etc., *et al.* [No. 227.]

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

*Mr. W. O. Glenn* for appellant. *Mr. J. M. Terrell* for appellees.

*May 4, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

W. W. RISER, *Appt.*, v. D. M. LANGFORD. [No. 287.]

Appeal from the Circuit Court of the United States for the District of South Carolina.

*Mr. D. A. Townsend* for appellant. *Mr. Hugh L. Bond, Jr.*, for appellee.

*May 4, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

W. H. OUTZS, *Appt.*, v. J. M. WARD. [No. 288.]

Appeal from the Circuit Court of the United States for the District of South Carolina.

*Mr. D. A. Townsend* for appellant. *Mr. Hugh L. Bond, Jr.*, for appellee.

*May 4, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

TERRITORY OF NEW MEXICO, on the Relation of CHARLES H. GILDERSLEEVE, *Plff. in Err.*, v. JOSE L. PEREA, Sheriff, etc. [No. 306.]

In Error to the Supreme Court of the Territory of New Mexico.

*Mr. C. H. Gildersleeve* for plaintiff in error. No counsel for defendant in error.

*May 5, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

ELEANOR TAYLOR, Administratrix, etc., *et al.*, *Appts.*, v. GIRARD LIFE INSURANCE, ANNUITY, & TRUST COMPANY OF PHILADELPHIA. [No. 307.]

In Error to the Court of Appeals of the District of Columbia.

*Messrs. Nathaniel Wilson, R. Ross Perry,* and *Ludovic Bennett* for appellants. *Messrs. Walter H. Smith* and *W. L. Cole* for appellee.

*May 5, 1896.* Dismissed with costs, pursuant to the 10th Rule.

---

ROBERT M. DOUGLAS, *Plff. in Err.*, v. UNITED STATES, *ex rel.* STATE OF NORTH CAROLINA, *et al.* [No. 309.]

In Error to the Supreme Court of the State of North Carolina.

*Mr. R. R. McMahon* for plaintiff in error. *Mr. R. H. Battle* for defendants in error.

*May 5, 1896.* Dismissed with costs, pursuant to the 10th Rule.



Digitized by Google

## SIXTEENTH RULE.

FIRST NATIONAL BANK OF CLARK, SOUTH DAKOTA, *Plff. in Err.*, *v.* STATE OF SOUTH DAKOTA. [No. 151.]

In Error to the Supreme Court of the State of South Dakota.

*Mr. John G. Manahan* for plaintiff in error. *Mr. Robert Dollard* for defendant in error.

*March 18, 1896.* Dismissed with costs, pursuant to the 16th Rule.

---

## NINETEENTH RULE.

E. T. POLLARD, *Appt.*, *v.* BONSACK MACHINE COMPANY. [No. 24.]

Appeal from the Circuit Court of the United States for the Western District of Virginia.

*Mr. Wm. D. Baldwin* for appellant. *Mr. S. A. Duncan* for appellee.

*October 15, 1895.* Dismissed with costs, pursuant to the 19th Rule.

---

SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, *Plff. in Err.*, *v.* TEOFILO ESQUIBEL. [No. 2.]

In Error to the Supreme Court of the Territory of New Mexico.

*Messrs. C. H. Tweed* and *T. B. Catron* for plaintiff in error. *Mr. C. H. Gildersleeve* for defendant in error.

*October 15, 1895.* Dismissed with costs, pursuant to the 19th Rule.

---

## TWENTY-EIGHTH RULE.

HORATIO GATES CILLEY, *Plff. in Err.*, *v.* WILLIAM A. PATTEN. [No. 379.]

In Error to the Supreme Court of the State of New Hampshire.

*Mr. Harvey D. Hadlock* for plaintiff in error. *Messrs. John M. Mitchell* and *Frank S. Streeter* for defendant in error.

*July 17, 1895.* Dismissed pursuant to 28th Rule.

---

HORATIO GATES CILLEY, *Appt.*, *v.* WILLIAM A. PATTEN *et al.* [No. 465.]

Appeal from the Circuit Court of the United States for the District of New Hampshire.

*Mr. Harvey D. Hadlock* for appellant. *Mr. Frank S. Streeter* for appellees.

*July 17, 1895.* Dismissed pursuant to the 28th Rule.

---

UNION PACIFIC RAILWAY COMPANY, *Plff. in Err.*, *v.* ISAAC CHILTON, Administrator. [No. 118.]

In Error to Supreme Court of Utah Territory.

*Mr. John F. Dillon* for plaintiff in error. *Mr. Lindsay R. Rogers* for defendant in error.

*August 6, 1895.* Dismissed pursuant to the 28th Rule.

SALT LAKE RAPID TRANSIT COMPANY, *Plff. in Err.*, *v.* JULIAN RILEY. [No. 484.]

In Error to the Supreme Court of Utah Territory.

*Messrs. C. W. Bennett* and *Jno. A. Marshall* for plaintiff in error. *Mr. P. L. Williams* for defendant in error.

*August 6, 1895.* Dismissed pursuant to the 28th Rule.

---

JOHN S. FRIEND, *Appt.*, *v.* UNITED STATES *et al.* [No. 546.]

Appeal from the Court of Claims.

*Mrs. Belva A. Lockwood* for appellant. *The Attorney General* and *Solicitor General* for appellees.

*September 19, 1895.* Dismissed pursuant to the 28th Rule.

---

## MISCELLANEOUS.

WM. H. ROBERTSON, Collector, etc., *Plff. in Err.*, *v.* MORRIS J. DRUCKER. [No. 61.] and MORRIS J. DRUCKER, *Plff. in Err.*, *v.* WM. H. ROBERTSON, Collector, etc. [No. 64.]

In Error to the Circuit Court of the United States for the Southern District of New York.

*The Attorney General* and *Solicitor General* for the Collector. *Messrs. Stephen G. Clarke, Edwin B. Smith,* and *Charles Curie* for Drucker.

*October 14, 1895.* Judgment reversed and cause remanded, with directions to proceed according to law, per stipulation of counsel, on motion of *Mr. Solicitor General* Conrad for the collector.

---

UNITED STATES, *Appt.*, *v.* CHARLES AULICK, Administrator, etc. [No. 106.]

Appeal from the Court of Claims.

*October 14, 1895.* Dismissed on motion of *Mr. Solicitor General* Conrad for the appellant. No counsel for appellee.

---

UNITED STATES, *Appt.*, *v.* JOHN Q. LOVELL. [No. 108.]

Appeal from the Court of Claims.

*October 14, 1895.* Dismissed on motion of *Mr. Solicitor General* Conrad for the appellant. No counsel for appellee.

---

UNITED STATES, *Appt.*, *v.* DANIEL O. FINCH. [No. 249.]

Appeal from the Court of Claims.

*October 14, 1895.* Dismissed on motion of *Mr. Solicitor General* Conrad for the appellant. *Mr. J. Altheus Johnson* for appellee.

---

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, *Plff. in Err.*, *v.* EDWARD LEE. [No. 162.]

In Error to the Supreme Court of the State of Arkansas.

*Messrs. A. T. Britton, A. B. Browne, Geo. R. Peck,* and *E. D. Kenna* for plaintiff in error. *Messrs. A. H. Garland* and *R. C. Garland* for defendant in error.

*October 14, 1895.* Dismissed with costs, on motion of *Mr. A. B. Browne* for the plaintiff in error.



Digitized by Google

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, *Plff. in Err.*, v. WM. RYAN. [No. 163.]

In Error to the Supreme Court of the State of Arkansas.

*Messrs. A. T. Britton, A. B. Browne, Geo. R. Peck,* and *E. D. Kenna* for plaintiff in error. *Messrs. A. H. Garland* and *R. C. Garland* for defendant in error.

*October 14, 1895.* Dismissed with costs, on motion of *Mr. A. B. Browne* for the plaintiff in error.

---

BATE REFRIGERATING COMPANY, *Appt.*, v. DANIEL TOFFEY *et al.* [No. 26.]

Appeal from the Circuit Court of the United States for the District of New Jersey.

*Messrs. Paul H. Bate* and *B. F. Lee* for appellant. *Mr. Livingston Gifford* for appellees.

*October 14, 1895.* Dismissed per stipulation.

---

ILLINOIS CENTRAL RAILROAD COMPANY, *Plff. in Err.*, v. CITY OF MATTOON. [No. 117.]

In Error to the Supreme Court of the State of Illinois.

*Mr. James Fentress* for plaintiff in error. No counsel for defendant in error.

*October 14, 1895.* Dismissed with costs, on authority of counsel for plaintiff in error.

---

T. D. STEED, Administrator, etc., *Plff. in Err.*, v. NORFOLK & WESTERN RAILROAD COMPANY. [No. 122.]

In Error to the Circuit Court of the United States for the Western District of Virginia.

*Messrs. M. L. Woods* and *J. H. Bible* for plaintiff in error. No counsel for defendant in error.

*October 14, 1895.* Dismissed with costs, on authority of counsel for the plaintiff in error.

---

STATE OF WASHINGTON, *ex rel.* COLUMBIA & PUGET SOUND RAILWAY COMPANY, *Plff. in Err.*, v. BOARD OF HARBOR LINE COMMISSIONERS. [No. 178.]

In Error to the Supreme Court of the State of Washington.

*Mr. A. H. Holmes* for plaintiff in error. *Mr. W. C. Jones* for defendant in error.

*October 14, 1895.* Dismissed per stipulation.

---

EASTERN RAILWAY COMPANY OF MINNESOTA, *Plff. in Err.*, v. JOHN J. MORAN. [No. 192.]

In Error to the Supreme Court of the State of Minnesota.

*Mr. M. D. Grover* for plaintiff in error. *Messrs. Jno. M. Martin* and *C. E. Flandrau* for defendant in error.

*October 14, 1895.* Dismissed with costs, per stipulation.

---

EDWARD MEDLER, *Appt.*, v. ALBUQUERQUE HOTEL & OPERA HOUSE COMPANY *et al.* [No. 222.]

Appeal from the Supreme Court of the Territory of New Mexico.

*Messrs. Thos. Smith* and *W. B. Childers* for appellant. No counsel for appellees.

*October 14, 1895.* Dismissed with costs, on authority of counsel for the appellant.

HARVEY BOOTH *et al.*, *Plffs. in Err.*, v. WILLIAM CRAWFORD. [No. 274.]

In Error to the Supreme Court of the Territory of Utah.

*Mr. James N. Kimball* for plaintiffs in error. No counsel for defendant in error.

*October 14, 1895.* Dismissed with costs, on authority of counsel for the plaintiffs in error.

---

WESTERN UNION TELEGRAPH COMPANY, *Appt.*, v. CITY COUNCIL OF CHARLESTON *et al.* [No. 275.]

Appeal from the Circuit Court of the United States for the District of South Carolina.

*Mr. A. T. Smythe* for appellant. No counsel for appellees.

*October 14, 1895.* Dismissed with costs, on authority of counsel for the appellant.

---

GEORGE E. SHUTE, Sheriff, etc., *et al.*, *Appts.*, v. WILLIAM KEYSER. [No. 168.]

Appeal from the Supreme Court of the Territory of Arizona.

*Messrs. Wm. Allen Butler* and *John Notman* for appellants. *Mr. R. F. Brent* for appellee.

*October 17, 1895.* Dismissed per stipulation, each party to pay one half the costs in this court.

---

NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*, v. H. W. NICKELS. [No. 152.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. James McNaught* and *W. J. Curtis* for plaintiff in error. *Mr. Frank D. Larabee* for defendant in error.

*October 18, 1895.* Dismissed per stipulation, and cause remanded to the circuit court of the United States for the district of Minnesota.

---

WILLIAM LAW *et al.*, *Appts.*, v. THE TRAVE, etc. [No. 638.]

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. E. P. Carver* and *Harrington Putnam* for appellants. *Mr. Wm. D. Shipman* for appellee.

*October 21, 1895.* Denied.

---

BARBER ASPHALT PAVING COMPANY, *Plff. in Err.*, v. CITY OF HARRISBURG. [No. 772.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Messrs. A. S. Worthington* and *Chas. H. Bergner* for plaintiff in error. *Mr. Wm. H. Middleton* for defendant in error.

*October 21, 1895.* Denied.

---

THE CENTURION, etc., *Appt.*, v. AMERICAN SUGAR REFINING COMPANY *et al.* [No. 734.]

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. J. Parker Kirlin* and *Geo. A. Black* for appellant. *Mr. W. W. MacFarland* for appellees.

*October 21, 1895.* Denied.





Digitized by Google

EDWIN DAVIS, *Plff. in Err.*, v. ANGELICA WAKELEE. [No. 776.], and
ERWIN DAVIS, *Plff. in Err.*, v. PIERRE B. CORNWALL. [No. 777.]

Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. Walter S. Logan* and *C. M. Demond* for plaintiff in error. *Mr. Anson Maltby* for defendants in error.

*October 21, 1895.* Denied.

---

LAURA P. DUVAL *et al.*, *Plffs. in Err.* v. PULLMAN PALACE CAR COMPANY. [No. 684.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Mr. J. L. Peeler* for plaintiffs in error. *Mr. Percy Roberts* for defendant in error.

*October 21, 1895.* Denied.

---

CALIFORNIA FIG SYRUP COMPANY, *Appt.*, v. KATE GARDNER PUTNAM *et al.* [No. 775.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

*Messrs. F. W. Lehmann* and *Paul Bakewell* for appellant. No counsel opposed.

*October 21, 1895.* Denied.

---

CENTRAL TRUST COMPANY OF NEW YORK, *Appt.*, v. RICHMOND, NICHOLASVILLE, IRVINE, & BEATTYVILLE RAILROAD COMPANY *et al.* [No. 746.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Mr. Roxel Weissinger* for appellant. *Messrs. Alex. Pope Humphrey* and *Geo. M. Davis* for appellees.

*October 28, 1895.* Denied.

---

HENRY DENO, *Plff. in Err.*, v. W. E. GRIFFIN. [No. 8.]

In Error to the Supreme Court of the State of Nevada.

*Mr. H. F. Bartine* for plaintiff in error. *Mr. J. H. Ralston* for defendant in error.

*October 29, 1895.* Dismissed with costs, the case having abated.

---

JOHN G. MOORE, *Appt.*, v. JOSEPH S. MILLER, Commissioner of Internal Revenue. [No. 581.]

Appeal from the Court of Appeals of the District of Columbia.

*Messrs. George F. Edmunds, Samuel Shellabarger*, and *J. M. Wilson* for appellant. *The Attorney General* and *Mr. Assistant Attorney General Whitney* for appellee.

*October 30, 1895.* Dismissed with costs, on motion of *Mr Samuel Shellabarger* for the appellant.

MINNEAPOLIS, ST. PAUL, & SAULTE STE. MARIE RAILWAY COMPANY, *Plff. in Err.*, v. FARWELL FARMERS' WAREHOUSE ASSOCIATION. [No. 297.]

In Error to the Supreme Court of the State of Minnesota.

*Mr. Albert E. Clarke* for plaintiff in error. *Mr. H. W. Childs* for defendant in error.

*October 30, 1895.* Dismissed per stipulation.

---

DETROIT CITIZENS' STREET RAILWAY COMPANY *et al.*, *Appts*, v. CITY OF DETROIT. [No. 684.]

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Messrs. H. M. Duffield, Michael Brennan, Jno. C. Donnelly, Ashley Pond, F. A. Baker*, and *James C. Carter* for appellants. *Messrs. C. A. Kent* and *Benton Hanchett* for appellee.

*November 11, 1895.* Denied.

(Mr. Justice **Brown** took no part in the consideration and determination of this petition.)

---

BERTHA ZINC & MINERAL COMPANY, *Appt.*, v. ELBERT CARRICO *et al.* [No. 278.]

Appeal from the Circuit Court of the United States for the Western District of Virginia.

*Mr. F. S. Blair* for appellant. No counsel for appellees.

*November 11, 1895.* Dismissed with costs, on motion of *Mr. F. S. Blair* for the appellant.

---

UNION PACIFIC RAILWAY COMPANY, *Plff. in Err.*, v. GLADWYS JONES. [No. 103.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. Jno. F. Dillon* and *Jno. M. Thurston* for plaintiff in error. *Messrs. E. T. Wells* and *R. T. McNeal* for defendant in error.

*November 14, 1895.* Dismissed with costs, on motion of *Mr. John F. Dillon* for the plaintiff in error, and cause remanded to the circuit court of the United States for the district of Colorado.

---

UNION PACIFIC RAILWAY COMPANY, *Plff. in Err.*, v. COLORADO EASTERN RAILWAY COMPANY. [No. 250.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. Jno. F. Dillon* for plaintiff in error. No counsel for defendant in error.

*November 14, 1895.* Dismissed with costs, on motion of *Mr. John F. Dillon* for the plaintiff in error, and cause remanded to the circuit court of the United States for the district of Colorado.

---

TEXAS & PACIFIC RAILWAY COMPANY, *Plff. in Err.*, v. ROSEDALE STREET RAILWAY COMPANY. [No. 114.]

In Error to the Court of Appeals of the State of Texas.

*Messrs. Jno. F. Dillon* and *Winslow S. Pierce* for plaintiff in error. No counsel for defendant in error.

*November 14, 1895.* Dismissed with costs, on motion of *Mr. John F. Dillon* for the plaintiff in error.



Digitized by Google

ÆTNA LIFE INSURANCE COMPANY, *Plff. in Err.*, *v.* NANCY L. FLORIDA. [No. 797.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. Frank M. Estes* for plaintiff in error. *Mr. L. R. Wilfley* for defendant in error.

*November 18, 1895.* Denied.

---

JOHN F. MCGLENSY, *Appt.*, *v.* JAMES VAN VRANKEN. [No. 70.]

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

*The Attorney General* and *Solicitor General* for appellant. No counsel for appellee.

*November 18, 1895.* Order reversed on the authority of *Johnson* v. *Sayre*, 158 U. S. 109 [39: 914], and cause remanded with directions to remand Van Vranken to custody.

---

NEW YORK & NEW ENGLAND RAILROAD COMPANY, *Plff. in Err.*, *v.* HARRIET S. RUMSEY *et al.* [No. 76.]

In Error to the Supreme Court of the State of New York.

*Mr. W. C. Anthony* for plaintiff in error. *Mr. Lawrence Godkin* for defendants in error.

*November 18, 1895.* Dismissed with costs, on authority of counsel for the plaintiff in error.

---

BALTIMORE & OHIO & CHICAGO RAILWAY COMPANY, *Plff. in Err.*, *v.* JOHN YARDE, *Jr.*, Administrator, etc. [No. 78.]

In Error to the Circuit Court of the United States for the District of Indiana.

*Messrs. John K. Cowen* and *E. J. D. Cross* for plaintiff in error. *Mr. Merrill Moores* for defendant in error.

*November 20, 1895.* Dismissed with costs, on motion of counsel for the plaintiff in error.

---

ATCHISON, TOPEKA, & SANTA FÉ RAILROAD COMPANY, *Plff. in Err.*, *v.* PATRICK MULLIGAN, *alias* PATRICK GUIVER. [No. 787.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Messrs. E. D. Kenna, A. T. Britton*, and *A. B. Browne* for plaintiff in error. *Mr. Alphonso Hart* for defendant in error.

*November 25, 1895.* Denied.

---

MARY F. MCCONNELL, *Appt.*, *v.* PROVIDENCE SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK. [No. 799.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Messrs. Tully R. Cornick* and *Jerome Templeton* for appellant. *Mr. Edwin B. Smith* for appellee.

*November 25, 1895.* Denied.

CHARLES A. GREGORY, *Appt.*, *v.* MARY H. PIKE. [No. 602.] and

CHARLES A. GREGORY, *Appt.*, *v.* THOMAS H. TALBOT. [No. 693.]

Appeals from the United States Circuit Court of Appeals for the First Circuit.

*Mr. F. A. Brooks* for appellant. *Messrs. Thos. H. Talbot* and *John Lowell* for appellees.

*November 25, 1895.* Dismissed for want of jurisdiction, and causes remanded to the Circuit Court of the United States for the District of Massachusetts. (*Vide Gregory v. Van Ee*, 160 U. S. 643 [40: 566]).

---

CARRIE E. T. KNOX, *Appt.*, *v.* MARGARET L. GADDIS. [No. 888.]

Appeal from the Court of Appeals of the District of Columbia.

*Mr. J. J. Johnson* for appellant. No counsel for appellee.

*December 2, 1895.* Dismissed with costs, on motion of *Mr. J. J. Johnson* for the appellant.

---

RUSSELL SAGE, Substituted, etc., *Appt.*, *v.* ST. PAUL, STILLWATER, & TAYLOR FALLS RAILWAY COMPANY. [No. 101.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. C. K. Davis, A. T. Britton*, and *A. B. Browne* for appellant. *Mr. Thomas Wilson* for appellee.

*December 2, 1895.* Dismissed with costs, on motion of *Mr. A. B. Browne*, for the appellant, and cause remanded to the circuit court of the United States for the district of Minnesota.

---

RUSSELL SAGE, Substituted, etc., *Appt.*, *v.* WINONA & ST. PETER RAILROAD COMPANY *et al.* [No. 474.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. A. T. Britton* and *A. B. Browne* for appellant. *Mr. Thomas Wilson* for appellees.

*December 2, 1895.* Dismissed with costs, on motion of *Mr. A. B. Browne* for the appellant, and cause remanded to the circuit court of the United States for the district of Minnesota.

---

LYONS-THOMAS HARDWARE COMPANY *et al.*, *Plffs. in Err.*, *v.* PERRY STOVE MANUFACTURING COMPANY *et al.* [No. 717.]

In Error to the Supreme Court of the State of Texas.

*Messrs. James G. Dudley, A. H. Garland*, and *R. C. Garland* for plaintiffs in error.

*Messrs. H. D. McDonald* and *V. W. Hale* for defendants in error.

*December 9, 1895.* Dismissed for want of jurisdiction.

---

A. B. KAHNWEILER & BRO., *Plffs. in Err.*, *v.* PHENIX INSURANCE COMPANY OF BROOKLYN, NEW YORK. [No. 743.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

No counsel for plaintiffs in error. *Messrs. Henry Elliston* and *Horace M. Jackson* for defendant in error.

*December 9, 1895.* Denied.



Digitized by Google

JOSE ALBINA BACA *et al.*, *Appts.*, v. UNITED STATES *et al.* [No. 816.]

Appeal from the Court of Private Land Claims.

No counsel for appellants. *Mr. Solicitor General Conrad* for appellees.

*December 9, 1895.* Docketed and dismissed, on motion of *Mr. Solicitor General Conrad* for the appellees.

---

GEORGE H. FLETCHER *et al.*, *Appts.*, v. UNITED STATES *et al.* [No. 817].

Appeal from the Court of Private Land Claims.

No counsel for appellants. *Mr. Solicitor General Conrad* for appellees.

*December 9, 1895.* Docketed and dismissed, on motion of *Mr. Solicitor General Conrad* for the appellees.

---

SOUTHERN PACIFIC RAILROAD COMPANY, *Appt.*, v. JOHN L. TILLEY and MRS. M. J. TILLEY. [No. 821.]

Appeal from the Circuit Court of the United States for the Southern District of California.

No counsel for appellant. *Mr. S. M. Stockslager* for appellees.

*December 10, 1895.* Docketed and dismissed with costs, on motion of *Mr. S. M. Stockslager* for the appellees.

---

SOUTHERN PACIFIC RAILROAD COMPANY, *Appt.*, v. WILLIAM B. WALKER. [No. 822.]

Appeal from the Circuit Court of the United States for the Southern District of California.

No counsel for appellant. *Mr. S. M. Stockslager* for appellee.

*December 10, 1895.* Docketed and dismissed with costs, on motion of *Mr. S. M. Stockslager* for the appellee.

---

SOUTHERN PACIFIC RAILROAD COMPANY, *Appt.*, v. J. M. PATTERSON *et al.* [No. 823.]

Appeal from the Circuit Court of the United States for the Southern District of California.

No counsel for appellant. *Mr. S. M. Stockslager* for appellees.

*December 10, 1895.* Docketed and dismissed with costs, on motion of *Mr. S. M. Stockslager* for the appellees.

---

KILDARE LUMBER COMPANY, *Appt.*, v. NATIONAL BANK OF COMMERCE OF KANSAS CITY, MISSOURI, *et al.* [No. 780.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Messrs. M. L. Crawford* and *Chas. S. Todd* for appellant. *Mr. Elijah Robinson* for appellees.

*December 16, 1895.* Denied.

---

UNITED STATES, *Appt.*, v. JAMES HARDEN. [No. 814.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*The Attorney General* and *Mr. Solicitor General Conrad* for appellant. *Messrs. Charles Ourie, W. Wickham Smith,* and *David Ives Mackie* for appellee.

*December 16, 1895.* Denied.

TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *Appt.*, v. FANNIE L. HENDERSON. [No. 824.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. T. F. Burke* and *B. D. Lee* for appellant. *Mr. J. J. Darlington* for appellee.

*December 16, 1895.* Denied.

---

MARY MCCULLOUGH, Administratrix, etc., *Appt.*, v. NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY *et al.* [No. 442.]

On a certificate from the United States Circuit Court of Appeals for the Second Circuit.

*Mr. J. A. Hyland* for appellant. No counsel for appellees.

*December 16, 1895.* Dismissed, on motion of *Mr. Mason N. Richardson* in behalf of counsel for the appellant.

---

GEORGE A. EDDY *et al.*, *Plffs. in Err.*, v. WILLIAM J. WALLACE. [No. 131.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. James Hagerman* for plaintiffs in error. *Mr. W. T. Hutchings* for defendant in error.

*December 16, 1895.* Dismissed with costs, on motion of *Mr. A. B. Browne* in behalf of counsel for the plaintiffs in error, and cause remanded to the United States court for the Indian territory.

---

KNUT ASLESEN, *Plff. in Err.*, v. STATE OF MINNESOTA. [No. 126.]

In Error to the Supreme Court of the State of Minnesota.

*Mr. Jno. M. Oliver* for plaintiff in error. *Mr. H. W. Childs* for defendant in error.

*December 17, 1895.* Dismissed per stipulation.

---

CHARLES M. BASSETT, *Plff. in Err.*, v. STATE OF MINNESOTA. [No. 127.]

In Error to the Supreme Court of the State of Minnesota.

*Mr. Jno. M. Oliver* for plaintiff in error. *Mr. H. W. Childs* for defendant in error.

*December 17, 1895.* Dismissed per stipulation.

---

NEW ORLEANS CITY & LAKE RAILROAD COMPANY, *Plff. in Err.*, v. CITY OF NEW ORLEANS. [No. 133.]

In Error to the Supreme Court of the State of Louisiana.

*Messrs. Chas. F. Buck, George Denegre,* and *Walter D. Denegre* for plaintiff in error. *Mr. E. A. O'Sullivan* for defendant in error.

*December 18, 1895.* Dismissed with costs, on motion of *Mr. E. B. Whitney* in behalf of counsel for the plaintiff in error.



Digitized by Google

STATE OF MISSOURI, *ex rel.* JOHN S. LEMON, *et al.*, *Plffs. in Err.*, v. BOARD OF EQUALIZATION OF BUCHANAN COUNTY, MISSOURI. [No. 144.]

In Error to the Circuit Court of Buchanan County, Missouri.

*Messrs. George G. Vest* and *H. K. White* for plaintiffs in error. *Mr. Stephen L. Brown* for defendant in error.

*December 20, 1895.* Dismissed with costs, on authority of counsel for the plaintiffs in error.

---

SOCIETY OF SHAKERS AT PLEASANT HILL, KENTUCKY, *et al.*, *Appts.*, v. OLIVER WATSON *et al.* [No. 826.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Mr. W. A. Sudduth* for appellants. *Mr. St. George R. Fitzhugh* for appellees.

*December 23, 1895.* Denied.

---

ALEXANDER WILLMAN, *Plff. in Err.*, v. S. M. FRIEDMAN. [No. 554.]

In Error to the Supreme Court of the State of Idaho.

*Mr. A. L. Rhodes* for plaintiff in error. *Mr. Arthur Brown* for defendant in error.

*December 23, 1895.* Dismissed with costs, per stipulation.

---

JOHN A. ANDREWS *et al.*, *Appts.*, v. OTTO and WILLIAM THUM. [No. 803.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

No counsel for appellants. *Messrs. Thos. J. Johnston* and *Wm. H. Doolittle* for appellees.

*January 6, 1896.* Denied.

---

WILL COOPER, *Plff. in Err.*, v. UNITED STATES. [No. 837.]

In Error to the Circuit Court of the United States for the Northern District of Alabama.

No counsel for plaintiff in error. *Mr. Solicitor General Conrad* for defendant in error.

*January 6, 1896.* Docketed and dismissed, on motion of *Mr. Solicitor General Conrad* for the defendant in error.

---

LOUIS A. SALOMON *et al.*, *Plffs. in Err.*, v. W. H. ROBERTSON, Collector, etc. [No. 29.]

In Error to the Circuit Court of the United States for the Southern District of New York.

*Messrs. H. E. Tremain* and *M. W. Tyler* for plaintiffs in error. *The Attorney General* for defendant in error.

*January 7, 1896.* Dismissed with costs, on the authority of counsel for the plaintiffs in error.

---

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, *Plff. in Err.*, v. E. S. STAHLEY. [No. 833.]

In Error to the Circuit Court of the United States for the District of Kansas.

*Messrs. M. A. Low* and *W. F. Evans* for plaintiff in error. *Mr. Henry Elliston* for defendant in error.

*January 7, 1896.* Dismissed with costs, on the authority of counsel for the plaintiff in error.

---

THOMAS J. THORNTON, *Plff. in Err.*, v. UNITED STATES. [No. 729.]

In Error to the Circuit Court of the United States for the Western District of Arkansas.

No counsel for plaintiff in error. *Messrs. Attorney General, Solicitor General, Assistant Attorney General Whitney*, and *Assistant Attorney General Dickinson* for defendant in error.

*January 13, 1896.* Judgment reversed, and cause remanded with a direction to set aside the verdict and grant a new trial, upon confession of errors by counsel for defendant in error.

---

G. W. MAYES, High Sheriff, etc., *Appt.*, v. BALL CHRISTIE. [No. 855.]

Appeal from the United States Court for the Indiana Territory.

*Messrs. Wm. M. Cravens* and *A. H. Garland* for appellant. No counsel for appellee.

*January 13, 1896.* Dismissed, the cause having abated, owing to the death of the appellee, on motion of *Mr. R. C. Garland* in behalf of counsel for the appellant.

---

GERMAN BANK *et al.*, *Plffs. in Err.*, v. STATE OF TENNESSEE for the Use of the CITY OF MEMPHIS. [No. 690.]

In Error to the Supreme Court of the State of Tennessee.

*Mr. L. B. McFarland* for plaintiffs in error. *Messrs. C. W. Metcalf* and *S. P. Walker* for defendant in error.

*January 16, 1896.* Dismissed with costs, per stipulation, on motion of *Mr. S. P. Walker* for the defendant in error.

---

GERMAN BANK *et al.*, *Plffs. in Err.*, v. STATE OF TENNESSEE and COUNTY OF SHELBY. [No. 691.]

In Error to the Supreme Court of the State of Tennessee.

*Mr. L. B. McFarland* for plaintiffs in error. *Messrs. C. W. Metcalf* and *S. P. Walker* for defendants in error.

*January 16, 1896.* Dismissed with costs, per stipulation, on motion of *Mr. S. P. Walker* for the defendants in error.



Digitized by Google

MECHANICS' SAVINGS BANK *et al.*, *Plffs. in Err.*, *v.* STATE OF TENNESSEE for the Use of the CITY OF MEMPHIS. [No. 670.]

In Error to the Supreme Court of the State of Tennessee.

*Mr. George Gantt* for plaintiffs in error. *Messrs. C. W. Metcalf* and *S. P. Walker* for defendant in error.

*January 16, 1896.* Dismissed with costs, per stipulation, on motion of *Mr. S. P. Walker* for the defendant in error.

---

MECHANICS' SAVINGS BANK *et al.*, *Plffs. in Err.*, *v.* STATE OF TENNESSEE and COUNTY OF SHELBY. [No. 671.]

In Error to the Supreme Court of the State of Tennessee.

*Mr. George Gantt* for plaintiffs in error. *Messrs. C. W. Metcalf* and *S. P. Walker* for defendants in error.

*January 16, 1896.* Dismissed with costs, per stipulation, on motion of *Mr. S. P. Walker* for the defendants in error.

---

CURTIS W. HOLCOMB, *Appt.*, *v.* IRVIN B. WRIGHT *et al.* [No. 556.] and

IRVIN B. WRIGHT *et al.*, *Appts.*, *v.* CURTIS W. HOLCOMB. [No. 577.]

Appeals from the Court of Appeals of the District of Columbia.

*Mr. Walter H. Smith* for Holcomb. *Messrs. C. A. Brandenberg, Henry E. Davis*, and *Edward A. Newman* for Wright *et al.*

*January 20, 1896.* Dismissed, costs to be paid by Curtis W. Holcomb, per stipulations, and mandate granted on motion of *Mr. Walter H. Smith* for Holcomb.

---

MAYOR AND CITY COUNCIL OF COLUMBUS, MISSISSIPPI, *Plffs. in Err.*, *v.* JOHN M. DENNISON *et al.* [No. 839.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Messrs. A. H. Garland* and *R. C. Garland* for plaintiffs in error. *Mr. R. C. Beckett* for defendants in error.

*January 27, 1896.* Denied.

---

CHURCH OF CHRIST AT INDEPENDENCE, MISSOURI, *et al.*, *Appts.*, *v.* REORGANIZED CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS. [No. 849.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth District.

*Mr. C. O. Tichenor* for appellants. *Messrs. Smith McPherson* and *Frank Hagerman* for appellee.

*January 27, 1896.* Denied.

BUZ LUCKEY, *Plff. in Err.*, *v.* UNITED STATES. [No. 768.]

In Error to the Circuit Court of the United States for the Western District of Arkansas.

No counsel for plaintiff in error. *Messrs. Attorney General, Solicitor General, Assistant Attorney General Whitney*, and *Assistant Attorney General Dickinson* for defendant in error.

*January 27, 1896.* Judgment reversed, upon confession of error by the defendant in error, and cause remanded with directions to set aside the verdict and grant a new trial.

---

WILLIAM GARLAND, *Appt.*, *v.* BEAR LAKE & RIVER WATER WORKS & IRRIGATION COMPANY. [Nos. 182, 183.]

Appeals from the Supreme Court of the Territory of Utah.

*Mr. Sanford B. Ladd* for appellant. *Messrs. Jno. F. Dillon* and *C. O. Tichenor* for appellee.

*January 27, 1896.* Dismissed, per stipulaton, on motion of *Mr. John F. Dillon* for the appellee.

---

BENJAMIN TUBMAN, Officer of Registration, *et al.*, *Plffs. in Err.*, *v.* BENJAMIN F. DEMENT. [No. 452.]

In Error to the Court of Appeals of the State of Maryland.

*Mr. J. Hubley Ashton* for plaintiffs in error. No counsel for defendant in error.

*January 27, 1896.* Dismissed with costs, on motion of *Mr. J. Hubley Ashton* for the plaintiffs in error.

---

JAMES S. DAVENPORT, *Plff. in Err.*, *v.* UNITED STATES. [No. 747.]

In Error to the Circuit Court of the United States for the Western District of Arkansas.

*Mr. G. B. Dennison* for plaintiff in error. *Messrs. Attorney General, Solicitor General, Assistant Attorney General Whitney*, and *Assistant Attorney General Dickinson* for defendant in error.

*February 3, 1896.* Judgment reversed, upon confession of error by counsel for the defendant in error, and cause remanded with directions to set aside the verdict and grant a new trial.

---

JOHN K. WHITE, *Plff. in Err.*, *v.* NICHOLAS LENNIG and JOHN B. LENNIG, Executors, etc. [No. 708.]

In Error to the Supreme Court of Appeals of the State of Virginia.

*Mr. John E. Roller* for plaintiff in error. *Messrs. Holmes Conrad* and *Ed. S. Conrad* for defendants in error.

*February 3, 1896.* Dismissed for the want of jurisdiction on the authority of *Johnson* v. *Risk*, 137 U. S. 300 [34: 683], and *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111].



Digitized by Google

WILLIAM HENRY ELDER *et al.*, *Appts.*, *v.* SARAH E. MCCLASKEY *et al.* [No. 862.]
Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
*Messrs. R. A. Harrison, J. C. Harper*, and *Ledyard Lincoln* for appellants. *Messrs. S. T. Crawford* and *J. J. Crawford* for appellees.
*February 3, 1896.* Denied.

---

ELMIRA & HORSEHEADS RAILWAY COMPANY, *Appt.*, *v.* THOMSON-HOUSTON ELECTRIC COMPANY. [No. 855.]
Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.
*Messrs. Edmund Wetmore, Wm. A. Jenner*, and *Thos. B. Kerr* for appellant. *Messrs. F. H. Betts* and *Jas. R. Sheffield* for appellee.
*February 3, 1896.* Denied.

---

CHARLES E. GARITEE, *Piff. in Err.*, *v.* UNITED STATES. [No. 882.]
In Error to the District Court of the United States for the District of Maryland.
No counsel for plaintiff in error. *Mr. Solicitor General Conrad* for defendant in error.
*February 3, 1896.* Docketed and dismissed, on motion of *Mr. Solicitor General Conrad* for the defendant in error.

---

STATE OF MISSOURI, *ex rel.* THOMAS J. TILLEY, *Piff. in Err.*, *v.* JAMES H. SLOVER, Judge, etc. [Nos. 578, 579.]
In Error to the Supreme Court of the State of Missouri.
*Mr. L. H. Bisbee* for plaintiff in error. No counsel for defendant in error.
*February 3, 1896.* Dismissed with costs, on authority of counsel for plaintiff in error.

---

QUAKER CITY NATIONAL BANK, *Piff. in Err.*, *v.* NOLAN COUNTY. [No. 825.]
Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
*Mr. John J. Butts* for plaintiff in error. No counsel for defendant in error.
*March 2, 1896.* Denied.

---

RAVEN GOLD MINING COMPANY, *Appt.*, *v.* MINERS' UNION OF THE TOWN OF ALTMAN *et al.* [No. 484.]
Appeal from the Circuit Court of the United States for the District of Colorado.
*Messrs. C. S. Thomas* and *W. H. Bryant* for appellant. No counsel for appellees.
*March 9, 1896.* Dismissed with costs.

---

FREDERIC P. OLCOTT, *Appt.*, *v.* FRED A. RICE *et al.* [No. 830.]
Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
*Messrs. John G. Winter, A. H. Garland*, and *R. C. Garland* for appellant. *Mr. Henry F. Ring* for appellees.
*March 9, 1896.* Denied.

UNITED STATES, *ex rel.* RUDOLPH DEIMEL, *Appt.*, *v.* JOHN W. ARNOLD, United States Marshal. [No. 913.]
Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
*Mr. Hiram T. Gilbert* for appellant. *Mr. Levy Mayer* for appellee.
*March 9, 1896.* Denied.

---

JOHN M. MACK *et al.*, *Piffs. in Err.*, *v.* JOHN PORTER. [No. 916.]
Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
*Messrs. Samuel Shellabarger* and *J. M. Wilson* for plaintiffs in error. *Messrs. Wm. P. Hubbard* and *Henry M. Russell* for defendant in error.
*March 9, 1896.* Denied.

---

RUFUS BUCK *et al.*, *Piffs. in Err.*, *v.* UNITED STATES. [No. 792.]
In Error to the Circuit Court of the United States for the Western District of Arkansas.
No counsel for plaintiffs in error. *The Attorney General* and *Mr. Assistant Attorney General Dickinson* for defendant in error.
*March 9, 1896.* Judgment affirmed.

---

ED. WILKEY, *alias* one DAVIS, *Piff. in Err.*, *v.* UNITED STATES. [No. 809.]
In Error to the Circuit Court of the United States for the Western District of Arkansas.
No counsel for plaintiff in error. *The Attorney General* and *Mr. Assistant Attorney General Dickinson* for defendant in error.
*March 9, 1896.* Judgment affirmed.

---

GEORGE W. HOWELL *et al.*, *Piffs. in Err.*, *v.* UNITED STATES. [No. 208.]
In Error to the District Court of the United States for the Western District of Missouri.
*Messrs. W. F. Evans* and *Willard Warner* for plaintiffs in error. *The Attorney General* and *Solicitor General* for defendant in error.
*March 9, 1896.* Dismissed on authority of counsel for the plaintiffs in error, on motion of *Mr. Solicitor General Conrad* for the defendant in error.

---

POSTAL TELEGRAPH CABLE COMPANY, *Piff. in Err.*, *v.* NORFOLK & WESTERN RAILROAD COMPANY. [No. 149.]
In Error to the Supreme Court of Appeals of the State of Virginia.
*Messrs. Edgar Allan* and *Wm. A. Maury* for plaintiff in error. *Messrs. Geo. H. Fearons, Geo. S. Bernard*, and *Robert Stiles* for defendant in error.
*March 10, 1896.* Dismissed with costs, on motion of *Mr. William A. Maury* for the plaintiff in error.



Digitized by Google

NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*, v. MICHAEL C. CAVANAUGH. [No. 201.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. A. H. Garland, W. J. Curtis*, and *C. W. Bunn* for plaintiff in error. *Mr. Cyrus Wellington* for defendant in error.

*March 13, 1896.* Dismissed per stipulation.

---

NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*, v. RALPH PETERSON. [No. 205.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. A. H. Garland, Jas. McNaught, W. J. Curtis*, and *C. W. Bunn* for plaintiff in error. *Mr. Cyrus Wellington* for defendant in error.

*March 13, 1896.* Dismissed per stipulation.

---

INTERNATIONAL TRUST COMPANY OF DENVER, COLORADO, *Appt.*, v. NORWICH UNION FIRE INSURANCE SOCIETY. [No. 902.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. Henry Wise Garnett* and *N. T. N. Robinson* for appellant. *Messrs. E. T. Wells, M. F. Taylor*, and *S. G. Williams* for appellee.

*March 16, 1896.* Denied.

---

INSURANCE COMPANY OF NORTH AMERICA, *Plff. in Err.*, v. INTERNATIONAL TRUST COMPANY. [No. 906.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. E. T. Wells, M. F. Taylor*, and *S. G. Williams* for plaintiff in error. *Messrs. Henry Wise Garnett* and *N. T. N. Robinson* for defendant in error.

*March 16, 1896.* Denied.

---

SUN INSURANCE OFFICE OF LONDON, ENGLAND, *Plff. in Err.*, v. INTERNATIONAL TRUST COMPANY OF DENVER, COLORADO. [No. 923.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. T. J. O'Donnell, W. S. Decker*, and *Milton Smith* for plaintiff in error. *Messrs. Henry Wise Garnett* and *N. T. N. Robinson* for defendant in error.

*March 16, 1896.* Denied.

---

JAMES ADDISON PERALTA-REAVIS, *Appt.*, v. UNITED STATES. [No. 933.]

Appeal from the Court of Private Land Claims.

No counsel for appellant. *Mr. Solicitor General Conrad* for appellee.

*March 16, 1896.* Docketed and dismissed, on motion of *Mr. Solicitor General Conrad* for the appellee.

ERWIN DAVIS *et al.*, *Plffs. in Err.*, v. ALGERNON S. PATRICK. [No. 295.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. J. M. Woolworth* for plaintiffs in error. No counsel for defendant in error.

*March 20, 1896.* Dismissed with costs, on authority of counsel for the plaintiffs in error.

---

HENRY C. ROUSE, Receiver, etc., *Plff. in Err.*, v. ROBERT H. CLOUGHLEY. [No. 705.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. James Hagerman* for plaintiff in error. *Mr. Nelson Case* for defendant in error.

*March 23, 1896.* Dismissed for the want of jurisdiction, per stipulation.

---

BALTIMORE & OHIO RAILROAD COMPANY, *Plff. in Err.*, v. WILLIAM SUTHERLAND. [No. 626.]

In Error to the Supreme Court of the State of Ohio.

*Mr. John K. Cowen* for plaintiff in error. *Messrs. G. R. Walker, Jno. H. Doyle*, and *Warren Severance* for defendant in error.

*March 23, 1896.* Dismissed for the want of jurisdiction.

---

JUAN M. CEBALLOS *et al. Appts.*, v. THE WARREN ADAMS, etc. [No. 931.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Mr. Sidney Chubb* for appellants. *Mr. R. D. Benedict* for appellee.

*March 23, 1896.* Denied.

---

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, *Plff. in Err.*, v. CORA E. NIXON. [No. 932.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*Messrs. Edwin B. Smith* and *Edmund Wetmore* for plaintiff in error. *Mr. Stanton Warburton* for defendant in error.

*March 23, 1896.* Denied.

---

UNITED STATES, *Appt.*, v. UNION PACIFIC RAILWAY COMPANY *et al.* [No. 700.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

*The Attorney General* and *Solicitor General* for appellant. *Messrs. M. R. Kelly* and *A. L. Williams* for appellees.

*March 23, 1896.* Dismissed per stipulation.

---

ANNE CROPPER *et al.*, *Plffs. in Err.*, v. ABBY K. MCLANE *et al.* [Nos. 261, 262.]

In Error to the Supreme Court of the District of Columbia.

*Messrs. Blair Lee* and *J. M. Wilson* for plaintiffs in error. *Messrs. Enoch Totten, J. Holdsworth Gordon*, and *Bernard Carter* for defendants in error.

*March 23, 1896.* Dismissed with costs, per stipulation, on motion of *Mr. J. Holdsworth Gordon* for the defendants in error.



Digitized by Google

NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*, v. JEREMIAH SULLIVAN. [No. 203.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. A. H. Garland, W. J. Curtis,* and *C. W. Bunn* for plaintiff in error. *Mr. Henry J. Gjertsen* for defendant in error.

*March 24, 1896.* Dismissed on authority of counsel for the plaintiff in error.

---

SAMUEL T. HUBBARD *et al.*, *Plffs. in Err.*, v. EXCHANGE BANK. [No. 934.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Mr. W. J. Curtis* for plaintiffs in error. *Mr. Jno. R. Abney* for defendant in error.

*March 30, 1896.* Denied.

---

COLLIS P. HUNTINGTON *et al.*, *Appts.*, v. PROCEEDS OF THE STEAMSHIP ADVANCE. [No. 935.],

COLLIS P. HUNTINGTON *et al.*, *Appts.*, v. PROCEEDS OF THE STEAMSHIP ALLIANCA. [No. 936.], and

COLLIS P. HUNTINGTON *et al.*, *Appts.*, v. PROCEEDS OF THE STEAMSHIP VIGILANCIA. [No. 937.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. R. D. Benedict* and *Maxwell Evarts* for appellants. *Mr. Lewis Cass Ledyard* for appellees.

*March 30, 1896.* Denied.

---

JOHN HAMMOND, *Plff in Err.*, v. STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS. [No. 944.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*Messrs. Jno. H. Miller* and *Jas. G. Maguire* for plaintiff in error. No counsel for defendant in error.

*March 30, 1896.* Denied.

---

HERSCHEL CAVERLY, Administrator, etc., *Appt.*, v. DEERE & Co. [No. 877.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Mr. Henry M. Foote* for appellant. *Messrs. L. L. Bond, C. E. Pickard, A. H. Adams,* and *J. L. Jackson* for appellees.

*March 30, 1896.* Denied.

---

THOMAS MATHEWS, *Appt.*, v. MARY E. HANKS, Administratrix, etc. [No. 216.]

Appeal from the Supreme Court of the Territory of Utah.

*Mr. Arthur Brown* for appellant. *Mr. Wm. T. S. Curtis* for appellee.

*April 2, 1896.* Dismissed with costs, on motion of counsel for the appellant, and cause remanded to the supreme court of the state of Utah.

AMERICAN DOCK & IMPROVEMENT COMPANY, *Plff. in Err.*, v. JERSEY CITY. [No. 212.]

In Error to the Court of Errors and Appeals of the State of New Jersey.

*Messrs. J. D. Bedle* and *Robert W. De Forest* for plaintiff in error. *Messrs. Gilbert Collins* and *Wm. D. Edwards* for defendant in error.

*April 13, 1896.* Dismissed for the want of jurisdiction.

---

SOUTHWESTERN RAILROAD COMPANY, *Appt.*, v. CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA *et al.* [No. 409.]

On a certificate from the United States Circuit Court of Appeals for the Fifth Circuit.

*Messrs. Frank H. Miller, Augustus O. Bacon,* and *C. C. Beaman* for appellant. No counsel for appellees.

*April 14, 1896.* Dismissed.

---

CHARLES REEDER, *Appt.*, v. C. C. LEWIS, Administrator, etc. [No. 224.]

Appeal from the Circuit Court of the United States for the District of West Virginia.

*Mr. James M. McColgan* for appellant. *Mr. George E. Price* for appellee.

*April 16, 1896.* Dismissed for the want of jurisdiction.

---

WILLIAM H. STRICKLAND, Master, etc., *Appt.*, v. LEO LOMM, Master, etc. [No. 945.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

*Mr. Wilhelmus Mynderse* for appellant. *Mr. Robert M. Hughes* for appellee.

*April 20, 1896.* Denied.

---

AUSTIN WALRATH, *Appt.*, v. CHAMPION MINING COMPANY. [No. 965.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*Mr. James F. Smith* for appellant. No counsel for appellee.

*April 20, 1896.* Denied.

---

WALLACE P. COOK *et al.*, *Plffs. in Err.*, v. CHARLES A. STREET *et al.* [No. 226.]

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

*Mr. W. H. Webster* for plaintiffs in error. *Mr. F. C. Winkler* for defendants in error.

*April 20, 1896.* Dismissed with costs on the authority of *Credit Co.* v. *Arkansas C. R. Co.* 128 U. S. 258 [32: 448]; *Evans* v. *State Nat. Bank,* 134 U. S. 330 [33: 917]; *Green* v. *Elbert,* 137 U. S. 615 [34:792]; and *Jacobs* v. *George,* 150 U. S. 415 [37: 1127].

---

ROLAND M. FILHIOL, Administrator, *Appt.*, v. UNITED STATES. [No. 228.]

Appeal from the Court of Claims.

*Messrs. Wm. E. Earle* and *Jas. L. Pugh, Jr.*, for appellant. *The Attorney General* and *Mr. Assistant Attorney General Dodge* for appellee.

*April 20, 1896.* Affirmed for want of prosecution.



Digitized by Google

CERTAIN REAL ESTATE KNOWN AS THE GARDO HOUSE, etc., *et al.*, *Appts.*, *v.* UNITED STATES. [No. 298.],

UNITED STATES, *Appt.*, *v.* CERTAIN REAL ESTATE KNOWN AS THE GARDO HOUSE, etc., *et al.* [No. 299.],

CERTAIN REAL ESTATE KNOWN AS THE CHURCH FARM *et al.*, *Appts.*, *v.* UNITED STATES. [No. 300.],

CERTAIN REAL ESTATE KNOWN AS THE COAL LANDS *et al.*, *Appts.*, *v.* UNITED STATES. [No. 301.], and

UNITED STATES, *Appt.*, *v.* CERTAIN REAL ESTATE KNOWN AS THE TITHING YARD AND OFFICES *et al.* [No. 302.]

Appeals from the Supreme Court of the Territory of Utah.

*Messrs. F. S. Richards* and *Le Grand Young* for Real Estate, etc. *The Attorney General* and *Mr. Solicitor General Conrad* for United States.

*April 20, 1896.* Judgments reversed and causes remanded to the supreme court of the state of Utah for such further proceedings as to law and justice may appertain, in conformity with the provisions of the joint resolution of Congress "providing for the disposition of certain property now in the hands of the receiver of the Church of Jesus Christ of Latter Day Saints," approved March 28, 1896.

---

THOMAS FARMER, *Plff. in Err.*, *v.* NATIONAL LIFE ASSOCIATION OF HARTFORD, CONNECTICUT. [No. 287.]

In Error to the Circuit Court of the United States for the Eastern District of New York.

*Messrs. A. G. McDonald* and *Jas. P. Judge* for plaintiff in error. *Mr. Roger Foster* for defendant in error.

*April 20, 1896.* Dismissed per stipulation.

---

FARMERS' LOAN & TRUST COMPANY, Trustee, etc., *Appt.*, *v.* CHARLES SCOTT. [No. 785.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. Jas. W. Lawrence* for appellant. *Messrs. Chas. E. Joslin* and *Chas. A. Willard* for appellee.

*April 24, 1896.* Dismissed per stipulation.

---

MARTIN & HILL CASH CARRIER COMPANY, *Appt.*, *v.* JOSEPH C. MARTIN. [No. 956.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

*Mr. Samuel Norris, Jr.*, for appellant. *Mr. F. P. Fish* for appellee.

*April 27, 1896.* Denied.

---

WILLIAM H. SMITH, *Plff. in Err.*, *v.* BENJAMIN SELLECK. [No. 286.]

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

*Mr. Lysander Hill* for plaintiff in error. *Messrs. J. V. Quarles* and *Reese H. Voorhees* for defendant in error.

*April 27, 1896.* Dismissed for the want of jurisdiction.

ILLINOIS CENTRAL RAILROAD COMPANY, *Plff. in Err.*, *v.* WILLIAM WALKER. [No. 244.]

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

*Messrs. Edward Mayes* and *James Fentress* for plaintiff in error. *Mr. L. Brame* for defendant in error.

*April 27, 1896.* Dismissed for the want of jurisdiction.

---

MARY M. BLACK, Administratrix, etc., *Plff. in Err.*, *v.* MARY K. L. BLACK. [No. 233.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

*Messrs. Francis Tracy Tobin* and *Henry Budd* for plaintiff in error. *Messrs. Arthur Biddle* and *George W. Biddle* for defendant in error.

*April 27, 1896.* Dismissed for the want of jurisdiction on the authority of *Smith* v. *McKay*, 161 U. S. 355 [40: 731].

---

M. M. WHEELER *et al.*, *Appts.*, *v.* J. C. CLOYD *et al.* [No. 235.]

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

*Mr. H. Tompkins* for appellants. *Messrs. J. C. Clayton, Lemuel Skidmore, Edwin Beecher,* and *Henry C. Whitney* for appellees.

*April 27, 1896.* Dismissed for the want of jurisdiction.

---

GILMORE G. SCRANTON, *Plff. in Err.*, *v.* EBEN S. WHEELER. [No. 292.]

In Error to the United States Circuit Court of Appeals for the Sixth Circuit.

*Mr. John C. Donnelly* for plaintiff in error. *The Attorney General* and *Solicitor General* for defendant in error.

*April 27, 1896.* Judgment reversed, costs in this court, United States circuit court of appeals, and in circuit court to be paid by defendant in error, and cause remanded to the circuit court of the United States for the western district of Michigan, with instructions to remand it to the circuit court of Chippewa county, Michigan, on motion of *Mr. Solicitor General Conrad* for the defendant in error.

---

MORSE ARMS MANUFACTURING COMPANY, *Appt.*, *v.* UNITED STATES. [No. 169.]

Appeal from the Court of Claims.

*Messrs. H. E. Paine* and *Jas. A. Skilton* for appellant. *The Attorney General* for appellee.

*April 27, 1896.* Dismissed, on motion of *Mr. James A. Skilton* for the appellant.

---

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*, *v.* CITY OF CHESTER. [No. 257.]

In Error to the Supreme Court of the State of Pennsylvania.

*Mr. Silas W. Pettit* for plaintiff in error. No counsel for defendant in error.

*April 27, 1896.* Dismissed with costs, on the authority of counsel for the plaintiff in error.



Digitized by Google

JOEL YANCEY, *Plff. in Err.*, v. P. C. IVY *et al.* [No. 726.]

In Error to the Supreme Court of the State of Missouri.

*Messrs. J. N. Morrison, W. M. Hough*, and *Warwick Hough* for plaintiff in error. *Mr. George G. Vest* for defendants in error.

*May 4, 1896.* Dismissed for the want of jurisdiction.

---

WAYNE LUMBER COMPANY, *Plff. in Err.*, v. CALVIN F. COLLINS *et al.* [No. 727.]

In Error to the Supreme Court of the State of Missouri.

*Messrs. J. N. Morrison* and *W. M. Hough* for plaintiff in error. *Mr. Eleneious Smith* for defendants in error.

*May 4, 1896.* Dismissed for the want of jurisdiction.

---

WILLIAM STARLING, *Appt.*, v. WEIR PLOW COMPANY *et al.* [No. 604.]

Petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

*Mr. William Starling in propria persona.* No opposition.

*May 4, 1896.* Denied.

---

DANIEL HAMER, Tax Collector, etc., *Appt.*, v. OGDEN CITY. [No. 882.]

Appeal from the Supreme Court of the Territory of Utah.

*Messrs. F. S. Richards, Samuel Shellabarger, J. M. Wilson*, and *Chas. C. Richards* for appellant. *Mr. Arthur Brown* for appellee.

*May 4, 1896.* Motion to remand granted and cause remanded to the supreme court of the state of Utah for further proceedings in conformity to law.

---

FRANK L. NEALL, Trustee, etc., *Appt.*, v. JOHN J. SCHRADER. [No. 976.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Messrs. J. Rodman Paul* and *John G. Johnson* for appellant. *Messrs. Henry Flanders* and *E. F. Pugh* for appellee.

*May 4, 1896.* Denied.

---

EUGENIA CRIMP, Executrix, etc., *Appt.*, v. MCCORMICK CONSTRUCTION COMPANY *et al.* [No. 955.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Mr. John N. Jewett* for appellant. *Mr. Charles M. Sturges* for appellees.

*May 4, 1896.* Denied.

---

*Ex parte:* In the Matter of WM. LOCHREN, Commissioner of Pensions, *Petitioner.* [No. 11, Original.]

*The Attorney General* and *Mr. Assistant Attorney General Whitney* for petitioner. No opposition.

*May 4, 1896.* Mandamus awarded, on authority of *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447 [38: 1047].

BENJAMIN R. FORMAN, *Plff. in Err.*, v. ROSE CHOPPIN *et al.* [No. 255.]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

*Mr. E. Howard McCaleb* for plaintiff in error. No counsel for defendants in error.

*May 4, 1896.* Dismissed for the want of jurisdiction.

---

MARY J. GARNER, *Appt.*, v. SECOND NATIONAL BANK OF PROVIDENCE *et al.* [No. 657.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

*Mr. Alex. Thain* for appellant. *Messrs. Jas. Tillinghast, A. T. Britton*, and *A. B. Browne* for appellees.

*May 18, 1896.* Denied.

---

JOSEPH FRANKEL'S SONS, *Appts.*, v. UNITED STATES. [No. 985.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. W. Wickham Smith, Chas. Curie*, and *David Ives Mackie* for appellants. *The Attorney General* and *Mr. Assistant Attorney General Whitney* for appellee.

*May 18, 1896.* Denied.

---

I. H. HATHAWAY & CO., *Appts.*, v. S. B. MARTS *et al.* [No. 987.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

No counsel for appellants. *Messrs. E. E. Blodgett* and *E. P. Carver* for appellees.

*May 18, 1896.* Denied.

---

THE CERES, etc., *et al.*, *Appts.*, v. GERHARD WESSELS *et al.* [No. 992.], and SYDSVENSKA ANGFARTYGS AKTIEBOLAGET, *Appts.*, v. GERHARD WESSELS *et al.* [No. 993.]

Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Mr. J. Parker Kirlin* for The Ceres. *Mr. Harrington Putnam* for Wessels.

*May 18, 1896.* Denied.

---

AMERICAN WATERWORKS COMPANY OF ILLINOIS *et al.*, *Appts.*, v. FARMERS' LOAN & TRUST COMPANY. [No. 994.], and THADDEUS S. CLARKSON, Receiver, etc., *Appt.*, v. FARMERS' LOAN & TRUST COMPANY. [No. 995.]

Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr John L. Webster* for appellants. *Mr. David McClure* for appellee.

*May 18, 1896.* Denied.



Digitized by Google

JAMES A. SHREVE *et al., Plffs. in Err.*, v. WALTER S. CREESMAN *et al.* [No. 996.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. T. M. Patterson* and *C. C. Parsons* for plaintiffs in error. *Messrs. Chas. J. Hughes, Jr.*, and *Tyson S. Dines* for defendants in error.

*May 18, 1896.* Denied.

---

HENRY C. ROUSE, Receiver, *Plff. in Err.*, v. JOHN E. HORNSBY. [No. 997.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. A. B. Browne, Jas. Hagerman*, and *T. N. Sedgwick* for plaintiff in error. *Mr. Nelson Case* for defendant in error.

*May 18, 1896.* Denied.

---

UNITED STATES, *Plff. in Err.*, v. SAMUEL ZUCKER *et al.* [No. 483.]

In Error to the District Court of the United States for the Southern District of New York.

*The Attorney General* and *Solicitor General* for plaintiff in error. *Mr. Abram J. Rose* for defendants in error.

*May 18, 1896.* Dismissed per stipulation, on motion of *Mr. Solicitor General Conrad* for the plaintiff in error.

---

CRAWFORD GOLSBY, *alias* CHEROKEE BILL, *Plff. in Err.*, v. UNITED STATES. [No. 728.]

In Error to the Circuit Court of the United States for the Western District of Arkansas.

No counsel for plaintiff in error. *The Attorney General* and *Solicitor General* for defendant in error.

*May 18, 1896.* Dismissed, the cause having abated, on motion of *Mr. Solicitor General Conrad* for the defendant in error.

PRESS PUBLISHING COMPANY, *Plff. in Err.*, v. ALEXANDER MCDONALD. [No. 1012.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. Chas. N. Harris* and *Jno. M. Bowers* for plaintiff in error. *Messrs. Joseph G. Deans* and *Horace E. Deming* for defendant in error.

*May 25, 1896.* Denied.

---

FRANK C. ROSS, *Appt.*, v. EDWIN ELLIS *et al.* [No. 1021.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

No counsel for appellant. *The Attorney General* and *Solicitor General* for appellees.

*May 25, 1896.* Docketed and dismissed with costs, on motion of *Mr. Solicitor General Conrad* for the appellees.

---

JOHN COOK *et ux.*, *Appts.* v. EDWIN ELLIS *et al.* [No. 1022.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

No counsel for appellants. *The Attorney General* and *Solicitor General* for appellees.

*May 25, 1896.* Docketed and dismissed with costs, on motion of *Mr. Solicitor General Conrad* for the appellees.

---

GEORGE H. BARBER, *Plff. in Err.*, v. HENRY P. ISAACS. [No. 954.]

In Error to the Supreme Court of the State of Washington.

*Mr. John H. Mitchell* for plaintiff in error. No counsel for defendant in error.

*May 25, 1896.* Dismissed with costs, on motion of *Mr. John H. Mitchell* for the plaintiff in error.



Digitized by Google

163 U. S. 1-30, 41 L. 49, WESTERN UNION TEL. CO. v. TAGGART.

**Taxation.**— States may tax property of those engaged in interstate commerce, if national powers not interfered with, p. 14.

Cited in dissenting opinion in Adams Exp. Co. v. Ohio, 165 U. S. 248, 41 L. 705, 17 S. Ct. 319, majority upholding law taxing express companies in proportion infra-State mileage.

**Taxation.**— State tax on State lines of interstate telegraph company may be proportioned to total mileage, p. 18.

Approved in Adams Exp. Co. v. Ohio, 165 U. S. 229, 41 L. 698, 17 S. Ct. 312, valuation of assessors under like statute cannot be overthrown merely by showing it not correct; Western Union Tel. Co. v. State, 146 Ind. 58. 59. 44 N. E. 795, arguendo.

**Taxation.**— Cost of property or its replacement is not true measure of its value, p. 28.

Approved in Adams Exp. Co. v. Ohio, 165 U. S. 221, 41 L. 695, 17 S. Ct. 309, and Wells, Fargo & Co.'s Exp. v. Crawford Co., 63 Ark. 589, 40 S. W. 713, 37 L. R. A. 375, upholding same method for taxing express companies.

Distinguished in People v. Clapp, 152 N. Y. 493, 46 N. E. 843, 39 L. R. A. 239, in assessing railroad's land within town, valuation cannot be based upon cost, earnings and rental of whole road, but at cost of reproduction.

**Taxation** by State of telegraph lines proportioned to total mileage, less allowance for greater proportional value outside of State, is valid, p. 27.

Approved in Adams Exp. Co. v. Ohio, 165 U. S. 220, 41 L. 695, 17 S. Ct. 309, reaffirming validity of proportionate mileage basis of taxing express companies; Adams Exp. Co. v. Ohio, 166 U. S. 223, 41 L. 978, 17 S. Ct. 607, if part of corporation's property is exempt, fact must be considered in fixing assessment; American, etc., Transit Co. v. Hall, 174 U. S. 78, 19 S. Ct. 603, upholding tax based on number of cars habitually used in State; Western Union Tel. Co. v. State, 147 Ind. 275, 45 N. E. 473, and Western Union Tel. Co. v. State, 146 Ind. 57, 44 N. E. 794, reaffirming constitutionality of law.

Distinguished in State Board v. Holliday, 150 Ind. 254, 49 N. E.



Digitized by Google

26, 42 L. R. A. 639, majority holding life insurance policies not taxable. See 62 Am. St. Rep. 175, note.

Miscellaneous.— Cited in Legler v. Paine, 147 Ind. 189, 45 N. E. 606, as to stare decisis.

163 U. S. 31-48, 41 L. 60, FARMERS' LOAN, ETC., CO. v. CHICAGO, ETC., RY.

Corporate stockholder selling his stock to rival concern after offering to officers of his own commits no breach of trust, p. 43.

Corporate stockholder is not bound to continue such to allow another to make profit out of negotiation pending, p. 44.

Cited in 57 Am. St. Rep. 379, note.

Corporate stockholder is not bound to sacrifice personal interests to secure corporation's welfare, p. 44.

Railroads.—Wisconsin act of 1882, transferring land grant of Chicago, Portage, etc., railroad to Chicago, St. Paul, etc., railroad, did not burden transferee with former's debts, p. 47.

Approved in Angle v. Chicago, etc., Ry., 94 Fed. 718, 720, holder of railroad stock, issued as fully paid in payment of claim, takes free from trusts in favor of railroad by previous contracts.

Miscellaneous.— Cited in Angle v. Chicago, etc., Ry., 95 Fed. 215 as to res adjudicata.

163 U. S. 49-56, 41 L. 66, KIRK v. UNITED STATES.

Patentee's assignee cannot sue government for royalties where patent issued after suit begun, and invalid, p. 55.

Approved in Ball, etc., Fastener Co. v. Cohn, 90 Fed. 665, assignee cannot recover for infringement before grant of patents.

Appeal.— Findings of Court of Claims, not excepted to, are conclusive on appeal, p. 56.

163 U. S. 56-63, 41 L. 69, WIGGAN v. CONOLLY.

Treaty negotiated with Indians prior to, but ratified after, termination of tribal relation by becoming citizens, is valid, p. 60.

Approved in Laughton v. Nadeau, 75 Fed. 794, laches cannot be imputed to one under disability as a tribal Indian.

Indian treaty, prohibiting alienation of lands patented to minor, invalidates guardian's deed, p. 63.

Followed in Laughton v. Nadeau, 75 Fed. 793, a like case.

163 U. S. 63-74, 41 L. 72, DIBBLE v. BELLINGHAM BAY LAND CO.

Supreme Court may examine State court's opinion to ascertain whether Federal question decided, p. 69.

Digitized by Google

**Supreme Court** will not take jurisdiction where non-Federal ground of State decision is valid and sufficient, p. 69.

Approved in Warren v. Chandos, 169 U. S. 735, 42 L. 1216, 18 S. Ct. 949, dismissing for want of jurisdiction.

**Supreme Court's** right to review State decision is for it to decide; State judge's certificate cannot control, p. 69.

**Courts.**— On error to State court, office of presiding judge's certificate is to render indefinite parts of record certain, p. 70.

**Supreme Court** can re-examine State decision only where record shows upholding of law assailed on Federal grounds, p. 70.

Approved in Zadig v. Baldwin, 166 U. S. 488, 41 L. 1088, 17 S. Ct. 640, neither statement in brief nor oral argument are sufficient to establish presence of Federal question; Miller v. Cornwall R. R., 168 U. S. 134, 42 L. 410, 18 S. Ct. 35, reaffirming rule.

**Courts.**— Denial of Federal right or authority must appear on face of State record, p. 71.

Approved in State v. Schuman, 36 Or. 24, 58 Pac. 663, claim of immunity because prohibited sale was of original imported packages cannot be first set up on appeal; dissenting opinion in Meyer v. Richmond, 172 U. S. 101, 19 S. Ct. 114, arguendo.

**Supreme Court** follows State, construing State statute of limitations, p. 73.

Approved in Noble v. Mitchell, 164 U. S. 372, 41 L. 474, 17 S. Ct. 112, State construction of code sections regulating insurance companies is controlling; Wheeling Bridge, etc., Ry. v. Reymann Brewing Co., 90 Fed. 195, 61 U. S. App. 540, Federal courts should follow State decisions as to laches affecting rights to title or possession of realty; Indianapolis v. Navin, 151 Ind. 158, 51 N. E. 81, 41 L. R. A. 344, conformity of State statute to State Constitution is for final determination of highest State court, irrespective of Federal decisions.

**Courts.**— State decision that statute runs when right to Federal patent accrues, not from issuance, denies no Federal right, p. 73.

163 U. S. 75–81, 41 L. 76, CORNELL v. GREEN.

**Circuit Court** decree cannot be appealed to Supreme Court where construction of Constitution neither expressed nor requested, p. 79.

Approved in Muse v. Arlington Hotel Co., 168 U. S. 435, 42 L. 533, 18 S. Ct. 111, definite issue in respect to constitutional right must be distinctly deducible from record; Consolidated Water Co. v. Babcock, 173 U. S. 702, 19 S. Ct. 874, dismissed on authority of principal case.

**Circuit Court** decree treated as involving practice, not Constitution, is not appealable direct to Supreme Court, p. 79.

Digitized by Google

163 U. S. 81-92, 41 L. 78, LOWE v. KANSAS.

**Constitutional guaranty of due process requires proceeding in accord with established English and American usage in similar cases, p. 85.**

Approved in Jones v. Brim, 165 U. S. 184, 41 L. 679, 17 S. Ct. 284, Utah law rendering party driving stock on hillside liable for damage from stones dislodged; Atchison, etc., R. R. v. Matthews, 174 U. S. 105, 19 S. Ct. 613, act including attorneys' fees in judgments for damages from fires from locomotives; Caldwell v. Wilson, 121 N. C. 461, 28 S. E. 559, provision for suspension of railroad commissioners becoming interested in railroads; State v. Call, 121 N. C. 647, 28 S. E. 518, act requiring examination of persons desiring to practice medicine, exempting those already practicing; Railroad v. Harris, 99 Tenn. 706, 43 S. W. 120, act imposing privilege tax on all railroads not subject to ad valorem tax.

**Constitution.— Law permitting jury to declare prosecutor of criminal libel suit acted maliciously, and punishing him, is valid, p. 85.**

Approved in Colby v. Backus, 19 Wash. 348, 67 Am. St. Rep. 732, 733, 53 Pac. 367, statute authorizing justices of peace to impose costs upon complaining witness and imprison until paid; dissenting opinion in Gulf, etc., Ry. v. Ellis, 165 U. S. 166, 41 L. 672, 17 S. Ct. 261, majority holding Texas law permitting successful plaintiffs to recover costs and attorneys' fees from railroads.

163 U. S. 93-99, 41 L. 82, NORTHERN PAC. R. R. v. EGELAND.

**Railroads.— Whether conductor is negligent in ordering section hand to jump, without stopping train, is for jury, p. 99.**

Approved in Cable v. Southern Ry., 122 N. C. 898, 29 S. E. 378, where conductor advised passenger to jump from slowly-moving train.

**Railroads.— Whether section hand guilty of contributory negligence, jumping from moving train, is for jury, p. 99.**

Approved in Patton v. Southern Ry., 82 Fed. 984, 42 U. S. App. 567, where different inferences might be drawn from facts, case should go to jury; Fitchburg R. R. v. Nichols, 65 Fed. 949, 50 U. S. App. 304, affirming recovery of cattle tender struck by projecting water spout while going to caboose; Cable v. Southern Ry., 122 N. C. 899, 29 S. E. 379, where passenger alighted from moving train at conductor's request.

163 U. S. 100-101, 41 L. 87, TELFENER v. RUSS.

**Public lands.— Field-notes, made up in office, held insufficient in Texas to enforce sale of lands under act of 1879, p. 100.**

**Not cited.**

Digitized by Google

163 U. S. 101-109, 41 L. 87, MURRAY v. LOUISIANA.

**Removal** petition, alleging exclusion of negroes from jury, is insufficient, unless showing exclusion by virtue of State law, p. 105.

**Witnesses.**— Refusal of subpœna duces tecum is not error where documents desired are not specified, p. 107.

**Witnesses.**— It is not error to refuse subpœna duces tecum to jury commissioners to furnish names on jury list, not specifying books, p. 107.

**Appeal.**— Deposition erroneously admitted will be presumed trivial error where record does not state substance, p. 158.

**Courts.**— State court's denial of contention that law special and not properly passed, raises no Federal question, p. 108.

**Constitution,** fourteenth amendment to, is not infringed by law giving jury commissioners judicial powers, where negroes treated like whites, p. 108.

**Not cited.**

163 U. S. 109-118, 41 L. 90, SALINA STOCK CO. v. SALINA CREEK IRR. CO.

**Supreme Court** has nothing to review in territorial Supreme Court record containing no facts or exceptions to rulings, p. 118.

Approved in Zeckendorf v. Zeckendorf, 171 U. S. 686, 19 S. Ct. 882, reaffirming rule; Marshall v. Burtis, 172 U. S. 635, 19 S. Ct. 292, in absence of findings, or statement in nature of special verdict, judgment must be affirmed.

163 U. S. 118-132, 41 L. 93, BARNITZ v. BEVERLY.

**Constitutional law.**— Changes in laws for enforcement of contract, seriously interfering with enforcement, are invalid, p. 122.

Approved in Shapleigh v. San Angelo, 167 U. S. 657, 42 L. 314, 17 S. Ct. 961, upon reincorporation of disincorporated city, contract obligations of old fall on new city; Low v. Blackford, 87 Fed. 406, mortgage and bonds and coupons secured thereby are construable as one contract; Union Bank v. Board of Commrs., 90 Fed. 9, contracts can no more be impaired by judicial decisions than by legislation; Deck v. Whitman, 96 Fed. 884, Federal courts should follow State statutes in foreclosure suits. See 54 Am. St. Rep. 811, note.

**Constitutional law.**— Act creating or enlarging time for redemption from foreclosure cannot apply to prior mortgages, p. 129.

Approved in Bluff City Lumber Co. v. Bloom, 64 Ark. 495, 43 S. W. 504, right of purchaser at lien sale of invalid homestead is not prejudiced by subsequent legislative validation thereof. Following cases held respective laws invalid: Heath, etc., Mfg. Co. v. Union Oil, etc., Co., 83 Fed. 777, statute permitting debtor's assignment after attachment to vitiate same; Crowther v. Fidelity

Digitized by Google

Ins., etc., Co., 85 Fed. 44, 42 U. S. App. 701, provision (1887) that persons supplying (specified) companies shall have lien prior to mortgages executed since 1877, as to mortgage executed 1881; Savings Bank v. Barrett, 126 Cal. 417, 58 Pac. 916, extension of period of redemption is inapplicable to pre-existing mortgages; Paris v. Nordburg, 6 Kan. App. 261, 51 Pac. 800, statute creating right of redemption as to sale under prior mortgages; State v. Sears, 29 Or. 582, 54 Am. St. Rep. 808, 46 Pac. 785, law extending time for redemption from execution sales, as to foreclosure sales under prior mortgages; Hollister v. Donahue, 11 S. Dak. 500, 78 N. W. 960, statute allowing year's extension of redemption period on mortgagor's payment of interest; Swinburne v. Mills, 17 Wash. 621, 61 Am. St. Rep. 939, 50 Pac. 492, statute staying sale under foreclosure for year and requiring it to be for 80 per cent. of appraised value; Bettman v. Cowley, 19 Wash. 214, 53 Pac. 56, 40 L. R. A. 819, statute providing against extension of judgment liens as to pre-existing judgments; Second Ward Sav. Bank v. Schranck, 97 Wis. 264, 73 N. W. 36, 39 L. R. A. 575, provisions of insolvency law applicable to notes and judgments thereon; Peninsular, etc., Color Works v. Union, etc., Paint Co., 100 Wis. 495, 69 Am. St. Rep. 939, 76 N. W. 361, 42 L. R. A. 333, law providing that upon assignment made ten days after attachment of insolvent's property, attachment shall be dissolved as to pre-existing creditors. See 54 Am. St. Rep. 809, note.

Distinguished in State v. Gilliam, 18 Mont. 109, 45 Pac. 661, 33 L. R. A. 557, upholding law extending time for redemption, even as to sales under prior mortgages.

163 U. S. 132–140, 41 L. 101, UNITED STATES v. RIDER.

Courts.— Certificate of division may not be had in criminal cases since act of 1891, p. 139.

Approved in United States v. Hewecker, 164 U. S. 48, 41 L. 346, 17 S. Ct. 19, certificates in criminal cases cannot be granted on request of defendants or prosecution.

Courts.— Only questions as to Circuit Court's jurisdiction, after final judgment, may be certified, since act of 1891, p. 139.

Approved in United States v. Hewecker, 164 U. S. 47, 41 L. 346, 17 S. Ct. 18, and Blythe v. Hinckley, 173 U. S. 506, 19 S. Ct. 499, both reaffirming rule; Bardes v. Hawarden First Nat. Bank, 175 U. S. 528, 20 S. Ct. 196, rule is applicable to cases arising under bankruptcy act of 1898; The Paquete Habana, 175 U. S. 685, 20 S. Ct. 294, generally.

Courts.— Certificates of division, under act of 1891, are governed by same general rules as previously, p. 139.

Courts.— Act of 1891 furnishes exclusive rule for appellate jurisdiction from inferior Federal courts, p. 140.

Approved in The Paquete Habana, 175 U. S. 684, 20 S. Ct. 293,

Digitized by Google

act of 1891 gave Supreme Court appellate jurisdiction from all final sentences and decrees in prize causes, irrespective of amount.

163 U. S. 140–142, 41 L. 104, HARRISON v. UNITED STATES.

**Jury.**— One tried for robbing mail carrier and putting his life in jeopardy is entitled to ten peremptory challenges, p. 141.

**Not cited.**

163 U. S. 142–154, 41 L. 107, ILLINOIS CENT. R. R. v. ILLINOIS.

**Railroads.**— Illinois Central's line from Chicago through Cairo to New Orleans, held a national highway for interstate commerce, p. 149.

Cited in Lake Shore, etc., Ry. v. Ohio, 173 U. S. 330, 19 S. Ct. 483, arguendo.

**Courts.**— State decision that State law required trains going through county seat to stop at station, presents no Federal question, p. 152.

Approved in Missouri Pac. Ry. v. Nebraska, 164 U. S. 414, 41 L. 494, 17 S. Ct. 134, highest State court's construction must be accepted in determining whether statute is constitutional; Indianapolis v. Navin, 151 Ind. 159, 51 N. E. 81, 41 L. R. A. 344, conformity of State statute to State Constitution is for final determination by highest State court, irrespective of Federal decisions; Lake Shore, etc., Ry. v. Ohio, 173 U. S. 307, 19 S. Ct. 474, arguendo.

**Courts.**— Decision that law requiring trains to stop at county seats does not hinder Federal mails, presents Federal question, p. 153.

Cited in dissenting opinion in Lake Shore, etc., Ry. v. Ohio, 173 U. S. 333, 19 S. Ct. 483, majority upholding act requiring trains to stop at certain stations.

**Commerce** is unlawfully interfered with by State law requiring fast mail on interstate railway to turn aside to county seat, p. 153.

Approved in Lake Shore, etc., Ry. v. Smith, 173 U. S. 688, 19 S. Ct. 567, Michigan statute, compelling railroads to issue 1,000-mile tickets with certain conditions, is unconstitutional.

Distinguished in Gladson v. Minnesota, 166 U. S. 431, 41 L. 1066, 17 S. Ct. 628, upholding Minnesota act requiring trains to stop at county seats; Lake Shore, etc., Ry. v. Ohio, 173 U. S. 306, 19 S. Ct. 473 (see dissenting opinion in 173 U. S. 321, 322, 334, 19 S. Ct. 479, 484), upholding Ohio act requiring trains to stop at stations of certain size.

**Post-office.**— State law, unnecessarily interfering with rapid transit of mails, is not reasonable police regulation, p. 154.

Approved in Lake Shore, etc., Ry. v. Smith, 173 U. S. 687, 19 S. Ct. 566, holding Michigan statute requiring issuance of 1,000-mile tickets void.

Distinguished in Lake Shore, etc., Ry. v. Ohio, 173 U. S. 303, 19

Digitized by Google

S. Ct. 472 (see dissenting opinion in 178 U. S. 323, 19 S. Ct. 480), upholding Ohio statute requiring stoppage of trains at certain stations.

163 U. S. 155–159, 41 L. 111, WEBSTER v. DALY.

Circuit Court decree, adopting mandate from Circuit Court of Appeals, is not appealable to Supreme Court, p. 159.

Not cited.

163 U. S. 160–168, 41 L. 113, PEREGO v. DODGE.

Courts.— Territorial District Court has jurisdiction of suit over possession of mining claim under R. S., § 2326, p. 164.

Approved in Mt. Rosa Min., etc., Land Co. v. Palmer, 26 Colo. 62, 77 Am. St. Rep. 251, 56 Pac. 178, located lode claim is interest in property supporting action to quiet title.

Appeal.— Complainant quieting title in equity cannot, on appeal, urge that complaint defective because adequate remedy at law, p. 164.

Approved in Lone Jack Min. Co. v. Megginson, 82 Fed. 91, 48 U. S. App. 457, objection to jurisdiction on ground of remedy at law comes too late on appeal.

Appeal.— Where answer, seeking affirmative relief, treated as cross-bill at trial, objection because no cross-complaint is too late on appeal, p. 165.

Equity court is not bound to submit issues of fact to jury and may disregard verdict if it does, p. 165.

Equity.— Complainant proceeding in equity to quiet title cannot, on appeal, claim deprivation of jury trial, p. 166.

Mines.— R. S., § 2326, as amended in 1881, does not require jury trial in proceedings for mining patent, p. 167.

Approved in Black v. Elkhorn Min. Co., 163 U. S. 449, 41 L. 223, 16 S. Ct. 1102, Bonner v. Meikle, 82 Fed. 698, and Gillis v. Downey, 85 Fed. 487, 489, 56 U. S. App. 575, 577, suit to determine title to mining claim is in law or equity, depending on possession or non-possession of plaintiff; Shoshone Min. Co. v. Rutter, 87 Fed. 805, 59 U. S. App. 546, suits, under § 2326, are equitable, not legal; Davidson v. Calkins, 92 Fed. 238, right of action of claimant to mining claim, out of possession, is at law; Providence Gold-Min. Co. v. Burke, — Ariz. —, 57 Pac. 644, verdict by three-fourths jury is sufficient in action under § 2326; California Oil, etc., Co. v. Miller, 96 Fed. 18, arguendo.

163 U. S. 169–204, 41 L. 118. SINGER MFG. CO. v. JUNE MFG. CO.

Patents.— Public may use name of patented machine after patent's expiration, where it has become generic; e. g., Singer sewing-machine, p. 185.

Digitized by Google

Reaffirmed in Centaur Co. v. Heinsfurter, 84 Fed. 957, 56 U. S. App. 11.

Patents.— Public may manufacture machine in form in which constructed before expiration of patent, p. 185.

Patents.— Public acquires right to generic designation of thing patented after patent's expiration, p. 185.

Approved in Deering Harvester Co. v. Whitman, etc., Mfg. Co., 86 Fed. 765, stamping letters and figures on parts of machinery is for purpose of identification and creates no trademark.

Distinguished in Batcheller v. Thomson, 93 Fed. 664, expiration of patent does not terminate exclusive right to trademark antedating same.

Patent having expired, public has right to use of its generic name, though also surname of patentee; e. g., Singer, p. 186.

Trademarks.— Right to use surname as designation of article passes to public by dedication or abandonment, p. 186.

Trademarks.— Public right to generic name, dedicated as result of monopoly, is subject to regulation, p. 188.

Approved in Atwater v. Castner, 88 Fed. 643, 50 U. S. App. 396, geographical names, long used, may be protected as tradename.

Trademarks.— One using generic name of machine, after patent's expiration, must accompany it with clear statement of name of true manufacturer, p. 200.

Approved in Duryea v. National Starch-Mfg. Co., 79 Fed. 652, 45 U. S. App. 649, refusing to enjoin use of own name by maker former member of plaintiff corporation; Centaur Co. v. Heinsfurter, 84 Fed. 959, 56 U. S. App. 16, Centaur Co. v. Killenberger, 87 Fed. 726, and Centaur Co. v. Marshall, 92 Fed. 606, generic name becomes public property on expiration of patent, but new makers must not so use as to deceive public; Pillsbury, etc., Mills Co. v. Eagle, 86 Fed. 628, 41 L. R. A. 173, and Dennison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. 662, no one has right to dress articles so as to cause them to be mistaken for those produced by another; Baker v. Baker, 87 Fed. 211, one entering particular trade may not use own name in way to cause confusion between his goods and those of another; Atwater v. Castner, 88 Fed. 644, 50 U. S. App. 397, 398, enjoining use of word "Pocahontas," as tradename for coal; Stuart v. F. G. Stewart Co., 91 Fed. 246, 63 U. S. App. 567, "Dr. Stewart's Dyspepsia Tablets" held a fraudulent imitation of "Stuart's Dyspepsia Tablets;" Centaur Co. v. Neathery, 91 Fed. 900, 62 U. S. App. 572, new manufacturer, after expiration of patent, must identify goods; Illinois Watch-Case Co. v. Elgin Nat. Watch Co., 94 Fed. 670, suit to enjoin unfair competition rests upon ground of fraud, and Federal jurisdiction depends on citizenship; American, etc., Watch Co. v. United States Watch Co., 173

Digitized by Google

Mass. 87, 73 Am. St. Rep. 265, 53 N. E. 142, 43 L. R. A. 830, enjoining use of word "Waltham" without some distinguishing statement; Robinson v. Storm, 103 Tenn. 49, 52 S. W. 883, person may be enjoined from using own name in manner to defraud purchasers; Fairbanks v. Des Moines, etc., Mfg. Co., 96 Fed. 973, generally.

Tradename, dedicated to public by expiration of patent, cannot be made private property by use in trademark, p. 203.

163 U. S. 205–207, 41 L. 131, SINGER MFG. CO. v. BENT.

Trademark imitated with intent to deceive, with only pretext of variance, is infringed, p. 206.

Reaffirmed in Centaur Co. v. Neathery, 91 Fed. 900.

163 U. S. 207–228, 41 L. 132, BACON v. TEXAS.

Supreme Court issues error to inferior State court where highest State court refuses to review, p. 215.

Supreme Court has jurisdiction for State's impairment of contract only where done by some statute or construction thereof, p. 216.

Approved in McCullough v. Virginia, 172 U. S. 116, 19 S. Ct. 139, Supreme Court is not limited to mere consideration of language used in opinion. See 66 Am. St. Rep. 335, note.

Supreme Court has no jurisdiction where State court finds no contract ever existed for non-compliance with original act, p. 219.

Approved in Douglas v. Kentucky, 168 U. S. 502, 42 L. 558, 18 S. Ct. 204, Supreme Court may determine for itself existence or non-existence of contract; dissenting opinion in McCullough v. Virginia, 172 U. S. 127, 19 S. Ct. 143, arguendo.

Distinguished in Iron Mountain R. R. v. Memphis, 96 Fed. 129, ordinance declaring forfeiture of contract and intention to seize tracks is impairment of contract.

Courts.— Whether party has acquired rights under State land act before withdrawal is not a Federal question, p. 219.

Courts.— Whether change in State statute is mere revision or necessitates different construction is not a Federal question, p. 225.

Courts.— Where there is non-Federal ground of State decision sufficiently broad, Federal question will not be reviewed, p. 227.

Reaffirmed in Baker v. Brickell, 166 U. S. 717, 41 L. 1186, 17 S. Ct. 990, Wheelan v. Brickell, 166 U. S. 718, 41 L. 1186, 17 S. Ct. 1002, and McQuade v. Trenton, 172 U. S. 640, 19 S. Ct. 294.

Supreme Court finding it unnecessary to review Federal ground of State decision will dismiss, not affirm, p. 228.

Miscellaneous.— Cited in Walla Walla v. Walla Walla Water Co., 172 U. S. 9, 19 S. Ct. 81, not in point.

Digitized by Google

163 U. S. 228–244, 41 L. 140, WONG WING v. UNITED STATES.

**Aliens.**— Law punishing violation of exclusion laws by hard labor or confiscation must provide judicial trial, p. 237.

Distinguished in In re Tsu Tse Mee, 81 Fed. 565, order of deportation may be made without jury trial.

**Aliens** may be excluded, and executive department may be given power of identifying, arresting and deporting them, p. 237.

Approved in United States v. Wong Kim Ark, 169 U. S. 699, 42 L. 908, 18 S. Ct. 476, reaffirming rule; In re Li Foon, 80 Fed. 883, infant child of Chinese lawfully residing in United States cannot enter without certificate; In re Li Sing, 86 Fed. 899, requirement that Chinese arrested under exclusion act affirmatively prove right to remain is constitutional.

**Aliens.**— Detention or confinement as incident to making exclusion laws effective is valid, p. 235.

Miscellaneous.— Cited in United States v. Wong Kim Ark, 169 U. S. 694, 42 L. 907, 18 S. Ct. 474, child born in America, of Chinese parents, is a citizen.

163 U. S. 244–258, 41 L. 145, UNITED STATES v. WINCHESTER, ETC., R. R.

**Court of Claims** has no jurisdiction since act of 1887 of claim for property taken by army; it is a "war claim," p. 258.

Not cited.

163 U. S. 258–268, 41 L. 151, UNITED STATES v. LAWS.

**Aliens.**— Contract whereby alien chemist's migration expenses are paid is not prohibited by act of 1885, p. 259.

Approved in United States v. Gay, 95 Fed. 229, affirming S. C., 80 Fed. 255, agreement to employ non-resident alien as window draper, refunding his passage, is not prohibited.

**Aliens.**— Chemist is member of profession within amendment of 1891 to alien immigration law of 1885, p. 266.

Approved in United States v. Gay, 95 Fed. 227, anti-alien contract law is penal and strictly construable.

163 U. S. 269–273, 41 L. 155, EDWARDS v. BATES CO.

**Bonds.**— Each matured coupon on negotiable bond is separate promise and distinct cause of action, p. 272.

Reaffirmed in Empire State Nail Co. v. American, etc., Button Co., 74 Fed. 867, 33 U. S. App. 522.

**Circuit Court's** jurisdictional amount, in suit on bonds with matured coupons, is determined by reckoning latter as independent, not as interest, p. 273.

Approved in Greene Co. v. Kortrecht, 81 Fed. 241, 52 U. S. App.

Digitized by Google

252, in action on matured bonds and coupons, neither interest on bonds or coupons after maturity constitute part of matter in dispute.

Miscellaneous.— Cited in Edwards v. Bates Co., 79 Fed. 57, subsequent phase, same litigation.

163 U. S. 273-280, 41 L. 157, HANFORD v. DAVIES.

Constitution.— Obligation clause has no reference to judicial decisions, or to acts in force when contract made, p. 279.

Courts.— Allegation that Probate Court acted without jurisdiction, etc., is not sufficient showing of undue process to create Federal question, p. 279.

Courts.— Presumption is, Circuit Court is without jurisdiction unless contrary affirmatively appears, p. 279.

Reaffirmed in Argonaut Min. Co. v. Kennedy Min., etc., Co., 84 Fed. 2, Montana Ore-Purchasing Co. v. Boston, etc., Min. Co., 85 Fed. 869, 57 U. S. App. 17, 18, and San Joaquin, etc., Irr. Co. v. Stanislaus Co., 90 Fed. 520.

Courts.— Averments showing Circuit Court's jurisdiction should be positive, p. 279.

Reaffirmed in St. Joseph, etc., R. R. v. Steele, 167 U. S. 662, 42 L. 316, 17 S. Ct. 926, and Argonaut Min. Co. v. Kennedy Min., etc., Co., 84 Fed. 3.

Approved in Press Pub. Co. v. Monroe, 164 U. S. 110, 41 L. 368, 17 S. Ct. 41, to give Circuit Court jurisdiction over action as arising under Federal laws, fact must appear from plaintiff's statement of claim; Muse v. Arlington Hotel Co., 168 U. S. 435, 42 L. 533, 18 S. Ct. 111, record must show definite issue in respect to possession of Federal right.

163 U. S. 280-289, 41 L. 160, RIO GRANDE, ETC., RY. v. LEAK.

Trial.— Refusal of instruction is not error where embodied in charge given, p. 285.

Approved in Chapman v. Reynolds, 77 Fed. 275, 33 U. S. App. 686, and Baltimore, etc., R. R. v. Hellenthal, 88 Fed. 122, 60 U. S. App. 166, special instruction need not be given on point covered by general instructions.

Negligence.— In action founded on negligent operation of cars, instruction as to defective premises is irrelevant, p. 287.

Trial court properly refuses instruction, singling out particular circumstances and omitting others as misleading, p. 288.

Approved in Spurr v. United States, 87 Fed. 706, 59 U. S. App. 679, and Illinois, etc., R. Co. v. Jones, 95 Fed. 390, court is not required to give special instructions which give particular facts undue importance.

Digitized by Google

163 U. S. 289–299, 41 L. 163, KNIGHTS OF PYTHIAS v. KALINSKI.

**Beneficial association may not complain if certificate-holders act on supreme council's construction of rules, p. 298.**

See 52 Am. St. Rep. 576, note.

**Beneficial association's continued receipt of assessments on certificate waives forfeiture for non-payment of lodge dues, p. 298.**

See 52 Am. St. Rep. 575, note.

**Beneficial association's endowment rank being forfeitable upon non-payment of lodge dues, lodge secretary's failure to inform of such is imputable to association, not to holder, p. 297.**

Approved in Toomey v. Supreme Lodge, 147 Mo. 139, 48 S. W. 938, affirming S. C., 74 Mo. App. 523, endowment rank, K. of P., is an insurance company.

Miscellaneous.— Cited in Supreme Lodge v. Hill, 76 Fed. 471, and Supreme Lodge v. England, 94 Fed. 369, as to jurisdiction; Knights of Pythias v. Powell, 25 Colo. 156, 53 Pac. 286, action may be brought against "Endowment Rank, K. of P." instead of Supreme Lodge.

163 U. S. 299–319, 41 L. 166, HENNINGTON v. GEORGIA.

**Sunday.— State legislature has power to fix day for cessation of all except necessary labor, p. 304.**

Approved in Keck v. Gainesville, 98 Ga. 425, 25 S. E. 559, reaffirming rule; State v. Powell, 58 Ohio St. 343, 50 N. E. 901, upholding act prohibiting Sunday baseball playing; State v. Southern Ry., 119 N. C. 820, 56 Am. St. Rep. 690, 25 S. E. 862, and Norfolk, etc., R. Co. v. Commonwealth, 93 Va. 749, 24 S. E. 842, 34 L. R. A. 110, upholding laws prohibiting certain railway traffic on Sundays; Smith v. State, 100 Tenn. 504, 46 S. W. 569, 41 L. R. A. 435, upholding law requiring railroads to provide distinct accommodations for whites and negroes; Breyer v. State, 102 Tenn. 110, 50 S. W. 771, upholding law prohibiting barbering on Sunday; dissenting opinion in Lake Shore, etc., Ry. v. Ohio, 173 U. S. 325, 19 S. Ct. 480, majority upholding Ohio statute requiring stoppage of trains at certain stations.

**Constitutional law.— Law against running of freight trains on Sunday is regulation of internal police, p. 307.**

Approved in Lake Shore, etc., Ry. v. Ohio, 173 U. S. 289, 19 S. Ct. 467 (see dissenting opinion in 173 U. S. 326, 19 S. Ct. 480), upholding requirement that trains stop at stations; Smith v. State, 100 Tenn. 511, 46 S. W. 571, 41 L. R. A. 436, upholding requirement for separate, equal train accommodations for whites and negroes.

**Commerce.— Real State police regulations affecting commerce only incidentally are valid until Congress acts, e. g., law against Sunday freight trains, p. 317.**

Digitized by Google

Following citing cases uphold respective laws: New York, etc., R. R. v. New York, 165 U. S. 631, 41 L. 854, 17 S. Ct. 419, law regulating mode of heating cars; Gladson v. Minnesota, 166 U. S. 430, 41 L. 1066, 17 S. Ct. 628, Minnesota act requiring trains to stop at county seats; Chicago, etc., Ry. v. Solan, 169 U. S. 138, 42 L. 692, 18 S. Ct. 291, act providing that railroad's liability as carrier shall not be exempted by contract; Richmond, etc., R. R. v. R. A. Patterson Tobacco Co., 169 U. S. 316, 42 L. 761, 18 S. Ct. 337, Virginia act establishing rule of evidence ordering character of proof by which carrier may show limited liability; Missouri, etc., Ry. v. Haber, 169 U. S. 627, 42 L. 883, 18 S. Ct. 493, Kansas law prohibiting importation of diseased cattle; Lake Shore, etc., Ry. v. Ohio, 173 U. S. 298, 19 S. Ct. 470 (see dissenting opinion in 173 U. S. 327, 19 S. Ct. 481), majority upholding act requiring stopping of trains at certain station; Peirce v. Van Dusen, 78 Fed. 699, 47 U. S. App. 339, law prohibiting railroad contracts restricting liability to employees; State v. Harbourne, 70 Conn. 493, 66 Am. St. Rep. 132, 40 Atl. 182, 40 L. R. A. 610, statute punishing transmission of bets on races; State v. Wagener, 77 Minn. 500, 77 Am. St. Rep. 689, 80 N. W. 637, act licensing and defining business of commission merchant; Smith v. State, 100 Tenn. 503, 46 S. W. 569, 41 L. R. A. 434, act requiring separate accommodations for whites and negroes on trains; Waters, etc., Oil Co. v. State, 19 Tex. Civ. App. 16, 44 S. W. 943, act prohibiting agreements restraining trade; dissenting opinion in State v. Holleyman, 55 S. C. 244, 33 S. E. 369, 45 L. R. A. 578, majority holding law prohibiting possession of liquor purchased without State unconstitutional.

Distinguished in Sawrie v. Tennessee, 82 Fed. 618, 623, statute prohibiting sale of cigarettes is void as to original packages.

**163 U. S. 319–321, 41 L. 174, HUNTINGTON v. SAUNDERS.**

**Bankruptcy.**— Supreme Court can review Circuit Court of Appeals' dismissal of appeal from Circuit Court's refusal to revise District Court's dismissal of opposition to discharge, p. 320.

Not cited.

**163 U. S. 321–325, 41 L. 175, BURFENNING v. CHICAGO, ETC., RY.**

**Public lands.**— Department's findings on questions of fact are, in general, final, p. 323.

Approved in Johnson v. Drew, 171 U. S. 99, 18 S. Ct. 802, party cannot defend against patent duly issued upon ground of his possession at time of issuance; Saunders v. La Purisima Gold Min. Co., 125 Cal. 165, 57 Pac. 659, lands plotted as agricultural are not open to settlement as mineral lands.

**Public lands.**— Patent for lands reserved from entry or dedicated to special purpose confers no title, p. 323.

Digitized by Google

Approved in Northern Pac. R. R. v. Colburn, 164 U. S. 387, 41 L. 480, 17 S. Ct. 100, patent is not always conclusive, nor are direct proceedings to set it aside always necessary; Beley v. Naphtaly, 169 U. S. 356, 42 L. 776, 18 S. Ct. 355, patent does not preclude inquiry into effect of act of July 23, 1866; Garrard v. Silver Peak Mines, 82 Fed. 583, reaffirming rule; United States v. Coos Bay Wagon-Road Co., 89 Fed. 152, where grant attempted to include land to which homestead rights had attached; Hewitt v. Schultz, 7 N. Dak. 605, 76 N. W. 230, patent based on entry of land within indemnity grant to Northern Pacific, after withdrawal thereof, is void; Northern Pac. Ry. v. Miller, 20 Wash. 31, 54 Pac. 606, patent issued after prior grant may be collaterally attacked; Deweese v. Reinhard, 165 U. S. 389, 41 L. 758, 17 S. Ct. 341, arguendo.

**Public lands.**— Patent issued subsequent to reservation of incorporated town under R. S., §§ 2258, 2289, is void, p. 324.

163 U. S. 325–331, 41 L. 177, UNION NAT. BANK v. LOUISVILLE, ETC., RY.

**Courts.**— Decision worded generally, that usurious contract not enforceable, raises no Federal question, though creditor a national bank, p. 330.

Approved in Leyson v. Davis, 170 U. S. 41, 42 L. 941, 18 S. Ct. 502, controversy as to which of claimants has superior equity to shares of national bank stock involves no Federal question; Noble v. Mitchell, 164 U. S. 373, 41 L. 474, 17 S. Ct. 112, highest State court's construction of its insurance laws is controlling.

Distinguished in Nashville, etc., Ry. v. Taylor, 86 Fed. 175, suit to enjoin certification of assessment on ground that complainants had been denied right of equalization involves Federal question.

**Banks.**— National banks are subject to rules as to interest prescribed by State laws, p. 331.

163 U. S. 331–342, 41 L. 179, WEBSTER v. LUTHER.

**Public lands.**— Right to "additional homestead" under R. S., § 2306, is assignable, p. 342.

Approved in Beley v. Naphtaly, 169 U. S. 363, 42 L. 779, 18 S. Ct. 357, act of 1866, "to quiet titles in California" includes purchasers from Mexican grantees; Pardoe v. Merritt, 75 Minn. 15, 16, 17, 77 N. W. 554, right to enter soldier's additional homestead may be sold as personal property by general guardian; Montague v. McCarroll, 15 Utah, 323, 325, 49 Pac. 419, 420, irrevocable power of attorney to enter land on soldier's scrip may be given.

**Statutes.**— Land department's construction of law, though entitled to respect, cannot defeat obvious intent of law, p. 342.

Approved in Hartman v. Warren, 76 Fed. 162, 40 U. S. App. 245, and McFadden v. Mountain View Min., etc., Co., 87 Fed. 156, reaffirming rule.



Digitized by Google

163 U. S. 342–346, 41 L. 183, HILBORN v. UNITED STATES.

District attorney should account for fees allowed for defending habeas corpus cases under Chinese exclusion acts, p. 344.

District attorney, in cases where entitled to charge fee, should also generally return earnings in his emolument account, p. 346.

Not cited.

163 U. S. 346–353, 41 L. 184, STEAMER COQUITLAM v. UNITED STATES.

District Court of Alaska is Supreme Court of that territory within act of 1891, § 15, p. 353.

District Court of Alaska decrees are reviewable by Circuit Court of Appeals for ninth circuit, p. 353.

Approved in Thorp v. Bonnifield, 168 U. S. 708, 42 L. 1211, 18 S. Ct. 947, memorandum decision; Lewis v. Johnson, 90 Fed. 674, R. S., §§ 601, 637, providing for transfer of causes in which judge is interested to Circuit Court in adjoining State does not authorize transfer from Alaska to Washington courts.

163 U. S. 353–368, 41 L. 186, TEXAS, ETC., RY. v. GENTRY.

Appeal lies by defendant from decrees aggregating $10,000, apportioning damages for employee's death among those entitled, though the separate decrees for less than appellate amount, p. 361.

Approved in Southern Pac. Co. v. Tomlinson, 163 U. S. 375, 41 L. 196, 16 S. Ct. 1173, defendant may object to judgment apportioning damages as unlawfully fixed by plaintiff.

Appeal.— Circuit Court of Appeals' decree affirming Circuit Court is final, though sum for which rendered unspecified, p. 363.

Railroads.— Whether road engine, with flat car attached for switching, is safe appliance, is for jury, p. 365.

Railroads.— Presumption is person did stop, look and listen for approaching trains, p. 366.

Approved in Chesapeake, etc., Ry. v. Steele, 84 Fed. 98, 54 U. S. App. 562, and Illinois Cent. R. Co. v. Jones, 95 Fed. 380, burden of establishing contributory negligence is on defendant; Norton v. North Carolina R. R., 122 N. C. 929, 29 S. E. 892, in absence of evidence presumption is against contributory negligence.

Distinguished in Smith v. City Ry., 29 Or. 547, 46 Pac. 780, notwithstanding evidence that plaintiff looked for approaching car question is for jury.

Railroads.— If no evidence whether deceased stopped and looked or not, general instruction as to contributory negligence suffices, p. 367.

Reaffirmed in Chesapeake, etc., Ry. v. Steele, 84 Fed. 100, 54 U. S. App. 565.

Digitized by Google

Negligence is for jury where reasonable men may fairly differ as to whether there was negligence, p. 368.

Approved in Warner v. Baltimore, etc., R. R., 168 U. S. 348, 42 L. 497, 18 S. Ct. 71, Weiss v. Bethlehem Iron Co., 88 Fed. 26, 59 U. S. App. 634, Sprague v. Southern Ry., 92 Fed. 61, 63 U. S. App. 714, and Illinois Cent. R. Co. v. Jones, 95 Fed. 373, all reaffirming rule.

Negligence is question of law where all reasonable men must draw same conclusions from facts, p. 368.

Approved in McPeck v. Central Vt. R. R., 79 Fed. 591, 50 U. S. App. 29, verdict may be directed for defendant on mere question of fact when proofs are insufficient to support contrary verdict; United States v. Kuhl, 85 Fed. 626, where, from inspection of indictment, it becomes clear that verdict of guilty would result in new trial, same will be quashed.

163 U. S. 369–376, 41 L. 193, SOUTHERN PAC. CO. v. TOMLINSON.

Trial.— Widow suing for husband's death may not, in remitting damages, reduce share of proceeds apportioned by statute, to deceased's mother, to nominal sum, p. 375.

Cited in 70 Am. St. Rep. 685, note.

163 U. S. 376–385, 41 L. 196, TALTON v. MAYES.

Indians.— Powers and status of Cherokee Nation, stated, p. 380.

Indians.— Murder of one Cherokee by another is not crime against United States requiring indictment under its laws, p. 382.

Indians.— Fifth amendment as to grand jury has no application to Cherokee's local self-government, p. 384.

Indians.— Whether one statute of Cherokee Nation is repealed by another is solely for courts of that nation, p. 385.

Cited in Nordstrom v. Washington, 164 U. S. 705, 41 L. 1183, 17 S. Ct. 997, memorandum decision.

163 U. S. 385–415, 41 L. 199, MEYER v. RICHARDS.

Sales.— Bond declared non-existent by State Constitution at time of sale may not be subject of valid sale, p. 398.

Sales.— Rights and obligations of parties to contract are determined by law of place where made, p. 397.

Bills and notes.— On sale of commercial paper there is implied warranty of identity, p. 410.

Approved in Waller v. Staples, 107 Iowa, 741, 77 N. W. 571, assignment of mortgage carries with it implied warranty of genuineness.

Sale of bonds being void by State Constitution, although parties did not know it, vendee may recover price. p. 415.

Digitized by Google

**Miscellaneous.**— Cited in Nashua Iron, etc., Co. v. Brush, 91 Fed. 216, 50 U. S. App. 466, not in point.

163 U. S. 416–426, 41 L. 211, BANK OF COMMERCE v. TENNESSEE.

**Courts.**— No effect can be given part of State court's opinion favoring plaintiffs in error, rendered immaterial by judgment against them on another ground, p. 420.

Supreme Court looks into State court's opinion only to discover ground on which judgment proceeded, p. 421.

Supreme Court will affirm State judgment properly deciding Federal question, though on improper ground, p. 422.

**Constitutional law.**— Amendment withdrawing charter-tax exemption of bank stock, issuable to depositors, is valid as against depositors after such amendment, p. 423.

Tax exemption must be clear and indubitable, p. 423.

Approved in New Orleans v. Citizens' Bank, 167 U. S. 402, 42 L. 213, 17 S. Ct. 915, exemption of capital of corporation does not necessarily exempt shareholders from taxation on stock.

**Constitutional law.**— Law withdrawing bank's charter right to issue stock for deposits, is valid except as applied to prior issues, p. 426.

Approved in Galveston, etc., Ry. v. Texas, 170 U. S. 240, 42 L. 1022, 18 S. Ct. 609, charter clause, granting right to consolidate, is not vested right prior to consolidation; People v. Adirondack Ry., 160 N. Y. 247, 54 N. E. 696, affirming rule with respect to railway's right to unused right of way.

163 U. S. 427–444, 41 L. 215, UNITED STATES v. REALTY CO.

**United States.**— Claims against, from compliance with sugar bounty law before its annulment, are of moral and honorary nature, p. 439.

Approved in Allen v. Smith, 173 U. S. 402, 19 S. Ct. 451, manufacturer of sugar, not producer of cane, is entitled to bounty, under act of 1895; Suthon v. United States, 81 Fed. 814, 52 U. S. App. 372, and Succession of Allen, 49 La. Ann. 1110, 22 So. 324, arguendo.

**United States.**— Congress may pay claims of moral or honorary nature, growing out of invalid law, p. 439.

Approved in Guthrie Nat. Bank v. Guthrie, 173 U. S. 535, 19 S. Ct. 516, Oklahoma legislature has like power; State v. Bader, 13 Ohio C. C. 21, one voluntarily paying void tax with knowledge of facts rendering it void, cannot restrain application of money raised thereby to purpose of tax; Lewis Co. v. Gordon, 20 Wash. 89, 54 Pac. 781, upholding act providing for paying expenses incurred in building ditch under unconstitutional act.

**Constitutional law.**— Whether claim is equitable or moral obligation of government, is for Congress to decide, p. 444.

Digitized by Google

Approved in Allen v. Smith, 173 U. S. 393, 19 S. Ct. 447, generally.

**United States.**— Act of 1895, appropriating money to those complying in good faith with invalid bounty law, is valid, p. 414.

Reaffirmed in Burdon Sugar-Ref. Co. v. Payne, 167 U. S. 148, 42 L. 112, 17 S. Ct. 58, and Allen v. Smith, 173 U. S. 394, 19 S. Ct. 448.

163 U. S. 445–452, 41 L. 221, BLACK v. ELKHORN MIN. CO.

**Mines.**— Wife of locator of claim has no dower rights therein as against grantee of such locator, p. 452.

Approved in St. Louis Min. Co. v. Montana Min. Co., 171 U. S. 655, 19 S. Ct. 63, contract to sell mining location is enforceable; Phœnix Min. Co. v. Scott, 20 Wash. 51, 52, 54 Pac. 778, 779, code section requiring husband and wife to join in conveyance of community realty, does not apply to mining location; Del Monte Min. Co. v. Last-Chance Min. Co., 171 U. S. 62, 18 S. Ct. 898, and Gillis v. Downey, 85 Fed. 489, 56 U. S. App. 578, arguendo.

163 U. S. 452–456, 41 L. 224, FAUST v. UNITED STATES.

Indictment will not be quashed because name "W. J. Foust" is spelled "W. S. Faust," p. 454.

Indictment need not contain correct spelling of name if substantially the same sound is preserved, p. 454.

**Post-office.**— Certified copy of postmaster's account, made up under sole management of assistant charged with embezzlement is admissible against him, p. 455.

**Criminal law.**— It is not error to reject evidence that another previously committed another offense, p. 455.

**Appeal.**— Refusal to permit witness to be recalled to change statements made on cross-examination, is discretionary, p. 455.

**Post-office.**— On indictment of assistant postmaster for embezzlement, principal's non-assent need not be proved, p. 456.

Not cited.

163 U. S. 456–467, 41 L. 225, EDDY v. LAFAYETTE.

**Railroads.**— In Indian Territory, summons in action against railroad receiver may be served on station agent, p. 464.

Approved in Peirce v. Van Dusen, 78 Fed. 701, 47 U. S. App. 339, law partially abrogating fellow-servant rule applies to actions against receivers.

Appellate court will not presume, in suit against railroad for burning hay, that it was cut by trespasser, where record fails to show whether on common or private Indian lands, p. 465.

**Parties.**— One cutting hay on Indian lands, in return for part of crop, may sue for destruction by locomotive fire, p. 466.

Railroad's action in letting combustible materials collect near track, is fact from which jury may infer negligence, p. 467.

Digitized by Google

Approved in St. Louis, etc., Ry. v. Mathews, 165 U. S. 21, 41 L. 619, 17 S. Ct. 250, upholding act making railroads liable for fires from locomotives, and giving them insurable interest in adjoining property.

Appeal.— Instruction as to jury's allowance of interest in tort, is immaterial where jury allows none, p. 467.

163 U. S. 468–485, 41 L. 230, GRAYSON v. LYNCH.

Appeal.— Special findings of fact by trial court on waiver of jury, are of ultimate fact, binding on appellate courts, p. 472.

Supreme Court, on appeal from territories, considers only whether findings support judgment and error in rulings, p. 473.

Approved in Klein v. Seattle, 77 Fed. 200, 44 U. S. App. 741, whether special findings sustain judgment is only question reviewable in patent appeal; Migeon v. Montana Cent. Ry., 77 Fed. 252, 44 U. S. App. 724, decree in equity will not be reversed for error in admitting evidence, result being unaffected.

Appeal.— Where reviewing power same as though trial by jury, appellate court has same powers as upon writ of error, p. 475.

Appellate court will not set aside trial court's findings of fact, if supported by competent evidence, though incompetent admitted, p. 476.

Pleading.— Proof of "infectious" disease is not a variance from pleading of "contagious," p. 477.

Pleading.— Variance is immaterial unless misleading opposite party in his defense on merits, p. 477.

Pleading.— Proof that contagious disease was communicated to cattle in place alleged, or another, is not variance, p. 478.

Pleading.— Allegations of place need not be proved with precision, p. 479.

Appeal.— Objections for variance are too late if first raised on appeal, p. 479.

Evidence.— Persons not experts may testify as to symptoms of cattle, in suit for communicating contagious disease, p. 479.

Appeal.— Evidence of title improperly admitted in tort action, being immaterial, is not reversible error, p. 480.

Evidence.— Department of agriculture officers held competent experts on cattle disease, though never in district, p. 480.

Approved in State v. Main, 69 Conn. 141, 61 Am. St. Rep. 43, 37 Atl. 85, 36 L. R. A. 629, deputy commissioner of "peach yellows" may testify as an expert in prosecution for violation of statute.

Animals.— Fences need not be built by cattle-owner to protect from contagion, contrary to custom of country, p. 483.

Animals.— One knowing his cattle have infectious disease is bound to prevent its communication to others, p. 484.

Digitized by Google

**Animals.**— Care required of cattle-owner, to prevent their getting disease from others, depends on circumstances, p. 484.

**Appeal.**— Practice of multiplying assignments of error, disapproved, p. 485.

Approved in New Jersey Zinc Co. v. Lehigh Zinc Co., 59 N. J. L. 190, 35 Atl. 916, Laird v. Upton, 8 N. Mex. 413, 45 Pac. 1011, and Padilla v. Territory, 8 N. Mex. 565, 45 Pac. 1120, all holding instruction not shown excepted to cannot be reviewed on appeal; Borrego v. Territory, 8 N. Mex. 484, 46 Pac. 359, reaffirming disapproval.

163 U. S. 485–491, 41 L. 236, UNION PAC. RY. v. JAMES.

**Railroads.**— Only issue being whether frog was properly blocked at time of accident, want of instructions as to previous unblocking, is not ground for reversal, p. 489.

Not cited.

163 U. S. 491–498, 41 L. 239, MISSOURI, ETC., RY. v. COOK.

**Public lands.**— Filing of map of surveyed line of Missouri, etc., railroad, fixed the route within meaning of act of 1866, p. 496.

**Public lands.**— Filing of map under Kansas railroad-aid act of 1866, secured withdrawal of lands, and location of line, p. 497.

**Public lands.**— Settler after railroad definitely located, cannot be brought within its lines by subsequent change of route, p. 498.

Not cited.

163 U. S. 499–504, 41 L. 242, UNITED STATES v. ALLEN.

**Customs** act of 1890 did not continue in force, prior right to drawback on bituminous coal used on coast steamers, p. 503.

Cited in Wheeler v. United States, 75 Fed. 656, importer is not entitled to drawback on improved bottles and corks re-exported with American beer.

**Customs duties.**— Claims for exemptions are strictly construed, p. 504.

163 U. S. 504–520, 41 L. 244, WARD v. RACE HORSE.

**Treaty** with Indians may be superseded by act of Congress admitting State to Union, p. 511.

**Indian treaty,** conferring hunting rights on public domain, is repealed by admission of territory to Union, p. 514.

Approved in Pablo v. People, 23 Colo. 137, 46 Pac. 637, 37 L. R. A. 638, Utes are amenable to State laws for offenses committed without reservations.

163 U. S. 520–537, 41 L. 250, INDIANA v. KENTUCKY.

**States.**— Kentucky-Indiana boundary settled as determined by commission, p. 537.

Not cited.

Digitized by Google

163 U. S. 537-564, 41 L. 256, PLESSY v. FERGUSON.

Constitution.— Law implying distinction between whites and negroes does not create involuntary servitude or inequality, p. 543.

Constitutional law.— Fourteenth amendment was not designed to secure social equality between races, p. 544.

Approved in Ohio Val. Ry.'s Receiver v. Lander, — Ky. —, 47 S. W. 348, railroads may make reasonable regulations for separation of white and colored passengers.

Constitutional law.— Police power must be reasonably exercised, not for oppression of particular class, p. 550.

Approved in Smith v. State, 100 Tenn. 507, 46 S. W. 570, 41 L. R. A. 435, upholding requirement for separate train accommodations for whites and negroes.

Constitutional law.— Legislature has large discretion as to reasonableness of police regulations, p. 550.

Approved in Atchison, etc., R. R. v. Matthews, 174 U. S. 105, 19 S. Ct. 613, upholding law including attorney's fees in judgments recoverable from railroads for fires from locomotives.

Constitutional law.— Legislature may enact police laws with view to established usages of people, p. 550.

Approved in Waters, etc., Oil Co. v. State, 19 Tex. Civ. App. 17, 44 S. W. 944, upholding acts of 1889 and 1895 prohibiting combinations restraining trade.

Constitutional law.— Separate coach law for whites and negroes is valid police regulation, p. 551.

Approved in Brinkley v. Louisville, etc., R. R. 95 Fed. 355, reaffirming rule; Smith v. State, 100 Tenn. 503, 46 S. W. 569, 41 L. R. A. 434, upholding law requiring railroads to provide equal separate accommodations for whites and negroes; dissenting opinion in Ohio Val. Ry.'s Receiver v. Lander, — Ky. —, 47 S. W. 888, majority opinion, supra.

163 U. S. 564-611, 41 L. 265, UNION PAC. RY. v. CHICAGO, ETC., RY.

Railroad corporations possess powers conferred and those fairly incident, p. 581.

Approved in California Bank v. Kennedy, 167 U. S. 367, 42 L. 200, 17 S. Ct. 833, by Federal rule, corporation may plead ultra vires.

Railroad contract disabling it from its public duties is not enforceable by doctrine of estoppel, p. 581.

Approved in California Bank v. Kennedy, 167 U. S. 371, 42 L. 201, 17 S. Ct. 835, one national bank purchasing stock of another; Louisville, etc., Ry. v. Louisville Trust Co., 174 U. S. 567, 19 S. Ct. 823, where one railroad corporation guaranteed bonds of another; De La Vergne v. German Sav. Inst., 175 U. S. 59, 20 S. Ct.

Digitized by Google

25, it is not within general corporation powers to purchase stock of other corporations to control their management; Park Hotel Co. v. Fourth Nat. Bank, 86 Fed. 747, applying rule to making of accommodation paper by corporation; Bowen v. Needles Nat. Bank, 94 Fed. 930, ultra vires contract of national bank cannot be ratified on ground of estoppel.

Railroads cannot, without State's consent, disable themselves from their proper functions, p. 581.

Contracts.— Character of contract is not determined by name given it, p. 582.

Railroad allowing another to run trains on its tracks, under former's direction, is trackage agreement, not a lease, p. 583.

Railroad may give another trackage rights without express statutory authority, p. 585.

Railroads.— Pacific railroad acts required that other companies be allowed to use Omaha bridge, p. 586.

Railroad's ability to discharge its public duties is limit of its jus disponendi over property and rights, p. 590.

Trial.— Denial of motion to permit evidence after close of testimony is not abuse of discretion, p. 591.

Corporations' contract is not invalid because one's charter expires before its termination, p. 592.

Corporations.— Contract between A. and a corporation whose members wholly owned and controlled another is not void for want of consideration, as to latter, p. 592.

Circuit Court of Appeals' judgment is not error because ignoring Circuit Court error, not complained of, p. 593.

Approved in Louisville, etc., Ry. v. Louisville Trust Co., 78 Fed. 862, certiorari awarded by Supreme Court does not restore jurisdiction to Circuit Court.

Railroad, although a Federal corporation, may operate other lines, where permitted by State and subserving public interests, p. 595.

Reaffirmed in Union Pac. Ry. v. Chicago, etc., Ry., 164 Ill. 105, 45 N. E. 494.

Corporate contract properly executed, authorized by executive committee and ratified by stockholders, does not need directors' action, p. 598.

Railroads.— Government directors of Union Pacific have no peculiar powers, differing from others, p. 599.

Specific performance of trackage agreement between railroads may be enforced, pp. 600–603.

Approved in Schmidt v. Louisville, etc., R. R., 101 Ky. 479, 41 S. W. 1026, 38 L. R. A. 821, equity will decree specific performance of contract to operate road for thirty years for benefit of mort-

Digitized by Google

gage bondholders; Southern Ry. v. Franklin, etc., R. R., 96 Va. 707, 32 S. E. 490, lessee of road may be enjoined from abandoning operation in violation of lease. See 68 Am. St. Rep. 759, note.

Specific performance.— Circumstances under which equity inclines to enforce, stated, p. 604.

163 U. S. 611, 41 L. 282, UNION PAC. RY. v. CHICAGO, ETC., RY.

Appeal from Circuit Court dismissed, where points decided by appeals from Circuit Court of Appeals, p. 611.

Not cited.

163 U. S. 612-618, 41 L. 282, LUCAS v. UNITED STATES.

Indian's indictment for murder of negro, not an Indian, requires proof of that by government, as jurisdictional fact, p. 615.

Indians.— There is no presumption that negro in Indian Territory is not an Indian, p. 616.

Indians.— To prove jurisdictional fact that one murdered by Indian was not such, his declarations in life are inadmissible, p. 617.

Trial.— Evidence is sufficiently objected to, where counsel asks its exclusion after answer, and excepts to court's refusal, p. 617.

Approved in Nat. Cash Reg. Co. v. Leland, 94 Fed. 507, arguendo.

163 U. S. 618-624, 41 L. 284, BROWN v. WYGANT.

Judgments.— Return of two "nihils" to scire facias to revive judgment is equivalent to service, p. 622.

Judgment may be revived by executrix of judgment creditor though assigned by him and in hands of bankrupt assignee, p. 623.

Judgment will not be relieved against in equity unless substantial merits shown, p. 624.

Not cited.

163 U. S. 625-631, 41 L. 287, UNITED STATES v. PERKINS.

Taxation.— State may tax bequests to United States, p. 630.

Tax on inheritance is not on property but on its transmission, p. 629.

Approved in In re Inheritance Tax, 23 Colo. 493, 48 Pac. 535, inheritance tax is not within constitutional requirement of uniformity; Storrs v. St. Luke's Hospital, 180 Ill. 375, 72 Am. St. Rep. 215, 54 N. E. 187, right to contest will by bill in chancery does not descend to heirs. Following approving cases uphold respective laws: Magoun v. Illinois, etc., Sav. Bank, 170 U. S. 290, 42 L. 1041, 18 S. Ct. 596, 597, Illinois inheritance tax law of 1895; High v. Coyne, 93 Fed. 451, succession tax imposed by war revenue act of 1898; In re Wilmerding, 117 Cal. 284, 49 Pac. 182, inheritance tax (Stat. 1893); Gelsthorpe v. Furnell, 20 Mont. 305, 307, 51 Pac. 268, 269, 39 L. R. A. 173, 174, Laws 1897, p. 83, providing inheritance tax.

Digitized by Google

**Taxation.**— United States is not a "corporation" exempt from inheritance tax, within New York law, p. 631.

163 U. S. 631, 41 L. 289, UNITED STATES v. FITCH.

Adjudged in conformity with United States v. Perkins, supra, q. v.

163 U. S. 662-662, 41 L. 289, WIBORG v. UNITED STATES.

**Neutrality laws.**— Providing or preparing means for filibustering expedition is within R. S., § 5286, p. 648.

Approved in Hart v. United States, 84 Fed. 800, 55 U. S. App. 488, and The Laurada, 65 Fed. 767, providing transportation for military expedition is providing means for it, within § 5286; The Three Friends, 166 U. S. 79, 41 923, 17 S. Ct. 508, reversing 78 Fed. 181, respecting filibustering in behalf of Cuba.

**Neutrality laws.**— Filibustering expedition from our ports is "carried on from thence" within R. S., § 5286, p. 648.

**Neutrality laws.**— Evidence held sufficient to warrant conviction for filibustering, under R. S., § 5286, p. 654.

Approved in The Three Friends, 166 U. S. 51, 41 L. 914, 17 S. Ct. 497, reversing S. C., 78 Fed. 180, defining neutrality and expeditions; United States v. Nunes, 82 Fed. 601, charging jury as to what would constitute military expedition; dissenting opinion in Hart v. United States, 84 Fed. 807, 55 U. S. App. 501, majority holding whether men and ammunition constituted "military expedition" was for jury.

Indictment being for series of acts alleged conjunctively though statute made them severally punishable, verdict will not be disturbed, where no objection made for duplicity, p. 648.

**Neutrality laws.**— Instruction that defendants must be acquitted unless clearly shown to have guilty knowledge is proper, p. 656.

Approved in Hart v. United States, 84 Fed. 804, 55 U. S. App. 496, whether men and munitions of war were a military expedition, was for jury.

Trial court's expression of opinion on facts is not error, where jury told that they alone must decide, p. 656.

Reaffirmed in Hart v. United States, 84 Fed. 803, 55 U. S. App. 495.

Appellate court may correct plain error in refusing to direct verdict, although not properly raised by exception to denial of motion therefor, p. 656.

Approved in Chapman v. Reynolds, 77 Fed. 275, 33 U. S. App. 686, where counsel argue requested instruction on merits, court will consider same though not in record; Nat. Cash Reg. Co. v. Leland, 94 Fed. 506, plain error may be noticed by appellate court, although exceptions are irregularly taken.

**Neutrality laws.**— After proof of secret combinations, declarations of members of filibustering expedition are admissible, p. 658.

Digitized by Google

**Evidence.**— How far conspirators' declarations are part of res gestæ is largely in trial court's discretion, p. 658.

Approved in Borrego v. Territory, 8 N. Mex. 477, 46 Pac. 357, permitting question as to whereabouts of defendants prior to murder is discretionary.

**Neutrality laws.**— Mate cannot be convicted for violating, unless guilty knowledge proved when leaving port, p. 659.

Approved in United States v. O'Brien, 75 Fed. 904, it is no offense to transport persons intending to enlist in foreign military service, providing they go as individuals; The Laurada, 85 Fed. 769, where intent to violate neutrality originates on high seas, on American vessel, no forfeiture accrues; dissenting opinion in The Three Friends, 166 U. S. 78, 41 L. 923, 17 S. Ct. 508, arguendo; Hart v. United States, 84 Fed. 805, 55 U. S. App. 498, majority holding whether men and ammunition constituted military expedition, was properly left to jury.

163 U. S. 662–674, 42 L. 300, UNITED STATES v. BALL.

**Criminal law.**— General acquittal on murder indictment is a bar, though indictment annullable on error, for defects, p. 669.

**Criminal** case submitted to jury on Saturday, verdict may be received and jury discharged on Sunday, p. 671.

**Criminal** prosecution is barred by verdict of acquittal though no judgment entered, p. 671.

**Criminal law.**— Defendant getting judgment on indictment set aside, is triable anew on that or another indictment, p. 672.

Cited in Robertson v. Baldwin, 165 U. S. 282, 41 L. 717, 17 S. Ct. 329, arguendo.

**Criminal law.**— Whether defendants jointly indicted shall be separately tried is discretionary, p. 672.

Approved in State v. Mitchell, 49 S. C. 411, 27 S. E. 424, motion to sever by one of two jointly-indicted defendants is addressed to sound discretion of court. See 53 Am. St. Rep. 377, 385, note.

**Witness** testifying that he hired counsel to assist district attorney cross-examination as to fee paid may be excluded, p. 673.

**Homicide.**— Question as to how far gun would scatter shot being material, leave to test it at trial is discretionary, p. 673.

**Homicide** indictment alleging mortal wound, of which deceased did instantly die, alleges death by the wound, p. 673.

**Criminal** verdict need not be set aside because deputy marshal in charge of jury, not specially sworn, in absence of objection, and after court's caution to jury, p. 674.

163 U. S. 678, 41 L. 318, BLACK v. BLACK.

Cited in Blythe Co. v. Blythe, 172 U. S. 644.

Digitized by Google

Digitized by Google

Digitized by Google

# CASES

ARGUED AND DECIDED

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

IN

OCTOBER TERM, 1896.

---

Vol. 164.

U. S., Book 41. 21

Digitized by Google

ANN

164

Digitized by Google

# REFERENCE TABLE

OF SUCH CASES

# ECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1896,

AND REPORTED HEREIN,

## VOL. 164,

AS ALSO APPEAR IN

## OFFICIAL REPORTER'S EDITION.

| Title. | Here in. | Off. Rep. 164 U. S. |
|---|---|---|
| Bear Lake & R. W. & I. Co. v. | | 100–102 |
| Garland | 327 | 102–105 |
| " " " | 328 | 105–108 |
| " " " | 329 | 108–110 |
| " " " | 331 | 111–112 |
| " " " | 332 | 112 |
| " " " | 333 | 114–116 |
| " " " | 334 | 116–123 |
| " " " | 335 | 123–124 |
| " " " | 336 | 124 |
| " " " | 337 | 151–153 |
| American Road Mach. Co. v. | | 153–156 |
| Pennock & S. Co. | 337 | 156–159 |
| " " " | 338 | 159–162 |
| " " " | 339 | 162–165 |
| " " " | 340 | 165–167 |
| " " " | 341 | 167–170 |
| " " " | 342 | 170–173 |
| " " " | 343 | 173–176 |
| " " " | 344 | 176–179 |
| United States v. Gilliat | 344 | 179 |
| " " " | 345 | 179–182 |
| United States v. Hewecker | 345 | 182–185 |
| " " " | 346 | 185–188 |
| United States v. Kurtz | 346 | 188–189 |
| " " " | 347 | 190 |
| " " " | 348 | |
| Saltonstall v. Birtwell | 348 | 190–194 |
| " " | 349 | 194–198 |
| " " | 350 | 198–199 |
| " " | 351 | 201–203 |
| " " | 352 | 203–206 |
| " " | 353 | 206–208 |
| " " | 354 | 208–211 |
| " " | 355 | 211–212 |
| McElroy v. United States | 355 | 213 |
| " " " | 356 | 213–216 |
| " " " | 357 | 216–219 |
| United States v. McMahon | | 219–220 |
| McMahon v. United States | 357 | 221–222 |
| " " " | 358 | 222–225 |
| " " " | 359 | 225–227 |
| " " " | 360 | 227 |
| Parsons v. Venzke | 360 | |
| " " | 361 | |
| " " | 362 | 227–228 |
| Central P. R. Co. v. United States | 362 | 228–229 |
| " " " | 363 | 229–230 |
| " " " | 364 | 230–233 |
| " " " | 365 | 233–235 |

| Title. | Here in. |
|---|---|
| White v. United States | 365 |
| " " " | 366 |
| Press Pub. Co. v. Monroe | 367 |
| " " " | 368 |
| " " " | 369 |
| Fallbrook Irrig. Dist. v. Bradley | 369 |
| " " " | 370 |
| " " " | 371 |
| " " " | 372 |
| " " " | 373 |
| " " " | 386 |
| " " " | 387 |
| " " " | 388 |
| " " " | 389 |
| " " " | 390 |
| " " " | 391 |
| " " " | 392 |
| " " " | 393 |
| " " " | 394 |
| " " " | 395 |
| Tregea v. Modesto Irrig. Dist. | 395 |
| " " " | 396 |
| " " " | 397 |
| " " " | 398 |
| " " " | 399 |
| Wisconsin C. R. Co. v. United States | 399 |
| " " " | 400 |
| " " " | 401 |
| " " " | 402 |
| " " " | 403 |
| " " " | 404 |
| " " " | 405 |
| " " " | 406 |
| " " " | 407 |
| United States v. Verdier | 407 |
| " " " | 408 |
| " " " | 409 |
| " " " | 410 |
| Brown v. United States | 410 |
| " " " | 411 |
| " " " | 412 |
| Prairie State Bank v. United States / United States v. Hitchcock | 412 |
| " " " | 413 |
| " " " | 414 |
| " " " | 415 |
| " " " | 416 |
| " " " | 417 |



Digitized by Google

| Off. Rep. 164 U. S. | Title. | Here in. |
|---|---|---|
| 235–238 | Prairie State Bank v. United States | |
| | United States v. Hitchcock | 418 |
| 238–240 | " " " | 419 |
| 240–241 | Draper v. United States | 419 |
| 241–244 | " " " | 420 |
| 244–247 | " " " | 421 |
| 247 | " " " | 423 |
| 248–249 | Wilson v. Kiesel | 422 |
| 249–252 | " " | 423 |
| 252–255 | Fowler v. Lamson | 424 |
| 255 | " " | 425 |
| 255–257 | Lalone v. United States | 425 |
| 257–260 | " " " | 426 |
| 260–261 | " " " | 427 |
| 261–262 | Old Jordan Min. & M. Co. v. Société Anonyme Des Mines | 427 |
| 262–265 | " " " | 428 |
| 265–267 | " " " | 429 |
| 267–270 | " " " | 430 |
| 271–273 | Wabash W. R. Co. v. Brow | 431 |
| 273 | " " " | 432 |
| 275–277 | " " " | 433 |
| 277–279 | " " " | 434 |
| 279–280 | " " " | 435 |
| 281 | National Acci. Soc. v. Spiro | 435 |
| 282 | United States v. Delaney | 435 |
| 282–285 | " " " | 436 |
| 285–286 | " " " | 437 |
| 287–288 | McKee v. United States | 437 |
| 288–291 | " " " | 438 |
| 291–294 | " " " | 439 |
| 294 | " " " | 440 |
| 294–296 | Glover v. United States | 440 |
| 296–299 | " " " | 441 |
| 299–301 | " " " | 442 |
| 301 | Coughran v. Bigelow | 442 |
| 301–304 | " " | 443 |
| 304–307 | " " | 444 |
| 307–309 | " " | 446 |
| 309–311 | " " | 447 |
| 311 | Cake v. Mohun | 447 |
| 311–313 | " " | 448 |
| 314–317 | " " | 450 |
| 317–318 | " " | 451 |
| 319 | Citizens' Bank v. Cannon | 451 |
| 319–322 | " " " | 452 |
| 322–324 | " " " | 453 |
| 325 | Carothers v. Mayer | 453 |
| 325–327 | " " | 454 |
| 327 | Central R. & B. Co. v. Wright | 454 |
| 327–331 | " " " | 455 |
| 331–333 | " " " | 456 |
| 333–336 | " " " | 457 |
| 336–337 | " " " | 458 |
| 338–339 | Gonzales v. French | 458 |
| 339–342 | " " | 459 |
| 342–345 | " " | 460 |
| 345–347 | " " | 461 |
| 347 | McClellan v. Chipman | |
| | Traders' Bank v. Chipman | 461 |
| 347–348 | " " " | 464 |
| 348–357 | " " " | 465 |
| 357–360 | " " " | 466 |
| 360–361 | " " " | 467 |
| 361 | Edgington v. United States | 467 |
| 361–362 | " " " | 468 |
| 362 | " " " | 469 |
| 362–364 | " " " | 470 |
| 364–367 | " " " | 471 |

| Off. Rep. 164 U. S. | Title. |
|---|---|
| 367 | Edgington v. United States |
| 367–369 | Noble v. Mitchell |
| 369–372 | " " |
| 372–373 | " " |
| 373–375 | United States v. Elliott |
| 375 | " " |
| 376–378 | " " |
| 378–380 | " " |
| 380 | Stone v. United States |
| 381–383 | " " |
| 383–385 | Northern P. R. Co. v. Colburn |
| 385–388 | " " |
| 388 | Acers v. United States |
| 389–390 | " " |
| 390–393 | " " |
| 393–395 | Atlantic & P. R. Co. v. Laird |
| 395–397 | " " |
| 397–400 | " " |
| 400–403 | " " |
| 403–406 | Missouri P. R. Co. v. Nebraska |
| 406–408 | " " |
| 408–411 | " " |
| 411–413 | " " |
| 413–416 | " " |
| 416–417 | " " |
| 418 | Warner v. Texas & P. R. Co. |
| 418–420 | " " |
| 420 | " " |
| 420–421 | " " |
| 421–422 | " " |
| 422–425 | " " |
| 425–428 | " " |
| 428–431 | " " |
| 431–434 | " " |
| 434–435 | " " |
| 436 | Chapman v. United States |
| 446–448 | " " |
| 448–451 | " " |
| 451–452 | " " |
| 452 | Prather v. United States |
| 452–454 | Perrine v. Slack |
| 454 | " " |
| 454–456 | Chicago & N. W. R. Co. v. Chicago |
| 456–458 | " " |
| 458 | The Kate |
| 459–460 | " " |
| 460–463 | " " |
| 463–466 | " " |
| 466–469 | " " |
| 469–471 | " " |
| 471 | New Orleans Waterworks Co. v. New Orleans |
| 472 | " " |
| 472–474 | " " |
| 474–475 | " " |
| 475–478 | " " |
| 478–481 | " " |
| 481–482 | " " |
| 483 | Grimes Dry Goods Co. v. Malcolm |
| | ("W. B. Grimes Dry Goods Co. v. Malcolm") |
| 483–486 | " " |
| 486–489 | " " |
| 489–492 | " " |
| 492–495 | Allen v. United States |
| 495–498 | " " |
| 498–501 | " " |
| 501–502 | " " |
| 502–503 | Willard v. Wood |





Digitized by Google

| Title. | Here in. | Off. Rep. 14 U. S. |
|---|---|---|
| Willard v. Wood | 532 | 619–622 |
| " " | 533 | 622–625 |
| " " | 534 | 625–627 |
| " " | 538 | 627 |
| " " | 539 | 628–630 |
| " " | 540 | 630–632 |
| United States v. Oregon & C. R. Co. | 541 | 633–635 |
| " " " | 542 | 636 |
| " " " | 543 | |
| " " " | 544 | 636–638 |
| " " " | 545 | 638–641 |
| " " " | 546 | 641–644 |
| " " " | 547 | 644–647 |
| Rowe v. United States | 547 | 647–649 |
| " " " | 549 | 650–652 |
| " " " | 550 | 652–655 |
| " " " | 551 | 655–656 |
| " " " | 552 | 657 |
| Rogers Locomotive Mach. Works v. American Emigrant Co. | 552 | 657–660 |
| " " " | 555 | 660–662 |
| " " " | 556 | 662–665 |
| " " " | 557 | 665–668 |
| " " " | 558 | 668–671 |
| " " " | 559 | 671–674 |
| Covington & L. Turnp. Road Co. v. Sandford | 560 | 674–676 |
| " " " | 561 | 676–678 |
| " " " | 562 | 678–680 |
| " " " | 563 | 680–683 |
| " " " | 564 | 683 |
| " " " | 565 | 684–685 |
| " " " | 566 | 685–686 |
| " " " | 567 | 686–688 |
| Maish v. Arizona | 567 | 688–691 |
| " " | 568 | 691–693 |
| " " | 569 | 693–694 |
| " " | 570 | 694–696 |
| " " | 571 | 696–698 |
| " " | 572 | 698–699 |
| Gonzales v. Cunningham | 572 | 701 |
| " " | 573 | 707 |
| " " | 574 | |

| Title. | Here in. |
|---|---|
| Gonzales v. Cunningham | 575 |
| " " | 576 |
| " " | 577 |
| Starr v. United States | 577 |
| " " " | 578 |
| " " " | 579 |
| *Re* Atlantic City R. Co. | 579 |
| " " | 580 |
| Texas & P. R. Co. v. Bloom ("Texas & P. R. Co. v. Manton") | 580 |
| " " " | 581 |
| " " " | 582 |
| " " " | 583 |
| Mills v. United States | 584 |
| " " " | 585 |
| Osborne v. Florida | 586 |
| " " | 587 |
| " " | 588 |
| Nofire v. United States | 588 |
| " " " | 589 |
| " " " | 590 |
| Ford v. Delta & P. Land Co. | 590 |
| " " " | 591 |
| " " " | 592 |
| " " " | 593 |
| " " " | 594 |
| " " " | 595 |
| France v. United States | 595 |
| " " " | 596 |
| " " " | 597 |
| " " " | 598 |
| Bushnell v. Leland | 598 |
| " " | 599 |
| United States v. Northwestern Express, S. & T. Co. | 599 |
| " " " | 600 |
| *Ex parte* Jones | 601 |
| " " | 602 |
| Carver v. United States | 602 |
| " " " | 603 |
| " " " | 604 |
| Memorandum Cases | 1177 |
| " " | 1188 |



Digitized by Google

Digitized by Google

# THE DECISIONS

OF THE

# preme Court of the United States

AT

## OCTOBER TERM, 1896.

---

ated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

---

LAKE & RIVER WATER-
S & IRRIGATION COMPANY,
e Jarvis-Conklin Mortgage Trust
y, *Appts.*,

*v.*

I GARLAND and Corey Brothers
& Co.

See S. C. Reporter's ed. 1-26.)

*e, when continuation of old one—ex-
f time to enforce mechanics' lien—re-
w during progress of work—mortgage
r-acquired property—superior lien—
ntractor—property acquired with the
of a lien—owner—prior record of
—doctrine of relation—presumptions.*

statute should be construed as a con-
of the old one with the modifications
in the new one, although it formally
e old statute, when it re-enacts its sub-
rovisions and the two statutes are al-
tical.

nsion of the time to enforce a mechan-
made by a new lien law repealing but
ally re-enacting the former, during the
of the work for which a lien is claimed,
ffect any right or remedy of the lienor,
e meaning of a proviso that the repeal
affect any right or remedy under the
w; and the proviso does not prevent him
ming the benefit of the enlargement of

eal of a mechanics' lien law during the
of the work for which a lien is claimed
cut off the lienor's right for the work
one, where the repealing statute re-en-
continues the lien law, with some
n matters of procedure only, which do
the lienor's right or remedy.

e in a mortgage which subjects subse-
acquired property to the lien thereof is a
use.

a mortgage mortgaging after-acquired property, if the mortgagor becomes the owner of property burdened with a lien, such lien is superior to that of the prior mortgage.

6. A lien of a contractor for the construction of a canal on public lands, by the completion of which his employer acquires a right of way under U. S. Rev. Stat. § 2339, is superior to that of a prior mortgage given by the latter which included after-acquired property, although the contractor's lien arose coincident with the ownership of the canal by the mortgagor.

7. A mortgage containing the after-acquired property clause is not a valid encumbrance upon after-acquired property superior to that of a contractor's lien, when the mortgagor's title is created by the contractor's labor and is acquired with the burden of the lien, which attached simultaneously with the vesting of title in the mortgagor.

8. The fiction of the doctrine of relation will not be indulged for the purpose of effecting an injustice by subjecting the right of way for a canal on public lands to the prior lien of a mortgage including after-acquired property, when the existence of the mortgagor's title to the right of way was made possible only after and by the labor of the lienors.

9. The fact that a mortgage including after-acquired property was on record before any work was done by a contractor who claims a lien on the property does not subordinate his lien to the mortgage, if the mortgagor acquired his title burdened with the lien upon the completion of the work.

10. Presumptions unfavorable to a judgment will not be indulged for the purpose of reversing it, unless they are natural and probable and such as ought to be drawn from the facts actually found by the court below.

11. A person for whom work is done on land under a contract may be the "owner" within the Utah mechanics' lien law of 1890, although without any legal or equitable title until the work was done, if he became the owner when the work was completed by virtue of its performance.

[No. 48.]

*Argued May 6, 1896. Decided October 19, 1896.*

---

*ls to lien of mortgage on after-acquired*
*ee note to Pennock v. Coe, 16: 436.*
*iority between mortgage and mechanics'*
*te to Brooks v. Burlington & S. W. R. Co.*

*As to when a lien or right to a lien is assignable*, see note to Davis v. Bilsland, 21: 969.

*As to constitutionality of laws or of repeal or modification of statute*, see note to Fletcher v. Peck, 3: 162.



Digitized by Google

APPEAL from a judgment of the Supreme Court of the Territory of Utah affirming a judgment of the District Court of the First Judicial District of the Territory, in favor of the plaintiff William Garland and of the defendant Corey Brothers & Company, establishing their liens respectively, and making them prior and superior to the lien of the Jarvis-Conklin Mortgage Trust Company by reason of its mortgage and decreeing the sale of the property to satisfy such liens, in an action brought by William Garland plaintiff against the Bear Lake Company, the Mortgage Trust Company, Corey Brothers & Company, *et al.*, for the purpose of enforcing an alleged mechanics' lien. *Affirmed.*

**Statement by Mr. Justice Peckham:**

The appellants herein have appealed from a judgment of the supreme court of the territory of Utah, affirming a judgment of the district court of the first judicial district of the terri-3] tory, *in favor of the respondents, William Garland and Corey Brothers & Company.

The action was brought by the plaintiff, William Garland, against the Bear Lake Company, the Jarvis-Conklin Mortgage Trust Company, as trustees; Corey Brothers & Company, and others, for the purpose of enforcing an alleged mechanics' lien in favor of the plaintiff, and against the Bear Lake Company, for work done by the plaintiff for that company in the construction of its canal from its initial point—the Bear River cañon—for a distance of 12 miles on both sides of the river. The complaint alleged that on the 16th of August, 1889, the plaintiff and the Bear Lake Company entered into a contract for the construction by plaintiff of the portion of the work above mentioned, and under that contract the plaintiff commenced work on the 31st of August, 1889, and continued it to and including December 10, 1890. Various payments on account of the work were made the plaintiff, and after crediting the same, the plaintiff alleged there was still due him from the Bear Lake Company, at the time of filing his claim for a lien (December 23, 1890), the sum of $80,250.50, and interest thereon, as set forth in the complaint. The Jarvis-Conklin Mortgage Trust Company and Corey Brothers & Company and the other defendants were made parties to the action as subsequent mortgagees or other encumbrancers. The answer of the Mortgage Trust Company set up the fact that it was the mortgagee in a mortgage executed by the Bear Lake Company to it as trustee on the 1st day of October, 1889, to secure the payment of $2,000,000 of the bonds of the mortgagor company, and that such mortgage covered all the water rights, franchises, lines of canal and other property upon the whole or any part of which the plaintiff claimed a lien, and that the mortgage also by its terms covered all after-acquired property of every kind. The mortgage was duly recorded in Box Elder County, Utah, November 14, 1889; in Bear Lake County, Idaho, December 24, 1889; in Weber County, Utah, February 6, 1890. The bonds secured by the mortgage were all delivered between October 1, 1889, and February 1, 1891, and in large part paid for, and the 4] balance was to be paid for *by drafts drawn upon the Mortgage Company by the treasurer of the Bear Lake Company as fast as the money was needed to pay for the construction of the works. At the time the plaintiff Garland entered into the contract already mentioned and when he commenced work thereunder, the statutes of Utah provided a mechanics' lien, under the provisions of which a contractor within sixty days after the completion of his contract was to file for record with the county recorder a claim stating his demand, and giving a description of the property to be subjected to the lien. By § 3814, s. 1065, no lien provided for by the chapter upon liens was to bind any of the property longer than ninety days after the claim was filed, "unless proceedings be commenced in a proper court within that time to enforce the same." 2 Utah, Comp. Laws 1888, p. 406, from § 3806 to and including § 3820. The answer further set up the fact that while the above act was in force, and on the 12th of March, 1890, the legislature of Utah passed an act in relation to mechanics' liens, and § 32 thereof repealed the former and above-mentioned lien act, but added the following proviso: "Provided, that the repeal of said acts or parts of acts or any of them shall not affect any right or remedy, nor abate any suit or action or proceeding existing, instituted, or pending under the laws hereby repealed."

The answer then set forth that the plaintiff did not commence his action to enforce his lien within the ninety days given by the act in force when the work was commenced under the contract, and therefore the lien no longer existed at the time the action was commenced to enforce it.

The answer of Corey Brothers & Company was in the nature of a cross-complaint, and set up the fact that they entered into a contract with the Bear Lake Company on the 1st of May, 1890, to construct certain portions of the canal of the company, and that between such date and the 5th of December, 1890, they did the work provided for in the contract, and on the 7th of January, 1891, they filed their claim for a lien for the balance of the money due them under the contract (which was about $11,000), and *they asked for a decree enforcing [5 their lien as a prior encumbrance to that of the mortgage upon the property of the Bear Lake Company.

The Bear Lake Company set up the same facts as a defense against the plaintiff's cause of action that were alleged by the Mortgage Trust Company, and it answered the claim of Corey Brothers & Company by alleging that the mortgage to the Mortgage Trust Company had been executed and duly recorded, and was in existence long before and at the time of the execution of the agreement which Corey Brothers & Company made with the Bear Lake Company, and that therefore the lien of Corey Brothers & Company was subsequent and subject to the lien of the mortgage upon the after-acquired property of the Bear Lake Company.

No question arises with reference to the other defendants.

The case came on for trial upon the issues thus found, and the court, after hearing the evidence, gave judgment in favor of plaintiff



Digitized by Google

and of Corey Brothers & Company establishing their liens, respectively, upon an equality, and making them prior and superior to the lien of the Mortgage Trust Company by reason of its mortgage, and decreeing the sale of the property to satisfy such liens.

*Messrs.* **John F. Dillon,** *Harry Hubbard,* and *Henry M. Beardsley,* for appellants:

Whatever right to a lien and remedy Garland may have had, at least as against the Jarvis-Conklin Mortgage Trust Company, existed only under Utah Comp. Laws 1888, §§ 3806-3820 inclusive. Those statutes required him to bring his action within ninety days from the time of filing his claim for a lien. He did not bring his action until long after the ninety days had expired, and thus permitted his right and remedy to lapse, and neglected to obtain a lien.

Garland made his contract August 19, 1889, and began work under his contract August 31, 1889. While he was engaged in his work, to wit, on March 12, 1890, the legislature of Utah repealed said §§ 3806-3820. At the time of this repeal Garland had undoubtedly had a right under those statutes, upon the completion of his work, to file a claim for a lien, and to complete his lien by bringing his action within the ninety days therein prescribed. This right the legislature of Utah could not take away from him. To do so would be contrary to the Constitution of the United States.

*Wabash & E. Canal Co.* v. *Beers,* 67 U. S. 2 Black, 448 (17: 327).

It is clear that, under the act of March 12, 1890, Garland had no lien which could in any way have priority over the lien of the mortgage to the Jarvis-Conklin Mortgage Trust Company. The mortgage was made October 1, 1889. It was recorded in November, and December, 1889, and February, 1890. The mortgage, therefore, was made and recorded, and was an existing lien on March 12, 1890. It is clear, therefore, that the act of March 12, 1890, could not displace this existing lien of the mortgage or give any other lien priority over it. If, therefore, Garland looks to the act of March 12, 1890, for his lien, he must fail, for that act could not give him any lien prior to the lien of the mortgage.

The act of March 12, 1890, is not retroactive. Garland could have no lien under it prior to the lien of the mortgage to the Jarvis-Conklin Mortgage Trust Company, made October 1, 1889. The act could not be retroactive so as to take away the prior lien of the mortgage.

*Murray* v. *Gibson,* 56 U. S. 15 How. 421 (14: 755); *United States* v. *Heth,* 7 U. S. 3 Cranch, 399 (2: 479); *McEwen* v. *Den,* 65 U. S. 24 How. 242 (16: 672).

It follows, therefore, that for the labor and material furnished by Garland prior to March 12, 1890, he can have no lien by virtue of the act of that date, and that the mortgage to the Jarvis-Conklin Mortgage Trust Company is prior to any lien which is or can be given to Garland by the act of March 12, 1890, whether it be for work done prior to March 12, 1890, or for work done after that date. In other words, if the right of Garland to a lien and a remedy therefor depend upon the act of March 12, 1890, he can have no lien prior to the mortgage.

The principle of law is well settled that in case a statute creates a right or liability not known to the common law, and provides a remedy for the enforcement of such right or liability, and limits the time within which the remedy must be pursued, the remedy forms a part of the right or liability, and must be pursued within the time prescribed or the right and remedy are both lost.

*Boyd* v. *Clark,* 8 Fed. Rep. 849; *Finnell* v. *Southern Kansas R. Co.* 33 Fed. Rep. 427; *Halsey* v. *McLean,* 12 Allen, 439, 443, 90 Am. Dec. 157; *The Harrisburg* v. *Rickards* ("*The Harrisburg*"), 119 U. S. 199, 214 (30: 358, 362).

The above decisions all show that in a case like the present the remedy is coupled with and forms a part of the right, and if the remedy is not pursued within the time limited by the statute creating the right, both the remedy and the right are lost.

It is also well-settled law that in case a repealing statute provides that the right and the remedy under the statute repealed shall not be affected, the repeal leaves both the right and the remedy unaffected, and any person, in order to avail himself of the right, must pursue the remedy prescribed and within the time prescribed by the repealed statute.

*Wilkerson* v. *Hudson,* 71 Miss. 130; *Cochran* v. *Taylor,* 18 Ohio St. 382; *Gilleland* v. *Schuyler,* 9 Kan. 569.

Corey Brothers & Company have no lien prior to the mortgage for the reason that their contract was not made until May 1, 1890, and they did not begin work until after that time; whereas the mortgage to the Jarvis-Conklin Mortgage Trust Company was made October 1, 1889, and recorded in November, and December, 1889, and February, 1890.

The supreme court of Utah was mistaken both as to the facts and as to the application of law.

The mortgage was in the usual form and was sufficient to convey property of every kind and description then owned or thereafter acquired by the Bear Lake Company.

The attorney for the Jarvis-Conklin Mortgage Trust Company excepted to finding 29 as follows:

The court erred as to finding of fact 29, for the reason that there is no evidence in this case upon which to base the said facts there stated, nor any one of them. The evidence does not support such finding, and there is no pleading upon which to base the same.

It is well settled that a mortgage can be made of after-acquired property, and that the mortgage thus made and recorded has priority over any lien which is subsequent in point of time.

*Galveston, H. & H. R. Co.* v. *Cowdrey,* 78 U. S. 11 Wall. 459 (20:199); *Tailby* v. *Official Receiver,* L. R. 13 App. Cas. 523; *Holroyd* v. *Marshall,* 10 H. L. Cas. 191; *Pennock* v. *Coe,* 64 U. S. 23 How. 117 (16:436); *McCaffrey* v. *Woodin,* 65 N. Y. 459, 22 Am. Rep. 644; *Phillips* v. *Phillips,* 4 De G. F. & J. 218.

The theory of the Utah court that, although the mortgage covered after-acquired property, yet the parts of the property on which Corey Brothers & Company did their work did not come into existence until such labor was performed, and that therefore they were entitled



Digitized by Google

to a lien prior to the mortgage, is not tenable, for the reason that the equity of the mortgagee is at least equal to that of Corey Brothers & Company, and their mortgage was long prior in time.

The mortgage was made in October, 1889, and recorded in November, and December, 1889, and February, 1890, and bonds issued and large sums of money advanced under the mortgage, including sums which went to pay Garland for his work, at least amounting, before May 1, 1890, to $386,318.98, all which was long prior to May 1, 1890, when Corey Brothers & Company began to perform their labor. This prior making of the mortgage and actual advancing of the moneys created an equity, which was, to say the least, equal to that of Corey Brothers & Company. We say it was far superior to theirs. But, assuming this equity to be only equal, still the mortgage was prior in time, and its equity should therefore prevail.

The Bear Lake Company had title to water rights and rights of way by appropriation long before the contract with Corey Brothers & Company.

The court, however, is clearly in error in supposing that as to government land the Bear Lake Company did not have property rights in their canal before the work was performed thereon by Corey Brothers & Company. Long before Corey Brothers & Company made their contract or did any work the company had begun the construction of its canal. Garland, who performed the largest part of the labor in constructing the canal, began his work as long prior thereto as August 31, 1889. The route of the canal had been selected and work had been done thereon by Garland long prior to May 1, 1890. The Bear Lake Company were clearly the owners, before May 1, 1890, of all parts of the canal on which work had thus been done prior to that date, and on those parts clearly Corey Brothers & Company were, even on the theories advanced by the supreme court of Utah, entitled to no lien.

Act of July 26, 1866. The title to this act, which was "An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes," shows its purpose.

Therefore, even if all the lands over and through which the Bear Lake Company constructed its canal had been public lands, yet the occupation of them by that company and the beginning of the work of constructing their canal gave them the right of way by appropriation. This right existed from the time the Bear Lake Company began the work of constructing its canal, and related back to the commencement of the work in August, 1889; and such property right was good against any person who acquired any interest in the land after the commencement of the work.

Such right of appropriation by priority of possession is "recognized and acknowledged by all the local customs, laws, and decisions of the courts of Utah," as well as of the other states on the Pacific slope for which §§ 2339, 2340, of the United States Revised Statutes were enacted.

*Sullivan* v. *Northern Spy Min. Co.* 11 Utah, 438, 30 L. R. A. 186.

It is clear, therefore, that, "under the laws and customs and decisions of the courts of Utah," the Bear Lake Company acquired a property right in its water rights and right of way long prior to May 1, 1890.

The following authorities show that in the case of an appropriation of water or water rights, or rights of way therefor, the ditch or canal or other work need not be fully completed in order to secure the priority given and recognized by U. S. Rev. Stat. § 2339, above quoted, and by the laws and customs of the Pacific states. It is sufficient if the work has been begun and is being prosecuted with due diligence.

*Kelly* v. *Natoma Water Co.* 6 Cal. 108; *Dyke* v. *Caldwell* (Ariz.) 18 Pac. 276; *Irwin* v. *Strait*, 18 Nev. 436.

If the Bear Lake Company was not the owner, then Corey Brothers & Company had no right to the lien under the provisions of the act of March 12, 1890.

If the Bear Lake Company was not the "owner" of the land or right of way, then Corey Brothers & Company had no contract with an "owner" within the meaning of this act of March 12, 1890, and therefore they have no lien.

*Nelson* v. *Clerf*, 4 Wash. 405; *Tritch* v. *Norton*, 10 Colo. 337.

Corey Brothers & Company entered upon the land and did their work under and in privity with the Bear Lake Company which had long prior thereto made and recorded its mortgage to the Jarvis Conklin Mortgage Trust Company. Corey Brothers & Company therefore entered with full notice of the mortgage, and, being in privity with the Bear Lake Company, are bound by the estoppel created by the mortgage.

Phillips, Mechanics' Liens, § 282; *Card* v. *Quinebaug Bank*, 23 Conn. 355; *Hoover* v. *Wheeler*, 23 Miss. 314; *Pride* v. *Viles*, 3 Sneed, 125; *Bridwell* v. *Clark*, 39 Mo. 170; *Galveston, H. & H. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 459 (20:199); *Seymour* v. *Slide & S. Gold Mines*, 153 U. S. 523 (38:807); *Jackson* v. *Denison*, 4 Wend. 558.

One who holds the possession of real estate as manager for or under another cannot dispute that other's title.

*Doe, Johnson*, v. *Baytup*, 3 Ad. & El. 188; *Phelan* v. *Kelly*, 25 Wend. 389, 393.

In *Seymour* v. *Slide & S. Gold Mines*, *supra*, this court says: "Neither is it necessary to inquire into the right of the plaintiff as a foreign corporation to take and hold title to real estate in Colorado, a question which, in some of its aspects, was before this court in the case of *Fritts* v. *Palmer*, 132 U. S. 282 (33: 317), for if, by so doing, any laws of the state are violated, the state is the one to challenge the act (Devlin, Deeds, § 127, and cases cited in note), and it does not lie in the mouth of the agent of the corporation to raise the question."

Even on the theory advanced by the supreme court of Utah, that if the lands over which the Bear Lake Company constructed its canal were public lands, and if, further, the Bear Lake Company did not acquire title to such public lands until after Corey Brothers & Company began their work, still the decision of the court was erroneous for the reason that this



Digitized by Google

theory would apply only in the case of lands over which the canal was constructed which were public lands, and on which Corey Brothers & Company did their work, and the route of the canal was, according to the finding of the court, only in part over public lands. The judgment of the court, therefore, even on its own theory, should at the most, have been limited to giving a lien to Corey Brothers and Company as respects the public lands over which the canal was constructed by them, but the lien could not attach to even this part for the reason that the statutes of Utah (act of March 12, 1890) make no provision for a lien upon a part of a canal or other work.

*Messrs.* **Sanford B. Ladd** and *John C. Gage*, for William Garland, appellee:

The findings of fact by the court below are conclusive in this court.

*Stringfellow* v. *Cain*, 99 U. S. 610 (25: 421); *Hecht* v. *Boughton*, 105 U. S. 235 (26: 1018); *Idaho & O. Land Improv. Co.* v. *Bradbury*, 132 U. S. 509 (33: 433); *Neslin* v. *Wells, F. & Co.* 104 U. S. 428 (26: 802); *Eilers* v. *Boatman*, 111 U. S. 356 (28: 454); *Gray* v. *Howe*, 108 U. S. 12 (27: 634); *O'Reilly* v. *Campbell*, 116 U. S. 418 (29: 669); *San Pedro & C. D. A. Co.* v. *United States*, 146 U. S. 120 (36: 911); *Mammoth Min. Co.* v. *Salt Lake Foundry & M. Co.* 151 U. S. 447 (38: 229).

The lien was properly claimed and proceedings instituted to enforce the same, under the law of March 12, 1890.

Phillips, Mechanics' Liens, 2d ed. § 9; 2 Jones, Liens, § 1558; *Hanes* v. *Wadey*, 73 Mich. 178, 2 L. R. A. 498; *Re Hope Min. Co.* 1 Sawy. 710.

There is a distinction between the obligation of a contract and the remedy to enforce it.

*Ogden* v. *Saunders*, 25 U. S. 12 Wheat. 214 (6: 606); *Kingley* v. *Cousins*, 47 Me. 91; *Turney* v. *Saunders*, 5 Ill. 527.

The proceeding to redeem must be governed by the provisions of the law in force at the time the right to redeem accrued.

*People* v. *Livingston*, 6 Wend. 526; *Hammond* v. *Shephard*, 50 Hun, 318; *Collins* v. *Warren*, 68 Tex. 311; *Nelson* v. *Sykes*, 44 Minn. 68; *Bardwell* v. *Mann*, 46 Minn. 285; *Tell* v. *Woodruff*, 45 Minn. 10; *Hill* v. *Lovell*, 47 Minn. 293; *Nystrom* v. *London & N. W. A. Mortg. Co.* 47 Minn. 31; *Orman* v. *Crystal River R. Co.* 5 Colo. App. 493.

If the true construction of the statute be doubtful, proceedings under the law of March 12, 1890, should be upheld.

*Scheftels* v. *Tabert*, 46 Wis. 439.

The new law, being in substitution for the old one, should be held to apply to all contracts sought to be enforced after its passage, unless its language renders such construction impossible.

*Bronson* v. *Kinzie*, 42 U. S. 1 How. 311 (11: 143); *Tennessee* v. *Sneed*, 96 U. S. 69 (24: 610); *Templeton* v. *Horne*, 82 Ill. 491; *Barton* v. *Steinmitz*, 37 Ill. App. 141; *Paine* v. *Woodworth*, 15 Wis. 298; *Hopkins* v. *Jamieson-Dixon Hill Co.* 11 Wash. 308; *Hauser* v. *Hoffman*, 32 Mo. 334; *Forcht* v. *Short*, 45 Mo. 377; *Phillips* v. *Mason*, 7 Heisk. 61; *Lawrence R. Co.* v. *Mahoning County Comrs.* 35 Ohio St. 1; *Goodbub* v. *Hornung*, 127 Ind. 181; *Nixon* v. *Cydon Lodge No. 5, K. of P.* 56 Kan. 298; *Main Street Hotel Co.* v. *Horton Hardware Co.* 56 Kan. 448; *Grosbeck* v. *Barget*, 1 Kan. App. 61; Phillips, Mechanics' Liens, § 24.

A lien under the law of March 12, 1890, might be enforced for work done after that date, although under a contract made before the passage of the law.

*Hauptman* v. *Catlin*, 20 N. Y. 247.

The Bear Lake & River Waterworks & Irrigation Company was the owner of the property within the meaning of the statute.

*Rollin* v. *Cross*, 45 N. Y. 766; *Meyer Bros. Drug Co.* v. *Brown*, 46 Kan. 543; *Jarvis-Conklin Mortg. Trust Co.* v. *Sutton*, 46 Kan. 166; *Chicago Lumber Co.* v. *Osborn*, 40 Kan. 168; *Chicago Lumber Co.* v. *Frets*, 51 Kan. 134; *Stockwell* v. *Carpenter*, 27 Iowa, 119; *Turney* v. *Saunders*, 5 Ill. 526; *Hooker* v. *McGlone*, 42 Conn. 95; *Goldheim* v. *Clark*, 68 Md. 498; *Bell* v. *Cooper*, 26 Miss. 650.

The question of ownership is not one upon which either of the appellants ought to be heard, because if the title be in one not a party to this proceeding, it is not for the appellants now or at any time to assert his rights for him.

Garland's lien is to be preferred to the claim under the mortgage.

Phillips, Mechanics' Liens, § 187; *Lane* v. *Snow*, 66 Iowa, 544; *Falconer* v. *Frazier*, 7 Smedes & M. 235; *Williams* v. *Lane*, 87 Wis. 152; *Willer* v. *Bergenthal*, 50 Wis. 474; *Davis* v. *Bilsland*, 85 U. S. 18 Wall. 659 (21: 969); *New Orleans & O. R. Co.* v. *Mellen* ("*United States* v. *New Orleans R. Co.*") 79 U. S. 12 Wall. 362 (20: 434); *Botsford* v. *New Haven, M. & W. R. Co.* 41 Conn. 454; *Williamson* v. *New Jersey Southern R. Co.* 28 N. J. Eq. 277, 29 N. J. Eq. 311.

*Mr.* **Arthur Brown** for Corey Brothers & Company, appellees.

Mr. Justice **Peckham** delivered the opinion of the court:

The contest in this case lies between the plaintiff and the firm of Corey Brothers & Company on the one hand and the Mortgage Trust Company on the other. The former demand priority of lien for their respective claims over that of the mortgage held by the Mortgage Trust Company upon the property of the Bear Lake Company.

It will be convenient to separately examine these claims.

First. As to the plaintiff's alleged lien. At the time when the plaintiff entered into his contract and commenced work under it the lien law of 1888 was in force, one of the sections of which (3810, s. 1061) provided that the lien mentioned in the act was to be preferred to any other which might attach subsequently to the time when the building, improvement, or structure was commenced, work done or materials were commenced to be furnished. As the work of the plaintiff under his contract was commenced on the 31st of August, 1889, and continued up to December, 1890, while the mortgage to the Mortgage Trust Company was not executed until October, 1889, it is conceded by the counsel for the latter company that if the plaintiff had complied in all respects with the provisions of the[11 act of 1888, and had commenced his action to enforce his lien within ninety days from the



Digitized by Google

time when he filed his claim for a lien (December 23, 1890), his action could have been maintained and his lien would have had priority. Inasmuch, however, as he failed to commence his action within the time mentioned, it is insisted that the lien had then expired by the express provisions of the act of 1888, § 3814. The plaintiff makes answer to this objection by citing § 21 of the act of the 12th of March, 1890, which reads as follows:

"Sec. 21. No lien claimed by virtue of this act shall hold the property longer than one year after filing the statement firstly described in § 10, unless an action be commenced within that time to enforce the same."

This action was commenced within one year after filing the statement of the plaintiff's claim, and he therefore insists that it was commenced in time, and that his lien should have priority. In that contention he is met by the claim of the Mortgage Company that the section referred to does not affect the plaintiff's case, as the contract between him and the Bear Lake Company was entered into and a large amount of the work was done under it prior to March, 1890, and while the act of 1888 was in force, and that by the express terms of the proviso in § 32 of the act of 1890 the repeal of the act of 1888 did not affect any right or remedy, nor abate any suit or proceeding existing, instituted, or pending under the laws thereby repealed.

The terms of the act of 1890 are thus cited as a limitation of the plaintiff to the provisions of the act of 1888. If plaintiff be thus confined he cannot maintain this action, as he did not commence it until some time after the expiration of the ninety days from the date of filing his claim.

Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provi-
12] sions *have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. This is the same principle that is recognized and asserted in *Pacific Mail S. S. Co.* v. *Joliffe*, 69 U. S. 2 Wall. 459 [7: 808]. In that case there was a repeal in terms of the former statute, and yet it was held that it was not the intention of the legislature to thereby impair the right to fees which had arisen under the act which was repealed. As the provisions of the new act took effect simultaneously with the repeal of the old one, the court held that the new one might more properly be said to be substituted in the place of the old one, and to continue in force, with modifications, the provisions of the old act, instead of abrogating or annulling them and re-enacting the same as a new and original act.

It is true that the law in the *Joliffe Case* did not contain any saving of or provision for the rights and remedies of the pilot, but the foundation of the reasoning by which the court concluded that the new should be treated as a continuation of the old statute with modifications did not rest alone upon this omission. It was chiefly based upon the facts above stated: the similarity of the subject-matter of the two statutes, and that the effect was a continuation of the old statute as modified by the new, notwithstanding the use of language which formally repealed the old statute.

The omission to provide for the rights of the pilot does not, therefore, detract from the authority of the case for the purpose for which it is here cited.

The two acts in question here are of a similar nature, relating to the same general subject-matter, and making provisions for the creation and enforcement of mechanics' liens. The new act of 1890, although in terms repealing the earlier act, is yet in truth, and for the reasons already given, a continuation of that act with the modifications as provided in the new one. One of those modifications is the extension of the time in which to commence the action to foreclose the lien after the filing of the statement which claims it. Where at the time of the *passage of the new act the proposed lienor[13 has only entered upon the execution of his contract and has not yet completed the work under it, we think that at least as to him the provision enlarging the time in which to commence the action to foreclose the lien is applicable, and there is no retroactive effect thereby given to that provision of the new act.

It may be asked what effect is given under this construction to the language of the proviso contained in § 32 of the act of 1890, already quoted. The answer is that the mere enlargement of the time in which to commence the action, at least in a case where the time had not yet arrived in which to file any statement of the plaintiff's claim for a lien, does not affect any right or remedy provided for in the old act. The right, as that term is used in the statute, consisted of the right of sale of the property in order, if necessary, to obtain payment of the money due the contractor. The remedy consisted of the taking of certain proceedings by which this sale was to be accomplished. Prior to the arrival of the time when one of these steps was to be taken an alteration of the statute by which the time to take that step might be enlarged was not an alteration of the right or of the remedy, as those terms are used in the statute, nor did it in any way affect either; it was simply an alteration of the mere procedure in the course of an employment of a remedy, the remedy itself remaining untouched or unaffected by such alteration. In this case such an enlargement of time to commence an action was given before the time had arrived in which the action could have been commenced under the old statute. The new statute was prospective in its operation, even as applied to this case. Of course, if the new act had curtailed the time in which to bring the action, after the time had commenced to run under the old statute, totally different considerations would spring up, and what was a mere alteration of procedure, having really nothing to do with a remedy in the one case, might, in the other, most seriously affect it, and hence come within the proviso in question. Under the facts of this case the right or remedy of the plaintiff was not touched, or, in the language of the proviso, was not "affected" by



Digitized by Google

14]the enlargement of the time in *which to commence the action, and therefore the proviso did not take the plaintiff's case out of the application of the section in the new act providing such enlarged time.

Under the construction given by us to the act of 1890, as a continuation of that of 1888, with modifications, the question as to which act the lien is claimed under is not specially material. In effect, it is one act, and those labors, etc., which were performed before the passage of the act of 1890 are added to those performed thereafter. The lien is really claimed by virtue of the fact that at the time when the contract was entered into the statute of Utah provided such a right or remedy, and although the action to foreclose the lien was commenced under the provisions of the act of 1890, yet the right itself commenced under the old act. That right is not affected by any provision of the new act, and although it is claimed that the right and the remedy must go together under the old act, as they are preserved by the same language, yet, for the reasons already given, the time in which to commence the action is no part of the remedy as that word is used in the proviso, and an extension of that time may be provided for in the new act without in any way affecting the right or remedy of the lienor where the facts are the same as in this case.

It may be assumed that where a statute creates a right not known to the common law, and provides a remedy for the enforcement of such right, and limits the time within which the remedy must be pursued, the remedy in such case forms a part of the right, and must be pursued within the time prescribed, or else the right and remedy are both lost; but it does not therefore follow that the plaintiff's right to a lien and to maintain this action must be based solely upon the act of 1888.

We must bear in mind the position of the plaintiff when the act of 1890 was passed. He had not then completed his contract and could not therefore file any statement of claim, nor could he commence any action. The particular time in which he would be allowed to commence his action (provided a sufficient time in fact were given) was, under such circumstances, mere matter of procedure as distin-

15]guished from remedy. The *remedy would not thereby be altered, because the remedy consisted in filing the statement and in commencing the action. The time in which to do either would be matter of procedure only. Hence, when the act of 1890 was passed, which enlarged the time in which to commence the action already provided for, such enlargement did not affect any right or remedy of the plaintiff. It did not affect either, because the provision applied only to procedure and not to right or remedy, and therefore the plaintiff could avail himself of the time given him by the act of 1890 in which to commence his action as one of the steps in procedure by which the remedy for a violation of the contract by the enforcement of foreclosure of the lien would be accomplished.

We conclude that the lien of the plaintiff was valid and superior to the mortgage of the Mortgage Trust Company.

Second. We are of the opinion also that the claim of Corey Brothers & Company for a lien superior to that of the Mortgage Trust Company was properly allowed. That company claims a superiority of lien because of the clause in its mortgage by which the Bear Lake Company mortgaged to it, in addition to the property then owned by the lake company, all its after-acquired property.

A clause in a mortgage which subjects subsequently acquired property to the lien of the mortgage is a valid clause. *Toledo, D. & B. R. Co.* v. *Hamilton*, 134 U. S. 296 [33: 905]; *Central Trust Co.* v. *Kneeland*, 138 U. S. 414 [34: 1014]; *Galveston, H. & H. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 459-481 [20: 193-206].

Such a mortgage, as against the mortgagor and subsequent encumbrancers, attaches itself to the after-acquired property as fast as it comes into existence, or as fast as the canal or railroad is built, and the lien of the mortgagee is held to be superior to that of the constructor. The lien of the mortgage extends also to an equitable as well as to a legal title to the property subsequently acquired. *Toledo, D. & B. R. Co.* v. *Hamilton* and *Central Trust Co.* v. *Kneeland, supra.*

The company claims that under the principles decided in these cases the lien of its mortgage is superior to the claim of Corey Brothers & Company.

On the contrary, the latter claim to bring their case within *the rule recognized in [16 this court, that even under the after-acquired property clause in a mortgage, if property be burdened with an encumbrance or lien at the very time of coming into the possession or ownership of the mortgagor, such encumbrance remains prior and superior to the lien of the mortgage, although it was actually subsequent thereto in point of time. *New Orleans & A. R. Co.* v. *Mellen* ("*United States* v. *New Orleans Railroad*"), 79 U. S. 12 Wall. 362 [20: 434]; *Fosdick* v. *Schall*, 99 U. S. 251 [25: 342].

Some further facts are material to this inquiry, and have been found by the court below. The work done by Corey Brothers & Company is set forth in findings nineteen and twenty-three as made by the trial court. It consisted of work and labor and the furnishing of materials in the construction of the canal from May 1 to December 5, 1890. The canal was constructed on land over which the company had what is termed in the finding the right of way. The land is described in the nineteenth finding, and the manner in which the right of way was acquired is set forth in finding twenty-nine, which reads as follows:

"The right of way upon which the canal was constructed, which right of way is described in the finding nineteen, consisted largely of public land, and was obtained by the defendant, the Bear Lake & River Water Works & Irrigation Company, under and by virtue of the act of Congress of 1866, being section —, Revised Statutes of the United States. A large portion of said right of way was obtained under contract with one Kerr, by which Kerr agreed, upon the construction of said canal through his land, to give said right of way. The other portions of said canals were purchased by the Bear Lake Company at various times from individual proprietors after May 1, 1890."

The section of the Revised Statutes above



Digitized by Google

referred to is § 2339, and it is taken from the 9th section of the act of Congress, approved July 26, 1866 (14 Stat. at L. 253), which reads as follows:

"Sec. 9. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local cus-
17] toms, laws, and the *decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed: *Provided, however*, That whenever after the passage of this act any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

Congress subsequently passed another act, approved July 9, 1870, entitled "An Act to Amend an Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands and for Other Purposes." 16 Stat. at L. 218.

Section 17 of that act is § 2340 of the Revised Statutes, and part of the section reads as follows:

"Sec. 17. None of the rights conferred by §§ 5, 8, and 9 of the act of which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act, and all patents granted or pre-emption or homesteads allowed shall be subject to any vested and accrued water rights or rights to ditches and reservoirs used in connection with such water rights as may be acquired under or recognized by the 9th section of the act of which this act is amendatory."

The trial court made one other finding of fact (the thirty-third), by which it was found that the work done by Garland and by Corey Brothers & Company was done for the Bear Lake Company, which company, with the consent of the owners of the legal title, entered into possession of the land through which the canal ditches were dug, and then after so entering into possession the company consented to and permitted the plaintiff Garland and also Corey Brothers & Company to do the work under their contracts with the company in digging and excavating the canal.

The counsel for the Mortgage Company excepted to the twenty-ninth finding of the court, on the grounds, 1st, that there was no evidence upon which to base the finding; 2d, the evidence did not support the finding; 3d, there
18] was no *pleading upon which to base the same. This exception as to the lack of evidence to support the findings we cannot consider, and we think that the objection as to the pleading is not well taken.

Upon appeal from the supreme court of a territory this court is precluded under the statute from reviewing any question of fact, and the finding of the court below is conclusive upon this court as to all such questions. The jurisdiction of this court on such an appeal, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment. *Stringfellow* v. *Cain*, 99 U. S. 619 [25:424]; *Neslin* v. *Wells, F. & Co.* 104 U. S. 428 [26:802]; *Eilers* v. *Boatman*, 111 U. S. 356 [28:356]; *Idaho & O. Land Improv. Co.* v. *Bradbury*, 132 U. S. 509 [33:433]; *Mammoth Min. Co.* v. *Salt Lake Foundry & Mach. Co.* 151 U. S. 450 [38:230].

The findings of the trial court are approved and adopted by the supreme court of the territory by a general judgment of affirmance. *Neslin* v. *Wells, F. & Co. supra.*

We must therefore, in the examination of the question now under consideration, be confined to the facts as found by the trial court, approved as they have been by the general affirmance of the judgment by the supreme court of the territory.

So far as the public land is concerned, over or through which these ditches for the canal were dug, the statutes above cited create no title, legal or equitable, in the individual or company that simply takes possession of such land. The government enacts that anyone may go upon its public lands for the purpose of procuring water, digging ditches for canals, etc., and when rights have become vested and accrued which are recognized and acknowledged by the local customs, laws, and decisions of courts, such rights are acknowledged and confirmed. Under this statute no right or title to the land, or to a right of way over or through it, or to the use of water from a well thereafter to be dug, vests, as against the government, in the party entering upon possession from the mere fact of such possession unaccompanied by the performance of any labor thereon.

Undoubtedly rights as against third persons are acquired *by priority of possession, and[19 the government will and does recognize such rights as between those parties. This is the principle running through the cases cited by the counsel for appellants. In *Sullivan* v. *Northern Spy Min. Co.* 11 Utah, 438, 80 L. R. A. 186, which is one of those cases, the priority of possession of the person who entered upon the public land and dug the well was recognized as thereby making a superior title to the use of the water from the well over that acquired by a person who was the subsequent purchaser of the land from the government. In that case the well had been dug and the condition fulfilled. If no well had ever been dug, and a reasonable time for digging it had passed, the mere priority of possession would have given no superior title to the land over that acquired by the grantee from the government. It is the doing of the work, the completion of the well, or the digging of the ditch, within a reasonable time from the taking of possession, that gives the right to use the water in the well or the right of way for the ditches of the canal upon or through the public land. Until the completion of this work, or, in other words, until the performance of the condition upon which the right to forever maintain possession is based, the person taking possession has no title, legal or equitable, as against the government. What, if any, equitable claims a party might have upon the government who did a large amount of work, but finally failed to complete the necessary amount to secure the water or



Digitized by Google

right of way, it is not necessary to determine or discuss. Those equities would not, in any event, amount to an *equitable title* to the right of way or to the use of the water, and so need not be here considered.

The Bear Lake Company, therefore, never had any legal or equitable title to the land over or through which the ditch for the canal was dug, as against the government, until the ditch was completed. As the ditch was completed by the labor of the contractor, and the very title of the mortgagor thereto was itself created by his labor, the lien attached to the property as it was created and came into being, and arose coincident with the ownership of the ditch by the mortgagor, and the property came into [20]*the hands of the mortgagor burdened with this lien, which remains superior to that of the mortgage. The point is that the mortgagor never had any claim or title, of a legal or equitable nature, to the land upon which this work was done during the whole time that the work was going on, and when the title did thereafter vest in the Bear Lake Company by virtue of the work done by Corey Brothers & Company, it became burdened with the lien created by virtue of the work so done upon it. If prior to the doing of the work the Bear Lake Company had simply purchased the land, or entered into any such agreement with the owner thereof as gave it an equitable title to the same, then the property would not have come to the Bear Lake Company burdened with any lien, and the work thereafter done upon it in the shape of digging the ditch, etc., would not have given ground for any priority of lien as against the mortgage of the Trust Company.

The material fact to remember is that the sole title to the land or the right of way, which the Bear Lake Company has, whether legal or equitable, is transferred to that company only by virtue of the work previously done upon the land by the constructors, who thereby fulfil the condition upon the performance of which such transfer or the right of such transfer depended. Under these circumstances it is proper to say that the title to the land was transferred subject to the constructors' lien for the work which made the transfer possible and by means of which it was accomplished. The claim is also urged that, even upon the theory of the appellees, the title to the portion of the land or right of way upon which Garland the plaintiff had worked had passed to the Bear Lake Company, and had come under the lien of the mortgage before any work was done by the Corey Brothers & Company firm, and as to that portion of the work the claim is made that the firm could have no lien prior to the mortgage. The fact is that at the time when the firm commenced work in May, 1890, the plaintiff Garland had not completed his work, and did not complete it until along in December following. The title had not therefore passed to the Bear Lake Company when Corey Brothers & Company commenced their work.

[21] *Nor is there any priority given to the mortgage as claimed by the appellants by reason of the provision contained in that portion of § 19 of the act of 1890, which reads as follows:

"All such liens shall relate back to the time of the commencement to do work or to furnish materials, and shall have priority over any and every lien or encumbrance subsequently intervening, or which may have been created prior thereto, but which was not then recorded, and of which the lienor under this act had no notice. Nothing herein contained shall be construed as impairing any valid encumbrance upon any such land, duly made and recorded before such work was commenced or the first of such materials were furnished."

The very question in issue is whether the mortgage was a valid encumbrance upon any after-acquired land prior to these liens. Inasmuch as the title to the right of way did not pass until the completion of the work, we hold the mortgage was not a valid encumbrance upon such right of way until that time, and that the title came to the Bear Lake Company burdened with the lien claimed by the lienor which attached to the property at the very moment of and simultaneously with the vesting of such title in the company and in priority to the lien of the mortgage.

This principle is in entire harmony with that laid down in the already cited cases of *Galveston, H. & H. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 459 [20: 199], and *Toledo, D. & B. R. Co.* v. *Hamilton*, 134 U. S. 296 [33: 905], and with the cases therein referred to. In neither of the above-mentioned cases did the title to the property come into the hands of the company burdened with any lien. Most of the property in the first above-cited case came to the company before any work was done, and a small portion only was purchased by it after the work was done, and it was held that the lien of the mortgage upon the property as after acquired was superior to that of the constructor who did the work. His work did not transfer the title or create the condition upon which the vesting of the title could take place in the mortgagor, and consequently there was no basis for the claim that the property came to the mortgagor burdened with the lien. *In the[22 *Toledo Case* the dock was built upon property to which the mortgagor had a good equitable title and which was covered by the mortgage, just the same as if the title were a legal one, and it was held that the dock became subject to the lien of the mortgage as prior and superior to any lien of the mechanics for construction. It was urged in that case that at the time the mechanic's lien was claimed to have been created, the legal title to the property sought to be affected was not in the railroad company, but was in one George W. Ballou, and therefore the mortgage of the property by the railroad company created no legal lien, and although by the decree of foreclosure the legal title was transferred to the mortgagor, yet it was transferred subject to the burden of the mechanics' lien. The court held that the mortgagor had the equitable title to the property before foreclosure, and that the mortgage given by the mortgagor covered property to which it had an equitable title as well as property to which it had a legal title. In the case at bar the mortgagor never had any title at all, legal or equitable, until after the work had been performed by the constructors, and only then by virtue and through the means of such work.

This case bears great similarity to that of



Digitized by Google

*Botsford* v. *New Haven, M. & W. R. Co.* 41 Conn. 454, the principle of which case was approved in 134 U. S. 296 [33: 905]. The mortgage executed by the company in the Connecticut case covered after-acquired property. After the execution of the mortgage it entered into an agreement with the owner of land by which the owner agreed to thereafter convey the land to the company upon condition that the depot of the company should be established thereon and other things done in connection therewith. The court held that the agreement amounted to a conditional sale, and that no title to the property passed to the railroad company unless and until it performed the conditions. Hence it was held that the lien acquired by the constructor of the depot, who was employed by the railroad company for that purpose, attached to the land, and that when the title subsequently came to the railroad company
23] by reason of the performance *of the conditions by it, the land came burdened with the lien upon it in favor of the constructor of the depot, and such lien was therefore superior to the lien of the mortgage.

It is said that in any event the title which finally vested in the Bear Lake Company by virtue of the completion of the work, as claimed by the respondents, relates back to the time when possession of the land over which the right of way existed was first taken, and that such possession was taken by the Bear Lake Company prior to any work being done by either the plaintiff Garland or by the defendants Corey Brothers & Company, and the title thus became subject to the lien of the mortgage before the work was done by the lienors. This doctrine of relation, by which it is claimed that the lien of the mortgage attached to the right of way prior to the lien of the constructor, is a fiction only. It is indulged in for the purpose of thereby cutting off intervening adverse claims of third parties against the right or title set up and acquired by the first possessor. It will not be indulged in for the purpose of thereby effecting an injustice by subjecting the right of way to the prior lien of a mortgage, when the existence of the title to the right of way in the Bear Lake Company was made possible only after and by the labor of the lienors. In such case the actual fact will be considered and not the fiction.

It is also said that the mortgagee occupies a position superior in equity to that of the Corey firm because the mortgage was executed and on record a long time before the firm did any work upon the ditches, and it must have known, or at any rate notice from the record will be imputed to the firm, that the mortgage lien was in existence. The answer to this position is that under the law as above stated the firm knew that prior to the completion of the work by it, the Bear Lake Company would have no title and the mortgage would not be a lien upon the property, and that when the work was completed the title would pass to the Bear Lake Company burdened with the lien of the firm, and such lien would be superior to that of the mortgage. To one occupying the position of these lienors, the mortgage was not in existence. Upon the same principle the mortgagee would know that it could acquire no lien
24] on *this property superior to that of the lienors, and that the title to the property created by the lienors would come to the Bear Lake Company burdened with their lien. It is plain that in this light the equity of the lienors is superior to that of the mortgagee, and their lien should, if possible, be preferred.

The general principle upon which the lien of Corey Brothers & Company upon the right of way over the public lands is claimed as being prior to that of the mortgage also applies to and covers the case of the land procured by the Bear Lake Company from Kerr and mentioned in the foregoing twenty-ninth finding of fact. It was a conditional gift by Kerr to the company of the right of way, to take effect and be valid upon the construction of the canal through the lands of Kerr. As to the portion of the land which was obtained by purchase by the Bear Lake Company at various times from individual proprietors after May 1, 1890, the finding is too general upon which to predicate error calling for a reversal of the whole judgment. The party alleging error should clearly show it, and where it is of a kind that ought not to carry a reversal of the whole judgment because of it, he should in that case show the amount of the error and the extent to which it affected the judgment. Here the case is barren of any finding as to the extent of the purchase from private individuals and whether the purchases were made prior to the work being done or after the same had been performed. Interpreting the thirtieth finding of the court upon this subject as being one of fact, we should say the purchase was not fully accomplished nor was the title finally transferred until after the work had been done. The thirtieth finding is as follows: "All the right of way of the Bear Lake & River Company, as described in finding nineteen, was acquired by said Bear Lake & River Water Works & Irrigation Company after the mechanics' lien of the plaintiff William Garland and the mechanics' lien of the defendants Corey Brothers & Company attached to the same." The appellants criticise this finding as a conclusion of law. It is made by the court as one of fact, and it may be there is some matter of fact mixed with a legal conclusion. At any rate, the whole matter is left in some uncertainty as to the *exact facts relat-[25
ing to the purchase of the right of way after May 1, 1890, and as to the extent of such purchases from individuals, and as to the conditions upon which the purchases were made.

They may have been made under such circumstances as to bring them directly within the principle of the case last cited. If so, the lands would be subject to a lien to the same extent as the lands otherwise acquired.

We will not in such case indulge in any presumption unfavorable to the judgment and for the purpose of reversing it, unless they are natural and probable and such as ought to be drawn from the facts actually found by the court below. We do not find this to be the case here.

As another answer to the claim of Corey Brothers & Company, the appellants assert that if the Bear Lake Company were not the owner of the right of way over or through the public lands or lands of Kerr, or of the other individuals, until after the completion of the



Digitized by Google

work, then of course it was not owner thereof at the time when the contract with Corey Brothers & Company was entered into, and in that case they would be entitled to no lien under the act of March 12, 1890.

The 1st section of that act provides "that whoever shall do work or furnish materials by contract, express or implied, with the owner of any land, to any amount," shall be entitled to a lien. The same section also provides that for the purposes of the act "any person having an assignable, transferable, or conveyable interest or claim in or to any land, building, structure, or other property mentioned in this act, shall be deemed an owner."

We think the Bear Lake Company was such an owner as comes within the meaning of the statute of 1890, providing for a lien. Although without a legal or an equitable title until the work was done, yet the Bear Lake Company, when the work was completed, became such owner, and in the mean time and after the execution of the contract with Corey Brothers & Company and with the plaintiff Garland it occupied such a position with regard to the property as brings it within the equity of the
26] statute for the purpose of the lien for *work done, and we think such lien when the work was completed and the statement of claim filed was superior to the lien of the mortgage.

Our conclusion is that *the whole judgment should be affirmed.*

---

## AMERICAN ROAD MACHINE COMPANY, *Appt.*, v. PENNOCK & SHARP COMPANY, Limited, *et al.*

(See S. C. Reporter's ed. 26-42.)

*Void patent—patentable novelty.*

1. Letters patent No. 331,920, issued to G. W. Taft December 8, 1885, for a machine for making, repairing, and cleaning roads, are void for want of invention.
2. Increasing the weight of the handwheels in this class of road machines, in order to correct the tendency of smaller wheels to reverse, did not involve patentable novelty.

[No. 27.]

*Argued March 30, 31, 1896. Decided October 19, 1896.*

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania dismissing a suit in equity brought by the American Road Machine Company, complainant, against the Pennock & Sharp Company, Limited, *et al.*, for the infringement of claims 4, 10, 11, and 18 of letters patent No. 331,920, issued to G. W. Taft December 8, 1885, for a machine for making, repairing, and cleaning roads. *Affirmed.*

See same case below, 45 Fed. Rep. 252.

The facts are stated in the opinion.

*Messrs.* **Frederick P. Fish** and *W. K. Richardson*, for appellant:

It is a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result never attained before, it is evidence of invention.

*Potts* v. *Creager*, 155 U. S. 597 (39: 275); *Bonsack Mach. Co.* v. *Elliott*, 69 Fed. Rep. 335; *Hillborn* v. *Hale & K. Mfg. Co.* 69 Fed. Rep. 958; *Du Bois* v. *Kirk*, 158 U. S. 58 (39: 895).

The test of invention is not complexity of construction; and the apparent simplicity or obviousness of the invention after it is made is no ground for invalidating the patent.

*Krementz* v. *S. Cottle Co.* 148 U. S. 556 (37: 558); *Topliff* v. *Topliff*, 145 U. S. 156 (36: 658); *Washburn & M. Mfg. Co.* v. *Beat 'Em All Barbed Wire Co.* ("*Barbed Wire Patent*") 143 U. S. 275 (36: 154); *Webster Loom Co.* v. *Higgins*, 105 U. S. 580 (26: 1177).

When the other facts in the case leave the question of invention in doubt, the fact that the device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, is sufficient to turn the scale in favor of the existence of invention.

*Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139 (38: 103); *Washburn & M. Mfg. Co.* v. *Beat 'Em All Barbed Wire Co.* ("*Barbed Wire Patent*")

---

NOTE.—*As to when assignee may sue for infringement; when patentee must; when they must join,* —see note to Wilson v. Rousseau, 11: 1141.

*As to notes given for patent rights; purchaser before maturity,*—see note to Mandeville v. Welch, 5: 87.

*That prior use or sale of invention renders patent void,* see note to French v. Carter, 34: 664.

*As to assignments of patents, their construction and effect; licenses to use patents; royalties,*—see note to Dalzell v. Dueber Watch Case Mfg. Co. 37: 749.

*As to anticipation of patents; prior patents and publication; application and issue, claims and specifications,*—see note to Leggett v. Standard Oil Co. 37: 737.

*As to patentability of inventions; patentable subject-matter; utility; what constitutes invention; patentable novelty; combinations; foreign patents and their effects,*—see note to Grant v. Walter, 37: 553.

*As to reissued patents for inventions, when valid; effect of reissue; laches,*—see note to National Meter Co. v. Yonkers Water Comrs. 37: 644.

*As to what constitutes infringement of patent; similarity of devices; designs; combinations; machines; construction of patent,*—see note to Royer v. Coupe, 36: 1073.

*As to patents for designs, when valid,* see note to Smith v. Whitman Saddle Co. 37: 606.

*For what patents are granted; when declared void,* —see note to Evans v. Eaton, 4: 433.

*As to patentability of inventions,* see notes to Thompson v. Boisselier, 29: 76, and Corning v. Burden, 14: 683.

*As to abandonment of invention,* see note to Pennock v. Dialogue, 7: 327.

*As to distinction between inventions of mechanism, articles, or products and processes; when latter patented,*—see note to Corning v. Burden, 14: 683.

*As to including process and product in same patent; separate patents therefor,*—see note to Evans v. Eaton, 4: 433.

*As to what reissue may cover,* see note to O'Reilly v. Morse, 14: 601.

*As to assignment before issuing and reissuing patent; recording; when assignment transfers extended terms,*—see note to Gayler v. Wilder, 13: 504.

*As to damages for infringement of patent; treble damages,*—see note to Hogg v. Emerson, 13: 824.



Digitized by Google

143 U. S. 275 (36: 154); *Gandy* v. *Main Belting Co.* 143 U. S. 587 (36: 272); *Magowan* v. *New York Belting & P. Co.* 141 U. S. 332 (35: 781); *Smith* v. *Goodyear Dental Vulcanite Co.* 93 U. S. 486 (23: 952).

The fact that the patent has been infringed by defendants is sufficient to establish its utility, at least against them.

*DuBois* v. *Kirk*, 158 U. S. 64 (39: 898); *Gandy* v. *Main Belting Co.* 143 U. S. 587 (36: 272); *Western Electric Co.* v. *La Rue*, 139 U. S. 601 (35: 294); *Lehnbeuter* v. *Holthaus*, 105 U. S. 94 (26: 939).

The most conclusive test of invention is the unsuccessful efforts of other patentees in the same field.

*Webster Loom Co.* v. *Higgins*, 105 U. S. 580 (26: 1177).

A new combination of elements separately old in the same art is patentable, if the combination produces a new and useful result.

*National Cash Register Co.* v. *Boston Cash Indicator & R. Co.* 156 U. S. 502 (39: 511); *Richards* v. *Chase Elevator Co.* 158 U. S. 299 (39: 991), 159 U. S. 477 (40: 225); *Hailes* v. *Van Wormer*, 87 U. S. 20 Wall. 353 (22: 241); *Webster Loom Co.* v. *Higgins*, 105 U. S. 580 (26: 1177); *Cantrell* v. *Wallick*, 117 U. S. 689 (29: 1017).

*Messrs.* **L. L. Bond**, *A. H. Adams*, *C. E. Pickard*, and *J. L. Jackson*, for appellees:

Defense of want of invention is a matter of law for the court, and the manner of determining this question appears from the following authorities:

*Pennsylvania R. Co.* v. *Locomotive Engine Safety Truck Co.* 110 U. S. 490 (28: 222); *Hailes* v. *Van Wormer*, 87 U. S. 20 Wall. 353 (22: 241); *Phillips* v. *Detroit*, 111 U. S. 604 (28: 532); *Hotchkiss* v. *Greenwood*, 52 U. S. 11 How. 248 (13: 683); *Phillips* v. *Page*, 65 U. S. 24 How. 164 (16: 639); *Smith* v. *Nichols*, 88 U. S. 21 Wall. 112 (22: 566); *Dunbar* v. *Meyers*, 94 U. S. 187 (24: 34); *Heald* v. *Rice*, 104 U. S. 737 (26: 910); *Aron* v. *Manhattan R. Co.* 132 U. S. 84 (33: 272); *Burt* v. *Evory*, 133 U. S. 358, 359 (33: 651); *Pearce* v. *Mulford*, 102 U. S. 112 (26: 93); *Slawson* v. *Grand Street P. P. & F. R. Co.* 107 U. S. 649 (27: 576); *Munson* v. *New York*, 124 U. S. 601 (31: 586); *Royer* v. *Roth*, 132 U. S. 206 (33: 323); *Tillotson* v. *Munson*, 5 Biss. 426; *St. Germain* v. *Brunswick*, 135 U. S. 231 (34: 123).

All improvement is not invention and entitled to protection as such. Thus to entitle it, it must be the product of some exercise of the inventive faculties, and it must involve something more than what is obvious to persons skilled in the art to which it relates.

*Pearce* v. *Mulford*, 102 U. S. 118 (26: 95); *Aron* v. *Manhattan R. Co.* 132 U. S. 84 (33: 272); *Day* v. *Fairhaven & W. R. Co.* 132 U. S. 98 (33: 265); *Watson* v. *Cincinnati, I. St. L. & C. R. Co.* 132 U. S. 161 (33: 295); *Marchand* v. *Emken*, 132 U. S. 195 (33: 332); *Royer* v. *Roth*, 132 U. S. 201 (33: 322); *Hill* v. *Wooster*, 132 U. S. 701 (33: 506).

An old thing applied in a new way to produce a particular result cannot be extended beyond the particular way, form, or device.

*Fuller* v. *Yentzer*, 6 Biss. 208.

A patentee cannot claim a result or effect. He can only claim the means for obtaining them, and attaining the same results or effects by different means is no violation of a patent.

*Case* v. *Brown*, 69 U. S. 2 Wall. 320 (17: 817); *Ashcroft* v. *Boston & L. R. Co.* 97 U. S. 203 (24: 985).

Result, mode of operation, principle, idea, or other abstraction cannot be patented.

*Burr* v. *Duryee*, 67 U. S. 1 Wall. 521 (17: 661); *Evarts* v. *Ford*, 6 Fish. Pat. Cas. 591.

If the invention claimed is an improvement on a known machine, the patentee cannot treat as an infringer one who has improved the same machine by a different form or combination performing the same functions.

*McCormick* v. *Talcott*, 61 U. S. 20 How. 402 (15: 930); *Union Sugar Refinery* v. *Matthiessen*, 2 Fish. Pat. Cas. 600; *Taylor* v. *Garretson*, 2 Fish. Pat. Cas. 124.

It is not invention to transfer apparatus from one machine to another.

*Swift* v. *Whisen*, 3 Fish. Pat. Cas. 360.

A mere change of form or proportions will not support a patent.

*Woodcock* v. *Parker*, 1 Gall. 438; *Aron* v. *Manhattan R. Co.* 132 U. S. 84 (33: 272); *Lowell* v. *Lewis*, 1 Mason, 182; *Adams* v. *Edwards*, 1 Fish. Pat. Cas. 1; *Wood* v. *Packer*, 17 Fed. Rep. 652; *Watson* v. *Cincinnati, I. St. L. & C. R. Co.* 132 U. S. 161 (33: 295).

The test of interchangeability is frequently made an important and decisive one by the courts, so that this feature of noninterchangeability, standing alone, is sufficient to defeat the complainant's action.

*Fuller* v. *Yentzer*, 94 U. S. 296 (24: 106); *Schumacher* v. *Cornell*, 96 U. S. 555 (24: 678).

One device cannot be said to be a well-known substitute for another which cannot be used for it.

*Crompton* v. *Belknap Mills*, 3 Fish. Pat. Cas. 536; *Pattee Plow Co.* v. *Kingman*, 129 U. S. 294 (32: 700).

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was a bill for infringement of claims four, ten, eleven, and thirteen of letters patent No. 331,920, issued to G. W. Taft December 8, 1885, for a "machine for making, repairing, and cleaning roads."

The defenses were want of patentable novelty, anticipation, and noninfringement. On hearing, the circuit court, held by Judge Butler, entered a decree dismissing the bill. 45 Fed. Rep. 252.

*The application was filed May 6, 1885, [27 and the specification declared:

"The objects of my present invention are to provide an efficient and convenient 'stiff-angled' or nonreversible road-machine in which the ends of the blade are positively sustained against the working strain, while permitted vertical adjustment by means of push-bars extending from the rear of the machine to the back of the blade; also, to provide in a nonreversible road-machine a vertically swinging thrust frame and push-bar arrangement that will permit the required adjustments of the scraper in relation to the plane of the road; also, to provide in a road-machine a handwheel operating device for imparting motion to the blade-elevating mechanism, whereby the respective ends of the blade can be raised and



Digitized by Google

depressed in a quick, easy, and convenient manner; also, to provide an improved lifting mechanism for elevating and depressing the blade; also, to afford facilities in a road-machine, in connection with handwheel operating devices, of a brake or stop device for retaining the handwheel, lifting mechanism, and blade at position of adjustment."

Then followed the drawings and the description, omitting a part of which, the specification thus continued:

"The front end of the blade D is suspended by a bar or link G from the arm of a lever H that is arranged along the side of the machine and fulcrumed at *h* on a support $A^2$ that projects from the carriage frame. The rear arm of said lever is provided with a gear segment $H^1$ that meshes with an actuating pinion I by which the arm of the lever may be moved up and down for raising and depressing the front end of the lever and blade. The rear end of the blade is connected by a link $G^1$ to a vertically sliding rack J that meshes with an actuating pinion $I^1$ and is guided by a flanged friction roll K pivoted on a suitable bracket or support connected to the carriage frame A. The pinion I that operates the lever H may be provided with flanges *i* $i^1$ for embracing the sides of the internally toothed segment $H^1$ and thus serving to guide and retain said segment and its lever H in proper relation therewith as it is moved up and down by the rotation of the handwheel M. *The rack J and its guide-roll K are *preferably* fitted to each other by intermatching grooved and flanged surfaces, as indicated in Figs. 3 and $3^a$ and the operating pinion $I^1$ is provided with flanges *j* to embrace the sides of the rack, so that said rack is confined and guided in proper relations as it slides up and down and works with but little friction or resistance when adjusting the blade. [28]

"Handwheels M and $M^1$ are provided for imparting motion to the respective pinions I $I^1$, or operating gear of the blade-lifting mechanism, when elevating and depressing the blade or adjusting the blade to differently inclined positions in relation to the plane of the road, these wheels may be made some 3 feet in diameter, more or less, with round or other formed rims that can be conveniently grasped by the hand at any part of their periphery. In the present instance the handwheels and their pinions are respectively attached to each other or formed on the same hub; they are mounted on a shaft L that extends across the carriage A and is supported in bearings on suitable standards *l* $l^1$. One of the wheels (M or $M^1$) is arranged to turn loose on shaft L, so that the two wheels can be revolved independently of each other for separately adjusting either end of the blade required. The rims of the handwheels are made sufficiently heavy to act as a balance against the weight of the blade-lifting devices so that the momentum of the wheel will greatly assist the operator in the manipulation of the machine. Short shafts or studs may be used in lieu of shaft L as journals for the handwheels and gears if desired. I prefer, however, to have the shaft extend across the machine as it makes a stronger and more rigid construction.

"Brake mechanism is arranged in connection with the carriage for stopping and retaining the handwheels to hold the blade at any position of adjustment. Said brake mechanism may be made, as indicated, with levers *n*, having one end fulcrumed beneath the platform at *n'*, and the other provided with a pad or shoe N, to press against the rim of the handwheel, a suitable spring *s*, being connected therewith to give the required holding pressure. A foot piece or pedal P, *arranged at a convenient po- [29] sition enables the attendant to depress the lever and brake shoe by placing his foot thereon when he desires to throw off the brake for releasing the handwheel.

"In lieu of connecting the handwheel and blade-lifting bar or lever by means of a toothed pinion and rack, said parts may be connected by a strap or chain (one or more), one end whereof connects with the lift bar or lever, while the other end is arranged to wind onto the pinion or hub on the handwheel, or onto a sheave geared to the handwheel hub.

"The operation of this road-machine is obvious from the drawings and foregoing description. The operator, standing upon the platform A, when he desires to raise or depress either end of the blade, places his foot upon the brake pedal P corresponding to the end to be adjusted, and grasping the rim of the wheel where it is most convenient to his hand, swings it backward or forward (accordingly as required), with a free and easy action, and to a greater or less extent, as desired, then releases the pedal and the brake or stop is automatically applied by its spring *s*.

"A handwheel, in combination with and for imparting motion to mechanism for elevating and depressing the scraper or blade in a road-machine, is of great practical utility and advantage, as it enables the operator to handle and control the machine with greater ease and facility than with a lever handle or crank, and does not necessitate his taking an awkward or constrained position at any part of the action. The rim of the wheel, acting by its momentum as a balance wheel, also enables the operator by a quick movement to suddenly throw the blade completely up from the ground to avoid contact of large stones or other obstructions while the machine is in motion. Said rim also serves as a continuous seat for the stop or brake, so that the adjustment can be held with the blade at any degree of elevation desired.

"A handwheel *adapted to act by its peripheral momentum, or as a balance wheel, for assisting or augmenting the throw or movement when adjusting the scraper*, in combination with *the scraper blade and* blade-adjusting mechanism, for the purpose specified, is an important feature of my invention.

*"Handwheels may be employed for ele- [30] vating and depressing the scraping-blade in a road machine, in combination with connections or lifting devices of other construction and arrangement from those herein shown, with beneficial results, and I so intend to employ said handwheels; and I have in other applications (see serial Nos. 167,212 and 173,968) for letters patent described and claimed certain combinations in which other forms of lifting mechanism are employed for effecting the vertical adjustment of the blade.

*"I am aware that a railway snowplow or track clearer has heretofore been patented, in which the plow was braced from the car-axle by*



Digitized by Google

*parallel braces rigidly connected to the plow; and that a swinging transverse scoop or shovel pivoted between the ends or rearwardly extending braces of equal length, and in connection with a wheeled carriage, has also been shown in another patent. I am also aware that other patents exhibit road-scrapers wherein braces or links are shown which connect blade-supporting standards in rear of the blade, with one of the side bars of the carriage frame. Such devices I do not therefore herein claim, as neither of them attain the results incident to my improvement—viz., perfect flexibility of adjustment with direct support or thrust under all conditions of use and positions of adjustment."*

[The foregoing words in italics were inserted by way of amendment, the disclaimer being preceded by the statement: "Regarding the 1st claim for recognition of the state of the art, insert at the end of the descriptive part of specification, page 9, the following clause, *viz.*"]

Of the fifteen claims, the first, fourth, fifth, tenth, eleventh, and twelfth were:

"1. In a machine for grading and clearing roads, the combination, with a scraper bar or blade suspended from the carriage between its front and rear wheels, of thrust bars extending from the axle or rear of said carriage and attached to the back of said scraper near its ends by connecting joints that permit upward and downward adjustment at each end of the scraper blade independent of the other, substantially for the purpose set forth."

31] *"4. In a road-grading machine, a handwheel in combination with the blade-elevating devices, for imparting motion to said devices, when raising and depressing the blade, substantially as hereinbefore set forth.

"5. In a machine for grading and cleaning roads, the combination, with the scraper blade, supported by a push frame at the rear of said blade, and blade-elevating mechanism connected therewith, of a handwheel for imparting motion to said elevating mechanism for effecting the upward and downward adjustment of the blade, substantially as hereinbefore set forth."

"10. In a road machine the standards *l l* and shift L in combination with the carriage, blade-lifting devices, and operating wheels and pinions, as and for the purposes set forth.

"11. The flanged guide-roll K and flanged pinion $l^1$, in combination with the rack J, blade D and carriage frame A, and handwheel $M^1$, substantially as and for the purpose set forth.

"12. In combination with the blade-elevating lever H having the internally toothed segment $H^1$, of an operating pinion I, provided with flanges *i*, for guiding said segment, substantially as set forth."

The application was examined by the Patent Office, and the following objections were made:

"If claim 1 is to stand, the state of the art as shown in patents 226,686, Sweatt, Apr. 20, 1880 (self-load'g carts); 52,028, Carncross, Jan. 16, 1866; 191,287, Jefferson, May 29, 1877, and 288,261, Raab, Nov. 13, 1883 (wheeled scrapers), must be recognized.

"Claim 4 is met in patent 220,812, Day, Oct. 21, 1879 (same). Furthermore the devices of patents 297,861, Smith, April 29, 1884; 275,614, Edwards & Durkee, April 10, 1883, and 135,475, Ham, Feb'y 4, 1873 (ex. carrier).

"As to claim 5, in view of the patents 160,535, McCall, Watkins, Scott, M'ch 9, 1875, and 296,138, Cook, Apr. 1, 1884 (wheeled scrapers), the claim does not present patentable novelty, these, with the patent of Day, showing that, broadly considered, a handwheel and a lever are equivalent substitutes.

*"Claims 10, 11, and 12 are met in patent [32 of Cary, 152,072, June 16, 1874 (self-load'g carts).

"Patent 145,786, Humphreys, Dec. 23, 1873 (ex. carrier), may also be referred to as showing the state of the art in connection with claim 11.]

"Claim 15 is met in patent of Carncross above cited."

Thereupon the specification was amended as before pointed out, and applicant further said:

"Regarding the fourth and fifth claims, in the references cited, patent No. 220,812, it is shown that a small handwheel mounted on a vertical shaft and adapted for winding up a rope or chain in manner similar to a car brake has been used for bodily lifting a diagonal scraper or snowplow on a railroad car, both ends of the scraper being lifted simultaneously; further, in other patents it is shown that wheels having a series of projecting handles or pins are employed in connection with means for lifting the plow and conveyer in ditching machines. Neither of these devices, it is thought, embody the features which applicant desires to secure, and while there is no question but that the present wording of said claim is met by these references, yet it is believed that applicant has a point to which these former inventions have not attained.

"The claims are hereafter amended with this feature in view, *viz.*, that in applicant's invention the wheel is designed and adapted to be worked in combination with a diagonal blade and as a balance or momentum wheel, so that a quick throw of the wheel with the hand will, by the weight of the periphery of the wheel, augment the action, or carry the blade mechanism up or down to a greater extent than the mere movement of the hand."

The fourth and fifth claims were amended; the tenth, eleventh, and twelfth canceled and two others substituted; and the fifteenth was erased.

The fourth, tenth, eleventh, and thirteenth claims of the patent as issued read:

"4. The combination, with a diagonal scraper supported in connection with a wheeled carriage and adapted for upward and downward adjustment independently at either of its ends, *of an operating wheel (or wheels) for [33 effecting such adjustment, adapted to act as a momentum or fly wheel, as set forth, whereby the peripheral weight of said wheel is utilized to assist in the adjustment of the blade, substantially as hereinbefore explained."

"10. In a road-machine, the combination of a scraper blade adapted for upward and downward adjustment at its respective ends, an operating handwheel (or wheels) connected therewith for effecting such adjustment, and a brake (or brakes) acting against said wheel to arrest movement thereof and retain the parts, substantially as set forth.



Digitized by Google

"11. In a wheel road scraper, the combination of a scraper blade adapted for upward and downward adjustment at its respective ends, an operating wheel (or wheels) connected therewith for effecting such adjustment and adapted for developing peripheral momentum for throwing the blade up or down, and a brake acting against said wheel to arrest the movement thereof and retain the parts in position, substantially as set forth."

"13. In a road machine, the combination, with an oblique scraper suspended beneath a carriage or body mounted on front and rear wheels, of means for imparting independent upward and downward adjustment at the respective ends of said scraper provided with handwheel and pinion devices for imparting movement thereto, and stops or brake devices acting in connection with said handwheels for retaining the parts at positions of adjustment, substantially as described."

Thus it appears that the patentee acquiesced in the ruling of the Patent Office that the application of handwheels to a road-grading machine, for imparting motion to the devices for raising and depressing the scraper-blade, was old, and, for the purpose of obtaining his patent, restricted his claims in this particular to momentum or balance wheels.

And it is with reference to the momentum feature, treated as an element in all the claims, that the case must be disposed of.

Momentum is the quantity of motion in a moving body, and is proportioned to the quantity of matter multiplied into its velocity.

34] *All revolving wheels possess momentum, but momentum wheels, so called, as balance or fly wheels, are wheels whose momentum is utilized in the operation of machinery by a sufficient accumulation of force, through the weight and velocity of the wheel combined, to overcome the effects of temporary loss of power.

The knowledge was common that when a continuous power is applied, but the resistance to be overcome is unequal, a fly or balance wheel will store some of the power expended during the operation and not needed at one stage, and give it out at another.

This familiar principle is thus expressed in the specification: "The rims of the handwheels are made sufficiently heavy to act as a balance against the weight of the blade-lifting devices, so that the momentum of the wheel will greatly assist the operator in the manipulation of the machine."

The momentum wheel of the patent is described in appellant's brief as being "a wheel having such peripheral weight, in relation to the weight of the scraper-blade to be lifted, that it will continue in rotation after the hand of the operator is removed, so as to enable him to secure a new grasp of the wheel to continue the lifting process."

Appellant's expert, Mr. Brevoort, puts it thus: "In the case of the Taft invention, the peripheral momentum was relied upon to continue the blade of a road-scraper in its upward motion so that the operator could again grasp the wheel to give further rotative force thereto without the blades falling and without the necessity of locking the wheel to enable him to get another grip thereon." And the patentee testifies: "The object of making the wheel with the heavy rim was that there might be sufficient momentum generated in the handwheel to make a continuous rotary motion of the wheel when it was desired to raise the blade over an obstacle, like a rock or a 'thank-you-ma'am,' or when approaching a crosswalk on a street. This we could not do with levers, if the lever had sufficient leverage to give this operation; and by making the rim of these wheels heavy I secured that ability to cause a continuous motion of the handwheel. After giving it one *impulse from the hand, I could [35 reach forward and give it a second without applying a brake or stop to the wheel, thus keeping up a continuous motion of the handwheel until I had raised the blade as high as desired."

In short, as the ordinary handwheels used for the same or analogous purposes in similar constructions were old, the claim of patentable novelty rests on the proposition that Mr. Taft was the first to increase their weight and apply them as momentum wheels in a common device for regulating road scrapers to secure the well-known result attendant on the use of such wheels.

Was he the first to do this, and, if so, did such increase of weight involve patentability?

The record contains a number of prior patents of road-machines in which the vertical adjustment of the scraper-blade is effected by levers on each side of the machine, with connecting mechanism to each end of the blade, the actuation of either lever raising one end of the blade, and of both, raising the blade as a whole.

The patent of Read of November 25, 1873, shows a reversible scraper blade adjustable up and down at either end; adjustable laterally in respect of side projection of its blade; susceptible of being raised quickly at either end or as an entirety; carried by a four-wheeled frame; and directly controlled by levers through suspending cords or bars, the rear ends of the levers being adapted to be held by catches or uprights projecting up from the frame of the machine.

The McCall, Watkins, and Scott patent of March 9, 1875, has a push-bar reversible scraper, with handlevers and stops for the vertical adjustment of the scraper-blade and handwheels for steering.

The Cook patent of September 22, 1885, has a scraper supported by a wheeled frame and moved by push-bars, and capable of being raised and lowered at either end independently by means of racks connected to the scraper, and pinions, operated by levers, which engage the racks and move them up and down.

These lever machines were all operative, and these and *other patents were introduced [36 in evidence as showing that wheeled frames, reversible and nonreversible blades, levers of various forms for adjusting either or both ends of the blade, stops for locking the levers in place, stops and various other devices for connecting the levers with the blades,—were all well known; but as this is conceded we need spend no time upon them.

It should, however, be observed that, broadly considered, a handwheel and a lever are substantial equivalents in these devices. The



Digitized by Google

wheel is a continuous lever. The rim enables the operator to lay hold at any point desired, and takes the place of a number of levers. But it is denied that momentum handwheels are the equivalents of levers.

Other prior patents adduced illustrate the use of handwheels, cranks, and momentum wheels.

Dyson's patent of June 2, 1868, for a "street scraper," has a triangular frame D, having slots in which the bars slip up and down freely, to which the scraper blades are pivoted. The dirt is gathered up within this triangle and deposited by the operation of the rear part of a frame E. The triangular frame D is raised by a crankwheel with a crank connected by cords with two wheels in such manner as to revolve both wheels simultaneously, and the whole scraper is thereby raised and retained by the engagement of the crank with a catch. The experts differ as to whether these wheels can be used as handwheels if so desired as well as by means of the cords as described in the patent.

The Carey patent of June 16, 1874, for an improvement in scrapers, has a scraper or dirt scoop, a rack attached to a lever which carries the scraper, a pinion engaging the rack to raise and lower the scraper, a crank handle, as an equivalent for a handwheel, to turn the pinion, and a lock to hold the devices in their adjusted position.

The Taft machine seems to embrace the connecting devices of this patent, but it has a shaft with a handwheel instead of with a crank.

April 10, 1883, Edwards & Durkee obtained a patent for an improvement in grading and [37] ditching machines, in which *all the adjustments are made by handwheels. This has a plow beam and a carrying apron or belt, and, "by arranging the several handwheels, as shown and described," the operator "can raise and lower either end of the plow beam independent of the other, and raise or lower the apron as required."

The patent of Elmer H. Smith of April 29, 1884, for a ditching machine, shows a plow "consisting of an inclined flat plate," supported by a wheeled frame, and raised and lowered by means of a handwheel and pinion acting upon a rack connected to the lever which carries the blade. The blade is operated by a single handwheel, in this resembling the fourth, tenth, and eleventh claims under consideration, which call for "an operating wheel (or wheels)," although it is testified that "in no case could the adjustments described in the patent be effected by a single wheel."

May 28, 1878, letters patent No. 204,205, for an "improvement in track clearers," were issued to Augustus Day. This was a device "for effectually clearing street railways from snow and ice, so arranged that the snow will not only be cleared away from the face of the rails, but also from between the rails and a suitable distance on each side of the track," it being so spread and packed as not to be left "in ridges or snowbanks along the street."

It has a diagonal scraper suspended beneath a wheel carriage and provided with a lifting mechanism consisting of a chain or rope wound upon the shaft by means of a handwheel, there being several handwheels for effecting the different adjustments of the scraper-blade, which is raised at either end at the will of the operator.

This concurs with the mechanism thus described in the Taft specification: "In lieu of connecting the handwheel and blade-lifting bar or lever by means of a toothed pinion and rack, said parts may be connected by a strap or chain (one or more), one end whereof connects with the lift bar or lever, while the other end is arranged to wind onto the pinion or hub on the handwheel, or onto a sheave geared to the handwheel hub."

Day's patent of October 21, 1879, No. 220,812, for "snowplows," *has a diagonal scraper [38] suspended beneath a wheeled carriage and capable of being raised and lowered by a chain or cord wound upon a shaft turned by a handwheel, the shaft having a locking device consisting of a ratchet wheel and a dog. There is but one handwheel which raises and lowers both ends of the scraper together, while the previous Day patent had two handwheels and chains for raising and lowering the two ends of the scraper independently. The substance to be dealt with was snow, and rails and their bed, with some distance on each side, the surface to be cleared, but so as not to encumber the circumjacent highway. In view of the work to be done, light handwheels might be sufficient, yet if momentum as a positive aid were found necessary, their weight could be increased.

The Boone patent of October 21, 1851, shows a windlass with drums for winding up cords to raise weights, with a wheel and pinion and suitable gearing for turning the drums, and a brake stop.

The Lyon patent of August 6, 1878, for improvement "in combined ship's pump and windlass" has very heavy momentum handwheels for operating either pumps or a winding drum. Apparently these wheels are heavier for the same diameter than the Taft handwheels.

The Tyler patent of February 14, 1882, for "friction brake for steering wheels" shows a momentum handwheel for operating the rudder of a vessel, and a pedal brake for holding the wheel in any desired position. The wheel is not described in the specifications as a momentum wheel, but, as it is such in fact, this is not material.

Appellee's expert Bates testifies that such wheels "are commonly used as momentum wheels and have been as long ago as 1871. The operator gives them an impulse and their momentum carries them on."

It is not controverted that a heavy wheel with a crank pin at the side, such as shown, was a common and very well-known form of construction for the specific purpose of applying momentum to a crank.

The wheels employed in landing ferryboats and the ancient *spinning wheels, instanced [39] by the district judge, readily recur as illustrations of the use of momentum in the continuance of motion. Indeed, it is admitted that all wheels for raising, winding up, and hoisting, if the load is light enough, "are capable of performing some movement after the hand of the operator has left them," and the principle does not



Digitized by Google

depend upon the extent of the aid thus given to propulsion.

We find, then, that handwheels in the regulation of scraper-blades for ditching, grading, street and road clearing were old, and that this was true of the utilization of momentum when required by the exigencies of the case, as in capstan wheels, crank-shaft wheels, rudder-regulating wheels, pump-operating wheels, and so on. Every one knew that momentum propelled the capstan wheel, the rudder wheel, the pump wheel, the spinning wheel, after the hand of the operator was withdrawn.

The law of nature was familiarly understood that any moving body tends to continue in motion with a force proportionate to its speed and weight; and it was well known that the function of fly wheels and balance wheels was, in the language of Mr. Brevoort, "to absorb energy when the machine is moving at greater speed with the least resistance, and to give it out again when the parts meet with greater resistance."

The circuit court was of opinion that the use in road-machines of wheels made heavier in the adjustment of momentum to resistance was not a new use of momentum wheels in working machinery, and that the difference in weight in handwheels performing the service of rotary levers was a difference in degree and not in kind. And the contention as to infringement confirms this view.

Mr. Bates describes appellee's machine as "composed of a wheeled frame or carriage, beneath which is suspended a turntable and to this turntable the scraper-blade is attached. The turntable is suspended by rods from the ends of a bar which extends across the machine and is capable of vertical motion between uprights. The bar is supported by being pivoted near each end to the lower end of a rack-bar. The rack-bars are moved up and down by pin-[40]ions on horizontal *shafts, the shafts extending back toward the rear of the machine. At their rear ends are bevel gears which mesh with pinions on cross-shafts, and there is a handwheel on each cross-shaft to turn it. There is also a bandwheel on each cross-shaft, which is embraced by a friction band or bandbrake. The band is connected to a spring-treadle so that the operator can loosen it by putting his foot on the treadle. The handwheels are small wheels comparatively, similar to those used on car brakes, and are certainly much too light to act as fly wheels or momentum wheels against such a weight as that of the scraper and turntable and attachments. Besides this, the strain on this weight is a constant one, always acting in the same direction upon the handwheels. The scraper is moved forward by means similar to ordinary plow-beams, which are connected with the turntable, the turntable being connected with the front of the machine, or rather to the king bolt by a draft-ring and link. There is no device for acting with a thrust upon the scraper wheel."

Without subjecting the evidence to critical examination, it is enough that it is admitted that these handwheels are smaller and lighter than those of appellant, and that to make out infringement it is requisite to construe the patent in suit as covering all wheels whose momentum can be utilized in operating a road-making machine.

On the one hand it is contended that appellee's handwheels are not momentum wheels at all, and that the continued motion of the blade is due to earth pressure, and not to momentum; while on the other, this is denied, and it is insisted that these wheels are to be treated as momentum wheels because they will store up "a useful amount of energy to make them continue their further movement, when the hand of the operator is taken therefrom," provided "the operator shall give to the wheel a rapid and vigorous pull, moving it while his hand is upon it at a greater speed than it afterwards maintains."

We can hardly doubt that similar manipulation of many of the old wheels would produce the same result, and if there could be infringement if this were not so, there would be anticipation if it were.

*But the decision of the circuit court [41 rested on the want of invention, and in that conclusion we concur.

"The whole essence of the Taft invention," says appellant's counsel, is the application of momentum to carry the wheel along "sufficiently to enable the operator to take a new grasp (as explained by Mr. Brevoort), without clamping the wheel to prevent its running backward."

Did increasing the weight of the handwheels in this class of road machines, in order to correct the tendency of smaller wheels to reverse, involve patentable novelty?

We do not think so. The use of handwheels as a substitute for straight levers in this class of machinery was old, and, whether the wheels were light or heavy (and heavy wheels were old), they alike performed the service of rotary levers.

The patentee had acquiesced in the rejection of his claim for a road-machine with a blade that was elevated or depressed by a handwheel operating through suitable gearing, and could not claim the benefit thereof, or of an equivalent construction of the claims allowed. To make the handwheels heavier was to increase their capacity, but the same end was accomplished by substantially the same means. The means were old, and their enlargement by a common method to attain a better result in the particular instance merely carried forward the original idea, and was nothing more than would occur to the experienced mechanic.

It appears to us that it being seen that the tendency to reverse would prove objectionable in the proposed machine, the suggestion that the handwheels should be made heavier in order, by greater momentum, to correct that tendency, as it was well known increase in weight coupled with adequate rotative force would, sprang naturally from the expected skill of the maker's calling, and that this use of the heavier wheel did not make the mechanism in any proper sense a new thing evolved by the inventive faculty.

The substitution of the heavier wheel was not the product of a creative mental conception, but merely the result of the exercise "of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and



Digitized by Google

42] the facility *of manipulation which results from its habitual and intelligent practice."
*Decree affirmed.*

---

UNITED STATES, *Appt.*,
v.
CHARLES G. GILLIAT, Administrator, etc., of Thomas Gilliat.

(See S. C. Reporter's ed. 42-46.)

*Appeal from court of claims.*

An appeal cannot be taken to this court from the decision of the court of claims under the act of Congress of August 23, 1894, upon the subsidiary question as to the particular person to whom the appropriation made by the act of March 3, 1891, for payment of French spoliation claims, should be paid.

[No. 585.]

*Submitted October 13, 1896. Decided October 26, 1896.*

APPEAL from a decision of the Court of Claims, under the act of August 23, 1894, deciding that Charles G. Gilliat, the appellee, administrator, etc., was entitled to payment of a portion of a French spoliation claim: On motion to dismiss. *Dismissed.*

Statement by Mr. Justice **Peckham**:

This is one of the claims originating in the depredations committed by French cruisers upon the commerce of American citizens prior to the year 1800, commonly called French Spoliation Claims. Pursuant to the provisions of the act of January 20, 1885 (23 Stat. at L. 283), the claim mentioned in this proceeding (among many others of a like nature) was presented to the court of claims, and that court made an award, advising the payment of the claim, which was reported to Congress, pursuant to the act above mentioned, and Congress, by the act of March 3, 1891 (26 Stat. at L. 862), appropriated money (§ 4, p. 897) "to pay the findings of the court of claims on the following claims for indemnity for spoliations by the French prior to July 31, 1801" (among others, on page 900), "on the ship Hannah, Richard Fryer, master, namely, . . . to John A. Brimmer, administrator of John Gilliat, deceased, $35,840.44." By the last clause in the act (p. 908) Congress added a proviso as a condition to the payment of the awards mentioned 43] *therein, which reads as follows: *Provided*, That in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the cases of individual claimants shall not be paid until the court of claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made represent the next of kin, and the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards."

John A. Brimmer, the administrator to whom, by the act of 1891, the appropriation was ordered to be paid upon the condition above recited, was unable to comply with the same, and Congress by the act of August 28, 1894 (28 Stat. at L. 487), enacted "that the sum of $35,840.44, appropriated to be paid to John A. Brimmer, Jr., administrator of John Gilliat, deceased, in the act entitled 'An Act Making Appropriations to Supply Deficiencies in the Appropriations for the Fiscal Year Ending June 30, 1891, for Prior Years, and for Other Purposes,' be paid to the person or persons entitled to recover and receive the same, to be ascertained by the court of claims upon sufficient evidence and certified to the Secretary of the Treasury." Proceeding under the above enactment, Charles G. Gilliat, the appellee, presented his petition to the court of claims for the payment of one third of the sum named, on the ground that he was a grandson of one of the three original sufferers by reason of the seizure of the ship Hannah, above mentioned, and had been duly appointed administrator *de bonis non* of the estate of his grandfather by the chancery court of the city of Richmond and state of Virginia. The Attorney General answered the petition of the claimant, denied the allegations therein, and asked judgment that the petition be dismissed.

Upon the hearing the court of claims decided that the petitioner was the administrator of the estate of Thomas Gilliat, who was one of the three members of the firm of Gilliat & Taylor, the original sufferers, and that the petitioner *represented the descendants and [44 next of kin of the above-mentioned Thomas Gilliat, and the court certified to the Secretary of the Treasury for payment to such administrator to the extent of one third of the sum of $38,840.44, appropriated by the act of March 3, 1891, being the sum of $11,946.81, which was the extent of the interest of Thomas Gilliat in the partnership of Gilliat & Taylor. The Attorney General in his notice of appeal described the certificate of the court of claims, which it made to the Secretary of the Treasury, pursuant to the above act of March 3, 1891, as a judgment, and as such assumed to appeal therefrom to the Supreme Court of the United States. The notice of appeal was filed and allowed in open court by the chief justice of the court of claims, and the record being now before this court, a motion is made to dismiss the appeal.

*Mr.* **Frank W. Hackett** for appellee, in favor of motion to dismiss.

*Messrs.* **Joshua Eric Dodge**, Assistant Attorney General, and **Charles W. Russell** for appellant, in opposition to motion.

**Mr. Justice Peckham** delivered the opinion of the court:

The appellee moves to dismiss the appeal in this proceeding on the ground that the action of the court of claims was conclusive under the special statute of August 28, 1894 (28 Stat. at L. 487), providing for the hearing of the question of fact by the court as to what person was entitled to recover and receive the amount appropriated to be paid to John A. Brimmer, Jr., under the act of March 3, 1891 (26 Stat. at L. 862, 900).



Digitized by Google

We think the appeal should be dismissed. The original act of Congress of January 20, 1885, by which the claimants in the spoliation cases were referred to the court of claims, gave no power to that court to enter judgment upon its finding. By § 6 of that act the finding and report of the court were to be taken merely as advisory as to the law and facts 45]*found, and were not to conclude either the claimant or Congress. No appeal, therefore, could be taken from the report of the court of claims made to Congress under that act. The liability of the government for the payment to those entitled to it of the amount of damages sustained by them by reason of the capture of the ship Hannah and its cargo, owned by the firm of Messrs. Gilliat & Taylor, was found by the court of claims and reported to Congress pursuant to the act of 1885, and the appropriation was subsequently made by that body for the payment of such damages. The person to whom the appropriation was made was unable to receive the same, because of his inability to comply with the proviso contained in the act of appropriation. For the purpose of ascertaining the person who might be entitled to recover and receive the sum already appropriated by Congress, for the payment of the damages described, Congress passed the act referring to the court of claims that single question, and that court, after having ascertained the fact upon sufficient evidence, was by the act directed to certify the same to the Secretary of the Treasury. As the action of the court of claims upon the original claim made under the act of 1885 was not the subject of an appeal to this court, but was simply advisory in its nature, the whole matter being left to the discretion of Congress, we think it clear that it was not the intention of that body to permit an appeal from the finding of the court of claims upon the subsidiary question as to the particular person to whom the appropriation already made by Congress should be paid.

It was undoubtedly the intention of Congress, by the language used in the act of 1894, to refer to the court of claims simply the ascertainment of the proper person to be paid the sum which it had already acknowledged to be due to the representatives of the original sufferers from the spoliation, and it was not intended that the decision which the court of claims might arrive at should be the subject of an appeal to this court. We think Congress intended that when such fact had been ascertained by the court of claims, upon evidence sufficient to satisfy that court, the 46] fact was to be certified by the *court to the Secretary of the Treasury, and such certificate was to be final and conclusive.

The case resembles in some aspects that of *Ex parte United States*, 84 U. S. 17 Wall. 439 [21: 696]. It differs from *Ex parte United States* ("*Vigo's Case*"), 88 U. S. 21 Wall. 648 [22: 690], because the original claim was never referred to the court of claims for such judicial action as should terminate in a judgment, but it was only referred to it by Congress for the purpose of receiving what is termed its advisory conclusions, upon which Congress would proceed in its discretion.

But aside from either of the above-cited cases, the nature of the original claim and the manner in which it has been treated by Congress, and the language of the appropriation, as contained in the act of 1894, all clearly lead to the conclusion that Congress intended the decision of the court of claims to be final, and that the Secretary of the Treasury should pay upon receipt of the certificate provided for in the act.

The motion to dismiss the appeal is therefore granted, and the *appeal dismissed*.

---

## UNITED STATES, *Plf.*,
*v.*
## HENRY HEWECKER.

(See S. C. Reporter's ed. 46-49.)

*Certificate of division of opinion in criminal cases.*

Certificates of division of opinion in criminal cases, whether made at the request of the United States or of the accused, are not allowable since the act of March 3, 1891, by which the provisions of U. S. Rev. Stat. §§ 651, 697, in relation to such certificates, are repealed.

[No. 547.]

*Submitted October 13, 1896. Decided October 26, 1896.*

ON A CERTIFICATE of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of New York in a criminal case in which Henry Hewecker was indicted for the murder of one Miller, and interposed a special plea that the offense was barred by the statute of limitations. On motion to dismiss. *Dismissed.*

The facts are stated in the opinion.

*Mr.* **Abram J. Rose** for defendant, in favor of motion to dismiss.

*Mr.* **J. M. Dickinson,** Assistant Attorney General, for plaintiff, in opposition to motion.

*Mr. Chief Justice **Fuller** delivered the [47 opinion of the court:

Hewecker was indicted for the murder of one Miller, on January 17, 1892, in the bay of Havana, off the island of Cuba, on board an American vessel, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, in the circuit court of the United States for the southern district of New York, that district being the district in which he was found and into which he was first brought. To the indictment he entered a special plea in the nature of a plea in abatement, to the effect that the indictment was not found until March 10, 1896; that Miller died January 21, 1892, in Cuba, without the United States, and that under and by virtue of U. S. Rev. Stat. § 1043, he could not be prosecuted or tried; that from January 17, 1892, until the date of the finding of the indictment he had not fled from justice

NOTE.—*As to jurisdiction of United States Supreme Court in cases certified on division of circuit court; on what division should be,*—see note to Webster v. Cooper, 13: 325.



Digitized by Google

but had been confined in a prison at Havana, Cuba, upon a charge of assault inflicted in that city; and that therefore the offense with which he was charged by the indictment was barred by the statute of limitations. To this plea the United States interposed a demurrer, and argument was had thereon, whereupon the judges of the circuit court, the court being held by a circuit judge and a district judge, announced that they were divided in opinion upon certain questions of law arising on the demurrer, and the points upon which the judges disagreed were at the request of the United States certified to this court. The case was submitted on a motion to dismiss.

By the judiciary act of March 3, 1891, it was provided that this court should not have appellate jurisdiction by appeal, by writ of error, or otherwise, over the circuit courts, except according to the provisions of the act; and jurisdiction was specifically given in "cases of conviction for a capital or otherwise infamous crime."

In *Rider* v. *United States*, 168 U. S. 132 41 [L. ed. 101] we decided that U. S. Rev. Stat. §§ 651, 697, in relation to certificates of division of opin-[48] ion in criminal cases were repealed *for the reasons given therein. It is true that in that case the defendants had been found guilty and that the certificate of division was on a motion for a new trial. The general rule was that this court could not, upon a certificate of division of opinion, acquire jurisdiction of questions relating to matters of pure discretion in the circuit court, and therefore that a certificate on a motion for new trial would not lie, but where the questions presented went directly to the merits of the case it had been held that jurisdiction might be entertained. *United States* v. *Rosenberg*, 74 U. S. 7 Wall. 580 [19: 263]. And accordingly we did not dismiss the certificate because made on a motion for new trial since the maintenance of the information at all depended on the points certified.

In this case it is contended that the right of the United States to proceed upon a certificate of division was not brought before us in that case and that the reasons assigned by us for that decision are not clearly applicable here. But we are unable to arrive at any other conclusion and see no reason for a different opinion on the general question than there expressed.

By the act of March 3, 1891, appellate jurisdiction on error was given in all criminal cases either to this court or the circuit court of appeals in favor of the accused, and, as to them, U. S. Rev. Stat. §§ 651, 697, did not remain in force. And if the sections were repealed so far as defendants were concerned, we think it follows that this was so as to the United States, and that a certificate which could not be granted upon the request of the defendants could not be granted on the request of the prosecution.

In *United States* v. *Sanges*, 144 U. S. 310 [36: 445], it was held that the act of 1891 did not confer upon the United States the right to sue out a writ of error in any criminal case, and as that right was given in favor of the accused in all such cases, and review by certificate done away with without any specific saving in favor of the United States, we are of opinion that the reasoning in *Rider* v. *United States* applies, and that the act furnishes the exclusive rule. The appellate jurisdiction was increased in many respects by that act and was curtailed in others, and while enlarged in criminal cases in favor *of de-[49] fendants, it was at the same time circumscribed as to the United States by the specific provisions relating to the particular subject, conceding that under the Revised Statutes the remedy by certificate was open to be availed of by the United States.

*Certificate dismissed.*

---

## UNITED STATES *Appt.*,
*v.*
## EDWARD KURTZ.

[See S. C. Reporter's ed. 49-53.]

*Fees of clerk—folios—docket fee—record of jurors—entering an order.*

1. In computing the fees of the clerk for recording the entries and proceedings in a criminal case under U. S. Rev. Stat. § 828, the entire record is to be taken as one instrument, and the folios counted continuously from beginning to end, instead of treating each document or entry as a separate instrument, and computing it as one folio although it may contain only a few words.
2. The clerk's right to the docket fee of $3 if testimony is taken, or $2 if none is taken, under U. S. Rev. Stat. § 828, attaches when the issue is joined, and is not lost by the subsequent withdrawal of the plea which constitutes the issue.
3. The clerk is entitled to such docket fee in every case where issue was joined, although the case be subsequently discontinued upon *nol. pros.* entered. The third paragraph of a cause "dismissed or discontinued" applies only to cases dismissed or discontinued before issue joined.
4. A folio charge for making a record of the names of jurors with their residences, as drawn by the jury commissioner, can be claimed by a clerk when he is required to make and post or file such list by order or practice of the court, and no other mode of compensating him is provided.
5. A clerk is entitled to fees for entering an order of court directing him as to the disposition of money received for fines, and for filing certificates of deposits or fines, although he has also a commission of 1 per cent for receiving, keeping, and disbursing the money.

[No. 530.]

*Submitted October 13, 1896. Decided October 26, 1896.*

APPEAL from a judgment of the Court of Claims adjudging that the clerk and commissioner of the circuit court, Edward Kurtz, is entitled to certain fees. *Reversed*, and case remanded for a new judgment in conformity to the opinion of this court.

---

NOTE.—*As to officers' fees and compensation; construction of statutes; extra pay; person holding two offices; construction of statutes in regard to officers,*—see note to United States v. Jones, 37: 335.

*As to extra pay or compensation to officers*, see note to United States v. Macdaniel, 8: 587.



Digitized by Google

Statement by Mr. Justice **Brown**:

This was a petition by Kurtz, who was clerk and commissioner of the circuit court for the eastern district of Wisconsin, for fees alleged to have been earned by him in both capacities.

The case resulted in the allowance of a large number of disputed items, and a final judgment in favor of the petitioner in the sum of $165.10. **50**] The government appealed, and *assigned as error the allowance of certain items specifically set forth in the opinion.

*Mr.* **Joshua Eric Dodge**, Assistant Attorney General, for appellant.

*Mr.* **Charles C. Lancaster** for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

1. The first assignment of error is taken to the allowance to the petitioner of clerk's fees for recording in the final record books the entries and proceedings in various criminal cases, consisting of the indictment or information, warrants, recognizances, judgments, and other proceedings, as required by rule of court, at 15 cents per folio. It seems that these records were made by him in compliance with a rule of the circuit court adopted November 3, 1890, requiring the clerk to keep a criminal final record book, in which should be recorded "the indictment or information, and all recognizances, warrants, process (except writs of subpœna and proceedings thereunder), judgments, and other proceedings in every prosecution for violation of the criminal laws of the United States." For making up these records the clerk charged a fee of 15 cents per folio in pursuance of the 8th subdivision of U. S. Rev. Stat. § 828, which entitles him to this amount "for entering any return, rule, order, continuance, judgment, decree, or recognizance, or drawing any bond, or making any record, return, or report." The only objection was to the clerk's method of computing folios by treating each document, judgment, order, and direction of the court as a separate instrument for the enumeration of folios, instead of counting the folios of the record as one instrument continuously from beginning to end.

The assignment is well taken. By his method of computation the clerk charges for each entry, many of which are less than a dozen words in length, as for one hundred words. This may be proper where the charge is made under the 1st clause of the paragraph **51**] "for entering any return, rule, *order," etc., upon the journal of the court, but the evident intent of the statute is that for the purpose of making up the record as a history of the case the entire record shall be taken as one instrument.

2. The next item to which the government objects is to the allowance for making dockets, indexes, taxing costs, etc., in nine cases, in which defendants at first pleaded not guilty, and at a later day, with no steps or proceedings intervening, withdrew such plea, pleaded guilty, and judgment was entered upon such plea.

In this connection § 828 provides as follows:

"For making dockets and indexes, issuing venire, taxing costs, and all other services, on the trial or argument of a cause where issue is joined and testimony given, $3."

For like services "in a cause where issue is joined, but no testimony is given, $2."

For like services "in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, $1."

The argument of the government is that as the plea of not guilty, which constituted the issue, was withdrawn, and a plea of guilty subsequently entered, upon which judgment was rendered, the case should be treated as one in which no issue was ever joined, and that the condition in which the case stands when finally disposed of is the criterion for the fee to be charged—in other words, if the case be finally disposed of upon a plea of guilty, regardless of the issue previously joined, the clerk is only entitled to the fee which would have been allowed him if no issue had ever been joined.

While we have held that a docket fee is not taxable until the case is finally disposed of (*United States* v. *McCandless*, 147 U. S. 692, 694, ¶ 3 [37: 334, 335]), we are still of the opinion that the clerk's right to the docket fee as upon issue joined attaches at the time such issue is in fact joined, and is not lost by the subsequent withdrawal of the plea which constituted the issue. Even when the clerk is allowed $3, there is no requirement that judgment shall be entered upon the issue, but only *that testimony shall be given, the only dif-[52 ference between the 1st and 2d paragraphs being that testimony must be taken to entitle the clerk to $3, while, where none is taken, he is entitled to $2. If the position of the government be sound it would seem to follow that, if the defendant plead not guilty and a jury trial be had, and the jury disagree, or before verdict actually rendered the defendant withdraw such plea and enter a plea of guilty, the clerk is entitled to no more than he would have been if the defendant had pleaded guilty upon first being arraigned. We think this could not have been the design of the statute.

3. The next item differs from the last only in the fact that, after issue was joined, the case was subsequently discontinued upon *nol. pros.* entered. Literally it falls within the 3d paragraph of a cause "dismissed or discontinued;" but we think that clause applies only to those cases where the case is dismissed or discontinued before issue has been joined, and that, as in the previous case, the clerk's right to the larger docket fee attaches at the time issue is joined. There is somewhat more doubt as to the construction of this paragraph than the last; but upon the whole we think that it was the design of the statute to allow the larger docket fee in every case where issue was joined in the course of the proceedings.

4. Objection is made to a folio charge for making a record of the names of jurors with their residences, as drawn by the jury commissioner. In the case of *United States* v. *King*, 147 U. S. 676, 678 [37: 328, 329], we held that the statute creating jury commissioners (21 Stat. at L. 43) did not make the clerk of the court such commissioner, although it required him to act with the commissioner in selecting the names of jurors, and placing them in the jury box; and that a new duty was thereby imposed upon him as clerk, for which no



Digitized by Google

compensation was provided by law. The question in that case was whether the clerk was entitled to a per diem fee of $5 for services in selecting jurors, in analogy to the compensation allowed to the jury commissioner; and it was held that he was not. But it was not intended in that case to hold that the clerk was 53] bound to forego any of his ordinary *fees as clerk, simply because he was aiding the jury commissioner in the performance of a new duty; and it seems to us that if the practice in that court requires the clerk to make a record of the names of jurors with their residences, or to do any other incidental work, in connection with the names of the jurors drawn, he is entitled to charge for that as for "making a record." It does not appear that a list of the jurors with their residences is strictly a part of the records of the court; but assuming that such list is required to be made by the order or the practice of the court, and posted up in the clerk's office, or preserved in the files, and no other method of compensating the clerk is provided, we think it may be properly charged for by the folio.

5. The final objection of the government is made to an item for entering an order of court directing the clerk as to what disposition to make of the money received for fines in certain cases, and for filing thirteen certificates of deposit of the bank for fines paid in to the credit of the Treasurer of the United States. The claim of the government is that the statutory fee of 1 per cent "for receiving, keeping, and paying out money in pursuance of any statute or order of court," covers all incidental services in this connection, including the entry of all orders for the payment of the money, and a filing of all receipts given by the persons to whom it is paid.

We think, however, the commission of 1 per cent was intended to compensate the clerk for his services and responsibility in the receipt, the safe-keeping and the proper disbursement of the money, and was not intended to deprive him of fees to which he would have been entitled if the money had been kept and disbursed by another officer. As the charge seems to be equitable, and has the sanction, not only of the court of claims, but of several other courts, we are not disposed to disturb it. *Goodrich* v. *United States*, 42 Fed. Rep. 392, 394; *Van Duzee* v. *United States*, 48 Fed. Rep. 643, 646.

It results that, for the error of the court of claims in respect to the first item, its *judgment must be reversed*, and the case remanded for a new judgment in conformity to this opinion.

---

54] ROSE L. SALTONSTALL and Others, Exrs. of Leverett Saltonstall, Deceased, *Plffs in Err.*,

v.

JOSEPH BIRTWELL.

(See S. C. Reporter's ed. 54-75.)

*Protest against payment of duties.*

A protest made within ten days after the ascertainment and liquidation of duties, though not made until after payment by the importer, is sufficient under U. S. Rev. Stat. §§ 2931, 2931, to give the importer a right of action to recover an excess of duties paid, since the amendment of 1877 of the latter section striking out the clause providing that protest should be made at or before payment.

[No. 257.]

*Argued October 31 and November 1, 1895. Reargued April 24, 27, 1896. Decided October 26, 1896.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the First Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the District of Massachusetts in favor of Joseph Birtwell, plaintiff, against Rose L. Saltonstall *et al.*, executors, etc., for excess of duties paid under protest on importation. *Affirmed.*

See same case below, 68 Fed. Rep. 1004, 33 U. S. App. 59.

Statement by Mr. Justice Shiras:

In October, 1888, Joseph Birtwell brought an action in the circuit court of the United States for the district of Massachusetts against Leverett Saltonstall, collector of the customs for the revenue district of Boston, to recover excess of duties paid under protest on importations. The trial resulted in a judgment for Birtwell, which was brought on error to this court, where the same was reversed and the case was returned to the circuit court for a new trial. 150 U. S. 417 [37: 1128].

In June, 1894, the case was again called for trial in the circuit court, and again resulted in a judgment for Birtwell. The case then went, by writ of error, to the United States circuit court of appeals for the first circuit; which court affirmed the judgment of the circuit court.

In April, 1895, the cause was removed into the Supreme Court by virtue of a writ of certiorari. The return to the writ set forth a stipulation between the counsel for the respective parties that the certified copy of the record of the cause in the circuit court of appeals for the first circuit, on file in the supreme court, should be treated as the return to the writ. That record discloses that, at the trial in the circuit court, the following proceedings took place:

"It is hereby agreed that trial by jury may be waived in the above entitled case, and that the same may be tried and determined by the court without the intervention of a jury, as *provided in §§ 649 and 700 of the Revised [55 Statutes of the United States.

"J. P. Tucker,
"Attorney for Plaintiff.
"Sherman Hoar,
"Attorney for Defendant and
United States Attorney.

"Issue being joined, this cause came on to be heard by the court, the Honorable Le Baron B. Colt, Circuit Judge, sitting.

"On October 2, 1894, at the time of the hear-

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

*As to action to recover back duties paid under protest; protest, how made, and its effect*,—see note to Greely v. Thompson, 12: 397.



Digitized by Google

ng the following admission on the part of the efendant is filed:

"It is hereby admitted that the 432 pieces of on and the four pieces of iron—the proper lassification of which for duty under the ariff act of March 3, 1883, is in question in he above-entitled case—are for the purposes f this case and for this case alone, 'manuactures not specially enumerated or provided or in' said 'act, composed wholly of iron,' ithin the meaning of schedule C (Treasury ompilation, ¶ 216) of said act, and are subject o duty under said paragraph at the rate of 45 er cent ad valorem.

"This admission as to the classification and ature of said pieces of iron is made to apply o this case and to this case alone, and the nited States and the defendant are not to be stopped or prejudiced thereby in any other ase whatsoever. Sherman Hoar,

"United States Attorney.

"At the same time the following motion for inding is filed by defendant:

"The defendant moves the court to rule that on all the evidence in this case, including the written admission of the defendant now on file in said case, the plaintiff has failed to prove his case, inasmuch as he has failed to show that he paid to the defendant under protest, and for the purpose of obtaining his merchandise, ac-56 | cording to the provisions of law in *force at the time of his importation, the duties he now seeks to recover.

"And said defendant moves the court to rule that on all the evidence in this case, including the aforesaid admission of the defendant, the plaintiff has failed to prove his case, inasmuch as he has failed to show that he complied with the provisions of law relative to protest, in force at the time of his said importation.

"And said defendant moves the court to rule that on all the evidence in this case, including the aforesaid admission of the defendant, the plaintiff has failed to prove his case.

"And the defendant moves also that the court find generally for him.

"Sherman Hoar,

"United States Attorney.

"Said motion is thereupon overruled by the court and judgment ordered to be entered for the plaintiff.

"On the 13th day of October the following findings of fact are filed by the court:

"The court finds the following facts:

"1. That on Feb. 27, 1888, the plaintiff, Joseph Birtwell, imported ex-steamship 'Jan Breydel,' from a foreign country into the port of Boston, and entered at the customhouse at said port, certain iron, described in the entry as '432 pieces in manufactures of iron for the third floor of the Boston court-house,' drilled and fitted complete, as required by plan, and painted.

"2. That on the 14th day of March, 1888, the said plaintiff imported ex-steamship 'Petre De Connick,' from a foreign country into port of Boston, and entered at the customhouse in said Boston, certain iron, described in the entry as '4 riveted girders in iron, complete framing of third floor of Boston court-house.'

"3. That the defendant, collector of said port of Boston, estimated the duties on both of said importations under the provisions of schedule C of the tariff act of March 3, 1883, which reads as follows: 'Iron or steel beams, girders, joists, *angles, channels, car-truck [57 channels, TT, columns and posts, or parts or sections of columns and posts, deck and bulb beams, and building forms, together with all other structural shapes of iron or steel, 1 and ¼ of 1 cent per pound.'

"4. That on Feb. 29, 1888, subsequently to said estimation of duties, for the purpose of obtaining said 432 pieces of iron, the plaintiff paid duties thereon at the rate exacted by the defendant, amounting to the sum of $2,889.29.

"5. That on March 14, 1888, subsequently to said estimation of duties, for the purpose of obtaining said four pieces of iron, the plaintiff paid duties thereon at the rate exacted by the defendant, amounting to the sum of $166.75.

"6. That the plaintiff actually obtained said 432 pieces of iron and said four pieces of iron at the time when he paid the estimated duties thereon, respectively.

"7. That on the 4th day of April, 1888, the defendant collector liquidated the duties on said 432 pieces of iron at the same rate and under the same provisions of law at which he had estimated said duties; and on the 10th day of April, 1888, said collector liquidated the duties on said four pieces of iron at the same rate and under the same provisions of law at which he had estimated said duties.

"8. That on the 4th day of April, 1888, the plaintiff filed with the defendant collector a protest in writing, setting forth distinctly and specifically the ground of his objection to the rate of duty at which the duties on said 432 pieces of iron had been liquidated by the defendant collector; and on the 10th day of April, 1888, the plaintiff filed with the defendant collector a protest in writing, setting forth distinctly and specifically the grounds of his objection to the rate of duty assessed by the collector upon said four pieces of iron, and in each of said protests the plaintiff claimed that said 432 pieces of iron and said four pieces of iron, respectively, were dutiable under that portion of schedule C of the tariff act of 1883, which is in the words following: 'Manufactures, articles, or wares not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, *copper, lead, [58 nickel, pewter, tin, zinc, gold, silver platinum, or any other metal, and whether partly or wholly manufactured, 45 per cent ad valorem;' and these protests were the only written protests filed by the plaintiff with the defendant in this case.

"9. The plaintiff took an appeal from the decision of the defendant collector on both the said importations to the Secretary of the Treasury within due time, and the Secretary of the Treasury having sustained the defendant collector in both cases, the defendant brought this suit in due time, and filed with the attorney of the defendant a bill of particulars in compliance with the requirements of U. S. Rev. Stat. § 3012.

"10. I find as a fact that in connection with his testimony as to making entries of said importations the plaintiff testified: 'I deposited what they demanded under protest.'

"11. On the question of the nature and dutiable character of said 432 pieces of iron and



Digitized by Google

said four riveted girders of iron, there being on record in said case an admission of the defendant in the following language:

" 'It is hereby admitted that the 432 pieces of iron and the four pieces of iron—the proper classification of which for duty, under the tariff act of March 3, 1883, is in question in the above-entitled case—are for the purposes of this case, and for this case alone, "manufactures not specially enumerated or provided for in" said "act, composed wholly of iron," within the meaning of ¶ 216 of said act, and are subject to duty under said paragraph at the rate of 45 per cent ad valorem.

" 'This admission as to the classification and nature of said pieces of iron is made to apply to this case and to this case alone, and the United States and the defendants are not to be estopped or prejudiced thereby in any other case whatsoever;' I find that said 432 pieces of iron and said four pieces of iron were dutiable at the rate of 45 per cent ad valorem, as claimed by the plaintiff.

"12. The value of said 432 pieces of iron was $2,647; the value of said four pieces of iron
59] was $216; and the excess of *duties paid over duties due is, on said 432 pieces of iron, $1,698.14, and on said four pieces of iron, $69.55.

"13. The court finds that the plaintiff is entitled to recover the sum of $1,767.69, and interest from the date of the writ and cost.

"Le Baron B. Colt,
"Circuit Judge.

"On the same day the following bill of exceptions is allowed and ordered to be filed:

"This was an action to recover the amount of certain duties alleged to have been illegally exacted of the plaintiff by the defendant collector of the port of Boston upon certain pieces of iron imported by the plaintiff into said port in the year 1888. The pleadings in the case are hereby referred to and made a part of this bill of exceptions. The parties, by their attorneys of record, filed with the clerk a stipulation in writing, waiving a jury. This case came on to be heard before the Honorable Le Baron B. Colt, Circuit Judge, at the May term, 1894.

"The court made thirteen special findings of fact, which are hereby referred to and made a part of this bill of exceptions.

"Joseph Birtwell, the first witness called by the plaintiff, testified that on February 27, 1888, he imported from Antwerp by the steamship Jan Breydel, into the port of Boston, and entered at the customhouse at said port, 432 pieces of manufactures of iron; and that on the 14th day of March, 1888, he imported from Antwerp by the steamship Petre De Connick, into said port of Boston, and entered at the customhouse at said port, four riveted girders.

"By agreement of counsel, naval office copies produced by the witness Birtwell of the entries of said two lots of iron, and triplicate copies of the consular invoices thereof offered by him in evidence, were admitted in lieu of the originals or collector's copies.

"The witness Birtwell then further testified that on the date of importation and entry, in the
60]case of each of said two *lots of iron, the defendant collector estimated the duties thereon at 1¼ cents per pound, and the third finding of fact of said circuit court shows that said estimation was under that provision of schedule C of the tariff act of March 3, 1883, which reads as follows: 'Iron or steel beams, girders, joists, angles, channels, car-truck channels, TT, columns and posts, or parts or sections of columns and posts, deck and bulb beams, and building forms, together with all other structural shapes of iron or steel, 1¼ of 1 cent per pound.' He further testified that on February 29, 1888, for the purpose of obtaining said 432 pieces of iron, he paid the duties estimated thereon by the defendant collector, amounting to the sum of $2,889.29, and that on March 14, 1888, for the purpose of obtaining said four riveted girders, he paid the duties estimated thereon by the defendant, amounting to the sum of $166.75, and that he actually obtained said 432 pieces of iron and said four riveted girders at the times when he paid the estimated duties thereon, respectively.

"From one of the entries referred to above, offered by the plaintiff and received in evidence, it appeared that the defendant collector liquidated the duties on said 432 pieces of iron on the 4th day of April, 1888, at the same rate and under the same provisions of law at which he had estimated said duties; and from the seventh finding of fact of said circuit court, it appears that on the said 10th day of April, 1888, the defendant collected liquidated duties on said four riveted girders at the same rate and under the same provision of law at which he had estimated said duties.

"The examination of the witness Birtwell was then suspended, and the plaintiff called Miss Clara Kenrick. She testified that she had for many years been the protest clerk in the customhouse at the port of Boston, and was said clerk during the year 1888, and that it was her duty to receive and care for protests filed by importers against the rate of duty exacted by the collector of said port upon their importations of merchandise.

"The entries of the plaintiff of the two lots of merchandise *in question, referred to above, [61
were then shown to Miss Kenrick and identified by her as naval office copies of the entries made by the plaintiff of the two lots of merchandise in question, and the stamps thereon, showing the dates of payment of the estimated duties and of the liquidation, were explained by the witness, corroborating the witness Birtwell, to mean what has been stated above.

"The witness was then asked: 'What is understood by the customhouse clerks as the liquidation of an entry?' She testified: 'Well, the duties are figured on the entry and the entry goes to the naval office for examination, then comes back to another clerk, who puts the stamp on—"liquidated"—and completes the liquidation.'

"Two papers were then handed to the witness by the attorney for the plaintiff, and she was asked if there was anything upon them to show when they were filed at the customhouse. She testified that there were stamps upon each of said papers indicating the dates, respectively, at which they were received at the customhouse. She further testified that the date upon one of the papers which related to the plaintiff's importation of said 432 pieces of iron by the



Digitized by Google

steamship Jan Breydel was April 4, 1888, and that the date upon the other paper which related to the plaintiff's importation of said four rivited girders by the steamship Petre De Connick was April 10, 1888, and she testified that said papers were protests in writing filed by the plaintiff with the defendant collector against the rate of duty exacted by him upon said importations.

"She was then asked the following question by the counsel for the plaintiff: 'What were your duties in relation to protests filed at that time, so far as the time within which and when they should be filed was concerned?' The question was objected to by the counsel for the defendant, but the court overruled the objection and permitted the witness to answer, and the defendant then and there duly excepted.

"The answer of the witness to said question was as follows: 'The instructions of the department as to when protests should be received have varied from time to time. At some times we have been instructed to receive [62] them at any time from the *date when the entry was made up to the end of ten days after liquidation. At other times we have been instructed to receive them only within ten days after liquidation.'

"The witness was then asked by the counsel for the plaintiff the following question: 'Can you, from your memory, tell which of those practices was in vogue at this time in 1888?' Her reply was, 'I think the last one.' The witness then testified further that she was the clerk who received protests; that she made certain entries in a book regarding them, giving the place from which the goods were imported, the date when the protests were received, the name of the importer, and the subject of the protest and appeal, the name of the vessel, the date of entry, whether the entry is duty paid or bonded, the date of liquidation and the date of filing the protest and appeal, and then it was her duty to send the protest to the deputy collector of customs; that the protests were required to be filed in duplicate, and that the original protest and appeal are sent to the deputy collector of customs and the duplicate protest retained by the witness; and that the original protest and appeal are afterwards sent by the deputy collector to the Secretary of the Treasury at Washington; that in some cases the deputy collector of customs sent protests to the appraisers and did not send protests to the Secretary of the Treasury, unless the report of the appraisers confirmed the decision of the collector, and that the decision of the Secretary of the Treasury upon protests and appeals is sent to the collector of customs from whom they have been received.

"The witness then identified two papers as the appeals to the Secretary of the Treasury filed by the plaintiff with the defendant collector in the matter of the decision of the defendant as to the rate of duty chargeable upon defendant's said two importations.

"Up to this point the papers containing the protests and appeals referred to above had not been formally offered in evidence by the plaintiff. Counsel for the plaintiff then formally offered in evidence the two papers identified by the witnesses Birtwell and Kenrick as the protest filed by the plaintiff with the defendant collector against the rate of duty *exacted [63] by the defendant upon the plaintiff's said two importations of iron.

"The papers were objected to by the attorney for the defendant on the ground that, from the testimony in the case and from the dates stamped upon said papers, it appeared that they had been filed by the plaintiff with the defendant collector too late to be good and valid protests under the law in force at the time of said importations; but the court overruled the objection and admitted the papers, whereupon the defendant then and there duly excepted.

"It is not deemed necessary to set out said two papers verbatim, inasmuch as the only objection to their admission was the objection just stated, it being conceded by the defendant that said papers complied with the provisions of law regarding protests in all respects, except the time at which they were filed with said defendant collector. Miss Kenrick then gave further testimony, which, however, is not material for the purpose of this bill of exceptions.

"At this point the defendant placed on file an admission in writing in the words following:

"'It is hereby admitted that the 432 pieces of iron and the four pieces of iron—the proper classification of which for duty under the tariff act of March 3, 1883, is in question in the above-entitled case—are, for the purposes of this case and for this case alone, "manufactures not specially enumerated or provided for in" said "act, composed wholly of iron," within the meaning of schedule C (Treasury Compilation, ¶ 216) of said act, and are subject to duty under said paragraph at the rate of 45 per cent ad valorem.

"'This admission as to the classification and nature of said pieces of iron is made to apply to this case and to this case alone, and the United States and the defendant are not to be estopped or prejudiced thereby in any other case whatsoever.'

"The four pieces of iron referred to in said admission are what are referred to herein as four riveted girders.

"On cross-examination, the witness Kenrick testified that she had no personal knowledge whatever in regard to *the practice at any [64] time at other ports than the port of Boston in the matter of the time of receiving protests.

"The examination of the witness Birtwell was then resumed, but his further testimony contained nothing material for the purpose of this bill of exceptions.

"Upon the conclusion of the plaintiff's evidence, and after the plaintiff had rested, the counsel for the defendant stated that he had no evidence to offer on behalf of the defendant, and thereupon rested.

"The counsel for the defendant then filed a motion in writing in the words following:

"'The defendant moves the court to rule that on all the evidence in this case, including the written admission of the defendant now on file in said case, the plaintiff has failed to prove his case, inasmuch as he has failed to show that he paid to the defendant under protest, and for the purpose of obtaining his merchandise according to the provisions of law in



Digitized by Google

force at the time of his importation, the duties he now seeks to recover;

"'And said defendant moves the court to rule that on all the evidence in this case, including the aforesaid admission of the defendant, the plaintiff has failed to prove his case, inasmuch as he has failed to show that he complied with the provisions of law relative to protest in force at the time of his said importations.

"'And said defendant moves the court to rule that on all the evidence in this case, including the aforesaid admission of the defendant, the plaintiff has failed to prove his case.

"'And the defendant moves also that the court find generally for him.'

"The court overruled the motion and the defendant duly excepted.

"This bill of exceptions having been tendered for signature and allowance to the judge presiding at said cause at the same term of court at which said special findings were rendered, and within the time allowed by the court therefor, the same is now hereby signed 65] and allowed as a further statement of *the exceptions taken and reserved by the said defendant at the said trial, and is hereby made a part of the record in the said cause.

"The within bill of exceptions is allowed this 12th day of October, 1894.

"Le Baron B. Colt,
"Circuit Judge.

"Also on the same day the following judgment is entered:

"It is thereupon considered by the court, to wit, Oct. 13, 1894, the Honorable Le Baron B. Colt, Circuit Judge, sitting, that the said Joseph Birtwell, plaintiff, recover of the said Leverett Saltonstall, defendant, the sum of $2,438.40 damages and $156.50 costs."

*Messrs.* **Judson Harmon,** Attorney General, and **Edward B. Whitney,** Assistant Attorney General, for plaintiffs in error.

*Messrs.* **Josiah P. Tucker,** and **Edward Hartley** for defendant in error.

*Messrs.* **Henry Edwin Tremain** and **Mason W. Tyler,** by leave of the court, also filed a brief on behalf of plaintiffs in other similar suits.

Mr. Justice **Shiras** delivered the opinion of the court:

This was a suit brought by Birtwell, an importer, against the collector of customs at Boston, to recover certain duties alleged to have been overcharged upon goods imported in 1888.

It is conceded, on the part of the government, that the classification and rate of duty adopted by the collector, and affirmed on appeal by the Secretary of the Treasury, were erroneous, and that the classification contended for by the importer was proper. The plaintiff was accordingly entitled to recover if payment of the duties was made by the importer for the pur-66] pose of obtaining possession of his *merchandise, and if the protest, which must be made in order to give an importer a right of action against a collector for duties claimed to have been illegally exacted, was made in time, as provided by law.

It was affirmatively found, in the circuit court, that the duties were paid by the importer in order to get possession of the goods, and no objection has been urged in this court to the correctness of that finding. The question principally discussed is, whether the plaintiff gave timely and sufficient notice of protest and dissatisfaction with the decision of the collector. The record discloses that when the gross estimates were made, as provided in U. S. Rev. Stat. § 2869, the importer paid the amounts thereof, and that subsequently, when the duties on the respective invoices were liquidated, protests in writing in the form required were filed.

The United States claim that the protests, to be efficacious, should have been made at or before the time the payments were made according to the gross estimates. This position was overruled by the trial court (63 Fed. Rep. 1004), and the same view prevailed in the circuit court of appeals. 33 U. S. App. 52.

It is unnecessary, at this time, to enter into a minute examination of the several enactments on this subject, as they have been so frequently and recently discussed in several opinions of this court cited in the arguments of counsel. *Barney* v. *Watson*, 92 U. S. 449 [23: 730]; *United States* v. *Schlesinger*, 120 U. S. 109 [30: 607]; *Davies* v. *Miller*, 130 U. S. 284 [32: 932], and *Barney* v. *Rickard*, 157 U. S. 352 [39: 730], may be particularly mentioned. Our present task is to apply the conclusions of those cases to the one in hand, and we can add but little to the opinion of the circuit court of appeals.

Without repeating the history of the prior statutes, it is sufficient, for the determination of this case, to advert to the phraseology of U. S. Rev. Stat. §§ 2931, 3011, and of the act of February 27, 1877, chap. 69 (19 Stat. at L. 240, 241, 247), respectively as follows:

"Sec. 2931. On the entry of any vessel, or of any merchandise, *the decision of the col-[67 lector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. The decision of the Secretary on such appeal shall be final and conclusive, and such vessel, or merchandise, or costs and charges shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary No suit shall be maintained in



Digitized by Google

any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky mountains, or more than five months in case of an entry west of those mountains."

"Sec. 3011. Any person who shall have made payment under protest, and in order to obtain possession of merchandise imported for him, to any collector or person acting as collector, of any money as duties when such amount of duties was not, or was not wholly, author-
68] ized by law, may maintain *an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest in writing and signed by the claimant or his agent was made and delivered at or before the payment, setting forth distinctly and specifically the grounds of objection to the amount claimed."

Section 3011 was, by the act of February 27, 1877, amended as follows:

"Section 3011 is amended by striking out all after word 'protest,' in the eighth line, and by adding the words 'and appeal shall have been taken as prescribed in § 2931.'"

Section 3011 as so amended therefore reads as follows:

"Any person who shall have made payment under protest, and in order to obtain possession of merchandise imported for him, to any collector or person acting as collector, of any money as duties when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand, and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one."

Undeniably, the general purpose of this legislation was to secure the importer, who, in order to get possession of his merchandise, has paid duties which he alleges to have been in excess of those authorized by law, and a remedy in the nature of an action at law to recover back any such excess, and to the United States a notice in writing, setting forth distinctly and specifically the grounds of objection to the amount claimed; and to provide, in respect to time, that such notice must be given within ten days after the ascertainment and liquidation of the duties, and that the action must be brought within ninety days after the decision on appeal by the Secretary of the Treasury.
69] *There is no apparent reason, in the way of advantage or disadvantage to the United States, why the notice or protest should be made at any particular juncture, if made before the appeal to the Secretary.

The moneys paid by the importer, in order that he may get possession of his merchandise, are forthwith paid into the Treasury of the United States, and the function of the protest to warn the government of the fact of dissatisfaction, and to commit the importer to a specific statement of the grounds of his objection is equally performed, whether made at the time of such payment or within ten days after the ascertainment and liquidation of the duties.

In *Davies* v. *Miller*, 130 U. S. 284 [32: 932], the contention on the part of the government was that the notice of dissatisfaction with the decision of the collector of customs, required by the act of June 30, 1864, to be given "within ten days after the ascertainment and liquidation of the duties," could not be efficiently given before the final ascertainment and liquidation of the duties as stamped upon the entry. But this court held that the notice might be validly given at any time after the entry of the goods and the collector's original estimate of the amount of the duties, saying:

"That purpose is as well accomplished by giving the notice as soon as the goods have been entered and the duties estimated by the collector, as by postponing the giving of the notice until after the final ascertainment and liquidation of the duties have been made and stamped upon the entry. The clause requiring the importer to give such notice 'within ten days after the ascertainment and liquidation of the duties' must therefore, according to the fair and reasonable interpretation of the words as applied to the subject-matter, be held to fix only the *terminus ad quem*, the limit beyond which the notice shall not be given, and not to fix the final ascertainment and liquidation of the duties as the *terminus a quo*, or the first point of time at which the notice may be given."

We think that the fair and reasonable import of § 2931 and of § 3011, as they stood in 1888, when these goods were imported, was that a right of action accrued to *the importer if [70
he paid the duties complained of in order to get possession of his merchandise, and if he made his protest, in the form required, within ten days after the ascertainment and liquidation of the duties.

That Congress, in 1877, amended § 3011 by striking out the provision that the protest should be made and delivered at or before payment, was a legislative declaration that thereafter such provision should not exist or apply.

It is urged that the phrase "under protest," in the first part of § 3011, is inconsistent with this view. But it is not unusual, in a succession of statutes on the same subject-matter, amending or modifying previous provisions, that a word or phrase may remain, although rendered useless or meaningless by the amendments. Such words are merely vestigial, and should not be permitted to impair or defeat the fair meaning of the enactment.

However, we do not think that, in this instance, there is any real inconsistency. The transaction treated of in this legislation is an entire one, beginning with the entry of the merchandise, and continuing through the appraisement, the liquidation of the duties, the payment, the protest, the appeal, to the trial of the action, and may properly be spoken of as one in which the payment is made under protest, or made in a process in which a protest is made. "Payment under protest" means a transaction where protest has been made in accordance with the requirement of § 2931, and



Digitized by Google

not "at or before the payment" of the estimated duties.

This view of the subject renders it unnecessary to consider what effect ought to be given, in the case before us, to the practice of the Treasury, either by way of departmental construction or by way of estoppel. Nor do we consider it incumbent on us to consider whether there was error in the circuit court, as a matter of practice, in directing judgment upon the special findings in favor of the importer. No such error was assigned in the circuit court, or was considered in the court of appeals, but it first appeared in the application for the writ of certiorari.

71] *_The judgment of the Circuit Court of Appeals affirming the judgment of the Circuit Court is affirmed._

Mr. Chief Justice **Fuller** dissenting:

At common law money unlawfully exacted by a collector of taxes or duties could be recovered back in an action of assumpsit brought against him, but to sustain the action the money must have been paid under duress. Duties are voluntarily paid if paid without objection. The finding in this case that the importer paid for the purpose of obtaining these pieces of iron is no more than would be true in any case, and does not show in the absence of expressed objection that the payment of the particular amount was made by the importer _in invitum_.

As construed by this court in *Cary* v. *Curtis*, 44 U. S. 3 How. 236 [11: 576], the act of March 3, 1839, took away the common-law right of action to recover moneys paid under duress of goods, but it was restored by the act of February 26, 1845, the provisions of which were carried forward as § 3011 of the Revised Statutes. The common-law action continued as before save that it was subject to certain new restrictions. In the Revision of 1873-74, § 3011 reads as follows: "Any person who shall have made payment under protest, and in order to obtain possession of merchandise imported for him, to any collector or person acting as collector, of any money as duties when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest in writing and signed by the claimant or his agent was made and delivered at or before the payment, setting forth distinctly and specifically the grounds of objection to the amount claimed."

72] *Protest was required to show that the legality of the demand was not conceded when payment was made, and the words "at or before the payment" were merely declaratory and redundant.

June 30, 1864, an act was passed, the 14th section of which was carried forward as § 2931 of the Revised Statutes, as follows:

"Sec. 2931. On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise, or the cost and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. The decision of the Secretary on such appeal shall be final and conclusive, and such vessel, or merchandise, or costs and charges shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety *days from the date of such appeal [73 in case of an entry at any port east of the Rocky mountains, or more than five months in case of an entry west of those mountains."

This act of 1864 added a new restriction, namely, that an action should not lie until a certain proceeding had been prosecuted in the Treasury Department. It did not abolish the common-law action but established the rule of the finality of the collector's decision unless appealed from in a certain way. Many reasons existed for this statute, as in addition to the former, such as the doing away with prospective protests and the securing, when the goods were warehoused, of early notification to the government of objections to the duties, if any, instead of being delayed until protest made on payment when the goods were withdrawn; but it is enough that this court has already ruled that §§ 2931 and 3011 coexist and must be construed together. *United States* v. *Schlesinger*, 120 U. S. 109, 114 [30: 607, 609]. The language of Judge Lowell in *Schlesinger's Case*, on circuit (14 Fed. Rep. 682, 684), is opposite:

"It is safe to say, I think, that no case has been decided in which, under objection, a plaintiff has ever recovered of a collector, or of anyone else, a payment which was not in the legal sense coerced. It is not mentioned in every case because it is one of those familiar facts which are taken for granted. Does the act of 1864, now Rev. Stat. § 2931, change all this? I think not. That act is not an enabling but a limiting and restricting act. It does not purport to tell us when an action may be



Digitized by Google

maintained, but only that the decision of the department shall be final unless certain things are done."

It may be observed that two written protests or notices of specific objections were not generally, if ever, necessary, for the notice required by § 2931 might be given at the time of paying the money.

The Revised Statutes did not change the action recognized by the act of 1845, substantially, or relax any of its requirements, and although it is true, as said in *Arnson* v. *Murphy*, 109 U. S. 238 [27: 920], that the specified action was regulated by express statutory pro-
74] visions, yet the conditions that the *payment must be made under protest and to obtain the goods still remained, and so it has been several times decided. *Porter* v. *Beard*, 124 U. S. 429 [31: 490]; *United States* v. *Schlesinger*, 120 U. S. 109 [30: 607].

The question really is, then, whether the restrictions were relaxed by the act of February 27, 1877 (19 Stat. at L. 240). That act is entitled "An Act to Perfect the Revision of the Statutes of the United States, and of the Statutes Relating to the District of Columbia," and declares "that for the purpose of correcting errors and supplying omissions in the act entitled, 'An Act to Revise and Consolidate the Statutes of the United States in Force on the First Day of December, Anno Domini, One Thousand, Eight Hundred and Seventy-Three,' so as to make the same truly express such laws; the following amendments are hereby made therein. . . . Section three thousand and eleven is amended by striking out all after the word 'protest' in the eighth line, and by adding the words 'and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one.'" This made § 3011 read as follows: "Any person who shall have made payment under protest, and in order to obtain possession of merchandise imported for him, to any collector or person acting as collector, of any money as duties when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one."

This amendment was held by the circuit court of appeals to have revolutionized the law as to the recovery back of moneys voluntarily paid, and to allow payments made without objection to be recovered if grounds of objection were afterwards discovered. And yet the statute, as amended, preserved the express requirement that payments to be recovered back must be made "under protest and in order to obtain possession" of the goods. In other words, the
75] amendment *preserved so much of the act of 1845 as announced the common-law rule and omitted so much as established new restrictions, referring instead to the restrictions of 1864. If the intention had been to change the common-law rule the words "under protest" would have been stricken out, and it seems to me a most dangerous and wholly inadmissible rule of construction to treat them as accidentally retained traces of something that had ceased to be. The words "at or before the payment" were omitted, but, as already said, these were merely declaratory and redundant, and that was undoubtedly the reason of the omission. The last clause of § 3011 as amended refers to the notice in writing required by § 2931, and is simply a cross reference to the additional requirement that the Treasury proceeding shall be had before the action is commenced. In my opinion the action remained an action in the nature of a common-law action and governed by the principles of the common law except as otherwise specifically provided. Indeed, § 3011 as it now stands is unambiguous on its face and does not call for construction unless in respect of the character of the protest, and that need not be considered, as the finding of facts must be taken to mean that no protest at all was made at the time these duties were paid and the pieces of iron obtained by the importer. I cannot accept the conclusion that under this act the importer can recover on a payment not made under duress, and think that such duress cannot be said to exist in the absence of any objection to making the payment.

I therefore dissent from the opinion and judgment of the court, and am authorized to say that Mr. Justice **Field**, Mr. Justice **Harlan**, and Mr. Justice **Brewer** concur in this dissent.

---

GEORGE McELROY *et al.*, *Plffs. in Err.*, [76
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 76-81.)

*Consolidation of indictments—distinct felonies—when conviction will be reversed.*

1. A consolidation for trial of two indictments against several defendants for assault with intent to kill, with another indictment against only part of them for arson committed on the same day, and with another indictment against all of them for arson committed two weeks later, when there is nothing to show a conspiracy or to connect the transactions together,—is erroneous.

2. Indictments for distinct felonies not provable by the same evidence, and in no sense resulting from the same series of acts, cannot be consolidated for trial.

3. A conviction will be reversed for improper consolidation of indictments with others for different transactions, although the record does not show that defendants were thereby prejudiced or embarrassed in their defense, where it cannot be said that they may not have been embarrassed and prejudiced or that the attention of the jury may not have been distracted to their injury in passing upon the distinct and independent transactions.

[No. 403.]

*Submitted October 13, 1896. Decided November 2, 1896.*

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment of conviction of the



Digitized by Google

plaintiffs in error, on the trial of several indictments consolidated, which were for distinct offenses at different times. *Reversed*, and cause remanded, with directions for a new trial, and for further proceedings.

The facts are stated in the opinion.

*Mr.* **Wm. M. Cravens** for plaintiffs in error.

*Mr.* **J. M. Dickinson,** Assistant Attorney General, for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

George McElroy, John C. W. Bland, Henry Hook, Charles Hook, Thomas Stufflebeam, and Joe Jennings were indicted in the circuit court for the western district of Arkansas for assault with intent to kill Elizabeth Miller, April 16, 1894, the indictment being numbered 5332; also for assault with intent to kill Sherman Miller, on the same day, the indictment being numbered 5333; also for arson of the dwelling house of one Eugene Miller, May 1, 1894, the indictment being numbered 5334. Three of these 77] defendants, namely, *George McElroy, John C. W. Bland, and Henry Hook, were also indicted for the arson of the dwelling house of one Bruce Miller, April 16, 1894, the indictment being numbered 4843. It does not appear that Jennings was tried. The court ordered the four indictments consolidated for trial, to which each of the five defendants duly excepted. Trial was then had and resulted in separate verdicts finding the defendants guilty, and, after the overruling of motions for new trial and in arrest, they were severally sentenced on each indictment to separate and successive terms in the penitentiary, and sued out this writ of error.

The consequence of this order of consolidation was that defendants Stufflebeam and Charles Hook were tried on three separate indictments against them and three other defendants, consolidated with another indictment against the other defendants for an offense with which the former were not charged, while an indictment for feloniously firing the dwelling house of one person on a certain day was tried with an indictment for arson committed a fortnight after in respect of the dwelling house of another person.

Section 1024 of the Revised Statutes is as follows: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

The order of consolidation under this statute put all the counts contained in the four indictments in the same category as if they were separate counts of one indictment, and we are met on the threshold with the inquiry whether counts against five defendants can be coupled with a count against part of them or offenses charged to have been committed by all at one time can be joined with another and distinct offense committed by part of them at a different time.

The statute was much considered in *Pointer* v. *United States*, *151 U.S. 396 [38:208]. In [78 that case the defendant was charged in different counts with two murders alleged to have been committed on the same day and in the same county and district, and moved to quash on that ground, which motion was denied. Before the case was opened to the jury for the government the defendant moved that the district attorney be required to elect on which count of the indictment he would claim a conviction. The motion was overruled, and he was required to go to trial upon all the counts. Upon the conclusion of the evidence the defendant renewed the motion that the government be required to elect upon which count of the indictment it would prosecute him, but this motion was overruled. The jury found separate verdicts of guilty of each murder as charged in the appropriate count. This court, speaking through Mr. Justice Harlan, said: "While recognizing as fundamental the principle that the court must not permit the defendant to be embarrassed in his defense by a multiplicity of charges embraced in one indictment and to be tried by one jury, and while conceding that regularly or usually an indictment should not include more than one felony, the authorities concur in holding that a joinder in one indictment, in separate counts, of different felonies, at least of the same class or grade, and subject to the same punishment, is not necessarily fatal to the indictment upon demurrer or upon motion to quash or on motion in arrest of judgment, and does not, in every case, by reason alone of such joinder, make it the duty of the court, upon motion of the accused, to compel the prosecutor to elect upon what one of the charges he will go to trial." It was decided that it could not be held from anything on the face of the indictment that the trial court erred or abused its discretion in overruling the defendant's motion to quash the indictment, or his motions for an election by the government between the two charges of murder. The indictment showed that the two murders were committed on the same day, in the same county and district, and with the same kind of an instrument, and these facts justified the trial court in forbearing at the beginning of the trial to compel an election. And when the evidence was closed it appeared *therefrom that the two murders were com-[79 mitted at the same place, on the same occasion, and under such circumstances that the proof in respect of one necessarily threw light upon the other; and that "there was such close connection between the two felonies, in respect of time, place, and occasion, that it was difficult, if not impossible, to separate the proof of one charge from the proof of another." As it was apparent that the substantial rights of the accused were not prejudiced by the action of the trial court, we declined to reverse on the ground of error therein.

It will be perceived that the two offenses were charged against one and the same defendant, and that the case disclosed such concurrence as to place, time, and circumstances as rendered the proof the same as to both, and



Digitized by Google

made the two alleged murders substantially parts of the same transaction.

In the case at bar, the two indictments for assault with intent to kill on April 16, 1894, and the indictment for arson on May 1, 1894, were against all of the defendants, while the indictment for arson committed April 16, 1894, the same day of the alleged assaults with intent to kill, was against three of the defendants, and not against the others.

On the face of the indictments there was no connection between the acts charged as committed April 16 and the arson alleged to have been committed two weeks later, on which last occasion the government's testimony, according to the record, showed that the two defendants Charles Hook and Thomas Stufflebeam were not present. The record also discloses that there was no evidence offered tending to show that there had been or was a conspiracy between defendants, or them and other parties, to commit the alleged crimes.

The several charges in the four indictments were not against the same persons, nor were they for the same act or transaction, nor for two or more acts or transactions connected together; and in our opinion they were not for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, com-
[80] mitted at different times and *not provable by the same evidence. In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offense or restrict the evidence to one transaction. *Young* v. *King*, 3 T. R. 98, 106; *Reg.* v. *Heywood*, Leigh & C. C. C. 451; Tindal, C. J., *O'Connell* v. *Reg.* 11 Clark & F. 241; *Reg.* v. *Ward*, 10 Cox, C. C. 42; *Rex* v. *Young*, Russ. & R. C. C. 280, note; *Reg.* v. *Lonsdale*, 4 Fost. & F. 56; *Goodhue* v. *People*, 94 Ill. 37; *State* v. *Nelson*, 8 N. H. 165; *People* v. *Aikin*, 66 Mich. 470; *Williams* v. *State*, 77 Ala. 53; *State* v. *Hutchings*, 24 S. C. 142; *State* v. *McNeill*, 93 N. C. 552; *State* v. *Daubert*, 42 Mo. 242; 1 Bishop, Crim. Proc. § 259. Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error.

It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. And even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts.

Under the third clause relating to several charges "for two or more acts or transactions of the same class of crimes or offenses," it is only when they "may be properly joined" that the joinder is permitted, the statute thus leaving it for the court to determine whether in any given case a joinder of two or more offenses in one indictment against the same person "is consistent with the settled principles of criminal law," as stated in *Pointer's Case*.

It is admitted by the government that the judgments against Stufflebeam and Charles Hook must be reversed, but it is contended that the judgments as to the other three defendants *should be affirmed because there [81 is nothing in the record to show that they were prejudiced or embarrassed in their defense by the course pursued. But we do not concur in this view. While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same and where the offenses are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute and did not rest in mere discretion.

*Judgment reversed* as to all the defendants, and cause remanded with directions to grant a new trial and for further proceedings in conformity with this opinion.

Mr. Justice **Brewer** and Mr. Justice **Peckham** concurred in the reversal as to Stufflebeam and Charles Hook only.

---

UNITED STATES, *Plff. in Err.*,
*v.*
MARTIN T. McMAHON.

---

MARTIN T. McMAHON, *Plff. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 81-88.)

*Fees of marshal—attending criminal examination—attendance before commissioner—sentence to penitentiary within the state—fees for transporting convicts—delivery of warrants.*

1. A marshal is entitled to a single fee only, under U. S. Rev. Stat. § 829, for attending criminal examinations before the same commissioner, in separate and distinct cases, on the same day.
2. When a marshal attends examinations before two different commissioners on the same day he is entitled to his fee of $3 for attendance before each commissioner.
3. The attendance of a special deputy marshal before a commissioner on election day, which is incidental to his service in arresting a fraudulent voter and taking him before the commissioner, is covered by the *per diem* provided by U. S. Rev.

NOTE.—*As to extra pay or compensation to officers*, see note to United States v. Macdaniel, 8: 567.



Digitized by Google

Stat. § 2061, and he cannot claim additional compensation for such attendance.

4. Power to sentence a convict to a penitentiary within the state but out of the judicial district in which he is convicted, which is conferred by U. S. Rev. Stat. §§ 5440-5442, is not taken away by § 5546 as amended by the act of July 12, 1876, providing for the sentence of a convict in a convenient state or territory when there is no suitable place of imprisonment in the district or territory where he is convicted.

5. A marshal is entitled, under U. S. Rev. Stat. § 829, to fees at the rate of 10 cents per mile, and not merely the actual expenses for transporting a convict to a penitentiary in the same state but outside of the district in which he was sentenced, where the court sentences him to that penitentiary under its discretion given by §§ 5541, 5542, and not under § 5546, because of the absence of any suitable place of confinement in the district or territory.

6. A marshal who has transported a prisoner is not entitled, in addition to his other fees, to a fee, under U. S. Rev. Stat. § 829, for the delivery of warrants of commitment to the warden of a penitentiary, as it is not a "service" within the meaning of such section.

[Nos. 356, 357.]

*Argued October 21, 1896. Decided November 2, 1896.*

IN ERROR to the Circuit Court of Appeals for the Second Circuit to review a judgment affirming, except in one particular, a judgment of the Circuit Court for the Southern District of New York in favor of the petitioner, McMahon, for fees and disbursements as marshal for that district. *Reversed*, and case remanded for a new judgment.

See same case below, 26 U. S. App. 687.

Statement by Mr. Justice Brown:

These were writs of error sued out by both parties to review a judgment of the circuit court of appeals for the second circuit, affirming, except in one particular, a judgment of the circuit court for the southern district of New York for $4,843.60 in favor of the petitioner, McMahon, for fees and disbursements as marshal for that district from July 7, 1885, to January 12, 1890. The opinion of the court of appeals is found in 26 U. S. App. 687.

The assignments of error filed by both parties are set out in the opinion of the court.

*Messrs.* **Joshua Eric Dodge**, Assistant Attorney General, and *Felix Brannigan*, for the United States.

*Mr.* **Richard Randolph McMahon** for Martin T. McMahon.

Mr. Justice **Brown** delivered the opinion of the court:

In these cases the government assigns as error—

1. The allowance of a charge of $2 per day for attending criminal examinations in separate and distinct cases upon the same day; these examinations being on some days all before the same commissioner, and on others before different commissioners. The evidence does not disclose how much of this amount is applicable to each class of cases.

By U. S. Rev. Stat. § 829, the marshal is allowed "for attending the circuit and district courts, . . . and for bringing in and committing prisoners and witnesses during the term, $5 a day," and "for attending examinations before a commissioner, and bringing in, guarding, and returning prisoners *charged with crime, [83 and witnesses, $2 a day; and for each deputy, not exceeding two, necessarily attending, $2 a day." If the fee were $2 for attending examinations simply, it might well be held that he was entitled to that amount for each examination, though there were a dozen in a single day; but as the allowance is not for each examination but for each day, we think it clear that the marshal is only entitled to a single fee. It is scarcely possible to suppose that he would be allowed but $5 for attending court, irrespective of the number of cases disposed of or of the number of prisoners brought in and committed, and yet be allowed separate fees in each case before a commissioner, which in the aggregate might be double the amount allowed for attending court. *McCafferty* v. *United States*, 26 Ct. Cl. 1.

But when a marshal attends examinations before two different commissioners on the same day, we think he is entitled to his fee of $2 for attendance before each commissioner. In the case of *United States* v. *Erwin*, 147 U. S. 685 [37: 331], we held that a district attorney was entitled to charge a *per diem* for services before a commissioner upon the same day that he was allowed a *per diem* for attendance upon court; and the argument controlling our opinion in that case is equally applicable here. It is true that in that case the charge was for attending before the court and before a single commissioner upon the same day; but where the officer attends before two or more commissioners, who may hold their sessions at a distance from each other, we see no reason why he should not be entitled to a fee in the case of each commissioner.

2. The allowance of $2 per day to special deputy marshals for attendance before a commissioner on November 2, 1886, "said day being an election day." The finding is that for his service upon this day each deputy marshal received a *per diem* of $5. It is not directly found by the circuit court that these special deputies were appointed pursuant to Rev. Stat. § 2021, but as it is so admitted in the briefs of counsel, and as this title makes the only *provision for the appointment of special [84 deputies, we may assume that to be the fact. The duties of such special deputies, who are appointed by the marshal to aid and assist the supervisors of election, are fixed by §§ 2021 2022, and 2023. They are in general to keep the peace, support and protect the supervisors of the election in the discharge of their duties, preserve order, to arrest and take into custody any person offending against the law, when (§ 2023) "the person so arrested shall forthwith be brought before a commissioner . . . for examination of the offenses alleged against him." By § 2031, "there shall be allowed and paid to . . . each special deputy marshal who is appointed and performs his duty under the preceding provisions, compensation at the rate of $5 per day for each day he is actually on duty, not exceeding ten days."

As it appears by these sections that the at-



Digitized by Google

tendance of the deputy before the commissioner is incidental to his service in arresting the fraudulent voter and taking him before the commissioner, we think it is covered by the *per diem* provided by § 2031. The allowance of $5 per day was evidently intended to be full compensation for all services performed by him as such deputy. The assignment is well taken.

3. Exception is also taken to the allowance of fees at the rate of 10 cents per mile for transporting convicts from New York city to the state penitentiary in Erie county, in the northern district of New York, instead of the actual expense of such transportation. By U. S. Rev. Stat. § 829, the marshal is allowed "for transporting criminals, 10 cents a mile for himself and for each prisoner and necessary guard," with the following exception: "For transporting criminals convicted of a crime in any district or territory, where there is no penitentiary available for the confinement of convicts of the United States, to a prison in another district or territory designated by the Attorney General, the reasonable actual expense of the transportation of the criminals, the marshal, and the guards, and the necessary subsistence and hire." It appears that no prison in the state of New York has been expressly designated by the Attorney General for [85] the *confinement of Federal convicts, but by the state law it is the duty of the keepers of state prisons to receive and keep such convicts, when sentenced to imprisonment therein by any court of the United States sitting within the state. Literally, the service charged for in this case does not fall within the 2d paragraph of the above section, since it does not appear that there is no penitentiary available within the southern district of New York, nor does it appear that the penitentiary of Erie county has been designated by the Attorney General for the confinement of Federal convicts.

There are other provisions of law, however, which it is necessary to consider in this connection. By U. S. Rev. Stat. § 5540, originally enacted in 1856, "where a judicial district has been or may hereafter be divided (New York was originally a single district, 1 Stat. at L. 73), the circuit and district courts of the United States shall have power to sentence anyone convicted of an offense punishable by imprisonment at hard labor to the penitentiary within the state, though it be out of the judicial district in which the conviction is had." Moreover, by U. S. Rev. Stat. § 5541, originally enacted in 1865, "in every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court . . . may order the same to be executed in any state jail or penitentiary within the district or state where such court is held," etc., and by U. S. Rev. Stat. § 5542, a similar provision is made where the convict is sentenced to imprisonment and confinement to hard labor.

By a subsequent act of July 12, 1876 (19 Stat. at L. 88, amending U.S. Rev. Stat. § 5546, convicts "whose punishment is imprisonment in a district or territory where, at the time of conviction, . . . there may be no penitentiary or jail suitable for the confinement of convicts, or available therefor, shall be confined . . . in some suitable jail or penitentiary in a convenient state or territory to be designated by the attorney general," in which case the marshal is only allowed the reasonable actual expenses of transportation, etc.; "but if, in the opinion of the Attorney General, the expense of *transportation [86] from any state . . . in which there is no penitentiary will exceed the cost of maintaining them in jail in the state, . . . then it shall be lawful so to confine them therein for the period designated in their respective sentences." We see no reason to suppose that this act was intended to repeal U. S. Rev. Stat. §§ 5540, 5541, and 5542, since the act is a mere re-enactment of original § 5546, enacted in 1864 (one year *before* § 5541), except that it permits the place of confinement of the convict to be changed, whenever the penitentiary to which he is sentenced becomes unsuitable or unavailable at any time during the term of imprisonment; and, by a further clause, permission is given the Attorney General to change the place of imprisonment whenever it is necessary for the preservation of the health of the prisoner, or the place of confinement becomes insecure, or the prisoner is cruelly or improperly treated.

Upon the other hand, it appears to us that it was the intention of Congress that these several provisions should be read together, and that the restriction of the marshal to his expenses of transportation was only designed to apply where the Attorney General has found that there is no available penitentiary within the district, and has designated a prison in another district for that purpose. It does not necessarily follow that, because a portion of his travel was outside his district, he is limited to his expenses, since the 1st paragraph of § 829, above quoted, is a general provision allowing him mileage with the exception provided for in the next paragraph. As the travel was actually made, the marshal is presumed to have earned his mileage, and the burden is upon the government to show that the transportation falls within the excepted clause. While the authority of the marshal, as such, is confined to his district, it may be lawfully extended by the United States to other districts for special purposes, such, for instance, as the service of a subpœna, for which it has usually been held the marshal was entitled to mileage, though the service was made outside his district.

Sections 5540 to 5542 were apparently designed to apply to cases where the state contains more than one district, while *§ 5546 [87] was probably intended, notwithstanding the use of the words "District or Territory," in the first clause, to apply to the not infrequent cases where there is no suitable penitentiary within the state, in which case the court is authorized to commit the convict to some suitable penitentiary "in a convenient state or territory, to be designated by the Attorney General." This power has been frequently exercised by courts of the western states by committing prisoners to penitentiaries in the northern or eastern states. Where the penitentiary is located in the same state, it would seem reasonable that the marshal should be entitled to his mileage, though the state prison



Digitized by Google

may happen to be in another district, since it may be in fact quite as near to the place where his court is held, as it is to the place where the court is held in the district of its actual location.

Why these convicts were sent to a penitentiary outside the district in which they were tried does not appear, but we are bound to presume that the action of the court in that particular was taken for a good and sufficient reason, and was dictated by what it conceived to be the best interests of the government. As, under §§ 5541 and 5542, it was within the discretion of the court to sentence the convicts to any penitentiary within the state, the mileage was properly allowed.

4. The last item to which exception is taken by the government is to a charge of $2 for serving temporary and final warrants of commitment. As the court had previously disallowed a charge of $503 for serving temporary warrants of commitment, the allowance of this item was probably an oversight. In *United States* v. *Tanner*, 147 U. S. 661 [37: 321], we held that the marshal was not entitled to charge for mileage in serving warrants of commitment, upon the ground that he was allowed 10 cents mileage for his own transportation and that of his prisoner, and that the delivery of such warrants to the warden of the penitentiary was not a "service" within the meaning of § 829. We have seen no reason to change our views in that particular. The word "service" in this connection ordinarily implies something in the nature of an 88] *act or proceeding adverse to the party served, or of a notice to him, and we think was not intended to cover the case of a warrant deposited with the warden of a penitentiary as a voucher or authority for detaining the prisoner. Moreover, it is scarcely possible that Congress could have intended to allow the marshal 10 cents a mile for his own travel when accompanying a prisoner, and at the same time to allow him 6 cents for carrying the warrant of commitment with him; or to allow him 50 cents for a commitment of the prisoner and also $2 for serving a warrant of commitment, when the commitment would not be valid without the warrant, and the commitment and service of the warrant are contemporaneous acts. As the *per diem* of the marshal for attendance before the court or commissioner includes "the bringing in, guarding, and returning prisoners charged with crime," and as, by § 1030, "no writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fee shall be charged by the clerk or marshal," and no such warrant appears to be necessary under the practice in the state of New York, the issue of such warrants, except perhaps the first one, appears to be unnecessary.

In the case of the writ sued out by McMahon, the plaintiff assigns as error the action of the court of appeals in rejecting a charge for serving temporary warrants of commitment issued by a commissioner; but as this is covered by the point last decided, it is unnecessary to consider it.

It results that in the case of *United States* v. *McMahon the judgment of the Court of Appeals must be reversed*, and the case remanded for a new judgment in conformity with this opinion.

---

## OCTAVIA J. PARSONS, *Plff. in Err.*, [89
*v.*
## GUSTAV VENZKE *et al.*

(See S. C. Reporter's ed. 89-93.)

*Setting aside pre-emption entry—act of March 3, 1891.*

1. The cancelation and setting aside of a pre-emption entry for fraud after the local land officers have approved the evidences offered of settlement and improvement, received the purchase money, and issued the receiver's final receipt, is within the jurisdiction of the general land office, although subject to judicial review like other orders and rulings of that department.
2. The confirmation of entries by the act of Congress of March 3, 1891, § 7, does not apply to an entry which has been previously canceled for fraud, but the statute refers only to existing entries which have not been avoided.

[No. 264.]

*Submitted October 13, 1896. Decided November 2, 1896.*

IN ERROR to the District Court of Richland County, State of North Dakota, to review a decree of that court which had been affirmed by the Supreme Court of the State, in favor of the defendants, Gustav Venzke, Fred B. Townsend, and L. E. Wood, in a suit commenced by Octavia J. Parsons to have said Venzke charged as trustee of the legal title of land for her benefit. *Affirmed.*

Statement by Mr. Justice **Brewer**:

On July 25, 1892, the United States issued a patent for the land in controversy to Gustav Venzke, one of the defendants in error. The other defendants in error are his mortgagees. On January 11, 1883, one Willis B. Simpkins made a pre-emption entry of the land, and received a receiver's final receipt, the land at that time being public and subject to pre-emption entry under the laws of the United States. On February 8, 1883, he conveyed the land to Charles J. Wolfe, through whom by foreclosure of a mortgage plaintiff in error acquired her title.

*On September 26, 1884, W. W. McIlvain, [90
a special agent of the land department of the United States, reported to the Commissioner of the General Land Office at Washington, as the result of his investigations, that the pre-emption entry of Simpkins had been fraudulently and unlawfully made. Proceedings for an investigation of this charge were ordered before the local land officers. Notice was duly given by publication. Simpkins made no appearance, but the plaintiff in error appeared by attorneys. The investigation was carried on in the local land office and thereafter in the General Land Office at Washington, and the proceedings reviewed by the Sec-



Digitized by Google

retary of the Interior, the plaintiff in error being a party to all those proceedings. They resulted in a cancelation of the entry on the ground that it had been fraudulently and unlawfully made; and the land was restored to the public domain.

Thereafter Venzke took those proceedings which culminated in the patent, whereupon the plaintiff in error commenced this suit in the district court of Richland county, North Dakota, to have him charged as trustee of the legal title for her benefit. In that court a decree was entered in favor of the defendants, which, having been affirmed by the supreme court of the state, has been brought here on writ of error.

On March 3, 1891, Congress passed an act (26 Stat. at L. 1098), § 7 of which contains this provision:

"And all entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or encumbered prior to the 1st day of March, eighteen hundred and eighty-eight, and after final entry, to bona fide purchasers, or encumbrancers, for a valuable consideration, shall, unless, upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or encumbrance."

*Messrs.* **Seth Newman**, *S. B. Pinney*, and *J. E. Robinson*, for plaintiff in error:

A pre-emptive right is a preference right to purchase a quarter section of public land. In the absence of congressional inhibition it is assignable.

*Myers* v. *Croft*, 80 U. S. 13 Wall. 291 (20: 562); *Thredgill* v. *Pintard*, 53 U. S. 12 How. 24 (13: 877).

After purchase the pre-emptor becomes an emptor—a purchaser—and his rights are not different from the rights of other purchasers.

*Camp* v. *Smith*, 2 Minn. 155.

A purchase of public lands under the pre-emption law is commonly called a cash entry. To constitute an authorized cash entry three things only must concur: (1) The land must be subject to entry; (2) the purchaser must be qualified; (3) the entry must be made in legal form and manner. By such an entry, which includes an authorized purchase and a payment, the emptor acquires a vested interest in the property of which he cannot be devested except by due process of law.

*Hutchings* v. *Low* ("*The Yosemite Valley Case*") 82 U. S. 15 Wall. 77 (21: 82); *Cornelius* v. *Kessel*, 128 U. S. 461 (32: 483); *Simmons* v. *Wagner*, 101 U. S. 260 (25: 910); *Witherspoon* v. *Duncan*, 71 U. S. 4 Wall. 210 (18: 339); *Carroll* v. *Safford*, 44 U. S. 3 How. 460 (11: 680); *Moore* v. *Robbins*, 96 U. S. 530 (24: 848); *Smith* v. *Ewing*, 28 Fed. Rep. 741; *Wilson* v. *Fine*, 40 Fed. Rep. 52; *United States* v. *White*, 17 Fed. Rep. 561; *Lewis* v. *Shaw*, 70 Fed. Rep. 289; *Stimson* v. *Clarke*, 45 Fed. Rep. 760; *United States* v. *California & O. Land Co.* 148 U. S. 42 (37: 360); *Arnold* v. *Grimes*, 2 Iowa, 1; *Sillyman* v. *King*, 36 Iowa, 307; *Cady* v. *Eighmey*, 54 Iowa, 615, 618; *Brill* v. *Stiles*, 35 Ill. 305, 85 Am. Dec. 364; *Aldrich* v. *Aldrich*, 37 Ill. 32; *Morton* v. *Blankenship*, 5 Mo. 346; *Moyer* v. *McCollough*, 1 Ind. 339; *Gwynne* v. *Niswanger*, 15 Ohio, 368.

The penalties of fraud do not fall of their own weight without the intervention of a court or jury.

*Bromley* v. *Goodrich*, 40 Wis. 134; *Crocker* v. *Bellangee*, 6 Wis. 645, 70 Am. Dec. 489.

In the absence of a controlling statute, to rescind a contract of sale on the ground of fraud the consideration received must be returned.

*Gay* v. *Alter*, 102 U. S. 79 (26: 48).

*Messrs.* **W. H. Standish**, *S. H. Snyder*, and *Curtiss Sweigle*, for defendants in error:

The question of vested rights is foreign to the inquiry. If there is power there can be no vested rights which can defeat its exercise. If there is no power, then the question of vested rights is of no possible moment, as the want of power will defeat its exercise without the aid of further argument.

*Swigart* v. *Walker*, 49 Kan. 100; *Darcy* v. *McCarthy* (Kan.) 12 Pac. 104; *Jones* v. *Meyers*, 2 Idaho, 793; *Sorrenson* v. *Meyers*, 2 Idaho, 802; *Gray* v. *Stockton*, 8 Minn. 529; *Hosmer* v. *Wallace*, 47 Cal. 461; *Hestres* v. *Brennan*, 50 Cal. 211; *McLane* v. *Bovee*, 35 Wis. 27; *United States* v. *Steenerson*, 50 Fed. Rep. 504; *Carr* v. *Fife*, 44 Fed. Rep. 713; *Lee* v. *Johnson*, 116 U. S. 48 (29: 570); *Knight* v. *United Land Asso.* 142 U. S. 161 (35: 974); *American Mortg. Co.* v. v. *Hopper*, 56 Fed. Rep. 67.

Of the cases cited by counsel in their brief but two deny the right of the Commissioner of the General Land Office under any circumstances to cancel an entry after the final certificate has been issued by the register and receiver of the local land office.

*Smith* v. *Ewing*, 28 Fed. Rep. 741; *Wilson* v. *Fine*, 40 Fed. Rep. 52.

These cases have been expressly overruled in the same court in the case of *American Mortg. Co.* v. *Hopper*, *supra*, decided by Judge Bellinger, in the circuit court for the district of Oregon, May 20, 1893.

The supreme court did not err in holding that the power of cancelation exists.

Where the matters to be determined by the Land Department are questions of fact, or mixed questions of law and fact, the decision of the Land Department is final and cannot be reviewed by the courts.

*Vantongeren* v. *Heffernan*, 5 Dak. 180; *Puget Mill Co.* v. *Brown*, 54 Fed. Rep. 987; *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 (20: 485); *Shepley* v. *Cowan*, 91 U. S. 330 (23: 424); *Moore* v. *Robbins*, 96 U. S. 530 (24: 848); *Lee* v. *Johnson*, 116 U. S. 48 (29: 570); *Quinby* v. *Conlan*, 104 U. S. 420 (26: 800); *Heath* v. *Wallace*, 138 U. S. 573 (34: 1063).

If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids the inquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained.

1 Warvelle, Vendors, 266; *American Mortg. Co.* v. *Hopper*, 56 Fed. Rep. 67; *Randell* v. *Edert*, 7 Minn. 450; *Shoufs* v. *Griffiths*, 4 Wash. 161.



Digitized by Google

Mr. Justice **Brewer** delivered the opinion of the court:

Counsel for plaintiff in error challenge the power of the Commissioner of the General Land Office or the Secretary of the Interior to cancel and set aside a pre-emption entry after the local land officers have approved the evidences offered of settlement and improvement, received the purchase money, and issued the receiver's final receipt. They contend that except in certain specified cases, which are not material for consideration here, the action of the local land officers concludes the government, and the General Land Office has no jurisdiction to supervise such action or correct any wrongs done in the entry.

Subsequently to the issuing of the writ of error in this case this precise question was presented to this court (*Orchard* v. *Alexander*, 157 U. S. 372 [39: 737]), and the jurisdiction of the land department was affirmed; a jurisdiction not arbitrary or unlimited, nor to be exercised without notice to the parties interested, nor one beyond judicial review under the same conditions as other orders and rulings of the land department.

In this case the entryman was brought in by due publication of notice, and the real party in interest appeared. The contest was carried through the land department, from the lowest to the highest officer, and there is nothing in the record which brings the case within the rules so often laid down for a judicial reversal of the decisions of that department.

Much reliance is placed upon the 7th section of the act of March 3, 1891, *supra*, and it is contended that before any adverse rights were created Congress ratified and confirmed the entry made by Simpkins. We think that statute inapplicable. It was passed long after the action of the land department in canceling the **92**] entry and restoring the land to the *public domain, and when there was no subsisting entry to be confirmed. The theory of the plaintiff in error is that the act applies to all entries which had ever been made prior thereto, whether subsisting or canceled. But clearly it refers to only subsisting entries. An entry is a contract. Whenever the local land officers approve the evidences of settlement and improvement and receive the cash price they issue a receiver's receipt. Thereby a contract is entered into between the United States and the pre-emptor, and that contract is known as an entry. It may be, like other contracts, voidable; and is voidable if fraudulently and unlawfully made. The effect of the entry is to segregate the land entered from the public domain, and while subject to such entry it cannot be appropriated to any other person, or for any other purposes. It would not pass under a land grant, no matter how irregular or fraudulent the entry. When by due proceedings in the proper tribunal the entry is set aside and canceled, the contract is also terminated. The voidable contract has been avoided. There is no longer a contract, no longer an entry, and the land is as free for disposal by the land department as though no entry had ever been attempted. The term used in the section, "confirmed," implies existing contracts which, though voidable, have not been avoided, and not contracts which once existed but have long since ceased to be. If the act is not limited to existing entries, existing contracts, then it must apply to all entries, all contracts, no matter when made or how long since canceled, or what rights have been acquired by others since the cancelation. It would apply to an entry canceled years before, although the land has since been entered and patented to another; and would carry a mandate to the land department to execute a patent to one whose claims had been adjudged fraudulent, and in disregard of the rights created in reliance upon that adjudication. No such intention can be imputed to Congress. The statute, as its language implies, refers only to existing entries, and does not reach a case like the present.

*The judgment is affirmed.*

---

## CENTRAL PACIFIC RAILROAD COMPANY, *Appt.*, [93]
*v.*
## UNITED STATES.

(See S. C. Reporter's ed. 93-100.)

*Free transportation of postoffice inspectors.*

Free transportation of postoffice inspectors for a series of years by a railroad company, upon the production of their commissions requiring railroads to extend to them facilities of free travel, and without any demand for compensation or protest against carrying them free, is a waiver of any right subsequently to demand of the government payment therefor. The omission of the company to charge for such transportation in its claims for carrying the mails is also evidence of such waiver.

[No. 46.]

*Argued and Submitted October 21, 1896. Decided November 9, 1896.*

APPEAL from a judgment of the Court of Claims dismissing the petition of the Central Pacific Railroad Company against the United States for compensation for carrying postoffice inspectors by said railroad company. *Affirmed.*

See same case below, 28 Ct. Cl. 427.

The facts are stated in the opinion.

*Messrs.* **Jos. K. McCammon** and **Chas. H. Tweed** for appellant.

*Mr.* **Holmes Conrad**, Solicitor General, for appellee.

Mr. Justice **Peckham** delivered the opinion of the court:

The Central Pacific Railroad Company owned or leased and operated numerous railroad lines, which may be generally described as, (1) those which were constructed by the aid of bonds from the United States; (2) lines of the Southern Pacific Railroad Company to which lands were granted by the acts of Congress of July 27, 1866, § 18 (14 Stat. at L. 292), and of March 3, 1871, § 23 (16 Stat. at L. 573), and the act of July 25, *1866 (14 Stat. at L. [94 239); (3) other railroads constructed without the aid of bonds from the government. All the subsidized portions of claimant's railroads



Digitized by Google

transported for a number of years prior to the filing of this claim many postoffice inspectors, formerly designated as special agents, traveling on government business, for which services the company has received no pay from the government and never demanded any before making and filing the claim in suit. If the claimant is entitled to be paid therefor, the amount is between $25,000 and $26,000.

The postoffice inspectors for whose transportation the claimant now asks compensation were commissioned by the Postmaster General, traveled on the business of the Postoffice Department as such inspectors, and were furnished transportation by the claimant upon the production of their commissions, which were in the following form:

Postoffice Department,
United States of America.

To whom it may concern:

The bearer hereof (name of special or inspector) is hereby designated a postoffice inspector of this department, and travels by my direction on its business. He will be obeyed and respected accordingly by mail contractors, postmasters, steamboats, stages, and others connected with the postal service. Railroads, steamboats, stages, and other mail contractors are required to extend facilities of free travel to the holder of this commission.

——— ———,
Postmaster General.

Washington, ——, 188–.

The regulations of the department were, during the time such transportation was furnished, as follows:

On routes where the mode of conveyance admits of it the special agents of the Postoffice Department, also postoffice blanks, mail bags, locks, and keys, are to be conveyed without extra charge.

Railroad companies are required to convey, 95] without specific *charge therefor, all mail bags, postoffice blanks, and stationery supplies. Also to convey free of charge all duly accredited special agents of the department on exhibition of their credentials.

The claimant transported these officials for more than six years prior to the filing of this claim, upon the production of their commissions, and made no claim for compensation for such transportation up to the filing of its claims therefor in the court of claims. No protest was ever made by or on behalf of claimant to the government, because of this claim for the free transportation of these officials, as contained in their commissions. The court of claims, among other facts, found that "it has always been assumed by the Postoffice Department that the carriage of inspectors upon the exhibition of their credentials in the form before stated was an acquiescence by the railway companies with the regulations of the department, and that the regulation was a notice to the company that there was no implied agreement on the part of the United States or of the department to pay for the transportation of such inspectors, but that such transportation was to be deemed an incident of their carriage of the mails. That in all cases where written contracts have been made with companies the contracts have provided for the transportation of their agents; but in cases of what are called 'recognized service'—that is, where the companies carry the mails for the compensation fixed by law without express contracts being made—the department has relied upon the regulation, the terms of the commission and the long-established usage to secure the transportation of these officers." The court of claims decided that the claimant was not entitled to recover, and dismissed its petition. 28 Ct. Cl. 427.

The claimant cites some sections in other statutes than those above referred to, as applicable to the different classes of railroads owned or leased by claimant. Section 6 of the act of July 1, 1862 (12 Stat. at L. 489), is one of them, and it reads as follows:

"*And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds *at maturity, [96 and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service)," etc.

Section 11 of the act of July 27, 1866 (14 Stat. at L. 292), is another, and it reads as follows:

"*And be it further enacted*, That said Atlantic & Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation."

Section 5 of the act of July 25, 1866 (14 Stat. at L. 239), is in substance the same as § 6 of the act of 1862 above recited. This section applies to the case of the California & Oregon Railroad, one of the lessees of the claimant.

The argument upon the part of appellant is that by these various sections the government entered into a contract with the claimant to pay for the services rendered, and the claimant agreed to transport the mails at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service, and in the case of the Southern Pacific Railroad, one of the lessees, it was to perform such services subject to such regulations as Congress might impose, restricting the charges for such government transportation. It is urged that under these various sections applicable to the various companies forming the Central Pacific Railroad Company nothing is left to the judgment of or the regulation by the Postmaster General, nor has Congress, at any time, delegated or attempted to delegate to him the right to refuse payment of compensation to any of the railroads for the transportation of government officials; that as to all of claimant's *railroads, whether sub-[97 sidized or unsubsidized, no department of the government is entitled to demand free trans-



Digitized by Google

portation for any of its officers or employees, and that the regulation of the Postoffice Department, demanding free transportation for postoffice inspectors, is simply void as being an attempt to take private property without just compensation.

It is not necessary in this case to construe the meaning of the various sections of the statutes cited by counsel for claimant. Whether the Postoffice Department had or had not the right to demand free transportation for the postoffice inspectors appointed by the Postmaster General is, in the view we take of this case, beside the question. By the regulations of the Postoffice Department, the right was assumed as existing, and the demand contained in the commissions for free transportation for the holders of the commissions was, when acquiesced in by the company, an acknowledgment on its part of the existence and validity of the right. The company was informed by the contents of the commission that the right of free transportation was claimed, and when it was accorded pursuant to the claim, and no demand made for payment, at the time or for years thereafter until the commencement of this suit, such acquiescence amounts to a clear and conclusive waiver on the part of the company of any right to now demand such payment. If the company intended to deny such right or to dispute the validity of the demand, it should have taken some step to that end at an early date, so that the government might know that its claim was disputed instead of being acknowledged. This was not done. On the contrary, when the demand was made the company acceded to it without objection, the inspectors were transported in accordance with the demands of the government, and no notice whatever given to anyone that the company disputed or intended to thereafter dispute the validity of the demand. It cannot be possible that it could silently acquiesce in this claim on the part of the government and continue for years the free transportation of these inspectors, and then suddenly make a demand for payment for their transportation for all that time, 98] *just the same as if it had always disputed the claim and demanded compensation for the transportation.

It is insisted, however, that the principle has been decided in favor of the company in the case of *Union P. R. Co.* v. *United States*, 104 U. S. 662 [26: 884]. We think the contention is untenable. The case cited was one where the services claimed were of a nature described in § 6 of the act of 1862 (12 Stat. at L. 489), and, in the absence of any other fact, the government was clearly liable to pay for them as prescribed in that act. But the government insisted that the rule of compensation allowed under § 6 of the act had been changed by subsequent legislation. It therefore required the company to perform the services and then undertook to pay for them at the reduced rate which the government alleged subsequent legislation called for. The company objected, and this court held that the section alluded to was, in substance, a contract, and that the claim of the government that its terms were altered by subsequent legislation was without foundation, and that the company was entitled to be paid, as prescribed in the 6th section, a reasonable compensation, which if not agreed upon was to be arrived at upon consideration of all the facts material to the issue, not to exceed the amounts paid by private parties. The company at all times disputed the amount of compensation it was entitled to as claimed by the government for services confessedly within the description of § 6, and it never acquiesced in the ruling of the government that the rate had been altered by subsequent legislation, but protested against it. Notwithstanding these facts, the government claimed that the company having performed the services required of it, with notice of the subsequent law (U. S. Rev. Stat. § 4002), must be taken to have assented to those terms in spite of its protest, but it was held that the Revised Statutes did not apply, and therefore they did not alter the contract, nor did they give to the Postmaster General any authority to insist that the contract, as evidenced by § 6 of the act mentioned, was not binding. It was stated in the opinion that "as the company, by its terms, was bound to render the service, if required, its compliance cannot be *regarded [99 as a waiver of any of its rights. The service cannot be treated as voluntary, in the sense of submission to exactions believed to be illegal, so as to justify an implied agreement to accept the compensation allowed; for, according to the terms of the obligation, which it did recognize and now seeks to enforce, it had no option to refuse performance when required. But it might perform, rejecting illegal conditions attached to the requirement, and save all its rights."

One of the material facts lacking in the case at bar was present in the case cited, *viz.*, the continuous claim on the part of the company as to its rights, its ever present dispute with the government in regard to the correctness of the claim, and its protest against the government's construction of the law. Instead of that we have absolute silence on the part of the claimant here for many years and a peaceful acquiescence in the demand made by the government for the free transportation of these officials.

It is also urged that the court of claims erred in its finding that the railroad company carried United States mails under the provisions of U. S. Rev. Stat. § 4002, and amendatory acts, which services were recognized and payments made therefor from time to time by the defendant under the provisions of said section. It is said that that section does not apply to the case of the Central Pacific Company, but that § 6, above mentioned, of the act of 1862 does apply, and counsel cites the case above commented upon of *Union P. R. Co.* v. *United States*, 104 U. S. 662 [26: 884], as conclusive of that point. It is immaterial, so far as the question in this case is concerned, whether the payments to the company were made under § 4002, or under § 6 of the act of 1862, the material fact being that during all these years the company has presented its accounts to the government for services in the transportation of the mails and for the use of the telegraph, and that it has made no claim in any of these years for compensation for the services described in its petition to the court of claims. Whether the services for which the company has been paid



Digitized by Google

were performed under the act of 1863 or under the Revised Statutes, the material fact is that the 100] company has *claimed and been awarded compensation for certain services in connection with the mails, and at the same time has failed to make any charge or claim for services connected with the transportation of postoffice inspectors. Such omission is further evidence of waiver. We are satisfied that no cause of action arises in favor of the company for compensation for the transportation of postoffice inspectors upon the facts developed in this case.

*The judgment of the Court of Claims was right, and it must be affirmed.*

---

SANDY WHITE, *Plff. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 100-105.)

*Sufficient judgment—entries in jailer's book, when evidence—charge to jury.*

1. A record in a criminal case, which shows the indictment, arraignment, plea, trial, conviction, and recites that defendant having been convicted and being present in open court it was ordered by the court that he be imprisoned in a specified penitentiary for a specified period,—shows a sufficient judgment for all purposes.
2. Entries in a book kept by a jailer, which he was required to keep, whether by statute or by a superior officer, are competent evidence to show that a prisoner was in jail on a certain day, and not in court as a witness, although the jailer, independently of the record, has no distinct recollection of that fact.
3. A charge that the jury may consider defendant's good character and give such weight to it as they see proper under all the evidence, and that he is entitled to a reasonable doubt, gives sufficient effect to evidence of his good character, although the court adds that the law presumes every defendant to have a good character.

[No. 375.]

*Submitted October 19, 1896. Decided November 9, 1896.*

IN ERROR to the District Court of the United States for the Northern District of Alabama to review a judgment of conviction and sentence of Sandy White, defendant, for presenting false, fictitious, and fraudulent claims against the United States. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **J. A. W. Smith** for plaintiff in error.

*Mr.* **Edward B. Whitney**, Assistant Attorney General, for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

The plaintiff in error was indicted in the district court of the United States for the southern division of the northern district of Alabama for presenting false, fictitious, and fraudulent claims against the United States to one A. R. Nininger, a marshal of the United States for the northern district of that state, for the purpose of obtaining payment of the fees of certain witnesses alleged to have been brought before a United States commissioner for that district, when in truth the witnesses had not attended, and the fees had not been paid. The defendant pleaded not guilty, and upon trial was found guilty as charged in the indictment. The defendant was sentenced to be imprisoned in the Kings county penitentiary, at Brooklyn, New York, for the period of one year and one day, and to pay the costs of the prosecution. He sued out a writ of error from this court, and now assigns three grounds for a reversal of the conviction. First, that there was no judgment upon which the defendant could be properly sentenced; second, the trial court erred in receiving in evidence entries made in a book kept by the jailer, James Morrow; third, the trial court erred in refusing to charge, as requested, in regard to the effect to be given to evidence of good character.

In regard to the first objection, we think it not well founded. The objection seems to be that there is no statement in the sentence showing what the offense is of which the defendant is convicted, and also that the record shows no *judgment* because the language used amounted only to a recital by the clerk as to what the court did, and not to a judgment *pronounced [102 by the court as the judgment of the law. The record shows an indictment, arraignment, plea, trial, conviction, and the following recital:

"This cause coming on to be heard upon the motion in arrest of judgment, and after being argued by counsel *pro* and *con.*, and duly considered by the court, it is ordered that the said motion be, and the same is hereby denied."

"The defendant, Sandy White, having been convicted on a former day of this term, and he being now present in open court and being asked if he had anything further to say why the judgment of the court should not be pronounced upon him sayeth nothing, it is thereupon ordered by the court that the said defendant, Sandy White, be imprisoned in Kings County penitentiary, at Brooklyn, New York, for the period of one year and one day, and pay the costs of this prosecution, for which let execution issue."

This we think was a sufficient judgment for all purposes. The record fully and plainly shows what the offense is, of which the defendant was convicted, and the language used shows that the sentence was the judgment of the court, and of the law, pronounced upon the defendant on account of the conviction upon the indictment. *Pointer* v. *United States*, 151 U. S. 396, 417 [38:208, 217].

Second. The second alleged error consists in receiving in evidence upon the trial of the case the entries in a book kept by a witness who was the jailer of one the jails in Alabama. Upon the trial it became necessary to show that one L. W. Andrews, admitted to be a colored man, was neither examined as a witness on the 6th of December, 1892, in Jefferson county, Alabama, before one William H.

NOTE.—*In criminal case; right of prisoner to be present during his trial, and necessity of his being present; record must show that he was present.*—see note to Lewis v. United States, 36: 1011.

*As to impeaching witness by proof of character; scope of inquiry as to character and time.*—see note to Vance v. Campbell, 17: 168.



Digitized by Google

Hunter, circuit court commissioner, nor was he there present on that day. Witnesses who were there and examined on that occasion testified on this trial that Andrews was not examined and was not present before the commissioner on the day mentioned. The government then produced one James Morrow as a witness, who, being sworn, testified that he was jailer of Jefferson county, Alabama, and that he had brought with him a book of dates of receiving in and discharging prisoners
103] from the county jail *of that county. He further testified that according to the entries in the book, L. W. Andrews, colored, was placed in jail under a commitment of W. H. Hunter, United States commissioner, on the 28th day of November, 1892, and that he was in that jail on the 6th day of December, 1892, but that, independently of the record, witness had no distinct recollection of Andrews being in jail on that day. The witness further stated that the book was a book kept by him as jailer, and the entries therein as to said Andrews were made by him in his own handwriting, and that the book was kept by him because, as jailer, he was required to keep such a jail book. The defendant objected to the introduction in evidence of the book or the entries therein, on the ground that there was no law in Alabama requiring such a record to be kept, and it could only be used as a private memorandum to refresh the recollection of the witness. The court overruled the objection, and the defendant duly excepted. The witness then was allowed to and did read to the jury the entries in the book showing that Andrews was in jail on the 6th of December, 1892, and the defendant duly excepted to the ruling of the court allowing such entries to be read.

We think no error was committed by the trial court in thus ruling. It was not necessary that a statute of Alabama should provide for the keeping of such a book. A jailer of a county jail is a public officer, and the book kept by him was one kept by him in his capacity as such officer and because he was required so to do. Whether such duty was enjoined upon him by statute or by his superior officer in the performance of his official duty, is not material. So long as he was discharging his public and official duty in keeping the book, it was sufficient. The nature of the office would seem to require it. In that case the entries are competent evidence. 1 Greenl. Ev. §§ 483, 484.

It is obvious that the nature of the office of jailer requires, not only the actual safe-keeping of the prisoners committed to his charge, but that in order to the proper discharge of those duties some list should be kept by him or under his supervision showing the names of those re-
104] ceived and discharged, *together with the dates of such reception and discharge. If there were a clerk whose duty it was to keep such a book instead of the jailer, then the entries so made by that clerk would be evidence in and of themselves. But the jailer, who was a witness, testified that it was his duty to himself to keep such book, and the entries were therefore within the rule in regard to official entries. The sections of the Criminal Code of Alabama cited below show the necessity for the keeping of such a book by the jailer. §§ 4537, 4539, 4555. In speaking of entries in books which are evidence in and of themselves, Greenleaf, in § 484, *supra*, mentions many kinds of such entries, and among them he includes prison registers, and cites the cases of *Rex* v. *Aickles*, 1 Leach, C. C. 435; *Salte* v. *Thomas*, 3 Bos. & P. 188, as authority. Those cases hold that the prison books are evidence to prove the period of the commitment and discharge of a prisoner, although the second case holds that the cause of the commitment cannot be thus shown, as the commitment itself is the best evidence of the cause. The same principle as to the admissibility of entries made by an official is held in *Evanston* v. *Gunn*, 99 U. S. 660, 665 [25: 306, 307].

The ruling of the trial court was therefore correct.

As to the third ground, it appears by the record that the defendant offered to prove his good character for the last twenty years, whereupon the district attorney admitted his good character. All the evidence being in, the defendant prayed the court to charge the jury as follows: "The evidence of good character, when established by the evidence in a case, taken in connection with all the other evidence, may generate a reasonable doubt of the guilt of the defendants." The court refused to give this charge and the defendant accepted. The court in his oral charge said to the jury: "It is admitted in this case that the defendants are men of good character, the law presuming every defendant to have a good character, and the jury may consider such good character and give it such weight as they see proper, under all the evidence in the case that defendant is entitled to a reasonable doubt." Assuming that the request stated the proper rule in regard to *evidence of good character, we are [105 of opinion that the charge as given to the jury by the trial court amounted in substance to the charge as requested.

When a jury has been properly instructed in regard to the law on any given subject, the court is not bound to grant the request of counsel to charge again in the language prepared by counsel, or if the request be given before the charge is made, the court is not bound to use the language of counsel, but may use its own language so long as the correct rule upon the subject requested be given. When the court told the jury it was admitted that the defendant was a man of good character, and that the jury might consider such good character and give such weight to it as they saw proper under all the evidence in the case, and that the defendant was entitled to a reasonable doubt, it was sufficient, although the court unnecessarily added that the law presumed every defendant to have a good character. The charge gave the jury the right to give weight enough to the evidence to generate a reasonable doubt of the guilt of the defendant, and a substantial compliance with the request was made, although not in the very words thereof.

The record reveals no error, and *the judgment must be affirmed.*



Digitized by Google

PRESS PUBLISHING COMPANY,
*Plff. in Err.*,
v.
HARRIET MONROE, *Deft. in Err.*

(See S. C. Reporter's ed. 105-112.)

*Decision of circuit court of appeals, when final—diversity of citizenship.*

1. The decision of the circuit court of appeals is final, and not subject to review by this court, where the complaint in the circuit court shows that the parties are citizens of different states, and does not claim under or mention the Constitution or laws of the United States, and plaintiff at the trial relies wholly upon a common-law right, although the defendant invokes the Federal Constitution and laws.
2. Where the jurisdiction of the circuit court has been obtained and exercised solely because the parties are citizens of different states, the judgment of the circuit court of appeals is final.

[No. 489.]

*Submitted October 19, 1896. Decided November 9, 1896.*

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment in favor of the plaintiff, Harriet Monroe, against the Press Publishing Company, defendant, for damages for the wrongful publication of an unpublished manuscript; which judgment was affirmed by the Circuit Court of Appeals. On motion to dismiss. *Dismissed.*

See same case below, 30 U. S. App. 410.

Statement by Mr. Justice **Gray**:

106] *This was an action brought in the circuit court of the United States for the southern district of New York by Harriet Monroe against the Press Publishing Company for the wrongful publication of an unpublished manuscript.

The complaint alleged that the plaintiff was a citizen of the state of Illinois, and a resident in the city of Chicago; and that the defendant was a citizen of the state of New York, a resident in the city of New York, and a corporation created and existing by force of and under the laws of that state, and having its chief place of business in that city, and its business that of editing, publishing, selling, and distributing a newspaper called The World.

The complaint further alleged that prior to September, 1892, the plaintiff had composed and written out in manuscript, but had not published, a lyrical ode, the work of her intellect and imagination; that on September 23, 1892, a committee of the World's Columbian Exposition made an agreement with the plaintiff whereby, for a good consideration, they were licensed by her to use the ode, for the sole purpose of having it read or sung, or partly read and partly sung, on the public occasion of the dedicatory ceremonies of that exposition in the city of Chicago on October 21, 1892; that the general ownership of the literary production, with the right of unlimited publication after that date, remained in the plaintiff; that during the ten days preceding said 23d of September, she delivered to the committee the manuscript of the ode, for the purpose expressed in the agreement of license, and with the injunction that the manuscript should be held secret, in order that the plaintiff's right of property should be preserved inviolate, and especially that premature publication should be avoided; and that the utmost care was taken, both by the plaintiff and by the committee, to prevent or forestall piratical attempts on the part of newspapers; but that the defendant, through its officers and agents, between September 14 and September 23, 1892, surreptitiously obtained from the rooms of the committee the manuscript, or a copy thereof, and sent the same to its office in New York, and, disregarding a protest sent by the plaintiff by telegraph, published in its paper of September 25 *the ode, with many errors, making [107 portions of the poem appear meaningless, and with a grotesquely incorrect analysis, calculated to produce a false and ludicrous impression of the work; and that these wrongful acts of the defendant deprived the plaintiff of gains she would otherwise have received from the sale of the ode, and damaged her reputation as an author, and were a wilful, wanton, and unlawful trespass upon her rights, and subjected her to shame, mortification, and great personal annoyance; and alleged damages in the sum of $25,000.

A motion by the defendant, at the commencement of the trial, to compel the plaintiff "to elect between the two causes of action set forth in the complaint," was denied by the court as immaterial, because the plaintiff's counsel declared in open court that "there is but one cause of action stated in the complaint, to wit, literary piracy of a manuscript before publication, and a violation of a common-law right."

At the trial, the plaintiff introduced evidence tending to support the allegations of the complaint (except that no evidence of pecuniary damage was offered) and put in evidence a receipt, signed by the plaintiff, and in these terms:

"Received, Chicago, the 23d day of September, 1892, from the World's Columbian Exposition, one thousand dollars ($1,000) in full payment for ode composed by me. It is understood and agreed that said Exposition Company shall have the right to furnish copies for publication to the newspaper press of the world, and copies for free distribution if desired, and also may publish same in the official history of the dedicatory ceremonies; and, subject to the concession herein made, the author expressly reserves her copyright therein."

The plaintiff testified that portions of the ode consisted of lyrical songs intended to be set to music and sung by the chorus, and that the rest was to be read; that a musical composer was engaged to write the music for the portions to be sung, and she gave him permission to publish those portions, because it was necessary for rehearsals by the chorus, and they were published in connection with the music; but that she *never, before the dedication day, [108 gave any permission for the publication or public use of any other part of the poem.

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1: 640.



Digitized by Google

The plaintiff also testified that in May, 1892, she applied to the Librarian of Congress for a copyright of the ode, and deposited with him a copy of its title only; and on October 22, the day after the dedicatory ceremonies, and not before, deposited with him two copies of the ode.

At the close of the whole evidence, the defendant moved the court to direct a verdict for the defendant, upon the grounds that the plaintiff had failed to show title to the ode; that she had disposed of her rights of property in the ode to the World's Columbian Exposition; that, in view of the contemplated publication in the newspapers, there could be no valid retention of any copyright; that any newspaper publication was an infringement of the rights of the Exposition, and not of the plaintiff; and that the only reservation in the contract between her and the Exposition was of her copyright; and, in view of the fact that no copyright was taken out until after October 21, there had been no infringement of her copyright; and upon the further grounds "that the plaintiff has failed to make out a cause of action, in that this is an action founded upon a statute which authorizes the maintaining of an action for damages occasioned to the plaintiff, and, in view of the fact that there is no evidence in this case of the plaintiff's having suffered damage, no cause of action has been made out;" and "that the statutes and Constitution of the United States have taken away the common-law right and all remedies, except under the statutes of the United States."

The court overruled this motion, as well as a subsequent motion to instruct the jury accordingly; and instructed the jury as follows:

"The action is not an action of libel. It is an action to recover damages for the alleged violation of the plaintiff's copyright in her unpublished manuscript ode. It is an action for an injury to property.

"Copyright is of two kinds. The first is the common-law right of an author or proprietor **109**]of an unpublished manuscript *to the possession and control of his or her manuscript, and to direct and control the circulation of the copies which he or she may make or cause to be made for his or her use, prior to the publication thereof. It is the original ownership of the manuscript, and of the copies which the author or proprietor has made for his or her use, before it is given to the public. Statutory copyright is the exclusive right granted by statute to the owner or proprietor of a printed book or other printed publication to publish, print, and sell copies of the book or publication, for a specific period of time. If the statutory formalities have been complied with, the right becomes complete upon the publication of the book.

"This case is not one of statutory copyright. While some of the preliminaries to the establishment of such a right had been taken, the right was not complete, and on September 24, 1892, did not exist. On that day, a copy of the unpublished manuscript came into the possession of the defendant. It had not then been published, although typewritten copies had been made for the examination and use of the musical composer, and for the examination of the committee whose duty it was to approve the work. This circulation of copies did not amount to what the law calls publication.

"The exclusive owner or proprietor of an unpublished manuscript has the exclusive right to its possession, and to direct and control its use—the same right which the owner of any other article of personal property has to its ownership and use. The trespasser upon that right is liable in damages."

The court further instructed the jury that the Exposition, by the terms of its contract with the plaintiff, "had the legal right to distribute copies to the newspaper press, and for free publication, before as well as after the day of dedication;" but that, "subject to those concessions, the author reserved her other rights of copyright therein;" and that the plaintiff, upon the evidence in the case, might recover exemplary damages against the defendant.

The defendant excepted to the instructions given, and to the refusal to instruct as requested. The jury returned a verdict for the plaintiff in the sum of $5,000, and judgment **110**]was rendered thereon, which was affirmed by the circuit court of appeals. 38 U. S. App. 410. The defendant thereupon sued out the present writ of error, and a motion was now made to dismiss it for want of jurisdiction.

*Messrs.* **George H. Yeaman** and **Henry S. Monroe** for defendant in error, in favor of motion.

*Mr.* **John M. Bowers** for plaintiff in error, in opposition to motion.

Mr. Justice **Gray** delivered the opinion of the court:

Of suits of a civil nature, at law or in equity, the circuit courts of the United States have original jurisdiction, by reason of the citizenship of the parties, in cases between citizens of different states, or between citizens of a state and aliens; and by reason of the cause of action, "in cases arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority," including, of course, suits arising under the patent or copyright laws of the United States. Act of August 13, 1888, chap. 866, § 1, (25 Stat. at L. 433); Rev. Stat. § 629, cl. 9. In order to give the circuit court jurisdiction of a case as one arising under the Constitution, laws, or treaties of the United States, that it does so arise must appear from the plaintiff's own statement of his claim. *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138 [37: 1030]; *Tennessee* v. *Union & P. Bank*, 152 U. S. 454 [38: 511]; *Oregon S. L. & U. N. R. Co.* v. *Skottowe*, 162 U. S. 490 [40: 1048]; *Hanford* v. *Davies*, 163 U. S. 273, 41 L. ed. 157.

From final judgments of the circuit court in civil suits an appeal or writ of error lies to this court, or to the circuit court of appeals. It lies directly to this court in any case in which the jurisdiction of the circuit court is in issue; and in such case the question of jurisdiction only is certified to and decided by this court. It also lies directly from the circuit court to this court in cases involving the construction or application of the Constitution, or the constitutionality of a law, or the validity or construction of a treaty, of the United States,



Digitized by Google

111] *or in which the Constitution or a law of a state is claimed to be in contravention of the Constitution of the United States; and in any of these cases the appellate jurisdiction of this court is not limited to the constitutional question, but extends to the determination of the whole case. Act of March 3, 1891, chap. 517, § 5 (26 Stat. at L. 827, 828); *Horner* v. *United States*, 143 U. S. 570 [36: 266]; *Chappell* v. *United States*, 160 U. S. 499 [40: 510].

From final judgments of the circuit court in all other civil suits an appeal or writ of error lies to the circuit court of appeals; and the judgments rendered thereon by the circuit court of appeals are final (unless this court, by writ of certiorari or otherwise, orders the whole case to be brought up for its decision), in all cases in which the jurisdiction of the circuit court "is dependent entirely upon the parties being aliens and citizens of the United States, or citizens of different states;" as well as in cases arising under the patent laws, or under the revenue laws. In all other civil actions (including those arising under the copyright laws of the United States), if the matter in controversy exceeds $1,000, besides costs, there is, as of right, an appeal or writ of error to bring the case to this court. Act of March 3, 1891, chap. 517, § 6.

This plaintiff in error, having been defeated in the circuit court, did not bring the case directly to this court, as one involving the construction or application of the Constitution of the United States, or upon any other of the grounds specified in § 5 of the act of 1891. But it took the case, under § 6, to the circuit court of appeals, and having been again defeated in that court, now claims, as of right, a review by this court of the judgment of the circuit court of appeals.

The judgment of the circuit court of appeals being made final in all cases in which the jurisdiction of the circuit court is dependent entirely upon the parties being citizens of different states, but not final in cases arising under the copyright laws of the United States, where the matter in controversy exceeds $1,000, the test of the appellate jurisdiction of this court over the case at bar is whether it was one arising under the copyright laws of the United
112] States, or was one in which *the jurisdiction of the circuit court wholly depended upon the parties being citizens of different states.

The complaint, alleging that the plaintiff was a citizen of Illinois and the defendant a citizen of New York, and claiming damages in a sum of more than $2,000, showed that the circuit court had jurisdiction of the case by reason of the parties being citizens of different states. The plaintiff, in her complaint, did not claim any right under the Constitution and laws of the United States, or in any way mention or refer to that Constitution or to those laws; and, at the trial, she relied wholly upon a right given by the common law, and maintained her action upon such a right only. It was the defendant, and not the plaintiff, who invoked the Constitution and laws of the United States. This, as necessarily follows from the foregoing considerations, and as was expressly adjudged in *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138 [37: 1030], is insufficient to support the jurisdiction of this court to review, by appeal or writ of error, the judgment of the circuit court of appeals.

The jurisdiction of the circuit court having been obtained and exercised solely because of the parties being citizens of different states, the judgment of the circuit court of appeals was final, and *the writ of error must be dismissed for want of jurisdiction.*

---

## FALLBROOK IRRIGATION DISTRICT, and Matthew Tomlins, as Collector of Said Fallbrook Irrigation District, *Appts.*,

*v.*

## MARIA KING BRADLEY *et al.*

(See S. C. Reporter's ed. 112-173.)

*Judicial power—due process of law—Federal question—state decisions—use of water—apportionment—California irrigation act—what lands may be included—right of contest—hearing—method of assessing—legislative power.*

1. If a state statute violates any provision of the Federal Constitution, it is the duty of this court to so decide, but if it does not, Federal courts are not justified in running counter to the decisions of the highest state court upon questions involving the construction of state statutes or Constitution, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law.
2. Whenever a state law imposes a tax, assessment, servitude, or other burden upon property for the public use, either of the whole state or a limited portion thereof, and such law provides a mode of confirming or contesting such charge in the ordinary courts of justice, with due notice to the owner, the judgment in such proceedings does not deprive the owner of his property without due process of law.
3. The question whether private property has been taken for any other than a public use is a Federal question, notwithstanding the absence of any prohibition in the Federal Constitution which acts upon the states, against their taking private property for any but a public use, when the taking for any other use is alleged to be a deprivation of property without due process of law.
4. The decisions of the California courts that the irrigation act of that state does not deprive the landowner of property without due process of law, and that the use of water for irrigation under the act is a public use, and the declaration of the people and legislature of the state to a similar effect in their Constitution and statutes, are to be

---

NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.

*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question*,—see note to Hamblin v. Western Land Co. 37: 267.

*As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws*,—see notes to Hart v. Lamphire, 7: 679, and Commercial Bank of Cincinnati v. Buckingham, 12: 169.



Digitized by Google

treated with very great respect by this court, but they are not absolutely binding on it as to what is due process of law, and, as incident thereto, what is a public use.

5. The fact that the use of the water under such act is limited to the landowner, and is not given to every resident of the district, does not prevent the use being public.

6. That the water is apportioned by such act ratably to each landowner upon the basis of his assessment, with the right to assign the whole or any portion of his share, does not amount to a distribution to individuals and not to lands, whereby the use for irrigation may not be achieved, nor alter the use from a public to a private one, as all persons have the right to use the water under the same circumstances.

7. The irrigation of arid lands under the California act is a public purpose and the water thus used is put to a public use.

8. Land which can be beneficially used to a certain extent without irrigation may yet be so much improved by it that such land can properly be included in an irrigation district, and assessed for the benefit of the artificial irrigation, as a public improvement, and such use of the water is a public use.

9. As the board is to hear the petition upon notice, and is not to include land which will not be benefited, it follows as a necessary implication that the persons interested have the right to appear before the board and contest the facts upon which the petition is based and as to the benefit to any particular land included in the proposed district.

10. Unless the legislature decides the question of benefit itself, the landowner has the right to be heard upon that question before his property can be taken; but the act provides for such a hearing and also for a hearing upon the question of the valuation of and assessment upon his land.

11. The adoption of an *ad valorem* method of assessing the lands in an irrigation district for the expense of the improvement is not a taking of the property without due process of law.

12. Legislative power is not delegated by enacting conditions upon the performance of which an irrigation district shall be regarded as organized within boundaries fixed by a board of supervisors after a hearing and a vote of electors therein in favor of the incorporation.

[No. 355.]

*Argued January 23, 24, 27, 1896. Decided November 16, 1896.*

APPEAL from a judgment of the Circuit Court of the United States for the Southern District of California against the Fallbrook Irrigation District *et al.*, defendants, in an action brought by Maria King Bradley *et al.*, plaintiffs, to procure an injunction restraining the collector of the irrigation district from giving a deed of certain lands on a sale by the collector for the nonpayment of an assessment under the act incorporating the irrigation district, and to set aside such assessment, and for other relief. *Reversed*, and cause remanded for further proceedings.

See same case below, 68 Fed. Rep. 948.

Statement by Mr. Justice **Peckham**:

This is an appeal from the United States circuit court for the southern district of California. The case is reported in 68 Fed. Rep. 948. The action was commenced in that court by defendants in error, the plaintiffs below, for the purpose of procuring an injunction restraining defendant Tomlins, the collector of the irrigation district, from giving a deed to it of the premises belonging to plaintiff, Mrs. Bradley, based on a sale of her land made by the collector for the nonpayment of a certain assessment upon such lands under the act incorporating the irrigation district, and to set aside such assessment, and for other relief.

The following, among other facts, were set up in the plaintiffs' second amended bill in equity: The plaintiffs are aliens and subjects of Great Britain, residing in San Diego county, California. The irrigation district is a corporation organized pursuant to the laws of California, and doing business at Fallbrook, San Diego county. Matthew Tomlins was the collector of the corporation at the time of the commencement of the suit, and it has been doing business as and claims to be a corporation under "An Act Providing for the Organization and Government of Irrigation Districts, and to Provide for the Acquisition of Water and Other Property, and for the Distribution of Water thereby for Irrigation Purposes," approved March 7, 1887, as such act has been amended by the acts of 1889 and 1891.

*The material sections of the act, as [116 amended by the other acts just stated, are set forth in the margin herein.†

†The act reads as follows:

"Sec. 1. Whenever fifty or a majority of the holders of title or evidence of title to lands susceptible of one mode of irrigation from a common source and by the same system of works, desire to provide for the irrigation of the same, they may propose the organization of an irrigation district, under the provisions of this act, and when so organized such district shall have the powers conferred, or that may hereafter be conferred, by law upon such irrigation districts. The equalized county assessment roll next preceding the presentation of a petition for the organization of an irrigation district, under the provisions of this act, shall be sufficient evidence of title for the purposes of this act.

"Sec. 2. A petition shall first be presented to the board of supervisors of the county in which the land, or the greatest portion thereof, is situated, signed by the required number of holders of title, or evidence of title, of such proposed district, evidenced as above provided, which petition shall set forth and particularly describe the proposed boundaries of such district, and shall pray that the same may be organized under the provisions of this act. The petitioners must accompany the petition with a good and sufficient bond, to be approved by the said board of supervisors, in double the amount of the probable cost of organizing such district, conditioned that the bondsmen shall pay all the said costs in case said organization shall not be effected. Such petition shall be presented at a regular meeting of the said board, and shall be published for at least two weeks before the time at which the same is to be presented, in some newspaper printed and published in the county where said petition is presented, together with a notice stating the time of the meeting at which the same will be presented; and if any portion of such proposed district lie within another county or counties, then said petition and notice shall be published in a newspaper published in each of said counties. When such petition is presented, the said board of supervisors shall hear the same and may adjourn such hearing from time to time, not exceeding four weeks in all; and on the final hearing may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries: *Provided*, That said board shall not modify said boundaries so as to except from the operation of this act any territory within the boundaries of the district proposed by said petitioners which is susceptible of irrigation by the same system of works applicable to the other lands in such proposed district; nor shall any lands which will not, in the judgment of the said board, be ben-



Digitized by Google

The legislature also passed two acts, approved February 16, 1889, called respectively the "inclusion" and the "exclusion" act, by which means were provided, in the first-named 117]*act, for including lands within an irrigation district which had not been included in the petition when first presented to the board of supervisors; and in the second-named act, for excluding from a district already formed some portion of the land which then formed part of 118] such district. An *examination of those acts does not become material in this case.

The plaintiff, Mrs. Bradley, is the owner of certain real estate described in complainant's 119]bill, which is included within *the lines of the irrigation district. The bill sets forth the various steps taken under the irrigation act for the purpose of forming the irrigation district, 120] and it alleges the taking of *all steps necessary therefor, including the election of officers as provided in the act; that the board of directors submitted to the electors the question, whether a special assessment for *$6,000[121 should be made for the purpose of defraying the expenses of organization, and that the electors approved of such assessment and the proper proceedings were thereafter taken *by [122 which to assess the property owners, and that plaintiff's, Mrs. Bradley's assessment, amounted to $51.81, which she refused to pay because the act was, as alleged, unconstitutional and void.

The bill further states that the collector then proceeded to enforce the collection by a sale of the land, and did sell it to the irrigation district, but that no deed has been given to the *district by the collector, and an injunc- [123 tion is asked to restrain the execution and delivery of any deed by such collector, because of the alleged invalidity of the act under which the proceedings were taken.

The bill also alleged a proposed issue of bonds to the amount of $400,000, subject to

---

efited by irrigation by said system be included within such district: *Provided*, That any person whose lands are susceptible of irrigation from the same source may, in the discretion of the board, upon application of the owner to said board, have such lands included in said district. Said board shall also make an order dividing said district into five divisions, as nearly equal in size as may be practicable, which shall be numbered first, second, third, fourth, and fifth, and one director, who shall be a freeholder in the division and an elector and resident of the district, shall be elected by each division: *Provided*, That if a majority of the holders of title, or evidence of title, evidenced as above provided, petition for the formation of a district, the board of supervisors may, if so requested in the petition, order that there may be either three or five directors, as said board may order, for such district, and that they may be elected by the district at large. Said board of supervisors shall then give notice of an election to be held in such proposed district, for the purpose of determining whether or not the same shall be organized under the provisions of this act. Such notice shall describe the boundaries so established, and shall designate a name for such proposed district, and said notice shall be published for at least three weeks prior to such election in a newspaper published within said county; and if any portion of such proposed district lie within another county or counties, then said notice shall be published in a newspaper published within each of said counties. Such notice shall require the electors to cast ballots which shall contain the words 'Irrigation District—Yes,' or 'Irrigation District—No,' or words equivalent thereto, and also the names of persons to be voted for to fill the various elective offices hereinafter prescribed. No person shall be entitled to vote at any election, held under the provisions of this act, unless he shall possess all the qualifications required of electors under the general election laws of this state.

Sec. 3. Such election shall be conducted as nearly as practicable in accordance with the general laws of this state: *Provided*, That no particular form of ballot shall be required. The said board of supervisors shall meet on the 2d Monday next succeeding such election, and proceed to canvass the votes cast thereat, and if upon such canvass it appears that at least two thirds of all the votes cast are 'Irrigation District—Yes,' the said board shall, by an order entered on its minutes, declare such territory duly organized as an irrigation district, under the name and style theretofore designated, and shall declare the persons receiving, respectively, the highest number of votes for such several offices to be duly elected to such offices. And no action shall be commenced or maintained, or defense made, affecting the validity of the organization, unless the same shall have been commenced or made within two years after the making and entering of said order. Said board shall cause a copy of such order, duly certified, to be immediately filed for record in the office of the county recorder of each county in which any portion of such lands are situated, and must also immediately forward a copy thereof to the clerk of the board of supervisors of each of the counties in which any portion of the district may lie; and no board of supervisors of any county, including any portion of such district, shall, after the date of the organization of such district, allow another district to be formed including any of the lands in such district, without the consent of the board of directors thereof; and from and after the date of such filing, the organization of such district shall be complete, and the officers thereof shall be entitled to enter immediately upon the duties of their respective offices, upon qualifying in accordance with law, and shall hold such offices respectively until their successors are elected and qualified. For the purposes of the election above provided for, the said board of supervisors must establish a convenient number of election precincts in said proposed district, and define the boundaries thereof, which said precincts may thereafter be changed by the board of directors of such district. In any district the board of directors thereof may, upon the presentation of a petition therefor, by a majority of the holders of title or evidence of title of said district, evidenced as above provided, order that on and after the next ensuing general election for the district there shall be either three or five directors, as said board may order, and that they shall be elected by the district at large, or by divisions, as so petitioned and ordered; and after such order such directors shall be so elected."

(Sections 4 to 10, inclusive, provide for the election of officers of the company and for their giving bonds, and are not material here.)

"Sec. 11. On the 1st Tuesday in March next following their election, the board of directors shall meet and organize as a board, elect a president from their number and appoint a secretary, who shall each hold office during the pleasure of the board. The board shall have the power, and it shall be their duty, to manage and conduct the business and affairs of the district; make and execute all necessary contracts; employ and appoint such agents, officers, and employees as may be required, and prescribe their duties; establish equitable by-laws, rules, and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purposes of this act. The said by-laws, rules, and regulations must be printed in convenient form for distribution in the district. And it is hereby expressly provided that all waters distributed for irrigation purposes shall be apportioned ratably to each landowner upon the basis of the ratio which *the last assessment of such owner for district purposes within said district bears to the whole sum assessed upon the district: *Provided*, That any landowner may assign the right to the whole or any portion of the waters so apportioned to him.

"Sec. 12. The board of directors shall hold a regular monthly meeting in their office on the 1st Tuesday in every month, and such special meetings as may be required for the proper transaction of business: *Provided*, That all special meetings must be ordered by a majority of the board. The order must be entered of record, and five days' notice thereof must, by the secretary, be given to each



Digitized by Google

the decision of the electors at an election proposed to be held under the provisions of the act.

Various reasons are set out in the bill upon which are based the allegation of the invalidity of the act, among which, it is stated, that the law violates the Federal Constitution in that it amounts to the taking of the plaintiff's property without due process of law. It is also stated that the act is in violation of the state Constitution in many different particulars, which are therein set forth.

The bill also asks that the assessment may be set aside and all the proceedings declared void on the ground of the invalidity of the act itself.

The defendants demurred to the first bill of the complainants and the demurrer was overruled. The complainants were granted leave to serve a second amended bill to which the defendants put in an answer, denying many of the material allegations of the bill, and claiming the entire validity of the act.

The case came on for hearing before the circuit judge by consent, upon the second amended bill of the complainants, and defendants' answer thereto, and the court gave judgment against the defendants because of the unconstitutionality of the irrigation act, it being, as held, in violation of the Federal Constitution, as the effect of such legislation by the state was to deprive complainants of their property without due process of law. The decision of the circuit judge was given for the reasons stated by him in his opinion rendered upon the argument of the demurrer to the bill of complainants, and some of the facts stated in the bill and admitted by the demurrer were denied in the answer subsequently served by the defendants. The sole ground of the decision was, however, the unconstitutionality of the act, as above stated. From the *judgment [124 entered upon the decision of the circuit judge the irrigation district appealed directly to this court by virtue of the provisions of Laws of 1891, chap. 517, § 5 (26 Stat. at L. 826), which give an appeal from the circuit court direct to the Supreme Court "in any case that involves the construction or application of the Constitution of the United States;" and also "in any case in which the Constitution or law of a state is claimed to be in contravention to the Constitution of the United States."

---

member not joining in the order. The order must specify the business to be transacted, and none other than that specified must be transacted at such special meeting. All meetings of the board must be public, and three members shall constitute a quorum for the transaction of business; but on all questions requiring a vote there shall be a concurrence of at least three members of said board. All records of the board shall be open to the inspection of any elector during business hours. The board and its agents and employees shall have the right to enter upon any land to make surveys, and may locate the necessary irrigation works and the line for any canal or canals, and the necessary branches for the same, on any lands which may be deemed best for such location. Said board shall also have the right to acquire, either by purchase or condemnation or other legal means, all lands and waters and water rights, and other property necessary for the construction, use, supply, maintenance, repair, and improvements of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs for the storage of needful waters, and all necessary appurtenances. In case of purchase the bonds of the district hereinafter provided for may be used at their par value in payment; and in case of condemnation the board shall proceed, in the name of the district, under the provisions of title 7 of part 3 of the Code of Civil Procedure. Said board may also construct the necessary dams, reservoirs, and works for the collection of water for said district, and do any and every lawful act necessary to be done that sufficient water may be furnished to each landowner in said district for irrigation purposes. The use of all water required for the irrigation of the lands of any district formed under the provisions of this act together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this act is hereby declared to be a public use, subject to the regulation and control of the state, in the manner prescribed by law."

(Sections 13 and 14 are not material.)

"Sec. 15. For the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of this act, the board of directors of any such district must, as soon after such district has been organized as may be practicable, and whenever thereafter the construction fund has been exhausted by expenditures herein authorized therefrom, and the board deem it necessary or expedient to raise additional money for said purposes, estimate and determine the amount of money necessary to be raised, and shall immediately thereafter call a special election, at which shall be submitted to the electors of such district possessing the qualifications prescribed by this act, the question whether or not the bonds of said district in the amount as determined shall be issued. Notice of such election must be given by posting notices in three public places in each election precinct in said district for at least twenty days, and also by publication of such notice in some newspaper published in the county where the office of the board of directors of such district is required to be kept, once a week for at least three successive weeks. Such notices must specify the time of holding the election, the amount of bonds proposed to be issued; and said election must be held, and the result thereof determined and declared in all respects as nearly as practicable in conformity with the provisions of this act governing the election of officers: *Provided*, That no informalities in conducting such an election shall invalidate the same, if the election shall have been otherwise fairly conducted. At such election the ballots shall contain the words 'Bonds—Yes,' or 'Bonds—No,' or words equivalent thereto. If a majority of the votes cast are 'Bonds—Yes,' the board of directors shall cause bonds in said amount to be issued; if a majority of the votes cast at any bond election are 'Bonds—No,' the result of such election shall be so declared, and entered of record. And whenever thereafter said board in its judgment deems it for the best interest of the district that the question of issuance of bonds in said amount, or any amount, shall be submitted to said electors, it shall so declare of record in its minutes, and may thereupon submit such question to said electors in the same manner and with like effect as at such previous election. . . ."

(The remainder of the section provides for the maturing and payment of the bonds, and is not material.)

(Section 16 is not material.)

"Sec. 17. Said bonds and the interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district; and all the real property in the district shall be and remain liable to be assessed for such payments, as hereinafter provided.

"Sec. 18. The assessor must, between the 1st Monday in March and the 1st Monday in June, in each year, assess all the real property in the district to the persons who own, claim, or have the possession or control thereof, at its full cash value. He must prepare an assessment book, with appropriate headings, in which must be listed all such property within the district, in which must be specified, in separate columns, under the appropriate head:

"*First.*—The name of the person to whom the property is assessed. If the name is not known to the assessor, the property shall be assessed to 'unknown owners.'

"*Second.*—Land by township, range, section, or



Digitized by Google

This case and the following case of *Tregea* v. *Board of Directors of Modesto Irrigation District*, *post*, 895, were argued and submitted together in this court.

*Messrs.* **A. L. Rhodes, Samuel F. Smith,** and **John R. Aitken,** for appellants:

The Wright act does not authorize the taking of any property without due process of law within the meaning of the Constitution of the United States.

*Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 707 (28: 571); *Palmer* v. *McMahon*, 133 U. S. 660 (33: 772); *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421 (38: 1031).

In addition to the notice and opportunity to be heard before the board of equalization provided for in the Wright act, the property owner in an irrigation district has, under the ruling of the supreme court of California, a further remedy against an illegal assessment upon his land.

*Tregea* v. *Owens*, 94 Cal. 318; *McMillen* v. *Anderson*, 95 U. S. 37 (24: 335).

A property owner in an irrigation district organized under the Wright act can, before his land is taken for an assessment, contest its validity on every ground open to a property owner in a reclamation district formed under the act before this court, in *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 707 (28: 571), except as to the amount of the assessment to be paid by him.

The irrigation districts authorized to be organized under the Wright act are public corporations, charged with the duty of carrying out a local public improvement.

*Turlock Irrig. Dist.* v. *Williams*, 76 Cal. 360; *Central Irrig. Dist.* v. *De Lappe*, 79 Cal. 351; *Crall* v. *Poso Irrig. Dist.* 87 Cal. 140; *People* v. *Turnbull*, 98 Cal. 630; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L. R. A. 755; *People* v. *Selma Irrig. Dist.* 98 Cal. 206.

The proceedings by the board of supervisors for the organization of an irrigation district under the Wright act are simply steps towards the creation of a public corporation to exercise on behalf of the state the powers given by that act.

*Central Irrig. Dist.* v. *De Lappe*, 79 Cal. 353; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 323, 14 L. R. A. 755.

The manner in which a corporation shall be created, and the powers which are to be conferred on such bodies, are matters wholly within the province of a state legislature to determine, controlled only by the Constitution of the state.

---

fractional section, and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, locality, and the improvements thereon.

"*Third.*—City and town lots, naming the city or town, and the number and block, according to the system of numbering in such city or town, and the improvements thereon.

"*Fourth.*—The cash value of real estate other than city or town lots.

"*Fifth.*—The cash value of improvements on such real estate.

"*Sixth.*—The cash value of city and town lots.

"*Seventh.*—The cash value of improvements on city and town lots.

"*Eighth.*—The cash value of improvements on real estate assessed to persons other than the owners of the real estate.

"*Ninth.*—The total value of all property assessed.

"*Tenth.*—The total value of all property after equalization by the board of directors.

"*Eleventh.*—Such other things as the board of directors may require.

"Any property which may have escaped the payment of any assessment for any year shall, in addition to the assessment for the then current year, be assessed for such year with the same effect and with the same penalties as are provided for such current year."

(Section 19 is not material.)

"Sec. 20. On or before the 1st Monday in August in each year, the assessor must complete his assessment book and deliver it to the secretary of the board, who must immediately give notice thereof, and of the time the board of directors, acting as a board of equalization, will meet to equalize assessments, by publication in a newspaper published in each of the counties comprising the district. The time fixed for the meeting shall not be less than twenty nor more than thirty days from the first publication of the notice, and in the meantime the assessment book must remain in the office of the secretary for the inspection of all persons interested.

"Sec. 21. Upon the day specified in the notice required by the preceding section for the meeting, the board of directors, which is hereby constituted a board of equalization for that purpose, shall meet and continue in session from day to day, as long as may be necessary, not to exceed ten days, exclusive of Sundays, to hear and determine such objections to the valuation and assessment as may come before them, and the board may change the valuation as may be just. The secretary of the board shall be present during its sessions and note all changes made in the valuation of property, and in the names of the persons whose property is assessed, and within ten days after the close of the session he shall have the total values, as finally equalized by the board, extended into columns and added.

"Sec. 22. The board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and at the expiration of ten years after the issuing of bonds of any issue must increase said assessment to an amount sufficient to raise a sum sufficient to pay the principal of the outstanding bonds as they mature. The secretary of the board must compute and enter in a separate column of the assessment book the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated. When collected, the assessment shall be paid into the district treasury, and shall constitute a special fund, to be called the 'Bond Fund of —— Irrigation District.' In case of the neglect or refusal of the board of directors to cause such assessment and levy to be made as in this act provided, then the assessment of property made by the county assessor and the state board of equalization shall be adopted, and shall be the basis of assessments for the district, and the board of supervisors for the county in which the office of the board of directors is situated shall cause an assessment roll for said district to be prepared, and shall make the levy required by this act, in the same manner and with the like effect as if the same had been made by said board of directors, and all expenses incident thereto shall be borne by such district. In case of the neglect or refusal of the collector or treasurer of the district to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated must, respectively, perform such duties, and shall be accountable therefor upon their official bond as in other cases.

"Sec. 23. The assessment upon real property is a lien against the property assessed from and after the 1st Monday in March for any year, and the lien for the bonds of any issue shall be a preferred lien to that for any subsequent issue, and such lien is not removed until the assessments are paid or the property sold for the payment thereof."

(Sections 24 to 30, inclusive, provide for collecting the assessments and for the sale of the lands of those not paying, the giving of deeds upon such sale, and for the redemption of the lands so sold and for the character of the deed as to its being prima facie evidence, and in some cases conclusive evidence, of the regularity of the proceedings, and such sections and the remainder of the act are not material to the present inquiry.)



Digitized by Google

*Quint* v. *Hoffman*, 108 Cal. 506; *People* v. *Hagar*, 52 Cal. 171, 183; *Reclamation Dist. No. 124* v. *Gray*, 95 Cal. 601; *Swamp Land Dist. 150* v. *Silver*, 98 Cal. 53; *Reclamation Dist. No. 542* v. *Turner*, 104 Cal. 334; *Baltimore & P. R. Co.* v. *Fifth Baptist Church*, 137 U. S. 568 (34: 784); *Atchison, T. & S. F. R. Co.* v. *Wilson*, 38 Kan. 223; *Clement* v. *Everest*, 29 Mich. 19.

No Federal question can possibly arise out of proceedings for the organization of an irrigation district under the Wright act.

*Tregea* v. *Owens*, 94 Cal. 319.

The distinction between a statute such as that authorizing the opening of Montgomery avenue, and one in which there is a provision for notice and an opportunity to be heard is pointed out in *Spaulding* v. *North San Francisco Homestead & R. Asso.* 87 Cal. 46; *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky* ("*Kentucky R. Tax Cases*") 115 U. S. 321 (29: 414).

The enactment of the Wright act by the legislature of the state of California was a legitimate exercise of its authority, within the scope of its power to provide for the welfare and prosperity of the people of the state.

*Turlock Irrig. Dist.* v. *Williams*, 76 Cal. 360; *Hagar* v. *Yolo County Supers.* 47 Cal. 233; *Coster* v. *Tide Water Co.* 18 N. J. Eq. 68; *Tide Water Co.* v. *Coster*, 18 N. J. Eq. 521, 90 Am. Dec. 634; *Wurts* v. *Hoagland*, 114 U. S. 606 (29: 229).

The use of water for the irrigation of land, provided for in the Wright act, is a public use.

*Lux* v. *Haggin*, 69 Cal. 303; *Williams* v. *School Dist. No. 6*, 33 Vt. 276; *Talbot* v. *Hudson*, 16 Gray, 425; *Stockton & V. R. Co.* v. *Stockton*, 41 Cal. 168.

The agricultural or industrial necessities of the people of a state may sometimes require of its legislature and courts a declaration that water or any other commodity is the subject of public use, although, under different circumstances, the use might be deemed to be private.

*Dayton Gold & S. Min. Co.* v. *Seawell*, 11 Nev. 400; *Oury* v. *Duffield*, 1 Ariz. 509.

Water supplied under the Wright act is none the less a public use because, by the provisions of that act, only the landowners within the irrigation district are to be supplied with water.

Miller, Em. Dom. § 12; *Lux* v. *Haggin*, 69 Cal. 303.

Water for irrigation purposes has been a public use in many countries for ages. Under the Wright law, and relying upon the repeated decisions of the supreme court of California that it is a valid law, vast sums have been raised by the sale of bonds and expended in the construction of canals, reservoirs, and other irrigation works.

The Wright act does not, in any of its provisions, authorize the taking of private property for a private use.

It is exclusively within the province of the legislature of a state to determine in what manner and at what time a local public improvement shall be effected, and the mode in which the expenses of such improvement shall be apportioned and paid by the owners of the property benefited thereby.

*Spencer* v. *Merchant*, 125 U. S. 345 (31: 768); *Mobile County* v. *Kimball*, 102 U. S. 691 (26: 238); *Daily* v. *Swope*, 47 Miss. 378; *Cleveland* v. *Tripp*, 13 R. I. 59; *Excelsior Planting & Mfg. Co.* v. *Green*, 39 La. Ann. 456; *Williams* v. *Detroit*, 2 Mich. 570; *Burnett* v. *Sacramento*, 12 Cal. 84; *People* v. *Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Emery* v. *San Francisco Gas Co.* 28 Cal. 345.

When a law has been construed by the highest court of the state in which it was enacted, and it has been uniformly held that the law is not in contravention of the Constitution of the state, that construction is binding on the Federal courts.

*Turlock Irrig Dist.* v. *Williams*, 76 Cal. 360; *Crall* v. *Poso Irrig. Dist.* 87 Cal. 140; *Modesto Irrig. Dist.* v. *Tregea*, 88 Cal. 334; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L. R. A. 755; *Gut* v. *Minnesota*, 76 U. S. 9 Wall. 35 (19: 573); *Bank of Hamilton* v. *Dudley*, 27 U. S. 2 Pet. 492 (7: 496); *East Hartford* v. *Hartford Bridge Co.* 51 U. S. 10 How. 511 (13: 518); *Chambers County* v. *Clews*, 88 U. S. 21 Wall. 317 (22: 517); *Elmwood* v. *Marcy*, 92 U. S. 289 (23: 710).

The system of works proposed for the irrigation of lands within Fallbrook Irrigation District are not experimental, uncertain, or problematical.

The appellee, Maria King Bradley, had ample opportunity to be heard respecting the validity of the $400,000 of bonds issued by the appellant, The Fallbrook Irrigation District, in the confirmation proceeding instituted by the board of directors of that district.

The bill of complaint in the case at bar does not disclose any equity entitling the appellees, or either of them, to relief.

*Mr.* **Benjamin Harrison** made oral argument for the appellants and an appearance was also entered for them by *Mr. R. Percy Wright.*

*Messrs. William D. Guthrie* and *Clarence A. Seward* filed, by leave of the court, a brief for bondholders.

*Mr.* **George H. Maxwell,** for appellees:

The broad question of the power of arid states to carry out a state policy of irrigation is not involved here, and this power will be unimpaired, though the Wright act be unconstitutional. Any state, by the exercise, within well-established constitutional limitations, of its power of general taxation for a public purpose, or of assessment for a local improvement upon lands benefited, may provide for the irrigation of its arid lands.

Dill. Mun. Corp. § 56; *Regents of the University* v. *Williams*, 9 Gill & J. 365.

The Wright act vested in self-constituted petitioners powers to determine the expediency, fix the boundaries, and thereby control the organization and operations of irrigation districts, and, without a hearing, to subject private property to burdens of assessment amounting to confiscation, giving to communities power to assess without limit, and without any regard to benefits, for an alleged public use which is in fact private, the one class of property selected to bear these burdens. No law could so violate natural justice, and constitutional rights, and operate successfully. It is communism and confiscation under the guise of law.



Digitized by Google

*McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 428 (4: 606); *Cullen* v. *Glendora Water Co.* 113 Cal. 510.

Assessments for local public improvements are an exercise of the general power of taxation, but are controlled by principles and constitutional limitations different from those governing taxation for revenue for governmental purposes. The principle, that private property shall not be taken for public use without just compensation, which limits the exercise of the power of eminent domain likewise limits this power of assessment, because such assessments are levied in the exercise of the sovereign power of the people to provide for the general public welfare, and the only ground upon which their levy upon specific property instead of upon the whole public can be justified is that the property assessed is specially benefited, and thus receives compensation for the burdens imposed upon it.

*Illinois C. R. Co.* v. *Decatur*, 147 U. S. 197 (37: 134); *State, Agens*, v. *Newark*, 37 N. J. L. 421; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 326, 14 L. R. A. 755; *Tide Water Co.* v. *Coster*, 18 N. J. Eq. 527, 90 Am. Dec. 634; *Hammett* v. *Philadelphia*, 65 Pa. 153, 3 Am. Rep. 615; *Washington Avenue*, 69 Pa. 360, 8 Am. Rep. 255; *Morewood Avenue*, 159 Pa. 27; *Stuart* v. *Palmer*, 74 N. Y. 189, 30 Am. Rep. 289; *Raleigh* v. *Peace*, 110 N. C. 32, 17 L. R. A. 380; *Creighton* v. *Manson*, 27 Cal. 613; *Chicago* v. *Larned*, 34 Ill. 273, *White* v. *Saginaw*, 67 Mich. 40; *Birmingham* v. *Klein*, 89 Ala. 466, 8 L. R. A. 369; *Bridgeport* v. *New York & N. H. R. Co.* 36 Conn. 262, 4 Am. Rep. 63; *Cheaney* v. *Hooser*, 9 B. Mon. 341.

The power of assessment for local public improvements is based upon special benefits to the property assessed and is limited to property benefited by the improvement, and the assessments must be apportioned according to benefits. Property not benefited by the improvement cannot be subjected to assessments for its construction, and assessments cannot be levied in excess of such benefits. These limitations are the law of the land, established by a long current of judicial decisions, resting upon fundamental principles of natural justice and constitutional government. Under the Wright act the assessments are not based upon or apportioned according to benefits. Property not benefited is assessed and the burdens of assessment are perpetual and not limited to benefits.

*Taylor* v. *Palmer*, 31 Cal. 254; *Re Market Street*, 49 Cal. 549; *Sharpe* v. *Speir*, 4 Hill, 82; *Macon* v. *Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Kirby* v. *Shaw*, 19 Pa. 258; *Echenley* v. *Com.* 36 Pa. 29, 78 Am. Dec. 359; *McGonigle* v. *Allegheny City*, 44 Pa. 118; *Washington Avenue*, 69 Pa. 360, 8 Am. Rep. 255; *Paterson* v. *Society for Establishing Useful Manufactures*, 24 N. J. L. 385; *Re Application for Drainage in Passaic, Essex, and Morris Counties*, 35 N. J. L. 497; *St. John* v. *East St. Louis*, 50 Ill. 92; *Lee* v. *Ruggles*, 62 Ill. 427; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Litchfield* v. *Vernon*, 41 N. Y. 123; *Stuart* v. *Palmer*, 74 N. Y. 189, 30 Am. Rep. 289; *Canal Bank* v. *Albany*, 9 Wend. 244-250; *William and Anthony Streets*, 19 Wend. 678; *Re Flatbush Avenue*, 1 Barb. 293; *Morewood Avenue*, 159 Pa. 20; *Allegheny City* v. *Western Pennsylvania R. Co.* 138 Pa. 375; *Re Pittsburgh*, 138 Pa. 434; *Re Park Avenue Sewer*, 169 Pa. 438; *Hale* v. *Kenosha*, 29 Wis. 605; *Johnson* v. *Milwaukee*, 40 Wis. 315; *Re Fourth Avenue*, 3 Wend. 452, note a; *State, Kean*, v. *Driggs Drainage Co.* 45 N. J. L. 91-94; *State, Reynolds*, v. *Paterson*, 48 N. J. L. 436; *State, New York & G. L. R. Co.*, v. *Kearney Twp.* 55 N. J. L. 463, 471; *Norfolk* v. *Chamberlain*, 89 Va. 196, 213; *Hanscom* v. *Omaha*, 11 Neb. 37; *State, Burger*, v. *Ramsey County Dist. Ct.* 33 Minn. 295, 307; *State, Central New Jersey Land & I. Co.*, v. *Bayonne*, 56 N. J. L. 297, 301; *People, Marvin*, v. *Brooklyn*, 23 Barb. 174; *Elwood* v. *Rochester*, 43 Hun, 114; *Clark* v. *Dunkirk*, 12 Hun, 181, Aff'd 75 N. Y. 612; Cooley, Taxn. 2d ed. 607; Burroughs, Taxn. 460.

Benefits to justify assessment must be special, direct, immediate, and certain. Under the Wright act, city and town property, covered with buildings and permanently devoted to uses excluding the possibility of irrigation, and lands and property incapable of being irrigated, and all improvements on any real property which are required to be separately assessed, are included in irrigation districts, and assessed for the construction of an irrigation system from which they cannot derive any benefit except such uncertain possibility of collateral, indirect, and remote advantage as might result from the irrigation of other property in the neighborhood. Such remote and indirect benefit will not warrant an assessment on any land for a proposed public improvement.

*Friedenwald* v. *Baltimore*, 74 Md. 116; *State, New Jersey R. & T. Co.*, v. *Newark*, 27 N. J. L. 190; *State, Agens*, v. *Newark*, 37 N. J. L. 422; *Re Fourth Avenue*, 3 Wend. 452; *Thomas* v. *Gain*, 35 Mich. 162, 24 Am. Rep. 535.

The assessments levied under the Wright act are an exercise of the power of assessment for local improvement, and their constitutionality must be determined under the principles controlling this power of assessment as distinguished from principles applicable only to general taxation or eminent domain, or the exercise of the police power or power to regulate a common use or provide for a common improvement among several owners. The decisions sustaining the Wright act, and the cases cited and arguments advanced in its support, rest upon wrong premises and false reasoning, because they utterly confuse the principles governing these different branches of the exercise of the power of the state, and, though conceding the Wright act to be an exercise of the power of assessment, seek to maintain it under principles and authorities applicable only to general taxation or eminent domain or the police power.

*Davidson* v. *New Orleans*, 96 U. S. 97 (24: 616); *Norfolk* v. *Chamberlain*, 89 Va. 196; *Turlock Irrig. Dist.* v. *Williams*, 76 Cal. 360; *Hagar* v. *Yolo County Supers.* 47 Cal. 222; *Hammett* v. *Philadelphia*, 65 Pa. 153, 3 Am. Rep. 615; *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 9 (28: 889); *Wurts* v. *Hoagland*, 114 U. S. 614 (29:231).

The legislature in the exercise of its power of assessment for a local public improvement has power primarily to determine the necessity



Digitized by Google

for the improvement, to determine what property will be benefited thereby, to designate the district within which the assessments are to be collected, and to fix the mode of their apportionment; but this power is not without restriction, or in all cases conclusive and beyond judicial control. It is only where the legislature, or the subordinate body to whom its power may be delegated, has exercised its judgment in the determination of a question of fact relating to any of these matters which has been committed to its discretion that its action is conclusive, and even then it is not necessarily so if it has acted in an arbitrary, oppressive, or fraudulent manner or has in any way acted in excess of its power. Whenever, as is the case of the Wright act, it appears that a principle of law has been violated, as by the inclusion of lands clearly not benefited, or by the application of a wrong basis of apportionment, the legislative action will be held void by the courts, because in excess of its powers.

*People, Marvin,* v. *Brooklyn*, 23 Barb. 174; *LeRoy* v. *New York*, 20 Johns. 430, 11 Am. Dec. 289; *Paulson* v. *Portland*, 16 Or. 459, 1 L. R. A. 673; *Mason* v. *Spencer*, 35 Kan. 512; *State, Burger,* v. *Ramsey County Dist. Ct.* 33 Minn. 295; *Merrill* v. *Humphrey*, 24 Mich. 173; *Chicago* v. *Burtice*, 24 Ill. 489; *Atlanta* v. *Gate City Street R. Co.* 80 Ga. 276; *Spring Valley Waterworks* v. *San Francisco City & County*, 82 Cal. 286, 6 Am. Rep. 756; *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30: 220); *Elwood* v. *Rochester*, 43 Hun, 102; *Hussen* v. *Rochester*, 65 N. Y. 516; *Thomas* v. *Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Lexington* v. *McQuillan*, 9 Dana, 513, 35 Am. Dec. 159; *People, Parker,* v. *Jefferson County Ct.* 55 N. Y. 604; *Graham* v. *Conger*, 85 Ky. 582; *Re New York Protestant Episcopal Public School*, 75 N. Y. 324; *Masters* v. *Portland*, 24 Or. 161.

The Wright act violates general principles of constitutional law by which this court will unquestionably be guided in this case, as it is one of original Federal jurisdiction; but these same principles are a part of the general law of the land, and when they are violated in the taking of private property it is taken without due process of law, and its owner is deprived of the equal protection of the law, and may claim the protection of the Federal Constitution, no matter whether the case be one of original Federal jurisdiction or an appeal from a state court.

*Sharpless* v. *Philadelphia*, 21 Pa. 168, 59 Am. Dec. 759; *Den, Murray,* v. *Hoboken Land & I. Co.* 59 U. S. 18 How. 272 (15:372); *Hurtado* v. *California*, 110 U. S. 535 (28:238); *San Mateo County* v. *Southern P. R. Co.* 13 Fed. Rep. 733; *Spencer* v. *Merchant*, 125 U. S. 353 (31: 766); *Davidson* v. *New Orleans*, 96 U. S. 97 (24: 616).

A hearing is essential to due process of law; and whenever an assessment district is to be created by any subordinate legislative body, and assessments are to be levied on lands therein for the construction of a local public improvement, every landowner must have a hearing, at some stage of the proceedings, before the assessment becomes a final charge against his land, at which he may show that his lands are not or will not be benefited by the proposed improvement, or that the assessment against him is not in proportion to benefits or is in excess of benefits, and this hearing must be given as a matter of right, before a tribunal having power and whose duty it shall be to exclude the lands or relieve them from assessment if not benefited, or, if the assessments are in excess of or not proportionate to benefits, then to readjust them or declare them invalid; and the landowner cannot be deprived of this right to a hearing by any determination of the legislature fixing in advance an arbitrary basis of apportionment, with reference to unknown future conditions, as to which the legislature could have had no knowledge upon which to base the exercise of any judgment or discretion in reaching its determination, or by clothing the assessment district in the guise of a public corporation.

*Lower Kings River Reclamation Dist.* v. *Phillips*, 108 Cal. 306; *Clark* v. *Van Riemsdyk*, 13 U. S. 9 Cranch, 160 (3: 690); *Remsen* v. *Wheeler*, 105 N. Y. 573; *People* v. *Henion*, 64 Hun, 471; *Spencer* v. *Merchant*, 125 U. S. 356 (31:767); *Paulsen* v. *Portland*, 149 U. S. 30 (37: 637); *Stuart* v. *Palmer*, 74 N. Y. 188, 30 Am. Rep. 289; *Macon* v. *Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Dyar* v. *Farmington*, 70 Me. 515; *Cypress Pond Draining Co.* v. *Hooper*, 2 Met. (Ky.) 350; *Howell* v. *Tacoma*, 3 Wash. 711; Cooley, Taxn. 640, 641.

It is contended in support of the Wright act that the hearing before the supervisors, when they are to hear the petition for the formation of the district, affords to the landowner all the opportunity for a hearing to which he is entitled upon the question of benefits, and consequently that the act does not in this respect take property without due process of law. This cannot be so, for the reason that under the provisions of the act as construed by the supreme court of California it is practically impossible for any facts to be established at this hearing by any objecting landowner which would give him the right or which would make it the duty of the board, upon the ground that his lands were not benefited, or upon any ground whatsoever, to exclude any lands which had been included in the boundaries of the proposed district as fixed by the petitioners in the petition for its organization.

*Santa Clara County* v. *Southern P. R. Co.* 18 Fed. Rep. 385; *Scott* v. *Toledo*, 36 Fed. Rep. 385; *Meyers* v. *Shields*, 61 Fed. Rep. 718; *Ulman* v. *Baltimore*, 72 Md. 587, 11 L. R. A. 224; *San Mateo County* v. *Southern P. R. Co.* 18 Fed. Rep. 722.

The radical changes from the Wright act, which have been made in the irrigation district laws of Nebraska, Idaho, and Oregon, which were framed in the light of experience with the practical operations of the Wright act, strongly support our argument that the unconstitutional features of the Wright act make it impossible for any such law to operate successfully, and show that these later statutes have sought to eliminate those unconstitutional features of the Wright act which have given rise to its most grievous oppressions, and which will work the practical destruction of any law embodying such provisions.

It is a settled principle of universal law, and is the law of the land in this nation, that the right to compensation whenever private prop-



Digitized by Google

erty is taken for public use, is an incident to the exercise of that power, and inseparably connected with it. Any attempt of a legislature to levy assessments on property not compensated by special benefits, or in excess of such benefits, or not proportionate to benefits, for the purpose of constructing a local public improvement for the general public welfare is therefore an excess of legislative power, and clearly a violation of the 14th Amendment.

*Scott* v. *Toledo*, 36 Fed. Rep. 385; *Sinnickson* v. *Johnson*, 17 N. J. L. 129, 34 Am. Dec. 184; *Gardner* v. *Newburgh*, 2 Johns. Ch. 166, 7 Am. Dec. 526; *Mobile County* v. *Kimball*, 102 U. S. 691 (26: 238); *Missouri P. R. Co.* v. *Humes*, 115 U. S. 512 (29: 463).

Mr. **Joseph H. Choate**, for appellees:

The Constitution of California provides by article 1, § 1, that acquiring, possessing, and protecting property are inalienable rights; and by § 14, that "private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner."

Our main contention is that the Wright act is in violation of the 14th Amendment of the Constitution of the United States, which provides: "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We insist that it violates each of these clauses, and that in its treatment of private property it violates those uniform constitutional provisions for the protection of private property which are found alike in the Constitution of California and those of all the other states.

I. Before coming to the special methods pursued in the Wright act, we submit that any law of any state which sought to accomplish the objects of that act would be obnoxious to the constitutional provisions which we invoke, for that act plainly attempts to provide for the taking of private property for a private use.

Definitions are dangerous and never conclusive, but we are content to start with that one uttered by this court seventy-five years ago and ever since repeatedly approved by it:

"As to the words from Magna Charta, incorporated into the Constitution of Maryland [*viz.*, No freeman ought to be . . . deprived of his . . . property but by the judgment of his peers or the law of the land], after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

*Bank of Columbia* v. *Okely*, 17 U. S. 4 Wheat. 235 (4: 559).

Whoever, then, undertakes to take away my property must show the authority of law for doing so; not an arbitrary edict of the legislature, but a legitimate exercise of legislative power, as restrained by the established principles of private rights and distributive justice; a law of the land which does not deny to me the equal protection of the laws.

Where money is sought to be taken by the state from an individual by the exercise of the power of taxation in any form, or however that power may be defined, it must be for the purpose of expenditure for a public object or use, and the test of the validity of a law enacted for that purpose must necessarily be the essential character of the direct object of the expenditure proposed.

This canon, though everywhere recognized, is nowhere better stated than by the supreme judicial court of Massachusetts in *Lowell* v. *Boston*, 111 Mass. 454, 461, 15 Am. Rep. 39.

"The power to levy taxes is founded on the right, duty, and responsibility to maintain and administer all the governmental functions of the state, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is in its essential character a private and not a public object. However certain and great the resulting good to the general public, it does not by reason of its comparative importance cease to be incidental. The incidental advantage to the public or to the state which results from the promotion of private interests and the prosperity of private enterprises or business does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion."

Guided by this beacon light we come to the examination of the Wright act, with a view of determining its general object. We find it to be to raise a fund by levy upon all the landholders of a given district, whether their lands need irrigating or not, and whether they desire to have them irrigated or not, to be expended in procuring water for the irrigation of all the lands in the district, so as to make it cheaper for those of them who desire it than if they had to irrigate their own lands at their own individual expense.

The pecuniary relief of such of the landholders is thus the direct and immediate object of the intervention of the state by the exercise of the power of taxation.

It is to be particularly noted that the operation of the act is not limited to arid lands, or to those which require irrigation in order to make them productive whether as grazing or arable lands.

The irrigation of a desert or of arid plains in the heart of a state might possibly be regarded as a matter of public concern for which public money might properly be spent. But this act is for no such object. Not lands that need to be irrigated, but all lands that are susceptible of irrigation from the same source, are brought within its operation.

"Requiring irrigation" would have made the act very limited; but "susceptible" is a very



Digitized by Google

large word and a new word in legislation,—it includes everything.

But, however limited or extended the operation of the act may be, there can be no question as to its object and purpose, or as to what is the direct object of the expenditure of the money to be raised. The essential thing is the promotion of the interests of certain individual landholders—the making of the land of each more productive—and, however certain and great the resulting good to the general public may be, it does not, by reason of its comparative importance, cease to be incidental.

Private enterprise in the form of private irrigation companies could supply ample water wherever it was necessary and practicable. But public companies which could compel each landholder to join with his neighbor, whether he would or not, whether he needed or desired or could use the water or not, served better the political purpose of the hour, and the Wright act was passed.

This is far and away beyond any attempt heretofore made to extort money by the strong hand of the state from one individual or set of individuals for the pecuniary benefit of another. It is practically giving money of the state, collected from A and B, to C and D for their own private uses.

The direct object of the expenditure is as strictly private as it was in any of the famous cases which have condemned similar attempts to wrest money from the citizens by force of law for private use, and the resulting benefits to the public are quite as indirect and uncertain as in any of those.

The great fire in Boston had laid a large part of the capital city in ashes, whereby the general prosperity, not only of the city, but of the whole state, was paralyzed and its future endangered. The universal interest of the people of the whole state, dictated the passage of the act by which $20,000,000 of the city's credit was to be advanced to raise funds to loan to the individual sufferers, to enable them to rebuild, each on his own property. But the supreme judicial court of that state unanimously condemned the law, in spite of the powerful popular sentiment in its favor, and the apparent necessity for its enforcement as a means of restoring the city.

*Lowell* v. *Boston*, 111 Mass. 454, 15 Am. Rep. 39.

In many cities and towns of the Union the establishment of manufacturing interests within or near the municipal precincts was regarded as necessary to the promotion of the prosperity of the municipality, to promote the general welfare of its people, but the direct object of the expenditure of the money was, and could only be, to promote individual interests; and the opinion of this court, in *Citizens' Sav. & L. Asso.* v. *Topeka*, 87 U. S. 20 Wall. 655 (22: 455), and of the supreme court of Maine in *Opinions of Judges*, 58 Me. 591, and *Allen* v. *Jay*, 60 Me. 124, 11 Am. Rep. 185, have all made such attempts forever impossible, unless the constitutional prohibition, whose aid we invoke, shall be repealed.

The legislature of Kansas, in view of a widespread calamity which had befallen the farmers of the state, passed an act authorizing townships to issue bonds for relief purposes, the money to be used for the purpose of providing the destitute citizens of such townships with provisions and with grain for seed and feed. But, in spite of the urgent necessity and the great public benefit which would certainly and largely result, the supreme court of that state condemned it.

*State* v. *Oswakee Twp.* 14 Kan. 418, 19 Am. Rep. 99.

In each of these cases the direct object of the proposed expenditure was no more manifestly and conspicuously for the promotion of individual interests, and the resulting benefit to the public was no less indirect and incidental, than they are in the present case.

Mr. Justice Harrison, in his very able opinion in *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L. R. A. 755, recognizes the force of these cases, but attempts to parry it by some most novel and startling, and, we submit, wholly untenable, propositions in regard to the effect of a declaration in the act itself, whose validity is disputed on this ground, that the use to which the money is to be applied is and shall be deemed a public use. Such a declaration is contained in the Wright act, but such a declaration cannot make a public use out of a private one.

The question must be determined by the general scope and particular provisions of the act itself.

*Davidson* v. *New Orleans*, 96 U. S. 102 (24: 618); *Waterloo Woolen Mfg. Co.* v. *Shanahan*, 128 N. Y. 345, 357, 14 L. R. A. 481; *Shoemaker* v. *United States*, 147 U. S. 282 (37: 170); *Re Niagara Falls & W. R. Co.* 108 N. Y. 375; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Concord R. Co.* v. *Greely*, 17 N. H. 57; *Allen* v. *Jay*, 60 Me. 140, 11 Am. Rep. 185; *Talbot* v. *Hudson*, 16 Gray, 425; Cooley, Taxn. 2d ed. 55.

As the present case is plainly governed by the principles laid down in the leading cases already referred to, so it is not only distinguishable, but is in its essential nature absolutely distinct, from all the classes of cases where local improvements have been held to be for public use, or have been sustained as a just exercise of the police power, or on other special and peculiar grounds. It was in reliance upon those classes of cases that the learned supreme court of California maintained the constitutionality of the law, while the United States circuit judge, adhering to the cardinal rules already laid down, declared it to be against first principles, and in direct violation of the constitutional prohibition whose protection we invoke.

We do not dispute that the legislature may by taxation or assessment provide for a local public improvement for the benefit of a portion of the state, nor do we question that the legislature might, in the lawful exercise of this power, provide for the irrigation of arid lands, unproductive without irrigation. The operations of the Wright act are, however, not limited to such unproductive lands, but include all lands, no matter how fertile or productive; and we deny that the furnishing of a fertilizer for the already productive lands of individual proprietors to make them more productive is or can be, in any possible legal sense, a public improvement; and we deny that the nine tenths



Digitized by Google

of the people of the locality who are not landholders have or can have any interest in such business, or that they can receive any benefit therefrom other than such as is, upon every principle of law, reason, and common sense, strictly indirect, incidental, and consequential. This is in the very nature of things.

*Scuffletown Fence Co.* v. *McAllister*, 12 Bush, 312; *Anderson* v. *Kerns Draining Co.* 14 Ind. 199, 77 Am. Dec. 63; *Reeves* v. *Wood County*, 8 Ohio St. 333; *McQuillen* v. *Hatton*, 42 Ohio St. 202; *Re Niagara Falls & W. R. Co.* 108 N. Y. 385; Tiedeman, Pol. Power, 446.

Nor is the contention of the supreme court of California aided by calling the unique entity, brought into existence by this statute under the name of irrigation district, a public corporation. If the essential thing sought to be accomplished is the taking of the property or money of one citizen for the private benefit of another, it matters not whether the agency created for the purpose be called a public or private corporation or a commission.

A corporation armed with the power to tax for the purpose of converting private grazing or farm lands into vineyards or orchards, with or without the will of the owner, takes private property for purely private uses, by whatever name it may be called.

*Beach* v. *Leahy*, 11 Kan. 31.

The cases in which the organization of districts for local improvement and the forced contributions of landholders therein by taxation or assessment for the common benefit have been upheld as a legitimate exercise of legislative power all differ from the Wright act in this: that in all those cases there was a common interest, a common necessity, or a common benefit, the promotion of which was obviously the direct and immediate object of the proposed expenditure, while here such direct and immediate object is the fertilization by water, at the common expense, of the lands of those owners who desire their lands to be irrigated, the interest of each being absolutely distinct and independent.

As a matter of fact, the reclamation district act differs from the Wright act in every particular in which we claim the latter to be unconstitutional. In the reclamation district act there was no unlawful delegation of legislative power; the object of the act was a purpose in which every landholder had a common interest, and was for the permanent reclamation of lands otherwise not only useless, but a menace to the public health. The reclamation district act (Cal. Stat. 1867, p. 514; Cal. Pol. Code, § 3446) gave the supervisors discretion to act upon the hearing of the petition. Then, too, only the land to be reclaimed was assessed, and that tax was proportionate to the whole expense and to the benefit received. Moreover, the tax was only to be collected by suit, in which any defense going to the validity of the tax could, of course, be set up. In all of these fundamentally important particulars, and others, did the reclamation act differ from the Wright act; the latter lacks every one of these provisions.

*Lower Kings River Reclamation Dist.* v. *Phillips*, 108 Cal. 315, on Rehearing 108 Cal. 306.

California decisions which support the Wright act on account of any similarity between the two are therefore founded on an utter misconception.

The obvious distinction between plainly public uses and the private benefit of individual proprietors needs only to be suggested.

It was said by the court in *Citizens' Sav. & L. Asso.* v. *Topeka*, 87 U. S. 20 Wall. 655 (22: 455), and has often been repeated that "in deciding whether in the given case the object for which the taxes are reassessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal," and that "whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government."

Surely it will not be pretended that this novel and utterly unique statute was sanctioned by previous use or acquiescence, or ever had a precedent in legislation, or that it approximates in any degree to the exercise of legislative power for a governmental purpose.

The drainage cases represented by the case of *Wurts* v *Hoagland*, 114 U. S. 606 (29: 229), well illustrate the force of Mr. Justice Miller's rule just quoted, and are in striking contrast to the case at bar.

The sound and well-reasoned conclusion there, drawn from the early New Jersey cases, is, that "the drainage of large tracts of swamps and low lands upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health), as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense."

Certainly, the proprietors of adjoining lands, already arable and devoted to the raising of wheat or other grain, or in use for grazing, which they are content and desire to continue to cultivate or use in that way, cannot be brought into the category here instanced by an application of some of their neighbors to compel them to have their lands irrigated in common with the petitioners.

But the court in *Wurts* v. *Hoagland*, 114 U. S. 606 (29: 229), immediately follows up this statement of the rule applicable to drainage cases by the further statement that "the case comes within the principle upon which this court upheld the validity of general mill acts in *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 9 (28: 889)."

In that interesting case the court declined to



Digitized by Google

decide or to consider the question whether the erection and maintenance of mills for manufacturing purposes under a general mill act could be upheld as a taking of private property for public use in the constitutional sense, and, after a careful review of the Massachusetts and New Hampshire cases from the beginning, rested the decision on the following proposition:

"Upon principle and authority, therefore, independently of any weight due to the opinions of the courts of New Hampshire and other states, maintaining the validity of general mill acts as taking private property for public use, in the strict constitutional meaning of that phrase, the statute under which the Amoskeag Manufacturing Company has flowed the land in question is clearly valid, as a just and reasonable exercise of the power of the legislature, having regard to the public good, in a moral sense, as well as to the rights of the riparian proprietors to regulate the use of the water power of running streams which, without some such legislation, could not be beneficially used."

No suggestion, therefore, can be found in the drainage or the mill acts, as interpreted by this court, which will countenance these irrigation acts as the legitimate exercise of legislative power for public or governmental purposes.

That there is a great difference between the application of public use in questions of taxation and in questions of eminent domain has frequently been noted.

*Mobile County* v. *Kimball*, 102 U. S. 691 (26: 238); *Gilmer* v. *Lime Point*, 18 Cal. 229.

The government exercises and grants eminent domain with considerable liberality wherever the public purpose is sufficient to demand it. But the power of taxation is one which has always been hemmed around with limitations, and must be used sparingly.

Cooley, Taxn. 2d ed. 113, 126; Randolph, Em. Dom. 22; Mills, Em. Dom. § 2.

The most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable. The power is much nearer like to that of the public police than that of taxation; it goes but a step further, and that in the same direction.

It is this principle upon which the mill acts are to be based (*Murdock* v. *Stickney*, 8 Cush. 113), and it is analogous to the common-law way of necessity. It has nothing to do with public use in the sense that applies to taxation. "It rests on the nature of the property and the fact that there must of necessity be a kind of joint use." *Allen* v. *Jay*, 60 Me. 124, 11 Am. Rep. 185, 12 Am. L. Reg. N. S. 498, note.

In certain cases, therefore, of arid tracts of land needing only water to render it fruitful, such a power might, perhaps, be invoked by the owners for easements for canals or aqueducts, in order to obtain that water. In such a case a full price is paid by the irrigator for whatever he takes, and no one is deprived of property without an equivalent. But to tax all landowners whether their land is arid or not, whether they will or not in a district, the bounds of which were determined by irresponsible petitioners, is, we submit, a very different matter. In such a case many a landowner may be and is deprived of his property—either in money or land—with no possible remuneration. Under the power of eminent domain he is made to exchange his land for other property, its exact legal equivalent. Under the Wright act he is made invariably to give it up, because he can in such case, by no possibility, get any legal equivalent; for when his land is gone he can have no irrigation. It is therefore the veriest sophistry to seek to uphold this act upon the principles which apply to eminent domain.

The immemorial and universally recognized right of every man to occupy and use his own land for such purposes as he sees fit, provided only that the land itself, or the condition in which he puts it, or the use which he makes of it, does not injure his neighbor, in which indeed the essential right of private property consists, cannot be invaded by his neighbor or by the state for the private benefit of his neighbor, for that is the very thing in which the taking of his property without due process of law consists.

Tiedeman, Pol. Power, 447, cited with approval by Prentice, Pol. Power, 57.

The act here in question really proposes to furnish water as a commodity to the several landholders in the district for use upon their lands, as they may prefer, and cannot be distinguished in principle from an act which should provide for furnishing to the farmers of a district, for use or sale, guano or other like fertilizers, or trees for planting, with an ultimate view to the promotion of the general prosperity of the neighborhood. Nor can it be distinguished in principle from an act providing for the erection of farm houses or farm barns or fences throughout a district by a forced levy on the landholders under the authority of the state in order to promote the growth of the neighborhood.

*Gaines* v. *Buford*, 1 Dana, 481; Cooley, Const. Lim. 6th ed. 475, 627, 628, 655.

Finally, in dealing in the water as merchandise, the statute here in question bears the distinct form of a statute for private as distinguished from public use.

Any landowner, and landowners only, can have it, to use or to sell, but of course they cannot be compelled to take or to use it.

In *Jones* v. *Detroit Water Comrs.* 34 Mich. 273, where a tax was levied upon vacant lots for the purpose of raising money to pay for water bonds, the court, in holding the tax invalid, said: "No one can be compelled to take water unless he chooses, and citizens may take it or not as the price does or does not suit them."

But in the Wright act the citizen is compelled to pay for the water whether he wants it or not. He is to be taxed in proportion to the amount of water which he might have if he chose to use it. So that the benefit does not accrue to the land by the construction of the improvement, but by the use of the improvement which the owner cannot be compelled to make. But in all drainage, reclamation, levee, and protection statutes the benefit does accrue to the landowner by the mere making of the improvement. He cannot help being benefited, and the same certain benefit accrues to the public by the making of it.

In the same way this irrigation act differs



Digitized by Google

from all school district acts, water and gas supply acts, and all others of similar nature, in that, under those acts, the general public have the full right to the use of the benefit on equal terms, whereas here it is necessarily restricted to the landowner. The public cannot have the water on any terms.

We submit, therefore, that the Wright act does violate the fundamental principles on which the right to the ownership and use of private property rests, takes from the citizen money to expend for the private use of his neighbors, does this without due process of law, and that it exceeds the legitimate authority of the legislature to accomplish the end sought by it, in any form or by any methods.

2. But assuming, for the sake of the argument, that the legislature itself might, without exceeding its constitutional powers, map out a district of the state, which did not require irrigation, and enact that it should, nevertheless, be irrigated at the common expense of the landowners, so as to make it more productive for their common benefit, and to promote the settlement and prosperity of that section of the state, we submit that it cannot abdicate its own responsibility and reach that result by the means and in the method provided by the Wright act. That act will be found to involve a delegation by the legislature of the sovereign power of government to private citizens, which is quite as fatal to the act under the constitutional prohibitions, whose aid we invoke, as any other attempt to exceed the constitutional bounds of legislative power.

This brings into view the unique and, as we believe, wholly unprecedented features of the scheme contrived by this act for the oppression of the farmers of California. We think that the statute books of all states and nations outside of California, prior to 1887, will be searched in vain, without finding another such example, and especially in view of the construction which has been given to certain details of this statute by the supreme court of California.

It will be seen that the all-important question of the expediency of forming an irrigation district is determined, not by the legislature, nor by any public body or officer, but by the self-constituting body of petitioners, subject only to a vote of the qualified electors of the proposed district, who may or may not have any interest in the lands or the subject-matter, and nine tenths of whom, as a matter of course, will have no interest. Practically, the vital question of the boundaries of the district is determined in the same way, for the functions of the supervisors in the matter of boundaries are really perfunctory.

As to the petitioners, they must be fifty, or a majority, of the landholders of the district proposed by themselves. Thus, according to the construction of the act contended for by its advocates, two landholders, each owning a city lot, may be a majority vested with this power over one proprietor owning 10 square miles; or fifty tenants in common of a town lot may institute the proceedings and exercise the vast power involved over five thousand proprietors of vast tracts of land who may have no desire or need for irrigation, for a majority is only required in the event of there being a less number of proprietors within the district than one hundred; and, if there be five thousand proprietors, a minority consisting of no more than fifty may proceed by petition.

The supervisors have no power to determine whether there shall be an irrigation district or not. They cannot reject the petition, but must proceed to establish and define the boundaries, and, although a nominal power is given them to make such changes in the proposed boundaries as they may find to be proper, the proviso substantially nullifies this apparent power, for the proviso declares that they shall not modify the boundaries so as to except from the operation of this act any territory within the boundaries of the district proposed by the petitioners which is susceptible of irrigation by the same system of works applicable to other lands in such proposed district; and, as to all the arable land in the state, it is hardly possible to point out any that is not, within the meaning of this section, susceptible of irrigation. Moreover, as no system of works is prescribed by the act, any method of furnishing water which the wit of man can devise, either by gravity from a neighboring river, or by artesian wells, or by the gathering of rainwater, will satisfy the act. So that the power of excepting any territory within the boundaries of the district proposed by the petitioners is substantially null.

In *Modesto Irrig. Dist.* v. *Trejea*, 88 Cal. 353, the supreme court, referring to the clause, "nor shall any land which will not, in the judgment of the said board, be benefited by irrigation by said system, be included within such district," held as follows:

"We construe the law to mean that the board may include in the boundaries of the district all land which in their natural state would be benefited by irrigation and are susceptible of irrigation by one system, regardless of the fact that buildings or other structures may have been erected here and there upon small lots which are thereby rendered unfit for cultivation, at the same time that their value for other purposes may have been greatly enhanced. So construed, we can see no objections to the law upon constitutional grounds or grounds of expediency. As to owners of such property, it seems reasonable to assume that they must participate, indirectly, at least, in any benefits the district may derive from the successful inauguration of a system of irrigation; but, aside from this, the law contains an express provision designed to secure to them a benefit exactly corresponding to any burden to which they may be subjected. . . . The provision referred to is this: Every taxpayer of the district receives a portion of all the water distributed exactly equivalent to his proportion of the total tax levied, and this water is his to use or to sell as he may elect, so that, if his lot is not fit for cultivation, he nevertheless gets a full equivalent for the tax assessed to him."

The distinction between the words "susceptible of irrigation," in the first portion of the clause and the words "benefited by irrigation by said system," as thus construed, will not be overlooked.

It is clear, therefore, that the board of supervisors not only has no power to pass upon the



Digitized by Google

question of the expediency of forming the district, but has no practical power to prescribe its boundaries.

They are peremptorily required by the terms of the act to submit the question of the organization of the district to the qualified voters of the district.

Before considering the legal question involved, the court should consider the practical working of this scheme of irrigation. The scheme may, in some cases, result in an abundant supply of water. In all cases it will result in an abundant supply of bonds, assessments, liens, and sales for nonpayment. The provision is for the creation of a nondescript quasi or semi-quasi public corporation for the purpose of managing the irrigation of private property. The board of directors of this corporation may not and probably will not include a single landholder.

Patronage, plunder, and bonds without limit are the obvious tendency and result, if not the direct object, of the act. Towns and villages, however solidly built, may be included, and practically are included, in the districts proposed. The supreme court of California has made this remark in regard to districts formed under the Wright act:

"We can imagine the formation of an irrigation district under that statute with its boundaries confined to the limits of an incorporated city, or to those of a swamp-land district where irrigation would be productive of injury and of no benefit."

*Woodward* v. *Fruitvale Sanitary Dist.* 99 Cal. 554.

The interest of the petitioners and of the majority of voters combined may be practically nothing, and the power, instead of being exercised by the legislature or by any public tribunal, or representative governmental body, is intrusted to them to bring the district into existence, and—a necessary sequel—to encumber the lands in the district by an indefinite amount of lien obligations. A more cruel, arbitrary, and oppressive system of administration cannot be conceived of. The landholders are at the mercy of an irresponsible body of self-constituted petitioners backed up by a majority of qualified voters, and not a single one of whom may have any interest in land or in the subject of irrigation of lands, except that indirect interest growing out of a possible improvement of a neighborhood.

The supreme court of California itself lately said: "I think the few checks provided by the statute against the reckless or improvident creation of bond liens . . . on all the lands in one of these irrigation districts, largely by the votes of electors who own no part of such lands, should be strictly enforced in favor of the owners of such lands."

*Cullen* v. *Glendora Water Co.* 113 Cal. 510.

This novel mode of constituting districts for assessment is an unlawful delegation of legislative power, and is, in its very nature, one of those exercises of the powers of government, unrestrained by the established principles of private rights and of distributive justice, which this court has declared to be the thing which constitutes the taking of a man's property without due process of law.

The law not only does not confer upon the supervisors any power to determine the expediency of the organization of the district, but provides for a hearing of the petition at a time and under conditions when it would be an impossibility that they should know facts, without a knowledge of which they could not exercise any judgment as to such expediency.

The authorities for the proposition upon which we now rely are quite numerous and very emphatic. The leading case, by reason of the ability and high character of the court from which it emanates, is *People, Shumway,* v. *Bennett,* 29 Mich. 451, 18 Am. Rep. 107. In its essential features on the point now presented it is strikingly identical with the case at bar.

The supreme court of Michigan laid it down as a generally recognized principle never to be lost sight of that, while the law may extend great facilities to persons and communities desirous of becoming incorporated, yet "a compulsory incorporation for municipal purposes can only come from direct legislative action or the action of such persons or bodies as may, by the law of the land, be vested with sufficient delegated authority to bind the community," and further held that while it is manifest that one of the first and most vital questions involved in a public corporation is that of boundaries, and while of course it would be natural for the interest of a compact body of inhabitants to be converted into a village for purposes of government, yet "it would be tyrannical to allow them to determine for themselves what property should be made tributary to their local interests, in which the rest of the town had no concern. That question should be decided on its own merits by an authority so constituted as to be presumably impartial, and such a determination, wherever made, belongs to policy rather than law, and is political and not judicial."

But it is not in the power of a legislature to abdicate its functions or to subject citizens and their interests to the interference of any but lawful public agencies. The judicial power must be vested in courts. Such legislative and local authority as can be delegated at all must be delegated to municipal corporations or local boards and officers. The definition of corporate bounds is second in importance to no corporate interests whatever. If it can be delegated at all so as to include any but single settlements it must be delegated to somebody recognized by the Constitution as capable of receiving such authority and having local jurisdiction over the territory to be incorporated. It is impossible to sustain a delegation of any sovereign power of government to private citizens or to justify their assumption of it.

*Wyandotte County Comrs.* v. *Abbott,* 52 Kan. 148; *Parks* v. *Wyandotte County Comrs.* 61 Fed. Rep. 436; *McCabe* v. *Carpenter,* 102 Cal. 469, 475.

And in other cases the supreme court of California itself has placed its most emphatic condemnation upon laws similar in principle which delegated the legislative power of defining districts to private hands.

*Brandenstein* v. *Hoke,* 101 Cal. 131; *Moulton* v. *Parks,* 64 Cal. 166; *People* v. *Parks,* 58 Cal. 624.



Digitized by Google

It is submitted with confidence that such a devolution of the essential powers of legislation upon private citizens to exercise for their own benefit and advantage, whether direct and immediate, or indirect and incidental, and to the detriment of their neighbors, is, when it culminates in a lien upon the lands of the latter for the purposes designated in the act, nothing short of a taking of private property without due process of law.

*Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 435.

The Wright act finds no support in any of the cases which have sustained the laying out of improvement districts of any kind by the state, or by municipal or other authorities representing the state and exercising governmental power on behalf of the state, as a proper method of taxing or taking property for public use.

3. Assuming again, for the sake of the argument, that the Wright act, so far as it provides for the organization of irrigation districts by means of a petition of fifty or a majority of the landholders of the district proposed in the petition, approved by a vote of the majority of the electors of the district, is a legitimate exercise of legislative power so as to constitute to that extent due process of law for the taking of private property by taxation, we submit that there is a further fatal defect in the act, in that it permits the whole cost to be levied by the board of directors of the district upon all of the real estate of the district according to value, with no reference to the degree of benefit conferred, all of which is done without due process of law and without compensation to the owner, and herein it violates the Constitutional provisions whose aid we invoke.

Here, again the legislature does not decide or declare that in the irrigation of a particular district described by it, or to be described by a municipal or other public authority representing it, the assessment shall be according to value as in its judgment the nearest approximation to benefit; but it decides and declares that in any district that may be described by petitioners and created by qualified electors the assessment according to value shall prevail. We submit that this method of taxation is purely arbitrary and capricious, contrary to the fundamental principles of taxation, and that it deprives the statute of the character of due process.

It is impossible, in a scheme which provides for local improvements to be instituted upon private petition approved by a mere majority of the local electors, that the legislature, which itself has abdicated the determination of the propriety of the improvement or the bounding of its district, should be deemed to have regarded the assessment ad valorem as any approximation to the actual benefit received.

In his opinion in *Re Madera Irrig. Dist. Bonds*, 92 Cal. 324, 14 L. R. A. 755, Mr. Justice Harrison says:

"All taxation has its source in the necessities of organized society, and is limited by such necessity, and can be exercised only by some demand for the public use or welfare. And whether the tax be by direct imposition for revenue or by assessment for a local improvement, it is based upon the theory that it is in return for the benefit received by the person who pays the tax, or by the property which is assessed. For the purpose of apportioning this benefit, the legislature may determine in advance what property will be benefited by designating the district within which it is to be collected, as well as the property upon which it is to be imposed, or it may appoint a commission or delegate to a subordinate agency the power to ascertain the extent of this benefit."

Under the Wright act, neither the legislature nor any subordinate or local legislative body determines what property will be benefited, either "by designating the district" or "by designating the property upon which the assessment is to be imposed." As we have shown, this power of designation and determination is practically vested in the petitioners. They may include any lands susceptible of irrigation, or which, under the construction given to the statute by the supreme court of California in *Modesto Irrig. Dist.* v. *Tregea*, 88 Cal. 353, would be even indirectly benefited thereby, by the increased productiveness of adjoining property, or which were, in their natural state, susceptible of irrigation.

Mr. Justice Harrison further says in the *Madera Case:* "It is not necessary to show that property within the district may be actually benefited by the local improvement, and, even if it positively appear that no benefit is received, such property is not thereby exempted from bearing its portion of the assessment, nor is the act unconstitutional because it provides that such property shall be assessed."

We submit that this statement of the law is simply revolutionary of all established principles, precedents, and cases upon this subject, and that the true principle is directly to the contrary.

As was said by Chief Justice Shaw, in *Wright* v. *Boston*, 9 Cush. 233, the principle is that, "when certain persons are so placed as to have a common interest amongst themselves, but in common with the rest of the community, laws may be justly made providing that, under suitable and equitable regulations, those common interests shall be so managed that those who enjoy the benefits shall equally bear the burden."

*Tide Water Co.* v. *Coster*, 18 N. J. Eq. 518, 526, 90 Am. Dec. 634.

The Wright act provides by § 27, as amended February 16, 1889, in regard to "real estate offered for sale for assessments due thereon," that "in case there is no purchaser in good faith for the same, . . . the whole amount of the property assessed shall be struck off to the irrigation district within which such lands are situated as the purchaser."

It is a well-settled rule of construction in the consideration of such statutes, that "the constitutional validity of a law is to be tested, not by what has been done under it, but what may by its authority be done."

*Stuart* v. *Palmer*, 74 N. Y. 195, 30 Am. Rep. 389; *Montana Co.* v. *St. Louis Min. & M. Co.* 152 U. S. 170 (38: 400).

If we are rightly informed, the instances of actual outrage, oppression, and spoliation



Digitized by Google

which already have occurred under the authority of this act exceed anything that the imagination could suggest.

The valuable lands and properties are brought within the line of the proposed district for the very purpose of bearing the brunt of the taxation which is sure to follow the creation of the district—a situation which has uniformly received the condemnation of the courts.

*Brandenstein* v. *Hoke*, 101 Cal. 131; *Macon* v. *Patty*, 57 Miss. 378, 34 Am. Rep. 451.

It is not true that the legislative power in making assessments for local improvements, whether exercised directly by the legislature, or by any subordinate governmental agencies, is unlimited and can be exercised in a despotic and arbitrary way.

*People* v. *Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Hammett* v. *Philadelphia*, 65 Pa. 155, 3 Am. Rep. 615; *Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255.

The case now before this court cannot be judicially disposed of without a study of the truly powerful opinion of the supreme court of Pennsylvania in the case last referred to.

The concluding sentences of the opinion in that case are entirely opposite.

"Taxation is bounded in its exercise by its own nature, essential characteristics, and purpose. It must therefore visit all alike in a reasonably practicable way, of which the legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people in districts and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation; extortion, not assessment; and falls within the clearly implied restriction of the Bill of Rights."

Later Pennsylvania cases still more forcibly affirming this doctrine are: *Allegheny City* v. *Western Pennsylvania R. Co.* 138 Pa. 375; *Re Pittsburgh*, 138 Pa. 401, 434; *Morewood Avenue*, 159 Pa. 20; *Re Park Avenue Sewer*, 169 Pa. 433.

The case of *State, Agens*, v. *Newark*, 37 N. J. L. 415, contains another magnificent presentation of the proposition upon which we now rely.

The court of appeals of New York, in the case of *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, has placed itself in the same line.

See also *Thomas* v. *Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Davidson* v. *New Orleans*, 96 U. S. 97 (24: 616); *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701 (28: 569); *Wurts* v. *Hoagland*, 114 U. S. 606 (29: 229); *People, Parker*, v. *Jefferson County Ct.* 55 N. Y. 604; *Cypress Pond Draining Co.* v. *Hooper*, 2 Met. (Ky.) 250.

4. Finally, assuming again, for the sake of the argument, that the statute in question is a valid exercise of legislative power in respect to the formation of the district by the means and through the agencies provided, and that the mode of assessment can be regarded as due process of law, we claim that the total want of an opportunity to be heard on the question of the expediency of forming the district, on the question of boundaries, on the question of cost and scheme of improvement, and on the question of benefit received, deprives the act of the constitutional character of due process of law as it has been heretofore defined by this court.

The only hearing accorded to the landholder, from the beginning to the end of the scheme, from the time of the filing of the petition until his land is sold out for nonpayment of assessment, is the very scanty right of being heard upon the question of the valuation of his property, and perhaps of other property, included in the district. That is accorded to him, apparently as an idle form; for even in respect to that limited point, if he cannot be heard on the question of benefit received, the hearing is utterly nugatory.

The principle has been stated by the supreme court of California:

"It is a principle which underlies all forms of government by law that a citizen shall not be deprived of life, liberty, or property without due process of law. The legislature has no power to take away a man's property, nor can it authorize its agents to do so, without first providing for personal notice to be given to him and for a full opportunity of time, place, and tribunal to be heard in defense of his rights. This constitutional guaranty is not confined to judicial proceedings but extends to every case in which a citizen may be deprived of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature."

*Mulligan* v. *Smith*, 59 Cal. 280.

In regard to the fundamental question as to whether there shall be an irrigation district, there is no hearing because the supervisors to whom the petition is to be presented have no power to consider or determine that question. It is idle, we submit, to say, as the supreme court of California does, that in this respect the grievance of the landholder is the same as is suffered by everybody within the limits of a municipal or school district whose organization and boundaries are to be determined by a popular vote of the residents of the proposed district. There is no resemblance whatever between the cases. The supervisors have no power to reject a petition.

A petition being once filed, there must be a district organized containing the lands described in the petition more or less subject to the very feeble power of modification lodged in the hands of the supervisors, if two thirds of the qualified electors so vote. It is really this organization of the district which forges the chain that inevitably fastens the fatal lien of the assessment upon the property of the landholder.

There is no hearing, as a matter of right, accorded to the landholder upon the question of boundaries. He may get notice, it is true, if he happens to take the local paper, that the petition is to be presented, but there is no right given him to present objections, and no duty imposed upon the supervisors to hear his objections. The law must require notice to them to give them a right to hear and an opportunity to be heard.

*Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

The right to be heard in tax cases is a constitutional one and indefeasible, and applies to



Digitized by Google

these special assessments for local improvements.

*Santa Clara County* v. *Southern P. R. Co.* 18 Fed. Rep. 385; *Scott* v. *Toledo*, 36 Fed. Rep. 385; *Meyers* v. *Shields*, 61 Fed. Rep. 718; *Ulman* v. *Baltimore*, 72 Md. 587, 11 L. R. A. 224; *San Mateo County* v. *Southern P. R. Co.* 13 Fed. Rep. 722; *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

As to the scheme of irrigation and its practicability and cost there is no pretense that these landholders who are to pay are to be consulted or to have a hearing in any respect whatever.

The audacious claim is made on the part of the upholders of the system that the mere right of being heard each on the value of his own land, without more, and without any right to be heard on the total cost or the proportional burden which he is to bear, or the benefit which he is to receive, is sufficient to uphold the act.

In answer to this objection, or rather in answer to the more limited objection that the act makes no provision for a hearing to be granted to the owners of the land prior to the organization of the district, it is claimed by Mr. Justice Harrison, in his opinion in *Re Madera Irrig. Dist. Bonds*, 92 Cal. 328, 14 L. R. A. 755, that the proceeding up to that point is merely for the creation of a public corporation, which is to be invested with certain political duties which it is to exercise in behalf of the state. He claims that it has never been held that the inhabitants of a district are entitled to notice and hearing upon a proposition to submit such a question to a popular vote; that it would be competent for the legislature to enact it without such a submission; and that it has as much power to create the district in accordance with the will of a majority of the electors.

We care not by what name the legal entity created by the act may be called, whether a public or a quasi or a semi-quasi, or, as it has been called by one learned judge, a bastard public-private corporation, but we do deny most emphatically that the function with which it is invested, the duties which it is to discharge, are in any manner political duties to be exercised in behalf of the state.

It is nothing more nor less than a service to be rendered to the landowners of the district for their own account without any intervention or interest of the public. It is for these landowners that the directors are to procure and furnish the water for use or for sale. It is for them and at their expense that they are to issue the bonds. It is for them that the directors are to mortgage the property acquired and to constitute the plant of irrigation works. There is nothing public about it; and if there is any force in the points we have already presented, there is no force in this contention of that learned judge.

It is the organization of the district which brings into existence the power to entail all these burdens upon the property within it. Until the organization no such power exists.

Once organized it moves irresistibly against any effort of the individual landowner to stay its course. The mere existence of the district is thus a cloud upon the title of the landholders and inevitably charges them with the cost of whatever debt may be incurred whether the bonds are already issued or not.

So, it is not sound reasoning to claim, as Mr. Justice Harrison does, that the landholder's property is not affected by the organization of the district.

The supreme court of California has very recently said: "The petition is the initial and jurisdictional point, and when that has been passed, landowners as such have no more power in the premises."

*Fallbrook Irrig. Dist.* v. *Abila*, 106 Cal. 355, 364.

We do not think that, within any of the cases that have been adjudicated by this court, the landholders can be denied a hearing on all these important matters, and must put up with the idle and almost formal hearing of the question of the valuation of each landowner's individual piece of property.

We invoke the decisions of this court already made in support of the proposition that there must be an actual hearing on the real merits, and not a mere formal one on a strictly side issue, in order to give to the proceedings the character of due process of law.

*Kennard* v. *Louisiana, Morgan*, 92 U. S. 480 (23: 478); *McMillen* v. *Anderson*, 95 U. S. 37 (24: 335); *Davidson* v. *New Orleans*, 96 U. S. 97 (24: 616); *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701 (28: 569); *Wurts* v. *Hoagland*, 114 U. S. 606 (29: 229); *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky* ("*Kentucky R. Tax Cases*") 115 U. S. 321 (29: 414); *Walston* v. *Nevin*, 128 U. S. 578 (32: 544); *Lent* v. *Tillson*, 140 U. S. 316 (35: 419).

Finally, in *Spencer* v. *Merchant*, 125 U. S. 345 (31: 763), this rule is laid down:

"If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

Even an act imposing a tax and declaring what lands should be deemed to be benefited recognized the right of the landholders to be heard upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature had conclusively determined to be benefited.

We think that no case can be found supporting a statute which deprives citizens of their property with no other right to be heard than upon the question of value of their own property, which is arbitrarily made the basis of assessment without any regard to actual benefit received, against the objection that such a statute is not due process of law.

Finally, the claim that the confirmation act, approved March 16, 1889, is a cure for the objection of want of notice and hearing is properly disposed of by the suggestion of Ross, Ch. J., in the *Fallbrook Case*, that it gives no right of hearing to the landholder, but is merely a proceeding to be taken, not by the landholder, but by the directors at their option.

*Messrs.* **John F. Dillon**, *Harry Hubbard*, and *John M. Dillon*, for appellants:

This case involves no question except due process of law under the 14th Amendment of the Constitution of the United States.



Digitized by Google

In the exercise of jurisdiction in this case the circuit court should have followed the decisions of the state court as to the construction of the irrigation statutes and as to all other matters of state law involved in this case.

The supreme court of California has repeatedly decided that the provisions of the Wright act as to the formation of irrigation districts do not violate any provision of the state Constitution, and that the said act is valid in every respect.

*Turlock Irrig. Dist.* v. *Williams*, 76 Cal. 360; *Central Irrig. Dist.* v. *De Lappe*, 79 Cal. 351; *Crall* v. *Poso Irrig. Dist.* 87 Cal. 140; *Modesto Irrig. Dist.* v. *Tregea*, 88 Cal. 334; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L. R. A. 755; *Tregea* v. *Owens*, 94 Cal. 317; *People* v. *Selma Irrig. Dist.* 98 Cal. 206; *Rialto Irrig. Dist.* v. *Brandon*, 103 Cal. 384; *Quint* v. *Hoffman*, 103 Cal. 506; *Woodruff* v. *Perry*, 103 Cal. 611; *Fallbrook Irrig. Dist.* v. *Abila*, 106 Cal. 355, 365; *Cullen* v. *Glendora Water Co.* 113 Cal. 510.

The supreme court of California also expressly holds that in the formation of the district the Wright act (§ 2) does provide for a hearing by the board of supervisors of any landowner or other party interested.

*Fallbrook Irrig. Dist.* v. *Abila*, 106 Cal. 355; *Page* v. *Los Angeles County Supers.* 85 Cal. 50; *Modesto Irrig. Dist.* v. *Tregea*, 88 Cal. 334; *People* v. *Hagar*, 52 Cal. 181.

In matters of state law the Federal courts must follow the decisions and precedents of the state courts.

*Shelby* v. *Guy*, 24 U. S. 11 Wheat. 361 (6: 495); *Jackson, St. John*, v. *Chew*, 25 U. S. 12 Wheat. 153 (6: 583); *Green* v. *Neal*, 31 U. S. 6 Pet. 291 (8: 402); *Roberts* v. *Lewis*, 153 U. S. 367 (38: 747); *Nesmith* v. *Sheldon*, 48 U. S. 7 How. 812 (12: 925); *Van Rensselaer* v. *Kearney*, 52 U. S. 11 How. 297 (13: 703); *Webster* v. *Cooper*, 55 U. S. 14 How. 488 (14: 510); *Leffingwell* v. *Warren*, 67 U. S. 2 Black, 599 (17: 261).

Questions of law arising in respect of municipal divisions of a state are matters of local state law on which the decisions of the state courts are conclusive and must be followed by the Federal courts.

*Detroit* v. *Osborne*, 135 U. S. 492 (34: 260).

The construction of the Constitution and statutes of a state as to political or municipal divisions of such state are emphatically matters of local state law on which the decisions of the state courts are conclusive, and must be followed by the Federal courts.

*Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701 (28: 569); *Bowman* v. *Lewis* ("*Missouri* v. *Lewis*") 101 U. S. 22 (25: 989); *Union Nat. Bank* v. *Bank of Kansas City*, 136 U. S. 223 (34: 341); *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408 (36: 485); *Bauserman* v. *Blunt*, 147 U. S. 647 (37: 316); *May* v. *Tenney*, 148 U. S. 60 (37: 368).

Mr. Justice **Peckham** delivered the opinion of the court:

The decision of this case involves the validity of the irrigation act enacted by the legislature of the state of California and set forth in the above statement of facts. The principal act, 152] *passed in 1887, has been amended once or twice by subsequent legislation, but in its main features it remains as first enacted. The title of the act indicates its purpose. It is admitted by all that very large tracts of land in California are in fact "arid lands," which require artificial irrigation in order to produce anything of value. There are different degrees, however, in which irrigation is necessary, from a point where, without its use, the land is absolutely uncultivable, to that where, if not irrigated artificially, it may yet produce some return for the labor of the husbandman in the shape of a puny and unreliable crop, but nothing like what it could and would do if water were used upon it. There are again other lands which, if not irrigated, will still produce the ordinary cereal crops to a more or less uncertain extent, but which, if water be used artificially upon them at appropriate times, are thereby fitted to and will produce much more certain and larger crops than without it, and will be also rendered capable of producing fruit and grapes of all kinds, of first rate quality, and in very large quantities. What is termed the "arid" belt is said in the Census Bulletin, No. 23, for the census of 1890, to extend from Colorado to the Pacific ocean, and to include over 600,000,000 acres of land.

Of this enormous total, artificial irrigation has thus far been used only upon about three and a half million acres, of which slightly over a million acres lie in the state of California. It was stated by counsel that something over thirty irrigation districts had been organized in California under the act in question, and that a total bonded indebtedness of more than $16,000,000 had been authorized by the various districts under the provisions of the act, and that more than $8,000,000 of the bonds had been sold and the money used for the acquisition of property and water rights and for the construction of works necessary for the irrigation of the lands contained in the various districts.

Whether these statements are perfectly accurate or not is a matter of no great importance, as it has been assumed by all that numbers of districts have been formed under the act and a very large indebtedness already incurred, and that more *will be necessary before [153 all the districts will be placed in an efficient working condition. All these moneys, if the act be valid, must eventually be repaid from assessments levied upon the lands embraced within the respective districts, while the annually recurring interest upon these moneys is also to be paid in the same way. Taking the California act as a model, it was also stated and not contradicted that several of the other states which contain portions of the arid belt (seven or eight of them) had passed irrigation acts, and that proceedings under them were generally awaiting the result of this litigation. The future prosperity of these states, it was claimed, depended upon the validity of this act as furnishing the only means practicable for obtaining artificial irrigation, without the aid of which millions and millions of acres would be condemned to lie idle and worthless, which otherwise would furnish enormous quantities of agricultural products and increase the material wealth and prosperity of that whole section of country. On the other hand



Digitized by Google

it has been asserted, with equal earnestness, that the whole scheme of the act will, if carried out to the end, result in the practical confiscation of lands like those belonging to the appellees herein for the benefit of those owning different kinds of land upon which the assessments for the water would be comparatively light, and the benefits resulting from its use far in excess of those otherwise situated. Such results, it is said, are nothing more than taking by legislation the property of one person or class of persons and giving it to another, which is an arbitrary act of pure spoliation, from which the citizen is protected, if not by any state Constitution at least by the Federal instrument, under which we live and the provisions of which we are all bound to obey.

These matters are only alluded to for the purpose of showing the really great practical importance of the question before the court to the people of California, and of those other states where similar statutes have been passed. Important not alone to the public, but also and specially important to those landowners whose lands are not only to be irrigated but are also to be assessed for the payment of the cost of the construction of the works necessary for supplying the water.

154] *This court fully appreciates the importance of the question, and its decision has been reached after due reflection upon the subject and after a careful examination of the authorities bearing upon it.

The form in which the question comes before the court in this case is by appeal from a decree of the United States circuit court for the southern district of California, perpetually enjoining the collector of the irrigation district from executing a deed conveying the land of the plaintiff, Maria King Bradley, under a sale made of such land pursuant to the provisions of the act under consideration. The grounds upon which relief was sought were that the act was in violation of the Federal Constitution and also the Constitution of the state of California. The decree is based upon the sole ground that the act violates the Federal Constitution in that it in substance authorizes the taking of the land of the appellee "without due process of law." Coming before the court in this way, we are not confined in our review of the decision of the lower court within the same limits that we would be if the case were here on error from the judgment of a state court.

The jurisdiction of the United States circuit court in this case was based upon the fact that the plaintiffs were aliens and subjects of Great Britain, and that court therefore had the same jurisdiction as a state court would have had to try the whole question and to examine and decide not only as to its conformity with the Federal Constitution, but in addition whether the act were a violation of the state Constitution, and whether the provisions of the act itself had been complied with. In exercising that jurisdiction it was nevertheless the duty of the trial court to follow and be guided by the decisions of the highest state court upon the construction of the statute, and upon the question whether as construed the statute violated any provision of the state Constitution. The same duty rests upon this court, and it has been so determined from the earliest period of its history. If the act of the state legislature as construed by its highest court conflicts with the Federal Constitution or with any valid act of Congress, it is the duty of the circuit court and of this court to so decide, and to thus enforce *the provisions of the Federal Constitu- [155 tion. The following are some of the numerous cases in which this principle has been announced and carried into effect: *Shelby* v. *Guy*, 24 U. S. 11 Wheat. 361 [6: 495]; *Nesmith* v. *Sheldon*, 48 U. S. 7 How. 812 [12: 925]; *Van Rensselaer* v. *Kearney*, 52 U. S. 11 How. 297 [13: 703]; *Webster* v. *Cooper*, 55 U. S. 14 How. 488 [14: 510]; *Leffingwell* v. *Warren*, 67 U. S. 2 Black, 599 [17: 261]; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 704 [28: 569, 570]; *Detroit* v. *Osborne*, 135 U. S. 492 [34: 260].

We should not be justified in holding the act to be in violation of the state Constitution in the face of clear and repeated decisions of the highest court of the state to the contrary, under the pretext that we were deciding principles of general constitutional law. If the act violate any provision, expressed or properly implied, of the Federal Constitution, it is our duty to so declare it, but if it do not, there is no justification for the Federal courts to run counter to the decisions of the highest state courts upon questions involving the construction of state statutes or Constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law. The contrary has not been held in this court by the case of *Citizens' Sav. & L. Asso.* v. *Topeka*, 87 U. S. 20 Wall. 655 [22: 455]. In that case a statute of Kansas was held invalid because by its provisions the property of the citizen under the guise of taxation would be taken in aid of a private enterprise, which was a perversion of the power of taxation. The case was brought in the United States circuit court for the district of Kansas, and was decided by that court in favor of the city. There had been no decision of the highest state court upon the question whether the act violated the Constitution of Kansas, and consequently there was none to be followed by the Federal court upon that question. This court held that a law taxing the citizen for the use of a private enterprise conducted by other citizens was an unauthorized invasion of private right. Mr. Justice Miller said that there were such rights in every free government which were beyond the control of the state. The ground of the decision was as stated; that the act took the property of the citizen for a private purpose, although under the forms of taxation. In thus holding, there was no overruling *or refusing to follow the decisions [156 of the highest court of the state respecting the Constitution of its own state.

We are therefore practically confined in this case to the inquiry whether the act in question, as it has been construed by the state courts, violates the Federal Constitution.

The assertion that it does is based upon that part of the 14th Amendment of the Constitution, which reads as follows: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."



Digitized by Google

Referring to the amendment above quoted, the appellees herein urge several objections to this act. They say, first, that the use for which the water is to be procured is not in any sense a public one, because it is limited to the landowners who may be such at the time when the water is to be apportioned, and the interest of the public is nothing more than that indirect and collateral benefit that it derives from every improvement of a useful character that is made in the state. Second. They assert that under the act in question the irrigation of lands need not be limited to those which are in fact unproductive, but that by its very terms the act includes all lands which are susceptible of one mode of irrigation from a common source, etc., no matter how fertile or productive they may already be, and it is denied that the furnishing of a fertilizer for lands of individual proprietors which are already productive, in order to make them more productive, is in any legal sense a public improvement. Third. It is also objected that under the act the landowner has no right to demand and no opportunity is given him for a hearing on the question whether his land is or can be benefited by irrigation as proposed; also, that he has no right to a hearing upon the question whether the statute has been complied with in the preliminaries requisite to the formation of the district. Fourth. That the basis of assessment for the cost of construction is not in accordance with and in proportion to the benefits conferred by the improvement. And finally, that land which cannot in fact be benefited may yet under the act be placed in one of the irrigation districts and assessed 157] upon its value to pay the cost *of construction of works which benefit others at his expense. These are the main objections urged against the act.

It has often been said to be extremely difficult to give any sufficient definition of what is embraced within the phrase "due process of law," as used in the constitutional amendment under discussion. None will be attempted here. It was stated by Mr. Justice Miller, in *Davidson* v. *New Orleans*, 96 U. S. 97, 104 [24: 616, 619], that there was "abundant evidence that there exists some strange misconception of the scope of this provision as found in the 14th Amendment. In fact it would seem from the character of many of the cases before us and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." Of course, no such jurisdiction exists or is claimed to exist by the parties here. It is at the same time most difficult to set certain and clear bounds to the right of this court and consequently to its duty to review questions arising under state legislation with reference to this amendment as to due process of law.

It never was intended that the court should, as the effect of the amendment, be transformed into a court of appeal, where all decisions of state courts involving merely questions of general justice and equitable considerations in the taking of property should be submitted to this court for its determination. The final jurisdiction of the courts of the states would thereby be enormously reduced and a corresponding increase in the jurisdiction of this court would result, and it would be a great misfortune in each case. *Mobile County* v. *Kimball*, 102 U. S. 691, 704 [26: 238, 242]; *Missouri P. R. Co.* v. *Humes*, 115 U. S. 512, 520 [29: 463, 465]. We reiterate the statement made in *Davidson* v. *New Orleans*, *supra*, that "whenever by the laws of the state or by state authority a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole state or of some more limited portion of the community, and those laws provide for a mode *of [158 confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

Coming to a review of these various objections, we think the first, that the water is not for a public use, is not well founded. The question, What constitutes a public use? has been before the courts of many of the states and their decisions have not been harmonious, the inclination of some of these courts being towards a narrower and more limited definition of such use than those of others.

There is no specific prohibition in the Federal Constitution which acts upon the states in regard to their taking private property for any but a public use. The 5th Amendment which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the Federal government as has many times been decided. *Ex parte Spies*, 123 U. S. 131 [31: 80]; *Thorington* v. *Montgomery*, 147 U. S. 490 [37: 252]. In the 14th Amendment the provision regarding the taking of private property is omitted, and the prohibition against the state is confined to its depriving any person of life, liberty, or property, without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the state instead of the Federal government.

Is this assessment, for the nonpayment of which the land of the plaintiff was to be sold, levied for a public purpose? The question has, in substance, been answered in the affirmative by the people of California, and by the legislative and *judicial branches of the [159 state government. The people of the state adopted a Constitution which contains this provision:

"*Water and Water Rights*—Sec. 1. The use of all water apportioned or that may hereafter be apportioned, for sale, rental, or distribution, is hereby declared to be a public use and subject to the regulation and control of the state



Digitized by Google

in the manner to be prescribed by law." Cal. Const. art. 14.

The latter part of § 12 of the act now under consideration, as amended in March, 1891, reads as follows:

"The use of all water required for the irrigation of the lands of any district formed under the provisions of this act, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required to fully carrying out the provisions of this act, is hereby declared to be for public use, subject to the regulation and control of the state, in the manner prescribed by law."

The supreme court of California has held in a number of cases that the irrigation act is in accordance with the state Constitution, and that it does not deprive the landowners of any property without due process of law; that the use of the water for irrigating purposes under the provisions of the act is a public use, and the corporations organized by virtue of the act for the purpose of irrigation are public municipal corporations organized for the promotion of the prosperity and welfare of the people. *Turlock Irrig. Dist.* v. *Williams*, 76 Cal. 360; *Central Irrig. Dist.* v. *De Lappe*, 79 Cal. 351; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L. R. A. 755.

We do not assume that these various statements, constitutional and legislative, together with the decisions of the state court, are conclusive and binding upon this court upon the question as to what is due process of law, and, as incident thereto, what is a public use. As here presented these are questions which also arise under the Federal Constitution, and we must decide them in accordance with our views of constitutional law.

It is obvious, however, that what is a public [160] use frequently *and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which character of the use is questioned.

To provide for the irrigation of lands in states where there is no color of necessity therefor within any fair meaning of the term, and simply for the purpose of gratifying the taste of the owner, or his desire to enter upon the cultivation of an entirely new kind of crop, not necessary for the purpose of rendering the ordinary cultivation of the land reasonably remunerative, might be regarded by courts as an improper exercise of legislative will, and the use might not be held to be public in any constitutional sense, no matter how many owners were interested in the scheme. On the other hand, in a state like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances which surround the subject and with the necessities and the occasion for the irrigation of the lands than can anyone be who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own state. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that state on this question.

Viewing the subject for ourselves and in the light of these considerations we have very little difficulty in coming to the same conclusion reached by the courts of California.

The use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be *formed or [161] carried into effect. In general, the water to be used must be carried for some distance and over or through private property which cannot be taken *in invitum* if the use to which it is to be put be not public, and if there be no power to take property by condemnation it may be impossible to acquire it at all. The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation. *Cole* v. *La Grange*, 113 U. S. 1 [28: 896]. A private company or corporation without the power to acquire the land *in invitum* would be of no real benefit, and at any rate the cost of the undertaking would be so greatly enhanced by the knowledge that the land must be acquired by purchase, that it would be practically impossible to build the works or obtain the water. Individual enterprise would be equally ineffectual; no one owner would find it possible to construct and maintain waterworks and canals any better than private corporations or companies, and unless they had the power of eminent domain they could accomplish nothing. If that power could be conferred upon them it could only be upon the ground that the property they took was to be taken for a public purpose.

While the consideration that the work of irrigation must be abandoned if the use of the water may not be held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact is in this case a most important consideration. Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the state in material wealth and prosperity. To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the state. The fact that the use of the water is limited to the landowner is not therefore a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a *public use. All [162] landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellow in his right to the use of the water. It is not necessary, in order that the use should be public,



Digitized by Google

that every resident in the district should have the right to the use of the water. The water is not used for general, domestic, or for drinking purposes, and it is plain from the scheme of the act that the water is intended for the use of those who will have occasion to use it on their lands. Nevertheless, if it should so happen that at any particular time the landowner should have more water than he wanted to use on his land, he has the right to sell or assign the surplus or the whole of the water as he may choose.

The method of the distribution of the water for irrigation purposes, provided for in § 11 of the act, is criticised as amounting to a distribution to individuals and not to lands, and on that account it is claimed that the use for irrigation may not be achieved, and therefore the only purpose which could render the use a public one may not exist. This claim we consider not well founded in the language and true construction of the act. It is plain that some method for apportioning the use of the water to the various lands to be benefited must be employed, and what better plan than to say that it shall be apportioned ratably to each landowner upon the basis which the last assessment of such owner for district purposes within the district bears to the whole sum assessed upon the district? Such an apportionment, when followed by the right to assign the whole or any portion of the waters apportioned to the landowner, operates with as near an approach to justice and equality as can be hoped for in such matters, and does not alter the use from a public to a private one. This right of assignment may be availed of also by the owner of any lands which, in his judgment, would not be benefited by irrigation, although the board of supervisors may have otherwise decided. We think it clearly appears that all who by reason of their ownership of or connection with any portion of the lands would have occasion to use the water, would in truth have 163]the opportunity to use it *upon the same terms as all others similarly situated. In this way the use, so far as this point is concerned, is public because all persons have the right to use the water under the same circumstances. This is sufficient.

The case does not essentially differ from that of *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701 [28: 569], where this court held that the power of the legislature of California to prescribe a system for reclaiming swamp lands was not inconsistent with any provision of the Federal Constitution. The power does not rest simply upon the ground that the reclamation must be necessary for the public health. That indeed is one ground for interposition by the state, but not the only one. Statutes authorizing drainage of swamp lands have frequently been upheld independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 9, 22 [28: 889, 894]; *Wurts* v. *Hoagland*, 114 U. S. 606, 611 [29: 229, 230]; Cooley, Taxn. 2d ed. p. 617. If it be essential or material for the prosperity of the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit.

Irrigation is not so different from the reclamation of swamps as to require the application of other and different principles to the case. The fact that in draining swamp lands it is a necessity to drain the lands of all owners which are similarly situated goes only to the extent of the peculiarity of situation and the kind of land. Some of the swamp lands may not be nearly so wet and worthless as some others, and yet all may be so situated as to be benefited by the reclamation, and *whether it is so[164 situated or not must be a question of fact. The same reasoning applies to land which is, to some extent, arid instead of wet. Indeed, the general principle that arid lands may be provided with water and the cost thereof provided for by a general tax or by an assessment for local improvement upon the lands benefited, seems to be admitted by counsel for the appellees. This necessarily assumes the proposition that water used for irrigation purposes upon lands which are actually arid is used for a public purpose, and the tax to pay for it is collected for a public use, and the assessment upon lands benefited is also levied for a public purpose. Taking all the facts into consideration, as already touched upon, we have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use.

Second. The second objection urged by the appellees herein is that the operations of this act need not be and are not limited to arid, unproductive lands, but include within its possibilities all lands, no matter how fertile or productive, so long as they are susceptible "in their natural state" of one mode of irrigation from a common source, etc. The words "in their natural state" are interpolated in the text of the statute, by the counsel for the appellees, on the assumption that the supreme court of California has thus construed the act in *Modesto Irrig. Dist. Directors* v. *Tregea*, 88 Cal. 334. The objection had been made in that case that it was unlawful to include the city of Modesto in an irrigation district. The court, per Chief Justice Beatty, said that the legislature undoubtedly intended that cities and towns should in proper cases be included in irrigation districts, and that the act as thus construed did not violate the state Constitution. The learned Chief Justice also said:

"The idea of a city or town is of course associated with the existence of streets to a greater or less extent, lined with shops and stores, as well as of dwelling houses, but it is also a notorious fact that in many of the towns and cities of California there are gardens and orchards inside the corporate boundaries, requiring irrigation. It is equally notorious that in many districts *lying outside of the cor- [165



Digitized by Google

porate limits of any city or town there are not only roads and highways, but dwelling houses, outhouses, warehouses, and shops. With respect to those things which determine the usefulness of irrigation there is only a difference of degree between town and country. . . . It being equally clear and notorious as matter of fact that there are cities and towns which not only may be benefited by irrigation, but actually have in profitable use extensive systems for irrigating lands within their corporate limits, it cannot be denied that the supervisors of Stanislaus county had the power to determine that the lands comprising the city of Modesto would be benefited by irrigation and might be included in an irrigation district. . . . In the nature of things, an irrigation district must cover an extensive tract of land, and no matter how purely rural and agricultural the community may be, there must exist here and there within its limits a shop or warehouse covering a limited extent of ground that can derive no direct benefit from the use of water for irrigation. Here, again, the difference between town and country is one of degree only, and a decision in the interest of shop owners in towns, that their lots cannot be included in an irrigation district, would necessarily cover the case of the owner of similar property outside of a town. It is nowhere contended by the appellant that in organizing irrigation districts it is the duty of the supervisors to exclude by demarcation every minute tract or parcel of land that happens to be covered by a building or other structure which unfits it for cultivation, and certainly the law could not be so construed without disregarding many of its express provisions, and at the same time rendering it practically inoperative. We construe the law to mean that the board may include in the boundaries of the district all lands which *in their natural state would be* benefited by irrigation and are susceptible of irrigation by one system, regardless of the fact that buildings or other structures may have been erected here and there upon small lots, which are thereby rendered unfit for cultivation at the same time that their value for other purposes may have been greatly enhanced."

166] *We do not see in this construction, the meaning of which is apparent from the foregoing quotations from the opinion, any substantial difference, favorable to the appellees, from the act without the interpolation of those words.

As an evidence of what can be done under the act it is alleged in the complaint in this suit that the plaintiff is the owner of 40 acres of land in the district, and that it is worth $5,000, and that it is subject to beneficial use without the necessity of water for irrigation, and that it has been used beneficially for the past several years for purposes other than cultivation with irrigation. These allegations are admitted by the answer of the defendants, who nevertheless assert that if a sufficient supply of water is obtained for the irrigation of the plaintiff's land, the same can be beneficially used for many purposes other than that for which it can be used without the water for irrigating the same.

What is the limit of the power of the legislature in regard to providing for irrigation? Is it bounded by the absolutely worthless condition of the land without the artificial irrigation? Is it confined to land which cannot otherwise be made to yield the smallest particle of a return for the labor bestowed upon it? If not absolutely worthless and incapable of growing any valuable thing without the water, how valuable may the land be and to what beneficial use and to what extent may it be put before it reaches the point at which the legislature has no power to provide for its improvement by that means? The general power of the legislature over the subject of providing for the irrigation of certain kinds of lands must be admitted and assumed. The further questions of limitation, as above propounded, are somewhat legislative in their nature, although subject to the scrutiny and judgment of the courts to the extent that it must appear that the use intended is a public use as that expression has been defined relatively to this kind of legislation.

The legislature by this act has not itself named any irrigation district, and, of course, has not decided as to the nature and quality of any specific lands which have been included in any such district. It has given a general statement as to what *conditions must [167 exist in order to permit the inclusion of any land within a district. The land which can properly be so included is, as we think, sufficiently limited in its character by the provisions of the act. It must be susceptible of one mode of irrigation, from a common source and by the same system of works, and it must be of such a character that it will be benefited by irrigation by the system to be adopted. This, as we think, means that the amount of benefit must be substantial and not limited to the creation of an opportunity to thereafter use the land for a new kind of crop, while not substantially benefiting it for the cultivation of the old kind, which it had produced in reasonable quantities and with ordinary certainty and success without the aid of artificial irrigation. The question whether any particular land would be thus benefited is necessarily one of fact.

The legislature not having itself described the district, has not decided that any particular land would or could possibly be benefited as described, and, therefore, it would be necessary to give a hearing at some time to those interested upon the question of fact whether or not the land of any owner which was intended to be included would be benefited by the irrigation proposed. If such a hearing were provided for by the act, the decision of the tribunal thereby created would be sufficient. Whether it is provided for will be discussed when we come to the question of the proper construction of the act itself. If land which can, to a certain extent, be beneficially used without artificial irrigation, may yet be so much improved by it that it will be thereby and for its original use substantially benefited, and, in addition to the former use, though not in exclusion of it, if it can then be put to other and more remunerative uses, we think it erroneous to say that the furnishing of artificial irrigation to that kind of land cannot be, in a legal sense, a public improvement, or the use of the water a public use.

Assuming for the purpose of this objection



Digitized by Google

that the owner of these lands had by the provisions of the act, and before the lands were finally included in the district, an opportunity to be heard before a proper tribunal upon the ques-
168] tion of benefits, *we are of opinion that the decision of such a tribunal in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question. It cannot be that upon a question of fact of such a nature this court has the power to review the decision of the state tribunal which has been pronounced under a statute providing for a hearing upon notice. The erroneous decision of such a question of fact violates no constitutional provision. The circuit court in this case has not assumed to undertake any such review of a question of fact.

The difference between this case and the case of *Spencer* v. *Merchant*, 125 U. S. 353 [31: 766], is said by counsel for appellees to consist in the fact that in the *Spencer Case* the lands in question might have been benefited, while here the additional benefit to land already capable of beneficial use without irrigation is in no legal or proper sense a benefit which can be considered for the purpose of an assessment. We think this alleged difference is not material. It is in each case one of degree only, and the fact of the benefit is by the act to be determined after a hearing by the board of supervisors. In this case the board has necessarily decided that question in favor of the fact of benefits by retaining the lands in the district. Unless this court is prepared to review all questions of fact of this nature decided by a state tribunal where the claim is made that the judgment was without any evidence to support it or was against the evidence, then we must be concluded by the judgment on such a question of fact and treat the legal question as based upon the facts as found by the state board. Due process of law is not violated, and the equal protection of the laws is given when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the state and where the party who may subsequently be charged in his property has had a hearing or an opportunity for one provided by the statute. *Kelly* v. *Pittsburgh*, 104 U. S. 78 [26: 658].

In view of the finding of the board of supervisors on this question of benefits, assuming that there has been one, this court cannot say
169] as a matter of law that the lands of *the plaintiff in this case have not been or cannot be benefited by this proposed irrigation. There can be no doubt that the board of supervisors (if it have the power to hear the question of benefits, as to which something will be said under another head of this discussion) would be a proper and sufficient tribunal to satisfy the constitutional requirement in such case. In speaking of the board of supervisors, Mr. Chief Justice Waite in *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 354 [28: 173, 176], said: "Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule." In that case the board was to fix the price of water, while in this it is to determine the fact of benefits to lands. The principle is the same in each case.

It may be that the action of the board upon any question of fact as to contents or sufficiency of the petition, or upon any other fact of a jurisdictional nature, is open to review in the state courts. It would seem to be so held in *Modesto Irrig. Dist. Directors* v. *Tregea*, decided in 1891. 88 Cal. 334.

If the state courts would have had the right to review these findings of fact, jurisdictional in their nature, the United States circuit court had the same right in this case, but it has not done so, its judgment being based upon the sole ground that the act was a violation of the 14th Amendment of the Federal Constitution. Upon the question of fact as to benefits, decided by the board, it is held that its decision is conclusive. 88 Cal. 334. Whether a review is or is not given upon any of these questions of fact (if the tribunal created by the state had power to decide them, and if an opportunity for a hearing was given by the act), is a mere question of legislative discretion. It is not constitutionally necessary in such cases to give a rehearing or an appeal. *Bowman* v. *Lewis* (*"Missouri* v. *Lewis"*), 101 U. S. 22 [25: 989]; *Pearson* v. *Yewdall*, 95 U. S. 294 [24: 436].

Very possibly a decision by the statutory tribunal which included *tracts of land [170 within the district that plainly could not by any fair or proper view of the facts be benefited by irrigation, would be the subject of a review in some form and of a reversal by the courts, on the ground that the decision was based, not alone upon no evidence in its favor, but that it was actually opposed to all the evidence and to the plain and uncontradicted facts of common knowledge, and was given in bad faith. In such case the decision would not have been the result of fair or honest, although grossly mistaken, judgment, but would be one based upon bad faith and fraud, and so could not be conclusive in the nature of things. A question of this kind would involve no constitutional element, and its solution would depend upon the ordinary jurisdiction of courts of justice over this class of cases. It is not pretended that such jurisdiction has been invoked or exercised here. As was said by Mr. Justice Miller in *Davidson* v. *New Orleans*, 96 U. S. 97 [24: 616], where the objection was made that part of the property was not in fact benefited, "this is a matter of detail with which this court cannot interfere if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds." To the same effect, *Spencer* v. *Merchant*, 125 U. S. 345 [31: 763]; *Lent* v. *Tillson*, 140 U. S. 316, 333 [35: 419, 427].

In regard to the matters thus far discussed, we see no valid objection to the act in question.

Third. We come now to the question of the true construction of the act. Does it provide for a hearing as to whether the petitioners are of the class mentioned and described in the act and as to their compliance with the conditions



Digitized by Google

of the act in regard to the proceedings prior to the presentation of the petition for the formation of the district? Is there any opportunity provided for a hearing upon notice to the land owners interested in the question whether their lands will be benefited by the proposed irrigation? We think the right to a hearing in regard to all these facts is given by the act, and that it has been practically so construed by the supreme court of California in some of the cases above cited from the reports of that court and in 171] the cases cited in the briefs of *counsel. We should come to the same conclusion from a perusal of the act. The first two sections provide for the petition and a hearing. The petition is to be signed by a majority of the holders of title to lands susceptible of one mode of irrigation, etc. This petition is to be presented to the board of supervisors at a regular meeting, and notice of intended presentation must be published two weeks before the time at which it is to be presented. The board shall hear the same, shall establish and define the boundaries, although it cannot modify those described in the petition, so as to except from the district lands susceptible of irrigation by the same system of works applicable to the other lands in the proposed district, and the board cannot include in the district, even though included in the description in the petition, lands which shall not, in the judgment of the* board, be benefited by irrigation by said system.

If the board is to hear the petition upon notice, and is not to include land which will not, in its judgment, be benefited by irrigation by the system, we think it follows as a necessary and a fair implication that the persons interested in or who may be affected by the proposed improvement have the right under the notice to appear before the board and contest the facts upon which the petition is based, and also the fact of benefit to any particular land included in the description of the proposed district.

It is not an accurate construction of the statute to say that no opportunity is afforded the landowner to test the sufficiency of the petition in regard to the signers thereof and in regard to the other conditions named in the act; nor is it correct to say that the power of the board of supervisors is, in terms, limited to making such changes in the boundaries proposed by the petitioners as it may deem proper, subject to the conditions named in the act.

When the act speaks of a hearing of the petition, what is meant by it? Certainly it must extend to a hearing of the facts stated in the petition, and whether those who sign it are sufficient in number and are among the class of persons mentioned in the act as alone having 172]the right to sign the same. *The obvious purpose of the publication of the notice of the intended presentation of the petition is to give those who are in any way interested in the proceeding an opportunity to appear before the board and be heard upon all the questions of fact, including the question of benefits to lands described in the petition. As there is to be a hearing before the board, and the board is not to include any lands which in its judgment will not be benefited, the plain construction of the act is that the hearing before the board includes the question as to the benefits of the lands, because that is one of the conditions upon which the final determination of the board is based, and the act cannot in reason be so construed as to provide that while the board is to give a hearing on the petition it must nevertheless decide in favor of the petitioners, and must establish and define the boundaries of the district, although the signers may not be fifty, or a majority of the holders of title, as provided by the act, and notwithstanding some other defects may become apparent upon the hearing.

This provision that the board "shall establish and define such boundaries" (§ 2) cannot reasonably or properly be held to mean that the boundaries must be established notwithstanding any or all of the defects above mentioned have been proved upon the hearing. The language of the sections taken together plainly implies that the board is to establish and define the boundaries only in case the necessary facts appear upon the hearing which the act provides for.

It cannot be supposed that the act while providing for a hearing of the petition, yet at the same time commands the establishment and defining of the boundaries of a district, notwithstanding the fact that the hearing shows a failure on the part of the petitioners to comply with some or all of the conditions upon which the right to organize is placed by the same act.

Such an absurdity cannot be imputed to the legislature. It cannot be doubted that, by the true construction of the act, the board of supervisors is not only entitled, but it is its duty, to entertain a contest by a landowner in respect to the question whether the signers of the petition fulfill the requirements *described in 173 the 1st section of the act, and if the board find in favor of the contestant upon that issue, it is the duty of the board, under the provisions of the statute, to deny the petition and dismiss the proceedings. Otherwise, what is the hearing for? And if upon a hearing of the question of benefits to any land described in the petition it appears to the board that such lands will not be benefited, it is the duty of the board to so decide, and to exclude the lands from the district. The inclusion of any lands is, therefore, in and of itself a determination (after an opportunity for a hearing) that they will be benefited by the proposed irrigation.

We have said that the supreme court of California has substantially decided these questions in the same way. This appears, among others, in the case of *Modesto Irrig. Dist. Directors* v. *Tregea*, 88 Cal. 334, above referred to. The court uses this language in that case:

"The formation of irrigation districts is accomplished by a proceeding so closely analogous to those prescribed for the formation of swamp-land reclamation districts that the decisions with respect to the latter are authority as to the former, and we cite as conclusive of this point *People* v. *Hagar*, 52 Cal. 181, 66 Cal. 60. Many decisions to the same effect are cited by the briefs of counsel, but we deem it unnecessary to refer to them."

In the case of *People* v. *Hagar*, 52 Cal. 171, 182, it was held that the board of supervisors on presentation of the petition was to hear and determine the question of jurisdiction, and whether the allegations of the petition were



Digitized by Google

true. An approval and confirmation of the petition and the establishment of the district was held to be a conclusive judgment by the board that the lands mentioned and in question were swamp lands; that the petitioners held the proper evidences of title thereto, and *that the lands would be benefited by the reclamation.* These jurisdictional facts, it was held, must exist before the district could lawfully be established.

The provision for a hearing in the irrigation act is similar, and the condition therein that lands which in the judgment of the board are not 174] benefited shall not be included, *renders the determination of the board including them after a hearing a judgment that such lands will be benefited by the proposed plan of irrigation.

The publication of a notice of the proposed presentation of the petition is a sufficient notification to those interested in the question, and gives them an opportunity to be heard before the board. *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701 [28: 569]; *Lent* v. *Tillson*, 140 U. S. 316 [35: 419]; *Paulsen* v. *Portland*, 149 U. S. 30 [37: 637].

The formation of one of these irrigation districts amounts to the creation of a public corporation, and their officers are public officers. This has been held in the supreme court of California. *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L. R. A. 755; *People* v. *Selma Irrig. Dist.* 98 Cal. 206.

There is nothing in the essential nature of such a corporation, so far as its creation only is concerned, which requires notice to or hearing of the parties included therein before it can be formed. It is created for a public purpose, and it rests in the discretion of the legislature when to create it, and with what powers to endow it.

In the act under consideration, however, the establishment of its boundaries and the purposes for which the district is created, if it be finally organized by reason of the approving vote of the people, will almost necessarily be followed by and result in an assessment upon all the lands included within the boundaries of the district. The legislature thus in substance provides for the creation not alone of a public corporation, but of a taxing district whose boundaries are fixed, not by the legislature, but after a hearing, by the board of supervisors, subject to the final approval by the people in an election called for that purpose. It has been held in this court that the legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the dis- 175]trict, and the citizen has no *constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.*, the amount of the tax which he is to pay. *Paulsen* v. *Portland*, 149 U. S. 30–41 [37: 637–641]. But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in *Spencer* v. *Merchant*, 125 U. S. 345, 356 [31: 763, 767], and *Walston* v. *Nevin*, 128 U. S. 578 [32: 544]. Such a hearing upon notice is duly provided for in the act.

Then, as to a hearing upon the question of apportionment, the act in §§ 18, 20, and 21 provides a general scheme for the assessment upon the property included in the district, and it also provides for a notice by publication of the making of such assessment, and an opportunity is given to the taxpayer to be heard upon the question of the valuation and assessment, and to make such objections thereto as he may think proper, and after that the assessors are to decide.

Thus the act provides for a hearing of the landowner both as to the question whether his land will be benefited by the proposed irrigation, and when that has been decided in favor of the benefit, then upon the question of the valuation and assessment of and upon his land included in the district. As to other matters, the district can be created without notice to anyone. Our conclusion is that the act as construed with reference to the objections considered under this third head is unassailable.

Fourth. The fourth objection and also the objection above alluded to as the final one may be discussed together, as *they practically [176 cover the same principle. It is insisted that the basis of the assessment upon the lands benefited, for the cost of the construction of the works, is not in accordance with and in proportion to the benefits conferred by the improvement, and therefore there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law.

Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation. Whatever objections may be urged to this kind of an assessment as being in violation of the state Constitution, yet, as the state court has held them to be without force, we follow its judgment in that case, and our attention must be directed to the question whether any violation of the Federal Constitution is shown in such an assessment. Can an ad valorem assessment on the land benefited, or, in other words, can such an assessment as is provided for in §§ 18, 20, 21, and 22 of the act, be legally levied in such a case as this? Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land



Digitized by Google

ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an ad valorem method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this **177** ]court ought *to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law.

In the case of *Davidson* v. *New Orleans*, 96 U. S. 97 [24: 616], the assessment, with which this court refused to interfere, was for a local improvement (reclaiming swamp lands), and by § 8 of the act of the legislature of Louisiana, passed in 1858 (La. Laws 1858, p. 114), such an uniform assessment was levied upon "the superficial or square foot of land situate within the draining section or district of such board" as would pay for the cost of construction. The effect of this provision was that each foot of land in the whole district paid the same sum as any other foot, although the assessment was founded upon the theory of an assessment for benefits. It was complained that the amount assessed upon plaintiff's lands was excessive, and that part of them received no benefit at all, and it was to that argument that the reply was made that it was a matter of detail so far as this court was concerned, *i. e.*, it was not a constitutional question, and therefore was not reviewable here. 96 U. S. 106 [24: 620].

In *Walston* v. *Nevin*, 128 U. S. 578 [32: 544], an assessment was laid upon lands for benefits received from construction of a local improvement, according to the number of square feet owned by the landowner. It was urged that it was not an assessment governed by the amount of benefits received, but was an absolutely arbitrary and illegal method of assessment. This court held the objection not well founded and that the matter was for the decision of the legislature, to which body the discretion was committed, of providing for payment of the improvement.

We refer to the case of *Cleveland* v. *Tripp*, 18 R. I. 59, decided in 1880, as one which treats this subject with much ability. The act provided for the construction of a sewer in the city of Providence and directed the laying of an assessment upon the abutting lands of a certain sum for each front foot and another sum for each square foot extending back 150 feet. The claim was made that such a mode of assess- **178**] ment *did not apply the tax in proportion to the benefits received, and was unequal and unfair, and therefore unconstitutional. The court, while admitting the complaints of inequality to be well founded, yet held the act to be within the power of the legislature.

There are some states where assessments under such circumstances as here exist and made upon an ad valorem basis have been held invalid, as an infringement of some provision of the state Constitution, or in violation of the act under which they were levied. Counsel have cited several such in the briefs herein filed. We do not discover, and our attention has not been called to any case in this court where such an assessment has been held to violate any provision of the Federal Constitution. If it do not, this court can grant no relief.

The method of assessment here provided for may not be the best which could have been adopted in order to accomplish the most equal and exact justice which the nature of the case permits. But none the less we are unable to say that it runs counter to any provision of the Federal Constitution, and we must for that reason hold the objection here considered to be untenable.

An objection is also urged that it is delegating to others a legislative right, that of the incorporating of public corporations, inasmuch as the act vests in the supervisors and the people the right to say whether such a corporation shall be created, and it is said that the legislature cannot so delegate its power, and that any act performed by such a corporation by means of which the property of the citizen is taken from him, either by the right of eminent domain or by assessment, results in taking such property without due process of law.

We do not think there is any validity to the argument. The legislature delegates no power. It enacts conditions upon the performance of which the corporation shall be regarded as organized with the powers mentioned and described in the act.

After careful scrutiny of the objections to this act we are compelled to the conclusion that no one of such objections is well taken. *The judgment appealed from herein is therefore* *reversed and the cause remanded to the [**179** circuit court of the United States for the southern district of California for further proceedings not inconsistent with this opinion.

**Mr. Chief Justice Fuller and Mr. Justice Field dissent.**

---

WILLIAM TREGEA, *Plff. in Err.*,
*v.*
BOARD OF DIRECTORS OF THE MODESTO IRRIGATION DISTRICT.

(See S. C. Reporter's ed. 179-189.)

*Federal question—validity of bonds.*

1. Where the defendant contended in the state court that the operation of a state irrigation statute deprived him of property without due process of law, contrary to the Federal Constitution, and

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitu-*



Digitized by Google

the supreme court of the state decided against such contention, a Federal question was presented.

2. A writ of error from this court to a state court will not be sustained to review its decision in favor of the validity of an order for the issue of bonds by an irrigation district, made in an *ex parte* proceeding before the issue of the bonds, although one resident of the district appeared and filed an answer and set up a Federal question, as the affirmance of the state decision would be simply an adjudication of the right to make a contract, and of a purely moot question unless the bonds should be issued, and the proceeding is only one to secure evidence.

[No. 13.]

*Argued October 15, 16, 1895. Ordered reargued, April 1, 1895. Reargued January 23, 24, 27, 1896. Decided November 16, 1896.*

IN ERROR to the Supreme Court of the State of California to review a judgment of that court modifying the decree of the Superior Court of Stanislaus County, California, by striking out so much thereof as confirmed an order for the issue of $800,000 of bonds of the Modesto irrigation district, and affirmed it as to certain other particulars. A motion to dismiss was also made. *Dismissed.*

See same case below, 88 Cal. 334.

Statement by Mr. Justice **Brewer**:

On March 7, 1887, the legislature of the state of California passed an act (Cal. Stat. 1877, p. 29), whose scope and purpose were disclosed in the 1st section:

180] *"Sec. 1. Whenever fifty, or a majority of freeholders owning lands susceptible of one mode of irrigation from a common source, and by the same system of works, desire to provide for the irrigation of the same, they may propose the organization of an irrigation district under the provisions of this act, and when so organized such districts shall have the powers conferred, or that may hereafter be conferred, by law upon such irrigation districts."

This act was amended in 1889 and 1891 (Cal. Stat. 1889, 15; Cal. Stat. 1891, 53, 142, 147, 274), the amendments looking to a mere perfection of the system. In a general way it may be remarked that the system contemplated was substantially this: Upon petition of the requisite number of inhabitants of a proposed district and publication of notice the board of supervisors of the county in which the district, or the larger portion of it, was situated was required to examine into the matter at a regular meeting, and after its determination to give notice and call an election, at which all the electors of the proposed district were entitled to vote. If two thirds of the votes cast were in favor thereof an order was to be entered on the minutes of the board declaring the proposed district organized into a municipal corporation. Provision was made for directors, three or five in number, to be elected from separate divisions or from the district at large, who constituted the governing board of the new corporation. They had charge of the construction of the irrigation works, of the levy of taxes, and the borrowing of money. They were authorized to submit to the voters the question of issuing bonds for a specified amount, such bonds to be the obligations of the district, to be paid by taxation in the ordinary manner of discharging municipal obligations. Section 12 reads that "the use of all water required for the irrigation of the lands of any district formed under the provisions of this act, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this act, is hereby declared to be a public use, subject to the regulation and control of the state, in the manner prescribed by law."

*This was simply carrying into the [181 statute the language of the state Constitution, § 1, art. 14, which is as follows:

"Sec. 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the control and regulation of the state, in the manner to be prescribed by law."

The constitutionality of this law has been settled in the case of *Fallbrook Irrig. Dist.* v. *Bradley*, just decided, 164 U. S. 112 [*ante*, 369].

On February 16, 1889, two acts were passed (Cal. Stat. 1889, 18, 21) for changing the boundaries of irrigation districts by taking in adjacent territory or excluding some of the territory within the original boundaries. On March 16, 1889 (Cal. Stat. 1889, 212), a further act was passed authorizing action in the courts at the instance of the board of directors for a judicial determination of the validity of the proceedings in respect to the issue of bonds, and this, if desired, before the bonds had been actually disposed of. The purpose of this act is thus stated by the supreme court of California, in the opinion filed in the present case:

"As the validity of the bonds when issued depends upon the regularity of the proceedings of the board and upon the ratification of the proposition by a majority of the electors, it is matter of common knowledge that investors have been unwilling to take them at their par value while all the facts affecting their validity remain the subject of question and dispute."

"To meet this inconvenience, for the security of investors, and to enable the irrigation districts to dispose of their bonds on advantageous terms, the supplemental act under which this proceeding was instituted was passed."

In the summer of 1887 the Modesto irrigation district was organized under authority of the act of March 7, 1887. The conformity of the proceedings taken in its organization to the requirements of the act is not denied. The area of the district as organized was 108,000 acres. The board of directors, *after estimat- [182 ing and determining that $800,000 were necessary for the proper construction of the irrigation works, ordered a special election to be held on December 14, 1887, to enable the voters of said district to pass upon the ques-

*tion*, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

*As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,*—see notes to Hart v. Lamphire, 7: 679, and Commercial Bank of Cincinnati v. Buckingham, 12: 169.



Digitized by Google

tion of the issue of bonds to that amount. The election was had and resulted in a large majority in favor of the issuing of the bonds; out of 515 votes cast, 439 were in the affirmative. On January 8, 1888, the board of directors met at a regular meeting and ordered the bonds of the district to the amount of $800,000 to be issued in the manner and form prescribed by law. On or about June 4, 1889, certain parties owning tracts of land within the boundaries of the irrigation district proceeded under the terms of the exclusion act to petition for an exclusion of their lands from its limits. These proceedings culminated in an order of July 20, 1889, excluding a tract of 28,000 acres, and leaving only 80,000 acres within the district. On July 31, 1889, no bonds having as yet been issued under the order of January 8, 1888, the board of directors entered a new order for the issue of bonds to the amount of $400,000. The resolution which was passed described the denomination and form of the bonds thus to be issued, and directed that notice be given that sealed proposals would be received up to September 3, 1889, for the purchase of such bonds. On August 1, 1889, the day after the entry of the last order, a petition was filed by the board of directors in the superior court in Stanislaus county, seeking a judicial determination, in accordance with the act of March 16, 1889, of the validity of the proposed issue of bonds. The petition as filed set forth only the order of July 31, 1889, for the issuance of bonds to the amount of $400,000, and asked that they be declared valid. In these proceedings Tregea, a resident of the district, appeared and filed an answer. The case, as between the board of directors and Tregea, came on for trial on October 21, 1889, and, after the testimony had all been received and during the argument, the plaintiffs were permitted to amend their petition so as to include therein the order of the directors of January 8, 1888, for the issue of $800,000 in bonds, and a prayer for the confirmation thereof. No one had notice of this amend-
183] ment *except the defendant Tregea. He demanded that, in consequence of such amendment, a trial should be had *de novo*, but the court overruled his application, granted leave to file an amended answer, and permitted further evidence only in respect to the new matter set out in such amended pleadings. On November 29, 1889, written findings of fact and conclusions of law were filed and judgment entered, which judgment was in the following language:

"Wherefore, by reason of the law and the finding aforesaid, it is ordered, adjudged, and decreed that the proceedings by and under the direction of the board of supervisors of said county which are recited in the said findings, which were had for the organization of said irrigation district, the boundaries of which are described in said finding, including in said proceedings the election in said finding mentioned, which was held for the purpose of determining whether said proposed district should be organized as an irrigation district, be, and the same hereby are, approved and confirmed; and it is further ordered, adjudged, and decreed that the proceedings had by and under the direction of the said board of directors which are recited in said petition and said findings, which were had for the purpose of the issue and sale of the bonds of said district to the amount of $800,000, including in said proceedings the said election mentioned in said petition and findings, which was held for the purpose of determining whether the bonds of said district should be issued; also the proceedings by and under the direction of said board, which are recited in said findings, by which a certain tract of land in said findings described, which was included within the boundaries of said district as it was organized as aforesaid, was excluded from said district, and by which the boundaries of said district are defined and described as said boundaries were and remained upon and after the exclusion from said district of said tract of land, which said boundaries are in said findings described, and also the proceedings by and under the direction of said board by which it was ordered that bonds of said district to the amount of $400,000, parcel of said amount of $800,000 of *said bonds, be offered for sale in the [184 manner provided by law, be, and each and all of said proceedings is, and are hereby, approved and confirmed; and it is further ordered, adjudged, and decreed that the said Modesto irrigation district, ever since its organization as aforesaid, has been and now is a duly and legally organized irrigation district, and that said irrigation district possesses full power and authority to issue and sell from time to time the bonds of said irrigation district to the amount of $800,000."

The defendant appealed from this judgment and decree to the supreme court of the state, which, on March 19, 1891, modified the decree of the superior court by striking out so much thereof as confirmed the order of January 8, 1888, for the issue of $800,000 of bonds of the district, and, as so modified, affirmed it. The opinion of that court is found in 88 Cal. 334. To reverse this judgment of the supreme court of the state the defendant sued out a writ of error from this court.

*Messrs.* **Thomas B. Bond,** *George W. Schell,* and *J. J. Scrivner* for plaintiff in error.

*Mr.* **John H. Boalt,** as *amicus curiæ,* filed a brief in favor of plaintiff in error.

*Messrs.* **A. L. Rhodes, Benjamin Harrison, C. C. Wright, John F. Dillon,** *Joseph H. Call, Harry Hubbard,* and *John M. Dillon* for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

A motion was made to dismiss this case on the ground of the lack of a Federal question. It appears from the opinion *of the supreme[185 court of the state that the defendant contended before it that the attempt to bind the reconstituted district—that is, the district diminished by the exclusion of 28,000 acres, and in which his property was situated—by a vote of the district prior to such exclusion in respect to the issue of bonds, was in violation of U. S. Const. art. 1, § 10, and that it overruled and denied such contention. So there was considered by the supreme court of the state the distinct question of an alleged conflict between the



Digitized by Google

proceedings confirmed by the decree of the lower court and rights claimed under the Constitution of the United States, and the decision was against those rights. Further, the real contention of the defendant was and is that the operation of this statute is to deprive him of property without due process of law. The burden of his case from the first has rested in the alleged conflict between proceedings had under the irrigation statute and the Federal Constitution; so that beyond the express declaration in the opinion of the supreme court of the state, we may look to the real matter in dispute, and these unite in forbidding us to say that no Federal question was presented. The motion to dismiss on that ground must be overruled.

But going beyond this matter, we are confronted with the question whether, in advance of the issue of bonds and before any obligation has been assumed by the district, there is a case or controversy with opposing parties, such as can be submitted to and can compel judicial consideration and judgment. This is no mere technical question. For, notwithstanding the adjudication by the courts of the state in favor of the validity of the order made for the issue of $400,000 of bonds, and, notwithstanding any inquiry and determination which this court might make in respect to the matters involved, there would still be no contract executed, no obligation resting on the district. All that would be accomplished by our affirmance of the decision of the state court would be an adjudication of the right to make a contract, and unless the board should see fit to proceed in the exercise of the power thus held [186] to exist, all the time and labor *of the court would be spent in determining a mere barren right—a purely moot question.

We are not concerned with any question as to what a state may require of its judges and courts, nor with what measures it may adopt for securing evidence of the regularity of the proceedings of its municipal corporations. It may authorize an auditor or other officer of state to examine the proceedings and make his certificate of regularity conclusive evidence thereof, or it may permit the district to appeal to a court for a like determination, but in either event it is a mere proceeding to secure evidence.

The directors of an irrigation district occupy no position antagonistic to the district. They are the agents and the district is the principal. The interests are identical, and it is practically an *ex parte* application on behalf of the district for the determination of a question which may never in fact arise. It may be true, as the supreme court says, that it is of advantage to the district to have some prior determination of the validity of the proceedings in order to secure the sale of its bonds on more advantageous terms, but that does not change the real character of this proceeding.

This is not the mere reverse of an injunction suit brought by an inhabitant of the district to restrain a board from issuing bonds, for in such case there is an adversary proceeding. Underlying it is the claim that the agent is proposing to do for his principal that which he has no right to do, and to bind him by a contract which he has no right to make; and to protect his property from burden or cloud the taxpayer is permitted to invoke judicial determination. If in such suit an injunction be granted, as is prayed for, the decision is not one of a moot question, but is an adjudication which protects the property of the taxpayer.

The power which the directors claim is a mere naked power, and not a power coupled with an interest. It is nothing to them, as agents, whether they issue the bonds or not; they neither make nor lose by an exercise of the alleged power; and if it be determined that the power exists, still no burden *is cast[187] upon the property of the district because no bonds are issued save by the voluntary act of the board.

It may well be doubted whether the adjudication really binds anybody. Suppose the judgment of the court be that the proceedings are irregular, and that no power has been by them vested in the district board, and yet notwithstanding such decision the board issues, as provided by the act, the negotiable bonds of the district, will a bona fide purchaser of those bonds be estopped by that judgment from recovering on the bonds against the district? The doctrine of *lis pendens* does not apply. Neither is any such adjudication binding in respect to negotiable paper unless the party purchases with knowledge of the suit or the decree. *Warren County* v. *Marcy*, 97 U. S. 93 [24: 977]; *Brooklyn* v. *Ætna L. Ins. Co.* 99 U. S. 362 [25: 416]; *Orleans* v. *Platt*, 99 U. S. 676 [25: 404]; *Cass County* v. *Gillett*, 100 U. S. 585 [25: 585]; *Empire Twp.* v. *Darlington*, 101 U. S. 87 [25: 878]; *Thompson* v. *Perrine*, 103 U. S. 806 [26: 612]; *Carroll County Supers.* v. *Smith*, 111 U. S. 556 [28: 517]; *Scotland County* v. *Hill*, 112 U. S. 183 [28: 692].

The case of *Carroll County Supers.* v. *Smith* is instructive on this question. In that case, before the issue of the bonds in suit, an injunction had been issued by the chancery court of the county enjoining the county officials from issuing and delivering the bonds, which injunction was afterwards sustained and made perpetual by the judgment and decree of the supreme court of the state. Notwithstanding which the county officials fraudulently and illegally issued the bonds, and this court sustained a judgment on those bonds in favor of a bona fide holder, saying in the opinion: "The defendant in error was no party to that suit, and the record of the judgment is therefore no estoppel. The bonds were negotiable, and there was, therefore, no constructive notice of any fraud or illegality by virtue of the doctrine of *lis pendens*. *Warren County* v. *Marcy*, *supra*. It is not alleged in the plea that the defendant in error had actual notice of the litigation, or of the grounds on which it proceeded, or that any injunction was served upon the board of supervisors; and, if he had, that notice would have been merely of the question of law, of *which, as we have seen, he is[188] bound to take notice, at all events, and which is now for adjudication in this case."

The case of *Scotland County* v. *Hill*, *supra*, contains nothing in conflict with this, for that determines only the effect of actual notice of the pendency of a suit, the point of the decision being expressed in these words of the Chief Justice:

"The case of *Warren County* v. *Marcy*, 97



Digitized by Google

U. S. 96 [24: 977], decides that purchasers of negotiable securities are not chargeable with *constructive* notice of the pendency of a suit affecting the title or validity of the securities; but it has never been doubted that those who buy such securities from litigating parties, with *actual* notice of the suit, do so at their peril, and must abide the result the same as the parties from whom they got their title."

But if a judgment in such a proceeding as this cannot be invoked by the district as *res judicata* in an action brought against it by the holders of bonds thereafter wrongfully issued, can a judgment in favor of the power be invoked by the holder of such bonds as conclusive upon the district upon the ground of *res judicata?* In order to create estoppel by judgment must there not be mutuality? We do not mean to intimate that it may not have effect as evidence, like the certificate of an auditor declared by a legislature to be conclusive, but is it not simply as evidence and not as *res judicata?*

Some light may be thrown on this question by reference to a matter of a somewhat kindred nature. In states which provide for the organization of corporations under general statute different modes of procedure are prescribed. In some states it is sufficient for the parties desiring to incorporate to prepare a charter, acknowledge it before some official, and file it with the secretary of state, or other public officer, and the certificate of such officer is made the evidence of the incorporation. In other states the parties may file a petition in some court, and that court upon presentation thereof examines into the propriety of the incorporation, and if satisfied thereof enters a decree declaring the petitioners duly incorporated, and the copy of such decree is the evidence of the incorporation. Does the difference in procedure be-
**189**]tween these two *cases create any essential difference in character? Is the one executive and the other judicial? Suppose, in the latter case, the statute had provided that either one of the petitioners might appeal from the decree of a lower to the supreme court of the state, in order to obtain a final adjudication in favor of the propriety of such incorporation, would this court entertain a suit in error to reverse such adjudication by the highest court of the state? Would it not be held in effect, whatever the form, a mere *ex parte* case to obtain a judicial opinion, upon which the parties might base further action? It seems to us that this proceeding is after all nothing but one to secure evidence, that in the securing of such evidence no right protected by the Constitution of the United States is invaded, that the state may determine for itself in what way it will secure evidence of the regularity of the proceedings of any of its municipal corporations, and that unless in the course of such proceeding some constitutional right is denied to the individual, this court cannot interfere on the ground that the evidence may thereafter be used in some further action in which there are adversary claims. So on this ground, and not because no Federal question was insisted upon in the state court, *the case will be dismissed.*

Mr. Justice **Harlan**, Mr. Justice **Gray**, and Mr. Justice **Brown** are of opinion that, as the judgment of the state court was against a right and privilege specially set up and claimed by the plaintiff in error under the Constitution of the United States, such judgment, if not modified or reversed, will conclude him, if not all holders of taxable property in the Modesto irrigation district, in respect of the Federal right and privilege so alleged; consequently, it is the duty of this court to determine, upon its merits, the Federal question so raised by the pleadings and determined by the judgment of the state court. They are also of opinion that the principles announced in *Fallbrook Irrig. Dist.* v. *Bradley*, just decided, 164 U. S. 112 [*ante*, 369], sustain the conclusions of the state court upon this Federal question and require the affirmance of its judgment.

---

## WISCONSIN CENTRAL RAILROAD COMPANY, *Appt.*, [190

*v.*

## UNITED STATES.

(See S. C. Reporter's ed. 190-212.)

*Transportation of mails—departmental construction of act of Congress—action of executive officers—mistake—refunding moneys illegally paid—overpayments by Postmaster General.*

1. The provision for transportation of mails at such price as Congress or the Postmaster General shall fix, made by § 5 of the land grant act of Congress of June 3, 1856, the substance of which section is not re-enacted by the act of May 5, 1864, is among those intended by § 3 of the later act, declaring that the grant is made "upon the same terms and conditions as are contained" in the act of 1856.
2. Departmental construction of an act of Congress, especially when it was neither contemporaneous nor continuous, will not be regarded when this court does not consider the true construction of the act as doubtful.
3. The action of executive officers in matters of account and payment cannot be regarded as a conclusive determination when brought in question in a court of justice.
4. An erroneous conclusion in the construction or application of a statute by the Postmaster General is a "mistake" within the meaning of U. S. Rev. Stat. § 4057, providing for suit to recover money paid by mistake.
5. Parties receiving moneys illegally paid by a public officer are liable *ex æquo et bono* to refund them.
6. Overpayments by a Postmaster General for transportation of mails, which are made under misconstruction or misapprehension of the law, can be deducted by his successor from money subsequently coming due to the same person, as this power is included in the power to cause suit to be brought under U. S. Rev. Stat. § 4057, for money paid by mistake.

[No. 21.]

*Argued March 12, 1895. Ordered for reargument April 15, 1896. Reargued October 15, 16, 1896. Decided November 16, 1896.*

APPEAL from a judgment of the Court of Claims in favor of the Wisconsin Central Railroad Company against the United States



Digitized by Google

for a balance due as compensation for carrying the mails. *Affirmed.*

See same case below, 27 Ct. Cl. 440.

Statement by Mr. Chief Justice Fuller:

An act of Congress of March 3, 1873 (17 Stat. at L. 556, chap. 231) prescribed the rates of compensation for the transportation of the mails on the basis of the average weight, and by 191] an act *of July 12, 1876 (19 Stat. at L. 78, chap. 179), the compensation was directed to be readjusted by the Postmaster General as specified on and after July 1, 1876. Section 13 of this act provided "that railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only 80 per cent of the compensation authorized by this act."

By an act approved June 3, 1856 (11 Stat. at L. 20, chap. 43), Congress granted to the state of Wisconsin lands to aid in the construction of certain railroads northward and northwestward in said state, ultimately reaching the west end of Lake Superior, the land granted being every alternate odd-numbered section for 6 sections in width on each side of the roads respectively. Section 5 of this act provided: "That the United States mail shall be transported over said roads, under the direction of the Postoffice Department, at such price as Congress may, by law, direct: *Provided*, That until such price is fixed by law, the Postmaster General shall have the power to determine the same." Some or all of the roads contemplated in this act not having been constructed, Congress, by act of May 5, 1864 (13 Stat. at L. 66, chap. 80), again granted lands to the state of Wisconsin for three different general lines of railroads, the line covered by § 3 of the act being the one in controversy. By this act alternate odd-numbered sections for 10 sections in width, instead of 6, were granted "upon the same terms and conditions as are contained in the act granting lands to said state to aid in the construction of railroads in said state, approved June 3, 1856."

The two acts in parallel columns, the words in each and not in the other being printed in italics, are as follows:

| ACT OF JUNE 3, 1856. | ACT OF MAY 5, 1864. |
|---|---|
| | Sec. 1. [This section grants land to aid in the construction of a railroad from Saint Croix river or lake to Lake Superior.] |
| | Sec. 2. [This section grants land to aid in the construction of a railroad from Tomah to Saint Croix river or lake.] |
| 192] *Sec. 1. That there be, and is hereby, granted to the state of Wisconsin for the purpose of aiding in the construction of a railroad from *Madison or Columbus, by the way of Portage City to the Saint Croix river or lake between townships 25 and 31, and from thence to the west end of* Lake Superior; *and to Bayfield;* | Sec. 3. *And be it further enacted*, That there be, and is hereby, granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from *Portage City, Berlin, Doty's Island, or Fond du Lac, as said state may determine, and also from Fond du Lac on Lake Winnebago, northerly to the state line*, every alternate section of land designated by odd numbers for 6 sections in width on each side of said roads, *respectively.* |
| But in case it shall appear that the United States have, when the lines or routes of said roads *are* definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, *then* it shall be lawful for any agent or agents, *to be* appointed by the governor *of said state*, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, *so* much land in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached, as aforesaid, which lands (thus selected in lieu of those sold and to which pre emption has attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by *the* state *of Wisconsin* for the use and purpose aforesaid: | But in case it shall appear that the United States have, when the line or route of said road *is* definitely fixed, sold, *reserved, or otherwise disposed of* any sections or parts thereof, granted as aforesaid, or that the right *of [193 pre-emption or homestead* has attached to the same, *that* it shall be lawful for any agent or agents *of said state*, appointed by the governor *thereof*, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, *as* much *public* land in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption *or homestead* has attached as aforesaid, which lands (thus selected in lieu of those sold and to which *the right of* pre-emption *or homestead* has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by *said state, or by the company to which she may transfer the same*, for the use and purpose aforesaid: |
| *Provided*, That the lands to be so located shall in no case be further than *15* miles from the line of *the* roads *in each case, and selected for* and *on account of said roads:* | *Provided*, That the lands to be so located shall in no case be further than *20* miles from the line of *said* road. |
| *Provided further, That the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever:* | |
| *And provided further*, That any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, be, and the same are hereby, reserved *to the United States* from the operation of this act, except so far as it may be found necessary to locate the | *in a northwestern direction, to Bayfield, and thence to Superior*, on Lake Superior, every alternate section of *public* land, designated by odd numbers for 10 sections in width on each side of said road, *upon the same terms and conditions as are contained in the act granting lands to said state to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six.* But in case it shall appear that the United States have, when the line or route of said road *is* definitely fixed, sold, *reserved, or otherwise disposed of* any sections or parts thereof, granted as aforesaid, or that the right *of [193 pre-emption or homestead* has attached to the same, *that* it shall be lawful for any agent or agents *of said state*, appointed by the governor *thereof*, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, *as* much *public* land in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption *or homestead* has attached as aforesaid, which lands (thus selected in lieu of those sold and to which *the right of* pre-emption *or homestead* has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by *said state, or by the company to which she may transfer the same*, for the use and purpose aforesaid: *Provided*, That the lands to be so located shall in no case be further than *20* miles from the line of *said* road. |
| | *Sec. 6. And be it [194 further enacted*, That any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, *and all mineral lands* be and the same are hereby reserved *and excluded* from the operation of this act, except so far as it may be |



Digitized by Google

route of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

Sec. 2. *And be it further enacted*, That the sections and parts of sections of land which, *by such grant*, shall remain to the United States, within 6 miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any 195] of *said lands become subject to private entry until the same have been first offered at public sale at the increased price.

Sec. 3. *And be it further enacted*, That the said lands hereby granted *to said state* shall be subject to the disposal of the *legislature thereof*, for the purposes aforesaid, and no other;

and the said railroads *shall* be and remain public highways for the use of the government of the United States free from toll or other charge, upon the transportation of property or troops of the United States.

Sec. 4. *And be it further enacted, That the lands hereby granted to said state shall be disposed of by said state only in manner following, that is to say: that a quantity of land not exceeding 120 sections, and included within a continuous length of 20 miles of roads, respectively, may be sold; and when the governor of said state shall certify to the Secretary of the Interior that any 20 continuous miles of either of said roads are completed, then* 196] *another like quantity of land hereby granted may be sold; and so from time to time until said roads are completed;*

found necessary to locate the route of *such* railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

Sec. 4. *And be it further enacted*, That the sections and parts of sections of lands which shall remain to the United States within 10 miles on each side of said roads shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of the said *reserved* lands become subject to private entry until the same have been first offered at public sale at the increased price.

Sec. 5. *And be it further enacted*, That the said lands hereby granted shall, *when patented as provided in § 7 of this act*, be subject to the disposal of the *companies respectively entitled thereto*, for the purposes aforesaid, and no other, and the said railroads be, and *shall* remain public highways for the use of the government of the United States, free from *all* toll or other charge, *for* the transportation of *any* property or troops of the United States.

Sec. 7. *And be it further enacted, That whenever the companies to which this grant is made, or to which the same may be transferred, shall have completed 20 consecutive miles of any portion of said railroads, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each 20 miles of said road is completed: Provided, however, That no patents shall issue for any of said lands unless there shall be presented to the Secretary of the Interior a statement, verified on oath or affirmation by the president of said company, and certified by the governor of the state of Wisconsin, that such 20 miles have been completed in the manner required by this act, and setting forth with certainty the points where such 20 miles begin and where the same end; which oath shall be taken before a judge of a court of record of the United States.*

*and if said roads are not completed within ten years,*

no further sales shall be made, and the land unsold shall revert to the United States.

Sec. 8. *And be it further enacted, That the United States mail shall be transported over said roads, under the direction of the Postoffice Department, at such price as Congress may, by law, direct: Provided, That until such price is fixed by law, the Postmaster General shall have the power to determine the same.*

Sec. 9. *And be it further enacted, That if said road mentioned in the 3d section aforesaid is not completed within 10 years from the time of the passage of this act, as provided herein; no further patents shall be issued to said company for said lands, and no further sale shall be made; and* *the lands unsold [197 shall revert to the United States.

Sec. 5. *And be it further enacted, That the time fixed and limited for the completion of said roads in the act aforesaid of June three, eighteen hundred and fifty-six, be, and the same is hereby extended to a period of 5 years from and after the passage of this act.*

The road constructed upon the line indicated in § 3 of the act of 1864 was originally that of two companies, which were afterwards consolidated and became the Wisconsin Central Railroad Company. These roads were constructed by the Phillips & Colby Construction Company, who apparently were to have control and operation of the road until fully equipped and delivered to the railroad company. The time for completion having been extended, portions of said road were completed, equipped, and operated in 1875, and carried mail under the management of the construction company up to some time prior to December 27, 1877, when notice was given of the turning over of the roads to the Wisconsin Central Railroad Company, and from that time the mails have been carried by that company. Commencing in 1875 *and contin-[198 uing until July, 1879, the Postmaster General allowed and paid for the carriage of the mails the customary rates paid to non-land-grant companies. Upon the informal opinion of the Assistant Attorney General for the Postoffice Department, the Postmaster General issued an order, June 2, 1880, directing that from July 1, 1879, the pay should only be at the rate provided by Congress for land grant roads, namely, 80 per cent of the full amount. January 26, 1881, upon a reconsideration, orders were issued recalling the order of June 2, 1880, whereupon the department returned to the earlier practice and paid full rates for the carriage of the mails until January 8, 1884, when Postmaster General Gresham again adopted the construction of June 2, 1880, and applied the same to the compensation of these roads from and after July 1, 1883, and that construction has been applied from thence hitherto, and payment made at the rate of 80 per cent of the amount paid non-land grant roads.



Digitized by Google

In addition to reducing the pay for carrying the mails for the current and subsequent years, namely, from July 1, 1883, the Postmaster General restated the account for the carriage of the mails prior to July 1, 1883, both during the period when they were carried by the construction company and during the period from about December, 1877, to July 1, 1883, in which they were carried by the Wisconsin Central Railroad Company and deducted out of moneys which had been earned since July 1, 1883, the excess over the 80 per cent rate which had been paid during the previous years.

Suit was brought in the court of claims May 26, 1887, by the Wisconsin Central Railroad Company against the United States to recover an alleged balance due as compensation for carrying the mails. The court of claims allowed the railroad company $6,448.80 as being the amount deducted from the claimant's earnings in 1886 and 1887 for payments in excess of the 80 per cent rate made to the construction company while that company was operating the roads, but the court of claims held that Postmaster General Gresham's construction was correct, and that the claimant was restricted to the 80 per cent rate, and therefore disallowed the *claim for the money withheld against the excess and also the amount of the claim for the period subsequent to July 1, 1883. The sums which had been paid to claimant in excess of the 80 per cent rate and which were deducted from subsequently earned pay, amounted to $12,532.43. The 20 per cent subsequent to July 1, 1883, was $16,343.58.

199

The court of claims gave judgment in favor of the Wisconsin Central Railroad Company for $6,448.80, and the railroad company appealed. The United States did not appeal.

The opinion of the court, by Nott, J., is reported 27 Ct. Cl. 440.

*Messrs.* **Louis D. Brandeis,** *Edwin H. Abbot, Howard Morris,* and *William H. Dunbar,* for appellant:

The grant made by § 3 of the act of May 5, 1864, was not upon the condition that the mail should be carried at such rates as Congress might fix.

The act of May 5, 1864, contains no express provision for transportation of the mail.

The circumstances leading to the passage of the act of May 5, 1864, show that Congress did not intend to impose this condition.

The intention of Congress is to be ascertained from the facts attending the passage of the act as well as from its language.

*Winona & St. P. R. Co.* v. *Barney,* 113 U. S. 618, 625 (28: 1109, 1111); *Wisconsin C. R. Co.* v. *Forsythe,* 159 U. S. 46 (40: 71); *Caledonian R. Co* v. *North British R. Co.* L. R. 6 App. Cas. 114, 126.

The facts show that Congress intended not to impose this condition.

*Ross* v. *Doe, Barland,* 26 U. S. 1 Pet. 655, 667 (7: 302, 307).

Such an intention is not inconsistent with any uniform policy of Congress.

*Union P. R. Co.* v. *United States,* 104 U. S. 662 (26: 884).

This condition was not, by reference, incorporated in the act of May 5, 1864.

An analysis of the act shows that no such incorporation by reference was intended.

*McRoberts* v. *Washburne,* 10 Minn. 23.

The structure of the act indicates that the words "terms and conditions" did not refer to the provision in the act of June 3, 1856, for transporting the mail.

*Atkins* v. *Fiber Disintegrating Co.* 85 U. S. 18 Wall. 272, 301 (21: 841, 844); *Re Cambrian R. Co.'s Scheme,* L. R. 3 Ch. App. 278; *Thompson* v. *Farrer,* L. R. 9 Q. B. Div. 372, 384; *People, Westchester F. Ins. Co.,* v. *Davenport,* 91 N. Y. 574.

The language used does not require a construction imposing such a condition.

If the language does require such a construction, the words in question should be disregarded as inconsistent with the general scope of the act.

*Ebbs* v. *Boulnois,* L. R. 10 Ch. 479; *People, Westchester F. Ins. Co.,* v. *Davenport,* 91 N. Y. 574, 585.

The construction contended for the claimant was adopted by the Postoffice Department contemporaneously with the passage of the act of July 12, 1876, chap. 179, and should be followed.

*United States* v. *Alabama G. S. R. Co.* 142 U. S. 615 (35: 1134).

The action of the Postmaster General in withholding money confessedly earned on account of an alleged prior overpayment by his predecessors was illegal, because such order involved the reversal of a decision of his predecessors that the money was payable.

*United States* v. *Bank of Metropolis,* 40 U. S. 15 Pet. 377 (10: 774); *Kendall* v. *Stokes,* 44 U. S. 3 How. 87 (11: 506); *Ex parte Randolph,* 2 Brock. 447; *Stotesbury* v. *United States,* 146 U. S. 196 (36: 940); *Stone* v. *United States,* 70 U. S. 2 Wall. 525 (17: 765); *Shepley* v. *Cowan,* 91 U. S. 330 (23: 424); *Moore* v. *Robbins,* 96 U. S. 530 (24: 848); *Noble* v. *Union River Logging R. Co.* 147 U. S. 165 (37: 123); *Waddell* v. *United States,* 25 Ct. Cl. 323; *Armstrong* v. *United States,* 29 Ct. Cl. 148; *Cotton* v. *United States,* 29 Ct. Cl. 207.

The United States has no right, in any event, to recover the alleged overpayments made, in the main, after full deliberation and with knowledge of all the facts.

*Elliott* v. *Swartwout,* 35 U. S. 10 Pet. 137 (9: 373); *Lamborn* v. *Dickinson County Comrs.* 97 U. S. 181 (24: 926); *Brisbane* v. *Dacres,* 5 Taunt. 143; *Midland Great Western R. Co.* v. *Johnson,* 6 H. L. Cas. 798; *Marshall* v. *Collett,* 1 Younge & C. 232; *Trigge* v. *Lavalles,* 15 Moore, P. C. C. 270; *Clarke* v. *Dutcher,* 9 Cow. 674; *Bank of United States* v. *Daniel,* 37 U. S. 12 Pet. 32 (9: 989); *Rogers* v. *Ingham,* L. R. 3 Ch. Div. 351; *Queen* v. *Lords Comrs. of the Treasury,* 16 Q. B. 357; *Wayne County* v. *Randall,* 43 Mich. 137; *Hearne* v. *New England Mut. M. Ins. Co.* 87 U. S. 20 Wall. 488, 491 (22: 395, 397); *Griswold* v. *Hazard,* 141 U. S. 260 (35: 678); *Hunt* v. *Rousmanier,* 21 U. S. 8 Wheat. 174 (5: 589), 26 U. S. 1 Pet. 1 (7: 27); *McArthur* v. *Luce,* 43 Mich. 435 (38: 204); *Onondaga Supers.* v. *Briggs,* 2 Denio, 26; *Snelson* v. *State,* 16 Ind. 29; *Livermore* v. *Peru,* 55 Me. 469; *United States* v. *Macdaniel,* 32 U. S. 7 Pet. 1 (8: 587); *Hillborn* v. *United States,* 27 Ct. Cl. 547, 163 U. S. 342 (*ante,* 183); *Patterson* v.



Digitized by Google

*United States*, 28 Ct. Cl. 321; *United States* v. *Barker*, 25 U. S. 12 Wheat. 559 (6: 728); *Brent* v. *Bank of Washington*, 35 U. S. 10 Pet. 596 (9: 547); *Bank of United States* v. *United States*, 43 U. S. 2 How. 711 (11: 439); *The Siren* v. *United States*, 74 U. S. 7 Wall. 152 (19: 129); *United States* v. *Smoot*, 82 U. S. 15 Wall. 36 (21: 107); *Cooke* v. *United States*, 91 U. S. 389 (23: 237); *United States* v. *Bostwick*, 94 U. S. 53 (24: 65); *McKnight* v. *United States*, 98 U. S. 179 (25: 115); *Belknap* v. *Schild*, 161 U. S. 10 (40: 599); *Whiteside* v. *United States*, 93 U. S. 247 (23: 882); *Hunter* v. *United States*, 30 U. S. 5 Pet. 173 (8: 86); *Badeau* v. *United States*, 130 U. S. 439 (32: 997).

The court held, in the last-named case, that "inasmuch as the claimant, if not an officer *de jure*, acted as an officer *de facto*, we are not inclined to hold that he has received money which, *ex æquo et bono*, he ought to return."

The United States could not, in any event, avail itself of the alleged overpayments as a defense in this suit, since no counterclaim was filed.

*United States* v. *Burns*, 79 U. S. 12 Wall. 246 (20: 388); *Clark* v. *United States*, 95 U. S. 539 (24: 518); *United States* v. *Behan*, 110 U. S. 338 (28: 168); *United States* v. *Carr*, 132 U. S. 644 (33: 483); *United States* v. *Stahl*, 151 U. S. 366 (38: 194).

*Mr.* **J. E. Dodge**, Assistant Attorney General, for appellee:

The primary proposition of law governing the construction of statutes which grant privileges or relinquish rights of the public is that that they are to be construed strictly against the grantee.

*Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659 (24: 1036); *Newton* v. *Mahoning County Comrs.* 100 U. S. 548 (25: 710); *Slidell* v. *Grandjean*, 111 U. S. 412 (28: 321); *Opinion of Attorney General Black*, 9 Ops. Atty. Gen. 57.

The general policy of the grant of 1864 is not inconsistent with the purpose to impose duty of mail transportation.

*Wisconsin C. R. Co.* v. *Forsythe*, 159 U. S. 46 (40: 71).

Departmental construction is neither contemporaneous nor continuous.

*United States* v. *Alabama G. S. R. Co.* 142 U. S. 615 (35: 1134); *United States* v. *Healey*, 160 U. S. 136 (40: 369); *United States* v. *Moore*, 95 U. S. 760 (24: 588); *Merritt* v. *Cameron*, 137 U. S. 542 (34: 772).

The claimant, having this money which should be repaid to the government and for which it is the duty of the Postmaster General to sue, should not recover any other sums earned by it while such liability to refund exists.

*Hunter* v. *United States*, 30 U. S. 5 Pet. 173 (8: 86); *United States* v. *Jones*, 33 U. S. 8 Pet. 375 (8: 979); *United States* v. *Bank of Metropolis*, 40 U. S. 15 Pet. 377 (10: 774); *Pierce* v. *United States* ("*The Floyd Acceptances*") 74 U. S. 7 Wall. 666 (19: 169); *Kendall* v. *Stokes*, 44 U. S. 3 How. 87 (11: 506); *Lavalette* v. *United States*, 1 Ct. Cl. 147; *McElrath* v. *United States*, 12 Ct. Cl. 201, 102 U. S. 426 (26: 189); *United States* v. *McKee*, 97 U. S. 233 (24: 911); *Whiteside* v. v. *United States*, 93 U. S. 247 (23: 882); *Hawkins* v. *United States*, 96 U. S. 689 (24: 607); *Steele* v. *United States*, 118 U. S. 128 (28: 952); *Mullan* v. *United States*, 118 U. S. 271 (30: 170); *United States* v. *Alabama G. S. R. Co.* 142 U. S. 615 (35: 1134); *United States* v. *Harmon*, 147 U. S. 268 (37: 164).

Mistake of law is good ground for the recovery of money by the government.

*Shepley* v. *Cowan*, 91 U. S. 330 (23: 424); *Stone* v. *United States*, 69 U. S. 2 Wall. 525 (17: 765); *United States* v. *Minor*, 114 U. S. 233 (29: 110); *Mullan* v. *United States*, 118 U. S. 271 (30: 170); *Wisconsin C. R. Co.* v. *Forsythe*, 159 U. S. 46 (40: 71).

**Mr. Chief Justice Fuller** delivered the opinion of the court:

Appellant contends that it was not subject to the 80 per cent rate, and hence that it is entitled to recover both the *items disallowed by [202 the court of claims; and also that, even if this position be untenable, it should not have been charged with amounts which had already been settled and paid under the view that the company was not so restricted, and should have been awarded the sum of $12,532.43 withheld.

The act of 1864 expressly provided that the grant was made upon "the same terms and conditions as are contained in the act granting lands to said state to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six," and that act contained in its 5th section the following: "That the United States mail shall be transported over said roads under the direction of the Postoffice Department at such price as Congress may by law direct, provided that until such price is fixed by law, the Postmaster General shall have the power to determine the same."

But it is argued that the "terms and conditions" referred to do not embrace the terms and conditions prescribed by § 5, because the general subject-matter of every other section of the act of 1856 was expressly re-enacted, and therefore it must be inferred that Congress intended to express in the act of 1864 all the terms and conditions which were imposed upon the grant thereby made; or that, in any event, the words should be limited to the terms and conditions of § 1 of the act of 1856.

The difficulty is that to hold that all the terms and conditions imposed upon the grant were specifically expressed in the act of 1864 itself would be to render the reference to the act of 1856 meaningless and to eliminate, by interpretation, the words "upon the same terms and conditions as are contained in" that act; and we are of opinion that the explicit language of the statute cannot thus be done away with.

The existence of terms and conditions in the act of 1856 left wholly unmodified by the re-enactments of the act of 1864 preclude the argument that the words so used are without meaning; and, moreover, the settled rule is that statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee.

Reference to the two acts will show that the changes in the *new grant rendered neces- [203 sary some modification of the 1st and 3d provisos of the 1st section and of §§ 2, 3, and 4 of the act of 1856 (which embody some, but not all, of the terms and conditions), and they were accordingly re-enacted in homologous provisos



Digitized by Google

and sections of the act of 1864, but as the 2d proviso of § 1 and § 5 required no modification they were not re-enacted, and the terms and conditions contained therein were carried forward by reference.

Thus for the 1st proviso of § 1 of the act of 1856, the 1st proviso of the 3d section of the act of 1864 was substituted in order to enlarge the 15-mile limit to 20, and § 6 of the act of 1864 was substituted for the 3d proviso in order to provide for the exclusion of mineral lands from the grant. So the 2d section of the act of 1856 was re-enacted in the 4th section of the act of 1864 to change the 6 miles on each side of the road to 10; and § 3 of the act of 1856 was re-enacted in § 8 of the act of 1864 to provide for the difference between the patenting to the state under the earlier act and the patenting direct to the companies under the last act, while § 4 of the act of 1856 was reproduced in § 7 of the act of 1864 with the alterations rendered necessary, not only by the change in patenting, but by the increased dimensions of the grant. The fact that the provision for the free transportation of troops and property of the United States, contained in § 3 of the 1st act, appeared substantially unchanged in the 8th section of the last act is of no significance, as the purpose of the re-enactment had no relation to that requirement. The 2d proviso of § 1 and § 5 of the act of 1856 were not re-enacted manifestly because no change was required, and the provision of § 3 of the act of 1864 that the grant should be subjected to *the same* terms and conditions as the grant by the act of 1856, dispensed with the necessity of repetition. Giving this operation to the plain language of that provision, as we must, involves no inconsistency in respect of the terms and conditions contained in the provisos and sections which were re-enacted, since the re-enactment was due to the necessity of modification arising under *the new grant and indicated no intention to withdraw any of the original terms and conditions. [204]

An intention to surrender the right to demand the carriage of the mails over the subsidized roads at reasonable charges would be opposed to the policy established by well-nigh uniform Congressional legislation on the subject, and although there may have been departures from that policy in a few instances, under exceptional circumstances, none of them justify the contention that such departure was intended here.

We think it follows, also, that there is no room for concluding that the words "the same terms and conditions as are contained in" the act of 1856, should be confined to the terms and conditions contained in the 1st section of that act, or rather in its 2d proviso, as the 1st and 3d provisos were re-enacted. The three provisos of the granting section of the act of 1856 did not embody all the terms and conditions imposed on that grant, and as the grant of the act of 1864 was subjected to the same terms and conditions as those of the prior act, and it was as true of the re-enacted sections as it was of the re-enacted provisos, that they were alike re-enacted to adapt the last act to the changes in the extent and manner of the new grant, we regard the suggestion which would restrict the words used to the 2d proviso and exclude the 5th section as obviously inadmissible.

Nor are we able to concur in the view that the general policy of the act of 1864 was inconsistent with the imposition of the duty of transporting the mails. The argument is that the grant of 1856 was not sufficiently favorable to induce the building of the roads and that therefore Congress, in 1864, deemed it proper and necessary to make a more favorable grant and did so in part by dispensing with this duty, but this will not do, for the inducements were made greater by adding two thirds more land, and at the same time it was expressly provided that the increased grant should be subject to the same terms and conditions as the earlier one. We find nothing in the record to give color to the suggestion that in addition to the increase of the grant Congress intended to surrender the rights of the government in respect of mail *transportation. *Wisconsin C.* [205 *R. Co.* v. *Forsythe*, 159 U. S. 47 [40: 71].

Some reliance is placed by appellant on departmental construction, but we may dismiss that contention with the observation that we do not consider the true construction as doubtful, and that the departmental construction referred to was neither contemporaneous nor continuous. *United States* v. *Alabama G. S. R. Co.* 142 U. S. 615 [35: 1134]; *United States* v. *Healey*, 160 U. S. 136 [40: 369].

We agree entirely with the court of claims that the terms and conditions imposed on this grant embraced the condition that the mail should be carried at such rates as Congress might fix, and that § 13 of the act of July 12, 1876 (19 Stat. at L. 78, chap. 179), was applicable. The item of $16,343.48 was properly disallowed as was also the item of $12,532.43, unless the latter was recoverable by reason of some ground of objection to its extinguishment by the application of the sums unlawfully paid to and received by the company.

And as to that it is insisted that such application cannot be made because it was not competent for the Postmaster General to withhold the moneys thus paid without authority of law, as the previous directions to make the payments were decisions binding on the department; because the payments were voluntarily made on due consideration and deliberation and the accounts settled; and because no counterclaim was filed.

The Postmaster General in directing payment of compensation for mail transportation, under the statutes providing the rate and basis thereof, does not act judicially, and whatever the conclusiveness of executive acts so far as executive departments are concerned, as a rule of administration, it has long been settled that the action of executive officers in matters of account and payment cannot be regarded as a conclusive determination when brought in question in a court of justice. *Harmon* v. *United States*, 43 Fed. Rep. 560, by Mr. Justice Gray; *United States* v. *Harmon*, 147 U. S. 268 [37: 164]; *Hunter* v. *United States*, 30 U. S. 5 Pet. 173 [8: 87]; *United States* v. *Jones*, 33 U. S. 8 Pet. 375 [8: 979]; *United States* v. *Bank of Metropolis*, 40 U. S. 15 Pet. 377 [10: 774].

*In the latter case, which was a suit up- [206 on negotiable drafts accepted by the Postmaster



Digitized by Google

neral (the authority to do so being assumed r the purposes of the case), and which was cided after the passage of the act of July 2, 36 (5 Stat. at L. 80, 83, chap. 270), whose th section was carried forward as § 4057 of e United States Revised Statutes, Mr. Justice ayne, delivering the opinion of the court, cussed the power of the succeeding Post-aster General to revise the action of his pre-cessor as to credits as follows:

"The third instruction asked the court to say, mong other things, if the credits given by Mr. arry were for extra allowances, which the id Postmaster General was not legally au-horized to allow, then it was the duty of the resent Postmaster General to disallow such ems of credit. The successor of Mr. Barry ad the same power, and no more, than his redecessor, and the power of the former did ot extend to the recall of credits or allowances ade by Mr. Barry, if he acted within the cope of official authority given by law to the ead of the department. This right in an in-umbent of reviewing a predecessor's decisions xtends to mistakes in matters of fact arising from errors in calculation, and to cases of re-jected claims, in which material testimony is fterwards discovered and produced. But if a credit has been given, or an allowance made, as these were, by the head of the department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resort-d to, to construe the law under which the al-owance was made, and to settle the rights be-tween the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judg-ment and that of his successor. A third party is interested, and he cannot be deprived of a payment on a credit so given, but by the inter-vention of a court to pass upon his right. No statute is necessary to authorize the United States to sue in such a case. The right to sue is independent of statute, and it may be done by the direction of the incumbent of the depart-ment. The act of July 2, 1836, entitled 'An Act to Change the Organization of the Postoffice Department,' is only affirmative of the antece-207] dent right of the government *to sue, and directory to the Postmaster General to cause suits to be brought in the cases mentioned in the 17th section of that act. It also excludes him from determining, finally, any case which he may suppose to arise under that section. His duty is to cause a suit to be brought. Additional allowances the Postmaster General could make under the 43d section of the act of March 2, 1825 (3 Story, Laws, 1985); and we presume it was because allowances were supposed to have been made contrary to that law, that the 17th section of the act of July 2, 1836, was passed. In this last, the extent of the Postmaster General's power in respect to allowances is too plain to be mistaken. We cannot say that either of the sections of the acts of 1825 and 1836, just alluded to, covers the allowances made by Mr. Barry to Mr. Reeside. But if the Postmaster General thought they did, and that such defense could have availed against the rights of the bank to claim these acceptances, as credits in this suit, the same proof which would have justified a recovery in an action by the United States, would have justified the rejection of them as credits when they are claimed as a set-off."

The view thus indicated, that executive decisions in cases like the present are not binding on the courts, has been repeatedly affirmed and steadily adhered to. *Gordon* v. *United States*, 1 Ct. Cl. 1; *McElrath* v. *United States*, 12 Ct. Cl. 201; *Duval* v. *United States*, 25 Ct. Cl. 46; *Steele* v. *United States*, 113 U. S. 128 [28: 952]; *United States* v. *Burchard*, 125 U. S. 176 [31: 662]; *United States* v. *Stahl*, 151 U. S. 366 [38: 194]. And it has been often applied in instances of the improvident issue of patents. *Stone* v. *United States*, 69 U. S. 2 Wall. 525 [17: 765]; *United States* v. *Minor*, 114 U. S. 233 [29: 110]; *Mullan* v. *United States*, 118 U. S. 271 [30: 170]; *Wisconsin C. R. Co.* v. *Forsythe*, 159 U. S. 46 [40: 71].

In *Steele* v. *United States*, the Navy Department, in contracting with the claimant for certain work upon vessels, delivered to him certain old materials at the agreed price of $2,000, which was considerably less than the true value. In his suit for payment on the contract it was contended that the delivery of these materials to him at an agreed price was *with-[208 out warrant of law, and that the materials having been disposed of should be accounted for by the claimant at their true value. This contention was sustained, and this court said: "The fact that the account of the appellant was settled by the officers of the Navy Department, by charging him with the value of the old material at $2,000, is no bar to the recovery of its real value by the government. The whole transaction was illegal, and appellant is chargeable with knowledge of the fact."

In *United States* v. *Burchard*, 125 U. S. 176 [31: 662], the claimant, an engineer officer, retired October 26, 1874, and entitled to half sea pay, was paid from said date up to April 1, 1878, at a higher rate, whereby he received $425 in excess of that allowed by law, his pay at that rate being passed from time to time by both the disbursing officers in the Navy Department and by the accounting officers. After April 1, 1878, he was paid at a lower rate, which this court held to be the legal rate. He brought suit for the difference after 1878, and the government counterclaimed for the $425 paid to him prior to that time. His petition was dismissed, and the court held the government could recover the overpayment for the prior period. Mr. Chief Justice Waite, speaking for the court, observed that in no event was he entitled to more than half sea pay, and that all over that which he got was by a mistake of the accounting officers, and said: "It only remains to consider whether the amount which has thus been paid, or as much thereof as is embraced in the counterclaim, can be recovered back in this action, and we are of the opinion that it can. The action was brought by Burchard to recover a balance claimed to be due on pay account from the date of his retirement. He had been paid according to his present claim until April 1, 1878, and consequenty there was nothing to complain of back of that date. But in reality the account had never been closed, and was always open to readjustment. Overpayments made at one time by mistake could be corrected and properly charged against credits coming in after-



Digitized by Google

wards. His pay was fixed by law, and the disbursing officers of the department had no author-
209] ity to allow him any more: *If they did, it was in violation of the law, and he has no right to keep what he thus obtained. Whether the government can in any case be precluded from reclaiming money which has been paid by its disbursing and accounting officers under a mistake of law is a question which it is not now necessary to decide any more than it was in *McElrath* v. *United States*, 102 U. S. 426, 441 [26: 189, 192], when it was suggested. This is a case where the disbursing officers, supposing that a retired officer of the navy was entitled to more than it turns out the law allowed, have overpaid him. Certainly under such circumstances the mistake may be corrected."

In *United States* v. *Stahl*, 151 U. S. 366 [38: 194], the claimant, a naval officer, upon a difference of opinion as to the law, had been overpaid in the grade then occupied by him, and sued for a deficiency claimed to exist in his previous grade. This court sustained his contention as to the previous grade, and held that he had been entitled in that grade to the increased compensation, but that the excessive payments which had been made to him in the latter grade should be deducted from any sum which might be found due him in the former.

In *Mullan* v. *United States*, 118 U. S. 271 [30: 170], a suit to vacate a patent which had been granted for certain coal lands, the court held that the mistake was one of law, but that, nevertheless, it having been committed and the patent given for lands which the land officers were not authorized to patent, the patent could be annulled by the court. And Mr. Chief Justice Waite said: "It is no doubt true that the actual character of the lands was as well known at the Department of the Interior as it was anywhere else, and that the Secretary approved the lists, not because he was mistaken about the facts, but because he was of opinion that coal lands were not mineral lands within the meaning of the act of 1853, and that they were open to selection by the state; but this does not alter the case. The list was certified without authority of law, and, therefore, by a mistake against which relief in equity may be afforded. As was said in *Stone* v. *United States*, 69 U. S. 2 Wall. 525, 535 [17: 765, 767]: 'The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a
210] patent for *land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.'"

In *Wisconsin C. R. Co.* v. *Forsythe*, 159 U. S. 47 [40: 71], which was an action of ejectment to recover certain lands claimed to have been included within its grant, but which defendant insisted were outside of its grant and subject to private entry, this court said: "But, further, it is urged that this question of title has been determined in the land department adversely to the claim of the plaintiff. This is doubtless true, but it was so determined, not upon any question of fact, but upon the construction of the law; and such matter, as we have repeatedly held, is not concluded by the decision of the land department."

As a general rule, and on grounds of public policy, the government cannot be bound by the action of its officers, who must be held to the performance of their duties within the strict limits of their legal authority, where, by misconstruction of the law under which they have assumed to act, unauthorized payments are made. *Whiteside* v. *United States*, 93 U. S. 247 [23: 882]; *Hawkins* v. *United States*, 96 U. S. 689 [24: 607], and cases before cited. The question is not presented as between the government and its officer, or between the officer and the recipient of such payments, but as between the government and the recipient, and is then a question whether the latter can be allowed to retain the fruits of action not authorized by law, resulting from an erroneous conclusion by the agent of the government as to the legal effect of the particular statutory law under or in reference to which he is proceeding.

Section 4057 of the Revised Statutes reads: "In all cases where money has been paid out of the funds of the Postoffice Department under the pretense that service had been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and in all other cases where money of the department has been paid to any person in consequence of fraudulent representations, *or by the mistake, collusion, or [211 misconduct of any officer or other employee in the postal service, the Postmaster General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon."

Undoubtedly the word "mistake," as used in this section, includes an erroneous conclusion in the construction or application of a statute. And, this being so, as the duty is developed on the Postmaster General to cause suit to be brought where money has been illegally paid by reason of misconstruction or misapprehension of the applicable law, it follows that he must be regarded as empowered to reconsider prior decisions to determine whether such a mistake has been committed or not. If in his judgment money has been paid without authority of law and he has money of the recipient in his hands, he is not compelled to pay such money over and sue to recover the illegal payments, but may hold subject to the decision of the court when the claimant sues. *United States* v. *Carr*, 132 U. S. 644 [33: 483]; *Gratiot* v. *United States*, 40 U. S. 15 Pet. 336 [10: 759]; *Steele* v. *United States*, 113 U. S. 128 [28: 952]; *United States* v. *Burchard*, 125 U. S. 176 [31: 662]; *United States* v. *Stahl*, 151 U. S. 366 [38: 194]. And in that way multiplicity of suits and circuity of action are avoided.

It is unnecessary to go into a discussion of the exceptions which may exist between private parties to the rule that moneys paid through mistake of law cannot be recovered back.

This branch of the case was disposed of by



Digitized by Google

the court of claims on the authority of *Duval* v. *United States*, 25 Ct. Cl. 46. It was there held that "the items of the several statements upon which the sixth auditor certifies balances due for carrying the mails ordinarily, and in the absence of special circumstances, may be regarded as running accounts, at least while the parties continue the same dealings between themselves; and that money paid in violation of law upon balances certified by the accounting officers generally may be recovered back by counterclaim or otherwise where no peculiar circumstances appear to make such recovery inequitable and unjust." The mistake was, indeed, treated as one of fact, the post-office officials erroneously assuming through 212]oversight that the *road in question had not been aided by grants of land, but the governing principle in the case before us is the same.

Reference was made to *Barnes* v. *District of Columbia*, 22 Ct. Cl. 366, 394, wherein it was ruled, Richardson, Ch. J., delivering the opinion, that "the doctrine that money paid can be recovered back when paid in mistake of fact and not of law does not have so general application to public officers using the funds of the people as to individuals dealing with their own money where nobody but themselves suffer for their ignorance, carelessness, or indiscretion, because in the former case the elements of agency and the authority and duty of officers, and their obligations to the public, of which all persons dealing with them are bound to take notice, are always involved." We concur in these views, and are of opinion that there is nothing on this record to take the case out of the scope of the principle that parties receiving moneys illegally paid by a public officer are liable *ex æquo et bono* to refund them.

The petition sets forth, among other things, that the Postmaster General wrongfully and unlawfully withheld the $12,582.43 out of moneys due petitioner, which was, therefore, entitled to recover the full amount; and to each and every allegation of the petition the government interposed a general traverse. It is now said that a counterclaim or set-off should have been pleaded, but the record does not disclose that this objection was raised below, while the findings of fact show that the entire matter was before the court for, and received, adjudication. Moreover, it has been repeatedly held that the forms of pleading in the court of claims are not of so strict a character as to require omissions of this kind to be held fatal to the rendition of such judgment as the facts demand. *United States* v. *Burns*, 79 U. S. 12 Wall. 246, 254 [20: 388, 390]; *Clark* v. *United States*, 95 U. S. 539, 543 [24: 518, 520]; *United States* v. *Behan*, 110 U. S. 338, 347 [28: 168, 171]; *United States* v. *Carr*, 132 U. S. 644, 650 [33: 483, 485].

*Judgment affirmed.*

Mr. Justice **Peckham** dissented on the question of the right of the government to offset the alleged overpayments prior to July 1, 1883.

## UNITED STATES, *Appt.*, [213
*v.*
## WILLIAM J. VERDIER, Administrator.

(See S. C. Reporter's ed. 213-220.)

*Interest on judgment—on postmaster's account.*

1. Interest on a judgment against a postmaster for a balance due on his account to the United States must be added to the judgment from the time of verdict, when the judgment remains unpaid for many years and until a readjustment of the postmaster's salary under the act of Congress of March 3, 1883, shows a balance in his favor even after deducting the judgment, although such interest cannot be offset by any interest on his claim for the readjusted salary earned prior to the judgment because it was unliquidated.

2. The neglect of the Postmaster General to readjust the salary of a postmaster when it is his duty to do so will not entitle the postmaster to interest on the amount allowed him prior to the time of its liquidation, since the government is not chargeable for the neglect of its officers.

[No. 49.]

*Argued October 20, 1896. Decided November 16, 1896.*

ON APPEAL from a judgment of the Court of Claims in favor of the plaintiff, William J. Verdier, administrator of James R. Verdier, deceased, against the United States, for an amount claimed to be due to said deceased on a readjustment of his accounts as postmaster. *Reversed*, and case remanded with direction to dismiss the petition.

See same case below, 28 Ct. Cl. 268.

Statement by Mr. Justice **Brown**:

This was a petition by the administrator of James R. Verdier, deceased, for the payment of a balance of $1,300.41 claimed to be due him upon a readjustment of his accounts as postmaster at Beaufort, South Carolina, from July 1, 1866, to April 30, 1869.

Upon a hearing in the court of claims that court made the following findings of fact:

"1. James R. Verdier was a duly qualified postmaster at Beaufort, South Carolina, from July 1, 1866, to the 30th day of April, 1869.

"2. Upon his retirement from office he appeared as indebted to the United States, on the face of his postal accounts, in the sum of $929.20. June 28, 1870, an action was brought by the United States against him on his official bond, in the United States district court of South Carolina, to recover said sum, and July 5, 1870, the jury returned a verdict in favor of the United States for the sum of $1,063.20, which verdict was, upon motion of Verdier's attorney, set aside.

"October 31 following, the attorney for said Verdier consented that the case be submitted to the court, and upon said date the jury returned a verdict in favor of the United States against Verdier for the sum of $1,059.93; the costs were $36.80; total, $1,095.83. Judg-

NOTE.—*As to interest, when recoverable as damages or on money*, see note to Sneed v. Wister, 5: 717.

*As to rate of interest after maturity*, see note to Ohio v. Frank, 26: 581.

*As to the rule for calculation of interest*, see note to Story v. Livingston, 10: 200.



Digitized by Google

ment thereon was duly signed January 25, 1871.

"3. November 3, 1885, application was made to the Postmaster General by the administrator 214] for a review and readjustment *of decedent's salary as postmaster aforesaid, under the provisions of the act of March 3, 1883, 22 Stat. at L. 487. December 23, 1885, said salary was readjusted and the sum of $2,892.84 found due said decedent's estate. August 4, 1886, a sum of money was appropriated by Congress to pay this and similar allowances. 24 Stat. at L. 307, 308.

"4. March 4, 1887, decedent's postal account was audited by the auditor for the Postoffice Department, who charged his account with the aforesaid judgment and interest thereon from July 5, 1870, to August 4, 1886 (the date of appropriation), and costs of suit, the total thereof being the sum of $2,296.77, and deducted this sum from the amount of salary credited to said account, showing a balance of $596.07.

"June 20, 1887, the United States attorney for the aforesaid district was instructed to satisfy said judgment, which was accordingly done July 25, 1887.

"The sum of $596.07 was paid plaintiff, who gave the following receipt:

Transfer draft.

" 'Mailed Sept. 14, 1887. Received Sept. 26, 1887, the transfer draft of the Third Assistant Postmaster General, No. 4655, for 596 dollars. 07 cents in my favor on the Postmaster at New York, State of N. Y., to the

" 'W. J. Verdier, Administrator.' "

Upon these facts the court found as a conclusion of law that the petitioner was entitled to recover in the sum of $1,283.57 (28 Ct. Cl. 268), for which amount judgment was entered, and the United States appealed.

*Messrs.* **Joshua Eric Dodge**, Assistant Attorney General, and *John G. Capers* for appellant.

*Mr.* **Harvey Spalding** for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

215] *The contest in this case is really over a question of interest. Upon the termination of his services as postmaster, Verdier was found, upon the face of his accounts, to be indebted to the government. Suit was brought against him upon his bond, and a verdict obtained July 5, 1870, for $1,063.20, which was subsequently set aside; but the action ultimately resulted in a judgment against him, rendered January 25, 1871, in the sum of $1,095.83.

By U. S. Rev. Stat. § 966, "interest shall be allowed on all judgments in civil causes recovered in a circuit or district court, . . . in all cases where, by the law of the state in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such state; and it shall be calculated from the date of the judgment, at such rate as allowed by law on judgments recovered in the courts of such state." We see no reason why this section, or § 3624, fixing the rate of interest upon delinquent accounts of public officers at 6 per cent, does not apply to this case. Verdier was therefore properly charged with interest upon the judgment. *Amis* v. *Smith*, 41 U. S. 16 Pet. 303 [10:973].

By the act of July 1, 1864 (13 Stat. at L. 335), the system which had theretofore prevailed of paying postmasters by a commission upon the receipts of their offices was changed, and postmasters were divided into five classes and paid by a salary gauged by their compensation for the two consecutive years preceding the act. The classification of postmasters was determined by the Postmaster General upon the basis of the commissions previously paid to them, and the exact amount of their salaries fixed within certain limitation provided by the act for each class. There was a further provision in the 2d section that the salary should be reviewed and readjusted by the Postmaster General once in two years, upon the basis upon which the salary was originally fixed; but that such change should not take effect until the first day of the quarter next following the order for the same. This section was amended by the act of July 12, 1866 (14 Stat. at L. 59, 60), by adding a proviso that when the quarterly returns of any postmaster showed that the salary allowed was *10 per cent less than[216 it would have been on a basis of commissions, the Postmaster General should review and readjust under the provisions of the prior act.

It will be observed that these acts of 1864 and 1866 were both prospective in their operation. *United States* v. *McLean*, 95 U. S. 750 [24: 579]. We must assume that when Verdier took office July 1, 1866, his salary was fixed by the Postmaster General under the act of 1864, this being the date at which the first biennial term fixed by the act of 1864 expired. It would seem that no readjustment could then be made until the lapse of two years or until July, 1868, unless, upon satisfactory representation, it was deemed expedient by the Postmaster General. If a readjustment had been made under these acts, it would have operated prospectively only, and until April 30, 1869, when he ceased to serve as postmaster. Why a readjustment was not made does not appear. It may have been for the absence of quarterly returns, as there is no finding that such returns were made. It may have been by simple neglect of the Postmaster General to comply with the law; but there is no evidence of his refusal to do so, and in any event the government would not be liable for his neglect in that particular. *United States* v. *Kirkpatrick*, 22 U. S. 9 Wheat. 720 [6: 199]; *United States* v. *Sherman*, 98 U. S. 565 [25: 235]. It was not until 1883 that the Postmaster General was authorized to readjust the compensation of postmasters and to make such readjustments retrospective.

By the act of March 3, 1883 (22 Stat. at L. 487), the Postmaster General was authorized and directed to readjust the salaries of postmasters whose salaries had not theretofore been readjusted under the act of 1866, "who had made sworn returns of their receipts and business for readjustment of salary" to the department, or who had "made quarterly returns in conformity to the then existing laws and regulations, showing that the salary allowed was 10 per cent less than it would have been upon the basis of commissions," such readjustment



Digitized by Google

to be made in accordance with the act of 1866, and "to date from the beginning of the quarter succeeding that in which such sworn returns of 217 ]receipts and business* or quarterly returns were made, provided, that every readjustment of salary under this act shall be upon a written application signed by the postmaster or late postmaster or legal representative entitled to such readjustment."

Pursuant to this statute application was made by the administrator of Verdier for a review and readjustment of his salary as postmaster, and on December 23, 1885, his salary was readjusted, and the sum of $2,092.84 found to be due his estate.

On August 4, 1886, an act was passed by Congress (24 Stat. at L. 307) appropriating a sum of money to pay this and similar allowances. Verdier's account was finally audited March 4, 1887. In this statement he was charged with the judgment and interest thereon from July 5, 1870, to August 4, 1886 (the date of the appropriation), the total being the sum of $2,296.77, and was credited with the amount of his readjusted salary and a balance of $596.07 found to be due him. This sum was subsequently paid, the receipt of petitioner's administrator taken for the amount, and the judgment against Verdier satisfied of record July 25, 1887. On September 28, 1888, this petition was filed to recover the difference between the original verdict and the amount which was deducted from his readjusted salary upon final settlement.

By the act of 1883 no readjustment could be made except upon the application of the postmaster, and when that application was made in this case, the salary was for the first time readjusted. Until this time the debt was not liquidated,—in fact it would be more accurate to say that it did not exist. The argument is made that, as the readjusted salary was earned prior to the verdict against Verdier of July 5, 1870, he ought not to be charged with interest upon the judgment against him for the sixteen years which elapsed from that time until August, 1886, when the act of Congress appropriating money for the payment of readjusted salaries was passed; or, which is nearly the same thing, that the government should be charged with interest upon his readjusted compensation from the time he left the office. It would certainly seem to be equitable that, if the government were indebted to Verdier at the time it obtained judgment against him, it 218 ]should not charge* him with interest upon its judgment. But interest being a matter of purely statutory regulation, we are bound to give or withhold it as the statute directs. By the judgment of the district court of South Carolina, Verdier became indebted to the government on January 25, 1871, in the sum of $1,095.83, and as he did not pay the debt at the time, he was properly chargeable with interest. U. S. Rev. Stat. § 966.

Upon the other hand, the government did not become a debtor to Verdier until his claim was liquidated, and by U. S. Rev. Stat. § 1091, no interest can be allowed upon any claim against the government up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest. The theory upon which interest is claimed seems to be that the Postmaster General was in fault for not having readjusted Verdier's salary under the act of 1866, and that Verdier ought not to be prejudiced by such default. The whole difficulty in the case, however, arises from the fact that there were claims upon both sides. Did the case of the government stand alone, there could be no doubt whatever that Verdier's estate would be properly chargeable with interest. Upon the other hand, if his accounts had been settled and paid at the expiration of his term, and a claim were now made under the act of 1883, it would not be claimed that the government would be chargeable with interest. The equity of petitioner's claim, if there be any, arises from the fact that while interest was running against him on his judgment, the government was equitably his debtor. Were the case between private individuals perhaps interest would be chargeable to both parties; but we are unable to see how the fact that there were mutual claims can authorize us to disregard the plain letter of the statutes. There is really no greater hardship in denying the petitioner interest than there would have been if he had not been a judgment debtor of the government.

An inherent vice of petitioner's argument is in the assumption that he and the government stand upon an equality with respect to interest. The truth is that in its dealings with individuals public policy demands that the government *should occupy an apparently favored 219 ]position. It may sue, but, except by its own consent, cannot be sued. In the matter of costs it recovers but does not pay, and the liability of the individual would not be affected by the fact he had a judgment against the government which did not carry costs. So the statute of limitations may be pleaded by the government, but not against it; nor is it affected by the laches of its officers. *United States* v. *Barker*, 15 U. S. 2 Wheat. 395 [4: 271]; *The Antelope*, 25 U. S. 12 Wheat. 546 [6: 723]; *United States* v. *McLemore*, 45 U. S. 4 How. 286 [11: 977]; *United States* v. *Boyd*, 46 U. S. 5 How. 29 [12: 36]; *United States* v. *Thompson*, 98 U. S. 486 [25: 194]; *Simmons* v. *Ogle*, 105 U. S. 271 [26: 1087]; *United States* v. *Kirkpatrick*, 22 U. S. 9 Wheat. 720 [6: 199]; *United States* v. *Nicholl*, 25 U. S. 12 Wheat. 505 [6: 709]; *Gaussen* v. *United States*, 97 U. S. 584 [24: 1009]. Under the bankruptcy law, it was a preferred creditor, and its claims were paid even before the wages of operatives, clerks, or house servants. U. S. Rev. Stat. § 5101. In short, the equities which arise as between individuals have but a limited application as between the government and a citizen.

Nor is it strictly true to say that the government was indebted to Verdier at the date of its judgment against him. He had performed services for which an indebtedness was subsequently voluntarily created by the government; but until the readjustment was made the law imposed no obligation upon the government to pay him an increased salary. Verdier could not have availed himself of it as a set-off or counterclaim to his own debt to the government, and in fact it never became a debt until the claim was liquidated under the act of 1883. As was



Digitized by Google

said by this court in *United States* v. *McLean*, 95 U. S. 750, 753 [24: 579, 580]: "The law imposes no obligation upon the government to pay an increased salary unless a readjustment has preceded it. And by the act of 1866 the Postmaster General is not to readjust an existing salary unless the quarterly returns made show cause for it. Now, if it be conceded that the quarterly returns made on the last day of each quarter, beginning with June 30, 1871, made it the duty of the Postmaster General to make a readjustment immediately on the receipt of the returns, still his readjustment was 220]*an executive act made necessary by the law in order to perfect any liability of the government. If the executive officer failed to do his duty he might have been constrained by a mandamus. But the courts cannot perform executive duties or treat them as performed when they have been neglected. They cannot enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform. The right asserted by the claimant rests upon a condition unfulfilled." In that case, as stated by Mr. Justice Miller in *United States, McLean*, v. *Vilas*, 124 U. S. 86, 87 [31: 329, 330], this court held that the court of claims could not "perform the duty of readjusting the salary under the acts which conferred that power on the Postmaster General, and that there was no legal liability against the United States for the amount claimed by him until that officer had readjusted the salary in accordance with those acts of Congress;" and in *United States, McLean*, v. *Vilas* it was held that the statute did not contemplate a readjustment oftener than once in two years as a legal duty or obligation on the part of the Postmaster General.

Verdier's claim for interest in this case is based upon the assumption that the Postmaster General neglected his duty in failing to readjust his salary. We have shown that if he had performed his statutory duty his action would have been prospective only, and would have covered but comparatively a short period of Verdier's services; but however this may be, the government is not chargeable for his neglect in that particular.

It results that *the judgment of the court below must be reversed*, and the case remanded with direction to dismiss the petition.

Mr. Justice **Gray** did not hear the argument and took no part in the decision of this case.

---

221] JOHN BROWN, *Plff. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 221-227.)

*Testimony to impeach a witness—evidence of reputation.*

1. A charge to the jury as to impeaching the general reputation of a witness for truth, that reputation could not grow out of the opinion of criminal or bad men, but only out of the dispassionate judgment of men who were honest and good and competent to form such judgment, and that this was a necessary condition of the admissibility of the impeaching testimony, is too narrow and restricted.

2. Evidence of the reputation of a man for truth and veracity in the neighborhood of his home is equally competent to affect his credibility as a witness, whether it is founded upon dispassionate judgment, or admiration for constant truthfulness, or natural indignation at habitual falsehood, and whether his neighbors are virtuous or immoral in their own lives. Such considerations may affect the weight of the evidence, but not its competency.

[No. 381.]

*Submitted October 23, 1896. Decided November 16, 1896.*

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment of conviction of John Brown for the murder of Thomas Whitehead. *Reversed*, and case remanded for a new trial.

The facts are stated in the opinion.

No counsel for plaintiff in error.

*Mr.* **J. M. Dickinson**, Assistant Attorney General, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This was an indictment charging John Brown, in separate counts, with the murders by shooting of Thomas Whitehead and of Joseph Poorboy, on December 8, 1891, at the Cherokee Nation in the Indian territory. Two successive convictions upon this indictment were set aside and new trials ordered, because of erroneous rulings and instructions of the court below, as stated in the opinions of this court, reported in 150 U. S. 93 [37: 1010], and in 159 U. S. 100 [40: 90].

At the third trial, the government introduced evidence tending to show that the defendant, being nineteen years of age, and one Hampton, being seventeen years old, participated in the killing of Whitehead and Poorboy in a shooting affray about 9 or 10 o'clock at night on December 8, 1891; that the defendant and Whitehead were white men, and Poorboy and Hampton were Cherokee Indians; and that Hampton had since been killed in resisting arrest. The defendant was acquitted *by the jury of the murder of Poorboy; [222 but was again convicted and sentenced upon the count for the killing of Whitehead, and sued out this writ of error.

At this trial Sam Manus, being called as a witness for the government, testified that on the night of the killing the defendant and Hampton came into his house, and said they had killed Whitehead and his comrade, and taken their firearms and three silver dollars, all they had, from Whitehead's pocket, and showed the witness the arms and money. Manus further testified that he had himself been convicted and sentenced to the penitentiary for twelve months for resisting an officer.

Witnesses called by the defendant testified that the reputation of Sam Manus for truth

NOTE.—*As to impeaching witness by proof of character; scope of inquiry as to character and time,*—see note to Teese v. Huntingdon, 16: 479.



Digitized by Google

and veracity was bad among the people of the neighborhood where he lived. Other witnesses, called in rebuttal, testified that his reputation for truth and veracity was good.

The court instructed the jury that if "the parties or either of them was robbed of property or money after being killed, that becomes a potential fact in the case to show that there was a wilful purpose upon the part of those who may have done the killing;" and that "if these parties were killed for the purpose of robbery, the very fact of the robbery shows a state of general malevolence, a general wickedness of purpose and a general design to do wrong, that is of a doubly criminal character in showing the existence of this element of the crime of murder." The defendant excepted to these instructions.

The court further instructed the jury as follows: "One of the principal witnesses in this case is Mr. Sam Manus. He comes before you and swears to inculpatory statements made by the defendant as to the robbery. He swears to you as to the statement of the defendant that he got $8 in silver. He swears to you in reference to a statement made by the defendant as to taking the firearms of these men who were killed. That shows a robbery, if true. Efforts have been made and brought to bear here to break down his evidence, to destroy his evidence before you, by impeaching his general character for truth. It is neces-[223 sary in the interest of *truth, and in the interest of justice, and in the interest of the enforcement of the law in this jurisdiction, that I should give you an admonition, and the one I am now about to give you. That is a proper way to attack a witness. It is a proper way to destroy his evidence. But it must amount to proof of a certain character. It must show a certain condition. It is a method that is easily resorted to; that is often resorted to. I cite these conditions, because I have a right to, on account of their notoriety, on account of its being common knowledge before you, and before this court, that under the law I can take judicial notice of. I say it is a method easily resorted to, often resorted to in this jurisdiction, and resorted to as often when it is based upon fraud, upon perjury, and upon subornation of perjury. It is a method of attack that lets in personal spite, neighborhood grievances, personal animosity, personal bickering, and the personal feelings of people. It opens wide the door for the admission of all these things that if properly considered go to cloud the judgment of men, but in many of these cases, unfortunately, they are the very seeds from which spring the judgment of the witness as to the general character of the witness who comes before you. Now, that is not the source of general character. Animosity, the feeling of hatred, nor of neighborhood bickering, that may produce a feeling of animosity against a man, is not the source from which impeachment by proof of general bad character is to come. It must come to you as the opinion of the people in the neighborhood where the man is known, and that opinion must be founded upon a state that is dispassionate, must grow out of the dispassionate judgment of men, who are honest men, and good men, and able and competent to make up a judgment of that kind. It is not the judgment of the bad people, the criminal element, the man of crime, that is to fasten upon a man and blacken his name; that is not the state of case that would show you that he has general bad character. That is not the condition that must come to you when the attack is made to be effective; but it must come to you as an honest reflection of the opinion of the people generally in the neighborhood where the man lives and is known."

*The defendant, at the time of the de-[224 livery of the charge, and before the jury retired, as appears by the bill of exceptions allowed by the presiding judge, alleged exceptions "to all the remarks of the court in reference to the impeachment of the witness Sam Manus," and "to that part of the charge in regard to the evidence of Sam Manus;" and thereby distinctly and sufficiently excepted to the instruction just quoted.

There was conflicting testimony in the case as to what took place in the affray when Whitehead and Poorboy were killed; and the government much relied on subsequent admissions by the defendant, as testified to by Sam Manus. His character for truth and veracity was therefore an important element to be considered by the jury who were to decide the guilt or innocence of the accused.

The jury were indeed instructed, in terms of themselves unobjectionable, that the general character of a person must come to the jury "as the opinion of the people in the neighborhood where the man is known;" and again, in equivalent phrase, that it must come to them "as an honest reflection of the opinion of the people generally in the neighborhood where the person lives and is known."

Those general statements, however, were materially qualified by the intervening definition that "that opinion must be founded upon a state that is dispassionate, must grow out of the dispassionate judgment of men, who are honest men, and good men, and able and competent to make up a judgment of that kind;" and "not the judgment of bad people, the criminal element, the man of crime."

The jury were thus plainly told, not only that reputation could not grow out of the opinion of criminal or bad men, but that it could only grow out of the dispassionate judgment of men who were honest and good, and competent to form such a judgment. And this, as appears throughout the instruction upon the subject, was declared to be a necessary condition of the admissibility of the impeaching testimony.

The instruction given was too narrow and restrictive. Evidence of the reputation of a man for truth and veracity in the *neighbor-[225 hood of his home is equally competent to affect his credibility as a witness, whether it is founded upon dispassionate judgment, or upon warm admiration for constant truthfulness, or natural indignation at habitual falsehood; and whether his neighbors are virtuous or immoral in their own lives. Such considerations may affect the weight, but do not touch the competency, of the evidence offered to impeach or to support his testimony.

The instruction in question is pervaded by an error analogous to that for which the judg-



Digitized by Google

ment was reversed in *Smith* v. *United States*, 161 U. S. 85 [40: 626].

As the error in this respect requires the verdict to be set aside, it would be superfluous to pass upon the many other questions of law presented by the bill of exceptions and by the assignments of error, some of which would require grave consideration, were it necessary to decide them in the form in which they are presented by this record.

*Judgment reversed, and case remanded,* with directions to set aside the verdict and to order a new trial.

Mr. Justice **Brewer** dissenting:

I dissent: First. Because after three juries, thirty-six jurors, have agreed in finding a defendant guilty of the crime charged, and such finding has each time been approved by the trial judge, the judgment based upon the last verdict ought not to be disturbed unless it is manifest that the verdict is against the truth of the case, or that the court grossly and prejudicially erred on the trial.

Second. Because the testimony in this case discloses an outrageous crime, showing that this defendant in connection with another party, that other party already convicted of one murder and a fugitive from justice, in the night-time called from their slumbers two officers of the law and shot them down without provocation. Justice and the protection of society unite in saying that it is high time such a crime was punished.

Third. Because no sufficient exception was 226] taken. The *entire charge of the court fills about thirty-seven closely printed pages of the record. If reprinted here it would make nearly seventy-five pages of this volume. With the exception of two or three short instructions at the close, it does not consist of separate instructions, but is one continuous charge. This charge was excepted to, as appears from the record, in this way: "Defendant, John Brown, excepts to those parts of the charge of the court to the jury at the time of the delivery thereof, as follows, to wit: first, to that part of the charge relating to what the court says as to evidence that 'cannot be bullied or bribed,' as to the 'fruits of the crime, the taking of the money,' etc; second, as to the definition and illustrations of 'wilfully;'" and so on through a series of twenty-five or thirty specifications, covering therewith the entire charge. The seventeenth is as follows: "Defendant excepts to all the remarks of the court in reference to the impeachment of the witness, Sam Manus;" and again, "also excepts to that part of the charge in regard to the evidence of Sam Manus." And in this way only was objection made or exception taken to the charge, or any part of it. Now, there is about a page referring to the testimony of Sam Manus. On this page are stated certain rules of law, which it is conceded are correct, and it is only a portion of the language used in reference to the testimony of Sam Manus that the court considers objectionable. I have always understood that the purpose of an objection and exception was to call the attention of the trial court to the particular words or phrases complained of in order that it might have an opportunity to consider, and if need be correct, the alleged error. The decision in this case seems to entirely ignore this purpose and to make the noting of an objection and exception simply a request to the appellate court to search through the several pages of a charge for any sentence or sentences which its critical eye may disapprove of. For all practical purposes a single exception might just as well have been taken to the entire charge.

Fourth. Because this part of the charge is as a whole unobjectionable. The testimony referred to was admitted, and therefore held to be competent. The rule of law in reference to impeachment was correctly stated, and the objectionable *matter was prefaced by a dec-[227 laration of the court that it gives a matter of admonition. That admonition was just and sound. Reputation is the general judgment of the community in respect to the witness whose reputation is challenged, and is not made up by the flippant talk of a few outlaws.

For these reasons I dissent.

Mr. Justice **Brown** and Mr. Justice **Peckham** concur in this dissent.

---

## PRAIRIE STATE NATIONAL BANK of Chicago, Illinois, *Appt.*,
*v.*
## UNITED STATES.

---

## UNITED STATES, *Appt.*,
*v.*
## CHARLES A. HITCHCOCK *et al.*

(See S. C. "*Prairie State Bank* v. *United States*," Reporter's ed. 227-240.)

*Rights of surety.*

A surety who completes a contract with the United States on the contractor's default is subrogated

NOTE.—*As to subrogation, right of assignee to, and as to prior encumbrances; junior encumbrancer, right of,*—see note to Bank of United States v. Peter, 10: 89.

*As to subrogation, doctrine of; who entitled to,*—see note to German Bank v. United States, 37: 564.

*Subrogation of sureties; when right accrues; sureties on bonds and in other instances.*

The surety of a bankrupt will take the place of a creditor of the bankrupt whose claim he satisfies. Watkins v. Worthington, 2 Bland, Ch. 509.

Sureties entitled to subrogation may maintain a bill to set aside a fraudulent conveyance executed by their principal. Tatum v. Tatum, 1 Ired. Eq. 113.

If the security be to indemnify the surety, and also to secure to him an absolute debt, it will be applied to both debts *pro rata*. Ross v. Wilson, 7 Smedes & M. 753; Moore v. Moberly, 7 B. Mon. 290; Helm v. Young, 9 B. Mon. 394; *contra*, Ten Eyck v. Holmes, 3 Sandf. Ch. 428.

The estate of a surety paying the debt of the principal will have the same right of subrogation as the surety himself. Ward's Appeal, 100 Pa. 289.

Bail of a partner, who have paid a judgment against him for a partnership debt, cannot be subrogated to the rights of the judgment creditor against the other partners. Bowman v. Blodgett, 2 Met. 308.

A surety will not be entitled to subrogation against a subsequent guarantor of the principal's



Digitized by Google

to the rights which the United States might assert against a fund created by the retention of 10 per cent of the sums estimated from time to time as the value of the work done, in order to insure its completion; and this right relates back to the making of the contract, and is superior to any equitable lien asserted by a bank for moneys advanced to the contractor without the surety's knowledge before he began to complete the work.

[Nos. 10, 16.]

*Argued and Submitted October 13, 14, 1896. Decided November 30, 1896.*

APPEALS from a judgment of the Court of Claims in favor of Charles A. Hitchcock for the amount of a fund arising by the retention of 10 per cent upon the estimated value of the work done by said Hitchcock under a contract made by Charles Sundberg & Company with the United States for the erection of a customhouse. Hitchock, the surety, having on default of his principals performed the work. *Affirmed.*

Statement by Mr. Justice White:

The real contestants in the controversy below were the Prairie State National Bank and Charles A. Hitchcock, who respectively claimed the right to receive from the government *a balance in its hands of $11,850.[228 This balance arose by the retention from time to time of 10 per cent upon the estimated value of work done under a contract entered into on May 10, 1888, by the government with Charles Sundberg & Company, wherein they agreed for the consideration of $118,590, to erect a customhouse at Galveston, Texas. The right of the government to retain the reserved sums was founded upon the following provision in the contract:

Payments to be made in the following manner, *viz.:* 90 per cent (nine tenths) of the value of the work executed to the satisfaction of the party of the first part will be paid from time to time as the work progresses in monthly payments (the said value to be ascertained by the party of the first part), and 10 per cent (one

---

debtor. Longley v. Griggs, 10 Pick. 121; Hamilton v. Johnston, 82 Ill. 39.

A person paying money under the mistaken idea that he is a surety cannot be subrogated to the benefit of a lien on the lands of his supposed principal. Dawson v. Lee, 83 Ky. 49.

The surety is entitled to the benefit of all collaterals held by the creditor, in the right of the principal debtor. Newton v. Chorlton, 10 Hare, 646.

A surety who pays the purchase price of property, the title to which was reserved by the selling creditor, will be subrogated to the right of the creditor to hold the property until he is reimbursed, and to recover the same from a vendee of the principal. Myers v. Yaple, 65 Mich. 408.

The sureties of a person owing bank stock who are compelled to pay advances made by the bank to him on the faith of such stock will be subrogated to all the rights of the bank, and entitled to enforce its lien on the stock. Klopp v. Lebanon Bank, 46 Pa. 88; Young v. Vough, 23 N. J. Eq. 325.

An undertaking to pay the holders of a note any deficiency not exceeding a given sum, which may exist after exhausting certain collaterals furnished by an indorser of the note, creates a seperate and independent responsibility, and gives the undertaker no right of subrogation to the benefit of the collaterals. Tracy v. Pomeroy, 120 Pa. 14.

If A borrows money for the use of B, and both execute a mortgage to secure the lender, A's land must be first sold to satisfy the debt, but he will be subrogated to the rights of the mortgagee against B. Canaday v. Bolliver, 25 S. C. 547.

A surety who pays a note secured by deed of trust or mortgage is entitled to have the security enforced for his benefit. Taylor v. Tarr, 84 Mo. 420; Atkinson v. Stewart, 46 Mo. 510; Wolff v. Walter, 56 Mo. 292; Hall v. Morgan, 79 Mo. 47.

If a debtor deposits collateral securities with the creditor, and afterwards obtains further advances from the creditor for which he provides a surety, the latter will be entitled to the benefit of any surplus of such securities remaining after the original loan has been repaid. Wright v. Morley, 11 Ves. Jr. 21; Heyman v. Dubois, L. R. 13 Eq. 158; Praed v. Gardiner, 2 Cox, Ch. 86.

A person who charges his own property with the debt of another will, on payment of that debt, be subrogated to the benefit of any securities of the principal debtor held by the creditor. McNeale v. Iteed, 7 Ir. Ch. 251; Lewis v. Palmer, 28 N. Y. 271; Vartie v. Underwood, 18 Barb. 561.

Sureties on a bond to stay execution upon appeal, who, after affirmance, are compelled to make good a loss of the property levied on, will be subrogated to the benefit of the judgment appealed from. Gifford v. Rising, 12 N. Y. Supp. 480.

Sureties in an appeal bond who pay the same have no equities superior to those of encumbrancers subsequent to the lien of the plaintiff in the judgment appealed from but prior to the undertaking of the sureties themselves. Powell v. Allen, 11 Ill. App. 129.

A surety who pays a judgment after it has been affirmed on appeal will be subrogated to the rights of the judgment creditor against the lands of the principal in the hands of one who purchased from the principal pending the appeal, and will have priority over an assignee of a mortgage given by such purchaser to secure the purchase money. Hill v. King, 48 Ohio St. 75.

A surety who pays the debt of his principal is entitled not only to all the equities of the creditor as against the principal, but also against all persons claiming under him. All persons who take securities to which the creditor is entitled, with notice of his rights, whether from the principal debtor or from the creditor, must hold them for the benefit of the surety. Drew v. Lockett, 32 Beav. 499; Atwood v. Vincent, 17 Conn. 575; Greene v. Ferrie, 1 Desaus. Eq. 164; Williams v. Owen, 13 Sim. 597; Farebrother v. Wodehouse, 23 Beav. 13.

The right of the surety to follow such securities in the hands of a person chargeable with notice of his rights is not affected by the fact that the surety, when he entered upon his obligation, did not know of the existence of such securities nor rely thereon. Cheesebrough v. Millard, 1 Johns. Ch. 413, 7 Am. Dec. 494; Stevens v. Cooper, 1 Johns. Ch. 430, 7 Am. Dec. 499; Hayes v. Ward, 4 Johns. Ch. 130, 8 Am. Dec. 554; Lidderdale v. Robinson, 2 Brock., 160, 25 U. S. 13 Wheat. 596 (6: 740); New Hampshire Sav. Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 685; Lichtenthaler v. Thompson, 13 Serg. & R. 157, 15 Am. Dec. 581.

A surety is entitled to the benefit of a security given without his knowledge by the debtor to the creditor at a different time to secure another demand in addition to that for which he became surety. Scott v. Knox, 2 Jones, 773.

One who executes a note as collateral security for a note secured by a lien on real estate will, if compelled to pay such collateral note, be subrogated to the lien in question, though he did not know of its existence when he made his note, and was in-



Digitized by Google

tenth) thereof will be retained until the completion of the entire work and the approval and the acceptance of the same by the party of the first part, which amount shall be forfeited by said party of the second part in the event of the nonfulfilment of this contract, subject, however, to the discretion of the Secretary of the Treasury; it being expressly stipulated and agreed that said forfeiture shall not relieve the party of the second part from liability to the party of the first part for all damages sustained by reason of any breach of this contract.

While the respective claims were pending before the Comptroller of the Treasury, and, at his request, the Secretary of the Treasury transmitted the same to the court of claims under U. S. Rev. Stat. § 1063.

The bank bases its claim to the fund upon the following state of facts: On February 3, 1890, in consideration of advances made and to be made by the Prairie Bank, Sundberg & Company gave to one Van Zandt, a representative of the bank, an order or power of attorney, authorizing him to receive from the United States the final payment under the contract. The acting Secretary of the Treasury declined to recognize this power of attorney, but expressed a willingness, on request of the contractors, to forward, when it became due, the check for the final payment to the address of Van Zandt. Being informed by the latter that this arrangement would *be satisfactory [229 to the contractor and himself, the assistant Secretary of the Treasury gave direction to the disbursing agent of the building to send the final check, drawn to the order of the contractor, to the address of Van Zandt. Between February and May, 1890, upon the faith of the lien upon the final payment alleged to have been acquired by this arrangement, the bank advanced to Sundberg & Company about $6,000, but, although it was claimed by the bank that the amount of the advances in question were, in large part, actually used in the performance of

---

formed of an assignment of the original note by the creditor to a third person. Hevener v. Berry, 17 W. Va. 474.

The surety cannot require the creditor, before proceeding against him, to exhaust collaterals deposited by the principal as security for the debt; he must first discharge the debt, then he may enforce the securities himself. Dougherty v. Mackenzie, 34 Mo. 462; Koehler v. Farmers' & D. Nat. Bank, 51 Hun, 418; First Nat. Bank v. Wood, 71 N. Y. 405; Geddis v. Hawk, 1 Watts, 280; Brough's Estate, 71 Pa. 460; Hardy v. Overman, 36 Ind. 549; Armstrong v. Poole, 30 W. Va. 666; Brick v. Freehold Nat. Bkg. Co. 37 N. J. L. 307; Hall v. Hoxsey, 84 Ill. 616.

If the security consists of a chattel mortgage the surety will, on payment of the debt, be entitled to the possession of the chattels. Torp v. Gulseth, 37 Minn. 135.

To allow the surety on payment of an instalment to have the benefit of the security provided for the other part of the debt might, in effect, require the creditor, instead of the principal debtor, to indemnify the surety. Grubbs v. Wysors, 32 Gratt. 127; Wade v. Coope, 2 Sim. 155; Crump v. McMurtry, 8 Mo. 408; Lynch v. Hancock, 14 S. C. 66.

Subrogation will not be enforced in favor of a surety so as to defeat an interest acquired and held by a third party, when that interest, though subordinate to that of the creditor, is prior to the surety's undertaking. Patterson v. Pope, 5 Dana, 243; Johnson v. Morrison, 5 B. Mon. 106; Farmers' & D. Bank v. Sherley, 12 Bush, 304; Fishback v. Bodman, 14 Bush, 117.

Payment of part of the debt by the surety will not entitle him to an assignment of the creditor's securities *pro tanto*. Hollingsworth v. Floyd, 2 Harr. & G. 87.

The surety of a person indebted to the government, who pays such indebtedness, does not succeed to the government's right of priority if there be any further indebtedness of his principal to the government, though on a different account. Reg. v. O'Callaghan, 1 Ir. Eq. 439.

In Williams v. Tipton, 5 Humph. 66, 42 Am. Dec. 420, it is held that a judgment creditor has a right in equity to set aside a fraudulent conveyance, and a surety who has satisfied a part of the judgment of such creditor will be substituted to the rights of such judgment creditor to the extent of his payment.

And in Bowen v. Barksdale, 33 S. C. 142, it was held that where a surety on a mortgage note pays part of it he is entitled to be subrogated to the right of the mortgagee and to receive payment before subsequent judgment creditors. Should the creditor permit the surety to resort to the right of subrogation before the debt has been entirely paid, neither the principal debtor nor any creditor may complain. Gedye v. Matson, 25 Beav. 310; Morley v. Harris, 1 Lea, 577; Spaulding v. Crane, 46 Vt. 292.

In Magee v. Leggett, 48 Miss. 139, the court, in referring to the general rule, said: "We do not understand the rule as requiring that the 'surety' must make entire payment. It is enough if the creditor has been fully paid, part by the principal debtor and part by the surety. In such case, subrogation will accrue *pro tanto* to the extent of his payment. Such would be the effect if two or more sureties contributed in equal or unequal amounts to the payment." Comins v. Culver, 35 N. J. Eq. 94; Vert v. Voss, 74 Ind. 565.

The surety of an administrator who pays a debt of the intestate which the administrator had become bound to pay is entitled to the same lien on the estate which the administrator would have had, had he paid the debt. Gowing v. Bland, 2 How. (Miss.) 813.

The sureties on the official bond of a sheriff, upon paying a judgment against him for making an erroneous seizure, will be subrogated to his rights in respect of an indemnity bond demanded and received by him of the judgment creditor before making the levy. People, Kellogg, v. Schuyler, 4 N. Y. 173.

The sureties on a bond given on a second appeal have no right to subrogation as against the sureties on the first appeal bond. Hinckley v. Kreits, 58 N. Y. 583; Chester v. Broderick, 131 N. Y. 549.

If the principal appeals from a judgment without the consent of the surety, the latter, on payment of the judgment, will be subrogated to the rights of the creditor against the surety on the appeal bond. Friberg v. Donovan, 23 Ill. App. 58; Mitchell v. De Witt, 25 Tex. Supp. 180, 78 Am. Dec. 561.

In Louisiana it is held that the latter surety is entitled to subrogation against the prior surety, on the ground that it must be presumed that he relied upon the undertaking of the first surety as a protection against loss. Howe v. Fraser, 2 Rob. (La.) 424. See also McClung v. Beirne, 10 Leigh, 394, 34 Am. Dec. 739; Rodgers v. McCluer, 4 Gratt. 81, 47 Am. Dec. 715; Leake v. Ferguson, 2 Gratt. 420; Hill v. Manser, 11 Gratt. 522,—cases in which the sureties on appeal bonds were subrogated to the lien of the judgment appealed from.



Digitized by Google

the contract of Sundberg & Company, the court of claims failed to find such to be the fact. It is true that the court, in one of its findings, gives "a full and accurate statement of the checking, deposit, and loan accounts between the bank and Sundberg & Company from January 24, 1890, to August 15, 1890," but to whom the checks were made payable or for what purpose they were issued does not appear.

Hitchcock's claim to the fund was asserted upon the ground that in May, 1890, Sundberg & Company defaulted in the performance of their contract, and that thereupon he, as surety, without any knowledge of the alleged rights of the bank, assumed the completion of the contract with the consent of the contractors, and that he had disbursed therein about $15,000 in excess of the current payments from the government. The bond which Hitchcock executed as surety was made pursuant to the following provision contained in the contract between Sundberg & Company and the government:

"It is further covenanted and agreed between the parties to this contract that the party of the second part shall execute, with two or more good and sufficient sureties, a bond of the United States in the sum of thirty thousand dollars ($30,000), conditioned for the faithful performance of this contract and the agreements and covenants herein made by the said party of the second part."

The court of claims held that Hitchcock was entitled to the fund (27 Ct. Cl. 185), and entered judgment accordingly. The Prairie Bank thereupon appealed, and a cross-appeal was 230]* taken by the United States in order that it might be protected from a double liability, in the event this court should hold that the Prairie Bank was entitled to any part of the fund.

*Messrs.* **A. B. Browne, Howard Henderson,** and *A. T. Britton*, for the Prairie State National Bank:

The contest in the present case is one between rival equities.

Subrogation is never enforced to the detriment of an equal or superior equity.

1 Story, Eq. Jur. 12th ed, § 64*d*; *Keely* v. *Cassidy*, 93 Pa. 318.

The extent to which the remedy will be carried for the sureties' indemnity will be governed by equitable considerations.

Sheldon, Subrogation, § 105.

The equity of the bank, being prior in time and superior, must prevail.

The power of attorney to the bank was irrevocable and binding on Hitchcock.

The equitable doctrine with respect to the assignment of property to be acquired in the future is extended to funds not yet in existence.

*Hawley* v. *Bristol*, 39 Conn. 26; *Ruple* v. *Bindley*, 91 Pa. 296; *East Lewisberg Lumber & M. Co.* v. *Marsh*, 91 Pa. 96; *Brooks* v. *Hatch*, 8 Leigh, 534.

The appointment of one party to act for another, where it is coupled with an interest or created upon a valuable consideration, is irrevocable.

*Hunt* v. *Rousmanier*, 21 U. S. 8 Wheat. 174 (5: 589); *Bonney* v. *Smith*, 17 Ill. 531; *Walker* v. *Denison*, 86 Ill. 142.

The demand in the present case is not a claim within the meaning of the statute. The power of attorney or assignment given by Sundberg & Co. to the bank was of an undisputed and liquidated debt, arising upon a contract with the United States, and such debt is not a claim within the meaning of the statute.

*Dowell* v. *Cardwell*, 4 Sawy. 217; *Douglas* v. *Beasley*, 40 Ala. 142; *Pennoyer* v. *McConnaughy*, 140 U. S. 1 (35: 363); *Heath* v. *Wallace*, 138 U. S. 573 (34: 1063).

Subrogation is to be carried out in the exercise of an equitable discretion with a due regard to the legal and equitable rights of others. It is not to be used to overthrow the equity of another and thus work injustice.

*Keely* v. *Cassidy*, 93 Pa. 318.

As between mere equitable claims he who is first in time is superior in right.

*Cherry* v. *Monro*, 2 Barb. Ch. 618, 630.

Precedency in time will, under many circumstances, give an advantage or a priority in right.

*Muir* v. *Schenck*, 3 Hill, 228, 38 Am. Dec. 633; *Fitzsimmons* v. *Ogden*, 11 U. S. 7 Cranch, 2 (3: 249).

Where equities are equal, priority gives preference.

*Vanmeter* v. *McFaddin*, 8 B. Mon. 435, 441.

Subrogation is not available or enforceable where there are subsisting and countervailing equities which forbid it.

*Miller* v. *Stout*, 5 Del. Ch. 259.

Hitchcock cannot claim that he has been injured by the giving by Sundberg & Co., and the recognition by the government, of the power of attorney to the bank, for through the advances of the bank, on the faith of this power of attorney, his liability is diminished by the amount of such advances. He has received a benefit, not an injury.

*Cross* v. *Allen*, 141 U. S. 528 (35: 843); *Marshall* v. *Dixon*, 82 Ga. 435.

*Messrs.* **George A. King** and *Rufus H. Thayer*, for Hitchcock *et al.*:

The power of attorney given to Van Zandt is void under U. S. Rev. Stat. § 3477.

*United States* v. *Gillis*, 95 U. S. 413 (24: 504); *Spofford* v. *Kirk*, 97 U. S. 484 (24: 1032).

Before simple contract creditors can resort to a court of equity to collect their debts or to remove obstacles interposed to collecting them, they must show a lien, or that they have obtained judgments at law.

*Reese* v. *Bradford*, 13 Ala. 837.

There was no assignment to the bank, either by the power of attorney or the acts of the parties.

*Wright* v. *Ellison*, 68 U. S. 1 Wall. 16 (17: 555).

If by any subsequent act or transaction between the principals the contract was varied it destroys all liability on the part of the sureties.

*Reese* v. *United States*, 76 U. S. 9 Wall. 13, 21 (19: 541, 544).

Any diversion by the government of the retained 10 per cent stipulated for by the contract would be in violation of the rights of the sureties, and a discharge of them.

*Lidderdale* v. *Robinson*, 25 U. S. 12 Wheat.



Digitized by Google

594 (6: 740); *Hunter* v. *United States*, 30 U. S. 5 Pet. 173 (8: 86); *Leggett* v. *Humphreys*, 62 U. S. 21 How. 66 (16: 50); *United States* v. *Ryder*, 110 U. S. 729, 732, 733 (28: 308, 309); *La Farge* v. *Herter*, 11 Barb. 159; *Union Mut. L. Ins. Co.* v. *Hunford*, 148 U. S. 187, 191 (36: 118, 121).

*Mr.* **Joshua Eric Dodge**, Assistant Attorney General, for the United States.

**Mr. Justice White** delivered the opinion of the court:

The question to be determined is, Which of the two contestants possesses a superior right to the fund? It is self-evident that, considering the agreements between Sundberg & Company and the bank as an intended transfer *pro tanto* of the rights of the latter to the results of the contract with the United States, such transfer would be void under U. S. Rev. Stat. § 3477. This position was not controverted in the discussion at bar, but it was asserted that as the bank had advanced money to complete the building and thus to enable Sundberg & Company to perform their contract obligations with the government, therefore the bank had an equitable lien upon the 10 per cent retained by the government paramount to any lien in favor of Hitchcock, whose lien, it was contended, only arose from the date of his advances made to execute the contract upon Sundberg's default.

Thus the respective contentions are as follows: The Prairie Bank asserts an equitable lien in its favor, which it claims originated in February, 1890, and is therefore paramount to Hitchcock's lien, which it is asserted arose only at the date of his advances. The claim of Hitchcock, on the other hand, is that his equity arose at the time he entered into the contract of suretyship, and therefore his right is prior in date and paramount to that of the bank.

231] *In considering these conflicting claims, it must be recognized at the outset that the terms of the original contract made by the United States with Sundberg were in no wise affected or changed by the agreements subsequently made between Sundberg and the Prairie Bank. Not to so consider would be admitting the application of § 3477, on the one hand, and then immediately proceeding to deny its effect on the other. We shall, therefore, in examining the rights of the parties, proceed upon the hypothesis that the contract made by the United States remained in full force and effect, and that the rights, if any, of both parties to this controversy were subject to its terms.

That Hitchcock, as surety on the original contract, was entitled to assert the equitable doctrine of subrogation is elementary. That doctrine is derived from the civil law, and its requirements are, as stated† in *Ætna L. Ins. Co.* v. *Middleport*, 124 U. S. 534 [31: 537]: "(1), That the persons seeking its benefits must have paid a debt due to a third party before he can be substituted to that party's rights; and, (2), that in doing this he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in cases of sureties, prior mortgages, etc. The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another." See authorities reviewed at pp. 548 [542] *et seq.*

As said by Chancellor Johnson in *Gadsen* v. *Brown*, Speers, Eq. 38, 41 (quoted and referred to approvingly in the opinion in *Ætna L. Ins. Co.* v. *Middleport*, just referred to), "the doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature never could have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound; and, as far as I have been able to learn its history, it never has been so applied. If one with the perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law *which would restore him his money or [232 absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound who could not but choose to abide the penalty."

Under the principles thus governing subrogation, it is clear whilst Hitchcock was entitled to subrogation the bank was not. The former in making his payments discharged an obligation due by Sundberg for the performance of which he, Hitchcock, was bound under the obligation of his suretyship. The bank, on the contrary, was a mere volunteer, who lent money to Sundberg on the faith of a presumed agreement and of supposed rights acquired thereunder. The sole question, therefore, is whether the equitable lien, which the bank claims it has, without reference to the question of its subrogation, is paramount to the right of subrogation which unquestionably exists in favor of Hitchcock. In other words, the rights of the parties depend upon whether Hitchcock's subrogation must be considered as arising from and relating back to the date of the original contract, or as taking its origin solely from the date of the advance by him.

A great deal of confusion has arisen in the case by treating Hitchcock as subrogated merely "in the rights of Sundberg & Co." in the fund, which, in effect, was saying that he was subrogated to no rights whatever. Hitchcock's right of subrogation, when it became capable of enforcement, was a right to resort to the securities and remedies which the creditor, the United States, was capable of asserting against its debtor, Sundberg & Company, had the security not satisfied the obligation of the contractors, and one of such remedies was the right based upon the original contract to appropriate the 10 per cent retained in its hands. If the United States had been compelled to complete the work, its right to forfeit the 10 per cent and apply the accumulations in reduction of the damage sustained remained. The right of Hitchcock to subrogation, therefore, would clearly entitle him when, as surety, he fulfilled the obligation of Sundberg & Company to the government, to be substituted to the rights which the United *States might [233 have asserted against the fund. It would hardly be claimed that if the sureties had failed to avail themselves of the privilege of completing

†This statement is not in the opinion but in the headnote of the official reporter.



Digitized by Google

work, they would not be entitled to a credit of the 10 per cent reserved in reduction of the excess of cost to the government in completing the work beyond the sum actually paid to the contractor, irrespective of the source from which the contractor had obtained the material and labor which went into the building.

That a stipulation in a building contract for the retention, until the completion of the work, of a certain portion of the consideration, is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed; that it raises an equity in the surety in the fund to be created; and that a disregard of such stipulation by the voluntary act of the creditor operates to release the sureties, is amply sustained by authority. Thus, in *Calvert* v. *London Dock Co.* (1838), 2 Keen, 638, where a contractor had undertaken to perform certain work, and it was agreed that three fourths of the work, as finished, should be paid for every two months, and the remaining one fourth upon the completion of the whole work, it was held that the sureties for the due performance of the contract were released from their liability by reason of payments exceeding three fourths of the work done having been made to the contractor without the consent of the sureties before the completion of the whole work. To the argument that the extra advances really went into the work and so inured to the benefit of the sureties, Lord Langdale, master of the rolls, answered as follows (p. 644):

"The argument, however, that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was beneficial to the surety, and the answer has always been that the surety himself was the proper judge of that, and that no arrangement, different from that contained in his con-234]tract, *is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is, whether what has been done lessens that security.

"In this case, the company were to pay for three fourths of the work done every two months; the remaining one fourth was to remain unpaid for, till the whole was completed; and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the company a fund wherewith to complete work, if he did not; and thus it materially tended to protect the sureties.

"What the company did was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure which by the contract was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands one fourth of the value of the work done, became creditors to a large amount, without any security; and, under the circumstances, I think that their situation with respect to Streather was so far altered that the sureties must be considered to be discharged from their suretyship."

In *General Steam Nav. Co.* v. *Rolt* (1859) 6 C. B. N. S. 550, upon a second appeal of the case, the exchequer chamber held that a plea by a surety to an action to recover from him the excess of cost in completing a ship after the contractor had made default, and also a stipulated sum by way of damages for delay, to the effect that the owner, without the consent of the surety, had allowed the builder to anticipate a greater portion of the last two instalments specified in the contract, and thus materially and prejudicially alter the surety's position, was a prima facie answer to the action, and that the *onus* lay upon the plaintiffs to prove the allegations of their reply that the advances were made with the knowledge and assent and at the request of the surety. It was argued on behalf of the plaintiffs, among other contentions, that under the circumstances in the case there was nothing to show that the defendant could be prejudiced in his capacity *of surety by any of the advances[235 made by the plaintiffs, and therefore he was not discharged from his liability of surety. The appellate court declined to hear counsel for the plaintiffs. In announcing the opinion of the court affirming the judgment below, Pollock, C. B., said (p. 604):

"Now, certainly, prima facie the withdrawal of a fund which is a security for the thing in respect of the not doing of which he is not called upon to pay damages is a prejudice to the surety. He is not in the same situation with regard to his principal in which he ought to be placed; he is deprived of the security of the fund out of which the company might in the first instance have indemnified themselves. With regard to the point that there was constructive notice, that has very properly been abandoned by Mr. Welsby. It is clearly not tenable. Prima facie, the surety was prejudiced by the existing state of things. Whether there could have been any proof to show that, notwithstanding the appearance of prejudice, in reality none was or could be sustained, it is not at all necessary to inquire. It is, however, exceedingly difficult to conceive any state of things in which it must not to a considerable extent be a prejudice to a surety to have a fund withdrawn which would be in reality the security to the company with whom he is contracting, and to the surety who guarantees."

*Polak* v. *Everett*, L. R. 1 Q. B. Div. 669, was decided by the court of appeals in 1876. Brandt, at page 629 of his Treatise on Suretyship, thus succinctly states the facts and ruling in the case: "A agreed to redeem certain shares for £6,000. within twelve months, and B became his surety. A at the same time transferred to the creditor certain book accounts, amounting to £8,000, with the understanding that they should be collected, and one half the amount collected should go as payment on the £6,000. Afterwards the creditors, for an equivalent in shares and cash, released to A their interest in the book accounts. *Held*, this discharged B altogether from his obligation, even though the



Digitized by Google

236] book accounts would only have *paid £4,000 of the £6,000, if they had all been collected. This was put upon the ground that the contract for which the surety became responsible had been changed, and he was thereby wholly discharged, the same as if time had been given, or any other material alteration in the original contract had been made."

The three judges of the queen's bench agreed upon the proposition that it was an established principle of equity that where time was given by a creditor to the principal debtor without the assent of the surety, there was thereby a violation of rights which the surety acquired when he entered into the suretyship, and that no inquiry could be made into the question of whether the act of the creditor was for the benefit or to the prejudice of the surety. Lord Blackburn thought the same principle should govern in the case before the court where the "equitable right" which the surety acquired when he entered into the suretyship to have the book debts appropriated to reduce the principal debt had been taken away from him by the act of the creditor in releasing the book debts to the person collecting them. He also (p. 676) called attention to the fact that there was a distinction made in equity between those rights of a surety which he acquired at the time when he entered into the suretyship, and those subsequently acquired, such as the benefit of new securities which might be received by the creditors subsequent to the making of the original contract; and he remarked that the question whether a dealing by the creditor with such new securities would operate to discharge the surety was quite a different question from that before the court.

Mellor, J., said (p. 676) that the question was one of contract, "and the surety is entitled not to be affected by anything done by the creditor, who has no right to consider whether it might be to the advantage of the surety or not. The surety is entitled to remain in the position in which he was at the time when the contract was entered into."

Quain, J., said (p .677):

"I agree with my brother Mellor, that it is a thoroughly sound and safe principle that, where 237] the act is voluntary and *deliberate, the creditor, altering the contract and rendering it impossible that it should be carried out in its original form, should suffer. This is a sound doctrine, which ought not to be impeached, and cannot be impeached, because it is established by authority."

The judgment of the queen's bench was affirmed by the court of appeal (Jessel, M. R., Kelly, C. B., Mellish, L. J., and Denman, J.) without opinion other than the statement that "the court had no doubt that the view taken by the queen's bench division was correct, and affirmed the judgment for the same reasons."

*Holme* v. *Brunskill* (1877) L. R. 3 Q. B. Div. 495, substantially reiterated the principle decided in the earlier cases. Cotton, L. J., with whom concurred Lord Justice Thesiger, said (p. 505):

"The true rule, in my opinion, is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is, without inquiry, evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable, notwithstanding the alteration, and that if he has not so consented he will be discharged."

The rulings of this court have been equally emphatic in upholding the right of a surety to stand upon the agreement with reference to which he entered into his contract of suretyship and to exact strict compliance with its stipulations. Thus, in the case of *Miller* v. *Stewart*, 22 U. S. 9 Wheat. 680 [6: 189], Mr. Justice Story, in delivering the opinion of the court, said (p. 702 [195]):

*"Nothing can be clearer, both upon [238 principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal."

In *Reese* v. *United States*, 76 U. S. 9 Wall. 13 [19: 541], Mr. Justice Field, delivering the opinion of the court, said (p. 21 [544]):

"It is true, the rights and liabilities of sureties on a recognizance are in many respects different from those of sureties on ordinary bonds or commercial contracts. The former can at any time discharge themselves from liability by surrendering their principal, and they are discharged by his death. The latter can only be released by payment of the debt or performance of the act stipulated. But in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent, their positions are similar. And the law upon these matters is perfectly well settled. Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

And the soundness of these opinions was recognized in *Cross* v. *Allen*, 141 U. S. 528, 537 [35: 843, 849], it being held that in the case there before the court the rights of the surety were not altered by certain transactions of



Digitized by Google

which complaint was made, but remained as before.

*Finney* v. *Condon* (1877) 86 Ill. 78, was a dis-
239]pute over a building contract. It was held that where, under the terms of a building contract, payments were to be made semi-monthly, according to the estimates of an architect, of a certain proportion of the value of the work done, the surety was bound by the estimates and could not defeat a recovery of damages sustained by reason of the contractor abandoning the completion of the erection of the dwelling houses provided for in the contract, upon the plea that payments in excess of the amount stipulated in the contract were made by the owner. The doctrine, however, enunciated in *Calvert* v. *London Dock Co.* 2 Keen, 638, and *General Steam Nav. Co.* v. *Rolt*, 6 C. B. N. S. 550, was approved by the court in the opinion delivered by Mr. Justice Scott, who said (pp. 80, 81):

"The point relied on most confidently in the defense is, that the sureties for the performance of the contract are released from all liability thereon, on account of payment exceeding 85 per cent of the work done having been made to the contractor without their consent before the completion of the work. The law upon this subject seems to be, the reserved per cent to be withheld until the completion of the work to be done is as much for the indemnity of him who may be a guarantor of the performance of the contract as for him for whom it is to be performed. And there is great justness in the rule adopted. Equitably, therefore, the sureties in such cases are entitled to have the sum agreed upon held as a fund out of which they may be indemnified, and if the principal releases it without their consent it discharges them from their undertaking. The principle is, the withdrawal of the fund agreed upon as security for the performance of the contract without his consent is a prejudice to the surety or guarantor. Sureties and guarantors are not to be made liable beyond the express terms of their engagements. They have the right to prescribe the terms and conditions on which they will assume responsibility, and neither of the principals can change those terms without the consent of the sureties, even with a view to avoid ultimate liability."

Applying the principles which are so clearly settled by the foregoing authorities to the case
240]at bar, it is manifest that if the transaction in February, 1890, by which the Prairie Bank acquired its alleged lien on the fund possessed the effect contended for by the bank, it would necessarily operate to alter and impair rights acquired by the surety under the original contract.

Sundberg & Company could not transfer to the bank any greater rights in the fund than they themselves possessed. Their rights were subordinate to those of the United States and the sureties. Depending, therefore, solely upon rights claimed to have been derived in February, 1890, by express contract with Sundberg & Company, it necessarily results that the equity, if any, acquired by the Prairie Bank in the 10 per cent fund then in existence and thereafter to arise was subordinate to the equity which had, in May, 1888, arisen in favor of the surety Hitchcock. It follows that the court of claims did not err in holding that Hitchcock was entitled to the fund, and its judgment is therefore affirmed.

*Judgment affirmed.*

---

## PLEASANT DRAPER, *Plff. in Err.*,
v.
## UNITED STATES.

(See S. C. Reporter's ed. 240-247.)

*Jurisdiction of circuit court—crime committed on Indian reservation—state power.*

1. The circuit court of the United States has no jurisdiction to try an offense committed on the Crow reservation, in Montana, by another than an Indian.
2. Exclusive jurisdiction of the state courts over crimes on Indian reservations not committed by or against Indians is not taken away by the clause of the enabling act of the state of Montana providing that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."
3. In reserving to the United States jurisdiction and control over Indian lands in Montana it was not intended to deprive that state of power to punish for murder committed on a reservation or Indian lands by other than an Indian.

[No. 496.]

*Submitted October 23, 1896. Decided November 30, 1896.*

IN ERROR to the Circuit Court of the United States for the District of Montana to review a judgment of conviction of Pleasant Draper for the crime of murder committed on the Crow Indian reservation in Montana. *Reversed*, and cause remanded for further proceedings.

The facts are stated in the opinion.

*Messrs.* **J. W. Strevell**, *S. A. Balliet*, and *Lewis Penwell* for plaintiff in error.

*Mr.* **J. M. Dickinson**, Assistant Attorney General, for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

The plaintiff in error was indicted, tried, convicted, and sentenced to death for the crime of murder alleged to have been committed on the Crow Indian reservation. He moved to arrest the judgment on the ground that the court had no jurisdiction to try an offense committed on the Crow reservation by other than an Indian, as such crime was exclusively cognizable by the proper court of the state of Montana. The refusal to arrest the judgment on account of this asserted want of jurisdiction is one of the errors pressed upon our attention, and our opinion on the subject will render it unnecessary to consider the other assignments.

The indictment does not state, nor does the

NOTE.—*As to Indians and Indian tribes, their status and rights; jurisdiction and control over them,* —see note to Worcester v. Georgia, 8: 483.

*As to courts; jurisdiction of United States circuit courts dependent on residence of parties; proper place of suit,*—see note to Roberts v. Lewis, 36: 573.



Digitized by Google

record affirmatively show, that the accused and the deceased were negroes, but that fact is conceded both by counsel for the prisoner and the government, and upon such concession, the case as to jurisdiction was determined below, and is here presented for consideration. Irrespective, however, of the admission of counsel as to the race to which the accused and the deceased belonged, the question of jurisdiction arises on the record, since, if, as matter of law, the reservation was not within the sole and exclusive jurisdiction of the United States, as the indictment fails to charge that the crime was committed by an Indian, it necessarily follows that if the court had jurisdiction only to punish such a crime the want of jurisdiction appears upon the face of the record. It is clear that if the accused was an Indian the court below had jurisdiction under the act of March 3, 1885, which, among other things, authorizes the punishment of any Indian committing the offense of murder within the boundaries of any state of the United States and within the limits of any Indian reservation, according to the laws and before the tribunals of the United States. *United States* v. *Kagama*, 118 U. S. 375 [30: 228]. The assertion of jurisdiction in the courts of the United States over the crime of murder 242]*perpetrated by one not an Indian against one not an Indian is based on the fact that the offense was committed on an Indian reservation. The contention as to want of jurisdiction rests upon the proposition that the Indian reservation being within the state, the courts of the state had alone cognizance of crimes therein done by other than Indians. To determine these conflicting contentions requires a brief examination of the legislation organizing the territory of Montana and which provided for the admission of that state into the Union.

The territory of Montana was organized in 1864. 13 Stat. at L. 85. Subsequently, in 1868, the Crow Indian reservation was created (15 Stat. at L. 649), the land of which it was composed being wholly situated within the geographical boundaries of the territory of Montana. The treaty creating this reservation contained no stipulation restricting the power of the United States to include the land, embraced within the reservation, in any state or territory then existing or which might thereafter be created. The law to enable Montana and other states to be admitted into the Union was passed in 1889. 25 Stat. at L. 676. This act embraced the usual provisions for a convention to frame a Constitution, for the adoption of an ordinance directed to contain certain specified agreements, and provided that, upon the compliance with the ordained requirements, and the proclamation of the President so announcing, the state should be admitted on an equal footing with the original states. The question then is, Has the state of Montana jurisdiction over offenses committed within its geographical boundaries by persons not Indians or against Indians, or did the enabling act deprive the courts of the state of such jurisdiction of all offenses committed on the Crow Indian reservation, thereby devesting the state *pro tanto* of equal authority and jurisdiction over its citizens, usually enjoyed by the other states of the Union?

In *United States* v. *McBratney*, 104 U. S. 622 [26: 869], this court held that where a state was admitted into the Union, and the enabling act contained no exclusion of jurisdiction as to crimes committed on an Indian reservation by others than *Indians or [243 against Indians, the state courts were vested with jurisdiction to try and punish such crimes. The court there said:

"The act of March 3, 1875 [the enabling act which provided for the admission of the state of Colorado], necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith. 207 ½ *lb. Papers S. Tobacco* v. *United States* ("*The Cherokee Tobacco*") 78 U. S. 11 Wall. 616 [20: 227]. Whenever, upon the admission of a state into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. *Blue Jacket* v. *Johnson County Comrs.* ("*The Kansas Indians*") 72 U. S. 5 Wall. 737 [18: 667]; *United States* v. *Ward*, Woolw. 17. The state of Colorado, by its admission into the Union by Congress upon an equal footing with the original states in all respects whatever, without any such exception as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States. The courts of the United States have, therefore, no jurisdiction to punish crimes within that reservation, unless so far as may be necessary to carry out such provisions of the treaty with the Ute Indians as remain in force. But that treaty contains no stipulation for the punishment of offenses committed by white men against white men."

*United States* v. *McBratney* is therefore decisive of the question now before us, unless the enabling act of the state of Montana contained provisions taking that state out of the general rule and depriving its courts of the jurisdiction to them belonging and resulting from the very nature of the equality conferred on the state by virtue of its admission into the Union. Such exception is sought here to be evolved from certain provisions of the enabling act of Montana which were ratified by an ordinance of the convention which framed the Constitution of that state. The provision relied on is as follows:

*"Second. That the people inhabiting [244 the said proposed state of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the



Digitized by Google

Congress of the United States; that the lands belonging to citizens of the United States residing without the said state of Montana shall never be taxed at a higher rate than the lands belonging to the residents thereof; that no taxes shall be imposed by the said state of Montana on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein contained shall preclude the said state of Montana from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States, or from any person, a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation, but said last-named lands shall be exempt from taxation by said state of Montana so long and to such extent as such act of Congress may prescribe."

The words in the foregoing provisions upon which the argument is based are the following: "And said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." This language has been considered in several cases in the courts of the United States with somewhat contradictory results. *United States* v. *Ewing*, 47 Fed. Rep. 809; *United States* v. *Partello*, 48 Fed. Rep. 670; *Truscott* v. *Hurlbut Land & C. Co.* 73 Fed. Rep. 61.

As equality of statehood is the rule, the words relied on here to create an exception cannot be construed as doing so, if, by any reasonable meaning, they can be otherwise treat-
245]ed. *The mere reservation of jurisdiction and control by the United States of "Indian lands" does not of necessity signify a retention of jurisdiction in the United States to punish all offenses committed on such lands by others than Indians or against Indians. It is argued that as the first portion of the section in which the language relied on is found disclaims all right and title of the state to "the unappropriated public lands lying within the boundaries thereof and of all lands lying within said limits, owned or held by an Indian or Indian tribes, and until the title thereof shall be extinguished by the United States, the same shall be and remain subject to the disposition of the United States," therefore the subsequent words, "and said lands shall remain under the absolute jurisdiction and control of the United States," are rendered purely tautological and meaningless, unless they signify something more than the reservation of authority of the United States over the lands themselves and the title thereto. This argument overlooks not only the particular action of Congress as to the Crow reservation, but also the state of the general law of the United States, as to Indian reservations, at the time of the admission of Montana into the Union.

On April 11, 1882 (22 Stat. at L. 42), Congress confirmed an agreement submitted by the Crow Indians for the sale of a portion of their reservation, and for the survey and division in severalty of the agricultural lands remaining in the reservation as thus reduced. The act, however, provided that the title to be acquired by the allottees was not to be subject to alienation, lease, or encumbrance, either by voluntary conveyance of the grantee or his heirs, or by the judgment, order, or decree of any court, but should remain inalienable and be not subject to taxation for the period of twenty-five years, and until such time thereafter as the President might see fit to remove the restriction.

The policy thus applied to the Crow reservation subsequently became the general method adopted by Congress to deal with Indian reservations. In February, 1887, by a general law, Congress provided "for the allotment of lands in severalty to Indians on the various reservations, and to extend the *protection of the[246 laws of the United States and the territories over the Indians, and for other purposes." 24 Stat. at L. 388. The act in question contemplated the gradual extinction of Indian reservations and Indian titles by the allotment of such lands to the Indians in severalty. It provided in § 6, "that upon the completion of said allotments and the patenting of said lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside." But the act at the same time put limitations and restrictions upon the power of the Indians to sell, encumber, or deal with the lands thus to be allotted. Moreover, by § 4 of the act of 1887, Indians not residing on a reservation, or for whose tribe no reservation had been provided, were empowered to enter a designated quantity of unappropriated public land and to have patents therefor, the right, however, of such Indian to sell or encumber being regulated by provisions like those controlling allotments in severalty of lands comprised within a reservation. From these enactments it clearly follows that at the time of the admission of Montana into the Union, and the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the power of the state to frustrate the limitations imposed by the laws of the United States upon the title of lands once in an Indian reservation, but which had become extinct by allotment in severalty, and in which contingency the Indians themselves would have passed under the authority and control of the state.

It is also equally clear that the reservation of jurisdiction and control over the Indian lands was relevant to and is explicable by the provisions of § 4 of the act of 1887, which allowed nonreservation Indians to enter on and take patents for a certain designated quantity of public land. *Indeed, if the meaning of[247 the words which reserved jurisdiction and control over Indian lands contended for by the defendant in error were true, then the state of Montana would not only be deprived of authority to punish offenses committed by her own citizens upon Indian reservations, but would also have like want of authority for all



Digitized by Google

offenses committed by her own citizens upon such portions of the public domain within her borders as may have been appropriated and patented to an Indian under the terms of the act of 1887. The conclusion to which the contention leads is an efficient demonstration of its fallacy. It follows that a proper appreciation of the legislation as to Indians existing at the time of the passage of the enabling act by which the state of Montana was admitted into the Union adequately explains the use of the words relied upon, and demonstrates that in reserving to the United States jurisdiction and control over Indian lands it was not intended to deprive that state of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians, and that a consideration of the whole subject fully answers the argument that the language used in the enabling act becomes meaningless unless it be construed as depriving the state of authority belonging in virtue of its existence as an equal member of the Union. Of course the construction of the enabling act here given is confined exclusively to the issue before us, and therefore involves in no way any of the questions fully reserved in *United States* v. *McBratney*, 104 U. S. 622 [26: 869], and which are also intended to be fully reserved here.

Our conclusion is that the circuit court of the United States for the district of Montana had no jurisdiction of the indictment, but, "according to the practice heretofore adopted in like cases, should deliver up the prisoner to the authorities of the state of Montana to be dealt with according to law." *United States* v. *McBratney*, *supra*, and authorities there cited.

*The judgment is reversed*, and the cause remanded for proceedings in conformity to this opinion.

---

248] PETER WILSON, *Appt.*,
*v.*
FRED. J. KIESEL *et al.*

(See S. C. Reporter's ed. 248-252.)

*Jurisdictional amount—proper parties to an appeal—dismissal for want of parties.*

1. The liability for $5,000 each, of several defendants, subscribers to stock of a corporation, cannot give jurisdiction on appeal to this court from a territorial court, although they contend that their subscriptions were paid by a conveyance of land owned by them jointly.
2. An appeal will be dismissed for want of proper parties, where the defendants vitally and directly interested in and necessary parties to it are not made parties, and there are no summons and severance, or the equivalent.
3. A case disposed of by a state court as to all the parties on a ground common to all, upon two appeals, one taken by the plaintiff and the other by a portion only of the defendants, will not be considered by this court on appeal by the plaintiff only, to which the defendants who had made the other appeal are not parties.

[No. 139.]

*Argued and Submitted November 3, 1896. Decided November 30, 1896.*

APPEAL from a judgment of the Supreme Court of the Territory of Utah affirming the judgment of the Fourth Judicial District Court for the Territory of Utah in favor of Fred J. Kiesel *et al.*, defendants, in an action brought by Peter Wilson, plaintiff, against said defendants to compel them to pay their respective unpaid subscriptions to the capital stock of the Ogden Power Company, to be applied in satisfaction of a judgment against said company. On motion to dismiss. *Dismissed.*

See same case below, 9 Utah, 397.

The facts are stated in the opinion.

*Mr.* **Abbot R. Heywood** for appellees, in favor of motion to dismiss.

*Messrs.* **Ogden Hiles** and *J. G. Sutherland* for appellant, in opposition to motion.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Wilson recovered judgment against the Ogden Power Company, a corporation organized under the laws of the territory of Utah, for $22,405.16, on which an execution was issued and returned wholly unsatisfied, whereupon he filed a bill in the fourth judicial district court for the territory of Utah, county of Weber, against the company; and against Kiesel, Anderson, and Carnahan, and many others, to compel them severally to pay their respective unpaid subscriptions to the capital stock of the corporation to be applied in satisfaction of the judgment. Defendants Kiesel, Carnahan, and Anderson were charged with having each subscribed for fifty shares of the par *value of $100 each, and with being each [249 liable for $5,000. They answered denying that there was anything due from them to the corporation, and alleging that each of them had paid in full and at par value the amount of the stock subscribed by him; and averring, among other things, that plaintiff was also a subscriber and had paid no part of his subscription; and that Wilson had long before sold and assigned the said judgment and now had no interest therein; and by way of cross-complaint alleged that said judgment was entered by unauthorized consent and was fraudulent and void for various reasons set forth; that it had been sold and transferred to third parties; and that if the action of Wilson against the company had been tried, no greater sum than $2,000 would have been found due; to which cross-complaint plaintiff filed an answer.

The record discloses that some twenty-two of the other defendants filed their several answers to the complaint, but does not contain those answers. The cause was referred to a special master to take testimony and report his findings thereon, and he subsequently filed a report containing twenty-one findings of fact, embracing a finding that defendants Kiesel, Carnahan, and Anderson had paid their subscriptions to the capital stock in full, and to

NOTE.—*As to parties in error, who necessary*, see note to Owings v. Kincannon, 8: 727.

*That only parties to record can be heard on appeal or writ of error*, see note to Harrison v. Nixon, 9: 201.

*As to review by United States Supreme Court of territorial decisions; extent and manner of; distinction between an appeal and a writ of error*,—see note to Miners' Bank v. Iowa, 13: 867.



Digitized by Google

these the master added twenty-nine further findings, making fifty in all. As a conclusion of law the master recommended that the court find that plaintiff was entitled to a judgment for the sum of $16,500.52; that some thirty-two named defendants, not including Kiesel, Carnahan, and Anderson, should be, respectively, ordered to pay their unpaid subscriptions in the amounts stated; and that said amounts should be applied in payment of the judgment and costs. A decree was thereupon rendered in favor of plaintiff, April 29, 1893, making the findings and conclusions of the master the findings and conclusions of the district court, and awarding judgment against each of some thirty defendants for amounts stated severally and separately as to each, and in favor of some seven defendants under a stipu-
250] lation that they had paid their *several subscriptions, and also in favor of defendants Kiesel, Carnahan, and Anderson. Plaintiff moved for a new trial as to Kiesel, Carnahan, and Anderson, which was denied, and he appealed to the supreme court of the territory from the judgment in favor of Kiesel, Carnahan, and Anderson, and from the order overruling the motion for a new trial. The record does not contain the appeal of the other defendants from the judgment which had been rendered in favor of plaintiff and against them, but it appears from the opinion of the supreme court of the territory that they did so appeal, and that all the contesting defendants were before that court.

On January 29, 1894, the judgment of the district court on plaintiff's appeal was affirmed with costs. On the same day the opinion of the supreme court of the territory was filed in the case, a copy of which was transmitted in accordance with our rule, is referred to by counsel for appellant as part of the record, and as such may serve to supply certain marked deficiencies otherwise existing therein. From this opinion it appears that plaintiff appealed from the judgment in favor of Kiesel, Carnahan, and Anderson, and that twenty-four other defendants appealed from the judgment against them. The supreme court, after rehearsing the facts in the case, stated the question on plaintiff's appeal to be whether Kiesel, Carnahan, and Anderson had paid their subscriptions to the capital stock of the company as contended on their behalf; and that the questions raised on the appeal of the other defendants were whether plaintiff while a delinquent subscriber himself could maintain this action in equity against other delinquent subscribers; whether the judgment at law in Wilson's favor was fraudulent and void; and whether if the judgment was valid plaintiff could maintain an action on it as the real party in interest. The supreme court held that a delinquent subscriber could maintain the action but must contribute *pari passu* with the other subscribers to the payment of the amount due him; that the judgment was not conclusive on the subscribers, ought to have been reduced by a very large amount, and would have to be reversed in order to afford the subscribers the opportunity to test
251] the validity of *Wilson's claim against the corporation; and that Wilson was not the real party in interest at the beginning of the action and could not maintain it in his own name, which latter conclusion called for the affirmance of the judgment in favor of Kiesel, Carnahan, and Anderson, and the absolute reversal of the judgment against the other defendant and the remanding of the cause to the court below with directions to dismiss the action, it being, therefore, unnecessary to pass on the question as to whether or not Kiesel, Carnahan, and Anderson had paid their subscriptions to the capital stock of the company.

While the judgment of affirmance appears in the record the judgment of reversal with directions does not. From the judgment of affirmance the plaintiff appealed to this court and gave bond running to Kiesel, Carnahan, and Anderson, or either of them, and citation was issued to Kiesel, Carnahan, and Anderson only.

It is evident from the foregoing statement that this appeal must be dismissed. The complaint alleged that Kiesel, Carnahan, and Anderson each subscribed to fifty shares of the capital stock of the Ogden Power Company of the par value of $100 each, and that each was liable for $5,000 for which recovery was sought. This did not reach the jurisdictional amount. *Chapman* v. *Handley*, 151 U. S. 443 [38: 227].

It is true that these defendants contended that the amount due from each on their several subscriptions had been paid by a conveyance of land which was owned by them jointly, but the matter in dispute was the liability of each for $5,000, and the fact that their several subscriptions may have been paid with joint property would not make the question of the liability of each a question of the liability of all, and they did not seek a recovery over. But it is said that the matter in dispute far exceeded the jurisdictional limit, because Kiesel, Carnahan, and Anderson had filed a cross-complaint seeking to set aside and cancel Wilson's judgment against the Ogden Power Company, which was a judgment for $22,405.16. This contention, however, only demonstrates that the appeal must be dismissed for want of proper parties, *as the other defendants were directly and
[252 vitally interested in the disposition of the cross-complaint, and necessary parties to the appeal. Not having been made such, and there being no summons and severance, or the equivalent, the appeal cannot be sustained. *Davis* v. *Mercantile Trust Co.* 152 U. S. 590 [38:563]; *Hardee* v. *Wilson*, 146 U. S. 179 [36: 933].

Indeed this objection is fatal in any view, for while this record is manifestly inadequate and insufficient, it does appear and is conceded that the other defendants were before the supreme court of the territory on their own appeal as well as Kiesel, Carnahan, and Anderson on Wilson's appeal, and that the case was disposed of as to all of them on a ground common to all. We cannot be required to consider such a case by piecemeal, and if we were to take jurisdiction and determine the questions which have been argued at the bar, we should, in fact, be disposing of matters affecting parties not before us and who have been afforded no opportunity to be heard.

*Appeal dismissed.*



Digitized by Google

GEORGE A. FOWLER *et al., Plffs. in Err.*,
v.
S. WARREN LAMSON *et al.*

(See S. C. Reporter's ed. 252-255.)

*Federal question—jurisdiction.*

1. An assignment of errors is unavailable for the purpose of showing any Federal question decided, where the record itself does not show that any such question was passed upon by the state court.
2. Where a case is brought to this court on error or appeal from a judgment of a state court, unless it appear in the record that a Federal question was raised and decided in the state court this court is without jurisdiction.

[No. 88.]

*Argued and Submitted November 9, 1896. Decided November 30, 1896.*

IN ERROR to the Supreme Court of the state of Illinois to review a decree of that court affirming the decree of the Appellate Court of that state reversing the decree of the Superior Court of Cook County for a recovery by plaintiffs, Charles A. Fowler *et al.*, against S. Warren Lamson *et al.*, defendants, stockholders in an insolvent corporation, of the amount of a judgment against the corporation. *Dismissed.*

See same case below, 146 Ill. 472.

The facts are stated in the opinion.

*Messrs.* **E. F. Thompson**, *G. W. Delamater*, *Frank H. Clark*, and *Wm. H. Wilkins* for plaintiffs in error.

*Messrs.* **L. H. Bisbee** and *D. M. Kirton* for defendants in error.

Mr. Justice **Peckham** delivered the opinion of the court:

The printed record which is before this court in this case is so fragmentary in its nature as to leave no foundation for us to even guess that there was a Federal question in the case, or that it was decided by the state court against the right now set up by plaintiffs in error.

The record opens with an assignment of errors which it is alleged were made by the supreme court of Illinois, and fourteen grounds of error are set forth, many of them setting up that such court, by the judgment in suit, erred in the decision of several Federal questions. Then follows the writ of error. Then comes what is termed a decree in the case of *George Fowler* v. *Cherokee Brilliant Coal & Mining Company* and others, in the superior court of Cook county, Illinois, which decree, after reciting the fact of a hearing and a reference to a master in chancery and his report thereon, proceeds to make certain findings of fact, and to give extracts from the Constitution and statutes of Kansas, which, briefly stated, are as follows:

(1) The incorporation of the coal and mining company under the statute of Kansas.

(2) An extract from the Constitution and statutes of Kansas providing for a double liability of stockholders of an insolvent corporation.

(3) An extract from the statutes of Kansas providing for the dissolution of corporations and for a recovery against the stockholders therein for debts due from the company.

(4) An extract from the statutes of limitation of Kansas relating to absconding or concealed debtors.

(5) Findings of indebtedness from the coal and mining company to the Fowlers, plaintiffs in error; the giving of a note and mortgage for such indebtedness, and default in the payment thereof, and a dissolution of the company.

(6) The recovery of judgment in Illinois in favor of the *plaintiffs in error herein on [254 account of the debt due them from the corporation; the issue and return of execution upon such judgment wholly unsatisfied.

(7) The ownership of stock in the company by the Lamsons.

Upon these findings the decree directs a recovery by the plaintiffs herein against the defendants Lamsons, stockholders in the dissolved and insolvent corporation, of the amount of the Illinois judgment against the corporation which had been obtained by plaintiffs herein.

This decree is followed in the record by an order made by the appellate court in Illinois reversing the decree of the court below. Then follows an assignment of errors committed by the court in ordering such reversal, after which the opinion of Judge Wilkin of the supreme court of Illinois is printed, which affirms the judgment of the appellate court. In that opinion no Federal question is discussed or decided. The point actually decided by the supreme court of Illinois was, as shown by that opinion, that the Constitution and statutes of Kansas in relation to the liability of stockholders in an insolvent corporation provide a special remedy for enforcing that liability, and that such remedy only could be pursued, and that the courts of Illinois would not enforce a statutory liability under a Kansas statute providing a special remedy against stockholders. Following this opinion is a decree of affirmance by the supreme court of Illinois; after which comes a petition for a writ of error from this court and an allowance thereof. This completes the record.

It will be seen that there are no pleadings in the record; no evidence is returned; no exceptions to any decision of the court are to be found; no request to the court to find upon any Federal question; no refusal of the court to find; and no finding upon any such question. Thus there is an entire absence in this whole record of any fact showing that the supreme court of Illinois or either of the lower courts decided any Federal question whatever. The assignment of errors alleged to have been made by the Illinois supreme court is unavailable for the purpose of showing any Federal question decided, where the record itself does not show that *any such question was passed upon by [255

NOTE.—*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,*—see note to Hamblin v. Western Land Co. 37: 267.

*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution,* see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 554, and Williams v. Norris, 6: 371.



Digitized by Google

the state court. *Missouri P. R. Co.* v. *Fitzgerald*, 160 U. S. 556-575 [40: 536-540].

Where a case is brought to this court on error or appeal from a judgment of a state court, unless it appear in the record that a Federal question was raised in the state court before the entry of final judgment in the case, this court is without jurisdiction. *Simmerman* v. *Nebraska*, 116 U. S. 54 [29: 535].

It has also been frequently decided that, to give this court jurisdiction on writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111]; *California Powder Works* v. *Davis*, 151 U. S. 389-393 [38: 206, 207]; *Missouri P. R. Co.* v. *Fitzgerald*, 160 U. S. 556-576 [40: 536, 540].

Nothing of the kind appears from this record, and *the writ of error must therefore be dismissed.*

---

## JOSEPH LALONE *et al.*, *Appts.*, v. UNITED STATES.

(See S. C. Reporter's ed. 255-261.)

*Proof of fraud—fraudulent pension.*

1. A mere preponderance of evidence which at the same time is vague or ambiguous is not sufficient to warrant a finding of fraud, and will not sustain a judgment based on such finding.
2. A pension obtained for partial paralysis claimed to have resulted from disease and sickness contracted in the army cannot be held fraudulent by showing that the paralysis was the direct, immediate result of a blow or accident, if the prior physical condition caused by ill health and exposure in the army may fairly be regarded as a concurring cause of the paralysis.

[No. 4.]

*Submitted October 13, 1896. Decided November 30, 1896.*

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Wisconsin in favor of the United States, plaintiff, against Joseph Lalone *et al.*, for a recovery for the amount of money received from them from a pension fund with interest, and also a deposit in the bank, and also decreeing the sale of certain real property and that the proceeds be applied to the payment back of pension money, alleged to have been obtained by fraud. *Reversed*, and case remanded with directions to dismiss the suit.

The facts are stated in the opinion.

*Messrs.* **A. T. Britton** and **A. B. Browne** for appellants.

*Mr.* **Holmes Conrad**, Solicitor General, for appellee.

Mr. Justice **Peckham** delivered the opinion of the court:

This is a suit in equity, brought by the United States to recover back certain moneys which had theretofore been paid the appellant Joseph Lalone, upon the granting of his application for a pension, and to enjoin the defendant, the First National Bank of Beaver Dam, Wisconsin, from paying out certain moneys deposited therein by the appellant Margaret Lalone, the wife of Joseph, and which moneys were alleged to be part of those paid to Joseph, and to enjoin the conveyance of certain real estate, the legal title to which was vested in the defendant Margaret Lalone, and which plaintiff alleged to have been purchased by her with a portion of such moneys, and to vest the title to such moneys and real estate in the United States.

The ground upon which a recovery of the moneys was sought was that the pension had been obtained through the fraudulent acts and representations of the individual defendants. The bill alleged that the defendant, Joseph Lalone, filed with the pension bureau, on the 19th day of May, 1880, a claim for a pension on account of partial paralysis due to disease and sickness contracted while serving in the army during 1865; that after the consideration of such claim for a period of eight years, and until April 21, 1888, the application was allowed, and more than $5,000 were paid to the applicant as arrearages of pension, and the sum of $30 per month thereafter was allowed. The bill then alleged that the partial paralysis which Lalone claimed he was suffering from and which he said resulted from the disease and sickness contracted while in such army service was not the result of any such cause, and that Lalone's allegation to that effect was false and fraudulent, and intended to deceive the officers charged with the duty of examining and allowing such claim, and that it did so deceive them; that claimant's disability *was [257] caused by and resulted from an accident suffered by him long subsequent to his discharge from the army; that Lalone had turned the pension moneys received from the government over to his wife, Margaret Lalone, who had deposited $5,000 thereof in her name in the First National Bank of Beaver Dam, Wisconsin, and had thereafter withdrawn all but about $1,500 thereof, and with it had purchased 120 acres of land in Dodge county, Wisconsin, subject to an existing mortgage of $1,800; that Margaret Lalone had knowledge of and was a party to the fraud alleged. The bill asked for a decree giving the United States the residue of the fund in the bank and a conveyance of the realty and for an injunction *pendente lite*. Upon the filing of the bill an injunction was issued. The individual defendants each an-

---

NOTE.—*As to fraud and undue influence in avoidance of deed or will*, see note to Harding v. Handy, 6: 439.

*As to fraud or illegal consideration, how far will avoid contract*, see note to Armstrong v. Toler, 6: 468.

*As to cancelation of a deed or a contract in equity for fraud, concealment, or misrepresentation*, see note to Neblett v. Macfarland, 23: 471.

*As to fraud; suppressio veri; duty to disclose*,—see note to Cleaveland v. Smith, 33: 384.



Digitized by Google

swered under oath denying all the charges of fraud made by the bill. The bank admitted its possession of $1,500 deposited by Margaret Lalone.

On the testimony submitted, which consisted of the depositions of many witnesses, the circuit court rendered a final decree in favor of the United States against the individual defendants for a recovery of the amount of money received by them from such pension fund, with interest; the decree also provided that the bank should pay the $1,500 on deposit with it into the United States Treasury; it also ordered the sale of the realty, and that the proceeds of the sale should be applied to the payment of the money decreed against the Lalones, with execution for any deficiency.

The case is now before us for review. In all proceedings instituted to recover moneys or to set aside and annul deeds or contracts or other written instruments on the ground of alleged fraud practised by a defendant upon a plaintiff, the rule is of long standing and is of universal application, that the evidence tending to prove the fraud and upon which to found a verdict or decree must be clear and satisfactory. It may be circumstantial, but it must be persuasive. A mere preponderance of evidence which at the same time is vague or ambiguous is not sufficient to warrant a finding of fraud, and will not sustain a judgment based on such finding. The rule obtains in cases of alleged fraudulent representa-
258] tions made to *an officer of the government upon the faith of which the officer has issued a patent or done any other official act upon which the rights of the party making the misrepresentations may be founded. This principle is exemplified in *United States* v. *Iron Silver Min. Co.* 128 U. S. 678 [32: 571], and cases cited, and is not confined to cases of patents for lands.

Examining the record in this case, and after perusing the whole evidence contained therein, and having in mind the rule above stated, we are entirely convinced that the evidence on the part of the plaintiff when read in connection with that which was given on the part of the defendants falls far short of the requirements of the rule.

There are some facts which are established by uncontradicted evidence in the case. Joseph Lalone, one of the defendants and the individual to whom the pension was granted, was, at the time of his enlistment, a young man of about thirty-two years of age, of French extraction, and living in the state of Wisconsin. In 1864 he enlisted as a private in one of the Wisconsin regiments. He was famed at that time among his townsmen for his physical strength and perfect health. As many of the witnesses expressed it, he was one of the healthiest men they ever saw. He was with his regiment in the Army of Virginia, and during the winter and spring of 1865 he contracted a disease and was in the hospital at Alexandria in Virginia, suffering from what was thought to be dumb ague, or fever and ague, as stated by some of the witnesses. He came back to his home in Wisconsin, after his discharge in August, 1865, badly shattered in health, and sickly in appearance, to such an extent as scarcely to be recognized by some of his former friends. His complexion and color were bad. He seemed to have no strength in his legs, walked in a trembling way, and seemed unable to do any hard work. (There is some difference in opinion among the witnesses as to the extent of his sickness when he came from the army.) Sometime in the spring or early summer of 1866 or 1867 he suffered from a stroke of paralysis, resulting in the almost complete loss of the use of one side of his body, and affecting his speech and to some extent his mind. From that time *until the time of the trial of this case [259 he has suffered without intermission and with scarcely any improvement. In making his application for a pension in 1880 he claimed that his paralysis was the result of his experience in the army and of his exposure incident to army life and of the disease he there contracted. So far the evidence is substantially uncontradicted. There is, however, a conflict in regard to the immediate cause of the paralysis. Two witnesses upon the part of the government, who were boys at the time of the alleged occurrence, testified that they saw the defendant thrown from his wagon while driving along the road, and it is claimed that immediately or soon thereafter the paralysis appeared. It is claimed that the evidence on the part of the government shows that before this accident he had exhibited no signs of any paralysis, and that he had been fairly capable from the time of his return from the army up to the time of the accident to attend to the work on his farm like any other man of his age. Other witnesses for the government testified to the general speech of the people at that time that Lalone had been thrown from his wagon and had received severe injuries, resulting in paralysis, from which he never recovered. On the other hand, the individual defendants denied the occurrence of any such alleged accident, contradicted the evidence of the government's witnesses as to its happening, and gave evidence tending to show that soon after his return from the army Lalone suffered a slight paralytic stroke, and that he was unable to do the ordinary work of the farm from the time of his return, and that in the spring of 1866 he sustained the last stroke, from the effects of which he never recovered, and was then suffering.

Upon a careful perusal of the evidence we think it clearly appears that Lalone was not able to work on his farm from the time of his return as he had been accustomed to work before his departure for the army. Many years have elapsed since those events, and it is not strange that witnesses differ somewhat as to Lalone's condition when he returned, or as to the first appearance of the paralysis with which he is unquestionably afflicted, and under which he has suffered and been almost helpless *for nearly thirty years. Whether it [260 was the direct result of his army life and the disease there contracted, or the direct and immediate result of the alleged accident, seems to be the chief subject of conflict in the evidence of the witnesses.

It is unnecessary and it would serve no good purpose for us on this occasion to go into an extended and minute review of the evidence given on both sides of this case. It has been read with great care and the most that can be



Digitized by Google

said is that after a careful perusal of all of it there are some circumstances shown which might raise a doubt as to whether the last stroke of paralysis did not occur immediately or soon after the alleged accident. We are not entirely satisfied from the evidence that the accident in truth occurred in the manner and to the extent as testified to by the witnesses who spoke in regard to it, and who were quite young boys at the time they allege that it happened, which was almost thirty years before the time they testified. But even if we were satisfied from the evidence that the accident took place as described by these witnesses, we should still feel that the case on the part of the government had not been made out with that clearness which is requisite in order to base a finding of fraud. It is not and cannot be disputed that Lalone went to the army a healthy man and come back very greatly altered and to all appearances a very sick man. It is uncontradicted that while in the army he suffered from some very grave and enervating fever, and that he was treated for it in the hospital at Alexandria. The medical witnesses called on the part of the government themselves admit that paralysis might supervene more readily in the case of one who had materially suffered from some disease and who had not recovered from its effects, such as fever and ague, than it might in the case of a healthy man, or, as one of them said, "just to the extent that his vital forces were depressed by the disease under which he suffered he would be just that much less able to withstand sickness or injury, and that, therefore, an injury which might not have resulted with a perfectly well person in such injury to the brain as to cause paralysis might be followed with 261]*such result more readily in the case of a man who had suffered from a previous illness and was still laboring under its depressing effects." In the latter case, while the blow or accident might be the direct, immediate cause of the paralysis, yet the prior physical condition of the subject caused by ill health and exposure in the army and the sickness which he endured while in the hospital in Virginia, from which he was then suffering, might fairly be regarded as a concurring cause of such paralysis. It could not be said to be a fraud at any rate, under such a state of facts, for the defendant to claim that his paralysis was caused by his sickness in the army.

It may be somewhat doubtful as to what was the immediate cause of the paralysis from which the defendant suffered and from which he is now suffering and probably will suffer to the end. That he is almost completely helpless and has been all these years is not doubted. The trial court in the opinion delivered by it only went so far as to say that on the whole it was satisfied that the government had a preponderance of evidence that the pension was obtained fraudulently and that the money paid on it should be recovered back. This mere preponderance, as we have seen, is not sufficient in such a case. *The decree in favor of the government must therefore be reversed*, and the case remanded to the Circuit Court with directions to dismiss the bill.

OLD JORDAN MINING & MILLING COMPANY, *Plff. in Err.*,

*v.*

SOCIÉTÉ ANONYME DES MINES DE LEXINGTON.

(See S. C. Reporter's ed. 261-270.)

*Assignments of error—evidence of contract—liability of cotenant.*

1. This court can only be called upon to consider such assignments of error as are pressed upon the attention or noticed in the opinion of the court below.
2. In determining whether there was a binding contract between tenants in common in property arising from letters from each to the other, the jury can consider, in connection with such letters, the subsequent correspondence and conduct of the parties in respect to the common property, and the interpretation put upon them by the parties themselves.
3. One of the two tenants in common of a canal, who replies to a letter from the other proposing, to make necessary repairs at joint expense, by agreeing that such an arrangement is desirable, saying that it will direct its engineer to co-operate with an agent of the co-owner in examining and reporting what repairs are necessary, but that it would be best to expend only so much as would prevent loss, may be held liable for half the expense of necessary repairs subsequently made by the co-owner, when it has received bills therefor from time to time without dissent or disavowal of an agreement between them or refusal to co-operate, and its engineer has acted with the agent of the other party in examining and reporting as to needed repairs, although during this time it has not been making use of the canal.

[No. 71.]

*Argued October 27, 1896. Decided November 30, 1896.*

IN ERROR to the Supreme Court of the Territory of Utah to review the judgment of that court affirming the judgment of the District Court of the Third Judicial District of that Territory in favor of the plaintiff, the Société Anonyme des Mines de Lexington, against the Old Jordan Mining & Milling Company, for the recovery of one half the expense of certain repairs made to a canal or water ditch. *Affirmed.*

See same case below, 9 Utah, 488.

Statement by Mr. Justice **Brown**:

*This was an action originally brought [262 in the district court for the third judicial district of the territory of Utah by the Société Anonyme

NOTE.—*That the Supreme Court will not review the discretionary action of the court below*, see note to Barrow v. Hill, 14: 48.

*As to contracts; performance, when excused by nonperformance of other party or his prevention of performance*,—see note to United States v. Peck, 28: 46.

*As to contracts, their interpretation and validity*, see note to Bell v. Bruen, 11: 89.

*As to construction of written contracts; how far a question for the court*,—see note to Ward v. United States, 30: 792.



Digitized by Google

des Mines de Lexington, a French corporation, against the Old Jordan Mining & Milling Company, to recover one half the expense of certain repairs made to a canal or water ditch owned by them in common.

The complaint alleged that since the month of March, 1883, these parties had continuously been tenants in common, owning an equal undivided interest in a certain canal, known sometimes as the "Galena," sometimes as the "Old Telegraph Canal," and sometimes the "Old Jordan Canal," together with the right of way and adjacent lands; that, between October 22, 1883, and November 5, 1883, they entered into a contract in writing, in which it was agreed that they would make repairs, etc., and that each should pay one half of the expense thereof; that in the year 1884 the plaintiff made certain repairs of the value of $993.93; in 1885, of the value of $4,025; in 1886, and until June, 1887, $4,826.95, and, in 1887, from June 30 to December 31, $500, aggregating $10,345.88, for its share of which a statement or bill of items was furnished to the defendant; that the said defendant, on the 31st of December, 1884, paid to plaintiff $496.96, its half of the amount expended in 1884, but failed to pay its half of the other expenses incurred as aforesaid, leaving a balance due of $4,675.98, for which judgment was demanded.

An answer was filed specifically denying the several averments of the complaint; and subsequently an amendment was made alleging that from the 1st of January, 1885, plaintiff had appropriated to its own use, without defendant's consent, all the water flowing through said ditch or canal, and that the reasonable value of that portion of the said water owned by defendant was $10 per day. The answer also made other allegations not necessary to be considered as the case was presented to this court.

In support of the contract alleged in the complaint plaintiff put in evidence the following letter, written by its manager to the manager of the defendant under date of October 24, 1883:

263] *"Dear Sir: During my present stay in this city for the purpose of investigating and inspecting our different pieces of property in this territory, my attention was particularly called to the bad state of the Jordan water ditch, which your and our companies own jointly. Considering that it is for our mutual interest to see that this property should be kept in proper shape, I beg you in the name of your company, if you do not judge that it would be advisable, while I am here, to have an understanding regarding this matter. I suggest that the necessary repairs should be done at once, and that hereafter the ditch should be kept in good condition, both companies paying their share of the incurred expenses.

"Will you please be kind enough to give this matter your prompt attention and favor us with an immediate reply, as I shall remain here only until the 15th of November."

To this letter the defendant's manager made the following reply:

"Cleveland, Ohio, Oct. 30, 1883.

"Mons. Eng. Renevey, l'administrateur délégué de Société des Mines de Lexington:

"Your letter of the 24th inst., in regard to the necessity of entering into some arrangement for repairing and preserving the Jordan water canal, owned by your company and the one I represent, is rec'd. I agree with you that it is for our mutual interest that this property should be kept in good order, and I shall be pleased to join you in a reasonable arrangement for the purpose of protecting the property from decay, and I am very glad to find a gentleman willing to co-operate in a business way for the protection of our mutual interests. Your suggestion that the needed repairs should be done at once, and that each company pay its share of expense, and also for care for the future, is right, and I will direct Mr. Van Deusen, our engineer, to co-operate with you or anyone you may delegate to examine the property and report what repairs are necessary, and the cost of the same. He is a very trustworthy and capable man, and I think you will find it for our mutual advantage to act under his judgment and let him *make the repairs. [264 As neither of us are using the water at present, I would think it best to expend only so much as is necessary to prevent loss, and then when we are ready to use the water, then we make permanent improvements. If you do not have time to go into details before you leave, will you please leave the matter in the hands of someone who will co-operate with me and Mr. Van Deusen—unless you are willing to have him do it, and each company pay one half the expense.

"I make this suggestion because I think Mr. Van Deusen can do the work satisfactory to both.

"Regretting that my absence from Salt Lake prevents me from a personal consultation with you, I am."

Other correspondence and evidence were introduced, which are fully set forth in the opinion of the court.

The case was tried before a jury, and a verdict rendered in favor of the plaintiff for the sum of $6,028.76, upon which a remittitur was filed of $12.35, and judgment thereupon entered in the sum of $6,016.41.

Upon appeal to the supreme court of the territory, this judgment was affirmed. 9 Utah, 488. Whereupon defendant sued out a writ of error from this court.

*Messrs.* **L. T. Michener**, *W. W. Dudley*, and *C. W. Bennett* for plaintiff in error.

*Mr.* **Jeremiah M. Wilson** for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

1. As the only error urged in the court below, or noticed in its opinion, turns upon the alleged insufficiency of the proof of the contract set up in the complaint, we shall confine our consideration of the case to that point, notwithstanding that other errors are assigned in this court, and, to some extent, noticed in the brief of the plaintiff in error. We have repeatedly held that the failure to present and insist upon errors *assigned in the court [265 below constitutes an abandonment or waiver of all the errors so assigned, not vital to the question of jurisdiction, or the foundation of the right; and this court can only be called upon



Digitized by Google

to consider such assignments as are pressed upon the attention, or noticed in the opinion, of the court below. If the action of the court below were correct as to the errors insisted upon as ground for reversal, none others will be considered here. *Montana R. Co.* v. *Warren*, 137 U. S. 351 [34: 682]; *San Pedro & C. D. A. Co.* v. *United States*, 146 U. S. 136 [36: 916].

2. From a perusal of the correspondence set forth in the statement of facts, it will appear that plaintiff's introductory letter contained the following propositions: (1) That the company should come to an understanding with regard to the keeping of the ditch "in proper shape;" (2) that the necessary repairs should be done at once; (3) that thereafter the ditch should be kept in good condition; (4) that both companies should pay their share of expenses.

In its reply, the defendant agreed: (1) That it was for their mutual interest that the property should be kept in good order, and that it would be pleased to join the plaintiff in any reasonable arrangement for the purpose of protecting it from decay; (2) that it approved of plaintiff's suggestion that the needed repairs should be done at once; that each company should pay its share of expenses, and also for its care in the future; (3) that it would direct Mr. Van Deusen, its engineer, to co-operate with the plaintiff, or anyone that plaintiff's manager might delegate, to examine the property and report what repairs were necessary, and the cost of the same; (4) that, as neither party was using the water at present, the writer thought it best to expend only so much as would prevent loss, and that when they were ready to use the water, they would make permanent improvements; that plaintiff should leave the matter in the hands of someone who would co-operate with the writer of the letter and Mr. Van Deusen, unless plaintiff were willing to have Mr. Van Deusen do it, and each pay one half the expense.

Conceding, for the purpose of the case, that this **266**] correspondence *standing alone did not contain a completed understanding for the repair of the property,—at least beyond such repairs as were immediately necessary,—it evidently was of such a character as to lead the plaintiff to believe that any arrangement it might make with Van Deusen, the engineer, for such repairs as were necessary to prevent loss to the property would be respected by the company.

Upon the receipt of defendant's answer, plaintiff proceeded to make certain repairs, and on September 24, 1884, addressed a letter to Van Deusen, stating that the expenses upon the canal for the eight months immediately preceding amounted to $643.85, giving the items, and requesting him to remit one half the amount. There was also evidence tending to show that the repairs had been made after a visit to the canal by Van Deusen and Lavagnino, an agent of the plaintiff company, when Van Deusen asked the latter to report to him what he thought would be necessary to be done, and that they agreed upon the work; that after receiving the letter of September 24, 1884, Van Deusen said that Mr. Holden, the manager of the company, would be there pretty soon; that he was acting under Holden's instructions; and that it would be best to wait until he came. On December 14, 1884, plaintiff wrote to Holden, the manager of the company, stating that the total expenditure for the year had been $993.93, and that the officers of his company desired to ask his co-operation "towards making next spring substantial repairs on the canal, so as to bring it up to usefulness;" and also "toward making all titles about the canal clear, and to proceed against trespassers." On December 31, defendant paid one half of the bill for that year, but made no comments upon the propositions contained in the plaintiff's letter.

There was also evidence tending to show that in the spring of 1885 Mr. Lavagnino examined the canal with Mr. Van Deusen in order to ascertain what repairs were absolutely necessary and urgent. As Mr. Lavagnino says: "We made an estimate. He told me that he would send the estimate to his company, and I would send the same estimate to my company. . . . These estimates were made because we *were waiting for Mr. Hol [**267** den. Mr. Van Deusen said that according to the instructions he had last year, he would have no objection, but that I remembered what Mr. Holden said last year, that he paid the bill, and that he didn't care to take any responsibility, but he would let Mr. Holden do it himself. . . . He was telling me all the time that he would be here very soon. This conversation was in the latter part of March, 1885."

On August 27, 1885, Lavagnino addressed Holden a note calling his attention to the canal, stating that in the spring he had Van Deusen with him along the canal to see what repairs were indispensable, in order to risk a little water in it, and to prevent a total ruin of it: that the expenses run at about $2,000; and saying that he would be able to present him a statement, and hoped that he would approve the same in behalf of the defendant. He also expressed the wish that he would like to have Mr. Holden inspect the canal to satisfy himself that he had done the most needed things for its protection, and to get his opinion "about the probable expenses for keeping up the canal to even its present low condition, and to define in a sure way how far you think it right for the Old Jordan company to stand the French company by."

On September 1 he sent him a statement of what he had paid during the last six months, amounting to $2,204.23, and asking for its proper contribution from the Old Jordan company.

Here, at least, was a distinct and unequivocal notice that repairs had been made, and that the plaintiff looked to defendant for a proportion of the cost. In view of their previous correspondence defendant could have had no doubt that such repairs were made upon the faith of the letters that had passed between them, and, if it did not intend to be bound, it was its duty to repudiate the bill at once, and give notice that the repairs were unauthorized. Instead of this, however, Mr. Holden on September 2 promptly acknowledged the receipt of the statement; said that the owners were expected early in the month, and desired them to examine the canal with him and decide



Digitized by Google

the matter, both for the present and for future expenditures; and suggesting that, as tenants in 268] *common, it was best for them "to agree upon some line of policy by which either party should be allowed to expend money on the property and thus bind the other to payments."

On November 19, he wrote to him again, desiring him to make a complete statement of the expenditures made during the last year, which had been necessary for the protection of the canal, and send them to him at Cleveland. He said that the owners had been opposed to spending any more money than was absolutely necessary for the protection of the canal; that when the Jordan company was ready to use it they would make improvements and repairs, and that he was quite certain the company would be disposed to do whatever was equitable.

On February 10, 1886, Lavagnino addressed a letter to Mr. Holden at Cleveland, enclosing a statement of the total expenditures upon the canal during 1885, which amounted to $4,025, stating that most of these expenditures had been necessary for the protection of the canal, and that the expenditures were either evidently indispensable, or were considered as necessary by Mr. Van Deusen and himself.

To this Mr. Holden replied on February 16, stating that he was pleased with the fair and candid statement made with regard to the expenditures; that he would submit them to the board for consideration, and felt sure they would be acted upon in an equitable manner. The letter further stated that the board did not desire to spend any more money than was absolutely necessary to protect the canal and save larger expenditures in the future; that if they were using the water, or contemplated its immediate use, they would have no hesitation in joining in any judicious expenditure; that "it was the hope of the management of our company that you would be willing to make such expenditures upon the canal as in your judgment would seem to be best, and that you should report the same to us from time to time, and that when we should be ready to use the water, that we should expend for the benefit of the canal a like amount, or, in case we should find it at that time in such good repair that it were not necessary to expend as much money 269] as you had expended, *that we should then pay to you the half of these expenditures made by you, as indicated in your different letters up to the 10th inst., less, of course, at any time, the amounts which we should expend upon the canal."

The next letter was not written until July 30, 1887, and in this Mr. Lavagnino states that the expenditures upon the canal property during the year 1886 and the first half of 1887 had been $4,826.95; that in his opinion the work had been necessary for the protection of the canal property, and that whatever value there was in it at present was "mainly due to the perseverant attention bestowed upon it during the last four years," and that he was willing to settle by arbitration any difference between them. He also gave a list of all the expenses put upon the canal as common property, which amounted to $10,745.88, and asked him to settle for his share of the expenses.

A further letter was written on February 6, 1888, stating that the expenses for the last half of 1887 had been $500.

A reply was made to this letter by Mr. Van Deusen on February 11, 1888, acknowledging the receipt of the statement of February 6, 1888, and asking him to forward him a completed statement of his account against the Old Jordan company, that he might report the same to the owners, and demanded that the statements show how and where each item of expense was applied, that they might be assured that such application was made for the protection of the property only:

To this Mr. Lavagnino replied, under date of February 14, sending copies of statements rendered to Mr. Holden, promising to give any further details required, and requesting a settlement of the account within ten days.

This letter completed the correspondence. In this connection the court charged the jury as follows: "If you believe from a preponderance of the evidence that the contract was made as alleged, as I have stated it to you, and that the plaintiff made the repairs during the time specified, and that the repairs were necessary to the preservation and protection of the property, and that the defendant has been requested to pay and has refused, then you should find for the plaintiff *the amount of such [270 one half of expenditures." It further charged that if the defendant were liable under the contract it was liable only for the reasonable and necessary expenditures to preserve and protect the property, and that such expenditures must have been made for the benefit of the common interest of both parties to preserve and protect them.

We see no reason to doubt that the case was properly submitted to the jury. In determining whether there was a binding contract between the parties arising from the letter of the plaintiff of October 24, 1883, and the answer of the defendant thereto, the jury were at liberty to consider, in connection with those letters, the subsequent correspondence and the conduct of the parties in respect to the common property, and the interpretation put upon them by the parties themselves. Not only was the canal visited and examined by the agents of both parties acting in concert, but, from the beginning to the end of the correspondence there was no refusal to co-operate on the part of defendant, no disavowal of an agreement between them, nor any expression of dissent as to the propriety of what had been done toward the preservation of the property. It is true that the defendant was not making use of the canal, but its preservation from ruin was an object of as much importance to one party as to the other. The conduct and letters of the defendant were such as to justify the plaintiff in believing that the repairs that it was making to the canal were assented to and approved of by it, and it was, at least, a question for the jury to say whether the plaintiff was not justified in believing that the defendant would pay its proportion of them, and whether the two first letters were not treated by both as embodying the arrangement between them.

We see no error in the record of which the defendant is entitled to complain, and *the judgment of the court below is therefore affirmed.*

Mr. Justice **Peckham** was not present at the argument, and took no part in the decision of this case.



Digitized by Google

271] WABASH WESTERN RAILWAY,
*Plff. in Err.,*
*v.*
JOSEPH BROW.

(See S. C. Reporter's ed. 271-280.)

*Waiver of objection to jurisdiction—general appearance.*

1. A petition in general terms for removal of a cause to a Federal court, without specifying or restricting the purpose of the defendant's appearance in the state court, is not, like a general appearance, a waiver of any objection to the jurisdiction of the court over the person of the defendant.
2. The filing of a petition for removal does not amount to a general appearance, but to a special appearance only.

[No. 285.]

*Submitted November 6, 1896. Decided November 30, 1896.*

ON A WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the Eastern District of Michigan in favor of Joseph Brow, plaintiff, against the Wabash Western Railway for damages for personal injuries caused by defendant's negligence. *Reversed* and the judgment of the circuit court also reversed, and cause remanded to that court to grant a new trial and dismiss the action.

See same case below, 31 U. S. App. 192.

Statement by Mr. Chief Justice Fuller:

Joseph Brow commenced suit in the circuit court of Wayne county, Michigan, against the Wabash Western Railway to recover the sum of $20,000 for personal injuries, caused, as he alleged, by defendant's negligence, by the service, September 24, 1892, of a declaration and notice to appear and plead within twenty days, on Fred J. Hill, as agent of the company, which declaration and notice were subsequently filed in that court. On the 7th of October defendant filed its petition and bond for removal in that court, and an order accepting said bond and removing the cause to the circuit court of the United States for the eastern district of Michigan, and directing the transmission of a transcript of record, was entered.

The petition alleged that the matter and amount in dispute exceeded, exclusive of interest and costs, the sum or value of $2,000, and that the controversy was between citizens of different states; that petitioner was at the time of the commencement of the suit and still was "a corporation created and existing under the laws of the state of Missouri, having its principal business office at the city of St. Louis in said state, and a citizen of the said state of Missouri, and a resident of said state, and that the plaintiff, Joseph Brow, was then and still is a citizen of the state of Michigan, and a resident of the county of Wayne in said state."

The record having been filed in the circuit court of the *United States for the east- [272
ern district of Michigan, a motion to set aside the declaration and rule to plead was made in the cause in these words and figures: "And now comes the Wabash Western Railway, defendant (appearing specially for the purpose of this motion), and moves the court, upon the files and records of the court in this cause, and upon the affidavit of Fred J. Hill, filed and served with this motion, to set aside the service of the declaration and rule to plead in this cause, and to dismiss the same for want of jurisdiction of the person of the defendant in the state court from which this cause was removed, and in this court." The affidavit was to the effect that Hill, on September 24, 1892, was the freight agent of "the Wabash Railroad Company, a corporation which owns and operates a railroad from Detroit to the Michigan state line, and was not an agent of the Wabash Western Railway, defendant in this suit;" and that on the day aforesaid the Wabash Western Railway "did not own, operate, or control any railroad in the state of Michigan, or have any officers or agent of any description therein, and did no business and had no property and no place of business in said state; and that on said day deponent was not a ticket or station agent of the said defendant, nor an officer or agent of the defendant of any description."

The motion was denied by the circuit court, with leave to defendant to plead within ten days, and defendant excepted. Thereafterwards defendant filed a plea in said cause as follows: "And the said defendant appearing and pleading under protest and excepting to the refusal of the court to grant its motion to dismiss, by Alfred Russell, its attorney, comes and demands a trial of the matters set forth in the declaration of the said plaintiff."

The cause was subsequently tried and resulted in a judgment in favor of Brow for $2,500 and costs. The bill of exceptions sets forth that, when the case came on for trial, "the defendant company protested in open court against being forced to go to trial and for cause of protest showed to the court, that the defendant was a corporation organized in the state of Missouri, and that at the time of the *commencement of this suit the defend- [273
ant had no agent, business, property, officer, or servant in the state of Michigan, and had not been served and had not appeared." The court overruled the protest and defendant duly

NOTE.—*As to removal of causes under act of 1875; citizenship,*—see note to Meyer v. Delaware R. R. Const. Co. 25: 598.

*As to removal by one of two or more defendants, separable controversies,*—see note to Sloane v. Anderson, 29: 899.

*As to removal of causes to United States courts for local prejudice,* see notes to Gaines v. Fuentes, 29: 824, and Jefferson v. Driver, 29: 897.

*As to removal of causes from state to Federal courts where United States Constitution, act of Congress, or treaty comes in question,* see note to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

*As to removal of actions against officers; Rev. Stat. § 643,*—see note to Davis v. South Carolina, 27: 574.



Digitized by Google

excepted. An instruction embracing the same point was also asked by defendant and refused, and an exception taken.

A writ of error was allowed from the circuit court of appeals for the sixth circuit and the cause heard by that court. Among the errors assigned were the refusal of the circuit court to grant the motion to set aside the service of declaration and rule to plead and to dismiss the cause; the compelling of defendant to go to trial against its protest, the court having no jurisdiction over its person; and the refusal of the instruction presenting the same point. The opinion is reported in 31 U. S. App. 192, and fully discusses the objection to the jurisdiction of the state court over defendant's person, ruling that the filing of a petition for removal to the circuit court effected a general appearance, and that it was too late after such removal had been perfected for it in the circuit court to attempt to plead that that court had no personal jurisdiction over the company by virtue of the process issued. The case was also considered upon the merits and the judgment was affirmed. Thereupon application was made by plaintiff in error to this court to issue a writ of certiorari to the circuit court of appeals, which was granted, and the record having been sent up, the cause was submitted on briefs.

*Mr.* **Alfred Russell** for plaintiff in error.

*Mr.* **Edwin F. Conely,** for defendant in error:

The petitioner on this application can only call the court's attention to the jurisdictional question raised by it, the judgment rendered herein being in the sum of $2,500.

The courts below had jurisdiction of the person of the plaintiff in certiorari for the reason that the petition for removal to the Federal court states as the sole reasons for removal:

1st. That the matter in dispute exceeds the sum of $2,000.

2d. That there is a controversy between citizens of different states, the Wabash, defendant, being a corporation organized under the laws of the state of Missouri, and the plaintiff, Joseph Brow, a resident of Detroit, Wayne county, Michigan.

3d. That the petitioner offers security conditioned for the paying of all costs to plaintiff should the court hold that the cause was wrongfully or improperly removed, prays that the state court proceed no further in the suit except to order the cause removed, accept the security accompanying the petition, and cause the record in the state court to be removed.

It will be seen from the above that the railway does not allege that, because of local prejudice or influence, it is unable to obtain justice in the state court, neither does the petition refer in any manner to the service on the defendant made in the state court; but prays for the removal of the cause on the merits of the controversy, in which the matter in dispute exceeds the sum of $2,000, and for no other reason whatever.

The defendant not having filed in the state court a special appearance or a motion for the purpose of attacking the service made there, there was nothing in the record removed which could be reviewed or revived in the Federal court except its petition which, with plaintiff's declaration, comprised the entire record. Nor can it be inferred that it was the intention of the defendant to attack the service after removal in the face of the petition, which refers only to a controversy on the merits which exceeds the sum of $2,000. This petition for removal as the case now stands could not be held an appearance in the state court for the purposes of attacking the service in that court on a motion made after a removal to the Federal court.

The following cases are cited by the counsel for the petitioner in certiorari in support of his position that there is a conflict among the different circuits upon the question of allowing service in the state court to be attacked after removal to the Federal court, counsel claiming that the majority of these circuits sustain his position:

*Parrott* v. *Alabama Gold L. Ins. Co.* 5 Fed. Rep. 391; *Blair* v. *Turtle*, 5 Fed. Rep. 394; *Small* v. *Montgomery*, 17 Fed. Rep. 865; *Hendrickson* v. *Chicago, R. I. & P. R. Co.* 22 Fed. Rep. 569; *Miner* v. *Markham*, 28 Fed. Rep. 387; *Golden* v. *Morning News*, 42 Fed. Rep. 112; *Clews* v. *Woodstock Iron Co.* 44 Fed. Rep. 31; *Reifsnider* v. *American Improv. Pub. Co.* 45 Fed. Rep. 433; *Forrest* v. *Union P. R. Co.* 47 Fed. Rep. 1; *O'Donnell* v. *Atchison, T. & S. F. R. Co.* 49 Fed. Rep. 689; *McGillin* v. *Claflin*, 52 Fed. Rep. 657.

In all these cases there was either a motion or special appearance by defendant for the purpose of setting aside the service in the state court which formed part of the record removed, and many of these cases would seem to allow defendant to revive or renew such motion or special appearance as being part of the record removed, the cause proceeding under the act of 1887 on the record removed only. The decisions, however, do not contemplate the taking up of any proceedings in the Federal court not contained in the record removed, and none of these cases can be compared with the present one, where the record consists of the petition for removal only, the contents of which we have referred to.

We therefore contend that there is no conflict in the different circuits on the questions raised by the facts and record in the case at bar.

There also seems to be some misunderstanding as to the ruling of the Supreme Court on these questions, counsel contending that this court should by its decision settle such questions.

We cannot overlook or, by so doing, ignore the decision in the case of *Bushnell* v. *Kennedy* (rendered by Mr. Chief Justice Chase) 76 U. S. 9 Wall. 387 (19: 736), in which, among other things, the learned justice has given a final opinion on this question of jurisdiction of the person of a defendant who, after praying for Federal jurisdiction and bringing a cause in which he is interested into the court, of his own election and by his own act, refuses to proceed on the merits and attacks the service in the state court, thereby attempting to deprive a plaintiff of the jurisdiction of both courts, and the learned justice concludes his opinion in this case by holding that the petition for removal of the controversy between the parties in the



Digitized by Google

state court constitutes an appearance on the merits in the Federal court.

In this case the question was fully discussed, and the decision of the learned justice has ever since been considered and referred to as the final judgment of this court in cases like the present one, and the case of *Bushnell* v. *Kennedy*, 76 U. S. 9 Wall. 387 (19: 736), has long been and now is considered as a celebrated case in that this question, now raised by the petitioner in certiorari, has been disposed of by it, and for no other reason.

We also refer the court to the following as being in point: *Sweeney* v. *Coffin*, 1 Dill. 73; *Sayles* v. *Northwestern Ins. Co.* 2 Curt. C. C. 212, decided by this court and sustaining defendant's position also; *Tallman* v. *Baltimore & O. R. Co.* 45 Fed. Rep. 156; *New York Const. Co.* v. *Simon*, 53 Fed. Rep. 1.

The plaintiff in certiorari has no reason to presume that the sheriff's return of service on it made in the state court was invalid and of no force on the showing made in the affidavit of Hill accompanying the motion made after removal to the Federal court, for had the service been attacked in the state court the defendant Brow could have secured, or tried to secure, a better service on plaintiff herein by reaching the proper officer or agent or by proceeding against a nonresident's property by garnishment or attachment under the statutes of Michigan. Defendant's remedy is entirely cut off by a removal of the cause, for if the petitioner in certiorari is correct in the position taken by it these proceedings would defeat the plaintiff in securing the jurisdiction of either the state or Federal courts to seek his relief. It is evident that the removal act of 1887 was not instituted for any such purpose as this, but to promote justice and not defeat it. The act of the petitioner in certiorari in removing the cause is something more than a consent, something more than a waiver of objection to the jurisdiction; it is a prayer for the privilege of resorting to Federal jurisdiction, and it cannot be permitted to afterwards question it.

Defendant in these proceedings has been dragged away from the court of his own election, deprived of the right to protect his service in the state court, the tribunal of his own choice, and, after going through a trial on the merits of the controversy involving a judgment in the sum of $2,500, has been forced to go through the different Federal courts, and is now informed by petitioner that he has never been in court, and further that the Federal courts have never had jurisdiction of the person of the petitioner. We respectfully submit that the cases cited by the petitioner have no bearing upon the present one, the petitioner not having in any manner signified its intention of attacking the service made in the state court until after the record was removed to the Federal court.

The petition to the state court, under the decisions herein cited, is tantamount to an appearance on the merits in the Federal court, and defendant cannot be permitted to revive something foreign to the record made, and having no place in the proceedings after a removal to the Federal court on a petition such as was filed in this cause.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was not a proceeding *in rem* or *quasi in rem*, but a personal action brought in the circuit court of Wayne county, Michigan, against a corporation which was neither incorporated nor did business, nor had any agent or property, within the state of Michigan; and service of declaration and rule to plead was made on an individual who was not, in any respect, an officer or agent of the corporation. The state court, therefore, acquired no jurisdiction over the person of *the [276 defendant by the service. Did the application for removal amount to such an appearance as conceded jurisdiction over the person?

We have already decided that when in a petition for removal it is expressed that the defendant appears specially and for the sole purpose of presenting the petition, the application cannot be treated as submitting the defendant to the jurisdiction of the state court for any other purpose. *Goldey* v. *Morning News*, 156 U. S. 518 [39: 517].

The question "how far a petition for removal, in general terms, without specifying and restricting the purpose of the defendant's appearance in the state court, might be considered, like a general appearance, as a waiver of any objection to the jurisdiction of the court over the person of the defendant," was not required to be determined, and was therefore reserved; but we think that the line of reasoning in that case and in the preceding case of *Gerling* v. *Baltimore & O. R. Co.* ("*Martin's Admr.* v. *Baltimore & O. R. Co.*") 151 U. S. 673 [38: 311], compels the same conclusion on the question as presented in the case before us.

In *Goldey* v. *Morning News*, Mr. Justice Gray, speaking for the court, observed: "The theory that a defendant, by filing in the state court a petition for removal into the circuit court of the United States, necessarily waives the right to insist that for any reason the state court had not acquired jurisdiction of his person, is inconsistent with the terms, as well as with the spirit, of the existing act of Congress regulating removals from a court of a state into the circuit court of the United States. The jurisdiction of the circuit court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and cannot be enlarged or abridged by any statute of a state. The legislature or the judiciary of a state can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the state into the circuit court of the United States, nor limit the effect of such removal. . . . Although the suit must be actually pending in the state court before it can be removed, its removal into the circuit court of the United States does not admit *that it was right- [277 fully pending in the state court, or that the defendant could have been compelled to answer therein, but enables the defendant to avail himself, in the circuit court of the United States, of any and every defense, duly and seasonably reserved and pleaded, to the action, 'in the same manner as if it had been origi-



Digitized by Google

nally commenced in said circuit court.'" 156 U. S. 523, 525 [39: 519, 520].

In *Gerling* v. *Baltimore & O. R. Co.* ("*Martin's Admr.* v. *Baltimore & O. R. Co.*"), referring to the provision of the act of Congress of 1887, defining the time of filing a petition for removal in the state court, it was said: "This provision allows the petition for removal to be filed at or before the time when the defendant is required by the local law or rule of court 'to answer or plead to the declaration or complaint.' These words make no distinction between different kinds of answers or pleas; and all pleas or answers of the defendant, whether in matter of law by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action, are said, in the standard books on pleading, 'to oppose or answer' the declaration or complaint which the defendant is summoned to meet. Stephen, Pl. 1st Am. ed. 60, 62, 63, 70, 71, 239; Lawes, Pl. 36. The judiciary act of September 24, 1789, chap. 20, § 12, required a petition for removal of a case from a state court into the circuit court of the United States to be filed by the defendant 'at the time of entering his appearance in such state court.' 1 Stat. at L. 79. The recent acts of Congress have tended more and more to contract the jurisdiction of the courts of the United States, which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earliest statute. *Pullman Palace Car Co.* v. *Speck*, 113 U. S. 84 [28: 925]; *Smith* v. *Lyon*, 133 U. S. 315, 320 [33: 635, 637]; *Ex parte Pennsylvania Co.* 137 U. S. 451, 454 [34: 738, 740]; *Fisk* v. *Henarie*, 142 U. S. 459, 467 [35: 1080, 1082]; *Ex parte Shaw* ("*Shaw* v. *Quincy Min. Co.*"), 145 U. S. 444, 449 [36: 768, 770]. Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal **278]*** should be filed in the state court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the circuit court of the United States." 151 U. S. 686, 687 [38: 316].

Want of jurisdiction over the person is one of these defenses, and, to use the language of Judge Drummond in *Atchison* v. *Morris*, 11 Fed. Rep. 582, we regard it as not open to doubt that "a party has the right to the opinion of the Federal court on every question that may arise in the case, not only in relation to the pleadings and merits, but to the service of process; and it would be contrary to the manifest intent of the act of Congress to hold that a party, who has the right to remove a cause, is foreclosed as to any question which the Federal court can be called upon, under the law, to decide."

An appearance which waives the objection of jurisdiction over the person is a voluntary appearance, and this may be effected in many ways, and sometimes may result from the act of the defendant even when not in fact intended. But the right of the defendant to a removal is a statutory one, and he is obliged to pursue the course pointed out, and when he confines himself to the enforcement of that right in the manner prescribed, he ought not to be held thereby to have voluntarily waived any other right he possesses. An acknowledged right cannot be forfeited by pursuit of the means the law affords of asserting that right. *Commercial & R. Bank* v. *Slocomb*, 39 U. S. 14 Pet. 65 [10: 354]. The statute does not require the removing party to raise the question of jurisdiction over his person in the state court before removing the cause, or to reserve that question in respect of a court which is to lose any power to deal with it; and to decide that the presentation of the petition and bond is a waiver of the objection would be to place a limitation upon the jurisdiction of the circuit court, which is wholly inconsistent with the act.

Moreover, the petition does not invoke the aid of the court touching relief only grantable in the exercise of jurisdiction of the person. The statute imposes the duty on the state court, on the filing of the petition and bond, "to accept such *petition and bond and proceed **[279** no further in such suit," and, if the cause be removable, an order of the state court denying the application is ineffectual, for the petitioner may, notwithstanding, file a copy of the record in the circuit court and that court must proceed in the cause.

In this aspect the conclusion is impossible that the party submits to the jurisdiction of the state court by availing himself of a right to which he is entitled under the act of Congress, and which the state court is by that act required to recognize.

It is conceded that if defendant had stated that it appeared specially for the purpose of making the application, that would have been sufficient; and yet when the purpose for which the applicant comes into the state court is the single purpose of removing the cause, and what he does has no relation to anything else, it is not apparent why he should be called on to repeat that this is his sole purpose; and when removal is had before any step is taken in the case, as the statute provides that "the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court," it seems to us that it cannot be successfully denied that every question is open for determination in the circuit court, as we have, indeed, already decided.

The circuit court of appeals held that a petition to remove, without more, was tantamount to a general appearance, but that this result could be avoided by a special appearance accompanying, or made part of, the petition, which would not be waived by or be inconsistent with the general appearance because the application was analogous to an objection to jurisdiction over the subject-matter. We do not concur in this view. By the exercise of the right of removal, the petitioner refuses to permit the state court to deal with the case in any way, because he prefers another forum to which the law gives him the right to resort. This may be said to challenge the jurisdiction of the state court, in the sense of declining to submit to it, and not necessarily otherwise.

We are of opinion that the filing of a



Digitized by Google

petition for removal does not amount to a general appearance, but to a special appearance only.

**280]** *Section 12 of the judiciary act of September 24, 1789, chap. 20, required the petition for removal to be filed by the defendant "at the time of entering his appearance in such state court" (1 Stat. at L. 79), and those words were omitted in the act of 1887, though probably the omission is of no special significance. Some cases are referred to, however, which were decided under that section, and have not been followed under the present statute. Pollard* v. *Dwight*, 8 U. S. 4 Cranch, 421 [2: 666]; *Bushnell* v. *Kennedy*, 76 U. S. 9 Wall. 387 [19: 736]; *Sayles* v. *Northwestern Ins. Co.* 2 Curt. C. C. 212. These were all cases of attachment and of jurisdiction asserted in the state courts through the levy of the writs. The two last cited were satisfactorily disposed of in *Goldey* v. *Morning News*, 156 U. S. 518 [39: 517].

In *Pollard* v. *Dwight* it appears that the objection that the circuit court had no jurisdiction, "the plaintiffs being citizens of Massachusetts and Connecticut, and the defendants, citizens of Virginia, not found in the district of Connecticut," was not raised in the circuit court, but for the first time in the assignment of errors after judgment in that court, and it was accordingly held that, "by appearing to the action, the defendants in the court below placed themselves precisely in the situation in which they would have stood, had process been served upon them, and consequently waived all objections to the nonservice of process."

*The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed*, and the cause remanded to that court with directions to grant a new trial, sustain the motion to set aside the service of the declaration and rule to plead, and dismiss the action.

Ordered accordingly.

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissented.

---

**281]** NATIONAL ACCIDENT SOCIETY, *Plff. in Err.*,
*v.*
FANNIE SPIRO.

(See S. C. Reporter's ed. 281.)

*Petition for removal—jurisdiction.*

A defendant by filing a petition in a state court for removal of the cause to the United States court, in general terms, unaccompanied by a plea in abatement, and without specifying or restricting the purpose of his appearance, does not thereby waive objection to the jurisdiction of the court for want of sufficient service of the summons.

[No. 460.]

*Submitted April 27, 1896. Decided November 30, 1896.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit.

The facts are stated in the opinion.

*Mr.* **H. D. McBurney** for plaintiff in error.

*Mr.* **Henry H. Ingersoll** for defendant in error.

THE CHIEF JUSTICE: This is a certificate from the circuit court of appeals for the sixth circuit, propounding, after a preliminary statement, the following question:

"Does a defendant, by filing a petition in a state court for removal of the cause to the United States court, in general terms, unaccompanied by a plea in abatement, and without specifying or restricting the purpose of his appearance, thereby waive objection to the jurisdiction of the court for want of sufficient service of the summons?"

For the reasons given and on the authorities cited in the above cause of *Wabash Western R. Co.* v. *Brow*, 164 U. S. 271 [*ante*, 431], the question must be answered in the negative.

*Certificate accordingly.*

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissented.

---

UNITED STATES, *Appt.*, **[282**
*v.*
JOHN C. DELANEY.

(See S. C. Reporter's ed. 282-286.)

*Compensation of register and receiver of land office.*

A register and receiver of a newly established land office enters upon the discharge of his duties within the meaning of U. S. Rev. Stat. § 2243, providing for his compensation, when, after qualifying, he is engaged under directions of the commissioner of the general land office in attending to business pertaining to his office, which necessarily had to be transacted before the day of the formal opening of the office in accordance with the published notice.

[No. 493.]

*Submitted November 3, 1896. Decided November 30, 1896.*

APPEAL from a judgment of the Court of Claims in favor of John C. Delaney, claimant, against the United States for compensation as register and receiver of the land office at the city of Oklahoma. *Affirmed.*

The facts are stated in the opinion.

*Messrs.* **Joshua Eric Dodge**, Assistant Attorney General, and **George H. Gorman**, Assistant Attorney, for appellant.

*Messrs.* **W. W. Dudley, L. T. Michener, John C. Chaney**, and **J. R. Garrison** for appellee.

Mr. Justice **Peckham** delivered the opinion of the court:

This is an appeal from the court of claims. It involves simply the question as to the right of the appellee to compensation as register and receiver of the land office at the city of Okla-

NOTE.—*As to extra pay or compensation to officers*, see note to United States v. Macdaniel, 8: 567.



Digitized by Google

homa, in the territory of Oklahoma, from the 18th of July to the 1st of September, 1890.

It appears from the findings of fact by the court of claims that the land office at Oklahoma city was first established by an executive order of the President on the 6th of June, 1890. The appellee, John C. Delaney, was duly appointed and commissioned as receiver of public moneys at Oklahoma city on the 23d of June, 1890, and on the 7th of July, 1890, he qualified by taking the oath of office and giving the bond required by law. On the 10th of July, 1890, the claimant was verbally directed by the Commissioner of the General Land Of-
283] fice to *go to Oklahoma as speedily as possible, and make the necessary preparations to open the office at that place. He left his residence in Harrisburg, Pennsylvania, on the 15th and arrived at Oklahoma city on the 18th of July, 1890. The land district at Oklahoma city was taken from parts of the two districts of Guthrie and Kingfisher, and on the 18th of July, 1890, the Commissioner of the General Land Office wrote to appellee at Oklahoma city, stating to him that the officers at Guthrie and Kingfisher had been directed to turn over to him all the plats and records of every description relating to the lands forming his district, and asking him to at once confer with those officers upon the subject. The letter also contained the following: "As soon as the records are received, you will proceed to give notice by publication, as an advertisement, at regular advertising rates, in the newspaper having the largest circulation in your district, once a week for four weeks, of the precise date when your office will be open for the transaction of public business, when the officers at Guthrie and Kingfisher will cease transacting business relating to the lands transferred." Between the 18th day of July (the date of the arrival of the appellee at Oklahoma city) and the 1st day of September, 1890 (the date on which the office was formally opened for the transfer of land and the receipt of money), the appellee was engaged in attending to business pertaining to his office, which had necessarily to be transacted before the date of the formal opening of the office in accordance with the published notice.

Upon this subject the court of claims found: "The nature of the services performed by claimant after his arrival and before the 1st of September is as follows: Conferring with the officers of other districts in the territory from which his district was formed to determine what date to open the office; preparing and issuing thirty days' notice of the day fixed for the opening of the office; overseeing and superintending the preparation of rooms for the office; getting estimates for the manufacture of cases for the office; superintending the constructing of fixtures and having them put into the office; giving information and receiving
284] instructions from the *inspector; attending to the transfer of the records from the other offices of the territory to that of the Oklahoma office. During said time there was a continuous arrival of letters from different parts of the district as well as letters from the department, which required the attention of claimant up to the 1st of September, 1890."

The land office of which the claimant was receiver was in fact open for the transaction of business the 1st day of September, 1890, pursuant to the published notice to that effect, thirty days prior to that time, and the claimant insists that he commenced his services as receiver upon his arrival at Oklahoma on the 18th of July, 1890, while the defendant, the appellant, urges that his term of office commenced when the office was opened for the entry and sale of land, September 1, 1890, and from that time it has allowed him compensation.

The written communication to the claimant from the Commissioner of the General Land Office, dated Washington, July 18, 1890, enclosed to the claimant the notice of the establishment of the office at Oklahoma city, and the letter in general terms defines certain services which were necessary to be performed before the opening of the office for the entry and sale of lands; and in pursuance of that letter the claimant commenced the performance of those services preliminary to the opening of the office. The character of the service has already been stated.

Section 2243, Revised Statutes, provides that "the compensation of registers and receivers, both for salary and commissions, shall commence and be calculated from the time they respectively enter upon the discharge of their duties." The sole question in this case, therefore, is, When did the claimant, within the meaning of the above section, "enter on the discharge of his duties?" The claimant had been duly appointed on the 23d of June, 1890. On July 7, 1890, he had qualified by taking the oath of office and giving the bond required by law. The office was newly established and was taken from parts of two other land offices. Pursuant to the directions of the Commissioner of the General Land Office the claimant had left his home in Pennsylvania on the 15th day of July, 1890, and arrived at *Oklahoma[285 city on the 18th of the same month. He at once entered upon the performance of the duties which it was essential should be performed, which pertained to the establishment of and the transaction of business at the new office, which were official in their nature and solely connected with the discharge of the duties of the office to which claimant had been appointed. What is the reason that he had not then, within the meaning of the statute, entered upon the discharge of the duties of his office? It is said that receiving applications and making entries in the public records of the office in regard to the transfer of public lands within the district and receiving the moneys of applicants for the purchase of such lands comprise the duties of a register and receiver of a land office at each land district established by law. These are undoubtedly the main duties of an already established land office. Here, however, the office had been but just established by order of the President. The location of chambers in which the business was to be done was part of the duty of the appointee. It was his official duty to see to their being properly furnished and prepared for the transaction of the public business. He had to see or to correspond with the officials of the two land offices from which the one in question had but just been taken. That cor-



Digitized by Google

respondence was not personal; it was official and it was necessarily connected with the performance of his duties as register and receiver for the newly made district. All of the services performed by the claimant, as found by the court of claims and above set forth, were wholly official in their nature, connected solely with the performance of the claimant's duties as an officer, and to our minds were just as much official as would be the entry of an application in the books of the land office or the receipt of money in payment for any portion of the public lands within the district. Doing that which it is necessary to do in order that a newly created land office may be in a proper and fit condition at the time appointed for opening it for the transaction of public business is, as it seems to us, a part of the official duties of the person who is appointed to the office. While it is true that he cannot earn commissions un-
286]til money *has been paid for lands transferred, and that no transfer can be made until after the formal opening of the office for the entry of applications, that fact can have no legitimate bearing upon the question as to when the register and receiver enters upon the discharge of the duties of his office in a newly created land district. It is said that the salary and commissions of a register and receiver commence at the same time, which is the time when they, respectively, enter upon the discharge of their duties, and that as commissions cannot be earned until work is done upon which commissions can be charged, which is not until after the formal opening of the office, it follows that the salary cannot commence until that time. The argument is not sound. The right to both salary and commissions, it is true, commences when the registers and receivers, respectively, enter upon the discharge of their duties, but a register may enter upon the discharge of his duties under such circumstances as the claimant did in this case before the time arrives for the formal and official opening of the land office to the public, and before the receipt of any moneys upon which commissions might be earned. Otherwise if the salary could not commence to run until the receipt of such moneys, the office might have been formally opened for the transaction of public business and the register have been in attendance thereat for a long time before any moneys were received in payment for any part of the public land, and so he would be without a right to compensation by salary during the time succeeding the opening of his office and up to the time of the receipt of such moneys.

It is unnecessary to enlarge upon the question, as it seems quite plain to us that upon the facts found by the court of claims the services performed by claimant after the creation of the new land district and before the formal opening of the land office were official services, and that as early as the 18th of July, 1890, he had entered upon the discharge of the duties of his office, and was in the continuous performance of such duties until after the 1st of September, 1890.

*The judgment of the Court of Claims was right, and it is affirmed.*

JANE M. McKEE, in Her Own Right, [287 and as Executor of Henry McKee *et al.*, *Appts.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 287-294.)

*Claim under direct tax act of 1861.*

A claim for moneys received by the United States from the sale of lands bid in for taxes under the direct tax act of Congress of 1861 cannot be asserted under the last clause of § 4 of the act of 1891, when the claimants have already obtained judgment under the 1st clause of that section for the value of the lands as therein provided.

[No. 131.]

*Argued November 3, 1896. Decided November 30, 1896.*

APPEAL from a judgment of the Court of Claims dismissing a claim under the direct tax act of 1861. *Affirmed.*

The facts are stated in the opinion.

*Messrs.* **W. S. Monteith** and *Leroy F. Youmans* for appellants.

*Messrs.* **Joshua Eric Dodge**, Assistant Attorney General, and *George H. Gorman*, Assistant Attorney, for appellee.

Mr. Justice **Peckham** delivered the opinion of the court:

The appellants herein have brought this appeal for the purpose of obtaining a review of a judgment of the court of claims dismissing their petition. No opinion was delivered by that court in this case, but it was decided upon the authority of the case of *Sams* v. *United States*, 27 Ct. Cl. 266, which involved the construction of the same statute that is before us in this case.

It appears by the finding of the court that one Henry McKee was the owner of certain lands, which are therein described, in the town of Beaufort, in the parish of St. Helena, South Carolina, and that while he was such owner the land was sold for the payment of the direct tax provided for in § 9, and the following sections of the act approved *August 5, 1861, [288 and entitled "An Act to Provide Increased Revenue from Imports, to Pay the Interest on the Public Debt, and for Other Purposes." 12 Stat. at L. 292. The property was bid in by the United States and was thereafter resold by the government. The direct tax on the property so sold amounted in all to $91.52, and upon the resale of such property there was received into the Treasury of the United States, in excess of the direct tax, the sum of $5,003.41. Henry McKee, the legal owner of the property at the time of its sale, died some time thereafter, leaving a will, and the claimants are the beneficiaries thereunder, being his widow and children. These same claimants have heretofore obtained judgment in the court of claims against the government for the sum of $5,680.60 on account of the same real estate above described. That judgment was obtained, and the claim in this case is founded upon the act

NOTE.—*As to sale of lands for taxes; strict compliance with statute necessary,*—see note to Williams v. Peyton, 4: 518.

*As to direct taxes*, see note to Scholey v. Rew 23: 99.



Digitized by Google

approved March 2, 1891 (26 Stat. at L. 822), entitled "An Act to Credit and Pay to the Several States and Territories and the District of Columbia All Moneys Collected under the Direct Tax Levied by the Act of Congress Approved August 5th, 1861." The act is set forth in full in the margin.†

289]*The judgment which the claimants have already obtained in the court of claims was rendered under the 1st clause in § 4 of the act. The claim now before the court rests upon the last clause of § 4, which reads as follows: "*And provided further*, That any sum or sums of money received into the Treasury of the United States from the sale of lands bid in for taxes in any state under the laws described in the 290]*1st section of this act in excess of the tax assessed thereon shall be paid to the owners of the land so bid in and resold, or to their legal heirs or representatives." We think this proviso does not apply to the owners of lands described in the 1st clause of the section.

A perusal of the entire act shows that its purpose was to pay back to the states or to individual citizens of states*the amounts of money [291 received from them in the course of the execution of the direct tax act of 1861 and the acts amendatory thereof. The 1st section of the act provides for the crediting by the Secretary of the Treasury to each state, etc., a sum equal to all collections by set-off or otherwise made from said states or from any of the citizens or inhabitants thereof, or other persons, under the act of Congress therein mentioned. Provision is thus made for the amount that had been collected by the United States.

The 2d section provides for the remission and relinquishment of all moneys still due to the United States under the direct tax apportioned by § 8 of the above-mentioned act of

†An Act to Credit and Pay to the Several States and Territories and the District of Columbia All Moneys Collected under the Direct Tax Levied by the Act of Congress Approved August 5th, 1861.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be the duty of the Secretary of the Treasury to credit to each state and territory of the United States and the District of Columbia a sum equal to all collections by set-off or otherwise made from said states and territories and the District of Columbia or from any of the citizens or inhabitants thereof or other persons under the act of Congress approved August 5th, 1861, and the amendatory acts thereto.

Sec. 2. That all moneys still due to the United States on the quota of direct tax apportioned by § 8 of the act of Congress approved August 5, 1861, are hereby remitted and relinquished.

Sec. 3. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary to reimburse each state, territory, and the District of Columbia for all money found due to them under the provisions of this act; and the Treasurer of the United States is hereby directed to pay the same to the governors of the states and territories and to the Commissioners of the District of Columbia, but no money shall be paid to any state or territory until the legislature thereof shall have accepted by resolution the sum herein appropriated, and the trusts imposed, in full satisfaction of all claims against the United States on account of the levy and collection of said tax, and shall have authorized the governor to receive said money for the use and purposes aforesaid: *Provided*, That where the sums, or any part thereof, credited to any state, territory, or the District of Columbia, have been collected by the United States from the citizens or inhabitants thereof, or any other person, either directly or by sale of property, such sums shall be held in trust by such state, territory, or the District of Columbia for the benefit of those persons or inhabitants from whom they were collected, or their legal representatives: *And provided further*, That no part of the money collected from individuals and to be held in trust as aforesaid shall be retained by the United States as a set-off against any indebtedness alleged to exist against the state, territory, or District of Columbia in which such tax was collected: *And provided further*, That no part of the money hereby appropriated shall be paid out by the governor of any state or territory or any other person to any attorney or agent under any contract for services now existing or heretofore made between the representative of any state or territory and any attorney or agent. All claims under the trust hereby created shall be filed with the governor of such state or territory and the commissioners of the District of Columbia, respectively, within six years next after the passage of this act; and all claims not so filed shall be forever barred, and the money attributable thereto shall belong to such state, territory, or the District of Columbia, respectively, as the case may be.

Sec. 4. That it shall be the duty of the Secretary of the Treasury to pay to such persons as shall in each case apply therefor, and furnish satisfactory evidence that such applicant was at the time of the sales hereinafter mentioned the legal owner, or is the heir at law or devisee of the legal owner of such lands as were sold in the parishes of Saint Helena and Saint Luke's in the state of South Carolina, under the said acts of Congress, the value of said lands in the manner following, to wit: To the owners of the lots in the town of Beaufort, one half of the value assessed thereon for taxation by the United States direct tax commissioners for South Carolina; to the owner of lands which were rated for taxation by the state of South Carolina as being usually cultivated, $5 per acre for each acre thereof returned on the proper tax book; to the owners of all other lands, $1 per acre for each acre thereof returned on said tax book: *Provided*, That in all cases where such owners, or persons claiming under them, have redeemed or purchased said lands, or any part thereof, from the United States, they shall not receive compensation for such part so redeemed or purchased; and any sum or sums held or to be held by the said state of South Carolina in trust for any such owner under § 3 of this act shall be deducted from the sum due to such owner under the provisions of this section: *And provided further*, That in all cases where said owners have heretofore received from the United States the surplus proceeds arising from the sale of their lands, such sums shall be deducted from the sum which they are entitled to receive under this act.

That in all cases where persons, while serving in the Army or Navy or Marine Corps of the United States, or who had been honorably discharged from said service, purchased any of said lands under § 11 of the act of Congress approved June 7, 1862, and such lands afterwards reverted to the United States, it shall be the duty of the Secretary of the Treasury to pay to such persons as shall in each case apply therefor, or to their heirs at law, devisees, or grantees, in good faith and for valuable consideration, whatever sum was so paid to the United States in such case. That before paying any money to such persons the Secretary of the Treasury shall require the person or persons entitled to receive the same to execute a release of all claims and demands of every kind and description whatever against the United States arising out of the execution of said acts, and also a release of all right, title, and interest in and to the said lands. That there is hereby appropriated, out of the money in the Treasury not otherwise appropriated, the sum of $500,000 or so much thereof as may be necessary to pay for said lots and lands, which sum shall include all moneys in the Treasury derived in any manner from the enforcement of said acts in said parishes, and not otherwise appropriated. That § 1068 of the Revised Statutes is hereby made applicable to claims arising under this act without limitation as to the amount involved in such claim: *And provided further*, That any sum or sums of money received into the Treasury of the United States from the sale of lands bid in for taxes in any state under the laws described in the 1st section of this act in excess of the tax assessed thereon shall be paid to the owners of the land so bid in and resold, or to their legal heirs or representatives.

Approved March 2, 1891.



Digitized by Google

Congress. The 3d section appropriates moneys for the purpose of reimbursing each state for all money found due under the provisions of the act, and various conditions are therein imposed relative to the payment of such moneys. By the 1st clause of the 4th section special provision is made for the payment to the legal owners or their heirs of such lands as were sold in the parishes of St. Helena and St. Luke's in the state of South Carolina under this direct tax act. Those owners or their representatives were to be paid for their lands which had been sold, and the value thereof was to be ascertained in the manner provided by the 4th section. Full and special provision was thus made in the clauses preceding the last clause of § 4 for the owners of lands which had been sold under the direct tax act in the parishes of St. Helena and St. Luke's in the state of South Carolina. The reimbursement of the owners in those particular parishes for their lands which had been sold was to be after the standard which was provided for in the clauses quoted.

There were, however, cases where lands had been sold under this direct tax act in other parishes of the state of South Carolina and in other states. There was added to the act of 1891 the last clause of § 4, which would cover all such cases, and we are of opinion that this last clause does not refer to or cover the cases of those owners who are mentioned in the 1st clause of the same section. Otherwise this curious result might and in this particular case [292] would follow. The owners of the *land at the time of its sale would recover under the first clause a greater amount than the government actually received upon its resale of the land pursuant to the provisions of the direct tax act. That result would be accomplished by the rule provided in the 1st clause for arriving at the sum to be paid by the government without reference to the amount actually received by it. But in addition to that and under the provisions of the last clause as construed by plaintiffs in error, the owners would be entitled to recover all the moneys received into the Treasury of the United States upon the sale of such lands for taxes, under the direct tax act, in excess of the taxes assessed thereon. In this case these claimants have already obtained judgment against the government for $5,680.60, and all that the government has received upon the sale of property (above the taxes on such land, which were $91.52) is $5,003.41. By that judgment, therefore, the government must pay nearly $600 more than it ever received on account of the land, and in addition to that, if the claimants' interpretation of the statute be the correct one, the government must pay $5,000 more to the owners of the same lands. We cannot think that this was the intention of Congress. To give back as much as it has received over and above the original tax would seem to be dealing with a good deal of liberality with the owners. The fact is well known as a matter of contemporaneous history, and it was so stated by counsel on the argument, that upon the sale of lands which the United States had bid in by virtue of the provisions of the direct tax act of 1861, and which were sold thereafter under the provisions of § 11 of the act of June 7, 1862, entitled "An Act for the Collection of Direct Taxes in Insurrectionary Districts within the United States, and for Other Purposes" (12 Stat. at L. 422), the amounts of such sales were frequently and generally very much less than the real value of the property sold. This was no fault of the government, however, and resulted in no benefit to it. By the rule adopted in the 1st clause of § 4 of the act of 1891 for ascertaining the amount which was to be paid to the former owners of the property that had been sold, the sum which the United States *would have to pay to those legal owners [293] might and probably would be much in excess of the sums which the government had actually received, so that in numerous cases there would be a pure gratuity on the part of the government to those owners. The language would have to be very plain to call for such a construction of the last proviso in § 4 as would give in addition to a gratuity a still further sum amounting to the surplus received by the government over and above the amount of the tax levied upon the property sold. The fact that there were lands sold in other parishes than those named, in the state of South Carolina, and also lands lying in other states, furnishes a rational and proper foundation for the last proviso in § 4 of the act of 1891, without construing it to involve these owners who had already been specially provided for. There is full opportunity thus given for the application of the clause in question to other landowners without including within its benefits the owners of those lands who had already been particularly mentioned and provided for by other clauses in the same section. It is true that if the language used in that last clause be given its widest and broadest application it would include all owners of real estate which had been sold in any portion of the country under the provisions of the direct tax act. But we think a perusal of the whole act prevents our giving this unlimited construction, because to do so would conflict with what we think was the intention of Congress, gathered from the provisions of the whole act. Under such circumstances it is not only the right but it is the plain duty of the court to limit by a proper construction the otherwise boundless application of the general language used in the statute. As was said by Mr. Chief Justice Taney: "It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it." *Brewer* v. *Blougher*, 39 U. S. 14 Pet. 178, 198 [10: 408, 417]; *Petri* v. *Commercial Nat. Bank*, 142 U. S. 644, 650 [35: 1144, 1146].

*It is true that, in the first case cited, the [294 court refused to limit the application of the statute as contended for by one of the parties to the controversy, but such refusal was based on the view of the statute taken by the court, which was that the intention of the legislature was not so plainly within the contention of counsel as to permit of the limitation in that case. The rule for the construction of a stat-



Digitized by Google

ute and of the duty of the court was given as above stated.

In this case we think the intention of Congress was plain, and that the general language of the last clause of § 4 should not be held to include the class of owners of lands mentioned in the 1st clause of the same section, for whose case special provision was therein made. We think that the construction given by the court of claims to the statute of 1891, as set forth in its opinion in *Sams* v. *United States*, 27 Ct. Cl. 266, was correct, and its *judgment in this case should therefore be affirmed.*

---

JAMES F. GLOVER *et al.*, *Appts.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 294-301.)

*Mortgage creditor is not the legal owner.*

One who was a mortgage creditor at the time of the sale of property to enforce the direct tax assessed by the United States under the act of Congress of 1861 is not the legal owner who is entitled under the act of Congress of 1891 to reimbursement.

[No. 140.]

*Argued and Submitted November 3, 1896. Decided November 30, 1896.*

APPEAL from a judgment of the Court of Claims disallowing the claim of the plaintiffs, James F. Glover *et al.*, against the United States for reimbursement under the refunding law of 1891 for property sold for taxes under the direct tax act of 1861. *Affirmed.*

The facts are stated in the opinion.

See same case below, 29 Ct. Cl. 236.

*Mr.* **James Lowndes** for appellants.

*Mr.* **W. S. Monteith** for Bythewood heirs.

*Messrs.* **J. E. Dodge**, Assistant Attorney General, and **George H. Gorman**, Assistant Attorney, for appellee.

295] *Mr. Justice **White** delivered the opinion of the court:

In 1861 Benjamin R. Bythewood was the owner of a lot in the town of Beaufort and a plantation in the county of the same name, both situated in Saint Helena parish, state of South Carolina. On the occupation of Port Royal by the national troops in November, 1861, Bythewood left Saint Helena island, as did all the white population of that island. Thereafter the property of Bythewood was assessed for taxes by the United States under the direct tax act of 1861 (12 Stat. at L. 294), and was sold in enforcement thereof. A portion of the plantation was subsequently redeemed.

Congress provided, by the act of March 3, 1891 (26 Stat. at L. 882), for refunding the direct tax collected under the act of 1861, and also for payment, under certain conditions, of a stipulated amount to the owners of property in Saint Helena parish, which had been sold to collect such direct tax. This controversy arises from a claim made, under said act, by the representatives of Mrs. Verdier, that as their ancestor was a creditor secured by mortgage on the property of Bythewood at the date when it was sold under the act of 1861, they are therefore entitled to be paid the sum stipulated in the act of Congress, because as the representatives of such mortgage creditor they were the legal owners of the property within the meaning of the refunding law of 1891. The full text of the act of 1891, upon which the issue depends, is set out in the margin of the opinion in *McKee* v. *United States*, 164 U. S. 287 [*ante*, 437]

By the 4th section of the act it is made "the duty of the Secretary of the Treasury to pay to such persons as shall in each case apply therefor and furnish evidence that such applicant was at the time of the sales hereinafter mentioned the legal owner or the heirs at law or devisee of the legal owner of such lands as were sold in the parish of Saint Helena and Saint Luke's in the state of South Carolina under the said acts of Congress, the value of said land in the manner following, to wit. . . ."

The question which therefore arises is this: Is one who was a mortgage creditor at the time of the sale of the property to *enforce [296 the direct tax, the legal owner contemplated by Congress when it enacted the law of 1891?

Construing the words "legal owner" in a strictly literal and purely technical sense, it is clear that under the law of South Carolina a mortgage creditor was not such legal owner. Without considering whether a mortgage creditor under the common law might be technically held to be the legal owner within the meaning of the act of 1891, it is plain that the statute law of South Carolina made the position of a mortgagee merely that of a creditor with security. The law from which this resulted was passed in 1791 (5 S. C. Stat. 169), and therein it was provided:

"No mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged, even after the time allotted for the payment of the money secured by the mortgage is elapsed; but the mortgagor shall be still deemed the owner of the land and the mortgagee as owner of the money lent, or due, and shall be entitled to recover satisfaction for the same out of the land. . . . Provided always, that nothing herein contained shall extend to any suit or action now pending, or when the mortgagor shall be out of possession. . . ."

As late as 1890 the supreme court of South Carolina construed this statute in *Hardin* v. *Hardin*, 34 S. C. 77, 80, and it was there held that it was well settled, by many decisions, that in South Carolina a mortgage of real estate is not a conveyance of any estate whatever, but is simply a contract whereby the mortgagee obtains a lien on the property mortgaged as a security for the payment of the debt, and that

---

NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

*As to sale of lands for taxes; strict compliance with statute necessary*,—see note to Williams v. Peyton, 4: 518.

*As to when an injunction to restrain the collection of a tax will be granted*, see note to Dows v. Chicago, 20: 65.

*As to when taxes illegally assessed can be recovered back*, see note to Erskine v. Van Arsdale, 21: 63.



Digitized by Google

the mortgagor still remains, even after the condition is broken, the owner of the land.

Nor did the mere fact that Bythewood left Saint Helena island, on the arrival of the Federal forces, convert Mrs Verdier's title, which was one of mere security, into that of a legal owner. It is not found that she herself in fact took any possession of the property mortgaged to secure her debt.

As said in *Norwich* v. *Hubbard*, 22 Conn. 587, 594:

"A mortgagee out of possession is not the pro-
297] prietor of *the mortgaged premises, and, in common parlance, is never spoken of as such, nor is he so recognized in a legal sense. To be sure, he is said to have the legal title, and as against the mortgagor, and for the purpose of enforcing his rights as mortgagee, he has such title. He can convey no beneficial interest in the land mortgaged, as separate and distinct from the debt; and he has no such interest in it as can be levied upon, and taken in execution, by his creditors."

Even the common-law right of a mortgagee not in possession to be considered the legal owner is so in a restricted sense, as is shown by *Great Falls Co.* v. *Worster*, 15 N. H. 412, 434, where the court said:

"A mortgagee not in possession is not entitled to be treated as owner, except in a suit, or some other proceeding, to enforce his rights as mortgagee. Until entry, he has no right to exercise any acts as owner. He cannot claim the rents and profits. He cannot convey the land by deed, without transferring the debt. But he may assign the debt, and thereby assign and transfer the charge upon the land. He has no right to commit waste or destroy the property when in possession, until he has foreclosed."

Whilst it is hence clear that a strict and technical construction of the words "legal owner" would be conclusive against the claim which the mortgage creditors here assert, the language of the act of 1891 should not be measured and interpreted by this narrow rule. The context of that act makes it manifest that the word "legal," prefixed to the word "owner," was not intended to give it a purely artificial meaning. This is shown by the fact that in other places in the section where the word "owner" is found the same idea is conveyed by the use of that word without the prefix "legal." In interpreting the act, therefore, we must be guided, not by any mere technicality, but must read its provisions by the light of the cardinal rule, commanding that the words must be apprehended, not in a forced and purely technical way, but in their general acceptation, and that the law must be interpreted in accordance with its spirit so as to effectuate the purpose intended to be accomplished thereby. *Maillard* v. *Lawrence*, 57 U. S. 16 How. 251 [14: 925]; *Smythe* v. *Fiske*, 90 U. S. 23 Wall. 374 [23: 47].

298]*Following these canons of construction, it cannot be denied that the general acceptation of the word "owner" is distinct and different—indeed, is the very opposite of the word "creditor," whether secured by mortgage or not. And that this meaning is the sense in which it was used in the law in question is demonstrated by the fact that nowhere therein is provision made for the classification and ascertainment of the rights of creditors for determining whether such rights had been duly preserved by proper registry or had been discharged by payment or barred by the statute of limitations. Indeed, there is one requirement of the act which excludes the implication that the word "owner" was intended to refer to a creditor. The payment to the owner, the 4th section commands, "shall be made by the Secretary of the Treasury to such persons as shall . . . furnish satisfactory evidence that such applicant was at the time of the sales hereinafter mentioned the legal owner." Now, whilst the time of the sale was an absolutely certain criterion by which to determine ownership *vel non*, it is an impossible test by which to ascertain the existence or nonexistence of a creditor at the time the law was enacted. The mere fact that a creditor held security at a given time does not exclude the possibility of the debt having been paid subsequent to the sale, or of its having perished by limitation, or having been extinguished in some other lawful way. To hold that the payment must be made, therefore, to one who was a creditor *at the time of the sale* would imply that Congress intended to make a payment to one who might not be a creditor at the time of the payment, although he may have been such creditor when the sale was made.

A consideration of the purpose meant to be accomplished by the act of 1891 fortifies the foregoing conclusions. That it was avowedly intended to repay the tax which had been levied under the act of 1861 is beyond question. The provision as to payment to the owners of a certain sum for land sold under that act was clearly a result and consequence of the general purpose contemplated by Congress in passing the refunding law. It follows that the aim proposed by the act of *1891 was the return of [299 the tax assessed under the act of 1861 and the repayment, in certain cases, to the owners of a named sum for lands which were assessed and sold under that act. Now, if it be clear that under the act of 1861 the owner and not the mortgage creditor out of possession was liable for assessment, it becomes equally clear that a mortgage creditor who was not assessable under the act of 1861 was not within the scope of the relief intended to be accomplished by the act of 1891. The act of 1861, in § 8 and subsequent sections, provided for a tax which was to be assessed and laid within the United States "on the value of lands and lots of ground, their improvement and dwelling houses." It contemplated an assessment against the owner of the property and not the creditor, since there was a personal liability entailed on the owner for the tax. Thus, by § 35, the collector was authorized upon default in the payment of the tax to distrain upon goods and chattels. Can it be contended that one who was a creditor with a mortgage security on the property of his debtor was liable to assessment for this tax, and hence to have his goods and chattels distrained for its payment? If it cannot be, then it follows that the mortgage creditor could not be assessed under the act of 1861. But if he was not assessable under that law, and the act of 1891 contemplates only the owners who could be so assessed, the deduction is irresistible that the mortgage creditor was not embraced in the word "owner" as used in the act



Digitized by Google

of 1891. Nor is the claim here asserted by the mortgage creditor that he is within the term "owner," as used in the act of 1891, fortified by a reference to decisions construing that word in statutes regulating the enforcement of the right of eminent domain. Some courts, considering that word strictly in such statutes, have held it not to embrace a mortgagee. *Farnsworth* v. *Boston*, 126 Mass. 1; *Norwich* v. *Hubbard*, 22 Conn. 587. Other courts, however, have held from a consideration of the context of the statutes which they were interpreting, and the evident purpose intended thereby to be subserved, that mortgagees were embraced. Even if *arguendo* it be conceded that the latter construction is a correct one, and that where the law seeks to devest all and 300]*every title to land or estate and substitute the price therefor, that the word "owner" should receive a broad and liberal construction so as to embrace every right in and to the land, such concession would not affect or control the proper interpretation to be given to the word "owner" in the act under consideration. In conferring the gratuity provided by the act of 1891, Congress in no way manifested its purpose to make a *restitutio in integrum*, to create a fund which would take the place of the property and be the representative of its entire value, at the date of the sale, or of all the interests then resting upon or entering into the land. The act does not provide for ascertaining the value of the land at the time of the sale and for a return of the amount thereof, but simply fixes an arbitrary sum to be paid to the one who was the owner at the time of the sale. And that this sum was not considered by Congress as the whole value of the property, at the date of the sale, is demonstrated by the fact that, as to the lots in Beaufort, the amount to be paid was fixed at one half the valuation placed on them, by the United States, when they were assessed under the direct tax law. We cannot adopt a theory of construction which substantially asserts that the half is equal to the whole. To enforce, then, against the money given by Congress to the owner, the rights of the mortgage creditor on the theory that it represents the entire value of the property would be indulging in an untrue hypothesis to justify, not only a repudiation of the express words of the law, but also a refusal to execute its manifest intent. Doubtless both the rights of the owner and those of the mortgage creditor were operated on by the tax sale. But the taxing law gave to either a right of redemption. If years after the sale and when the right to redeem had lapsed, Congress chose to give to the owner a proportion of the value of the property to compensate for his loss, we can see no equitable consideration supporting the claim that the money should be, by judicial construction, taken from the owner, in order to bestow it on the mortgage creditor. To so construe would substitute the judicial for the legislative mind.

301]* This case is also unlike that of a factor who, by reason of advance upon goods in his physical possession, has acquired a quasi ownership in such goods, and who, to the extent of such advances, is entitled as special owner to sell the goods in his possession. *United States* v. *Villalonga*, 90 U. S. 23 Wall. 35 [23:64]. Of course the construction which we give to the term "legal owner" or "owner" in the act of 1891, is limited to the precise question arising on this record, which is simply whether a mortgagee can properly be said to be embraced within the terms of the act of 1891 giving a particular sum to the legal owner or owners for lands sold by the government under the direct tax act of 1861. In determining, therefore, as we do, that the mortgage creditor is not embraced in the provisions of the act, we are not to be understood as expressing an opinion upon what construction might be justified under other facts and circumstances and for other purposes.

*The judgment of the Court of Claims* disallowing the claim of the plaintiffs, having construed the act of 1891 in accordance with the foregoing views, *was right, and is therefore affirmed.*

---

EUGENE W. COUGHRAN *et al., Plffs. in Err.*,
*v.*
HENRY C. BIGELOW and H. P. Henderson.

(See S. C. Reporter's ed. 301-311.)

*Bond for a deed—nonsuit—sureties in the bond.*

1. Granting a nonsuit for want of sufficient evidence is not an infringement of the constitutional right of trial by jury.
2. Vendees cannot enforce a bond given to secure the execution and delivery of a deed within a certain time, if they have failed to make a payment within the time agreed, where the obligatory part of the bond expressly provides that they shall comply with their part of the contract.
3. Sureties in a bond for a deed are relieved from liability by the failure of the vendee to perform the precedent act of payment at the time provided in the contract; and the acceptance by the vendor of a payment subsequently made, although a waiver of his right to rescind, does not bind the sureties or restore their liability.

[No. 53.]

*Argued and Submitted May 7, 1896. Decided November 30, 1896.*

IN ERROR to the Supreme Court of the Territory of Utah to review a judgment affirming the judgment of the District Court of the First Judicial District of that Territory in favor of the defendants, upon a nonsuit, in an action brought by Eugene W. Coughran *et al.*, plaintiffs, against Henry C. Bigelow *et al.*, to recover the amount of a bond given by them as sureties for the performance of a contract, to convey lands. *Affirmed.*

See same case below, 9 Utah, 260.

Statement by Mr. Justice **Shiras**:

Eugene W. Coughran and Nathan H. Cottrell filed their amended complaint in the dis-

NOTE.—*As to trial by jury; how affected by 7th Amendment to the Constitution,*—see note to Justices of New York v. United States, Murray, 19: 658.

*As to bonds, official and other, and for debts; liability of sureties on,*—see notes to United States v. Giles, 3: 708, and Postmaster General v. Early, 6: 577.



Digitized by Google

trict court of the first judicial district of the territory of Utah on December 15, 1891, against 302]*Henry C. Bigelow and H. P. Henderson, showing that on April 26, 1890, E. A. Reed and H. H. Henderson, as principals, and the defendants as sureties, executed and delivered to the plaintiffs a bond conditioned for the performance of a contract on the part of the said principals to convey to the plaintiffs an interest in certain lands situate in Weber county, in the said territory; alleging that the said principals had failed to perform their contract, and seeking, on account of such alleged breach of the condition of the bond, to recover the amount of the penalty thereof from the defendants.

The bond was as follows:

Know all men by these presents that we, E. A. Reed and H. H. Henderson, principals, and H. Bigelow and H. P. Henderson, as sureties, all of the county of Weber, territory of Utah, are held and firmly bound unto Eugene W. Coughran and Nathan H. Cottrell, of Sioux Falls, South Dakota, in the sum of $5,000 lawful money of the United States, to be paid to the said Eugene W. Cottrell and Nathan W. Cottrell, their heirs, executors, or assigns, for which payment, well and truly to be made, we bind ourselves, we and each of ourselves, executors, and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this 26th day of April, A. D. 1890.

The condition of the above obligation is such that the above-bounden E. A. Reed and H. H. Henderson, on or before the 1st day of October, next, or in case of their death before that time, if the heirs of the said E. A. Reed and H. H. Henderson within three months after their decease, shall and do upon the reasonable request of the said Eugene W. Coughran and Nathan H. Cottrell, their heirs or assigns, make, execute, and deliver, or cause so to be made, a good and sufficient warranty deed, in fee simple, free from all encumbrance and with the usual covenants of warranty, of the following-described premises, to wit: An undivided one tenth of section fifteen (15) in township six (6), north of range one (1) west, Salt Lake meridian, Weber county, Utah territory, 303]except a part of the *southwest quarter-section of said section 15, described as follows: Beginning at the southeast corner of said southwest quarter-section, and running thence west 20 rods, thence north 30 rods, thence west 20 rods, thence north 40 rods, thence east 40 rods, thence south 70 rods to the place of beginning; provided the said Eugene W. Coughran and Nathan H. Cottrell comply with their part of the contract this day made and delivered to them by the said E. A. Reed and H. H. Henderson, and a copy of which is hereto attached, then the above obligation to be void; else to remain in full force and virtue.

H. H. Henderson.
E. A. Reed.
H. C. Bigelow.
H. P. Henderson.

Signed in presence of—
Geo. H. Burgitt.

Attached to the bond was the instrument following:

Ogden, April 26th, 1890.

Received of Eugene W. Coughran and Nathan H. Cottrell $3,333 as part purchase price of an undivided one-tenth part of the following described lands, *viz.*: Section fifteen (15) in township six (6) north of range one (1) west, Salt Lake meridian, Weber county, Utah territory, except a part of the southwest quarter-section of said section 15 described as follows: Beginning at the southeast corner of said southwest quarter-section, and running thence west 20 rods, thence north 30 rods, thence west 20 rods, thence north 40 rods, thence east 40 rods, thence south 70 rods, to the place of beginning.

The full purchase price being $10,000 to be paid as follows: $3,334 on October 1, 1890, and $3,333 on April 1st, 1891, with interest at 8 per cent per annum on deferred payment from October 1st, 1890. But in case said land is sold before October 1st, 1890, then, the last two payments are to bear interest from April 1, 1890, to the date of sale. And in case any payments are not made as above*provided the 304 amount paid herein is forfeited, and this receipt is from that time void and inoperative, and when the payment [*sic*] are made as above provided the land to be conveyed to said Eugene W. Coughran and Nathan H. Cottrell, or their assigns, with good title free from encumbrances.

H. H. Henderson.
E. A. Reed.
Millie G. Reed.

Signed in presence of—
Geo. H. Burgitt.

The plaintiffs alleged that they made the first and second payments provided for in the contract in accordance with the terms thereof; that on or about November 1, 1890, upon the request of the plaintiffs, E. A. Reed and H. H. Henderson tendered them a deed for the said interest in the lands; that thereupon they examined the title to the property, found the same to be defective and, because of the defects therein, refused to accept the deed; and that as to these transactions between the parties to the contract the defendants had due notice. It was alleged that Reed and H. H. Henderson had never been able, and were not able at the time the complaint was filed, to convey a fee simple and unencumbered title to the one-tenth interest in the lands described in the bond and contract; that for a long time prior to April 12, 1890, the property was owned in fee simple by the Union Pacific Railway Company, which company, by deed of that date, conveyed all of the east half and the north half of the northwest quarter of said section 15 to one James Taylor; that in and by that deed the company reserved to itself "the exclusive right to prospect for coal and other minerals within and underlying said land, and mine and remove the same if found," and also "the right of way over and across said lands, and space necessary for the conduct of said business thereon, without charge or liability therefor;" that the title of Reed and H. H. Henderson to the said interest was obtained by deed to them from Taylor, dated October 17,



Digitized by Google

1890, which deed was made subject to the said 305]mining rights reserved to *the company; that the lands were situated in a mining district, and that the said reservation rendered the title to the lands doubtful and unmarketable, and greatly diminished their probable value; that, furthermore, the property was subject to a mortgage. The plaintiffs allege that they had performed all the conditions of the contract upon their part, except to pay the sum of $8,333 on April 1, 1891, and that neither Reed and H. H. Henderson, nor the defendants, had ever tendered to them any other or different title than the alleged defective one aforesaid, or had ever refunded to them the amount of the first two payments. They asked for judgment in the sum of $5,000.

The defendants, on January 8, 1892, filed separate answers, wherein they denied that the said second payment made by the plaintiffs was made in accordance with the provisions of the contract, or that the title to the property was defective, or that the refusal of the plaintiffs to accept the deed tendered to them by Reed and H. H. Henderson was on account of any defect in the title, or that the lands were mineral lands, or that a reservation of mineral rights therein would be an encumbrance upon the title thereto. Further answering, they alleged that shortly before the execution of the said bond the plaintiffs had entered into negotiations with Reed and H. H. Henderson for the purchase of the said interest in the lands; that at that time Reed and H. H. Henderson held the said interest under executory contracts for the conveyance thereof to them; that Reed and H. H. Henderson fully informed the plaintiffs of the character of their title; that the said contract was then entered into, and the plaintiffs, in receiving the same, required some guaranty that Reed and H. H. Henderson would perfect their rights under the said executory contracts by April 1, 1891, that being the agreed time, as alleged, at which the plaintiffs would be entitled to a conveyance from Reed and H. H. Henderson; that thereupon it was agreed and understood that the defendants, as sureties, would execute a bond in the sum of $5,000, with Reed and H. H. Henderson as principals, guaranteeing that on or before April 1, 1891, Reed and H. H. Henderson should execute and deliver a deed as 306]*stipulated in the contract, provided that the plaintiffs should perform all the conditions of the contract upon their part; that the bond was prepared and attached to the contract, and was signed by Reed and H. H. Henderson and by the defendants; that by inadvertence in the preparation of the bond the time therein stated for the delivery of the deed was October 1, 1890, instead of April 1, 1891; that, therefore, the bond was not in accordance with the agreement and understanding of the parties thereto.

The case came on for trial in the said court November 29, 1892, before the court and a jury. Thereupon the plaintiffs introduced evidence tending to show, among other things, that the said lands were, on November 1, 1890, subject to a mortgage for the sum of $9,000, recorded July 2, 1889; that on October 17, 1890, the defendants placed in the custody of the Ogden State Bank a deed bearing that date, whereby Reed and H. H. Henderson conveyed to the plaintiffs the said interest in the said lands, subject to one tenth of the said mortgage; two notes, unsigned, dated October 17, 1890, payable to Reed and H. H. Henderson on April 1, 1890, for the aggregate amount of $2,433, being the amount of the last payment under the said contract, less $900, or one tenth of the amount of the said mortgage; and an unexecuted mortgage of the interest in the lands described in the contract, in favor of Reed and H. H. Henderson; that the bank was instructed to deliver the deed to the plaintiffs when they should have executed the notes and the last-mentioned mortgage, and should have returned them to the bank to be delivered by it to Reed and H. H. Henderson; that subsequently to October 8, 1890, and not later than the 12th of that month, the bank received the sum of $3,334 from the plaintiffs, with instructions to pay the same to Reed and H. H. Henderson, and did pay the same to them some time within the month following. It was further shown that Reed and H. H. Henderson derived their title to the property from James Taylor, by deed dated October 17, 1890; that Taylor's title was obtained from the said railway company; and that the deed from the company to Taylor as well as the deed of Taylor to Reed and H. H. Henderson contained the reservation of mineral rights as set out in the complaint.

*After all the evidence on behalf of the[307 plaintiffs had been introduced, the defendants moved for a nonsuit. The motion was granted, and judgment was entered in favor of the defendants. The plaintiffs then appealed to the supreme court of the territory of Utah, where the judgment of the said district court was affirmed. *Coughran* v. *Bigelow*, 9 Utah, 260. Thereupon they sued out a writ of error from this court.

*Mr.* **C. W. Bennett,** for plaintiffs in error:

The Constitution of the United States, Amendment 7, provides that in suits at common law where the amount in controversy exceeds $20 the right of trial by jury shall be preserved. The organic act of Utah (act Sept. 1850, § 17) extends the Constitution over Utah. Under these laws the trial court has no right to deprive plaintiff of the right to have his cause tried by jury, the territorial statute to the contrary notwithstanding.

*Elmore* v. *Grymes*, 26 U. S. 1 Pet. 469 (7: 224); *De Wolf* v. *Rabaud*, 26 U. S. 1 Pet. 476 (7: 227); *Crane* v. *Morris*, 31 U. S. 6 Pet. 598 (8: 514); *Castle* v. *Bullard*, 64 U. S. 23 How. 172 (16: 424); *Boucicault* v. *Fox*, 5 Blatchf. 87; *Foote* v. *Silsby*, 1 Blatchf. 445, Aff'd 55 U. S. 14 How. 218 (14: 394); *Thompson* v. *Campbell*, Hempst. 8; *Scott* v. *Neely*, 140 U. S. 106 (35: 358).

The evidence was amply sufficient to establish a prima facie case, and the grounds of defendant's motion are not well taken.

The court will adopt a construction which will support the contract, rather than one which will destroy it.

*Waldron* v. *Willard*, 17 N. Y. 466; *Archibald* v. *Thomas*, 3 Cow. 284.

Interpretation will lean to the rendering



Digitized by Google

which will make the contract reasonable and just.

*Noonan* v. *Bradley*, 76 U. S. 9 Wall. 394 (19: 757); *First Nat. Bank* v. *Hartford F. Ins. Co.* 95 U. S. 673 (24: 563).

The agreement in the bond for the delivery of the deed on or before October 1, 1890, must prevail over any repugnant provisions contained in the contract to which reference is made.

*Hoey* v. *Jarman*, 39 N. J. L. 525; *Gullischen* v. *Stewart*, L. R. 13 Q. B. Div. 317.

The sureties are not parties to the contract and there is such a want of identity of parties as would exclude the contract from consideration except for the reference to it.

*Craig* v. *Wells*, 11 N. Y. 315.

The surety is not entitled to stand on the strict terms of his agreement until that agreement has been ascertained.

*Dobbin* v. *Bradley*, 17 Wend. 425.

The ordinary rules apply to the construction of contracts of guaranty and suretyship.

*Hoey* v. *Jarman*, 39 N. J. L. 525; *Davis* v. *Wells, F. & Co.* 104 U. S. 159 (26: 686); *Lawrence* v. *McCalmont*, 43 U. S. 2 How. 426 (11: 326).

Both the principals and the sureties are estopped from asserting that there was no agreement to make and deliver a deed on October 1, 1890, for they have set their hands and seals to an instrument assuming that such an agreement existed, and other parties acted upon that assumption and paid out money under the belief that such assumption was true.

*Gray* v. *State*, 78 Ind. 68, 41 Am. Rep. 545; *Bruce* v. *United States*, 58 U. S. 17 How. 437 (15: 129); *Cutler* v. *Dickinson*, 8 Pick. 386; *Shroyer* v. *Richmond*, 16 Ohio St. 455.

Greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of that intent.

*Ford* v. *Beech*, 11 Q. B. 866; *Field* v. *Leiter*, 118 Ill. 17.

The intention of the parties is to prevail if it is not incompatible with some rule or maxim of the law; this is considered as the polar star in expounding.

*Howard* v. *Rogers*, 4 Harr. & J. 278; *Church* v. *Hubbart*, 6 U. S. 2 Cranch, 187 (2: 249); *Bradley* v. *Washington, A. & G. Steam Packet Co.* 38 U. S. 13 Pet. 89 (10: 72); *Mauran* v. *Bulus*, 41 U. S. 16 Pet. 528 (10: 1056).

Where purchase money is to be paid and premises are to be conveyed at the same time, covenants are mutual and reciprocal.

*Hill* v. *Grigsby*, 35 Cal. 662; *Englander* v. *Rogers*, 41 Cal. 420.

Neither party can put the other in default when covenants are mutual and reciprocal, without a tender of performance.

*Bank of Columbia* v. *Hagner*, 26 U. S. 1 Pet. 455 (7: 223); *Peasley* v. *Hart*, 65 Cal. 524; *Hill* v. *Grigsby*, 35 Cal. 656, 661.

So long as the vendor is unable to make a conveyance there could be no forfeiture for nonpayment.

*Wallace* v. *McLaughlin*, 57 Ill. 53; *Getty* v. *Peters*, 82 Mich. 661, 10 L. R. A. 465; *Baker* v. *Bishop Hill Colony*, 45 Ill. 264.

The vendee is always excused from a tender of payment or performance on his part where the vendor is unable to convey good title.

*Falkner* v. *Guild*, 10 Wis. 564; *Ankeny* v. *Clark*, 148 U. S. 345 (37: 475).

The title offered is defective, doubtful, and unmarketable, owing to the reservation in the deeds, within the general rule.

2 Story, Eq. Jur. § 749.

As soon as this title was offered to the appellants they rejected it on the ground of this reservation. They had never been in possession. Their rights to refuse the whole on account of failure of title to part of the land was clear.

*Ankeny* v. *Clark*, 148 U. S. 345 (37: 475).

The remaining ground urged for a nonsuit is that an extension of time for performance had been made without the knowledge or consent of the sureties.

It was error to take the case from the jury on that ground.

*Roach* v. *Summers*, 87 U. S. 20 Wall. 165 (22: 252).

*Mr.* **Arthur Brown,** for defendants in error:

Where a bond is given to secure the performance of a contract and it refers to the contract the bond is to be considered just as though the contract was copied in the preamble and is a part of it.

*Locke* v. *McVean*, 33 Mich. 473.

In this case the bond refers to the contract, and its performance on the part of the plaintiffs is made a condition precedent, and there is a discrepancy between the bond itself and the contract in the time when the deed is to be delivered. It is a plain, patent ambiguity upon the face of the papers, and parol evidence at law cannot be given to explain it, and the agreement is therefore void for uncertainty.

1 Am. & Eng. Enc. Law, 529; Parsons, Cont. 557; 1 Warvelle, Vendors, pp. 130, 131, § 15.

Under such circumstances the only extrinsic evidence that can be given is to show the situation and surroundings of the parties.

1 Parsons, Cont. 561, 562; 1 Warvelle, Vendors, p. 129, § 13.

The contract which the bond in this case is made to secure, and which is referred to in it, is a unilateral contract, in which time is expressly made the essence of the contract, and all the conditions prescribed in it to be performed by the plaintiffs before the deed was to be delivered are conditions precedent, and any failure on their part renders the contract absolutely void.

*Martin* v. *Morgan*, 87 Cal. 203.

The liability of a guarantor or surety is always *strictissimi juris*. He is not bound beyond the literal and exact terms of his guaranty. He is only liable because he has promised to be, and his liability is limited by the exact terms of his promise.

*Miller* v. *Stewart*, 22 U. S. 9 Wheat. 680 (6: 189); *Walrath* v. *Thompson*, 6 Hill, 540; *Burlington Ins. Co.* v. *Johnson*, 120 Ill. 622, 625; *Cunningham* v. *Wrenn*, 23 Ill. 65.

Encumbrance by mortgage is never such an obstacle of performance as permits the vendee to declare the contract void, and recover back his money, because it is possible that the very



Digitized by Google

money which was to be paid was the money with which the defect could be remedied.

*Gates* v. *McLean*, 70 Cal. 42; *Rhorer* v. *Bila*, 83 Cal. 51.

Before the vendees could claim that they were excused from performance on their part by reason of defects of title they should have pointed out the defects so that they might be removed.

*Anderson* v. *Strassburger*, 92 Cal. 88.

The rejection of an offer to perform by one party to a contract excuses the other party from performance as a condition precedent.

*Rhorer* v. *Bila*, 83 Cal. 55.

If the purchaser chooses not to rescind but to retain possession under the contract he can do so only on the condition that he pays the purchase money, with interest, according to the contract.

*Gates* v. *McLean*, 70 Cal. 50.

Mere defects of title will not authorize the vendee either to rescind or sue on covenants of title. They must be such as cannot be cleared by the vendor.

*Easton* v. *Montgomery*, 90 Cal. 313.

The so-called cloud in the mineral reservation was of no consequence whatever. It was no injury to the title. Nobody ever dreamed or pretended that there was any mineral in the lands.

*Winne* v. *Reynolds*, 6 Paige, 407.

Any change in the obligation of the contract or any of its terms would release the sureties, and an extension of time of performance would operate to release the sureties, and an agreement for such extension, if founded upon mutual promises, was binding and need not be in writing.

*Dodgson* v. *Henderson*, 113 Ill. 360.

Mr. Justice **Shiras** delivered the opinion of the court:

The ruling of the supreme court of the territory of Utah in affirming the action of the trial court ordering a nonsuit of plaintiffs is assigned as error. It was held by this court in *Elmore* v. *Grymes*, 26 U. S. 1 Pet. 469 [7: 224], that a circuit court of the United States had no authority to order a peremptory nonsuit against the will of the plaintiff. This case has been followed in repeated decisions. *Crane* v. *Morris*, 31 U. S. 6 Pet. 598 [8: 514]; *Castle* v. *Bullard*, 64 U. S. 23 How. 172 [16: 424].

The foundation for those rulings was not in the constitutional right of a trial by jury, for it has long been the doctrine of this court that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the *onus* of proof is imposed, and that, if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly, and, if the jury disregard such instruction, to set aside the verdict. *Parks* v. *Ross*, 52 U. S. 11 How. 362 [13: 730]; *Schuchardt* v. *Allen*, 68 U. S. 1 Wall. 359 [17: 645]; *Pleasants* v. *Fant*, 89 U. S. 22 Wall. 120 [22: 782]. And, in the case of *Oscanyon* v. *Winchester Repeating Arms Co.* 103 U. S. 264 [26: 541], it was said by Mr. Justice Field, in delivering the opinion of the court, that "the differ-[308 ence between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is "rather a matter of form than of substance."

That the cases above cited, which held that the circuit court of the United States had no authority to order peremptory nonsuits, were based, not upon a constitutional right of a plaintiff to have the verdict of a jury, even if his evidence was insufficient to sustain his case, but upon the absence of authority, whether statutory or by a rule promulgated by this court, is shown by the recent case of *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 38 [30: 55, 61], where it was held that, since the act of Congress of June 1, 1872 (17 Stat. at L. 197), re-enacted in § 914 of the Revised Statutes, courts of the United States are required to conform as near as may be, in questions of "practice, pleadings, and forms and modes of proceeding," to those existing in the courts of the state within which the trial is had, and a judgment of the circuit court of the United States for the eastern district of Pennsylvania, ordering a peremptory nonsuit, in pursuance of a state statute, was upheld. It is the clear implication of this case that granting a nonsuit for want of sufficient evidence is not an infringement of the constitutional right of trial by jury.

As there was a statute of the territory of Utah authorizing courts to enter judgments of peremptory nonsuit, there was no error in the trial court in granting the motion for a nonsuit in the present case, nor in the judgment of the supreme court affirming such ruling; if, indeed, upon the entire evidence adduced by the plaintiffs enough did not appear to sustain a verdict.

We are thus brought to the question whether the trial court was mistaken in its view of the plaintiff's evidence.

The facts of the case are somewhat peculiar. The suit is against sureties on a bond, conditioned for the performance by the principals of the terms of a contract for the sale of land to the parties plaintiff. The chief difficulty arises from the fact that there is a discrepancy between the terms of the contract, as they appear in the written instrument itself, and as they are described or narrated in the bond.

"The contract is clear and unambiguous. [309 It is dated April 26, 1890. After acknowledging receipt of $3,333 as part purchase price of an undivided one-tenth part of a certain tract of land, describing it, it proceeds as follows: "The full purchase price being $10,000, to be paid as follows, $3,334 on October 1st, 1890, and $3,333 on April 1st, 1891, with interest at 8 per cent per annum on deferred payment from October 1st, 1890. But in case said land is sold before October 1st, 1890, then the last two payments are to bear interest from April 1st, 1890, to the date of sale. And in case any payments are not made as above provided, the amount paid herein is forfeited, and this receipt is from that time void and inoperative, and when the payments are made as above provided the land to be conveyed to said Eugene W. Coughran and Nathan H. Cottrell, or their assigns, with good title free from encumbrances."



Digitized by Google

The obvious meaning of these provisions is that if the sum of $3,334 is paid on October 1, 1890, and the sum of $3,333 is paid on April 1, 1891, with interest from October 1, 1890, then it shall be the duty of the vendors to convey the property to the vendees or their assigns with a good title free from encumbrances; but that if said deferred payments are not made, as provided for, then the amount previously paid shall be forfeited and the contract become void.

The bond, bearing even date with the contract, contains the following language: "The condition of the above obligation is such that the above-bounden E. A. Reed and H. H. Henderson, on or before the 1st day of October next, or in the case of their death before that time if the heirs of the said E. A. Reed and H. H. Henderson, within three months after their decease, shall and do upon the reasonable request of the said Eugene W. Coughran and Nathan H. Cottrell, their heirs or assigns, make, execute, and deliver, or cause so to be made, a good and sufficient warranty deed, in fee simple, free from all encumbrances, and with the usual covenants of warranty of the following-described premises, . . . provided the said Eugene W. Coughran and Nathan H. Cottrell comply with their part of the contract this day [310] made and delivered to them *by the said E. A. Reed and H. H. Henderson, and a copy of which is hereto attached, then the above obligation to be void; else to remain in full force and virtue."

It will be observed that, by the terms of the contract, the deed of conveyance was not to be made until the purchase money had been paid in full, but the recital in the bond calls for the making and delivery of the deed on or before the 1st day of October, 1890.

The solution of the difficulty thus created will be found by reading the bond in the light of the contract, to secure the performance of which was the purpose of the bond. The contract provided, indeed, that the vendors should execute and deliver a proper deed, but also provided that the title should not pass until the deferred payments were made. To construe the bond as compelling a coveyance before such payments were made would deprive the vendors of the security given them by retaining the title, and also of their stipulated right to forfeit the cash payment and rescind the sale, if the payments were not made as provided in the contract.

The obligatory portion of the bond was expressly made dependent on the proviso that Coughran and Cottrell should comply with their portion of the contract that day made and a copy of which was attached, one of the terms of which was that the sum of $3,334 should be paid on October 1, 1890. This payment was not so made on that day. The acceptance by the vendors of the payment subsequently made, on or about October 12, was, of course, a waiver by them of their right to rescind and declare a forfeiture, but such waiver did not bind the sureties, who were relieved from liability by the failure of the vendees to perform the precedent act of payment at the time provided in the contract. *Bank of Columbia* v. *Hagner*, 26 U. S. 1 Pet. 455 [7: 223]; *Kelsey* v. *Crowther*, 162 U. S. 404 [40: 1017].

The contention on the part of plaintiffs in error that the alleged inability of the vendors to make a conveyance of the character called for by the contract relieved them from the duty of payment, is only true so far as they might choose to make such inability on the ground of a right to rescind. They could not elect to abide by and enforce the contract, except *upon performance or tender of [311] payment on their part. *Telfener* v. *Russ*, 162 U. S. 171[40: 930]; *Kelsey* v. *Crowther*, *supra*. These were the views that prevailed in the Supreme Court of the Territory, and *its judgment is accordingly affirmed.*

---

## HORACE M. CAKE *et al.*, *Appts.*,
*v.*
## MARTHA V. MOHUN, Executrix, etc.

(See S. C. Reporter's ed. 311-318.)

*Power of receiver—borrowing money by him—undertaking to pay him—allowance for receiver's services.*

1. A judgment in favor of a receiver for his compensation and for an indebtedness for which he has assumed an individual liability passes to his personal representatives and may be enforced by them.
2. A receiver has power to incur obligations for supplies and materials incidental to the business which the court permits him to continue and carry on.
3. The borrowing of money by a receiver on the furniture and other personal property in a hotel may be authorized by the court, in order to prevent the closing of the hotel and the loss of the goodwill of its business during the pendency of a suit for foreclosure.
4. An undertaking to pay a receiver such sums as should be found due him on account of his indebtedness or expenditures or compensation, when made to obtain possession of the property in his hands as receiver after foreclosure sale, will prevent the obligors from claiming that the indebtedness and expenditures, the amount of which was found due, were made without authority, or that they, including the purchaser, one of the obligors, are not personally liable therefor.
5. An allowance to a receiver of hotel property, being 10 per cent of the receipts of the business and amounting to about $2,500, for his services from May to December, during which he spent ordinarily only his evenings at the hotel and employed a manager at $125 or $150 per month who was under bond for the faithful performance of his duties, will not be disturbed on appeal after it has been approved by two lower courts, where there is testimony by hotel proprietors that $5,000 a year was fair compensation, and he has had no compensation for the custody and responsibility of a large amount of personal property, and the position was attended with considerable anxiety and he retained it apparently against his own inclinations, in compliance with the wishes of the party in interest.

[No. 123.]

*Argued November 2, 1896. Decided November 30, 1896.*

---

NOTE.—*As to powers and duties of receivers*, see note to Davis v. Gray, 21: 447.



Digitized by Google

APPEAL from a decree of the Court of Appeals of the District of Columbia affirming the decree of the Supreme Court of the District (except for a small amount) for the payment to the receiver of the balance found due upon his account for disbursements and services in an action brought by Horace M. Cake to foreclose a deed of trust. *Affirmed.*

See same case below, 3 D. C. App. 60.

Statement by Mr. Justice **Brown:**

This was an appeal taken by Horace M. Cake and the administrators of William B. Moses, surety upon a certain undertaking of his to pay Francis B. Mohun, appellee's intestate, such sums as the court should find to be due the latter as receiver of the furniture, equipments, and other personal property of the hotel known as the La Normandie, in the city of Washington.

The original bill was filed April 23, 1891, by the appellant Cake to foreclose a chattel mort- [312] gage or deed of trust executed *by one Woodbury to William B. Moses and John C. Heald, to secure an indebtedness of $75,000 to Cake, and covering the furniture and other personal property in the hotel, a part of which property was also subject to a prior mortgage or deed of trust to secure the payment of the rent of the hotel. As it was manifestly for the interest of all parties that the hotel should not be closed, shortly after the bill was filed, and on May 5, 1891, Francis B. Mohun was appointed receiver, with instructions to take possession of the property, "and to carry on and manage the business of keeping said hotel in substantially the same manner in which it has heretofore been carried on," provided that he gave a bond in the sum of $15,000, conditioned for the faithful performance of his duties as such receiver.

Upon his appointment, Mohun at once took possession of the hotel and personal property as receiver, and carried on the business until December 4, 1891, when he was directed to surrender the property to the appellant Cake, who became the purchaser under a decree of foreclosure, subject to the prior mortgage, as well as the unexpired term of the lease, which was sold by the marshal on an execution against Woodbury. Before taking possession, however, Cake was required to file an undertaking, with surety, conditioned for the prompt payment to the receiver of such amounts as should be found to be due him on account of his expenditures or indebtedness, as well as of his compensation; and also conditioned that a decree might be pronounced against such surety, as well as against the principal obligor, for the payment of such amounts. This undertaking was executed by Cake, with William B. Moses as surety, and was filed December 4, 1891. The undertaking having proved satisfactory to the court, possession was surrendered, and the cause referred, by order of the court, to an auditor, with directions to state the account of the receiver, and directing that all questions as to the payment of expenses incurred by him in the performance of his duties or as to the settlement of his unpaid obligations be reserved until the coming in of the auditor's report. Before the accounts were stated, Moses, the surety upon the undertaking, died intestate, *and the administra- [313] tors of his estate were brought in and made parties to the cause.

The auditor proceeded to take proof under the reference, and stated an account showing an aggregate sum to be paid to the receiver of $8,332.58. This sum was made up as follows:

| | |
|---|---|
| Indebtedness of the receiver incurred in the conduct of the business | $5,038 74 |
| Allowance for compensation for his services | 2,793 79 |
| Allowance to his counsel | 500 00 |
| Total | $8,332 53 |

Exceptions were filed to this report by the appellant Cake, by the administrators of Moses as surety upon the undertaking, and by Mohun, the receiver. Upon the hearing of these exceptions, they were all overruled, the report ratified and approved, and a final decree passed for the payment to the receiver of the above amount. All parties appealed from this decree to the court of appeals, which affirmed the decree of the supreme court of the District, reducing the amount by a small credit of $7.59 to $8,324.94. *Cake* v. *Woodbury*, 3 App. D. C. 60. Before this decree was entered, Mohun having died, his executrix, Martha V. Mohun, was substituted in his place. From this decree of the court of appeals, Cake and the administrators of Moses, his surety, appealed to this court.

*Mr.* **W. L. Cole,** for the administrators of William B. Moses, appellants:

The questions presented by this case arise upon exceptions by the appellants to the auditor's report, stating the account of Francis B. Mohun as receiver, and finding certain sums to be due him for his services and for indebtedness incurred by him.

The exceptions were overruled and the auditor's report ratified, and a decree made thereon by the supreme court of the District of Columbia. An appeal was taken to the court of appeals of said District, which affirmed the decree below, and the appellants appealed to this court.

Exceptions were filed to the auditor's report by Cake, the complainant, and by the administrators of the estate of William B. Moses, his surety, who died while the case was pending before the auditor.

Mr. Mohun, the receiver, died while the case was pending in the court of appeals, and an order was made reviving the case in the name of his executrix, Martha V. Mohun, and a motion was made by the appellants to vacate that order, which was overruled by the court.

The receiver, Francis B. Mohun, was an officer of the court, acting in the discharge of certain duties imposed upon him by the orders of the court. Upon his death his powers and duties could not devolve upon his personal representative. It was the province of the court to select his successor to discharge the duties which he left unperformed.

There was no personal liability upon him for the debts which had been incurred in the management of the hotel. No claim can be made against his estate therefor.

*Farmers' Loan & T. Co.* v. *Central R. Co.* 2 McCrary, 181.



Digitized by Google

A receiver has no power to contract debts so as to make them a charge on the trust fund without express authority from the court.

*Lehigh Coal & Nav. Co.* v. *Central R. Co.* 35 N. J. Eq. 426; *Brown* v. *Hazlehurst*, 54 Md. 26; *Addison* v. *Lewis*, 75 Va. 701; *Cowdrey* v. *Galveston, H. & H. R. Co.* 1 Woods, 331, 93 U. S. 352 (23: 950); *Davis* v. *Gray*, 88 U. S. 16 Wall. 218 (21: 452); High, Receivers, §§ 175, 188.

A party dealing with a receiver must take notice of his want of authority.

*Tripp* v. *Boardman*, 49 Iowa, 410; *Kennedy* v. *St. Paul & P. R. Co.* 5 Dill. 519.

He cannot make a contract that will bind his successor.

*Lehigh Coal & Nav. Co.* v. *Central R. Co.* 35 N. J. Eq. 426.

Debts contracted without previous authority of the court are subordinate to the secured indebtedness.

*Union Trust Co.* v. *Illinois M. R. Co.* 117 U. S. 477 (29: 978).

The court has no power to use the trust fund for paying indebtedness other than that necessarily incurred in the protection and preservation of the property.

*Fosdick* v. *Schall*, 99 U. S. 235–238 (25: 339).

After the appointment of the receiver the complainant in the bill was no more responsible for the conduct and management of the property than any other party to the suit. He was in no way liable for the acts of the receiver or the debts incurred by him.

A receiver is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is *in custodia legis*. He has only such power and authority as are given him by the court, and must not exceed the prescribed limits.

*Davis* v. *Gray*, 21 U. S. 16 Wall. 218 (21: 452).

In so far as the undertaking is broader in its scope than the decree requiring it, it is of no force or effect against the surety.

*Kountze* v. *Omaha Hotel Co.* 107 U. S. 378 (27: 609).

The amount allowed the receiver for his compensation is excessive.

*Farmers' Loan & T. Co.* v. *Central R. Co.* 2 McCrary, 181; *Re Woven Tape Skirt Co.* 85 N. Y. 506; *Stretch* v. *Gowdey*, 3 Tenn. Ch. 565.

*Mr.* **J. J. Darlington,** for appellee:

The appellant is not charged as complainant, or as a part of the costs of the case, with the receiver's costs; though, perhaps, under the circumstances of the case, he well might be. He is charged with them as purchaser of the trust property, in whose hands the purchase money still remains, his undertaking to pay the receiver's costs being, upon his application, substituted for payment of the purchase money.

The cases in which it has been held that the proceeds of property subject to a prior mortgage cannot be used to pay receiver's expenses will, on examination, be found to be cases in which the application for the receiver was made by, and solely in the interest of, puisne encumbrancers, as, for example, second mortgagees, subsequent judgment creditors, and the like. No case can be found in which such a rule has been applied to the expenses of a receivership sought by, and granted at the instance of, the prior mortgagee himself, for protecting and preserving the value of the mortgaged property for his own interest, as in the present case.

Even where the proceeding in which the receiver is appointed is not at the instance of, but is against, the parties claiming under the antecedent mortgages, it is held that, in a case in which the appointment of a receiver is proper, and especially where the mortgagees have not opposed it, the receiver's expenses cannot be made to depend upon the result of litigation, and that he must be indemnified out of the fund or property for the preservation and security of which he was appointed.

*Jaffray* v. *Raab*, 72 Iowa, 335; *Courand* v. *Hanmer*, 9 Beav. 8; *Hopfensack* v. *Hopfensack*, 65 How. Pr. 698; *Hembree* v. *Dawson*, 18 Or. 474.

The proceeds of the foreclosure sale of the property, which, with its value, was thus protected and preserved by an officer of the court under its direction, at the mortgagee's instance, is liable for the expenses of such protection and preservation.

*Kneeland* v. *American Loan & T. Co.* 136 U. S. 89 (34: 379).

A receiver, without the previous sanction of the court, manifested by special orders, may incur ordinary expenses or liability for supplies, material, or labor needed in the daily administration of railroad property committed to his care as an officer of the court.

*Chicago Deposit Vault Co.* v. *McNulta*, 158 U. S. 561 (38: 822).

The compensation allowed the receiver by a master in chancery, sustained by competent and experienced men, will not be disturbed.

*Karn* v. *Rorer Iron Co.* 86 Va. 754.

The receiver is entitled to commissions on personal property which he has turned over in specie.

*Bennett* v. *Chapin*, 3 Sandf. 678.

Allowances to a receiver are largely discretionary, and that action of the court below in this respect is treated by an appellate court as presumably correct.

*Stuart* v. *Boulware*, 133 U. S. 78, 82 (33:568, 570).

Exceptions to the reports of masters in chancery are in the nature of special demurrers, and the party objecting must point out the error, designating particularly the erroneous action excepted to, and referring the court distinctly and clearly to the ground of his exceptions.

*Story* v. *Livingston*, 38 U. S. 13 Pet. 365 (10: 203); *Greene* v. *Bishop*, 1 Cliff. 192; *Harding* v. *Handy*, 24 U. S. 11 Wheat. 126 (6: 436).

And this is, specifically, the rule of practice in the supreme court of the District of Columbia, from which this case comes.

*Haller* v. *Clark*, 21 D. C. 134; *Richardson* v. *Van Auken*, 5 App. D. C. 213; *Grafton* v. *Paine*, 23 Wash. L. Rep. 809, 810; *Morgan* v. *Daniels*, 153 U. S. 124 (38: 659).

The executrix was the proper representative of the receiver in this respect. The indebtedness had been contracted by her testator as receiver, and he was liable to suit thereon, even without any application to the court for leave to sue.

A receiver is individually liable upon con-



Digitized by Google

tracts made by him, in the absence of stipulation that the other party shall look exclusively to the trust fund.

*People* v. *Universal L. Ins. Co.* 30 Hun, 142; *Ryan* v. *Rand*, 20 Abb. N. C. 313.

And the action will lie against his executor.

*Rogers* v. *Wendell*, 54 Hun, 543, 546; *Stuart* v. *Boulware*, 133 U. S. 81 (33: 570).

The executrix, as such, was not a proper party to represent so much of the decree in the court below as was based upon the indebtedness incurred by the receiver in the discharge of his trust.

*Holden* v. *Freedman's Sav. & T. Co.* 100 U. S. 74 (25: 568).

Mr. Justice **Brown** delivered the opinion of the court:

1. The first error assigned is to the allowance by the court below of a revival of the case in the name of the executrix of Francis B. Mohun. As the original decree in favor of Mohun was passed March 10, 1893, and as the order making the executrix a party was made [315] by the court of appeals January *4, 1894, it would appear that Mohun died after the case had been carried to the court of appeals and before it was finally decided. It will scarcely be claimed that a judgment in his favor lapsed by his death, and that no one could be authorized to make it available or collect it. As no one had been appointed to succeed him, and the receivership had, in fact, terminated by the sale of the property and the installation of the purchaser, it would seem that, from the necessities of the case, the right to collect this judgment must have passed to the personal representatives of Mohun. Beyond this, however, one third of the decree was for his own services, and to that extent, at least, his executrix was entitled to represent him, and was properly made a party. While his powers and duties as receiver would not devolve upon his personal representatives, a judgment entered in his favor for his own compensation, and for an indebtedness, for which he had assumed an individual liability, would pass to such representatives, and might be enforced by them. It is impossible that the court should be called upon to appoint a successor for that purpose. That the receiver had in fact assumed a personal liability for the bills contracted by him in the conduct of his business is evident from the very fact that he made claim for the same against the plaintiff Cake and his surety Moses under their undertaking of December 4, 1891. The question whether a receiver has assumed such personal liability or not is one to be determined from the facts and circumstances of the case. *Ryan* v. *Rand*, 20 Abb. N. C. 313; *People* v. *Universal L. Ins. Co.* 30 Hun, 142; *Ferrin* v. *Myrick*, 41 N. Y. 315; *Rogers* v. *Wendell*, 54 Hun, 540; *Schmittler* v. *Simon*, 114 N. Y. 176. See also *Cowdrey* v. *Galveston, H. & H. R. Co.* 93 U. S. 352, 355 [23: 950, 952].

2. That the receiver exceeded his authority in incurring the indebtedness mentioned in the auditor's report. Admitting to its fullest extent the general proposition laid down by this court in *Cowdrey* v. *Galveston, H. & H. R. Co.* 93 U. S. 352 [23: 950], that a receiver has no authority, as such, to continue and carry on the business of which he is appointed *receiver, [316] there is a discretion on the part of the court to permit this to be done temporarily when the interests of the parties seem to require it. Under such circumstances, the power of the receiver to incur obligations for supplies and materials incidental to the business follows as a necessary incident to the receivership. *Barton* v. *Barbour*, 104 U. S. 126, 135 [26: 672, 677]; *Thompson* v. *Phenix Ins. Co.* 136 U. S. 287, 293 [34: 408, 411].

In the case under consideration the receiver was expressly authorized by the court "to carry on and manage the business of keeping said hotel in substantially the same manner as it has heretofore been carried on;" and by a subsequent order was authorized to borrow, not to exceed $8,000, for the purpose of paying the rent and other necessary and urgent debts incurred, or to be incurred, on account of the running expenses of the hotel. In view of the fact that the closing of the hotel, even temporarily, would have soon become known to its patrons, and would probably have been attended by a serious loss to the goodwill of the business, we think the court did not exceed its authority in directing the receiver to keep it open during the pendency of the suit.

Beyond this, however, appellants are in no condition to make this objection, since in their undertaking of December 4, 1891, they agreed to pay the receiver such sums of money as the court should thereafter find to be due him on account of his indebtedness or expenditures as receiver, or on account of his compensation as such receiver.

3. The assignment that it was error to find that Cake, the plaintiff in the suit, was personally liable for the expenditures and indebtedness of the receiver, is fully met by the above-mentioned undertaking which Cake was obliged to give before taking possession of the property. Had he refused to give this undertaking, it would have been perfectly competent for the court to have required enough of the purchase money to be paid in cash to discharge the expenses of the receivership, and to compensate the receiver. It is true that Cake might not have been personally liable in the absence of this undertaking, but, as he chose to assume this responsibility in order *to [317] obtain immediate possession of the property, and to avoid the payment of any part of the purchase money into court, he is in no condition to set up this defense.

4. The only assignment that strikes us as entitled to any weight is that wherein complaint is made of the amount allowed to the receiver for his compensation, which was itemized by the auditor as follows:

| | |
|---|---|
| Allowance of 10 per cent on the receipts of the business | $2,510 81 |
| Allowance of 5 per cent on the amount received from trustees and paid to George J. Seufferle | 81 05 |
| Allowance of 5 per cent on disbursements of indebtedness | 251 93 |
| Total | $2,793 79 |
| Counsel fee | 500 00 |

In view of the fact that the receiver had never been in the hotel business; that he em-



Digitized by Google

ployed a manager at $125, and a part of the time at $150 a month, and required of him a bond for the faithful performance of his duties; that he was not prevented from giving his usual attention to his private business, and ordinarily spent only his evenings at the hotel, —we are bound to say that, if it had been an original question, we should have fixed his compensation at a considerably less amount.

Upon the other hand, however, as it appears that the hotel was kept open during the summer months at a very considerable loss; that the receiver was obliged to raise money to pay the rent and meet a deficiency each month; that the position was attended with considerable anxiety; that he retained it apparently against his own inclinations and in compliance with the wishes of the parties in interest; that proprietors of other large hotels in Washington testified that $5,000 a year was a fair compensation, and there was no evidence to the contrary; that the auditor, upon full consideration of all the facts of the case, made the allowance; that it was subsequently approved by 318]the learned judge of the supreme *court of the District, and, upon appeal, by the three justices of the court of appeals,—we are not disposed to disturb it. Great consideration will be paid to the concurring views of the auditor or master and the courts respecting a mere question of amount. High, Receivers, §§ 781–786.

It has been said in a number of cases that an allowance of 5 per cent upon the receipts and disbursements of the business was a fair compensation to receivers. *Stretch* v. *Gowdey*, 3 Tenn. Ch. 565; but in view of the facts above stated and the further fact that no compensation was allowed him for the custody and responsibility of the large amount of personal property that came into his possession, we are not prepared to say that the allowance was so excessive as to justify us in reducing it.

The reasons given by the auditor for the allowance of $500 counsel fee are full and satisfactory. "The record shows that the receiver was frequently called into court either to answer the call of other parties in the cause or to ask instructions or authority from the court to meet the emergencies arising in the business. It is evident that wise and capable advice was needed to protect him in the proper discharge of his duties, both as affecting himself and his responsibility, and as affecting the property intrusted to his charge. In view of what is disclosed in the record and proceedings I consider the sum so allowed to be reasonable and fair." High, Receivers, § 805.

This disposes of all the errors assigned, and, upon the whole, we think *the judgment of the court should be affirmed.*

CITIZENS' BANK OF LOUISIANA, *Appt.*, [319

*v.*

CLIFTON CANNON, Sheriff of Avoyelles Parish, *et al.*

(See S. C. Reporter's ed. 319-324.)

*Action to enjoin the collection of taxes—jurisdictional amount—value of exemption—decree for costs—want of jurisdiction.*

1. In an action to enjoin sheriffs of several parishes from enforcing the payment of taxes, the taxes for the several parishes cannot be added together in order to make the amount involved sufficient to confer jurisdiction on the United States circuit court.
2. Sufficient jurisdictional amount, in such case, cannot be arrived at by taking the tax for one year assessed and in the hands of the sheriff for collection in a district, and assuming that the taxes for subsequent years in that district are for similar amounts, where the proof was restricted to the first year.
3. In a suit by a bank to restrain tax assessors and collectors of several parishes from collecting taxes against exempt property of the bank for specific years, jurisdiction cannot be shown by the averment that the value of the exemption during the continuance of its charter exceeds $2,000 for each parish.
4. An appeal will not lie in a matter of costs alone; but when the appeal is also on other grounds, and the entire decree is before this court, it can determine whether the court below on dismissal for want of jurisdiction can give a decree for costs.
5. Where the court has dismissed the suit for want of jurisdiction, it has no power to decree the payment of costs and penalties; it can only strike the case from the docket.

[No. 58.]

*Argued and Submitted October 21, 1896. Decided November 30, 1896.*

APPEAL from a decree of the Circuit Court of the United States for the Western District of Louisiana dismissing for want of jurisdiction a suit in equity brought by the Citizens' Bank of Louisiana against Clifton Cannon *et al.*, sheriffs respectively of a number of parishes in Louisiana, to enjoin them from enforcing the payment of taxes by the plaintiff. *Reversed*, and cause remanded for further proceedings.

Statement by Mr. Justice **Shiras:**

In March, 1893, the Citizens' Bank of Louisiana, a banking corporation created by the legislature of Louisiana, filed a bill of complaint in the circuit court of the United States for the western district of Louisiana, against several defendants who were sheriffs respectively of a number of parishes in that district, seeking to enjoin the defendants from enforcing the payment of taxes alleged to be due from the bank on lands owned by it in the several parishes.

The main allegation of the bill was that the

NOTE.—*As to amount necessary to give jurisdiction in circuit court cases prior to act of 1875; amount necessary since act of 1875; amount in dispute,*—see note to Schunk v. Moline, M. & S. Co. 37: 356.



Digitized by Google

bank was by the terms of its charter exempt from taxation of every kind on its capital and property, and that certain specific and subsequent statutes of the state of Louisiana, by virtue of whose provisions the defendants were proposing to enforce the payment of taxes, would, if carried into effect, operate to impair the contract between the bank and the state, contrary to the 10th section of the 1st article of 320] the Constitution of the *United States. The taxes, which it was alleged it was the purpose of the defendants to assess and collect, were for state and parish taxation for the years 1889, 1890, 1891, and 1892.

Restraining orders were issued against the several defendants. Afterwards, in May, 1893, an amended bill of complaint was filed by the bank against the same defendants, alleging that, since the granting of the restraining orders and pending the disposition of the case, certain named assessors of the said several parishes were proceeding to list for assessment and taxation for the year 1893 the property of the bank situated in the said parishes, and praying that the said assessors might be subpœnaed to appear and answer said original and amended bill, and to abide the decrees of the court. Restraining orders were likewise issued under this amended bill.

On July 17, 1893, the defendants filed a general demurrer to both bills, and, on the same day, filed a plea to said bills, alleging that the taxes levied on the property of the complainant did not in any one of the parishes named in the bill amount to the sum of $2,000, and because such taxes so levied were payable to and levied for the state, the respective parish, and the levee board of the levee district in which such parish was situated; and alleging that the assessors and tax collectors of each of said parishes could not be joined for the purpose of giving the circuit court jurisdiction. The defendants also filed an answer, setting up various matters on which they contended that the bank's exemption from taxation was no longer operative.

The demurrer was, after argument, overruled. Replication to the plea and answer were filed. The complainant put in evidence the original charter of the bank and several acts of the legislature amendatory thereof; the revenue act of the legislature for the year 1890, and extracts from the assessment rolls of the several parishes named in the original and amended bill, showing the property owned by the bank and the amount of taxes assessed thereon. The defendants put in evidence certificates from the respective parishes, showing the property owned by the bank and the amount of taxes assessed thereon.

321] *On November 22, 1893, after argument the court entered a decree, sustaining the plea to the jurisdiction and dismissing the bill at complainant's costs. The decree further ordered that a fee should be allowed the solicitor of the defendants, amounting to 10 per cent of the taxes sought to be enjoined in the bill, *viz.*, the sum of $317.44, to be paid by complainant as part of the costs in the case. From this decree an appeal was prayed and allowed to this court. A certificate was duly signed by the judge of the circuit court, setting forth that the question decided was solely that raised by the plea to the jurisdiction of the court, and directing that copies of the bill, the exhibits showing the taxes involved and the property on which the taxes were levied, and the valuation of said property, and of the plea and decree, should be attached to the certificate.

*Messrs.* **Wm. A. Maury** and *Charles J. Boatner* for appellant.

*Messrs.* **M. J. Cunningham,** Attorney General of Louisiana, **A. H. Leonard,** and **Alex. Porter Morse** for appellees.

**Mr. Justice Shiras** delivered the opinion of the court:

The first assignment of error questions the correctness of the decree of the court in sustaining the plea to the jurisdiction and dismissing the bill.

The bill alleged that the defendants were about to assess and collect state and parish taxes for the years 1889, 1890, 1891, and 1892, and the amended bill alleged a similar purpose as to taxes for 1893. Neither bill contained a specific allegation as to the amount of the assessment or taxes for any one parish, but averred that the taxes so assessed exceeded, exclusive of interest and costs, the sum of $2,000.

This must be understood to mean that the aggregate amount of the taxes for the several parishes exceeded $2,000, *and the theory [322 of that part of the bill evidently was that the amount involved, in order to confer jurisdiction on the circuit court, could be reached by adding together the taxes for the several parishes. But, for reasons given in the recent cases of *Walter* v. *Northeastern R. Co.* 147 U. S. 370 [37: 206], and *Northern P. R. Co.* v. *Walker*, 148 U. S. 391 [37: 494], jurisdiction cannot be conferred on the circuit court by joining in one bill against distinct defendants claims no one of which reached the jurisdictional amount. It is now contended that, as it appears in the extract from the assessment roll for the year 1892, that the tax for that year assessed and in the hands of John S. Young, sheriff for the parish of Caddo, for collection, amounted to upwards of $900, it can be assumed that the taxes for the years 1889, 1890, and 1891 were for similar amounts, and thus, in the case of that parish at least, that jurisdiction was shown. But, as the facts showing jurisdiction do not affirmatively appear in the bill, and as, for some reason that does not appear, the proof was restricted to the year 1892, we do not think the defect is supplied by such a conjecture.

It is further argued that jurisdiction may be seen in the averment of the bill that the value of the exemption of the bank's property during the continuance of its charter exceeds $2,000 for each parish. But the answer to this is, that this is not a suit to exempt property from taxation permanently. The purpose of the bill is to restrain certain tax assessors and tax collectors from collecting taxes for specific years, and, if the amount of such taxes does not confer jurisdiction, it is, from the nature of things, impossible for a court to foresee what, if any, taxes may be assessed in the future.

It is, however, suggested that the allegations



Digitized by Google

of the bill and the evidence adduced to sustain the plea leave it uncertain whether, if the facts were made fully to appear, jurisdiction might not be maintainable, this court should reverse the decree in order to afford an opportunity to the complainant to make it appear, by competent evidence, what were the amounts of the taxes assessed and levied for the whole four 323]*years, and also for the year 1893 covered by the amended bill; and reference is made to *Northern P. R. Co.* v. *Walker*, 148 U. S. 392 [37: 495], a case somewhat similar to the present, where such a course, it is said, was followed: We do not feel warranted to reverse the decree of the court below on such a view, but as we are constrained to reverse the decree, for reasons presently to be stated, we shall leave it to the court below to exercise its own discretion in the matter of further proceedings of the kind suggested.

Error is assigned to the action of the court decreeing that the complainant should pay the costs, including a fee of upwards of $800 to the defendants' counsel.

As a general rule, an appeal will not lie in the matter of costs alone. But such appeals have been sustained in particular circumstances, as, for instance, where the costs have been directed to be paid out of a trust fund. In *Internal Improv. Fund* v. *Greenough*, 105 U. S. 528 [26: 1158], this court said, through Mr. Justice Bradley, that the objection to an appeal on the ground of its being from a decree for costs only, is untenable. However, in the present case, the appeal was not taken from the decree on the sole ground that costs were wrongfully awarded, and, as the entire decree is before us, it is competent for us to consider whether, when a circuit court dismisses a suit for want of jurisdiction, it can give a decree for costs, including a fee in the nature of a penalty, to the defendants' counsel.

The revenue law of Louisiana, Act 106 of 1890, § 56, provides that the attorney at law who represents the tax collector in injunction proceedings shall, in case of a successful defense, receive a compensation of 10 per cent on the amount of the taxes and penalties collected as the result of the proceedings, which shall be paid to the said attorney by the party against whom the judgment is rendered, and shall be collected by the tax collector as costs at the same time that the taxes and other penalties are collected. It would seem that the court below applied the provisions of that statute in the present instance.

Without considering or deciding whether it would be the duty of a Federal court to follow the state statute in assessing costs, and particularly in making a payment to an attorney at law 324]*of a fee proportionate to the amount recovered a part of the decree, we are of opinion that this decree was erroneous in the particular complained of. Having dismissed the bill for want of jurisdiction, the court was without power to [decree the payment of costs and penalties.

*Nashville* v. *Cooper*, 78 U. S. 6 Wall. 250 [18: 852], was a case where the circuit court of the United States had held that it had no jurisdiction of a case removed to it from a state court, and had sustained a motion to remand for that reason, yet proceeded to give a judgment for the costs of the motion, and ordered that an execution should issue to collect them. This court said: "The court held that it had no jurisdiction whatever of the case, and yet gave a judgment for the cost of the motion, and ordered that an execution should issue to collect them. This was clearly erroneous. If there were no jurisdiction, there was no power to do anything but to strike the case from the docket. In that view of the subject the matter was as much *coram non judice* as anything else could be, and the award of costs and execution was consequently void. Such was the necessary result of the conclusions of the court."

In *Inglee* v. *Coolidge*, 15 U. S. 2 Wheat. 363 [4: 261], it was said by the Chief Justice that this court does not give costs where a cause is dismissed for want of jurisdiction.

In *Hornthall* v. *Keary*, 76 U. S. 9 Wall. 566 [19: 562], where the circuit court of the United States for the district of Mississippi had dismissed a bill for want of jurisdiction and had awarded costs to the respondents, this court reversed the decree for that reason, and remanded the cause, with directions to dismiss the bill of complaint but without costs. *Blacklock* v. *Small*, 127 U. S. 96 [32: 70].

*The decree of the court below is reversed*, and cause remanded, with directions to proceed in conformity with this opinion.

---

JOHN MILTON CAROTHERS, *Plff. in Err.*, [325
*v.*
ISAAC MAYER *et al.*

(See S. C. Reporter's ed. 325-327.)

*Federal question.*

In ejectment for a mining claim a decision of the state court in favor of plaintiff's title under a patent of the United States, and against the defenses of adverse possession and an alleged estoppel *in pais*, presents no Federal question.

[No. 144.]

*Submitted November 4, 1896. Decided November 30, 1896.*

IN ERROR to the Supreme Court of the State of Montana to review a judgment of that court affirming the judgment of the District Court of the Sixth Judicial District of Montana in favor of plaintiffs, Isaac Mayer *et al.*, against John Milton Carothers in ejectment for a mining claim. *Dismissed.*

See same case below, 14 Mont. 274.

Statement by Mr. Justice **Brown:**

This was an action of ejectment originally brought by the defendants in error, Isaac Meyer and Andrew J. Wilson, in the district court of the sixth judicial district of Montana, in and for the county of Meagher, to recover

NOTE.—*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,*—see note to Hamblin v. Western Land Co. 37: 267.



Digitized by Google

possession of five lots in the townsite of Neihart. The complaint alleged a seisin in fee on July 22, 1887, and upon the trial plaintiffs introduced in support thereof a patent of the United States for the Keegan lode mining claim, bearing date July 27, 1887, and running to the plaintiffs.

Defendants averred no privity of title under such mining claim or patent, but set up, *first*, an adverse and exclusive possession of the premises since June 1, 1882; and, second, an equitable defense of estoppel arising from the following state of facts, namely: That in April, 1882, when about fifteen or twenty people were living in that vicinity, a meeting of citizens was held for the purpose of laying out a townsite, the Keegan being then a located mining claim; that at such meeting it was agreed that the surface ground should be devoted to townsite uses; that each citizen should be entitled to enter with the recorder not to exceed two of the lots as laid off, and that each citizen entering lots should fence them; that thereupon at such meeting the said mining claim owners, **326**]*among others the predecessor in interest of plaintiffs, he being at that time the claimant of the Keegan lode, agreed that the surface ground should belong to the town, and gave the same to the citizens for townsite purposes; that such premises were so laid off for town purposes, and the lots were entered in the manner agreed at the meeting with the knowledge and consent of plaintiffs' predecessor in interest.

A general demurrer to this answer having been overruled, plaintiffs replied by a denial of the defenses therein set up.

Upon the trial defendants offered to prove an exclusive continuous possession of the premises from 1882 down to the commencement of the action, which offer was rejected by the court, under objection from the plaintiffs that the statute of limitations could not begin to run until the patent for the Keegan mining claim was issued, July 27, 1887, to which ruling the defendants excepted. After making proof in support of the equitable defenses so pleaded, the trial court refused all instructions asked by the defendants thereunder, and directed the jury to return a verdict for the plaintiffs.

On appeal the judgment upon such verdict was affirmed by the supreme court of Montana (14 Mont. 274), whereupon defendant sued out this writ, and assigned as error, first, the ruling of the court in excluding evidence of the adverse possession of the defendants and their predecessors in interest prior to the issuance of the patent; and, second, to the action of the court in directing the jury to return a verdict for the plaintiffs.

*Messrs.* **E. W. Toole** and **Wm. Wallace**, Jr., for plaintiff in error.

*Messrs.* **A. T. Britton** and **A. B. Browne** for defendants in error.

Mr. Justice **Brown** delivered the opinion of the court:

Upon the facts above stated, the supreme court held, first, that the statute of limitations **327**]did not begin to run against the *mining claim until the patent had been issued, following in this particular *King* v. *Thomas*, 6 Mont. 409; and, second, that the matters alleged as an estoppel having taken place before the time the plaintiffs made their application for a patent, and notice of such application having been given, that all adverse claimants were given an opportunity of contesting the applicant's right to a patent, and that the patent having been issued, it was too late to base a defense upon facts existing prior thereto, citing in support of its position a prior ruling of the court in *Talbott* v. *King*, 6 Mont. 76.

Neither of these defenses presents a Federal question. Defendants asserted no right under a Federal statute; made no claim under any Federal patent; claimed solely under a statute of limitations, which the highest court of the state declared did not protect them, and certain matters of alleged estoppel *in pais*, which the court held to constitute no defense.

*The writ of error must therefore be dismissed.*

---

## CENTRAL RAILROAD & BANKING COMPANY *et al.*, *Appts.*, *v.* WILLIAM A. WRIGHT.

(See S. C. Reporter's ed. 327–337.)

*State decision—taxation of railroad property—subsequent incorporation of counties.*

1. The headnote of a Georgia case construing a statute will not be regarded by this court as controlling, when it is not borne out by an examination of the case, and the opinions of the three judges of the court agree simply in the result, but no two of them concur in such construction.
2. Taxation of real and personal property of a railroad company in the ratio that other like property is taxed is within the power of counties and other municipal corporations, under Ga. Laws 1833, p. 246, as amended Dec. 14, 1835, chartering a company with the provisions, that the railroad and appurtenances shall not be taxed higher than ½ per cent on its annual net income, and also that no municipal or other corporation shall have power to tax the stock of the company, but may tax any property, real or personal, of the company, in the ratio of taxation of like property.
3. The subsequent incorporation of counties or other municipalities will include them among the "municipal or other corporations" which may tax the real or personal property of the railroad company chartered by Ga. Laws 1833, p. 246, although a county was not a corporation when that act was passed.

[No. 300.]

*Argued October 22, 1896. Decided November 30, 1896.*

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Georgia for the payment by the receivers of the Central Railroad & Banking Company of certain taxes upon its property in different counties and cities. *Affirmed.*

NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

*As to power of states to tax*, see note to Dobbins v. Erie County Comrs. 10: 1022.



Digitized by Google

Statement by Mr. Justice **Brown**:

This was an intervening petition filed by William A. Wright, comptroller-general of the state of Georgia, praying that the receivers of the Central Railroad & Banking Company, appointed in a suit for the foreclosure of a mortgage to the Farmers' Loan & Trust Company, be required to pay him certain taxes said to be due by the corporation for the year 1891, upon its property in different counties and cities upon the line of its road in the state of Georgia, which taxes were claimed to be a lien upon the property of the road.

The taxes were assessed in pursuance of certain acts of the general assembly, passed in 1889 and 1890, authorizing counties and cities to tax railroad property. The taxes were levied upon the *railroad and appurtenances* of that portion of the Central Railroad between Savannah and Macon, and included no other property of the company. The defendants claim the taxes to be invalid, upon the ground that the railroad and its appurtenances over that part of the line from Savannah to Macon were subject only to a taxation of ½ of 1 per cent upon the net annual income of the road, and that the acts of 1889 and 1890, in so far as they authorized the taxation of its property by counties and other municipalities, impaired the obligation of the original contract of the state contained in its charter, and were therefore void.

The circuit court was of opinion that the taxes were properly levied, and made a decree for their payment by the receivers, and from that decree the corporation and its receivers appealed to this court.

*Messrs.* **A. R. Lawton,** *Henry C. Cunningham,* and *Samuel B. Adams* for appellants.
*Mr.* **J. M. Terrell** for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

329] *This case raises the question, frequently presented to this court, of the power of a state to impose upon a corporation a tax not provided for or contemplated, nor yet expressly forbidden, in its original charter.

The defendant corporation was chartered in 1833 (Ga. Laws 1833, p. 246), under the name of the Central Railroad & Canal Company, "for the purpose of opening a canal or railroad communication from the city of Savannah to the interior of the state." The 7th section declared that "the said canal or railway, and the appurtenances of the same, shall not be subjected to be taxed higher than ½ per cent upon its annual net income." On December 14, 1835, the general assembly passed an amendatory act (Laws 1833, p. 217), under which the road was constructed, changing the name to the Central Railroad & Banking Company, and giving it certain banking powers and privileges. The 18th section of this act provided that "the said railroad, and the appurtenances of the same shall not be subjected to be taxed higher than ½ of 1 per cent upon its annual net income, and no municipal or other corporation shall have power to tax the stock of said company, but may tax any property, real or personal, of the said company, within the jurisdiction of said corporation in the ratio of taxation of like property."

No other act affecting the question at issue was passed until 1889, when the general assembly provided a general system of taxation of railroad property in each of the counties of the state through which the railroads ran, and required the various companies to make annual returns to the comptroller general, under the oath of the president or chief executive officer, and enacted that they should be subjected to taxation in every county through which their roads might pass. Other sections of the act provided how the amounts should be assessed and paid, and the manner of issuing execution in the event they were not paid.

By another act, approved December 24, 1890, railroad companies were subjected to taxation upon their property located in the different towns and cities of the state.

By reason of the fact that all of the property and effects of *the Central Railroad & [330 Banking Company were in the hands of receivers, appointed by the circuit court of the United States, under certain bills filed to foreclose a mortgage to the Farmers' Loan & Trust Company, the comptroller general was unable to collect such taxes by the ordinary process of levy and sale, and therefore filed his petition against such receivers, praying that they might be required to pay him the taxes. Under the acts of 1889 and 1890 the corporation made the returns required, and paid such taxes as were assessed upon those parts of its property which were admitted to be subject to taxation, but contended that, as to its original line between Savannah and Macon, it could not be taxed, either by the state or by its municipalities, at a greater rate than ½ of 1 per cent upon its net annual income.

In § 18 of the act of 1885, above cited, there is an express prohibition against the municipal taxation of the "stock" of the company, and an express permission to tax any "property" of the company within the jurisdiction of the corporation. The real question is whether these two clauses can be reconciled, and each given its proper effect. The position of the railway company in this connection is that the railroad and its appurtenances may not be taxed either by the state or by municipalities or counties, at a greater rate than ½ of 1 per cent upon its net annual income; that this amount having been paid, the power to tax the railroad and its appurtenances has been exhausted; that the permission given the municipalities to tax the property of the company applies only to such property as is not included in the term "railroad and appurtenances" and must have been intended to include such property as the corporation, by virtue of its banking powers, could purchase or might receive in satisfaction of debts. It is further contended that the prohibition of the taxation of the stock applies equally to the property represented by the stock.

In support of this contention we are cited to certain decisions holding that a tax upon the "property" of a railway company is within the prohibition of a tax upon the "stock" of the company; in other words, that a tax upon the property *is a tax upon the stock. In ex- [331 amining these cases, however, it will be found



Digitized by Google

that the words "stock" or "capital stock" were used in the sense of the capital, the plant, or the property of the company, and not, as in this statute, in the sense of stock or shares of stock, as distinguished from the property of the company. Thus, in *Rome R. Co.* v. *Rome*, 14 Ga. 275, there was an attempt made to levy a tax upon the property of the Rome Railroad Company within the corporate limits of the city of Rome. There was a provision in the charter that the "stock" of the company should "not be liable to any tax, duty, or imposition whatever, unless such, and no more, as is now in the banks of this state." The tax was held to be invalid. As it appeared in this case that a certain part of the stock of the company, which was on deposit in the bank, was expressly permitted to be taxed, it was apparent that the word "stock" was used in the sense of property, and that the money of the company on deposit in the banks was intended to be distinguished from its other property.

So, also, in *State, South Carolina R. Co.*, v. *Hood*, 15 Rich. L. 177, a charter of a railroad company exempting the "stock" of a railroad company from taxation was held also to exempt its "gross income," as the income was only an accessory of the stock, which was an aggregate of the property and effects of the corporation.

Indeed, the general tenor of the authorities is to the effect that where there is a general exemption of the stock or capital stock of a corporation, without other explanatory words, the exemption applies equally to the property of the corporation represented by its shares of stock. *Gordon* v. *Baltimore*, 5 Gill, 231; *Baltimore* v. *Baltimore & O. R. Co.* 6 Gill, 288; *State* v. *Cumberland & P. R. Co.* 40 Md. 22; *Connersville* v. *State Bank*, 16 Ind. 105; *New Haven* v. *City Bank*, 31 Conn. 106; *Hannibal & St. J. R. Co.* v. *Shacklett*, 30 Mo. 550. And, in *Central R. & B. Co.* v. *Georgia*, 92 U. S. 665 [23: 757], it was held by this court that, in view of the 18th section of the act of 1835, the state itself could not tax the property of the Central Railroad & Banking Company between 332]*Savannah and Macon beyond ½ of 1 per cent upon its annual net income, notwithstanding that, in 1872, it had become consolidated with the Macon & Western Railroad Company, whose charter did not possess such immunity from taxation.

The only embarrassment in the case arises from a decision of the supreme court of Georgia in the case of *Bibb County* v. *Central R. & Bkg. Co.* 40 Ga. 646. It appeared in this case that the ordinary of Bibb county endeavored to levy a tax upon the property of railroad companies having their *termini* in Macon, and it was submitted to the judge of the Macon circuit to decide whether, under its charter, the company could be taxed for county purposes, or was liable for any other tax than ½ of 1 per cent upon its annual net income. The judge held that so much of the property as was necessary and proper for sustaining the railroads was exempt from the county tax, but that such of its real estate as was not improved and in use was subject to be taxed until it was improved and used for railroad purposes. Both parties appealed to the supreme court of the state.

The headnote of the case in that court indicates the ruling of the court to have been that all the property of the company that was necessary and proper for laying, building, and sustaining the railroad constituted a part of its capital stock, and was not liable to be taxed in any other manner than was specified in its charter; but that any other property owned by the company, which was not necessary for that purpose, might be taxed by the county or other corporation in the ratio of taxation of like property. The statement of the headnote, however, is not borne out by an examination of the opinions. The court, which then consisted of three members, was unanimous in reversing the judgment of the court below, but each gave a different reason for his opinion. Mr. Justice Warner, who delivered the first opinion, held that the stock of the company consisted of its capital invested in such property as was necessary and proper for conducting its business, and was not liable to be taxed in any other manner than was specified in the charter, either by the state or by the county corporation; but *that any other property [333 owned by it which was not necessary and proper for railroad purposes, might be taxed in the ratio of taxation of like property. Mr. Justice McCay concurred upon the ground that under the laws of Georgia, as they then existed, no county tax could be collected upon any property not taxed by the state; that although the state had expressly reserved the right to authorize municipal and other corporations to tax for local purposes the property of the company, it had not by any law been as yet conferred on the counties. Chief Justice Brown, on the other hand, held that although the state had relinquished her right of taxation beyond a percentage upon the income, the company had expressly agreed that a municipal or other corporation might tax any property of the company within its jurisdiction; that such property was not limited to such as the company might have purchased in payment of debts, and the like, which was not appurtenant to the road, but that the municipal corporation, through which the road ran, might tax any of its property, real or personal, in the ratio of taxation imposed on any other like property. But, he was further of opinion that the power had not been exercised as to any part of the property of the company not subject to a state tax; that the county was only authorized to levy a percentage on the state tax, and that as the state was not authorized to levy a tax upon the road and its appurtenances, and none such had been levied, there was no state tax upon which the county could assess a percentage.

If the opinion of Mr. Justice Warner had been the opinion of the court, it would have been difficult to avoid the conclusion that this was a construction of the charter which would have been binding upon the Federal court, as it held, in effect, that the law taxing the property of the railroad impaired the obligation of the contract contained in the charter. But his opinion was not the opinion of the court, but of only one of its three members. The opinion of the court was, simply, that the action of the court below should be reversed for reasons in which no two of its members concurred.

As our attention has not been called to any



Digitized by Google

334] later case in *the supreme court of the state of Georgia which gives a different construction to the charter of this road, we consider ourselves at liberty to deal with the question presented in this case as an original one to which the supreme court of the state has not given an answer.

In this aspect, we can have no doubt whatever of the power of municipalities to do exactly what the charter authorized them to do, namely, to tax any property, real or personal, of the company within the jurisdiction of the corporation in the ratio of taxation of like property. While, as above stated, the word "stock" has sometimes been held to include the property of the corporation represented by its stock, this is true only when the context does not require a different construction. The distinction was clearly stated by Chief Justice Waite in *Memphis & C. R. Co.* v. *Gaines*, 97 U. S. 697 [24: 1091], in which the charter of a railroad company provided that "the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, machinery, and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road and no longer." It was insisted by the road that the term "capital stock" must be held to signify the property purchased therewith and represented thereby, and that it necessarily followed that the perpetual exemption of the stock from taxation extended to such property, and that full effect might be given to the charter by exempting for a limited period such property as was purchased or constructed with money, not constituting a part of the fund subscribed by the corporators, but borrowed pursuant to the power which the charter conferred upon the company. In delivering the opinion of the court, Mr. Chief Justice Waite said that there were undoubtedly many cases to be found in this and other courts where it had been held that an exemption of the capital stock from taxation was equivalent to an exemption of the property into which the capital had been converted. But in all these cases the question had turned upon the effect to be given to the term "capital" or "capital stock," as used in the 335] *particular charter under consideration, and that when the property had been exempted by reason of the exemption of the capital, it had been because, taking the whole charter together, it was apparent that the legislature so intended. "Thus the capital stock of a bank usually consists of money paid in to be used in banking, and an exemption of such capital stock from taxation must almost necessarily mean an exemption of the securities into which the money had been converted in the regular course of a banking business. And, in general, an exemption of capital stock, without more, may, with great propriety, be considered, under ordinary circumstances, as exempting that which, in the legitimate operations of the corporation, comes to represent the capital." It was held, however, that in that particular case it could not have been understood that the property was to represent the capital for the purposes of taxation, and that such property was taxable under the original charter at the expiration of twenty years from the completion of the road.

The same construction was given to a similar provision of the charter of the Cario & Fulton Railroad Company in *St. Louis, I. M. & S. R. Co.* v. *Loftin*, 98 U. S. 559 [25: 222]. So in *Bank of Commerce* v. *Tennessee*, 104 U. S. 493 [26: 810], where a bank was required to "pay to the state an annual tax of ¼ of 1 per cent upon each share of capital stock, in lieu of all other taxes," and was also allowed to "purchase and hold a lot of ground" for its place of business, and hold such real property as might be conveyed to it to secure its debts, it was held that the immunity from taxation extended only to so much of the building as was required by the actual wants of the bank to carry on its business. See also *Wiggins Ferry Co.* v. *East St Louis*, 107 U. S. 365 [27: 419], and *Tennessee* v. *Whitworth*, 117 U. S. 129 [29: 830].

From a review of these cases, it is evident that while in the absence of any words showing a different intent, an exemption of the stock or capital stock of a corporation may imply, and carry with it, an exemption of the property in which such stock is invested, yet, if the legislature uses language at variance with such intention, the courts, which will never presume a purpose to exempt any property from its just share of *the public [336 burdens, will construe any doubts which may arise as to the proper interpretation of the charter against the exemption.

In the 18th section of the charter under consideration there are three clauses which cover the question of taxation. First, the railroad and its appurtenances shall not be subjected to be taxed higher than ¼ of 1 per cent upon its annual net income; second, no municipal or other corporation shall have the power to tax the stock of said corporation; third, but such municipal or other corporation may tax any property, real or personal, of the said company within the jurisdiction of said corporation in the ratio of taxation of like property. The 1st clause was obviously intended as a limit upon state taxation; the second, as a prohibition upon the powers of municipalities to tax the shares of stock held by its citizens; the third, as an express permission to tax any property of the company within its jurisdiction for local purposes. If, as insisted by the defendants, this permission were limited to the taxation of property belonging to the company other than the railroad and its appurtenances, the clause would be meaningless, since the 1st clause, limiting taxation to a percentage upon the income, applies only to the railroad and its appurtenances, and leaves to the state itself, as well as to its municipalities, the power to tax property received by the corporation in satisfaction of debts, or otherwise, for purposes disconnected with the business operations of the railroad. Full effect can be given to these three clauses only by sustaining the right of the municipalities to tax any property of the company within their jurisdiction. Indeed, the argument made here was the very one made in connection with the somewhat similar clause in *Memphis & C. R. Co.* v. *Gaines*, 97 U. S. 697 [24: 1091], and held to be unsound.

In the state of Georgia there seems to have



Digitized by Google

been, prior to the act of 1889, some efforts made to subject the property of this road to municipal taxation, which were ineffectual by reason of the legislature failing to provide the proper machinery for the assessment and collection of such taxes; and, as late as 1883, it was held that its system of taxation virtually 337] *excluded counties and municipal corporations from levying a tax upon it for county or municipal purposes by making no provision for the assessment and collection of such taxes. *Houston County* v. *Central Railroad*, 72 Ga. 211. This defect seems to have been supplied by the acts of 1889 and 1890, and we see no reason why the system of taxation provided by these acts is not valid and consistent with the charter.

We regard it as quite immaterial that when the act of 1835 was passed, a county was not a municipal corporation, or indeed a corporation at all. The power given by the 18th section not only extends to municipal but to other corporations, by which was evidently intended other corporations with power to tax for local purposes. If, for instance, cities were reorganized under the names of boroughs or taxing districts, the power of taxation, so far as this section is concerned, would pass to the same corporation under its new name, if the legislature so directed; and the fact that no corporations existed in 1835 under the names of boroughs or taxing districts, would not affect the question. The essential thing reserved was the power to tax for local purposes by whatever corporation then existed, or should thereafter be called into being, for municipal purposes. The legislature could not foresee what corporations might hereafter be established for municipal purposes, and it would be frittering away its whole object to limit it to corporations then existing.

*The decree of the court below was clearly right, and it is therefore affirmed.*

---

## 338] EMMA J. GONZALES, *Appt.*,

*v.*

## E. W. FRENCH *et al.*

(See S. C. Reporter's ed. 338-347.)

*Setting aside patent of land for fraud—school grant lands.*

1. Where a claim to public land has been passed upon by the proper local officers of the land department, and, upon appeal, by the Commissioner of the General Land Office, and, upon a further appeal, by the Secretary of the Interior, and in pursuance of their decisions a patent has been granted for the land, a pre-emption claimant, in order to recover the land from the patentee, must aver and prove, either that the land department erred in the construction of the law applicable to the case, or that fraud was practised upon its officers, or that they themselves were chargeable with fraudulent practices.
2. Mere settlement and cultivation upon a portion of sections 16 and 36 of public lands before the same were surveyed, without any entry in the land office or any declaratory statement, does not exclude the land from the school grant or prevent the operation upon it of the act of Congress of February 18, 1889, authorizing the entry of the land for townsite purposes.

[No. 34.]

*Argued and Submitted April 27, 28, 1896. Decided November 30, 1896.*

APPEAL from a judgment of the Supreme Court of the Territory of Arizona affirming the judgment of the District Court of the Fourth Judicial District of that Territory sustaining a demurrer to the complaint and dismissing the suit brought by Emma J. Gonzales, plaintiff, against E. W. French *et al.*, to declare the defendant to be trustee of the plaintiff, and that he be required to deliver a deed of certain land to the plaintiff. *Affirmed.*

Statement by Mr. Justice **Shiras:**

Emma J. Gonzales, in October, 1891, filed a bill of complaint in the district court of the fourth judicial district of the territory of Arizona, against E. W. French, probate judge of the county of Yavapai and territory of Arizona, and former trustee of the inhabitants of the town of Flagstaff, of the county of Coconino, and J. E. Jones, probate judge of said county of Coconino, and the successor as trustee of the inhabitants of the said town of Flagstaff, and therein alleged that she was the equitable owner of a certain tract of land containing 120 acres, and forming part of section 16, T. 21 N., R. 7 E. of the Gila and Salt river meridian. The facts, as alleged by her, were substantially these: Prior to the survey of said township, Thomas F. McMillian, Frank Christie, and Conrad Farriner, who were citizens of the United States over the age of twenty-one years, and qualified pre-emptors, while prospecting for a home upon the public lands of the United States subject to pre-emption, or that might so become when the same should be surveyed, settled on this land, intending to claim the same as pre-emptors, and were on said land at the date of survey in 1878; that they had built dwelling *houses thereon and re- [339 duced portions of it to cultivation prior to such survey; that they continued to improve and claim the same until in June, 1883, when the plaintiff bought from the said occupants all their improvements and took possession thereof; that she afterwards, and while living on the land she now claims, built a dwelling house thereon and made other improvements, prior to April 2, 1885, of the value of $3,000; that, on said date, she made formal application to the register and receiver of the United States Land Office at Prescott, Arizona, to be allowed to file a pre-emption declaratory statement for the land, and to enter the same, tendering to said officers the proper price therefor, said application being made before any adverse claimant was known, but her application was rejected on the ground that the land was reserved

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 735.

*That patents for land may be set aside for fraud*, see note to Miller v. Kerr, 5: 381.

*As to errors in surveys and descriptions in patents for lands, how construed*, see note to Watts v. Lindsey, 5: 423.



Digitized by Google

for schools; that on February 3, 1889, Congress passed an act for the relief of the inhabitants of Flagstaff, Arizona, the tract involved in this suit being embraced in the half section mentioned in said act, by which it was provided that the probate judge of Yavapai county might enter the south half of section 16, township 21 north, range 7 east, in trust for the occupants and inhabitants of Flagstaff. The bill further alleged that the tracts settled on at the date of the survey were excepted by U. S. Rev. Stat. § 2275, from the reservation of the 16th and 36th sections in each township for school purposes, but that, if not so excepted, the land claimed by her was released from any such reservation by said act of February 18, 1889, and became subject to her settlement claim; that the said French, probate judge, had been permitted, on January 17, 1889, to make townsite declaratory statement for the benefit of the inhabitants of Flagstaff for said half section; that she, the plaintiff, contested the right of the said French to make townsite entry, and prosecuted her protest by successive appeals to the Commissioner of the General Land Office and the Secretary of the Interior, but that a patent of the United States was issued to said French on said entry for said land; that at the time she purchased said improvements and settled on the land, the town of Flagstaff was unorganized [340] *and unknown, and none of the inhabitants were then settled on said land or claiming any part of it; and that on the organization of Coconino county the land in suit became a part thereof, and the defendant Jones became probate judge of the new county and the successor to French in the trust. The plaintiff asked a decree declaring that the settlement and occupancy of said land, at the date of survey, by qualified pre-emptors, excluded the same from the reservation for school purposes; that, by reason of defendants' purchase of the improvements and her own occupancy and improvements, a right of entry attached thereto in her; that the refusal of the local officers to allow her filing in 1885 was unlawful; that the act of February 13, 1889, did not take away any of her rights, but, if anything, released any claim the territory of Arizona might have to the land, and that, under the townsite laws referred to in said act, her rights as a settler were and are superior to those of the inhabitants of Flagstaff, as to the particular part of the section covered by her claim; and that the said patentee, as trustee for the said inhabitants, in so far as the land claimed by the plaintiff is embraced in said patent, should be decreed to be the trustee of the plaintiff, and be required to deliver a deed for the same to the plaintiff.

The defendant demurred to the complaint on the general ground that it failed to state facts sufficient to constitute a cause of action. This demurrer was sustained by the district court. The plaintiff elected to stand on her complaint, and a final decree was entered dismissing the bill. The plaintiff thereupon appealed to the supreme court of the territory, where the judgment below was affirmed, from which decree an appeal was taken and allowed to this court.

*Messrs.* **S. D. Luckett** and *Henry N. Copp* for appellant.

*Mr.* **Edward M. Doe** for appellees.

Mr. Justice **Shiras** delivered the opinion of the court:

*Section 1946 of the Revised Statutes [341 enacted that sections numbered 16 and 36 in each township of the territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana, and Wyoming should be reserved for the purpose of being applied to schools in the several territories named, and in the states and territories thereafter to be erected out of the same. Section 2275 is as follows: "Where settlements with a view to pre-emption have been made before the survey of the lands in the field, which are found to have been made on section 16 or 36, those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors. . . ."

In 1878 a survey in the field was made of the township in which the lands in dispute were situated, which survey, together with a plat of the same, was approved February 8, 1879. At the time of the survey McMillan and Farriner were residing on and cultivating lands constituting a portion of section 16, and in 1883 Emma J. Gonzales, the plaintiff in error, purchased from said occupants their improvements, took possession of the land, and erected additional improvements thereon.

On February 13, 1889 (25 Stat. at L. 668), Congress enacted the following law:

"A Bill for the Relief of the Occupants of the Town of Flagstaff, County of Yavapai, Territory of Arizona.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the probate judge of Yavapai county, territory of Arizona, be, and is hereby, authorized to enter, in trust for the occupants of the town of Flagstaff for townsite purposes, the south half of section 16, township 21 north of range 7 east, Gila and Salt river meridian, in the territory of Arizona, subject to the provisions of §§ 2387, *2388, and 2389 of chapter 8 of the [342 Revised Statutes of the United States relating to townsites.

"Sec. 2. That upon the passage of this act the territory of Arizona, through its proper officer, shall be, and is, hereby authorized to select as indemnity for said land, and in full satisfaction thereof and for the purpose stated in § 1946, one half section or 320 acres, of public lands, in any office in said territory, said selections to be made according to legal subdivisions."

On January 17, 1889, E. W. French, as probate judge of said county, in trust for the inhabitants of the town of Flagstaff, filed a declaratory statement for the entry of said south half of said section 16, and on July 29, 1889, the plaintiff in error appeared before the local land officers and filed a protest against the allowance of said entry by the said probate judge.



Digitized by Google

At the hearing before said local land officers the land was awarded to the said probate judge in trust for the inhabitants of Flagstaff, and the plaintiff appealed successively to the Commissioner of the General Land Office and to the Secretary of the Interior, by both of whom her right of entry was denied; the land was awarded to said probate judge, and subsequently a patent was issued to him in trust for the occupants and inhabitants of the said town of Flagstaff.

As the claim of the plaintiff in error to the land in question was passed upon by the proper local officers of the land department, and subsequently, upon appeal, by the Commissioner of the General Land Office, and, upon a further appeal, by the Secretary of the Interior, and as the result of the contest was the granting of a patent to the probate judge of the county of Yavapai as trustee of the inhabitants of the town of Flagstaff, the plaintiff, to maintain her bill, must aver and prove either that the land department erred in the construction of the law applicable to the case, or that fraud was practised upon its officers, or that they themselves were chargeable with fraudulent practices. *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 [20: 485]; *Moore* v. *Robbins*, 96 U. S. 530 [24: 848]; *Steel* v. *St. Louis Smelt. & Ref. Co.* 106 U. S. 447 [27: 226].

343] *Recognizing this well-settled rule, the plaintiff contends that the land department and the supreme court of Arizona erred in failing to find, as matter of law, that the conceded settlement of McMillan and Farriner on the land in question, prior to the survey in the field, and their occupancy of the same with the intention of claiming said land under the pre-emption law, excluded said land from the reservation for school purposes. In other words, the contention is that mere settlement and cultivation upon any portion of sections 16 and 36 before the same shall be surveyed exclude such portion from the school grant; and *Sherman* v. *Buick*, 93 U. S. 209 [23: 849], and *Ivanhoe Min. Co.* v. *Keystone Consol. Min. Co.* 102 U. S. 167 [26: 126], are cited to that effect.

But those were cases decided under the act of March 3, 1853 (10 Stat. at L. 244), under which the right of the state of California to school lands arose, and it was held that, by the express terms of the 7th section of that act, where there was either a dwelling house or the cultivation of any portion of the land, on which someone was residing and was asserting claim to it, the title of the state did not vest, but the alternative right to other land as indemnity did.

The language of the 7th section of that act: "Where any settlement, by the erection of a dwelling house or the cultivation of any portion of the land, shall be made upon the 16th and 36th sections before the same shall be surveyed, . . . other lands shall be selected by the authorities of the state in lieu thereof,"—is widely different from that of § 2275: "Where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which are found to have been made on sections 16 and 36, those sections shall be subject to the pre-emption claim of such settler, and . . . other lands of like quantity are appropriated in lieu of such as may be pat-



ented by pre-emptors." And Mr. Justice Miller, in delivering the opinion of the court in *Ivanhoe Min. Co.* v. *Keystone Consol. Min. Co.* 102 U. S. 175 [26: 129], was careful to say that "the qualifying incidents," prescribed in the act of 1853, "are not the same required under the general pre-emption law," but *are [344 intended "to convey the idea of a settlement and a settler according to the terms of the statute under consideration."

The claim of the plaintiff in error, therefore, to a right of pre-emption, was fatally defective because her vendors and predecessors in title had failed to make or file an actual entry in the proper land office. As they did not choose to assert their rights by filing a declaratory statement, or by making an entry as pre-emptioners, their mere possession did not prevent the rights of the territory from attaching to the school sections when the survey was made. Nor did the plaintiff in error lawfully succeed to any possessory rights they may have had, as against the United States, because such rights were merely personal to the settler, and, under U. S. Rev. Stat. § 2263, were not assignable to the plaintiff in error. She did not herself, after taking possession, comply with the requisitions of the law.

Section 2265, Revised Statutes, provides that "every claimant under the pre emption law for land not yet proclaimed for sale is required to make known his claim in writing to the register of the proper land office within three months from the time of the settlement, giving the designation of the tract and the time of settlement; otherwise his claim shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law;" and § 2266 provides that "in regard to settlements which are authorized upon unsurveyed lands, the pre-emption claimant shall be in all cases required to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such pre emption settlement;" and § 2267 provides that "all claimants of pre-emption rights, under the two preceding sections, shall, when no shorter time is prescribed by law, make the proper proof and payment for the lands claimed within thirty months after the date prescribed therein, respectively, for filing their declaratory notice, has expired."

The bill discloses that the plaintiff in error first appeared in the land office and proposed to file her declaratory *statement on [345 April 2, 1885, more than six years after the filing of the plat.

The register and receiver were therefore warranted in rejecting the claim of the plaintiff in error. And, at any rate, as she did not appeal from their decision to the Commissioner of the General Land Office, she must be deemed to have acquiesced therein, and is concluded thereby so long as it remains unreversed. *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 511 [10: 270].

The plaintiff in error took no further steps until July 20, 1889, when, as already stated, she ineffectually opposed the claim of the probate judge in making his entry under the provision of



Digitized by Google

the act of February 13, 1889. The present bill was not filed until October 2, 1891, and in the meantime, as appears by one of the pleas, the truth of which was admitted by demurrer, the probate judge had, as trustee under the act, conveyed many and large portions of the lands in controversy to numerous inhabitants of the town of Flagstaff.

The supreme court of the territory held that the land in question was never devested of its character as school land until the entry by the probate judge under the act of 1889, and accordingly sustained the action of the trial court in dismissing the plaintiff's complaint, and in this we see no error.

Whatever might have been the possessory rights of the plaintiff in error as against other claimants under the ordinary land laws, such rights could not avail against the right of Congress to confer said lands upon other parties. *Frisbie* v. *Whitney*, 76 U. S. 9 Wall. 187 [19: 668]; *Hutchins* v. *Low* ("*Yosemite Valley Case*") 82 U. S. 15 Wall. 77 [21: 82]; *Shepley* v. *Cowan*, 91 U. S. 330 [28: 424]. We cannot accede to the argument on behalf of the plaintiff in error that the legal effect of the act of February 13, 1889, was to leave the land described therein open to controversy between townsite settlers and persons who might have settled on the lands but had not complied with the requisites of the pre-exemption laws.

As was said in *Shepley* v. *Cowan*, *supra*, "in those cases [*Frisbie* v. *Whitney* and the *Yosemite Valley Case*] the court only decided that a party, by mere settlement upon the public lands, with the intention to obtain a title to the same under the pre-emption laws, did not there-
346] by acquire such a vested *interest in the premises as to deprive Congress of the power to dispose of the property; that, notwithstanding the settlement, Congress could reserve the lands for sale whenever they might be needed for public uses, as for arsenals, fortifications, lighthouses, customhouses, and other public purposes for which real property is required by the government; that the settlement, even when accompanied with an improvement of the property, did not confer upon the settler any right in the land as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it might deem proper; that the power of regulation and disposition, conferred upon Congress by the Constitution, only ceased when all the preliminary acts prescribed by law for the acquisition of the title, including the payment of the price of the land, had been performed by the settler. When these prerequisites were complied with, the settler for the first time acquired a vested interest in the premises of which he could not be subsequently deprived. He was then entitled to a certificate of entry from the local land officers, and ultimately to a patent of the United States. Until such payment and entry, the acts of Congress gave to the seller only a privilege of pre-emption in case the lands were offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others."

In *Buxton* v. *Traver*, 130 U. S. 235 [32: 921], this language was used: "A settlement upon the public lands in advance of public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase. If, within a specified time after the survey, and the return of the township plat, the settler takes certain steps, that is, files a declaratory statement, and performs certain other acts prescribed by law, he acquires for the first time a right of pre-emption to the land. . . . If those steps are from any cause not taken, the proffer of the government has not been accepted, and a title in the occupant is not even initiated."

Proper effect would not be given, as we think, to the act of February 13, 1889, by subjecting the patentee and his *grantees to the [347 claims of persons who have no vested rights under the pre-emption laws. Such claims would, in the present case, oust the townsite settlers from large portions of the grant, and defeat the manifest purpose of Congress.

*The judgment of the Supreme Court of the Territory of Arizona is affirmed.*

---

ARTHUR D. McCLELLAN, *Plff. in Err.*,
v.
GEORGE W. CHIPMAN, Assignee.

TRADERS' NATIONAL BANK, *Plff. in Err.*,
v.
GEORGE W. CHIPMAN, Assignee.

(See S. C. Reporter's ed. 347-361.)

*National banks—controlled by state law prohibiting preferences—Massachusetts statute.*

1. There is no conflict between U. S. Rev. Stat. §§ 5136, 5137, authorizing national banks to take mortgages and conveyances of real estate for previous debts, and the Massachusetts statute forbidding preferences by transfers of property in cases of insolvency.
2. A national bank is not exempted by U. S. Rev. Stat. § 5137, authorizing national banks for certain purposes to hold and convey real estate, from the operation of Mass. Pub. Stat. chap. 157, §§ 96, 98, prohibiting preferences to creditors of an insolvent.
3. The security vested in a national bank by a conveyance from an insolvent in violation of Mass. Pub. Stat. chap. 157, §§ 96, 98, is not taken away from the bank in violation of the United States law, because the state statute makes the conveyance merely voidable, and not void.

[Nos. 35, 36.]
*Argued April 23, 29, 1896. Decided November 30, 1896.*

IN ERROR to the Supreme Judicial Court of the State of Massachusetts to review decrees of that court, one in an action brought by George W. Chipman *et al.*, assignees, against Arthur D. McClellan to recover two pieces of land, and the other in an action brought by the

NOTE.—*As to priority of United States in cases of insolvency*, see notes to Prince v. Bartlett, 3: 614, and Field v. United States, 9: 94.

*As to assignments with preferences, when valid, and when not*, see note to Marbury v. Brooks, 5: [illegible].



Digitized by Google

Traders' Bank against said Chipman, surviving assignee, *et al.*, to procure the application of the proceeds of the property to the payment of a note and loan secured thereby, the decrees being in favor of the surviving assignee. *Affirmed.*

See same case below, 159 Mass. 368.

The facts are stated in the opinion.

*Messrs.* **Almon A. Strout, William H. Coolidge,** and *H. J. Jaquith*, for plaintiffs in error:

The provisions of §§ 96 and 98 of chapter 157 of the Massachusetts Laws are inconsistent with the letter and spirit of §§ 5136 and 5137 of the Revised Statutes of the United States, and tend to impair the operations of a national bank organized thereunder in taking security for its debts, whereby it is enabled to preserve its assets and insure its stability and efficiency in carrying out the purposes for which it was organized, thereby rendering effectual the end for which these statutes were enacted.

*Waite* v. *Dowley*, 94 U. S. 527 (24: 181).

National banks organized under the acts of Congress are subject to state legislation, except where such legislation is in conflict with some act of Congress, or where it tends to impair or destroy the utility of such banks as agents or instrumentalities of the United States, or interferes with the purposes of their creation.

*First Nat. Bank* v. *Kentucky*, 76 U. S. 9 Wall. 353 (19: 701); *Davis* v. *Elmira Sav. Bank*, 161 U. S. 275 (40: 700).

In this last case it is held that "national banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

*Gulf, C. & S. F. R. Co.* v. *Hefley*, 158 U. S. 98 (39: 910).

In the case at bar the statute of Massachusetts is not in the nature of a police regulation, nor is it a statute prescribing certain forms to be observed in executing the conveyance and making public record thereof. It is rather a statute which goes to the validity of the conveyance made in accordance with the provisions of the statutes of the United States, because it is alleged such conveyance was made in violation of certain conditions which the legislature of Massachusetts had declared should render it void if they were disregarded.

The Constitution has conferred on Congress the authority to establish a banking system which may become exclusive when exercised.

*M'Culloch* v. *Maryland*, 17 U. S. 4 Wheat. 316 (4: 579); *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738 (6: 204); *Veazie* v. *Fenno*, 75 U. S. 8 Wall. 533 (19: 482); *Farmers' & M. Nat. Bank* v. *Dearing*, 91 U. S. 29 (23: 196); *Van Brocklin* v. *Anderson*, 117 U. S. 151 (29: 845).

At the time of the passage of the national banking act the finances of the country were in a deplorable condition. There was no uniformity, and so great was the distrust of state banks that in many instances bills which were used in one state were not current in another. Nor could the United States avail themselves of these institutions to carry on the fiscal operations of the government, and the result was that commerce was impeded, the operations of the national government crippled, and it became absolutely necessary that Congress should establish not only a "stable" but a "uniform" system of currency applicable alike to every state in the Union.

With this end in view, the national banking act was so constructed as to afford security to currency issued by the several banking associations, and it was intended that they should have credit for stability and permanency, not only by depositing the bonds of the United States, but by taking security whenever necessary for the protection of their property and assets. Hence it was that Congress was not satisfied with legislating in a general way upon the manner of doing business by national banking associations, but legislation was had covering the specific question in controversy, and by U. S. Rev. Stat. § 5136, it is declared that the banking association shall have power—"Third. To make contracts . . . Seventh. All such incidental powers as shall be necessary to carry on the business of banking . . . by loaning money on personal security." And U. S. Rev. Stat. § 5137, provides that "a national banking association may purchase, hold, and convey real estate for the following purposes and for no others: . . . Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted. . . . Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings."

The act further points out the qualifications and disabilities attending such holding, for it says:—

"But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debt due to it, for a longer period than five years."

This last qualification, which was intended to prevent speculation in land, or the accumulation of large amounts of real estate to be held for an indefinite period, is the only restriction which Congress placed upon the power of the national bank to take conveyances of real estate by way of mortgage for the security of debts previously contracted. *Expressio unius est exclusio alterius.* Had it been the intention of Congress to have placed any other conditions or modifications or restrictions upon the conveyance of real estate, it would have been expressed in the legislation.

But there is no limitation in the act, and in its language and effect it had regard to the common law, which was generally in force in the greater part of the United States, and not the provisions of the insolvent law of Massachusetts. It was no fraud and no crime at common law for a debtor to obtain security, or even a preference for his honest indebtedness;



Digitized by Google

it is only made a fraud by statutes operative in some states and totally wanting in others.

There can be no doubt that, under the provisions of the statute of the United States, the Traders' National Bank could hold this real estate conveyed to one of its directors in trust and mortgage to secure a debt previously contracted in good faith, and even for a debt contracted contemporaneously with the conveyance. This conveyance was valid security for the debt of the bank, unless it is rendered invalid by the laws of the state of Massachusetts.

*Genesee Nat. Bank* v. *Whitney*, 108 U. S. 102 (26: 444); *Union Nat. Bank* v. *Matthews*, 98 U. S. 621 (25: 188); *Wall* v. *Lakin*, 18 Met. 167.

Considering the purposes for which banking associations are organized, and for which the provisions of the national banking act were enacted by Congress, do the provisions of the insolvent law of Massachusetts render void this conveyance and other like conveyances at the will of the assignee, appointed by the state courts, and under authority of state statutes, by attaching to it conditions which provide that such conveyance shall be void if at any time within six months the bank has reasonable cause to believe that the mortgagor is insolvent or in contemplation of insolvency? In other words, if the bank has reasonable cause to believe that a state of affairs exists which makes it the duty of the bank to take additional security for an existing debt in order to preserve its own assets, and thereby its usefulness in carrying out the purposes of its organization, does such knowledge, at the election of the assignee, who may affirm or repudiate the conveyance, render its efforts to obtain the security provided by the statute without avail? We respectfully contend that such a statute tends to impair the usefulness of national banks, and is in conflict with both the letter and spirit of the act of Congress.

It is provided by the banking act that "the United States shall have a first and paramount lien upon all the assets" of the association. This lien would attach immediately upon the taking of the conveyance by the association, either by direct conveyance or by mortgage.

There can be no doubt that, in the absence of the state statute, a mortgage security such as that taken by the bank in this case was an "asset" of which it would be the duty of the receiver of the bank to avail himself for the benefit of the government and the public.

The conveyance to the plaintiff in error was not void at the time it was made, but under the construction given to the state laws of insolvency was only voidable.

*Snow* v. *Lang*, 2 Allen, 18; *Butler* v. *Hildreth*, 5 Met. 49; *Perkins* v. *Webster*, 2 Cush. 480; *Dudley* v. *Coburn*, 9 Cush. 314.

If, however, the conveyance had been rendered void by the force of the statute, no title would have passed to the purchaser; otherwise if it was voidable at the election of the assignee. If the title passed, then the lien of the United States attached, and the statute of the state of Massachusetts would be inoperative to defeat that lien, because of the insolvency of the grantor. The knowledge of the bank and the subsequent election of the assignee to proceed under the state statute for the recovery of the property certainly would operate as an impairment of the operation of the statute of the United States creating a national bank.

*First Nat. Bank* v. *Colby*, 88 U. S. 21 Wall. 609 (22: 687); 13 Ops. Atty. Gen. 56.

In *Merchants Nat. Bank* v. *Mears*, 8 Biss. 158, Judge Blodgett, of the United States circuit court, says: "There is no doubt but what the bank, after having made a loan, if it becomes doubtful of the borrower's solvency or ability to give satisfactory personal security, may then take a mortgage on real estate."

And in the practical discharge of his duty it is a common thing for the bank examiner to require a bank to obtain additional security to a note held by it.

The effect of the Massachusetts state insolvent laws to nullify this intention of Congress to provide for a uniform and stable currency is emphasized by the decisions of the state courts, that the exigencies arising from public disturbance of credit from any cause do not take a conveyance out of the operation of the statute as a preference, even where the inability of the debtor arises from a panic or other public disaster and is regarded as temporary merely.

*Vennard* v. *McConnell*, 11 Allen, 555, 561; *Marsh* v. *Hammond*, 11 Allen, 483; *Peabody* v. *Knapp*, 153 Mass. 248.

Where, as in the present case, Congress has legislated fully upon a specific subject-matter, such legislation is exclusive of any legislation upon the same subject-matter by the several states.

The statute of the United States provides: First, the kind of security to be taken. Second, the kind of debt for which security may be taken, namely, a debt previously contracted. Third, the nature of the conveyance to be made; that it shall be by way of mortgage security, or in satisfaction of the debt itself. Fourth, the conditions and restrictions to be applied to the conveyance; that it shall be mortgaged in good faith or conveyed in satisfaction of debts previously contracted in the course of its dealings. Fifth, the length of time for which the real estate can be held; that it shall not be for a longer period than five years.

If Congress had intended to make these provisions for the taking and holding of real estate subject to any other conditions its intention would have been apparent in additional provisions of the law. If it was intended by Congress to make the laws subject to the provisions of the laws of insolvency in the several states, it would have said so. If any other conditions or limitations had been intended by Congress to the plain provisions of the act giving authority to national banks, it would have appeared in the act itself.

Where there is no legislation by Congress, either by express enactment or growing out of the spirit and intent of legislation, state laws are operative, provided they do not affect the spirit and purpose of the legislation of Congress and impair its operation.

*First Nat. Bank* v. *Garlinghouse*, 22 Ohio St. 492, 10 Am. Rep. 751; *Farmers & M. Nat. Bank* v. *Dearing*, 91 U. S. 29 (23: 196); *Central*



Digitized by Google

*Nat. Bank* v. *Pratt*, 115 Mass. 539, 15 Am. Rep. 138; *Davis* v. *Randall*, 115 Mass. 547, 15 Am. Rep. 146; *Peterborough Nat. Bank* v. *Childs*, 133 Mass. 248, 43 Am. Rep. 509; *First Nat. Bank* v. *Childs*, 130 Mass. 519, 39 Am. Rep. 474; *Second Nat. Bank* v. *Hunt*, 78 U. S. 11 Wall. 391 (20: 190); *Petri* v. *Commercial Nat. Bank*, 142 U. S. 644 (35: 1144).

Unless otherwise expressed, wherever Congress has provided in relation to remedies their legislation is exclusive of state legislation.

*National Exch. Bank* v. *Peters*, 44 Fed. Rep. 18; *Cook County Nat. Bank* v. *United States*, 107 U. S. 448 (27: 538).

In the last case it is said:

"We consider that act as constituting by itself a complete system for the establishment and government of national banks. . . . Everything essential to the formation of the banks, the issue, security, and redemption of their notes, the winding-up of the institutions and the distribution of their effects, are fully provided for."

In *Davis* v. *Elmira Sav. Bank*, 161 U. S. 275 (40: 700), after a full citation of authorities and an exhaustive opinion, the court comes to the conclusion that the statutes of the state of New York conflict in letter and spirit with the statute of the United States, and therefore must yield.

The court says, in *First Nat. Bank* v. *Colby*, 88 U. S. 21 Wall. 613 (22: 688): "As to general creditors, the act evidently intends to secure equality among them in the division of the proceeds of the property of the bank." The act further secures this equality, and declares that "all transfers by an insolvent bank of its property of every kind, and all payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by the act, or 'with a view to the preference of one creditor over another, except in the payment of its circulating notes, shall be utterly null and void.'"

Now, the method of securing the assets of the bank for such ratable distribution among its several creditors can only be subserved under the act by taking such security as the circumstances of the case may warrant and is shown to be necessary for the payment of notes held by the bank; and only the United States can object to this method of taking security, or the security taken, provided actual fraud is not present.

If the statute of Massachusetts is to have force, the assets of the bank will be distributed among a different set of creditors than those contemplated by the statute of the United States, and by an assignee in insolvency instead of an assignee under the direction of the comptroller of the currency.

In the case at bar the provisions of the state law are much more antagonistic to the provisions of the statute of the United States, both in letter and spirit, than they were in the case of *Davis* v. *Elmira Sav. Bank*, 161 U. S. 275 (40: 700).

The grant of powers to national banking associations by the act creating them is to be construed by the common law and the laws of the United States at the time of its enactment, and not by peculiar contemporary or subsequent enactments of state legislatures.

Where Congress has legislated, the state may not; when Congress prescribed the method of winding-up national banks, it was exclusive of state insolvency laws; and when Congress enacted what national banks might take as security, it was exclusive of state insolvency laws to qualify.

We contend, therefore, that the case of *Davis* v. *Elmira Sav. Bank*, *supra*, is conclusive that the provisions of the state insolvent law in the present case, applying to the same subject-matter as the provisions of the act of Congress, must give way to the provisions made by Congress for the taking of securities by national banks.

*Mr.* **William B. French** for defendant in error.

*Mr.* **S. J. Elder** for defendant in error in No. 36.

Mr. Justice **White** delivered the opinion of the court:

Although these two cases were brought here by separate writs of error, they depend on the same facts and involve the same legal question, and were passed upon by the court below in one opinion. 159 Mass. 363. We shall therefore consider them together.

The Traders' National Bank, a corporation organized under the banking laws of the United States, carried on its business in the city of Boston. The firm of Dudley Hall & Company, composed of Dudley Hall and Dudley C. Hall, were likewise engaged in business in Boston, and were customers of the bank, having a deposit account therein. By an understanding between the bank and the firm, made to induce the latter *to keep its deposit account [348 with the former, the firm was to be considered as entitled to a line of discount on its paper to the extent of $20,000. On the 16th of October, 1890, the partnership, then being in the enjoyment of its full agreed discount, borrowed from the bank an additional sum of $12,500, which was evidenced by a note of Dudley C. Hall at one month, indorsed by the firm and secured by the pledge of certain shares of the Ætna Mining Company and by two notes of that company, amounting to about $2,500. When this note matured, on the 16th of November, 1890, a new demand note in an equal amount was given in renewal thereof and was secured by the same collaterals. On the 17th of December, 1890, payment of this note was demanded, and the debtor being unable to meet it a new note at two months was given, the sum thereof was passed to the credit of the firm, and the old note was debited, canceled, and surrendered. This new note was drawn like the preceding one by Hall and indorsed by the firm, and was secured, not only by the same collaterals, but also by a conveyance of two pieces of land made by Dudley C. Hall to A. D. McClellan, a director of the bank, he giving to Hall a writing, in which it was declared that the conveyance was made for the sole purpose of securing the note held by the bank, and that on its payment the land would be retransferred. In March, 1891, the firm suspended payment,



Digitized by Google

and the members thereof were adjudged to be insolvent under the insolvency laws of the state of Massachusetts, and made to their assignees an assignment of all their property, as required by the statutes of the state. In May the assignees brought a writ of entry against McClellan to recover the two pieces of land.

Sections 96 and 98 of chapter 157 of the Public Statutes of the state of Massachusetts, relied on by the assignees to sustain their action to recover the land, are as follows:

"Sec. 96. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, with a view to give a preference to a creditor or person who has a claim against him, or is under any liability for him, procures [349] any part of his property to be *attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, having reasonable cause to believe such person is insolvent or in contemplation of insolvency and that such payment, pledge, assignment, or conveyance is made in fraud of the laws relating to insolvency, the same shall be void; and the assignees may recover the property or the value of it from the person so receiving it or so to be benefited."

"Sec. 98. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, makes a sale, assignment, transfer, or other conveyance of any description of any part of his property to a person who then has reasonable cause to believe him to be insolvent or in contemplation of insolvency, and that such sale, assignment, transfer, or other conveyance is made with a view to prevent the property from coming to his assignee in insolvency, or to prevent the same from being distributed under the laws relating to insolvency, or to defeat the object of, or in any way to impair, hinder, impede, or delay the operation and effect of, or to evade any of said provisions, the sale, assignment, transfer, or conveyance thereof shall be void, and the assignee may recover the property or the value thereof as assets of the insolvent. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be prima facie evidence of such cause of belief."

The action was tried before a jury and there was a verdict in favor of the surviving assignee, and exceptions were filed and allowed. Whilst these exceptions were pending before the supreme judicial court, the Traders' Bank filed its bill in equity against the surviving assignee of the estate of Dudley C. Hall and Dudley Hall and A. D. McClellan, setting up its right under the conveyance made to McClellan, the bringing of the writ of entry and the fact that the bank had not been made party defend- [350] ant therein. The bill charged *that the complainant, as a national bank, was entitled to take the conveyance of the real estate to secure the debt of Hall, and that the provisions of the statutes of Massachusetts which were relied on by the assignees were in conflict with U. S. Rev. Stat. §§ 5136, 5137. The bill prayed that the assignee and McClellan be permanently enjoined from proceeding under the writ of entry and the exceptions filed therein; that McClellan be ordered to apply the proceeds of the property to the payment of the note and loan secured thereby. After due pleading the issues tendered were reported by the presiding justice for the consideration of the full court upon certain questions of law reserved, and the full court affirmed the verdict of the jury and judgment thereon in the writ of entry case and dismissed the bill in equity.

So far as concerned the Federal question, the court held that there was no conflict between §§ 5136 and 5137 of the Revised Statutes of the United States, and §§ 96 and 98 of chapter 157 of the Public Statutes of Massachusetts. Both cases were brought here by writ of error.

The only Federal question for our consideration is whether there was conflict between the statutes of the United States and the provisions of the general law of the state of Massachusetts referred to and heretofore fully set out. Two propositions have been long since settled by the decisions of this court:

First. National banks "are subject to the laws of the state, and are governed in their daily course of business far more by *the laws [357] of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." *First Nat. Bank* v. *Kentucky*, 76 U. S. 9 Wall. 362 [19: 708].

Second. "National banks are instrumentalities of the Federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties, or control the conduct of their affairs, is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created." *Davis* v. *Elmira Sav. Bank*, 161 U. S. 283 [40: 701].

These two propositions, which are distinct, yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States. The provisions of the statutes of the United States upon which the plaintiffs in error rely are as follows:

"The national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

. . . . . .



Digitized by Google

"Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"Third. Such as shall be conveyed to it in 358] satisfaction of *debts previously contracted in the course of its dealings." U. S. Rev. Stat. § 5137.

The argument is that as this statute permits national banks to take real estate for given purposes, therefore the Massachusetts law which forbids a transfer of property, with a view to a preference, in case of insolvency, where the transferee has reasonable cause to believe that the transferrer is insolvent or in contemplation of insolvency, in no way controls the contracts or dealings of a national bank. But this position denies the general rule just referred to, and amounts to asserting that in every case where a national bank is empowered to make a contract, such contract is not subject to the state law. In the case in hand there is no express conflict between the grant of power by the United States to the bank to take real estate for previous debts, and the provisions of the Massachusetts law, which, although allowing as a general rule the taking of real estate as a security for an antecedent debt provides that it cannot be done under particular and exceptional circumstances. Nor is there anything in the statutes of the state of Massachusetts, here considered, which in any way impairs the efficiency of national banks or frustrates the purpose for which they were created. No function of such banks is destroyed or hampered by allowing the banks to exercise the power to take real estate, provided only they do so under the same conditions and restrictions to which all the other citizens of the state are subjected, one of which limitations arises from the provisions of the state law which in case of insolvency seeks to forbid preferences between creditors. Of course, in the broadest sense, any limitation by a state on the making of contracts is a restraint upon the power of a national bank within the state to make such contracts; but the question which we determine is whether it is such a regulation as violates the act of Congress. As well might it be contended that any contract made by a national bank within a state in violation of the state laws on the subject of minority or coverture, was valid because such state laws were in conflict with the act of Congress or impaired the power of the bank to perform its functions. 359] Indeed, reduced to its last analysis, *the position here assumed by the plaintiff in error amounts to the assertion that national banks in virtue of the act of Congress are entirely removed, as to all their contracts, from any and every control by the state law. The argument that the concession of a right on the part of a state to forbid the taking of real estate by a national bank for an antecedent debt, under any circumstances, implies the existence of a power in the state to forbid such taking in all cases, begs the question, and amounts simply to a restatement of the proposition already answered. As long since settled in the cases already referred to, the purpose and object of Congress in enacting the national bank law was to leave such banks as to their contracts in general under the operation of the state law, and thereby invest them as Federal agencies with local strength, whilst, at the same time, preserving them from undue state interference wherever Congress within the limits of its constitutional authority has expressly so directed, or wherever such state interference frustrates the lawful purpose of Congress or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States.

It is said that § 98 of the Massachusetts statute is in conflict with the statutes of the United States in so far as it provides that, "and if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be prima facie evidence of such cause of belief," that is, the belief on the part of the creditor of the insolvency of the debtor by whom the transaction was made. The reason is that as the United States law allows the taking by a bank of real estate for an antecedent debt, and the state statute makes such taking of real estate prima facie evidence of a reasonable belief on the part of the bank of the insolvency of the debtor from whom the real estate is so taken, therefore the state law violates the national bank law, since it attributes to the doing of the act which the national bank law authorizes, a presumption which virtually annuls the contract, unless proof be made to the contrary. But this view gives to the words "ordinary course of business" in the state statute a strained and unreasonable *construction. The [360 state statute does not provide that the mere fact that a security is taken for an antecedent debt renders the contract one not in the actual course of the debtor's business, thereby engendering the presumption of knowledge on the part of the creditor, but affixes such presumption only to cases where the particular nature of the dealings between the parties is such as to make the contract not one in the actual course of business, from which fact the statutory presumption arises. However, this objection does not arise on the record before us, since the supreme court of Massachusetts held that the effect of the charge of the trial court was substantially to instruct the jury that before the plaintiff in the entry suit could recover he must satisfy the jury by a preponderance of evidence that Hall at the time of the conveyance was insolvent.

The claim that the security vested in the bank by the conveyance of the land is taken away from it in violation of the United States law, because, under the Massachusetts law, a contract by a debtor giving a fraudulent preference to one creditor over another, is voidable and not void, is without merit. This contention concedes that if the state law rendered the transaction void there would be a void exercise of state authority. But the power to do the greater necessarily carries with it the right to do the lesser. Nor is there anything in the opinion of this court in *Davis* v. *Elmira Sav. Bank*, 161 U. S. 283 [40: 701], which supports the argument of the plaintiff in error. There, the conflict between the state and the Federal law was found to be express and irreconcilable, bringing that case, therefore, under the exception to the general rule. The opinion carefully confined the ruling there made to such a case, so as to render it inapplicable in a case like the one now before it. It said:

"It is certain that, in so far as not repugnant



Digitized by Google

to acts of Congress, the contracts and dealings of national banks are left subject to the state law, and upon this undoubted promise, which nothing in this opinion gainsays." . . .

And the whole opinion was qualified by this language:

"Nothing, of course, in this opinion is intend-
**361** ed to deny the *operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purposes of congressional legislation."

Finding no conflict between the special power conferred by Congress upon national banks to take real estate for certain purposes, and the general and undiscriminating law of the state of Massachusetts subjecting the taking of real estate to certain restrictions, in order to prevent preferences in case of insolvency, we conclude that *the judgments of the Supreme Court of the state of Massachusetts were right, and they are therefore in both cases affirmed.*

---

## AVINGTON A. EDGINGTON, *Plff. in Err.*, v. UNITED STATES.

(See S. C. Reporter's ed. 361-367.)

*U. S. Rev. Stat. § 5438, not reported—evidence of good character—erroneous charge—sufficient exception—reasonable doubt.*

1. U. S. Rev. Stat. § 5438, making it penal to make or cause to be made any false deposition to obtain a payment or approval of any claim against the United States, is not repealed by § 4746, imposing a penalty upon the offense of procuring any false or fraudulent affidavit respecting a pension claim, or other matter within the jurisdiction of the commissioner of pensions.
2. Evidence of a defendant's general reputation for truth and veracity is admissible on a prosecution for making a false deposition, not merely to give weight to his personal testimony in the case, but to establish a general character inconsistent with guilt of that crime, whether he has testified or not.
3. A charge to the jury that if they have hesitation as to defendant's guilt then they may consider as important the testimony as to his good character is erroneous as limiting the effect of such testimony to a doubtful case.
4. An exception to a whole paragraph of a charge is sufficient where the subject of the paragraph is the single one of the proper effect to be given to evidence of defendant's good character.
5. Evidence of an established reputation for good character, if relevant to the issue, may alone create a reasonable doubt, although without it the other evidence would be convincing.

[No. 336.]

*Submitted November 2, 1896. Decided November 30, 1896.*

IN ERROR to the District Court of the United States for the Southern District of Iowa to review a judgment convicting Avington A. Edgington of the crime of making a false deposition in aid of a fraudulent pension claim. *Reversed*, and cause remanded with directions for a new trial.

---

NOTE.—*Evidence of good character as an answer to an accusation of crime, how proved; evidence of bad or violent character, when admissible; distinction between reputation and character; particular acts; neighborhood; reasonable time.*

In criminal proceedings the fact that the person accused has a good character is relevant. Felix v. State, 18 Ala. 720; Hall v. State, 40 Ala. 698; Kee v. State, 28 Ark. 155; People v. Ashe, 44 Cal. 288; State v. Turner, 19 Iowa, 144; People v. Garbett, 17 Mich. 9, 97 Am. Dec. 162; Wesley v. State, 37 Miss. 327; Schaller v. State, 14 Mo. 502; State v. O'Connor, 31 Mo. 389; Griffin v. State, 14 Ohio St. 55; Cathcart v. Com. 37 Pa. 108; Lockhart v. State, 3 Tex. App. 567; State v. Wells, 1 N. J. L. 424, 1 Am. Rep. 211; People v. Moett, 23 Hun, 60; Hoppe v. People, 31 Ill. 388, 83 Am. Dec. 231; State v. Donohoo, 22 W.Va. 761.

In Matthews v. State, 32 Tex. 117, evidence of character was rejected as irrelevant to the issue of a trial for assault and battery, the admission of such evidence being held to be in the discretion of the court, and it being invariably admissible only in cases where the life of the prisoner is involved.

But the fact that the person accused has a bad character is irrelevant, unless it is itself a fact in issue, or unless evidence has been given that he has a good character. People v. Fair, 43 Cal. 137; Fletcher v. State, 49 Ind. 124, 19 Am. Rep. 673; State v. Kabrich, 39 Iowa, 277; State v. Creson, 38 Mo. 372; People v. White, 14 Wend. 111; Com. v. Hardy, 2 Mass. 303; Pauli v. Com. 89 Pa. 432; Hartless v. State, 32 Tex. 88; State v. Thurtell, 29 Kan. 148; Reg. v. Rowton, 10 Cox, C. C. 25; Rex v. Hodgkiss, 7 Car. & P. 298.

If the prisoner's counsel brings out evidence of his good character on cross-examination, the prosecution may then give evidence of his bad character. Reg. v. Gadbury, 8 Car. & P. 676; Reg. v. Shrimpton, 8 Car. & K. 373, 5 Cox, C. C. 387.

In an indictment for assaulting a peace officer he cannot testify to his knowledge of the prisoner's bad character for the purpose of showing that he had reasonable cause to suspect him of the crime for which he was arrested. Reg. v. Tuberfield, 10 Cox, C. C. 1.

The kind of character proved must relate to the particular charge, *e. g.*, in murder the prisoner's general reputation for peace and good order is admissible. People v. Stewart, 23 Cal. 395; Kee v. State, 28 Ark. 155; State v. Kinley, 43 Iowa, 294; State v. King, 78 Mo. 555; State v. Pearce, 15 Nev. 188; State v. Emery, 59 Vt. 84.

In homicide the prisoners' reputation as a good soldier is inadmissible. People v. Garbett, 17 Mich. 9, 97 Am. Dec. 162.

The object and effect of such evidence are to disprove guilt by furnishing a presumption that the defendant would not have committed the offense. In homicide it has also been held admissible to aid the jury in ascertaining the grade of the crime. Carroll v. State, 3 Humph. 315.

A failure to prove his good character raises no presumption against the prisoner. People v. Bodine, 1 Denio, 282; People v. White, 24 Wend. 520; State v. Kabrich, 39 Iowa, 277; State v. O'Neal, 7 Ired. L. 251; State v. Dockstader, 43 Iowa, 432.

Evidence of good character must be considered in all cases where it is offered, as well where the other evidence is direct as where it is circumstantial. Its weight is not confined to doubtful cases, but it may of itself create a doubt. The degree of its force is to be determined by the attending circumstances, and not by the grade of the offense. Cancemi v. People, 16 N. Y. 501; Stephens v. People, 4



Digitized by Google

Statement by Mr. Justice **Shiras:**

At the March term, 1895, in the district court of the United States for the southern district of Iowa, Avington A. Edgington was tried and found guilty of the crime of making a false deposition on April 18, 1894, in aid of a fraudulent pension claim on behalf of his mother, Jennie M. Edgington, claiming to be the widow of Francis M. Edgington.

The indictment was based on U. S. Rev. Stat. § 5438, and it was claimed on behalf of the de-
362] fendant *that that section had been repealed by the subsequent enactment of U. S. Rev. Stat. § 4746, and was no longer in force at the time the indictment was found. The motion to direct a verdict of not guilty for that reason was overruled, to which action of the court an exception was taken. Exceptions were also taken to the action of the court in excluding testimony as to the defendant's general reputation for truth and veracity, and to the instruction to the jury upon the testimony as to the good character of the defendant.

On April 30, 1895, judgment was pronounced against the defendant that he pay a fine of $1,500 and the costs, and that he stand committed to jail until said fine and costs should be paid. A writ of error was prayed for and allowed.

***Messrs.* Smith McPherson, A. H. Garland, and R. C. Garland,** for plaintiff in error:

Evidence as to the truth and veracity of the prisoner goes directly to the trait involved, and should have been admitted.

1 Greenl. Ev. 14th ed. §§ 54, 55, and notes.

It must be evidence as to such traits of character as would make it the more improbable that he committed the crime with which he is charged.

*State* v. *Northup*, 48 Iowa, 583, 30 Am. Rep. 408; *State* v. *Gustafson*, 50 Iowa, 194; *People* v. *Fair*, 43 Cal. 137; *Kee* v. *State*, 28 Ark. 155; *Stover* v. *People*, 56 N. Y. 315.

Evidence of good character is independent evidence and of itself may raise the reasonable doubt and of itself require the jury to find the prisoner not guilty.

*State* v. *Kinley*, 43 Iowa, 294; *Felix* v. *State*, 18 Ala. 720; *Dupree* v. *State*, 33 Ala. 380, 73 Am. Dec. 423; *People* v. *Ashe*, 44 Cal. 288;

---

Park. Crim. Rep. 396; Harrington v. State, 19 Ohio St. 264.

It is error to charge that good character only steps in in cases of doubt. It will itself sometimes create a doubt where none without it would exist. Felix v. State, 18 Ala. 720; Rosenbaum v. State, 33 Ala. 354; Dupree v. State, 33 Ala. 380, 73 Am. Dec. 422; Harrison v. State, 37 Ala. 154; Hall v. State, 40 Ala. 698; People v. Ashe, 44 Cal. 288; People v. Kalkman, 72 Cal. 212; United States v. Jackson, 29 Fed. Rep. 503; Kistler v. State, 54 Ind. 400; McQueen v. State, 82 Ind. 72; State v. Kinley, 43 Iowa, 294; State v. Beebe, 17 Minn. 241; Coleman v. State, 59 Miss. 484; Remsen v. People, 43 N. Y. 6; People v. Lamb, 2 Keyes, 360; Kilpatrick v. Com. 31 Pa. 198; Heine v. Com. 91 Pa. 145; State v. Edwards, 13 S. C. 30; Lee v. State, 2 Tex. App. 339; State v. Daley, 53 Vt. 442, 38 Am. Rep. 694.

A weak case on the part of the prosecution is a doubtful case, and without evidence of any kind on the part of the defense the jury ought to acquit. To say, therefore, that proof of character is only available under such circumstances is to say that it is of no substantial account at all. Hanney v. Com. 19 W. N. C. 437.

Character should be submitted to the jury like any other fact whether the other evidence in the case is direct or circumstantial, and should be considered by them. If the evidence of guilt is direct it goes to its credibility. Stover v. People, 56 N. Y. 315; People v. Raina, 45 Cal. 292; People v. Shepardson, 49 Cal. 629; State v. McMurphy, 52 Mo. 251; State v. Alexander, 66 Mo. 148; People v. Bell, 49 Cal. 485.

But against facts positively and strongly proved it cannot avail. State v. Turner, 19 Iowa, 149; Com. v. Webster, 5 Cush. 295, 52 Am. Dec. 711; State v. Levigne, 17 Nev. 435; United States v. Jackson, 29 Fed. Rep. 503.

In some states it is held that such evidence can only be taken into consideration when a reasonable doubt already exists in the mind of the jury. People v. Gleason, 1 Nev. 173; State v. McGinnis, 6 Nev. 109; State v. Wells, 1 N. J. L. 424, 1 Am. Rep. 211; Turner's Trial, 6 How. St. Tr. 613.

In Massachusetts its force is dependent upon the nature of the offense. "Where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things and beyond common experience, it is so manifest that the offense, if perpetrated, must have been influenced by motives not frequently operating upon the human mind—the evidence of character and of a man's habitual conduct under common circumstances must be considered far inferior to what it is in the instance of accusations of a lower grade." Com. v. Webster, 5 Cush. 295, 52 Am. Dec. 711; Com. v. Hardy, 2 Mass. 303.

In homicide the violent character of the deceased may be proved, but only where the evidence shows that there was an assault committed or threatened by him upon the prisoner, and a doubt was created whether the homicide was prepetrated from malace or to repel such assault and in self-defense. People v. Lamb, 2 Keyes, 360; Reynolds v. People, 17 Abb. Pr. 413; Abbott v. People, 86 N. Y. 460; State v. Field, 14 Me. 248, 31 Am. Dec. 52; Rippy v. State, 2 Head, 217; Abernethy v. Com. 101 Pa. 322; Franklin v. State, 29 Ala. 19; State v. Chandler, 5 La. Ann. 489, 52 Am. Dec. 599; State v. Robertson, 30 La. Ann. 340; Cotton v. State, 31 Miss. 504; State v. Keene, 50 Mo. 357; State v. Bryant, 55 Mo. 75; State v. Elkins, 63 Mo. 159; State v. Freeman, 3 Mo. App. Appx. 597.

When the conduct of the deceased, although in itself innocent, is such that, illustrated by his character, its tendency is to excite a reasonable belief of imminent peril, the evidence ought to be admitted, and the question of its effect left to the determination of the jury. Franklin v. State, 29 Ala. 14.

But such evidence is inadmissible unless it is shown that the prisoner was, by the violent character of the deceased, impelled to kill him. The mere bad character of the deceased cannot affect the guilt of the accused. Queensberry v. State, 8 Stew. & P. 308; Chase v. State, 46 Miss. 683; State v. Keene, 50 Mo. 357; Com. v. Ferrigan, 44 Pa. 386; Prickett v. State, 22 Ala. 39, 58 Am. Dec. 250; State v. Hogue, 6 Jones, L. 333; State v. Thawley, 4 Harr. (Del.) 562.

On a similar principle the character of the prosecutrix in rape is in issue. State v. Forshner, 43 N. H. 89, 80 Am. Dec. 132; State v. Knapp, 45 N. H. 148; Turney v. State, 8 Smedes & M. 104, 47 Am. Dec. 74. Likewise in bastardy proceedings. Walker v. State, Corbin, 6 Blackf. 1. *Contra*, Rawles v. State, Ford, 56 Ind. 433. By bringing such proceedings the prosecutrix acknowledges her want of chastity.

Character of prosecutor is inadmissible in indict-



Digitized by Google

*United States* v. *Jackson*, 29 Fed. Rep. 583; *Kistler* v. *State*, 54 Ind. 400; *State* v. *Beebe*, 17 Minn. 241; *Remsen* v. *People*, 43 N. Y. 6; *Kilpatrick* v. *Com.* 31 Pa. 198.

*Mr.* **Edward B. Whitney**, Assistant Attorney General, for defendant in error:

It is no ground for reversal that the court omitted to give instructions where they were not requested by the defendant.

*Isaacs* v. *United States*, 159 U. S. 487 (40: 229).

Good character is no defense when the evidence shows that the defendant is guilty of the crime. Error arises only when the court charges the jury that good character is no defense when the evidence, excluding from consideration the evidence of good character, shows him guilty of the crime.

1 Bishop, New Crim. Proc. § 1116; *People* v. *Sweeney*, 133 N. Y. 609; *People* v. *Brooks*, 131 N. Y. 321; *Hirschman* v. *People*, 101 Ill. 568; *People* v. *Mead*, 50 Mich. 228; *Walker* v. *State*, 136 Ind. 663; *People* v. *Samsels*, 66 Cal. 99; *State* v. *Turner*, 19 Iowa, 144; *State* v. *Levigne*, 17 Nev. 435, 444; *Hathcock* v. *State*, 88 Ga. 91; *Edmonds* v. *State*, 34 Ark. 720; *United States* v. *Jackson*, 29 Fed. Rep. 583.

An exception to the whole paragraph is not sustained by error in any single proposition not specifically pointed out.

*Johnston* v. *Jones*, 66 U. S. 1 Black, 210 (17: 117); *Hunt* v. *Maybee*, 7 N. Y. 273; *Decker* v. *Mathews*, 12 N. Y. 313; *United States* v. *Conklin*, 68 U. S. 1 Wall. 644 (17: 714); *Beaver* v. *Taylor*, 93 U. S. 46 (23: 797); *Washington & G. R. Co.* v. *Varnell*, 98 U. S. 479 (25: 233); *Mobile & M. R. Co.* v. *Jurey*, 111 U. S. 584 (28: 527).

Mr. Justice **Shiras** delivered the opinion of the court:

Section 5438 of the Revised Statutes makes it penal to make or cause to be made, for the purpose of obtaining or aiding to obtain payment or approval of any claim against the United States, any false deposition, knowing the same to contain any fraudulent or fictitious statement; and such offense is made punishable by imprisonment at hard labor for not less than one nor more than five years, or by fine of not less than $1,000 nor more than $5,000. The statute which was carried into this section of the Revised Statutes was enacted March 2, 1863. 12 Stat. at L. 696.

---

ments for assault and battery. Pratt v. State, 56 Ind. 179.

So is that of defendant's wife in an indictment for attempt to levy blackmail by accusing prosecutor of seducing his wife. McMillen v. State, 60 Ind. 216.

Such evidence may be rebutted by evidence of good character, which is not admissible until attacked. The peaceable character of the deceased cannot be shown until it is attacked. Ben v. State, 37 Ala. 103; People v. Hulse, 3 Hill, 309. *Contra* in rape in Turney v. State, 8 Smedes & M. 104.

General reputation is the opinion of a man's character held generally by those who are acquainted with him. The question then is what people in general say, not what others or certain others say of him. Sorrell v. Craig, 9 Ala. 534; Vernon v. Tucker, 30 Md. 456; Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494; Com. v. Rogers, 136 Mass. 158; Pickens v. State, 61 Miss. 563; Weaver v. Hendrick, 30 Mo. 502; Matthewson v. Burr, 6 Neb. 311; Taylor v. Ryan, 15 Neb. 573; Sawyer v. People, 1 N. Y. Crim. Rep. 249; Gulerette v. McKinley, 27 Hun, 320; Dance v. McBride, 43 Iowa, 624; Wike v. Lightner, 11 Serg. & R. 198; Frazier v. Pennsylvania R. Co. 38 Pa. 104, 80 Am. Dec. 467; Snyder v. Com. 85 Pa. 519.

Nor what is said of him by a majority of his neighbors. Adams v. Hannon, 3 Mo. 222; Emory v. Phillips, 22 Mo. 499.

Rumor is not reputation. Campbell v. State, 23 Ala. 44; Haley v. State, 63 Ala. 83.

In Alabama a distinction is made between a man's character and reputation, and a witness who says that he is not acquainted with the latter but knows the former is allowed to testify. Sullivan v. State, 66 Ala. 48.

The rule is applicable to the proof of the character of the deceased in homicide. State v. Elkins, 63 Mo. 159; State v. Abarr, 39 Iowa, 135; Nichols v. People, 86 N. Y. 641.

Specific facts showing character cannot be proved. Every man is supposed to be capable of supporting his general character, but is not likely to be prepared to answer particular facts without notice. Teese v. Huntingdon, 64 U. S. 23 How. 2 (16: 479); J'Anson v. Stuart, 1 T. R. 754; Hirschman v. People, 101 Ill. 568; Walker v. State, Corbin, 6 Blackf. 1; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; Wilson v. State, 16 Ind. 392; Hallowell v. Guntle, 88 Ind. 554; Taylor v. Com. 3 Bush, 508; Thurman v. Virgin, 18 B. Mon. 785; Hume v. Scott, 3 A. K. Marsh. 261; Macdonald v. Garrison, 2 Hilt. 510; Corning v. Corning, 6 N. Y. 97; Conley v. Meeker, 85 N. Y. 618; Seymour v. Farrell, 51 Mo. 95; Sawyer v. Eifert, 2 Nott & McC. 511, 10 Am. Dec. 633; Johnson v. Brown, 51 Tex. 65.

There is an exception where character for chastity is in issue. In this case particular acts may be proved, but here it has been said the fact of chastity itself is in issue. Ford v. Jones, 63 Barb. 484; Gulerette v. McKinley, 27 Hun, 320; White v. Murtland, 71 Ill. 258, 22 Am. Rep. 100; West v. Druff, 55 Iowa, 335. But see Hoffman v. Kemerer, 44 Pa. 452. An exception is also made in case of *crimen falsi* in Bette v. Lockwood, 8 Conn. 488.

As good characters are generally little talked about a witness may testify that he has never heard a person's character spoken of, or that he has never heard anything against it. Hadjo v. Gooden, 13 Ala. 718; Dave v. State, 22 Ala. 23; Ward v. State, 28 Ala. 53; Childs v. State, 55 Ala. 28; State v. Nelson, 58 Iowa, 208; State v. Lee, 22 Minn. 407, 21 Am. Rep. 769; Davis v. Foster, 68 Ind. 238; Craig v. Craig, 5 Rawle, 91; Johnson v. Brown, 51 Tex. 65; Davis v. Franke, 33 Gratt. 413; Reg. v. Rowton, 10 Cox, C.C. 25.

One who testifies that he does not know a witness's character for truth may be asked if he ever heard it questioned. Lenox v. Fuller, 39 Mich. 268.

The witness to character should ordinarily be of the same community as the one whose character is inquired into; and he should speak from a knowledge of his reputation acquired by time and the general speech of the people who know and have the opportunity of forming an opinion from their knowledge. Cheritree v. Roggen, 67 Barb. 124; Martin v. Martin, 25 Ala. 201; State v. Cox, 67 Mo. 392; Kelley v. Proctor, 41 N. H. 139; Dupree v. State, 33 Ala. 380, 73 Am. Dec. 422.

It is essential that the witness should know the reputation rather than the person himself who bears it. Martin v. Martin, *supra*.

A stranger who has gone to a particular locality and made inquiries for the purpose of ascertaining the character of an individual is incompetent to testify to it. Douglass v. Tousey, 2 Wend. 352, 20 Am. Dec. 616; Sorrelle v. Craig, 9 Ala. 534; Reid v. Reid, 17 N. J. Eq. 101; Curtis v. Fay, 37 Barb. 64; Kelley v. Proctor, 41 N. H. 139; Dave v. State, 22 Ala. 23.

It was held not to be necessary to first inquire



Digitized by Google

Section 4746 is based on a statute passed March 3, 1873 (17 Stat. at L. 575), and provides a penalty of a fine not exceeding $500 or of im-
**363]** prisonment for *a term not exceeding three years, or of both, for every person who knowingly or wilfully in any wise procures the making or presentation of any false or fraudulent affidavit concerning any claim for pension, or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions.

We are unable to accept the contention that the latter section is to be deemed a repeal of the former. Undoubtedly there is some ground that is common to both. Thus the procuring or causing to be made a false deposition or affidavit in promoting a fraudulent pension claim is made an offense by both statutes. But the earlier statute is wider in its scope, because not restricted to fraudulent pension claims, nor to merely procuring a false affidavit to be made. We think the offense charged in the present indictment, of making a false deposition in aid of a fraudulent pension claim, is properly within § 5438, and not within § 4746, which is in terms applicable only to the offense of procuring another person to commit the offense.

We are constrained to sustain the assignments which complain of the exclusion of testimony offered to show defendant's general reputation for truth and veracity. It is not necessary to cite authorities to show that, in criminal prosecutions, the accused will be allowed to call witnesses to show that his character was such as would make it unlikely that he would be guilty of the particular crime with which he is charged. And as here the defendant was charged with a species of the *crimen falsi*, the rejected evidence was material and competent. This, indeed, is conceded in the brief for the government; but it is argued that, as the learned judge, in overruling the offer of the evidence, observed that the testimony might "become proper later on," he was merely passing on the order of proof, his discretion in respect to which is not reversible. It is possible, as suggested, that the judge thought that such evidence should not be offered until it appeared that the defendant had himself testified. But this would show a misconception of the reason why the evidence was competent. It was not intended to give weight to the defendant's personal *testimony [**364** in the case, but to establish a general character inconsistent with guilt of the crime with which

---

of witness whether he knew the plaintiff's general character for chastity, in Senter v. Carr, 15 N. H. 351.

One's neighborhood extends as far as one is well known. Kelley v. Procter, 41 N. H. 139; Dupree v. State, 33 Ala. 380, 73 Am. Dec. 422; Griffin v. State, 14 Ohio St. 55; People v. Lyons, 51 Mich. 215.

The number of character witnesses allowed rests in the discretion of the court. Cox v. Pruitt, 25 Ind. 90.

The individual opinion of the witness is inadmissible. Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657; Com. v. Rogers, 136 Mass. 158; State v. King, 78 Mo. 555; Kitteringham v. Dance, 58 Iowa, 632; Sargent v. Wilson, 59 N. H. 396; Best, Ev. 260.

But an impeaching witness may, after testifying to general character for truth and veracity, be asked to testify whether he would believe the impeached witness on oath. Bogle v. Kreitzer, 46 Pa. 465; Taylor v. Smith, 16 Ga. 7; Stokes v. State, 18 Ga. 17; State v. Howard, 9 N. H. 485; Knight v. House, 29 Md. 194, 96 Am. Dec. 515; Marshall v. State, 5 Tex. App. 273; Pleasant v. State, 15 Ark. 624; Stevens v. Irwin, 12 Cal. 306; State v. Meadows, 18 W. Va. 658; Mawson v. Hartsink, 4 Esp. 104; Carlos v. Brook, 10 Ves. Jr. 50; Queen v. Brown, L. R. 1 C. C. 70, 10 Cox, C. C. 453.

But he must show his knowledge of general reputation of the impeached witness before he will be allowed to say whether he would believe him on oath. Lyman v. Philadelphia, 56 Pa. 488. *Contra*, Willard v. Goodenough, 30 Vt. 393; Indianapolis, P. & C. R. Co. v. Anthony, 43 Ind. 183; King v. Ruckman, 20 N. J. Eq. 317; State v. Mairs, 1 N. J. L. 453; State v. Rush, 77 Mo. 519; Walton v. State, 88 Ind. 9.

It is not necessary that the witness be asked whether he would believe the impeached witness on oath. Laclede Bank v. Keeler, 109 Ill. 385.

After testimony as to general reputation, it is admissible to ask him whether he is worthy of belief. This is not the same as asking him if he would believe him on oath. Holbert v. State, 9 Tex. App. 219, 35 Am. Rep. 738.

On cross-examination a witness may be asked if he has not heard certain reports which tend to contradict his testimony as to character. Carpenter v. Blake, 10 Hun, 358; Oliver v. Pate, 43 Ind. 132.

Where particulars are brought out on cross-examination they cannot be gone into on re-examination. Gulerette v. McKinley, 27 Hun, 320.

Where on cross-examination a witness gives the name of one whom he has heard speak against the person whose character is being investigated, he may be asked what he said. Annis v. People, 13 Mich. 511.

In slander the character proved must be that which the plaintiff enjoyed before, and not after, the slander, for the slander itself might have affected his character. Douglass v. Tousey, 2 Wend. 352, 20 Am. Dec. 616. So in seduction and breach of promise. Stowell v. Beagle, 79 Ill. 525; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Boynton v. Kellogg, 3 Mass. 189, 3 Am. Dec. 122; Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672; Capehart v. Carradine, 4 Strobh. L. 42; Elsam v. Faucett, 2 Esp. 562. And in malicious prosecution. Winebiddle v. Porterfield, 9 Pa. 137.

In criminal cases the prosecution cannot show character subsequent to the indictment (State v. Kinley, 43 Iowa, 294; Com. v. Sackett, 22 Pick. 394); or the discovery of the offense. White v. Com. 89 Ky. 480; Wroe v. State, 20 Ohio St. 461.

What is a reasonable time is generally within the discretion of the court to decide. Holliday v. Cohen, 34 Ark. 707; Manion v. Lambert, 10 Bush, 298; Rucker v. Beaty, 3 Ind. 70; Stratton v. State, 45 Ind. 468; Aurora v. Cobb, 21 Ind. 492; State v. Howard, 9 N. H. 485; Willard v. Goodenough, 30 Vt. 393; Buse v. Page, 32 Minn. 111; Memphis & O. R. Packet Co. v. McCool, 83 Ind. 392, 43 Am. Rep. 71; Wood v. Matthews, 73 Mo. 477; Kelly v. State, 61 Ala. 19; Louisville, N. A. & C. R. Co. v. Richardson, 66 Ind. 43, 32 Am. Rep. 94.

But where later character has been shown to be bad, previous good character may be proved. Quinsigamond Bank v. Hobbs, 11 Gray, 250.

Whether a prisoner takes the stand in his own behalf his character as a witness may be impeached, but such impeaching evidence goes to his credibility only. Adams v. People, 9 Hun, 89; People v. Beck, 58 Cal. 212; State v. Beal, 68 Ind. 345, 34 Am. Rep. 263.



Digitized by Google

he stood charged; and the evidence was admissible whether or not the defendant himself testified. When testimony, competent and material, has been offered and erroneously rejected, the error is not cured by a conjecture that if offered at a subsequent period in the trial the evidence might have been admitted. It should also be observed that when a subsequent offer to the same effect was made the judge rejected it without qualification.

There was likewise error in that portion of the charge in which the judge instructed the jury as to the effect that they should give to the testimony showing the defendant's good character.

It is proper to give the judge's own language:

"Some testimony has been given you touching the good character of the defendant. When a man is charged with crime the courts of the United States permit this question of good character to be introduced to go to the jury. The theory, as I view it, is a wise one. If a man, in the community where he lives, by his incoming and outgoing among his neighbors, has built up in the years of his life, be they comparatively few or many, a character among them for good morals, which includes the uprightness and excellency of our general citizenship, it is right that the jury should know that fact. It is of value to them in conflicting cases in determining points in the case; and yet, gentlemen, I have to say to you that evidence of good character is no defense against crime actually proved. If the defendant in this case is proved guilty of crime charged, any good character borne by him in his community is no defense; it must not change your verdict; for the experience of mankind, of all of us, teaches us that men reputed to be of good moral character in a community unfortunately sometimes we find they are sadly different from that which they are reputed to be, and that they are committers of crime; yet the good character goes to the jury with special force whenever the commission of the crime is doubtful. If your mind hesitates [365] on any *point as to the guilt of this defendant, then you have the right and should consider the testimony given as to his good character, and it becomes, as I have suggested, or may be, of great importance in the minds of the jury in the matters of doubt."

To this portion of the charge the defendant's counsel took exception in the following terms: "We except to that part of the charge in stating the effect of good character, the defendant claiming that it should not be of force only in doubtful cases, but should be considered by the jury in connection with all of the evidence as to whether or not on all the evidence there is a reasonable doubt."

Some criticism is offered to the exception as made to the whole paragraph, and thus coming within cited cases, to the effect that exceptions are not well taken to an entire charge, or to large portions of a charge, if the instructions complained of are, as to some of them, sound. There is a reasonable rule that if the entire charge is excepted to, or a series of propositions contained in it is excepted to in gross, the exception cannot be sustained if there were a distinct proposition or instruction given that was sound. Waiving the question as to how far this rule is justly applicable to the case of a charge in a criminal case, we are of opinion that, in the present instance, the criticism is not well founded. The paragraph of the charge excepted to does not contain instructions on separate and distinct propositions, some of which are sound and others not so. The subject treated of in the paragraph is the single one of the proper effect to be given by the jury to the evidence of the defendant's good character. A fair understanding of the meaning of the instruction cannot be reached without reading and weighing the entire paragraph. There would have been more room for just criticism had the defendant taken exceptions to sentences or phrases detached from their connection.

If formally correct, was the exception in question substantially well taken? Was the charge, in the particular complained of, a correct exposition of the law?

It is impossible, we think, to read the charge without *perceiving that the leading [366 thought in the mind of the learned judge was that evidence of good character could only be considered if the rest of the evidence created a doubt of defendant's guilt. He stated that such evidence "is of value in conflicting cases," and that if the mind of the jury "hesitates on any point as to the guilt of the defendant, then you have the right and should consider the testimony given as to his good character."

Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.

*Jupits* v. *People*, 34 Ill. 516, was a case where the defendant was indicted for having received goods knowing them to have been stolen, and his counsel requested the trial judge to instruct the jury that the evidence of the good character of the defendant for honesty should have great weight in determining as to his guilt or innocence. This was qualified by the court by the addition of these words: "If the jury believe there is any doubt of his guilt." This was held to be error, and the supreme court of Illinois used the following language:

"The instruction as asked may be objectionable on account of the epithet "great," but as that was not the ground of the qualification, but on the ground, as is inferable, that the court did not consider evidence of good character of any weight except in a doubtful case. The more modern decisions . . . go to the extent that in all criminal cases, whether the case is doubtful or not, evidence of good character is admissible on the part of the prisoner. . . . We can hardly imagine a case where evidence of good character was a more important element of defense than this, and in the *language [367 of the instruction was entitled to great weight. Proof of uniform good character should raise



Digitized by Google

a doubt of guilty knowledge, and the prisoner would be entitled to the benefit of that doubt. Proof of this kind may sometimes be the only mode by which an innocent man can repel the presumption of guilt arising from the possession of stolen goods. It is not proof of innocence, although it may be sufficient to raise a doubt of guilt. The court seemed to think it was entitled to no weight, unless, taking the language used in the most favorable aspect, there was doubt of his guilt. A strong prima facie case was made out by the prosecution, but it was not conclusive. If the court had told the jury that his good character should be taken into consideration by them, and was entitled to much weight, a reasonable doubt of the prisoner's guilt might have been raised which would have resulted in his acquittal."

Similar conclusions were reached in *Com.* v. *Leonard*, 140 Mass. 473, 54 Am. Rep. 485; *Heine* v. *Com.* 91 Pa. 145; *Remsen* v. *People*, 43 N. Y. 6; *People* v. *Garbutt*, 17 Mich. 28, 97 Am. Dec. 162; 1 Whart. Crim. Law, § 636.

We find no errors disclosed by the other assignments.

*The judgment of the court below is reversed*, and the cause remanded with directions to set aside the verdict and award a new trial.

Mr. Justice **Brewer** concurs in the judgment.

Mr. Justice **Brown** dissents.

---

J. S. NOBLE and W. H. Noble, Partners under the Name of Noble & Ware, *Plffs. in Err.*,

*v.*

S. M. MITCHELL.

(See S. C. Reporter's ed. 367-378.)

*Act to punish agents of foreign insurance company for violation of statute—interpretation of state statute—question of fact.*

1. A state can lawfully punish or regulate, by the imposition of civil liability or otherwise, the doing of acts within the state by agents of a foreign insurance company, which are calculated to neutralize and make ineffective a statute prescribing conditions of the right of such corporation to do business within the state.
2. The interpretation of a state statute by the supreme court of the state, as to the divisibility of provisions some of which are unconstitutional, is binding on this court.
3. A mere question of fact which was submitted to the jury by the state trial court, and as to which the supreme court of the state said there was evidence sufficient for the consideration of the jury, is not subject to review here on writ of error.

[No. 101.]

*Submitted October 29, 1896. Decided November 30, 1896.*

IN ERROR to the Supreme Court of the State of Alabama to review a judgment affirming the judgment of the Circuit Court of Alabama in favor of the plaintiff, S. M. Mitchell, against J. S. Noble *et al.*, for the amount of a loss under a policy of insurance covering a stock of merchandise. *Affirmed.*

See same case below, 100 Ala. 519, 25 L. R. A. 238.

The facts are stated in the opinion.

*Messrs.* **John M. Chilton** and **Ariosto A. Wiley** for plaintiff in error.

*Mr.* **Charles Wilkinson** for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

Article 2 of chapter 5, title 12, of the Code of Alabama, regulates the subject of fire and marine insurance within the state by companies not incorporated therein. It is required by § 1199 that such companies shall pay annually into the treasury the sum of $100. Section 1200 directs that each of such corporations must file with the state auditor a certified copy of its charter and a statement setting forth certain items in relation to its business condition on the 31st day of December next preceding; and, by § 1201, such corporations are required to possess a cash capital of at least $150,000, and are obliged to file a written instrument consenting to service of process upon any agent of such company within the state. Upon compliance with all the requirements of the article, the auditor, if satisfied that the affairs of such company are in sound condition, is required to issue to it a license to transact the business of insurance within the state until the 15th day of January next ensuing.

Sections 1205, 1206, and 1207 of the same article read as follows:

"Sec. 1205. Any person who solicits insurance on behalf of an insurance company, not incorporated by the laws of this state, or who, other than for himself, takes or transmits an application for insurance, a premium of insurance, or a policy of insurance to or from such company, or in any way gives notice that he will receive or transmit the same, or receives or delivers a policy of insurance of such company, or who inspects any risk, or makes or [369 forwards a diagram of any building, or does any other thing in the making of a contract of insurance, for or with such company, other than for himself, or examines into, adjusts, or aids in examining into or adjusting any loss for such company, whether such acts are done at the instance of such company, or any broker, or other person, shall be held to be the agent of the company for which the act is done, and such company held to be doing business in this state.

"Sec. 1206. Any person acting as agent of any foreign insurance company which has not received the license from the auditor above provided for, or shall so act after its expiration, is liable personally to the holder of any policy of insurance in respect to which he so acted as agent for any loss covered by it; and shall forfeit, for each offense, the sum of $500, to be sued for in the circuit court where the delinquency occurs, by the solicitor, in the name of the state and paid into the state treasury, less 25 per cent retained by the solicitor for his services.

"Sec. 1207. The term 'insurance company,' as used in this article, includes every company, corporation, association, or partnership organized for the purpose of transacting the business of insurance."



Digitized by Google

The action below was originally instituted in a circuit court of Alabama by Mitchell, a citizen of Alabama, to recover from the defendants, a firm of insurance agents doing business in the city of Montgomery, the amount of a loss under a policy of insurance covering a stock of merchandise owned by the plaintiff, which policy was procured by the defendants from a corporation known as the Fairmount Insurance Association of Philadelphia, Pennsylvania. The corporation in question was not incorporated under the laws of Alabama, and at the time of the issue of the policy had not been licensed to do an insurance business within that state. From a verdict and judgment against them the defendants prosecuted error. The supreme court of the state affirmed the judgment. 100 Ala. 519, 25 L. R. A. 238.

The highest court of the state having affirmed
**370** the validity *of the state statute and enforced its provisions against the plaintiff in error, despite his objection duly made that such statute was repugnant to the Constitution of the United States, a writ of error was allowed, and the cause is here for review.

In *Hooper* v. *California*, 155 U. S. 648 [39: 297], this court held that a statute of the state of California which made it a misdemeanor for a person in that state to procure insurance for a resident in the state from an insurance company not incorporated under its laws, and which company had not filed the bond required by the laws of the state, was not a regulation of commerce, and did not conflict with the Constitution of the United States. The doctrine of earlier decisions of this court with reference to contracts of insurance, namely, that the business of insurance is not commerce, and that a contract of insurance is not, in the constitutional sense of the words, an instrumentality of commerce, was reiterated and held applicable to a marine policy. This court said (p. 655 [301]):

"The state of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power
**371** efficacious to the fullest extent, *subject always, of course, to the paramount authority of the Constitution of the United States."

It inevitably results from this ruling that the state of Alabama, in virtue of the power possessed by it of excluding foreign fire insurance corporations from its jurisdiction, could lawfully punish or regulate, by the imposition of civil liability, or otherwise, the doing of acts within the territory of the state calculated to neutralize and make ineffective the statute which prescribed conditions upon which alone the right existed in a foreign insurance corporation to do business within the state.

It is conceded that in so far as the Alabama law forbids foreign insurance corporations from doing business within the state in violation of the state law, such law does not conflict with the Constitution of the United States; but the claim is made that since the statute not only regulates foreign corporations, but declares that the term "insurance company" embraces every company, corporation, association, or partnership organized for the purpose of transacting an insurance business, therefore it violates § 2, art. 4, of the Constitution, guaranteeing that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The fact that foreign corporations are not "citizens," within the meaning of the Constitution, it is said was the reason of the ruling in *Hooper* v. *California*, hence that case does not apply to a state law which includes within its inhibitions those who are citizens. We need not, however, express any opinion as to the correctness of this asserted distinction, since, even if it be well founded, it has no relevancy to the question before us. The action below was predicated upon the fact that the business of insurance alleged on had been done by a foreign corporation. The supreme court of Alabama in interpreting the statute held that the provision as to foreign corporations was distinct and separable from those concerning associations or partnerships. It said:

"It is contended, however, by § 1207 of the Code, these provisions of the law are made to include 'associations' *and 'partnerships'
**372** as well as 'corporations' and in this respect discriminates against citizens of another state who may compose such 'partnerships,' and in this respect is violative of the constitutional provision which declares that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' We construe § 1207 as amendatory of the sections to which it refers, so as to substitute the words 'corporation, association, or partnership' for the words 'insurance company.' Thus construed, § 1205, would read as follows: 'Any person who solicits insurance on behalf of a corporation, association, or partnership not incorporated by the laws of this state,' etc., and § 1206, would read: 'Any person acting as agent of any foreign corporation, association, or partnership, which has,' etc. By holding that § 1207 is amendatory of the other sections referred to in the manner declared, §§ 1205 and 1206 are separable in their provisions, and, so far as they are made to apply to and are enforced against 'foreign corporations,' they do not contravene any provision of the state Constitution or the Constitution of the United States. *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168 [19: 357]; *Baldwin* v. *Franks*, 120 U. S.



Digitized by Google

678 [80. 766]; *South & N. Ala. R. Co.* v. *Morris*, 65 Ala. 193; *McCreary* v. *State*, 78 Ala. 480; *Powell* v. *State*, 69 Ala. 10; *Vine* v. *State*, 67 Ala. 73. The construction of the statute is one of difficulty, and the one given to it is not altogether satisfactory, but we are of opinion the language used in § 1207, considered in connection with other sections to which it refers, admits of the interpretation given to it, and when the statute is attacked upon constitutional grounds it is our duty to avoid such a construction, if it can be done consistently, as will defeat the entire legislation of the state upon questions embraced in these statutes relating to insurance companies."

This construction of the Alabama statute, made by the supreme court of that state, it is urged, is erroneous, and we are invited to disregard it, but manifestly the interpretation of a statute of the state of Alabama by the supreme court thereof under the circumstances here presented is binding on us. *Dibble* v. *Bel-*
373] *lingham Bay Land Co.* *163 U. S. 63, 78, 41 L. ed. 72, 75; *Union Nat. Bank* v *Louisville, N. A. & C. R. Co.* 163 U. S. 325, 331, 41 L. ed. 177, 178.

Reading, then, into the Alabama statute the construction given thereto by the court of last resort of that state, the argument of the plaintiff in error amounts to this, that although it is admitted that the law of the state of Alabama regulating the doing of insurance business by foreign corporations is not in conflict with the Constitution of the United States, nevertheless we should hold that it does violate that Constitution, because of another and separate law of Alabama, which it is asserted would be unconstitutional if it were before us for consideration. Of course, to state this proposition is to answer it.

It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the supreme court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error. *Dower* v. *Richards*, 151 U. S. 659 [38: 306]; *Re Buchanan*, 158 U. S. 31 [39: 884].

*Affirmed.*

Mr. Justice **Harlan** dissents.

---

UNITED STATES, *Appt.*,
v.
ALFRED H. ELLIOTT *et al.*

(See S. C. Reporter's ed. 373-380.)

*Redemption of land sold for taxes.*

Where lands have been sold for direct taxes under the act of February 6, 1863, and bid in by the United States, and the time of redemption has expired, a subsequent purchase of such lands from the United States by the life tenant at public auction is not a redemption or repurchase on the part of the remaindermen, and they are entitled to the benefit of the statute of 1891 giving compensation to owners of property sold for direct taxes.

[No. 87.]

*Argued October 19, 1896. Decided November 30, 1896.*

APPEAL from a judgment of the Court of Claims in favor of Alfred H. Elliott *et al.*, plaintiffs, against the United States, for one half of the assessed value of lands less the taxes assessed thereon under the direct tax acts. *Affirmed.*

Statement by Mr. Justice **Shiras:**

The facts of the case, as found by the court of claims, were as follows:

On March 18, 1863, block 91, in the town of Beaufort, South Carolina, was sold by the United States direct tax commissioner for South Carolina, under the direct tax act (12 Stat. at L. 294–423), to satisfy a tax, with penalty and interest, of $127.42 assessed against it, and was bid in by the United States. Said block was assessed for taxation by the said commissioner at $10,000 Subsequently it was divided into two lots, *viz.*, lot A, containing buildings, and measuring on the north line 103 feet; and lot B, measuring on the north line 207½ feet.

Lot A was resold November 1, 1866, at public auction, to T. R. S. Elliott for $200 and conveyed to him. Lot B was resold at public auction to Thomas M. S. Rhett for $225. At the time of the said sale for taxes the titles in lots A and B, save so much thereof as lies west of a line drawn parallel to the west line of lot A 103 feet west therefrom, were vested in T. R. S. Elliott as tenant for life, with remainder in fee in Alfred, William, Phœbe, Ann C., James C., Arthur H., Isabella R., Seignley C., Montrose, and Apsley H. Elliott, children of the said T. R. S. Elliott. The said Apsley H. Elliott died in the year 1867, and the other mentioned children are his heirs at law. The said Thomas R. S. Elliott died in 1876. The surviving children, who are the claimants, were of tender years during the late civil war. The value of that part of block 91 owned by the claimants is twenty-nine thirtieths of the whole value of said block.

*Thomas R. S. Elliott, the tenant for [375 life, adhered to the cause of the rebellion, and on the occupation of Port Royal by the Union troops in November, 1861, left St. Helena island, with all the population of those islands, and remained away until after the close of the war. During the entire period of his absence St. Helena island and the adjacent islands were occupied by United States troops and had been entirely abandoned by the original inhabitants. After the purchase, in November, 1866, by T. R. S. Elliott, the property was seized under

NOTE.—*As to sale of land for taxes; strict compliance with statute necessary,*—see note to Williams v. Peyton, 4: 518.

*As to direct taxes,* see note to Scholey v. Rew, 23: 99.



Digitized by Google

execution and sold as his property. Subsequently the purchaser of the property at sheriff's sale handed to the widow of T. R. S. Elliott the value of her dower in the property. No part of the property has come into the possession or ownership of the claimants, or any one of them, through the said T. R. S. Elliott. The claimants have not repurchased or redeemed any part of said property from the United States, nor has any purchase been made or intended to be on their account.

On this state of facts the court of claims found that the claimants were entitled to recover, and on May 8, 1893, entered judgment in their favor for the sum of $4,185.98. From this judgment an appeal was taken and allowed to this court.

*Messrs.* **J. E. Dodge,** Assistant Attorney General, and **George H. Gorman,** Assistant Attorney, for appellant.

The act of March 2, 1891 (26 Stat. at L. 822), § 4, after providing for the repayment of one half of the assessed value of certain real estate which had been sold for direct taxes, recites this proviso:

"That in all cases where such owners, or persons claiming under them, have redeemed or purchased said lands, or any part thereof, from the United States, they shall not receive compensation for such part so redeemed or purchased."

We hold that the facts of this case show the respondents to be fully and completely within the exclusion of this proviso.

*Chaplin* v. *United States*, 29 Ct. Cl. 231; *Lamborn* v. *Dickinson County Comrs.* 97 U. S. 181, 184 [24: 926, 928]; *Noonan* v. *Braley*, 67 U. S. 2 Black, 499-506 [17: 378-380]; *Varney* v. *Stevens*, 22 Me. 331.

If a tenant for life neglects or refuses to pay the taxes, a receiver may be appointed to take so much of the rent as is necessary for that purpose and to discharge that obligation.

*Cairns* v. *Chabert*, 3 Edw. Ch. 312.

It is thoroughly settled that a tenant for life cannot purchase at a tax sale, nor acquire an interest adverse to the reversioner or remainderman by obtaining an assignment of the tax title.

*Phelan* v. *Boylan*, 35 Wis. 679; *Varney* v. *Stevens*, 22 Me. 331; *Prettyman* v. *Walston*, 34 Ill. 175-191; *Olleman* v. *Kelgore*, 52 Iowa, 38; *Patrick* v. *Sherwood*, 4 Blatchf. 112; *Arnold* v. *Smith*, 3 Bush, 163; *Stovall* v. *Austin*, 16 Lea, 700; *Stewart* v. *Matheny*, 66 Miss. 21; *Jones* v. *Merrill*, 69 Miss. 747; 1 Washb. Real Prop. 5th ed. 132; Black, Tax Titles, § 285.

It is entirely unnecessary, however, to multiply authorities on the subject.

As was said by Judge Cooley and approvingly quoted by this court in *Lamborn* v. *Dickinson County Comrs.* 97 U. S. 181, 184 (24:-926, 928), "the principle is universal, and is so entirely reasonable as scarcely to need the support of authorities;" or, as was said by the court of claims in *Chaplin* v. *United States*, 29 Ct. Cl. 231, "the authorities are abundant and are all one way."

The term "owner" as used in the act applies to the life tenant. Under the decisions of the court of claims the term is held to embrace all persons who have any estate in the property.

*Rodgers* v. *United States*, 21 Ct. Cl. 130; *Elliott* v. *United States*, 20 Ct. Cl. 328; *Cuthbert* v. *United States*, 20 Ct. Cl. 172.

When this life tenant, Thomas R. S. Elliott, repurchased the real estate in question from the United States, it was a purchase for the benefit of the respondents, the remaindermen. It follows that the property having been purchased from the United States "by the owner, or those under whom he claims," the respondents are by the terms of the 1st proviso, § 4 of the act of March 2, 1891, expressly inhibited from recovery, and that the judgment rendered in their favor was erroneous.

The life tenant must pay the taxes, and if he does not do so and the property be sold and bought by him, such purchase, the law says, shall be for the benefit of the remainderman, whether the life tenant so intends it or not.

In *Joyce* v. *Gunnels*, 2 Rich. Eq. 260, it is held that a life tenant is a trustee by implication of law for the benefit of his remaindermen.

*Smith* v. *Daniel*, 2 McCord Eq. 143, 149, 16 Am. Dec. 641; *Clarke* v. *Deveaux*, 1 S. C. N. 172.

*Mr.* **James Lowndes,** for appellees:

It has not been disputed that a remainderman is an owner within the meaning of this statute.

Mills, Em. Dom. §§ 65, 73; Randolph, Em. Dom. § 302; *Watson* v. *New York C. R. Co.* 47 N. Y. 162.

It is not asserted that there was any redemption of the land, or that there was any actual purchase of it by the appellees or on their account, from the United States. The findings of fact expressly negative a redemption of any such purchase. The court of claims found that the appellees did not redeem or repurchase any part of said property from the United States, and that the purchase of the said Thomas R. S. Elliott was not intended to be on their account.

The purchase of the life tenant did not, in the circumstances of this case, come within this principle and did not inure to the benefit of the remaindermen.

The alleged right of the remaindermen against the life tenant, if it exists, did not constitute the former purchasers within the meaning of the proviso of the act of March 2, 1891.

So far as regards the rule that a tenant for life in purchasing at tax sale is a trustee for the remaindermen, that rule has no application to the present case, as the life tenant, Thomas R. S. Elliott, did not purchase at the tax sale.

The tax sale was made in March, 1863, and the land was bid off to the United States, by virtue of which proceedings the legal title vested in the United States. The purchase by the life tenant was made more than three years afterwards, to wit, on the 1st of November, 1866, when the United States offered at public auction to the highest bidder said lot A, to which it had obtained title under the previous tax sale. At this auction the tenant for life was the successful bidder.

The remedy granted to the remaindermen goes upon the ground of constructive fraud by the life tenant.

Black, Tax Titles, 2d ed. §§ 276, 566; *Frank* v. *Arnold*, 78 Iowa, 370; *Lindley* v. *Snell*, 80 Iowa, 103; *Thorington* v. *Montgomery*, 88 Ala. 548; *Bernal* v. *Lynch*, 37 Cal. 135; *Guynn* v.



Digitized by Google

*McCauley*, 32 Ark. 109; *Barney* v. *Stevens*, 22 Me. 331; *Petty* v. *Mays*, 19 Fla. 661; *Rothwell* v. *Dewees*, 67 U. S. 2 Black, 613 (17: 309); *Branson* v. *Yancy*, 1 Dev. Eq. 77; *Phelan* v. *Boylan*, 25 Wis. 679.

It is apparent from all these decisions that the ground of relief granted to the remaindermen is fraud. In all of them there was collusion between the life tenant and the nominal purchaser.

To bring the present case within this principle it would be necessary to show that the life tenant stood by and permitted the tax sale to be made with the purpose of carrying out a fraudulent intent to devest the remaindermen of their title, and that there was a corrupt arrangement between him and the United States, by which the latter was to purchase at a tax sale and to resell to him, the life tenant, at a nominal price.

The failure of the life tenant to pay the direct tax was not a part of a scheme to commit a fraud, but the result of a common calamity in which both the life tenant and remaindermen were involved.

The act of February 6, 1863, contemplated an absolute sale to the United States, and the tenant for life could not at that time have laid a scheme for the repurchase of the land.

In cases of this class one of the evidences of fraud is that the life tenant has bought the property for the tax or a nominal sum. In this case, on the contrary, the life tenant bought at a public auction conducted by the officers of the United States, under a statute which gave him no privilege. He could purchase only in competition with all the world and by being the highest bidder and by paying value for the property. He was a bona fide purchaser for value.

No reasonable ground can be suggested for holding that the life tenant should not be allowed to purchase at the tax sale under the act of 1866 on his own account and to retain his purchase. By purchasing he did no harm to the remaindermen, and by abstaining from purchasing would have worked them no benefit.

The present case is one of purchase by the life tenant, and not of redemption. The two proceedings should be carefully distinguished.

In the present case there was no redemption, but an entirely different proceeding, *viz.*, a sale to a third person and a release by that third person to the tenant for life.

If, for the sake of argument, it be assumed that remaindermen have rights in the land, as alleged, by virtue of the purchase of a life tenant, they cannot, by virtue of such rights, be said to have "purchased" the land within the meaning of the proviso of the act of March 2, 1891.

Endlich, Interpretation of Statutes, §§ 107, 108.

Mr. **Justice Shiras** delivered the opinion of the court:

The act of February 6, 1863 (12 Stat. at L. 64), provided for the collection of direct taxes in insurrectionary districts within the United States, by subjecting lands, on which such taxes had been assessed and remained unpaid, to public sale to the highest bidder for a sum not less than the taxes, penalty, and costs, and 10 per cent per annum on said tax. The act contained a provision that the tax commissioners should be authorized to bid in such lands for the United States at a *sum not exceeding[377 two thirds of the assessed value thereof, unless some person should bid a larger sum. It also gave a right of redemption to minors, nonresident aliens, loyal citizens beyond seas, guardians or trustees of persons under legal disabilities, at any time within two years of such sale.

The land of the claimants was sold on March 3, 1863, and bid in by the United States for the sum of $1,100. Subsequently, November 1, 1866, the United States sold at public auction that portion of its land described as lot A to T. R. S. Elliott for $200, and the same was conveyed to him. Said Elliott died in 1876. During his lifetime the land was seized under execution as his property and sold, and never afterwards came into his possession or that of the claimants.

The act of March 2, 1891 (26 Stat. at L. 822), provided for the return to the owners of lands bid in for taxes and subsequently resold of any excess received by the United States beyond the amount of the tax assessed thereon, and also for a certain rate of compensation to the owners of property sold for direct taxes. The 4th section of that act contained the following:

"That it shall be the duty of the Secretary of the Treasury to pay to such persons as shall apply therefor and furnish satisfactory evidence that such applicant was at the time of the sales the legal owner, or is the heir at law or devisee of the legal owner of such lands as were sold in the parishes of St. Helena and St. Luke in the state of South Carolina, under the said acts of Congress, the value of said lands, in the manner following, to wit: To the owners of the lots in the town of Beaufort, one half of the value assessed thereon for taxation by the United States direct tax commissioners for South Carolina; to the owners of lands which were rated for taxation by the state of South Carolina as being usually cultivated, $5 per acre for each acre thereof returned on the proper tax book; to the owners of all other lands, $1 per acre for each acre thereof returned on said tax book: *Provided*, That in all cases where such owners, or persons claiming under them, have redeemed or *purchased[378 said lands, or any part thereof, from the United States, they shall not receive compensation for such part so redeemed or purchased; and any sum or sums held or to be held by the said state of South Carolina in trust for any such owner under § 3 of this act shall be deducted from the sum due to such owner under the provisions of this section: *And provided, further*, That in all cases where said owners have heretofore received from the United States the surplus proceeds arising from the sale of their lands, such sum shall be deducted from the sum which they are entitled to receive under this act. . . ."

This suit was brought by the appellees in the court of claims to assert their claim as the owners in fee simple in remainder of block 91, composed of lots A and B, to $\frac{11}{12}$ths of one half of the value assessed for taxation on said block by the United States direct tax commissioners for South Carolina. The court of claims



Digitized by Google

found, among other findings, that the claimants had not repurchased or redeemed any part of lot A from the United States; nor had any purchase been made, intended to be, on their account; and rendered judgment for the claimants in the sum of $4,709.22, being $\frac{1}{16}$ths of one half of the assessed value of block 91, less the taxes assessed thereon under the direct tax acts. From so much of this judgment as relates to one half of the assessed value of lot A the United States has appealed to this court. There is no controversy as to so much of the judgment as relates to lot B.

The United States do not claim that the appellees, as remaindermen in fee, are not owners, within the meaning of the statute; but they contend that the claimants are within the exclusion of the proviso that in all cases where such owners, or persons claiming under them, have redeemed or repurchased said lands, or any part thereof, from the United States, they shall not receive compensation for such part so redeemed or purchased.

As already stated, the court of claims found, as a fact, that the claimants had not redeemed or repurchased any part of lot A, nor had any purchase thereof been made on their account. But this finding is alleged by the United States 379] to *have been based on an erroneous view of the law, that the claimants must be deemed to have repurchased lot A because T. R. S. Elliott, the life tenant, had purchased said lot A at the public sale made by the government in 1866.

The theory of the government is that the life tenant was so far a trustee or representative of the remaindermen that, when he purchased at the public sale in 1866 he acted as well for those in remainder as for himself. To sustain this view the counsel for the United States point to the numerous cases in which it has been held that a tenant for life cannot purchase for himself at a tax sale, or acquire an interest adverse to the reversioner or remainderman by obtaining an assignment of the tax title.

Unquestionably, those cases do declare that, as it is the duty of the life tenant to pay the taxes, he cannot, by buying the property at a tax sale or by buying from a purchaser at such sale, take advantage of his own wrong and set up a title so acquired against the remaindermen.

But does the principle of such decisions apply to a case like the present?

That principle is that one whose duty it is to keep the taxes paid cannot, as against those who had a right to rely on his performance of such duty, successfully assert a title originating in his dereliction of duty. In all the cases cited the question was between the life tenant and the remaindermen. In the present case the doctrine is invoked, not in protection of the remaindermen, but to their detriment. The argument is that, because the remaindermen might, by proceeding in equity, have had it declared that the title purchased by the life tenant at a public sale inured to their benefit, it therefore follows that they must be regarded to have been purchasers at said sale, and be now precluded from the benefits of the act of 1891.

An important circumstance is that T. R. S. Elliott did not buy the property at the tax sale in 1863; nor did he buy from an agent or go-between who bought at that sale; nor did he redeem the land under the provisions of the tax law. He bought at the public sale in 1866; the time for redemption *having long expired, when[380 the United States gave a fee-simple title, free from encumbrances, to the purchaser. If anyone else than the former life tenant had purchased at that sale, it is indisputable that the present claimants would have had a right to recover the money coming to them as owners under the act of 1891. T. R. S. Elliott was under no obligations to bid, and we are unable to see that his doing so changed the relations between the United States and the appellees. If the creditors of T. R. S. Elliott, instead of awaiting his action in possessing himself of the title of the United States to the property, and then seizing it in execution, had themselves bought at the sale, the substantial facts would have been just what they now are. It was found as a fact, by the court of claims, that in buying at the auction sale T. R. S. Elliott did not act for or on account of the remaindermen, and we do not feel constrained to extend a doctrine devised for the protection of *cestuis que trustent* so as to operate to their injury.

As, then, the appellees were admittedly owners; as they themselves neither purchased nor redeemed the land; and as they are not held by any necessary intendment of law to have been represented by the actual purchaser,—it follows that they are entitled to the benefit of the remedial statute of 1891, and *the decree of the Court of Claims to that effect is accordingly affirmed.*

---

LEWIS M. STONE, *Appt.*,
*v.*
UNITED STATES and the Cheyenne and Arapahoe Indians.

(See S. C. Reporter's ed. 380-383.)

*Findings of courts of claims—opinion—modifying findings.*

1. The findings of the court of claims in an action at law determine all matters of fact precisely as the verdict of a jury.
2. A statement in the opinion of the court, that it has no reason other than the lapse of time and the inaction of the claimant to discredit the witnesses or suspect a claim which was over twenty years old, which was supported by only two witnesses, and which the court found was not sufficiently proved, does not lay down an arbitrary rule of evidence as to the number of witnesses required in different classes of cases, but is only a finding that the proof is not sufficient.
3. This court cannot refer to the opinion of the court below for the purpose of eking out, controlling, or modifying the scope of the findings of that court.

[No. 118.]

*Argued November 4, 1896. Decided November 30, 1896.*

APPEAL from a judgment of the Court of Claims in favor of defendants, the United States *et al.*, in an action brought by Lewis M.

NOTE.—*That the Supreme Court will not review the discretionary action of the court below*, see note to Barrow v. Hill, 14: 48.



Digitized by Google

Stone, plaintiff, to recover the value of property taken or destroyed by the Indians. *Affirmed.*

See same case below, 29 Ct. Cl. 111.

Statement by Mr. Justice **Brewer:**

381] *On April 16, 1891, appellant, under authority of the act of March 3, 1891 (26 Stat. at L. 851), filed his petition in the court of claims to recover the sum of $12,375 for certain property, to wit, two geldings, of the value of $500 each, and ninety-one head of horses, of the value of $125 each, alleged to have been taken or destroyed by the Cheyenne and Arapahoe Indians on November 17, 1867. A traverse having been filed, the case was submitted to the court upon the evidence. Certain findings of fact were made, the second of which is as follows:

"The depredation was committed on the 17th of November, 1867, near the town of Fort Collins, in Larimer county, Colorado, by the defendant Indians. The claimant never presented this claim to the Department of the Interior nor to Congress nor to any officer or agent of the government until his petition in this case was filed in this court on the 16th of April, 1891. It is supported only by the testimony of the claimant himself and one witness. Since the claimant testified he has filed his own *ex parte* affidavit, stating that the witness above referred to 'is the only person with whom I am acquainted who is familiar with the theft complained of,' and that of thirteen persons who followed the Indians at the time they took his horses he does not know the whereabouts of any except the witness produced, and that he had used every endeavor to discover the other witnesses, but can secure no information except that they are dead. The court is not satisfied by this evidence as to the extent of the depredation or the value of the property."

Upon this finding judgment was entered in favor of the defendants (29 Ct. Cl. 111), from which judgment the claimant appealed to this court.

*Messrs.* **Charles A. Keigwin, J. M. Wilson,** *Samuel Shellabarger,* and *Wm. B. Matthews* for appellant.

*Mr.* **Charles B. Howry,** Assistant Attorney General, for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

382] *The findings of the court of claims in an action at law determine all matters of fact precisely as the verdict of a jury. 24 Stat. at L. 505, §§ 2, 7; 26 Stat. at L. 851, §§ 1, 4; *Desmare* v. *United States,* 93 U. S. 605, 610 [23: 959, 960]; *McClure* v. *United States,* 116 U. S. 145 [29: 572].

That court finds that the claimant, upon whom rests the burden of proof, has not proved the extent of the depredation or the value of the property, and there being thus a case of a failure of proof judgment properly went against the party upon whom the burden rested. Counsel for appellant contend that the court of claims has attempted to create a rule of evidence as to the number of witnesses required in different classes of cases. Beyond the language of this finding they call our attention to the opinion in which, after a reference to the peculiar circumstances of this case, the court observes: "The court has no reason in this particular case, other than the lapse of time and the inaction of the claimant, to discredit the witnesses or suspect the claim." We cannot so interpret the finding or the opinion. We do not understand that either lays down any arbitrary rule of evidence, as, for instance, that a claim ten years old must be proved by at least two witnesses, one twenty years old by three witnesses; and so on. Such action would be legislative rather than judicial. The court simply refers, and properly, to the age of the claim, the failure to present it for such a length of time and the meagreness of the testimony now offered to substantiate it, and then finds that such testimony, as to two essential facts in the claimant's case, to wit, the extent of the depredation and the amount of the loss, is not sufficient. It is true the court does not find that the witnesses have sworn falsely, but that is not essential even when that is its belief. To say that the testimony is not satisfactory is more polite and less offensive, and at the same time equally sufficient. More than that, it is the very language of the statute (§ 4): "But the claimant shall not have judgment for his claim, or for any part thereof, unless he shall establish the same by proof satisfactory to the court." We do not mean to intimate that the court in this *case believed that the witnesses [383 committed perjury. On the contrary it may well be that it simply found the testimony so confused, so lacking in distinctness and precision, as to suggest a weakening of the memory through lapse of time, and, therefore, not the satisfactory proof required of these essential facts.

We are not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings. *British Queen Min. Co.* v. *Baker S. Min. Co.* 139 U. S. 222 [35: 147]; *Lehnen* v. *Dickson,* 148 U. S. 71 [37: 373]; *Saltonstall* v. *Birtwell,* 150 U. S. 417 [37: 1128]. Neither is this a case like *United States* v. *Clark,* 96 U. S. 37 [24: 696], in which in one finding was stated the testimony, and in another the conclusion as to the ultimate fact, in which case the court held that it might consider the sufficiency of such testimony to establish that principal fact, for here the finding does not disclose the testimony, but only describes its character, and, without questioning its competency, simply declares its insufficiency.

*The judgment is affirmed.*



Digitized by Google

NORTHERN PACIFIC RAILROAD COMPANY, *Piff. in Err.*,
*v.*
LEONARD P. COLBURN.

(See S. C. Reporter's ed. 383-388.)

*Federal question—ruling of land department.*

1. A Federal question presented by an unsuccessful claim of title by defendant, a railroad company, under a congressional land grant, is not made ineffectual as the basis of a writ of error by the fact that its answer also sets up certain proceedings in the land department and the decision of that department that the land was excepted from the company's grant, when this was set up merely to show that such decision was ineffective and as an answer to plaintiff's claim that it was controlling in his favor.

2. A ruling of the land department that occupation and cultivation without filing any claim in the land office will exempt land from a grant is a decision on a matter of law which is not conclusive on the parties against an attempt to review it in the courts, although the decision as to the fact of occupation may be conclusive.

[No. 70.]

*Argued October 27, 1896. Decided November 30, 1896.*

IN ERROR to the Supreme Court of Montana to review a judgment of that court which affirmed a judgment of the District Court of the County of Gallatin, Montana, in favor of plaintiff, Leonard P. Colburn, against the Northern Pacific Railroad Company for moneys paid as the contract price of a tract of land conveyed by defendant to plaintiff, the title to which was not good. There was also a motion to dismiss. *Reversed*, and case remanded for further proceedings

See same case below, 13 Mont. 476.

Statement by Mr. Justice **Brewer**:

On April 28, 1892, defendant in error, as plaintiff, filed in the district court of the county [384] of Gallatin, Montana, his *complaint against the railroad company to recover a sum of money paid as the contract price of a tract of land conveyed by it to him. The contract was alleged to have been made on January 16, 1886, by the company, with Nathan Frost, who, in the same year, transferred his interest to John R. Foster, who, in 1888, in like manner conveyed to the plaintiff. Payments by the terms of the contract were to be made and were made on January 16 of the years 1886, 1887, 1888, 1889, 1890, and 1891. The complaint further alleged that the railroad company did not have and could not convey any title to the land; that in January, 1891, in certain proceedings in contest, the Secretary of the Interior decided that the land did not pass under the land grant to the railroad company, but was subject to entry and patent under the general land laws of the United States, and that during that year a patent was issued to the plaintiff.

The railroad company answered, setting up the act of Congress of July 2, 1864 (13 Stat. at L. 365), making to it a land grant of 20 alternate sections per mile on each side of its road in the territories of the United States; the filing on February 21, 1872, in the office of the Commissioner of the General Land Office, of its map of general route, as provided in § 6 of the act; the like filing on July 6, 1882, of its line of definite location; the construction of its road; that this land was not mineral; was free from pre-emption and other claims; was an odd-numbered section within 40 miles of its line of general route and 20 miles of its road as definitely located and constructed, and situated within the territory of Montana; and alleged that thereby it acquired full title. It set forth in terms the contract of January 16, 1886, with Nathan Frost, the various transfers by which, on January 15, 1888, the plaintiff obtained title thereto, admitted the payments, and alleged an execution and delivery to the plaintiff of a deed, in conformity to the terms of the contract; and further, that his possession had never been disturbed or his title assailed or impaired. It admitted that at the time of the filing of the map of definite location one Horace F. Kelly claimed to be occupying and cultivating the land, but denied that he had made any entry or filing in the local land *office. [385] It alleged that in 1888, Foster, plaintiff's immediate grantor, contested the right of the railroad company to this land, that a contest thereon was had in the land office and finally on appeal before the Secretary of the Interior, who held that Kelly's cultivation and occupation created a claim which he could have perfected under the public land laws, and therefore excepted the land from the scope of the company's grant. It denied that a patent had been issued to the plaintiff, or to anyone else, and alleged that prior to plaintiff's purchase of the contract from Foster he knew of the claim that the land was not within the scope of the company's land grant and was not its property.

To this answer a demurrer was filed by the plaintiff which was sustained by the circuit court, and a judgment rendered for the plaintiff. Thereupon the case was taken to the supreme court of the state, which affirmed the judgment (13 Mont. 476), and then the railroad company sued out this writ of error.

*Mr.* **C. W. Bunn** for plaintiff in error.

No brief filed for defendant in error, on the merits, but a brief was filed on the motion to dismiss by *Messrs.* **W. B. Matthews** and **W. L. Holloway** for defendant in error, in favor of motion.

Mr. Justice **Brewer** delivered the opinion of the court:

A motion is made to dismiss for lack of a Federal question. The contention is that the defendant disclosed in its answer a decision of the land department; that it is bound by its own pleadings; and that having pleaded this decision of the land department, that decision is final and conclusive until set aside in a direct proceeding instituted for that purpose. This motion must be overruled. The answer of the company alleged the congressional land grant, and the facts and circumstances which under

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

*As to land grants to railroads*, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.



Digitized by Google

that grant created as claimed a title in it to the land. It is true it also set up certain proceedings in the land department, but that was by way of answer to the allegations in the complaint of a decision by that department claimed by the plaintiff to be controlling, and disclosed **386**] *in detail the facts upon which that decision was based and the terms of the decision itself in order to show that such decision was ineffective to disturb the title which it took by virtue of the land grant and the proceedings had thereunder. If the company had relied upon this decision as its defense against the action, and the court had decided in favor of its validity, a different conclusion might be reached. The judgment of the supreme court of the state was adverse to the claim of title made by the company. It denied to it the right which it asserted under the act of Congress, and a Federal question is therefore presented.

On the merits of the case it may be observed that the burden of the decision of the supreme court of the state is that because the land department had decided adversely to the claim of the railroad company, and because no direct proceedings had been had to set aside that decision, it was conclusive against the company. In this we think the learned court erred. The facts set up in the answer in reference to the land grant, the filing of the map of the line of general route and also that of definite location, the situation of the land, and its freedom from record claims, were such as to prima facie vest a title in the company. It is true it is also disclosed by the answer that one Kelly was in occupation, or at least cultivating the land at the time of the filing of the map of definite location, and the decision of the land department as to that fact undoubtedly concludes both parties. And if it be true, as matter of law, that mere occupation or cultivation of the premises at the time of the filing of the map of definite location, unaccompanied by any filing of a claim in the land office then or thereafter, excludes the tract from the operation of the land grant, the decision of the supreme court of Montana was right. But frequent decisions of this court have been to the effect that no pre emption or homestead claim attaches to a tract until an entry in the local land office. Thus, in the case of *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 629, 644 [28: 1122, 1127], Mr. Justice Miller, speaking for the court, said:

"Of all the words in the English language, **387**] this word *'attached' was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation."

This language was quoted and the decision reaffirmed in *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357 [33: 363]; *Whitney* v. *Taylor*, 158 U. S. 85 [39: 906]. In *Lansdale* v. *Daniels*, 100 U S. 113, 116 [25: 587, 589], it was ruled that "such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preemptor, the rule being that the settlement alone is not sufficient for that purpose." See also *Maddox* v. *Burnham*, 156 U. S. 544 [39: 527]. Now in this case the allegations are that Kelly never made any entry in the local land office, and the decision of the Secretary of the Interior is based simply on the fact of occupation and cultivation. And while the decision of that fact may be conclusive between the parties, his ruling that such occupation and cultivation created a claim exempting the land from the operation of the land grant, is a decision on a matter of law which does not conclude the parties, and which is open to review in the courts.

In this connection it may be borne in mind that the act of Congress operated to pass the fee of the land to the company, and this independently of the issue of a patent. *St. Paul & P. R. Co.* v. *Northern P. R. Co.* 139 U. S. 1, 6 [25: 7, 80]; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241 [35: 999]. While it is alleged in the complaint that a patent had been issued to the plaintiff, this fact is denied in the answer, so that the case is presented of a mere decision of the Secretary of the Interior that the plaintiff was entitled to a patent and not that of a patent already issued.

Though a patent had been issued it would not follow that that is conclusive in even an action at law, and that in all cases some direct proceeding to set aside the patent is necessary. *Burfenning* v. *Chicago, St. P. M. & O. R. Co.* 163 U. S. 321 [41:175] and cases cited in the opinion.

*There are other questions in this case, **388** such as the significance of an "expired filing," the omission in the Northern Pacific land grant of the word "attached" in respect to pre-emption claims which seems to have been deemed by this court significant in the construction of the Union Pacific and other land grants, the question whether, after the filing of the map of general route on February 21, 1872, any rights of pre-emption or homestead could be acquired in this land, and also whether, as plaintiff had not been disturbed in his possession and made his payments with notice of all the facts, he must not be held to have made such payments voluntarily or only under a mistake of law, and so be precluded from recovering. But as none of these matters were considered by the supreme court of the state, and are not noticed by counsel for defendant in error, we deem it unwise to make any observations thereon, leaving them for consideration in the future progress of the case.

For the reasons above indicated, because the decision of the land department was only on matters of fact and did not conclude the law of the case, and because such facts so found were not of themselves sufficient to disturb the title of the railroad company, *the judgment is reversed* and the case remanded to the supreme court of the state for further proceedings not inconsistent with this opinion.



Digitized by Google

CHARLES W. ACERS, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 383-393.)

*Instruction to jury—intent to assault—deadly weapon—self-defense—deadly violence.*

1. On a trial for assault with intent to kill an instruction to the jury that the intent to commit an assault may be found from the act itself is not erroneous when it is given in connection with repeated declarations that the intent is to be deduced from all the circumstances of the case, without anywhere stating that the assault of itself necessarily proves the intent.
2. An instruction that a deadly weapon is a weapon with which death can be easily and readily produced, and referring to the manner in which it was used and the part of the body upon which a blow was struck, as circumstances to be considered in determining its character, is not improper.
3. An instruction that a real danger to justify self-defense cannot be a past danger or a danger of a future injury, but must be a present danger and a danger of great injury to the person, that would maim him or be permanent in its character or that might produce death, is not erroneous.
4. An instruction that an apparent danger, to justify self-defense, is danger to life or of deadly violence to person, is not erroneous as limiting the defense to such cases as show an intention of the assailant to take life, when other parts of the charge show that what was meant by "deadly violence" was simply great violence.

[No. 393.]

*Submitted October 22, 1896. Decided November 30, 1896.*

IN ERROR to the District Court of the United States for the Western District of Arkansas to review a judgment of conviction of Charles W. Acers of an assault with intent to kill. *Affirmed.*

The facts are stated in the opinion.

*Messrs.* **A. H. Garland** and **R. C. Garland,** for plaintiff in error:

While the court may have correctly applied the law as to mere assault, the crime with which Acers was charged was something

---

NOTE.—*As to criminal law, effect of general verdict,* see note to Snyder v. United States, 28: 697.

*As to threats by deceased in cases of homicide; when admissible in evidence,*—see note to Wiggins v. Utah, 23: 941.

*Assault with intent to kill or murder, what is; what intent sufficient; what evidence sufficient; distinction between intent to murder and intent to kill.*

An assault with intent to murder involves the concurrence of two distinct elements, an intent to murder, and an assault or attempt to carry out that intention. People v. Devine, 59 Cal. 630; White v. State, 3 Tex. App. 605. See also Bass v. State, 6 Baxt. 581.

In an assault with intent to murder, while the specific intent is the gist of the offense, still, so long as the crime remains in mere intention it is not punishable, but if an attempt is made to execute the intention, which falls short of its consummation, the crime is committed, because the act and intent coalesce and the intent has passed into action, although that action was futile. Watts v. State, 30 Tex. App. 533.

The intent to commit the specific crime is the essence of the offense. Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; Smith v. State, 83 Ala. 26; Felker v. State, 54 Ark. 489; People v. Mize, 80 Cal. 41; State v. Fiske, 63 Conn. 388; Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396; Crosby v. People, 137 Ill. 325; State v. White, 41 Iowa, 316, 20 Am. Rep. 602; State v. Neal, 37 Me. 468; Botsch v. State, 43 Neb. 501; Slatterley v. People, 58 N. Y. 354.

In Allen v. State, 52 Ala. 391, it was held that an intent to maim or murder, whether deliberate or formed on the instant, whether it is specific or general, if directed against the person charged in the indictment to have been assaulted, amounts to the criminal intent described in the statute. The malice may be either express or implied. Hanreban v. People, 91 Ill. 142; Anderson v. State, 1 Tex. App. 730; Wilson v. State, 4 Tex. App. 637.

To constitute an assault with intent to murder, which is a felony by statute, it is not sufficient to prove a general felonious intent or any other than the particular intent alleged in the indictment. The burden of proving the alleged intent as well as the other facts which constitute the felony, is on the state, and its actual existence is a question of fact for the jury. Ogletree v. State, 28 Ala. 693; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; Morgan v. State, 13 Smedes & M. 242; Jones v. State, 11 Smedes & M. 315; State v. Gainus, 86 N. C. 632.

It was held in People v. Shaw, 1 Park. Crim. Rep. 327, that an indictment under the New York Revised Statutes, charging the committing of an assault and battery with a deadly weapon with intent to kill, is sustained by proof that the act was done with intent to commit any felonious homicide, it not being necessary to prove an intent to commit murder. It was held in Lacefield v. State, 34 Ark. 275, 36 Am. Rep. 8, that where one aiming at A misses him and wounds B, he cannot be convicted of assault with intent to kill B. *Contra*, State v. Gilman, 69 Me. 163, 31 Am. Rep. 257; Callahan v. State, 21 Ohio St. 306; Walker v. State, 8 Ind. 290; Dunaway v. People, 110 Ill. 333, 51 Am. Rep. 686; State v. Jump, 90 Mo. 171.

The intent may be inferred from the character of the assault, the want or the use of a deadly weapon, and the presence or absence of excusing or palliating circumstances. Meredith v. State, 60 Ala. 441.

An intent to take life, in an assault with intent to murder, may, like the malicious intent of the murder, be inferred from the character of the assault, the use of a deadly weapon, and other circumstances. Walls v. State, 90 Ala. 619; Smith v. State, 88 Ala. 23; Crawford v. State, 86 Ala. 16; Jolly v. State, 94 Ala. 19.

If the means used in committing an assault and battery are such as would ordinarily and probably produce death the jury may find the defendant guilty of the alleged intent. Hughes v. State, 65 Ind. 39.

There must be some adaptation, real or apparent, in the act done and the means used to accomplish the alleged purpose. If it be evident that the means used are entirely inadequate to the consummation of the intent charged, that fact will rebut or disprove the felonious intent, and a conviction cannot be justified. Kunkle v. State, 32 Ind. 220; Mullen v. State, 45 Ala. 43, 6 Am. Rep. 691.

If a man shoots with a pistol at another and hits him, the law presumes, prima facie, that he did it with malice, even when the act was done recklessly in sport, nor do the friendly relations of the parties rebut the presumption. Collier v. State, 39 Ga. 31, 99 Am. Dec. 449; Perry v. People, 14 Ill. 496; Com.



Digitized by Google

more than that,—it was "assault with intent to kill,"—and there must have been not only the assault, but coupled with it the "intent to kill" the victim. To sustain an indictment for an assault to murder, the evidence must be such as would warrant a conviction of murder had death ensued from the assault.

*McCoy* v. *State*, 8 Ark. 451; *Reg.* v. *Cruse*, 8 Car. & P. 541; *State* v. *Jefferson*, 8 Harr. (Del.) 571; 1 Russell, Crimes, 719; Whart. Crim. Law, 467; Stark, Ev. 53.

The seventh assignment relates to the rule as laid down by the court, that a man must be just as deliberate, when attacked, in deciding whether he has a right to defend himself, as he would be if he was executing the law in a court of justice. This court holds language of this sort erroneous.

*Hickory* v. *United States*, 151 U. S. 303 (38: 170).

The *Hickory Case* and *Allen* v. *United States*, 150 U. S. 551 (37: 1179), completely overthrow the charge of the trial court, and in the face of these Acers stands most erroneously convicted.

It is not required that defendant should be in fear of "deadly" violence, but of "great or enormous" bodily harm simply.

3 Greenl. Ev. 14th ed. § 116.

The last assignment goes to the failure of the court to instruct upon presumption of innocence—confounding this with reasonable doubt. It is true that this is not specifically assigned as error, but this court will, if error be patent upon the face of the record, examine the same, and act upon it as if it had been assigned.

*Coffin* v. *United States*, 156 U. S. 432 (39: 481); *Cochran* v. *United States*, 157 U. S. 286 (39: 704).

Some of the errors complained of are not presented as specifically as they might have

---

v. Reynolds, 120 Mass. 190, 21 Am. Rep. 510; People v. Vinegar, 2 Park. Crim. Rep. 24.

The same presumption arises in the case of an assault by stabbing, and to rebut it the proof must show that the stabbing was done under such circumstances as would, had death ensued therefrom, have mitigated the offense from murder to manslaughter, or excusable homicide, or to leave it doubtful whether it was not so done. Wright v. State, 9 Yerg. 343; Conn v. People, 116 Ill. 458.

It was held in Monday v. State, 32 Ga. 672, 79 Am. Dec. 314, that while an intent to murder is usually manifested by the use of a deadly weapon, still an assault with intent to murder may be committed without the use of a weapon that would be likely to produce death. See Southworth v. State, 5 Conn. 325.

It was held in State v. Foley, 12 Mo. App. 431, that the question whether one charged with an assault with intent to kill is guilty of a felonious intent in committing the act charged, must be determined by the facts as they appear to the defendant himself.

In an indictment for an assault with intent to commit the crime of murder, it is wholly immaterial whether the murder intended would, if consummated, have been murder in the first or second degree. Meredith v. State, 60 Ala. 441; People v. Scott, 6 Mich. 287; State v. Williams, 23 N. H. 321; Sharp v. State, 19 Ohio, 379; Wright v. State, 9 Yerg. 342; Wilson v. State, 4 Tex. App. 637; Stapp v. State, 3 Tex. App. 138; Bonfanti v. State, 2 Minn. 123; Dains v. State, 2 Humph. 439.

In order to convict upon the charge of assault with intent to murder, the evidence must be such as would have warranted a conviction of murder had death ensued from the assault. Scitz v. State, 23 Ala. 42; Smith v. State, 33 Ala. 26; Lawrence v. State, 34 Ala. 424; McCormack v. State, 102 Ala. 156; McCoy v. State, 8 Ark. 451; Cole v. State, 10 Ark. 318; Lacefield v. State, 34 Ark. 275, 36 Am. Rep. 8; People v. Landman, 103 Cal. 577; Elliott v. State, 46 Ga. 159; Seborn v. State, 51 Ga. 164; Jackson v. State, 51 Ga. 402; Smith v. State, 52 Ga. 88; Hopkinson v. People, 18 Ill. 264; Kunkle v. State, 32 Ind. 220; Wilson v. Com. 3 Bush, 105; Rapp v. Com. 14 B. Mon. 614; Maher v. People, 10 Mich. 212, 81 Am. Dec. 181; Roberts v. People, 19 Mich. 401; Wilson v. People, 24 Mich. 410; State v. Butman, 42 N. H. 490; Rumsey v. People, 19 N. Y. 41; Nichols v. State, 8 Ohio St. 435; State v. Stout, 49 Ohio St. 270; State v. White, 21 S. C. 597; Yanez v. State, 20 Tex. 656; Lockwood v. State, 1 Tex. App. 749; Hodges v. State, 3 Tex. App 470; Ferguson v. State, 6 Tex. App. 504; Read v. Com. 22 Gratt. 924.

If the mortal blow was unlawful and malicious, and death ensued, the perpetrator is guilty of murder, although he did not intend to murder. People v. Mize, 80 Cal. 41; State v. Evans, 39 La. Ann. 912; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1.

In a prosecution for an assault with intent to murder, if the evidence should show that had homicide resulted the offense would have been manslaughter, then the accused cannot be convicted of assault with intent to murder, but only of simple assault, or of aggravated assault. People v. Vanard, 6 Cal. 562; People v. English, 30 Cal. 214; People v. Congleton, 44 Cal. 92; People v. Marseiler, 70 Cal. 98; People v. Bentley, 75 Cal. 407; State v. Nichols, 8 Conn. 496; Pittman v. State, 25 Fla. 648; Seborn v. State, 51 Ga. 164; Meeks v. State, 51 Ga. 429; Smith v. State, 52 Ga. 88; Beckwith v. People, 26 Ill. 500; Wall v. State, 23 Ind. 150; Dixon v. State, 3 Iowa. 416; State v. Shepard, 10 Iowa, 126; State v. White, 45 Iowa, 325; State v. Connor, 59 Iowa, 357, 44 Am. Rep. 686; State v. Postal, 83 Iowa, 460; State v. Waters, 39 Me. 54; State v. Phinney, 42 Me. 384; State v. Clair, 84 Me. 248; People v. Prague, 72 Mich. 178; State v. Butman, 42 N. H. 490; People v. Dartmore, 48 Hun, 321; Slatterly v. People, 58 N. Y. 354; Carter v. State, 28 Tex. App. 355; Spivey v. State, 30 Tex. App. 343; Beaty v. State, 30 Tex. App. 677.

In State v. Reed, 40 Vt. 603, it is pointed out that there is a distinction between an assault with intent to murder and an assault with intent to kill. In the former case, the proof must be such as shows that if death had been caused by the assault, the assailant would have been guilty of murder; and in the latter case, the proof need only be established that, had death ensued, the crime would have been manslaughter. In the former case, the intent must be the result of malice aforethought, and in the latter, the result of sudden passion or emotion, without time for deliberation or reflection. To the same effect are Hall v. State, 9 Fla. 203, 76 Am. Dec. 617; Warrock v. State, 9 Fla. 404.

It was held in *Ex parte* Brown, 40 Fed. Rep. 81, that to make an assault with intent to kill, U. S. Rev. Stat. § 2142, does not require that the act should have been murder if death had ensued. If it would have been only manslaughter in the case of death, it will be an assault with intent to kill if death does not ensue. United States v. Tharp, 5 Cranch, C. C. 390, is to the same effect.

It was held in O'Leary v. People, 4 Park. Crim. Rep. 187, that an assault and battery with intent to kill is not a felony, unless committed with a deadly weapon, or by such other means or force as are likely to produce death.



Digitized by Google

been, but when they are patent, as here, upon the face of the record, the court can and will notice them, though not assigned or specified.

Rule 21, ¶ 4; *Lewis* v. *United States*, 146 U. S. 370 (36: 1011).

The public has an interest in the life and liberty of Acers, and it is not possible to take either merely because counsel failed to specifically except and assign, when the unauthorized methods of the court are plain upon the record.

*Hopt* v. *Utah*, 110 U. S. 574–579 (28: 262–265); *Schwab* v. *Berggren*, 143 U. S. 442–448 (36: 218–223).

*Mr.* **J. M. Dickinson**, Assistant Attorney General, for defendant in error:

The definition of deadly weapon, as a weapon with which death may be easily and readily produced, is sustained by the authorities.

The following were held to be deadly weapons:

Chisel. *Com.* v. *Branham*, 8 Bush, 387.

A heavy iron weight or other ponderous instrument. *State* v. *West*, 6 Jones, L. 506; *McReynolds* v. *State*, 4 Tex. App. 327.

A heavy pistol used as a bludgeon. *Prior* v. *State*, 41 Ga. 155.

Club. *State* v. *Phillips*, 104 N. C. 786.

Piece of timber. *State* v. *Alfred*, 44 La. Ann. 582.

Pocketknife. *State* v. *Scott*, 39 La. Ann. 943.

Ax. *Dollarhide* v. *United States*, 1 Morris (Iowa) 233, 39 Am. Dec. 460; *State* v. *Ostrander*, 18 Iowa, 456; *State* v. *Shields*, 110 N. C. 497.

Whether a weapon was, under the circumstances, dangerous, is a question of fact to be determined by all the circumstances of the case, and especially by the mode of use.

*United States* v. *Small*, 2 Curt. C. C. 241, 243; *Doering* v. *State*, 49 Ind. 56, 19 Am. Rep. 669; *Com.* v. *Duncan*, 91 Ky. 592, 595; *State* v. *Davis*, 14 Nev. 407, 413; *People* v. *Irving*, 95 N. Y. 541, 546; *Hunt* v. *State*, 6 Tex. App. 663; *Melton* v. *State*, 30 Tex. App. 273; *Jenkins* v. *State*, 30 Tex. App. 379.

The comment of the court as to what the testimony implied was not error, the finding of all the facts having been distinctly left to the jury.

*United States* v. *Philadelphia & R. R. Co.* 123 U. S. 113, 114 (31: 138, 139); *Williams* v. *Conger*, 125 U. S. 397, 421 (31: 778, 788); *Rucker* v. *Wheeler*, 127 U. S. 85, 93 (32: 102, 105); *Lovejoy* v. *United States*, 128 U. S. 171, 173 (32: 389, 390); *California Ins. Co.* v. *Union Compress Co.* 133 U. S. 387, 416 (33: 730, 738); *Allis* v. *United States*, 155 U. S. 117, 123 (39: 91, 93).

It was not error in the court to instruct the jury as follows: "Now, remember that it is an axiom of the law that if a man wilfully and intentionally does an act of a certain character or that might produce a certain result, the law says that he is held to have intended that result. Now, then, it becomes easy from that principle of the law and the facts that show the wilful use of a deadly weapon to find that he intended to kill if the act be of a character that might produce death, because this matter of intent is only a matter of inference."

*First Nat. Bank* v. *Jones*, 88 U. S. 21 Wall. 337 (22: 545); *Com.* v. *York*, 9 Met. 93, 103, 43 Am. Dec. 373; *Com.* v. *Webster*, 5 Cush. 295, 305, 52 Am. Dec. 711; *People* v. *Potter*, 5 Mich. 1, 8, 71 Am. Dec. 763; *People* v. *Scott*, 6 Mich. 287, 296; *United States* v. *Taintor*, 11 Blatchf. 374, 375.

In order to justify the doing the act charged in the indictment, in self-defense, the danger must be imminent, impending, and present, and not prospective, or even in the near future.

*Dolan* v. *State*, 81 Ala. 11; *Field* v. *Com.* 89 Va. 690.

The weight of the authorities is to the effect that the circumstances must have been such as to excite the fears of a reasonable man, that there must have been a reasonable appearance of danger, or reasonable grounds to believe there was danger.

*Askew* v. *State*, 94 Ala. 4; *State* v. *Crawford*, 66 Iowa, 318; *State* v. *Shippey*, 10 Minn. 223, 87 Am. Dec. 70; *Kendrick* v. *State*, 55 Miss. 436; *State* v. *Parker*, 106 Mo. 217; *Shorter* v. *People*, 2 N. Y. 193, 51 Am. Dec. 286; *People* v. *Austin*, 1 Park. Crim. Rep. 154, 164; *Field* v. *Com.* 89 Va. 690; *Golden* v. *State*, 25 Ga. 527, 538.

Mr. Justice **Brewer** delivered the opinion of the court:

Plaintiff in error was convicted in the district court for the western district of Arkansas of an assault with intent to kill and sentenced to the penitentiary for the term of two years and six months. The undisputed facts were these: Defendant and one Joseph M. Owens had some dispute about business affairs, and on returning together to the house where they were both stopping, defendant picked up a stone about 8 inches wide, 9 inches long, and 1½ or 2 inches thick, and with it struck Owens on the side of the head, fracturing the skull. The defense was that there was no intent to kill; that defendant acted in self-defense; that, believing Owens was about to draw a pistol, he picked up the stone and pushed him down; and the disputed matters were whether Owens had a pistol, and if so, whether he attempted to draw it, or made any motions suggestive of such a purpose. The verdict of the jury was adverse to the contentions of the defendant.

*The only questions presented for our [390 consideration arise on the charge of the court, and may be grouped under four heads: First, as to the evidences of intent; second, as to what constitutes a deadly weapon; third, as to real danger; and fourth, as to apparent danger. It may be premised that the exceptions to this charge are taken in the careless way which prevails in the western district of Arkansas; but passing this and considering the charge as properly excepted to we find in it no substantial error.

First. With reference to the charge as to the matter of intent, counsel for plaintiff in error challenge a single sentence, as follows: "But you need not go to a thing of that kind, because the law says you may take the act itself as done, and from it you may find that it was wilfully done." But this sentence is to be taken, not by itself alone, but in connection with many others, in order to determine what the court instructed as to the evidences



Digitized by Google

of intent. It distinguished between the assault and the intent to kill, and charged specifically that each must be proved, that the intent could only be found from the circumstances of the transaction, and, after suggesting that the declarations made by a party at the time of an assault would tend to show the intent with which it was committed, added the sentence which counsel have quoted. Nowhere, not even in the sentence quoted, was it said that the assault of itself necessarily proved the intent, but all through the charge in this respect was the constant declaration that the intent was to be deduced from all the circumstances of the case, the court pointing out many things which tended to disclose the real intent of a party, summing up the matter with these observations: "That is the way you find intent, then, bearing in mind that he is held to have intended whatever consequences might have followed from the act as wilfully done by him with the deadly weapon. You, in other words, to find intent, take the circumstances, you take the character of the act done, the manner in which it was executed, the weapon used in executing it, the part of the body upon which it was executed, the very result produced by that act upon that vital [391] part of the body known as the *head. These are all circumstances that it is your duty to take into consideration to find whether the party intended to kill him or not." There is nothing objectionable in this.

Second. With respect to a deadly weapon, the court defined it as "a weapon with which death may be easily and readily produced; anything, no matter what it is, whether it is made for the purpose of destroying animal life, or whether it was not made by man at all, or whether it was made by him for some other purpose, if it is a weapon, or if it is a thing with which death can be easily and readily produced, the law recognizes it as a deadly weapon." We see nothing in this definition to which any reasonable exception can be taken. Nor do we find anything in the subsequent language of the court which in any manner qualifies this definition, or can be construed as an instruction to the jury that as matter of law the stone actually used was a deadly weapon. It is true reference was made to the manner in which the stone was used and the part of the body upon which the blow was struck as considerations to aid the jury in determining whether it was properly to be considered a deadly weapon. We have so little doubt that when one uses a stone of such size and strikes a blow on the skull so severe as to fracture it, a jury ought to find that the stone was a deadly weapon, that if the court had expressed a definite opinion to that effect we should have been reluctant on that account alone to have disturbed the judgment. But the court did not so express itself, and in calling attention to the manner of its use and the part of the body upon which the blow was struck it only properly called the attention of the jury to circumstances fairly to be considered in determining the character of the weapon. *United States* v. *Small*, 2 Curt. C. C. 241, 248; *Com.* v. *Duncan*, 91 Ky. 592, 595; *State* v. *Davis*, 14 Nev. 407, 413; *People* v. *Irving*, 95 N. Y. 541, 546; *Hunt* v. *State*, 6 Tex. App. 668; *Melton* v. *State*, 30 Tex. App. 278; *Jenkins* v. *State*, 30 Tex. App. 379.

Third. With reference to the matter of self-defense by reason of the presence of a real danger, the court charged that it could not be a past danger, or a danger of a future injury, but a present danger and a danger of "great injury to the *person injured that would maim[392] him, or that would be permanent in its character, or that might produce death." In this we think nothing was stated incorrectly, and that there was a fair definition of what is necessary to constitute self-defense by reason of the existence of a real danger.

Neither, fourthly, do we find anything to condemn in the instructions in reference to self-defense based on an apparent danger. Several approved authorities are quoted from in which the doctrine is correctly stated that it is not sufficient that the defendant claims that he believed he was in danger, but that it is essential that there were reasonable grounds for such belief, and then the rule was summed up in this way:

"Now, these cases are along the same line, and they are without limit, going to show that, as far as this proposition of apparent danger is concerned, that to rest upon a foundation upon which a conclusion that is reasonable can be erected there must be some overt act being done by the party which from its character, from its nature, would give a reasonable man, situated as was the defendant, the ground to believe—reasonable ground to believe—that there was danger to his life or of deadly violence to his person, and unless that condition existed then there is no ground upon which this proposition can stand; there is nothing to which the doctrine of apparent danger could apply."

Counsel criticise the use of the words "deadly violence," as though the court meant thereby to limit the defense to such cases as showed an intention on the part of the person assaulted to take the life of the defendant, but obviously that is not a fair construction of the language, not only because danger to life is expressly named, but also because in other parts of the charge it has indicated that what was meant by those words was simply great violence. This is obvious from this language, found a little preceding the quotation: "'When from the nature of the attack.' You look at the act being done, and you from that draw an inference as to whether there was reasonable ground to believe that there was a design upon the part of Owens in this case to destroy the life of the defendant, Acers, or to commit any great violence upon his person at the *time [393] he was struck by the rock. 'When from the nature of the attack.' That implies, not that he can act upon a state of case where there is a bare conception of fear, but that there must exist that which is either really or apparently an act of violence, and from that the inference may reasonably be drawn that there was deadly danger hanging over Acers, in this case, at that time."

These are all the matters complained of. We see no error in the rulings of the court, and therefore *the judgment is affirmed.*

Mr. Justice **Shiras** dissents.



Digitized by Google

ATLANTIC & PACIFIC RAILWAY COMPANY, *Plf. in Err.*,
v.
MARY J. LAIRD.

(See S. C. Reporter's ed. 393-408.)

*Allegations in complaint—action for tort—joint tortfeasors—recovery against one—statute of limitations—amended complaint.*

1. Allegations in a complaint that defendants jointly owned and operated a line of road, and jointly committed the alleged negligent acts, and "were a common carrier of passengers," are not to be construed as an averment that defendants were a single company, and that neither could be sued separately, where, in separate paragraphs, each was alleged to be a separate corporation.
2. A complaint alleging that plaintiff was the holder of and traveling upon a certain ticket on a train which was derailed, causing injury to him, without alleging any undertaking or promise or breach thereof, does not state an action on contract.
3. In an action against joint tortfeasors, allegations of joint relationship and the doing of negligent acts jointly are divisible, and recovery may be had against one if the proof connects him with the acts averred.
4. In California, recovery may be had against either of several defendants, even in actions on contract.
5. An amendment of a complaint merely dismissing one of two joint tortfeasors, and complaining of the remaining defendant only, does not introduce a new cause of action with respect to the statute of limitations.
6. Amendments to a complaint stating that plaintiff was traveling upon a "ticket," instead of a "first-class" ticket as originally stated, and that the defendant was chartered by Congress, instead of the laws of Massachusetts as first averred, do not state a new cause of action with respect to the statute of limitations.

[No. 64.]

*Submitted October 27, 1896. Decided November 30, 1896.*

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment affirming the judgment of the Circuit Court of the United States for the Southern District of California in favor of the plaintiff, Mary J. Laird, against the Atlantic & Pacific Railway Company for damages for personal injuries to plaintiff by a derailment of a train of cars upon which plaintiff was a passenger. *Affirmed.*

See same case below, 15 U. S. App. 248.

Statement by Mr. Justice **White**:

The action below was originally brought in a state court in California against the plaintiff in error and the Atchison, Topeka, & Santa Fé Railroad Company to recover damages for personal injuries sustained on November 8, 1890, by the derailment of a train of cars upon which the plaintiff was a passenger. It was alleged in the complaint that each of the defendants was a corporation of the state of Massachusetts; that they jointly owned and operated a described line of a railroad; that plaintiff was a passenger on one of the trains coming westward on said line of railroad, holding and traveling upon a first-class ticket entitling her to travel between named stations, and the liability of the defendants was claimed to arise by reason of alleged negligence, both in the construction of the road and in the management of the train. Upon the several applications of the defendants, the cause was transferred to the circuit court of the United States for the southern district of California. In that court answers were filed denying that the defendants were jointly guilty of the negligence complained of or that they jointly operated the line of railroad described in the complaint, but admitting that the defendant, the Atlantic & Pacific Railway Company, was operating the road. The cause was tried for the first time in November, 1892, and resulted in a verdict for plaintiff against the Atlantic & Pacific Railway Company, and in favor of the Atchison Company. On the trial the plaintiff was allowed to amend her complaint by alleging that the ticket upon which she was traveling was a "second-class" ticket instead of, as alleged in the original complaint, a "first-class" ticket. To the cause of action stated in the complaint as thus amended the defendants pleaded a statute of limitations of two years. Judgment was entered on the verdict, *but this [395 judgment was subsequently set aside, with leave to the plaintiff to amend her complaint. On February 7, 1893, a second amended complaint was filed, in which the Atlantic & Pacific Railway Company was charged to have owned and operated the line of railroad in question, and to have done the negligent acts averred in the original complaint. An attack upon this pleading was made in the trial court by motion to strike from the files, by demurrer, by motion for judgment upon the pleadings, and by special requests for directions to the jury upon the second trial of the case. The ground of all such attacks was that the pleading set up a new cause of action, against which the statute of limitations had run at the time of the filing of such pleading. The cause was tried for the second time in April, 1893, and a verdict was again rendered against the Atlantic & Pacific Railway Company. A judgment upon such verdict was subsequently affirmed by the circuit court of appeals. 15 U. S. App. 248. By writ of error such judgment of affirmance was brought to this court for review.

*Messrs.* **A. T. Britton, A. B. Browne,** and *O. N. Sterry*, for plaintiff in error:

Under the rules of pleading at common law and in California, a several judgment could not have been rendered, under the allegations of the original complaint, in favor of the plaintiff and against the defendant, the Atlantic & Pacific Railroad Company, upon proof of facts proved on the trial, which resulted in the judgment complained of or upon proof of the facts stated or attempted to be stated in the second amended complaint.

NOTE.—*As to contracts limiting the time within which action must be brought; waiver of; estoppel as to,*—see note to Southern Exp. Co. v. Caldwell, 22: 556.

*As to damages for personal injury from negligence,* see note to Pennsylvania Co. v. Roy, 26: 141.

*As to joint trespassers; effect of judgment against one; may be sued separately or jointly,*—see note to Lovejoy v. Murray, 18: 120.



Digitized by Google

*Pennsylvania R. Co.* v. *Price*, 96 Pa. 256; *Wabash W. R. Co.* v. *Friedman*, 146 Ill. 583; *Little* v. *Dusenberry*, 46 N. J. L. 614, 50 Am. Rep. 445; *New Jersey S. B. Co.* v. *Brockett*, 121 U. S. 637 (30: 1049); *Stokes* v. *Saltonstall*, 38 U. S. 13 Pet. 181 (10: 115); *Whittaker* v. *Collins*, 34 Minn. 299; *Walcott* v. *Canfield*, 3 Conn. 198; *Gossom* v. *Badgett*, 6 Bush, 97, 99 Am. Dec. 658; *McCord* v. *Seale*, 56 Cal. 264; *Weinreich* v. *Johnston*, 78 Cal. 254; *Reed* v. *Norton*, 99 Cal. 619; *Louisville & N. R. Co.* v. *Ide*, 114 U. S. 52 (29: 63); *Sessions* v. *Johnson*, 95 U. S. 347 (34: 596).

The action stated in the second amended complaint was barred by the provisions of Cal. Code Civ. Proc. § 339, subd. 1, at the time when the amended complaint was filed, in February, 1893, as the injury occurred on November 3, 1890.

*Meeks* v. *Southern P. R. Co.* 61 Cal. 149; *Anderson* v. *Mayers*, 50 Cal. 525; *Sicard* v. *Davis*, 31 U. S. 6 Pet. 124 (8: 342); *Union P. R. Co.* v. *Wyler*, 158 U. S. 285 (39: 983); *Wright* v. *Hart*, 44 Pa. 454; *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593 (36: 829); *Buell* v. *St. Louis Transfer Co.* 45 Mo. 562; *Lumpkin* v. *Collier*, 69 Mo. 170; *Scovill* v. *Glasner*, 79 Mo. 449.

*Messrs.* **George H. Smith**, *Frank H. Short*, and *Edwin A. Meserve*, for defendant in error:

The motion made by the defendant, the Atlantic & Pacific Railroad Company, to strike from the files of the cause the second amended complaint, was properly denied.

*Acquital* v. *Crowell*, 1 Cal. 191; *Rowe* v. *Chandler*, 1 Cal. 167; *People* v. *Evans*, 29 Cal. 430; *Dimick* v. *Deringer*, 32 Cal. 488; *Nichols* v. *Dunphy*, 58 Cal. 605; *Rutenberg* v. *Main*, 47 Cal. 213; *Trenor* v. *Central P. R. Co.* 50 Cal. 231; *Rogers* v. *Duhart*, 97 Cal. 500; *Cox* v. *McLaughlin*, 76 Cal. 66; *Vanderslice* v. *Matthews*, 79 Cal. 277; *Redington* v. *Cornwell*, 90 Cal. 49; *Easton* v. *O'Reilly*, 63 Cal. 308; *Smullen* v. *Phillips*, 92 Cal. 408–411.

There can be no difference between an allegation that the plaintiff was the holder of and riding on a "first-class ticket," and an allegation that she was the holder of and riding on "a ticket." The obligation of the common carrier is the same in either case.

*Philadelphia & R. R. Co.* v. *Derby*, 55 U. S. 14 How. 468 (14: 502); *Pennsylvania R. Co.* v. *Books*, 57 Pa. 339, 98 Am. Dec. 229; *Ohio & M. R. Co.* v. *Muhling*, 30 Ill. 9, 81 Am. Dec. 336; Patterson, Railway Acci. Law, §§ 213–215.

The statute of limitations is not let in by amended pleadings where the nature of the action is not changed.

*Barber* v. *Reynolds*, 33 Cal. 497; *Lorenzana* v. *Camarillo*, 45 Cal. 125; *Swift* v. *Foster*, 55 Ill. App. 280; *Critelli* v. *Rodgers*, 87 Hun, 530; *Bogart* v. *Crosby*, 91 Cal. 278; *Smullen* v. *Phillips*, 92 Cal. 408.

The demurrer to the second amended complaint was properly overruled.

**Mr. Justice White** delivered the opinion of the court:

It is not controverted that under Cal. Code Civ. Proc. § 339, a cause of action of the character of that set forth in the various complaints filed on behalf of plaintiff was required to be instituted within two years after the cause of action accrued.

The question to be determined, therefore, is whether the trial court erred in holding that the amendments effected by the second amended complaint did not set up a new cause of action; for, if the second amended complaint stated a distinct and independent cause of action, the bar of the statute *should have been allowed to prevail. *Union P. R. Co.* v. *Wyler*, 158 U. S. 285 [39: 983]. [396

The contention of the plaintiff in error that there was a departure resulting from the amended petition is based upon two propositions: 1, that the parties defendant in the original complaint were sued jointly *ex quasi contractu*, and were liable only upon proof of a joint contract, whilst the amended petition proceeded upon a contract made only by one and a different person than those originally sued; and, 2, because certain averments in the petition as to the place of incorporation of plaintiff in error and as to the character of ticket upon which the plaintiff traveled changed the cause of action.

We will discuss these two contentions separately.

1. *Was the action stated in the original complaint one against the defendants as distinct and separate corporations, or against them as a single entity or artificial being, and what was the nature of the cause of action?*

It is urged by the plaintiff in error that as the complaint, after alleging that the defendants jointly owned and operated the line of road in question and jointly committed the alleged negligent acts, charged that they together "were a common carrier of passengers on said road," that such allegation must be construed as an averment that the defendants were a single company, and that it cannot be assumed that one or the other, by itself, had capacity to violate any duty of a common carrier of passengers, or that either had power to sue or be sued separately and alone from the other.

This construction of the complaint is obviously a forced and unnatural one. In the caption of the complaint the two defendants were designated as distinct corporations and several defendants, while in separate paragraphs each defendant was alleged to be a corporation, duly incorporated under the laws of the state of Massachusetts, and having its principal place of business outside of the state of California. Soon after the filing of the complaint each defendant presented its separate application for the removal of the cause to the Federal court. In that of the Atchison, Topeka, & Santa Fé road it was averred that it was a corporation organized, existing, and doing *business under and by virtue of the laws [397 of the state of Kansas. The Atlantic & Pacific Company averred in its application that it was a corporation duly created, organized, and existing under an act of Congress, which, it was expressly alleged, authorized it to construct and operate, as a common carrier of passengers and freight, certain described lines of railroad, including the line of railroad upon which plaintiff received her injury. The answer filed on behalf of the defendants was "joint and several," and it was



Digitized by Google

therein admitted that the defendant, the Atlantic & Pacific Company, plaintiff in error here, was operating the line of railroad in question. The case presented by the complaint, giving to the language employed the reasonable inferences which it should receive, was one where each of two corporations was proceeded against as a common carrier of passengers, exercising their respective corporate powers concurrently, the two corporations acting together, just as several individuals might have done.

Looking, then, to the averments of the complaint, we find it stated that the defendants, as common carriers, jointly owned and operated a described line of railroad; that on November 3, 1890, the plaintiff was a passenger on a train of cars then being run by the defendants, which train was derailed and thrown from the track and the plaintiff injured. Was this an action *ex quasi contractu* as now claimed?

Before proceeding to answer this question, we observe that it seems manifest, from the attacks originally made upon the amended complaint, that this claim is an afterthought. The motion to strike from the files demurrer, answer, and motion for judgment on the pleadings proceeded upon the assumption that the cause of action stated in both complaints was subject to a limitation of two years, whereas it did not appear upon the face of the complaint, but that the agreement, if any, made by the alleged contract, was entered into in the state of California, in which event the statutory limitation for commencing the action would have been four years. The fact that a written contract was executed in Ohio, which it is claimed [398] was established on the *trial, was not at any time specially set up as a defense to the amended complaint.

It is clear that the original complaint is not susceptible of the construction now attempted to be given to it. Though it is alleged that the plaintiff was the holder of and traveling upon a certain ticket, no undertaking or promise by the defendants was averred, nor is there any allegation of the breach of any undertaking or promise. The reference to the ticket joined with the allegation immediately preceding it, that the plaintiff was a passenger on the described line of railroad, was evidently introduced by the pleader to show the existence of the relation of passenger and carrier between the plaintiff and the defendants. Because of such relation the duty to exercise due care in the carriage of the passenger was imposed upon the defendants, and from the recital of the negligent acts committed arose the implication of the failure of the defendants to perform that legal duty. As said by Martin, B., in *Legge* v. *Tucker*, 1 Hurlst. & N. 500, 501:

"In the case of carriers, the custom of the realm imposes on them a duty to carry safely, and a breach of that duty is a breach of the law, for which an action lies founded on the common law, and which does not require a contract to support it."

*Legge* v. *Tucker* was in form an action on the case for the negligence of a livery-stable keeper in the care and custody of a horse. It was held that the foundation of the action was a contract, and that whatever way the declaration was framed it was an action for assumpsit. The line which distinguishes the case at bar from an action *ex quasi contractu* is thus expressed in the remarks of Watson, B., who said (p. 502):

"The action is clearly founded on contract. Formerly, in actions against carriers, the custom of the realm was set out in the declaration. Here a contract is stated by way of inducement, and the true question is, whether, if that were struck out, any ground of action would remain. *Williamson* v. *Allison*, 2 East, 452. There is no duty independently of the contract, and therefore it is an action of assumpsit."

The doctrine is very clearly expressed in *Kelly* v. **Metropolitan R. Co.* [1895] 1 Q. [399 B. 944, where the court of appeals held that an action brought by a railway passenger against a company for personal injuries caused by the negligence of the servants of the company, while he was traveling on their line, was an action founded upon tort. In reading the judgment of the court, A. L. Smith, L. J., said (p. 947):

"The distinction is this: If the cause of complaint be for an act of omission or nonfeasance which, without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort."

So, in the case at bar, there was a duty shown, independently of contract; and the trial court, looking at the allegations of a complaint which had not been demurred to, solely for the purpose of determining the propriety of an amendment, was manifestly justified in holding that the right to recover was not founded upon the breach of a contract, but upon the neglect of a common-law duty. The action therefore was *ex delicto*, and the defendants, being joint tortfeasors, might have been sued either separately or jointly at the election of the injured party, and, if, upon the trial, the proof warranted, a recovery might have been had against a single defendant. *Sessions* v. *Johnson*, 95 U. S. 347 [24: 596].

The right of recovery against one of several joint tortfeasors thus existing is in principle analogous to the rule declared by Chitty at page 386 of his work on Pleading, to the effect that in torts the plaintiff may prove a part of the charge if the averment be divisible and there be enough proof to support his case. This is illustrated at page 392, where Chitty says:

"In an action *ex delicto*, upon proof of part only of the injury charged, or of one of several injuries laid in the same count, the plaintiff will be entitled to recover *pro *tanto*, [400 provided the part which is proved afford *per se* a sufficient cause of action, for torts are, generally speaking, divisible."

As, therefore, in an action against joint tortfeasors recovery may be had against one, it follows that allegations alleging a joint relationship and the doing of negligent acts jointly are divisible, and that a recovery may be had where the proof establishes the connection of



Digitized by Google

but one of the defendants with the acts averred. The case also comes within the principle of the rule alluded to by Chitty (Pl. 393), that "a general averment, including several particulars, may be considered *reddendo singula singulis.*" He instances the case of a declaration for a false return to a *fi. fa.* against the goods of A and B, wherein it was alleged that A and B had goods within the bailiwick, and it was held to be sufficient to prove that either of them had, the averment being severable.

But even though the action was founded upon a contract, under the rules of practice in California a recovery might have been had against either defendant. Thus, in *Shain* v. *Forbes*, 82 Cal. 588, which was an action against two defendants to recover compensation for professional services alleged to have been rendered for them jointly by an attorney at law, pending the action one of the defendants died. It was argued that the testimony of a certain witness, not being admissible against the representatives of the deceased defendant, was not competent for any purpose, because the action was joint, and that no several judgment could be rendered against the surviving defendant. To this argument the supreme court answered:

"It is true that the rule contended for existed at common law, but from the earliest time it has been changed by statute in this state. The Code provides: 'Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.' Cal. Code Civ. Proc. § 578. And this was but a re-enactment of § 145 of the old practice act. Under this provision it has been held that where two persons are sued jointly upon a joint con-

[401] tract, *judgment may be rendered in favor of the plaintiff against one of the defendants, and in favor of one of the defendants against the plaintiff. *Rowe* v. *Chandler*, 1 Cal. 168; *Lewis* v. *Clarkin*, 18 Cal. 399; *People* v. *Frisbie*, 18 Cal. 402. . . . In our opinion a several judgment might have been rendered against McPherson."

It results that if the nature of the action was not changed, the amendment merely dismissing one of two joint tortfeasors and alleging that the injury complained of was occasioned solely by the remaining defendant did not introduce a new cause of action.

2. *Did the amendments stating that the plaintiff was traveling upon a "ticket" instead of, as stated in the original complaint, a "first-class" ticket, and that the Atlantic & Pacific Company was chartered by an act of Congress instead of by the laws of Massachusetts, as averred in the original complaint, state a new cause of action?*

The changes made clearly were not of the essence of the cause of action, and could in no wise have injuriously prejudiced the Atlantic & Pacific Company. Amendments of this character were plainly allowable. Cal. Code, § 471, virtually forbids amendments only where the allegation of the claim or defense would be changed in its general scope and meaning. Illustrations of the construction given to these provisions are found in several cases. *Smullen* v. *Phillips*, 92 Cal. 408, was an action of slander, and the words charged to have been spoken were, "He is a thief." The proof introduced at the trial was that the words uttered were, "That thieving ———; he stole $2,500 from me, and I can prove it." An amendment of the complaint was at once allowed over the objection of the defendant that the statute of limitations barred the cause of action as thus amended. The supreme court of California held that the scandalous words alleged in the original complaint were not qualified or altered in their sense or meaning by those proved to have been used by the defendant, that the cause of action remained the same, and that the amendment simply obviated a variance between the allegations and the proof.

*In *Redington* v. *Cornwell*, 90 Cal. 49, [402] it was held that as the original complaint declared on two notes, alleging that they were given "for value received," and were assigned by indorsement, and also alleged facts from which an equitable assignment would result, an amended complaint which omitted the allegation of indorsement and alleged that the debt was for money loaned and for a balance due on account, set up substantially the same cause of action, the averment as to value received being equivalent to the more specific allegations of the items of money loaned and due on account.

In *Bogart* v. *Crosby*, 91 Cal. 278, the complaint in an action against a firm of real estate agents to recover money deposited on a verbal contract of sale which had been rescinded was amended by making the owners of the land defendants, and alleging that defendants were an association of two or more persons doing business under a common name. A second amended complaint was filed, alleging that only the agents constituted the association, and both amendments charged all the defendants with having received the deposit from plaintiff and to his use.

The court said (p. 281):

"It is claimed by appellants that the cause of action stated in the last amended complaint is, as against appellants, essentially different from that alleged in the first-amended complaint, and that, as it was not filed within two years after the cause of action accrued, the same is barred by the provision of subdivision 1 of § 339 of the Code of Civil Procedure. We do not agree with appellants in this contention. The difference between the first and second amended complaints is not so marked that the latter can be deemed the statement of an entirely new and different cause of action against the appellants. In both amended complaints the appellants are charged with having received from plaintiff, and to his use, the money sued for, and with a refusal to pay it to plaintiff when demanded."

As we hold that the dismissal of the Atchison Company did not operate to change the cause of action against the other corporation, and that the allegations of the second *amended [403] complaint substantially counted upon the same wrong charged in the original complaint, to wit, a neglect of duty causing injury to plaintiff while traveling as a passenger, upon a ticket, in a train of cars over a described line of railroad, and between specified stations, it results that *the judgment of the Circuit Court of Appeals was right, and it is affirmed.*



Digitized by Google

MISSOURI PACIFIC RAILWAY COMPANY, *Plff. in Err.*,
*v.*
STATE OF NEBRASKA, *ex rel.* BOARD OF TRANSPORTATION OF THE STATE OF NEBRASKA.

(See S. C. Reporter's ed. 403-417.)

*State decisions—Nebraska statute—taking private property for private use without owner's consent.*

1. The construction given to a state statute by the highest court of the state must be accepted by this court in judging whether the statute conforms to the Constitution of the United States.
2. An order of the Nebraska State Board of Transportation, under the state statute of March 31, 1887, requiring a railroad company to surrender a part of its land to private persons for the purpose of building and maintaining their elevator upon it, is a taking of private property of the company for the private use of such persons.
3. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Amendment of the Constitution of the United States.

[No. 1.]

*Argued December 3, 4, 1894. Ordered for Reargument December 17, 1894. Reargued March 4, 1896. Decided November 30, 1896.*

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment awarding a writ of mandamus to compel the Missouri Pacific Railway Company to comply with an order of the Nebraska State Board of Transportation, which directed the company to grant to John W. Hollenbeck *et al.* the right of erecting an elevator on the land of the railway company. *Reversed*, and case remanded for further proceedings.

See same case below, 29 Neb. 550.

Statement by Mr. Justice **Gray**:

This was a writ of error to review a judgment of the supreme court of the state of Nebraska, awarding a writ of mandamus to compel the Missouri Pacific Railway Company, a corporation of Nebraska, to comply with an order of the Nebraska State Board of Transportation, which directed the company to grant to John W. Hollenbeck and others the right and privilege of erecting an elevator upon the grounds of the railway company at its station at Elmwood.

By the Constitution of Nebraska of 1875, art. 11, § 4, "railways heretofore constructed or that [404] may hereafter be *constructed in this state are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state." And by § 7, "the legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph, and railroad companies in this state, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises."

The State Board of Transportation was created by the statute of Nebraska of March 31, 1887, chap. 60, entitled "An Act to Regulate Railroads, Prevent Unjust Discrimination," etc., which took effect July 1, 1887, and was very similar to the act of Congress of February 4, 1887, chap. 104, regulating interstate commerce (24 Stat. at L. 379), except in applying only to commerce within the state. The material provisions of the Nebraska statute are copied in the margin.†

*On October 9, 1889, there was pre- [405] sented to the Nebraska State Board of Transportation a complaint in these terms:

"The petition and complaint of John W. Hollenbeck, Cyrelius Lemasters, John W. Miller, John Hayes, Charles Hall, and others, trading under the name of the Elmwood Farmers' Alliance Number 365, of Elmwood, Cass county, Nebraska, respectfully represents:

*"First. That the petitioners and com- [406] plainants are now and have for many years been extensive raisers of corn, wheat, oats, and other cereals, and that large quantities of said

NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.

†Sec. 1. The provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property by railroad, under a common control, management, or arrangement for a continuous carriage or shipment from any point in the state of Nebraska to any other point in said state. The term "railroad," as used in this act, shall include the road in use in by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivery, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Sec. 2. If any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of like kind of traffic under substantially similar circumstances and conditions, such common carriers shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3. It shall be unlawful for any common carrier subject to the provisions of this act to make or give any preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such contracting lines; but this shall not



Digitized by Google

407] cereals *have been marketed in seasons past, and that large quantities are now ready for the markets; that the several farms and leaseholds of the petitioners are situated near Elmwood, in Cass county, Nebraska.

"Second. That the Missouri Pacific Railway Company is a common carrier, engaged in the transportation of passengers and property by railroad under a common control, management, or arrangement for a continuous carriage or shipment through Elmwood aforesaid.

"Third. That the said defendant railroad company is the owner of the right of way and depot grounds bordering the main and side tracks of the defendant company, upon which are located the station houses and other shipping facilities connected with the transportation originating at or destined to Elmwood station aforesaid; that the complainants aforesaid did make a written application to the general manager of the defendant company for a location, on the right of way at Elmwood station aforesaid, for the erection of an elevator of sufficient capacity to store from time to time the cereal products of the farms and leaseholds of complainants aforesaid, as well as the products of other neighboring farms; that the application aforesaid was refused by the general manager of the defendant company aforesaid.

"Fourth. That the elevators now located on the right of way of the defendants aforesaid at Elmwood station aforesaid are during certain seasons of the year wholly insufficient in affording a market for the cereals of the complainants and others desirous of marketing their grain.

"Fifth. That the refusal of the defendant railroad company to lease a location for an elevator as aforesaid is in contravention of the provisions of an act of the legislature entitled 'An Act to Regulate Railroads, Prevent Unjust Discrimination,' etc., approved March 31, 1887, in that—

"(*a*) The said refusal is an unjust discrimination.

"(*b*) The said Missouri Pacific Railway Company, by the refusal aforesaid, is subjecting the complainants aforesaid to an undue and unreasonable prejudice and disadvantage, in respect to traffic facilities, over other localities.

*"(*c*) The said Missouri Pacific Railway [408 Company, by the refusal aforesaid, is giving an undue and unreasonable preference and advantage to Adams and Gilbert and Eells Brothers, owners of the elevators located at Elmwood, on the right of way of the defendant, by permission of the said Missouri Pacific Railway Company.

"Wherefore the petitioners pray that the defendants may be required to answer the charges herein, and that after due hearing and investigation an order be made, commanding the defendants to cease and desist from said violations of the act of the legislature entitled 'An Act to Regulate Railroads,' etc., and for such other and further relief as the board of

---

be construed as requiring any such common carrier to give the use of its track or terminal facilities to another carrier engaged in like business.

Sec. 17. Said board shall have the general supervision of all railroads operated by steam in the state, and shall inquire into any neglect of duty or violation of any of the laws of this state by railroad corporations doing business in this state, or by any officer, agent, or employee of any railroad corporations doing business in this state; and shall from time to time carefully examine and inspect the condition of each railroad in this state, and its equipments and manner of the conduct and management of the same, with reference to the public safety, interest, and conveniences. It shall carefully investigate any complaint made in writing, and under oath, concerning any lack of facilities or accommodations furnished by any railroad corporation doing business in this state, for the comfort, convenience, and accommodation of individuals and the public; or any unjust discrimination against either any person, firm, or corporation, or locality, either in rates, facilities furnished, or otherwise; and whenever, in the judgment of said board, any repairs are necessary upon any portion of the road, or upon any stations, depots, stationhouses, or warehouses, or upon any of the rolling stock of any railroad doing business in this state, or additions to, or any changes in its rolling stock, stations, depots, station houses, or warehouses are necessary in order to secure the safety, comfort, accommodation, and convenience of the public and individuals, or any change in the mode of conducting its business or operating its road which is reasonable and expedient in order to promote the security and accommodation of the public, or in order to prevent unjust discriminations against either persons or places, it shall make a finding of facts, and an order requiring said railroad corporation to make such repairs, improvements, or additions to its rolling stock, road, stations, depots, or warehouses, or to make such changes, either in the manner of conducting its business or in the manner of operating its road, as such board shall deem proper, reasonable, and expedient; and said finding shall be entered in a record kept for that purpose, and said board shall cause a copy of the same to be served on said railroad corporation by any sheriff or constable in this state, in the same manner as a summons is required to be served, and shall also transmit to the person, firm, or corporation interested a copy of the same. Said railroad corporation shall, within ten days after being served with a copy of said finding and order, show cause, if any it has, why it should not comply with said order, by filing with said board an answer, verified in the same manner as pleadings of fact in the district court are required to be verified. If no answer shall be filed as aforesaid, then such finding and order shall be final and conclusive as against said railroad corporation. Upon the filing of any answer as provided for in this section, the said board shall set a day, not exceeding thirty days from the date of the filing of such answer, for the hearing of the matter, and shall notify said railroad company, or any other person or persons or corporations interested, of the time so fixed, and the place of hearing the same; and shall carefully and fully investigate the matter, and for that purpose may subpœna witnesses, and compel their attendance, and the productions of any books or papers; in the same manner as the courts of law of this state may do. After a full investigation of the matter, said board shall again make a finding of the facts, and make such an order as it may deem just in the premises. If said railroad shall refuse or neglect to comply with such order, the board shall order the attorney general or the county attorney of the proper county to institute a suit to compel such railroad company to comply with such order; and it shall be the duty of the attorney general, or the county attorney of the proper county, at the request of the board or any person interested in any such order or finding, to apply to the supreme court, or to the district court of any county through or into which its line of road may run, in the name of the state and on the relation of said board, for a writ of mandamus to compel such railroad company to comply with such order; and upon the hearing of any such cause such finding and order shall be, as against such railroad company, prima facie evidence of the reasonableness of such order, and of the necessity of such repairs, changes, additions, or improvements, or other matters in such order required to be done or omitted. Nebraska Laws 1887, pp. 541, 542, 555, 558; Neb. Comp. Stat. 1895, pp. 778, 780, 785, 786.



Digitized by Google

transportation may deem necessary in the premises."

On the same day, the board of transportation issued an order to the railway company to show cause why the prayer of the complaint should not be granted; and on October 19, 1889, the railway company filed an answer, admitting its ownership of the right of way and depot grounds at Elmwood, described in the complaint, and its refusal to allow the petitioners to erect an elevator on the side track there, and that there were two elevators now upon that track; and alleging that these two elevators were sufficient to transact the business at Elmwood, and that there was no room there for another elevator, without purchasing an additional right of way and extending its track, and that this was the only reason for the refusal; and denying all the other allegations of the complaint.

On December 13, 1889, the board of transportation, after a hearing, at which evidence and arguments were submitted on behalf of both parties, made the following findings and order:

"This case and complaint having been heard by the board upon the pleadings, evidence, and argument of counsel, the board finds as follows:

"First. That the defendant has all its side tracks within the limits of its right of way and depot grounds at the said station of Elmwood.

"Second. That there are only two elevators at [409] said station *of Elmwood, having the combined capacity of 10,000 bushels, and that said elevators are insufficient to handle the grain shipped at said station, and that the owners and operators thereof have entered into a combination, and do combine and fix the prices of grain, and prevent competition in the purchase price thereof, and that there are not sufficient facilities for the handling and shipping of grain at said station.

"Third. That it is necessary for the convenience of the public, patrons and shippers of grain of said railroad company, that another elevator be erected and operated at said station.

"Fourth. That the defendant has permitted two elevators to be erected upon its grounds at said station, and that the same are now being operated, and that the said defendant has refused to grant the same privilege to the complainant.

"Fifth. That an elevator is necessary for the shipment of grain by railroad, and that, by reason of the side track being placed within the right of way and depot grounds, the plaintiff cannot ship grain without building its elevator upon the grounds of the defendant.

"Sixth. That there is room upon the grounds of the defendant at said station for another elevator without materially interfering with the operation of said railroad, and the building of the elevator by the plaintiffs upon said ground will not materially affect the defendant in the use of its grounds, or be an unreasonable burden to the defendant.

"Seventh. That granting of the right and privilege by the defendant to the elevators now standing upon its right of way and depot grounds at said station, and refusing to grant the same right and privilege to the complainant, is an unjust and unreasonable discrimination against the complainant, under the circumstances of this case.

"Eighth. That the said respondent has discriminated against the complainant, and that it has unlawfully made and given a preference and advantage to Adams and Gilbert, and to Eells Brothers, owners and operators of elevators at said station.

"It is therefore, by the Board of Transportation of the State of Nebraska, considered, adjudged, and ordered that the respondent, the Missouri Pacific Railway Company, shall cease *and discontinue discriminating against [410 the complainant, and grant to said complainant the same facilities and privileges as granted to the owners and operators of the elevators now established at said station; and that said respondent, within ten days after the service of this order, grant and give to the complainant, on like terms and conditions as granted to the said Adams and Gilbert and Eells Brothers, the right and privilege of erecting an elevator upon its grounds at said station, adjacent to said respondent's side track, at a convenient and suitable place thereon, to wit, at a point on the side track of said respondent near the east terminus of said side track, or some other suitable and convenient place on said side track, if the parties to this action can agree; and that said respondent grant to the said complainant all and equal facilities for the handling and shipping of grain at said station which it grants and gives to other shippers of grain at said station, and cease from all discrimination or preferences to and of said shippers and operators of elevators at said station of Elmwood aforesaid."

The railway company not having complied with that order, there was presented to the supreme court of the state of Nebraska, on January 7, 1890, a petition in the name of the state of Nebraska, at the relation of the board of transportation, and signed by the attorney general of the state, setting forth the proceedings and order of the board of transportation, and praying for a writ of mandamus to the railway company to compel them to comply with that order.

To this petition for a mandamus the railway company filed an answer, setting up the same defenses as before the board of transportation, and relying upon the provisions of the 14th Amendment of the Constitution of the United States, which prohibits any state to deprive any person of property without due process of law, or to deny to any person, within its jurisdiction, the equal protection of the laws.

Upon a hearing on this petition and answer, the supreme court of Nebraska, on May 13, 1890, "found the issues in favor of the relators," and adjudged that, unless the railway company within forty days complied with the order of the *board of transportation, a [411 writ of mandamus should issue to compel a compliance with that order according to its terms. 29 Neb. 550. The railway company sued out this writ of error.

*Messrs.* **John F. Dillon,** *Winslow S. Pierce,* and *Harry Hubbard,* for plaintiff in error:

A corporation is a "person" within the pro-



Digitized by Google

tection of the 14th Amendment to the Constitution of the United States.

*Santa Clara County* v. *Southern P. R. Co.* 118 U. S. 394 (30: 118); *Pembina Consol. S. Min. & M. Co.* v. *Pennsylvania*, 125 U. S. 181, (31: 650), 2 Inters. Com. Rep. 24; *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205 (32: 107); *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26 (32: 585).

The land taken is the private property of the railway company, purchased and owned by it, and, like any other private property, cannot be taken except by due process of law.

*State* v. *Chicago, M. & St. P. R. Co.* 36 Minn. 402; *Lake Shore & M. S. R. Co.* v. *Chicago & W. I. R. Co.* 97 Ill. 506.

The obligation of the contracts of a corporation cannot be impaired by state or Federal legislation any more than can the contracts of individuals.

*Danolds* v. *State*, 89 N. Y. 36, 42 Am. Rep. 277; *Union P. R. Co.* v. *United States* ("*Sinking Fund Cases*") 99 U. S. 700 (25: 496); *Com.* v. *Essex Co.* 13 Gray, 239; *Detroit* v. *Detroit & H. Pl. Road Co.* 43 Mich. 140; *People* v. *O'Brien*, 111 N. Y. 1, 2 L. R. A. 255.

The legislation of the state of Nebraska as construed by the judgment or decree of the Nebraska supreme court took the land of the railway company for a private use, contrary to the 14th Amendment of the Constitution of the United States.

*Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418 (33: 970), 3 Inters. Com. Rep. 209.

The test of a public use is whether the use can be participated in by all of the public.

*Cole* v. *La Grange*, 113 U. S. 1 (28: 896); *Burlington Twp.* v. *Beasley*, 94 U. S. 310 (24: 161); *Blair* v. *Cuming County*, 111 U. S. 363 (28: 457); *Parkersburg* v. *Brown*, 106 U. S. 487 (27: 238); *Citizen's Sav. & L. Asso.* v. *Topeka*, 87 U. S. 20 Wall. 655 (22: 455).

The property of the railway company is protected by the Constitution of the United States.

*Scott* v. *McNeal*, 154 U. S. 34 (38: 896).

It is not enough that the matter has been passed upon by the courts of the state. This does not make the proceeding by which the railway company's property is taken due process of law. This court passes upon the matter for itself and decides whether or not the property was taken by due process of law.

*Calder* v. *Bull*, 3 U. S. 3 Dall. 388 (1: 649).

The words "due process of law" have been several times discussed and somewhat defined by the decisions of this court.

*Den, Murray*, v. *Hoboken Land & Improv. Co.* 59 U. S. 18 How. 272 (15: 272); *Davidson* v. *New Orleans*, 96 U. S. 97 (24: 616); *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254 (35: 1004).

This legislation is not valid as an exercise of the police power of the state of Nebraska.

*Butcher's Benev. Asso.* v. *Crescent City L. S. L. & S. H. Co.* ("*Slaughter House Cases*") 83 U. S. 16 Wall. 36 (21: 394); *Missouri P. R. Co.* v. *Humes*, 115 U. S. 512 (29: 463); *Mugler* v. *Kansas*, 123 U. S. 623 (31: 205); *Powell* v. *Pennsylvania*, 127 U. S. 678 (32: 253).

Private property cannot be taken under the pretense of regulating the affairs of railroads, except (as other private property) for a public use, and on just compensation ascertained by due process of law.

*Stone* v. *Farmers' Loan & T. Co.* ("*Railroad Commission Cases*") 116 U. S. 307 (29: 636); *Reagan* v. *Farmers' Loan & T. Co.* (No. 1), 154 U. S. 362 (38: 1014), 4 Inters. Com. Rep. 560; *State* v. *Chicago, M. & St. P. R. Co.* 36 Minn. 402.

Due process of law means law of the land.

*Missouri P. R. Co.* v. *Humes*, 115 U. S. 512 (29: 463); *Taylor* v. *Porter*, 4 Hill, 145, 40 Am. Dec. 274; *Hoke* v. *Henderson*, 4 Dev. L. 15, 25 Am. Dec. 677; *Wynehamer* v. *People*, 13 N. Y. 378; *Sears* v. *Cottrell*, 5 Mich. 251; *Turner* v. *Althaus*, 6 Neb. 71; *Cole* v. *La Grange*, 113 U. S. 1 (28: 896); *Yesler* v. *Harbor Line Comrs.* 146 U. S. 646 (36: 1119).

The legislation of the state of Nebraska as construed by the judgment of the Nebraska supreme court deprived the railway company of its property without making compensation therefor or providing for its ascertainment and payment, by due process of law, contrary to the Constitution of the state of Nebraska, and in violation of the Constitution of the United States.

*Scott* v. *McNeal*, 154 U. S. 34 (38: 896).

*Messrs.* **A. H. Churchill,** *George H. Hastings*, and *W. A. Dilworth*, for defendant in error:

The Missouri Pacific Railway Company can only use its property, real and personal, in the furtherance of the purposes for which the corporation was created, namely, the constructing, maintaining, and operating of a railroad.

*Proprietors of Locks & Canals* v. *Nashua & L. R. Co.* 104 Mass. 1, 6 Am. Rep. 181; *Pierce* v. *Emery*, 32 N. H. 504; *Burlington & M. R. R. Co.* v. *Spearman*, 12 Iowa, 112; *Grand Rapids & L. S. R. Co.* v. *Grand Rapids & I. R. Co.* 35 Mich. 265, 24 Am. Rep. 545; *Lance's Appeal*, 55 Pa. 25, 93 Am. Dec. 722; *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454 (23: 356).

An elevator is a necessity and facility in the successful handling of grain, and a site therefor is a facility that the law will compel a common carrier to furnish to all alike.

*Rhodes* v. *Northern P. R. Co.* 34 Minn. 87, 21 Am. & Eng. R. Cas. 33; *State, Mattoon*, v. *Republican Valley R. Co.* 17 Neb. 647, 52 Am. Rep. 424.

The Missouri Pacific Railway Company in furnishing a site upon its station or right-of-way grounds at Elmwood to two firms for two elevators, and refusing to grant the same facilities, at the same place, upon the same conditions, to the Farmers' Alliance of Elmwood, thereby discriminates in favor of the two firms and against said Farmers' Alliance.

*Chicago & N. W. R. Co.* v. *People*, 56 Ill. 365, 8 Am. Rep. 690; *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1 (24: 708); *State, American U. Teleg. Co.*, v. *Bell Teleph. Co.* 36 Ohio St. 296; *Railroad Comrs.* v. *Portland & O. C. R. Co.* 63 Me. 269, 18 Am. Rep. 208; *Marriott* v. *London & S. W. R. Co.* 1 C. B. N. S. 499; *Couch* v. *London & N. W. R. Co.* 14 C. B. 255; *Sandford* v. *Catawissa, W. & E. R. Co.* 24 Pa. 382, 64 Am. Dec. 667; *McDuffee* v. *Portland & R. R. Co.* 52 N. H. 449, 13 Am. Rep. 72; *Hall* v. *London, B. & S. C. R. Co.* L. R. 15 Q. B. Div. 505, 22 Am. & Eng. R. Cas. 446.

The Missouri Pacific Railway Company is purely and strictly a domestic corporation of the state of Nebraska and subject to the laws



Digitized by Google

and regulations thereof—a creature of the state. And the order complained of is simply an exercise of the police power of the state towards that company.

*Munn* v. *Illinois*, 94 U. S. 125 (24:84); *San Antonio & A. P. R. Co.* v. *State*, 79 Tex. 264, 45 Am. & Eng. R. Cas. 586; *State* v. *Wabash, St. L. & P. R. Co.* 88 Mo. 144; *Diamond* v. *Northern P. R. Co.* 6 Mont. 580; *Cincinnati, H. & D. R. Co.* v. *Sullivan*, 32 Ohio St. 152.

The enforcing of the order of railroad commissioners to require a railroad company to conform to their schedule of rates is a matter of public right, for which an action may be maintained in the name of the state.

*Campbell* v. *Chicago, M. & St. P. R. Co.* 86 Iowa, 587, 17 L. R. A. 443, 4 Inters. Com. Rep. 203.

Mr. Justice **Gray** delivered the opinion of the court:

The arguments in this case have taken a wider range than is required for its decision. The material facts, as assumed by the court below, are as follows:

The Missouri Pacific Railway Company, a corporation of the state of Nebraska, was the owner of the right of way and depot grounds, within which were its main and side tracks, its stations, and other shipping facilities, at Elmwood in that state; and had permitted two elevators to be erected and operated by private firms on the side track at that station.

John W. Hollenbeck and others, apparently not a corporation, but a voluntary association of persons owning farms and leaseholds in the neighborhood of Elmwood, upon which they raised corn, wheat, oats, and other cereals, large quantities of which were ready for market, made an application in writing to the railway company to grant them "a location on the right of way at Elmwood station aforesaid, for the erection of an elevator of sufficient capacity to store from time to time the cereal products of the farms and leaseholds of" the applicants, "as well as the products of other neighboring farms." That application was refused by the railway company.

The applicants then made a complaint to the Board of Transportation of the State of Nebraska, alleging that the two elevators already built [412] on the right of way of the *railway company at Elmwood station were "during certain seasons of the year wholly insufficient in affording a market for the cereals of the complainants and others desirous of marketing their grain;" and that the refusal of the railway company to grant to the complainants a location for an elevator was in violation of the Nebraska statute of 1887, chap. 60, in that such refusal was an unjust discrimination and that the railway company, by such refusal, was subjecting the complainants to an undue and unreasonable prejudice and disadvantage, in respect to traffic facilities, over other localities, and was giving an undue and unreasonable preference and advantage to the owners and operators of the two elevators already built at that station.

The board of transportation, after notice to the railway company, and hearing evidence and arguments, found that the two existing elevators were insufficient to handle the grain shipped at Elmwood station, and the owners and operators of those elevators had entered into a combination to fix the prices of grain and to prevent competition in the price thereof, and there were not sufficient facilities for the handling and shipping of grain at that station; that it was necessary for the convenience of the public that another elevator should be erected and operated there; that, by reason of the side track being placed within the right of way and depot grounds, the complainants could not ship grain without building their elevator upon the grounds of the railway company; that there was room upon those grounds for another elevator without materially interfering with the operation of the railroad, and the building of an elevator thereon by the complainants would not materially affect the railway company in the use of its grounds, or be an unreasonable burden to it; and that the granting by the railway company of the right and privilege to the owners of the two elevators now standing, and refusing to grant the like right and privilege to the complainants, was an unjust and unreasonable discrimination against the complainants, and unlawfully gave a preference and advantage to the owners of the two existing elevators.

*The board of transportation thereupon [413] ordered that the railway company, within ten days, grant to the complainants, on like terms and conditions as granted to the owners of the two existing elevators, the right and privilege of erecting an elevator upon its grounds, and adjacent to its track, at a point specified in the order, or at some other suitable and convenient place if the parties could agree; and grant to the complainants all and equal facilities for the handling and shipping of grain at that station, which it granted to other shippers of grain there, and cease from all discrimination or preference to and of shippers and operators of elevators at that station.

The railway company not having complied with the order, the supreme court of the state, upon a petition in the name of the state, at the relation of the board of transportation, for a mandamus, and an answer thereto and hearing thereon, found the issues in favor of the relators, and adjudged that, unless the railway company, within forty days, complied with order of the board of transportation, a writ of mandamus should issue to compel compliance with that order according to its terms. In the opinion of the court, it was said: "The correctness of the findings of the board is not seriously questioned, but its power to make such findings and order is denied." 29 Neb. 556.

The statute of Nebraska of 1887, chap. 60, §§ 1-3, prohibit and declare to be unlawful all unjust and unreasonable charges made by a railroad company for any services rendered in the transportation (which includes all instrumentalities of shipment or carriage) of passengers or property, or in connection therewith, or for the receiving, delivering, storage, or handling of such property; the demanding or collecting, directly or indirectly, by a railroad company, from any person, of a greater compensation for such service than it demands or collects from any other person for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, is declared to be unjust discrimination; it is also



Digitized by Google

made unlawful to give any preference or advantage to, or to subject to any prejudice or disadvantage, any particular person, company, firm, **414** ] corporation, or locality, or *any particular description of traffic, in any respect whatsoever; and railroad companies are required, according to their respective powers, to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and not to discriminate in their rates and charges between such contracting lines.

By § 17, upon complaint in writing concerning any lack of facilities or accommodations furnished by a railroad company for the comfort, convenience, and accommodation of individuals and the public, or concerning any unjust discrimination against any person, firm, corporation, or locality, either in rates, facilities furnished, or otherwise, the board of transportation, whenever, in its judgment any repairs of, or additions to, or changes in, any portion of the road, rolling stock, stations, depots, station houses, or warehouses of a railroad company, are necessary in order to secure the safety, comfort, accommodation, and convenience of the public and individuals, or any change in the mode of conducting its business is reasonable and expedient in order to promote the security and accommodation of the public, or to prevent unjust discrimination against persons or places, is directed to order the railroad company to make such repairs, additions, or changes.

The supreme court of Nebraska has construed this statute as authorizing the board of transportation to make the order questioned in this case, which required the railroad company to grant to the relators the right to erect an elevator upon its right of way at Elmwood station, on the same terms and conditions on which it had already granted to other persons rights to erect two elevators thereon. The construction so given to the statute by the highest court of the state must be accepted by this court in judging whether the statute conforms to the Constitution of the United States. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 456 [33: 970, 8 Inters. Com. Rep. 209]; *Illinois C. R. Co.* v. *Illinois*, 163 U. S. 142, 152, 41 L. ed. 107, 110.

A railroad corporation doubtless holds its station grounds, tracks, and right of way as its **415** ]private property, but for the *public use for which it was incorporated; and may, in its discretion, permit them to be occupied by other parties with structures convenient for the receipt and delivery of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers. *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454 [23: 356]. But how far the railroad company can be compelled to do so, against its will, is a wholly different question.

Upon the admitted facts of the case at bar, the railroad company had granted to two private firms the privilege of erecting elevators upon its right of way at Elmwood station; and had refused an application of other private persons, farmers in the neighborhood, for the privilege of erecting on that right of way a third elevator of sufficient capacity to store from time to time the grain produced upon their farms and upon those of their neighbors; and has been ordered by the board of transportation, and by the supreme court of the state, to grant to the applicants a location upon its right of way for the purpose of erecting thereon such an elevator, upon the like terms and conditions as in its grants to the owners of the two existing elevators.

The only particular alleged in the complaint, and the only one, therefore, presented for our consideration in this case, in which the railroad company is supposed to have made an unjust discrimination against the complainants, or to have subjected them to an undue and unreasonable prejudice and disadvantage, in respect to traffic facilities, over other locations, or to have given an undue and unreasonable preference to other persons, is the refusal of the railroad company to grant to the complainants a location upon its right of way for the purpose of erecting an elevator thereon, upon the terms and conditions upon which it had previously granted to other persons similar privileges to erect two other elevators.

The record does not show what were the terms and conditions of the contracts between the railroad company and the owners of those elevators; nor present any question as to the validity of those contracts.

Nor does it present any question as to the power of the *legislature to compel the [**416** railroad company itself to erect and maintain an elevator for the use of the public; or to compel it to permit to all persons equal facilities of access from their own lands to its tracks, and of the use from time to time of those tracks, for the purpose of shipping or receiving grain or other freight, as in *Rhodes* v. *Northern P. R. Co.* 34 Minn. 87, in *Chicago & N. W. R. Co.* v. *People*, 56 Ill. 356, 8 Am. Rep. 690, and in *Hoyt* v. *Chicago, B. & Q. R. Co.* 93 Ill. 601.

Nor does this case show any such exercise of the legislative power to regulate the conduct of the business, or the rate of tolls, fees, or charges, either of railroad corporations or of the proprietors of elevators, as has been upheld by this court in previous cases. *Munn* v. *Illinois*, 94 U. S. 113 [24: 77]; *Chicago, B. & Q. R. Co.* v. *Iowa*, 94 U. S. 155 [24: 94]; *Dow* v. *Beidelman*, 125 U. S. 680 [31: 841, 2 Inters. Com. Rep. 56]; *Budd* v. *New York*, 143 U. S. 517 [36: 247, 4 Inters. Com. Rep. 45]; *Brass* v. *North Dakota, Stoeser*, 153 U. S. 391 [38: 757, 4 Inters. Com. Rep. 670]; *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 213, 214 [38: 962, 967, 4 Inters. Com. Rep. 649]; *Louisville & N. R. Co.* v. *Kentucky*, 161 U. S. 677, 696 [40: 849, 857].

The order in question was not limited to temporary use of tracks, nor to the conduct of the business of the railway company. But it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its right of way.

The order in question was not, and was not claimed to be, either in the opinion of the court below, or in the argument for the defendant in error in this court, a taking of private property for a public use under the right of eminent domain. The petitioners were merely private



Digitized by Google

individuals, voluntarily associated together for their own benefit. They do not appear to have been incorporated by the state for any public purpose whatever, or to have themselves intended to establish an elevator for the use of the public. On the contrary, their own application to the railroad company, as recited in their complaint to the board of transportation, was only "for a location, on the right of way at Elmwood station aforesaid, for the erection of an elevator of sufficient capacity to 417] store *from time to time the cereal products of the farms and leaseholds of complainants aforesaid, as well as the products of other neighboring farms."

To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected thereon, to the railroad company for the accommodation of its own business, or for the convenience of the public.

This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States. *Wilkinson* v. *Leland*, 27 U. S. 2 Pet. 627, 658 [7: 542, 553]; *Den, Murray*, v. *Hoboken Land & I. Co.* 59 U. S. 18 How. 272, 276 [15: 372, 374]; *Citizens' Sav. & L. Asso.* v. *Topeka*, 87 U. S. 20 Wall. 655 [22: 455]; *Davidson* v. *New Orleans*, 96 U. S. 97, 102 [24: 616, 618]; *Cole* v. *La Grange*, 113 U. S. 1 [28: 896]; *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 158, 161 [*ante*, 59]; *State* v. *Chicago, M. & St. P. R. Co.* 36 Minn. 402.

*Judgment reversed*, and case remanded to the supreme court of the state of Nebraska for further proceedings not inconsistent with this opinion.

CHARLES WARNER, *Plff. in Err.*, [418
*v.*
TEXAS & PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 418-425.)

*Agreement to maintain a switch—when not within the statute of frauds.*

1. An oral contract by a railroad company to put down the iron rails for a switch on its railroad and maintain the switch for plaintiff's benefit for shipping purposes as long as he needed it, at the place where he proposed to erect a sawmill, is not within the Texas statute of frauds as to agreements not to be performed within one year.
2. Such agreement is not within the clause of the Texas statute of frauds which requires certain conveyances of real estate and contracts for sale or lease thereof to be in writing, but does not include grants of easements.

[No. 47.]

*Argued May 5, 1896. Decided November 30, 1896.*

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment affirming a judgment of the Circuit Court in favor of defendant in an action brought by Charles Warner, plaintiff, against the Texas & Pacific Railway Company, upon an oral contract to make and maintain a switch. *Reversed*, and case remanded with direction for a new trial.

See same case below, 13 U. S. App. 236.

---

NOTE.—*As to how far fraud or illegal consideration will avoid contract*, see note to Armstrong v. Toler, 6: 468.

*As to construction of written contracts; how far a question for the court*,—see note to Ward v. United States, 28: 792.

*Statute of frauds; agreements not to be performed within one year; when statute applicable, and when not.*

The statute applies only to contracts which cannot be fully performed in accordance with the intent of the parties within a year from the time of making. Doyle v. Dixon, 97 Mass. 208, 93 Am. Dec. 80; Boydell v. Drummond, 11 East, 142.

If the acts contracted for can be done within a year, and such a doing will be a complete performance of the contract, the statute does not apply; although the parties may have contemplated, and indeed expected, that the acts would not be done within the year, and although the possibility of performance within a year may not in fact have occurred to them. Knowlman v. Bluett, L. R. 9 Exch. 1.

But if it was their deliberate intention that the act should not be done within a year, although possible, and if, accordingly, such a doing would technically not be a performance of the contract, the statute does apply, and an oral agreement will be insufficient to support an action.

Thus, a contract to clear land within three years and seed down 1 acre the first, 1 acre the second, and 1 acre the third year (Herrin v. Butters, 20 Me. 119), was held to be within the statute; for though it was physically possible to clear the whole and seed down the 3 acres within one year, still that would not constitute a performance according to the intention of the parties.

In Boydell v. Drummond, 11 East, 142, the con-



Digitized by Google

Statement by Mr. Justice **Gray**:

This was an action brought May 9, 1892, by Warner against the Texas & Pacific Railway Company, a corporation created by the laws of the United States, upon a contract made in 1874, by which it was agreed between the parties that if the plaintiff would grade the ground for a switch, and put on the ties, at a certain point on the defendant's railroad, the defendant would put down the rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it. The defendant pleaded that the contract was oral, and within the statute of frauds, because it was "not to be performed within one year from the making thereof," and because it was "a grant or conveyance by this defendant of an estate of inheritance, and for a term of more than one year, in lands."

419] *At the trial, the plaintiff, being called as witness in his own behalf, testified that prior to the year 1874 he had been engaged in the lumbering and milling business in Iowa and in Arkansas, and, in contemplation of breaking up and consolidating his business, came to Texas, and selected a point, afterwards known as Warner's Switch, as a suitable location, provided he could obtain transportation facilities; that he found at that point an abundance of fine pine timber, and, 8 miles back from the railroad, a stream, known as Big Sandy creek, peculiarly adapted for floating logs, and lined for many miles above with pine timber; that in 1874 the defendant's agent, after conversing with him about his experience in the lumber business, the capacity of his mill, and the amount of lumber accessible from the proposed location, made an oral contract with him, by which it was agreed that if he would furnish the ties and grade the ground for the switch, the defendant would put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it; that the plaintiff immediately graded the ground for the switch, and got out and put down the ties, and the defendant put down the iron rails and established the switch; and that the plaintiff, on the faith of the continuance of transportation facilities at the switch, put up a large sawmill, bought many thousand acres of land and timber rights and the water privileges of Big Sandy creek, made a tram road 3 miles long from the switch to the creek, and otherwise expended large sums of money, and sawed and shipped large quantities of lumber, until the defendant, on May 19, 1887, while its road was operated by receivers, tore up the switch and ties, and destroyed his transportation facilities, leaving his lands and other property without any connection with the railroad. His testimony also tended to prove that he had thereby been injured to the amount of more than $50,000, for which the defendant was liable if the contract sued on was not within the statute of frauds.

On cross-examination the plaintiff testified that, when he made the contract, he expected to engage in the manufacture of lumber at this place for more than one year, and to stay there, *and to have a site for lumber there, as[420 long as he lived; and that he told the defend-

---

tract was for an edition of Shakespeare's works, one number at least to be published each year, but the intention was clear that the publication should extend over several years. The court held the statute to apply.

The statute applies to contracts when the performance within a year is impossible as a contract to labor or employ labor for more than a year, or for one year, the service to begin at a future day. Meyer v. Roberts, 46 Ark. 80, 55 Am. Rep. 567; Tuttle v. Swett, 31 Me. 555; Kleeman v. Collins, 9 Bush, 460; Drummond v. Burrell, 13 Wend. 307; Bracegirdle v. Heald, 1 Barn. & Ald. 722; Giraud v. Richmond, 2 C. B. 835.

It makes no difference how little the time that the term exceeds the year,—a contract for service made one day to begin the next is within the statute. Blanck v. Littell, 9 Daly, 268; McElroy v. Ludlum, 32 N. J. Eq. 828; Dickson v. Frisbie, 52 Ala. 165, 23 Am. Rep. 565, which excluded the day of making.

In Cawthorne v. Cordrey, 13 C. B. N. S. 406, a contract was made March 24, the services to begin March 25, and an action was sustained; but there was evidence of a new contract for a year's labor on the 25th. A *dictum* that, where the contract was made at noon Monday, to begin Tuesday, the statute did not apply since the law disregards fractions of a day, was questioned in Britain v. Rossiter, L. R. 11 Q. B. Div. 128, which, however, approved the decision rendered.

Dickson v. Frisbie, 52 Ala. 165, 23 Am. Rep. 565, cited above, quoted and followed the *dictum* in Cawthorne v. Cordrey; but has been disapproved in Levison v. Stix, 10 Daly, 229. In that case a contract made December 31 of one year, for services to end on December 31 of the next year, was held void, the court saying that the performance must end within the year in which the contract was made. McAleer v. Corning, 18 Jones & S. 63.

A contract made on the 2d of October, 1854, to hire the plaintiff until September 1, 1855, and for a year thereafter unless the employment was terminated by three months' notice, is within the statute. Dobson v. Collis, 1 Hurlst. & N. 81.

It has been intimated that, where the contract was for service to begin at a future time, a contract for a year would be implied if the parties entered upon the performance; but this is denied in Britain v. Rossiter, L. R. 11 Q. B. Div. 128.

To the same effect, see Snelling v. Lord Huntingfield, 1 Cromp. M. & R. 20; Sutcliffe v. Atlantic Mills, 13 R. I. 480, 43 Am. Rep. 39.

After the complete performance of the part of a contract of hiring had by the statute, a new contract may arise, which the law will enforce. Collis v. Botthamley, 7 Week. Rep. 87.

The statute does not apply to a hiring from year to year. Beeston v. Collyer, 12 J. B. Moore, 552, 4 Bing. 309; Giraud v. Richmond, 2 C. B. 835. It applies to a contract to take a lease for a year or more. The term to begin at a future day. Atwood v. Norton, 31 Ga. 507; Comstock v. Ward, 22 Ill. 243; Ryan v. Kirchberg, 17 Ill. App. 132; Jones v. Marcy, 49 Iowa, 188; Delano v. Montague, 4 Cush. 42; Briar v. Robertson, 19 Mo. App. 66.

A contrary decision has been rendered in Michigan where it would seem that the provision as to contracts not to be performed within one year is not applied to leases. Whiting v. Ohlert, 52 Mich. 462, 50 Am. Rep. 265.

The New York statute has been held not to apply to interests in lands. Taggard v. Roosevelt, 2 E. D. Smith, 100; Young v. Dake, 5 N. Y. 463, 55 Am. Dec. 356; Cayuga R. Co. v. Niles, 13 Hun, 170 (which applied the provision to the case of an easement), and cases there cited, which disregarded the first two cases. See also Day v. New York C. R. Co. 22 Hun, 412.



Digitized by Google

ant's agent, in the conversation between them at the time of making the contract, that there was lumber enough in sight on the railroad to run a mill for ten years, and by moving back to the creek there would be enough to run the mill for twenty years longer.

No other testimony being offered by either party, bearing upon the question whether the contract sued on was within the statute of frauds, the circuit court, against the plaintiff's objection and exception, ruled that the contract was within the statute, instructed the jury to find a verdict for the defendant, and rendered judgment thereon, which was affirmed by the circuit court of appeals, upon the ground that the contract was within the statute of frauds, as one not to be performed within a year. 13 U. S. App. 236. The plaintiff sued out this writ of error.

*Mr.* **Horace Chilton,** for plaintiff in error:

The statute of frauds of Texas provides that no action shall be brought "upon any agreement which is not to be performed within the space of one year from the making thereof," unless the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged. Art. 2464.

*Thouvenin* v. *Lea*, 26 Tex. 614; *Thomas* v. *Hammond*, 47 Tex. 42; *Central Texas Min. M. & L. Co.* v. *Weems*, 78 Tex. 252; *Arkansas M. R. Co.* v. *Whitley*, 54 Ark. 199, 11 L. R. A. 621; *Sweet* v. *Desha Lumber Co.* 56 Ark. 629; *Powder River Livestock Co.* v. *Lamb*, 38 Neb. 339; *Blanding* v. *Sargent*, 33 N. H. 239, 66 Am. Dec. 720; *Donellan* v. *Read*, 3 Barn. & Ald. 906; *Cherry* v. *Heming*, 4 Exch. 631; *Mayor* v. *Pyne*, 11 J. B. Moore, 2; *McPherson* v. *Cox*, 96 U. S. 416 (24: 750); *Walker* v. *Johnson*, 96 U. S. 424 (24: 834); Wood, Stat. Fr. 484; Browne, Stat. Fr. § 116.

We claim that Warner's contract with the railway company does not fall within the statute of frauds:

1. Because it might have been performed on both sides within one year. *Arkansas M. R. Co.* v. *Whitley*, and *Sweet* v. *Desha Lumber Co. supra.*

2. Because it was wholly performed on one side within one year. *Blanding* v. *Sargent*, 33 N. H. 239, 66 Am. Dec. 720; *Donellan* v. *Read*, 3 Barn. & Ald. 906; *Cherry* v. *Heming*, 4 Exch. 631; *Mayor* v. *Pyne*, 11 J. B. Moore, 2.

3. Because it falls within the meaning of an executed contract, which has always been held to constitute an exception to the prohibition of the statute of frauds. *Showalter* v. *McDonell*, 33 Tex. 158; *Central Texas Min. M. & L. Co.* v. *Weems*, 78 Tex. 252; Browne, Stat. Fr. 116.

It will of course be admitted that the construction of the statute of frauds adopted by the Texas court furnishes the rule for this court; but, even if this were not so, the above propositions are all sustained by general authority.

*Messrs.* **John F. Dillon,** *Winslow S. Pierce,* and *David D. Duncan,* for defendant in error:

The mere fact that it is possible that a parol contract may be performed within a year does not prevent the statute of frauds from applying to it. The intent and understanding of the

---

A similar decision has been given in Iowa. Sobey v. Brisbee, 20 Iowa, 105.

In Kentucky the provision is applicable to agreements relating to lands. Roberts v. Tennell, 3 T. B. Mon. 247.

The statute applies to a contract to do any act at a time more than a year distant. Thus, to pay off an encumbrance that will not mature for more than a year (Curtis v. Sage, 35 Ill. 22); to deliver a crop that cannot be grown within a year (Holloway v. Hampton, 4 B. Mon. 415); to repay if a certain sum is not realized within three years (Lapham v. Whipple, 8 Met. 59, 41 Am. Dec. 487); to pay to the mortgagor all the surplus above the mortgage debt which the promisee, the mortgagee in possession, receives, within a year after the sale, no sale being possible until after three years (Frary v. Sterling, 99 Mass. 461); to pay a certain sum in March of the year following the February in which the promise was made (Lower v. Winters, 7 Cow. 263); to deliver sheep at the end of four years (Bartlett v. Wheeler, 44 Barb. 162); and to allow for fixtures at the end of a lease still having several years to run (Lawrence v. Woods, 4 Bosw. 354); to do from year to year the things necessary to obtain a certain annual income for a curate (Roberts v. Tucker, 3 Exch. 632).

To a contract to continue to do an act for a period greater than one year; as, to edit a book annually (Sweet v. Lee, 4 Scott, N. R. 77); to support a person (Goodrich v. Johnson, 66 Ind. 259); to maintain an agency (Cowles v. Warner, 22 Minn. 449); to support a widow and her children for a definite period (Deaton v. Tennessee Coal & R. Co. 12 Heisk. 650); to run a mill (Hinckley v. Southgate, 11 Vt. 428); see also Drake v. Seaman, 97 N. Y. 230.

Or to a contract to refrain from doing during such a period; to refrain from carrying on a trade or calling for a fixed term (Davy v. Shannon, 4 Exch. Div. 81; Perkins v. Clay, 54 N. H. 518; Gottschalk v. Witter, 25 Ohio St. 76); to refrain from using any other than a particular carding-machine (Self v. Cordell, 45 Mo. 345).

To pay a sum of money by instalments such that full payment within the year is impossible. Thus, an agreement to pay for machinery in certain instalments, the last to become due after a year (Tiernan v. Granger, 65 Ill. 351); to pay $764 in instalments of $50 (Kellogg v. Clark, 23 Hun, 398); to pay $500 in annual payments of $100 (Parks v. Francis, 50 Vt. 626).

The mere fact that the money is payable in instalments at less than a year, and that no time is fixed for the complete payment, is not enough to show that the contract was to be performed within the year, and to take it out of the statute. Moore v. Fox, 10 Johns. 244, 6 Am. Dec. 338.

The statute only extends to such promises where, by the express appointment of the party, the thing is not to be performed within a year. Boydell v. Drummond, 11 East, 142; Roberts v. Tucker, 3 Exch. 632; Eley v. Positive Government Secur. L. Assur. Co. L. R. 1 Exch. Div. 20; Giraud v. Richmond, 2 C. B. 835; *Re* Pentreguinea Coal Co. 4 De G. F. & J. 541; Walker v. Johnson, 96 U. S. 424 (24: 834); Hinkle v. Fisher, 104 Ind. 84; Niagara Fire Ins. Co. v. Greene, 77 Ind. 590; Saunders v. Kastenbine, 6 B. Mon. 17; Farwell v. Tillson, 76 Me. 227; Lawrence v. Cooke, 56 Me. 187, 96 Am. Dec. 443; Herrin v. Butters, 20 Me. 119; Linscott v. McIntire, 15 Me. 201, 33 Am. Dec. 602; Chaffe v. Benoit, 60 Miss. 34; Kimmins v. Oldham, 27 W. Va. 258; Day v. New York C. R. Co. 22 Hun, 412.

The case of Lockwood v. Barnes, 3 Hill, 128, 38 Am. Dec. 620, disapproved by Browne (Stat. Fr. § 280), can be supported upon this ground. In that case, the agreement was to deliver the foal to be got by a stallion at a certain price, the delivery to



Digitized by Google

parties, as gathered from the words used in it and from the circumstances under which it was entered into, must necessarily govern the character of the contract as to the applicability of the statute.

*Herrin* v. *Butters*, 20 Me. 122; *Washington, A. & G. Steam Packet Co.* v. *Sickles*, 72 U. S. 5 Wall. 580 (18: 550); *McPherson* v. *Cox*, 96 U. S. 404 (24: 746); *Deaton* v. *Tennessee Coal & R. Co.* 12 Heisk. 650; *Boydell* v. *Drummond*, 11 East, 142; *Pitkin* v. *Long Island R. Co.* 2 Barb. Ch. 222; *Day* v. *New York C. R. Co.* 51 N. Y. 583.

The test whether or not the contract comes within the statute is: (1) Was it the understanding and the intention of the parties that the contract might be performed in one year? If not, the case is clearly within the statute. (2) Is the contract such a one as was capable of entire and complete execution within the year?

Browne, Stat. Fr. § 284; *Herrin* v. *Butters*, 20 Me. 119; *Saunders* v. *Kastenbine*, 6 B. Mon. 17; *Peters* v. *Westborough*, 19 Pick. 365, 31 Am. Dec. 142; *Linscott* v. *McIntire*, 15 Me. 201, 33 Am. Dec. 602; *Hinckley* v. *Southgate*, 11 Vt. 428.

Part performance of a verbal contract within the statute of frauds has no effect at law to take the case out of its provisions, but is only ground for equitable relief and cannot be urged as a defense in a suit at law.

Reed, Stat. Fr. § 548; Story, Eq. Jur. §§ 339, 1522, 1522*a*; Bispham, Eq. § 385; *Newell* v. *Newell*, 13 Vt. 24; *Thompson* v. *Gould*, 20 Pick. 138; *Thomas* v. *Dickinson*, 14 Barb. 90; *Jackson & S. Co.* v. *Philadelphia, W. & B. R. Co.* 4 Del. Ch. 180; *Texas & P. R. Co.* v. *Marshall*, 136 U. S. 393 (34: 385).

An agreement made by a railroad company with a person owning land and other property adjacent to the railroad to establish and maintain a side track at a particular place in the neighborhood of his property is, in substance, the grant of an easement of servitude and is a contract for the sale of real estate and within the statute of frauds, and to be valid must be in writing.

*Pitkin* v. *Long Island R. Co.* 2 Barb. Ch. 230; Washb. Easements & Servitudes, 15, 19, 24.

Mr. Justice **Gray** delivered the opinion of the court:

The statute of frauds of the state of Texas, re-enacting, in this particular, the English Statute of 29 Car. II. chap. 3, § 4 (1677), provides that no action shall be brought "upon any agreement which is not to be performed within the space of one year from the making thereof," unless the "agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized." Tex. Stat. January 18, 1840; 1 Paschal's Dig. (4th ed.) art. 3875; Tex. Rev. Stat. 1879, art. 2464; *Bason* v. *Hughart*, 2 Tex. 476, 480.

This case has been so fully and ably argued, and the construction of this clause of the statute of frauds has so seldom *come before this[421

be after the colt was weaned. In the natural course of events, the agreement would not be performed within from fifteen to seventeen months; yet, by possibility, the period of gestation and weaning might be completed within twelve months. The court held the contract within the statute.

This decision was followed in Groves v. Cook, 88 Ind. 169, 45 Am. Rep. 462, where the owner of a stallion furnished the use of the horse and agreed to pay a fixed sum for the foal when five months old.

Merely allowing an additional time for performance beyond the year will not bring the contract within the statute if the parties intended a performance within the year, or if such performance is possible and satisfactory.

In Jones v. Pouch, 41 Ohio St. 146, twenty days beyond the year were allowed. The court said the intent that the contract should be performed within the year was clear; and the fact that to provide against an emergency, twenty days more were allowed, did not make the statute apply.

Where the time of performance is not specified, the statute does not apply if by any possibility the contract may be performed within a year. Fenton v. Emblers, 3 Burr. 1278. Thus, a promise to pay $50 if the plaintiff would procure a certain marriage (Francam v. Foster, Skin. 326); to act as attorney and receive payment out of the proceeds of a certain suit (McPherson v. Cox, 96 U. S. 404 (24: 746); to hold a surety harmless (Blake v. Cole, 22 Pick. 97); to employ generally (Niagara Fire Ins. Co. v. Greene, 77 Ind. 590; La Du King Mfg. Co. v. La Du, 36 Minn. 473; Franklin Sugar Co. v. Taylor, 37 Kan. 435).

A general promise of marriage is not within the statute. Blackburn v. Mann, 85 Ill. 222; Brick v. Gannar, 36 Hun, 52; Paris v. Strong, 51 Ind. 339; Lawrence v. Cooke, 56 Me. 187, 96 Am. Dec. 443.

For other instances where contract is held valid, see Sutphen v. Sutphen, 30 Kan. 510; Morley v. Noblett, 42 Ind. 85; Blair Town Lot & L. Co. v. Walker, 39 Iowa, 406; Kent v. Kent, 18 Pick. 569; Chaffe v. Benoit, 60 Miss. 34; Duff v. Snider, 54 Miss. 245; Soggins v. Heard, 31 Miss. 426; Suggett v. Cason, 26 Mo. 221; Fitzpatrick v. Woodruff, 96 N. Y. 561; Van Woest v. Albany & S. R. Co. 67 N. Y. 538; Hedges v. Strong, 3 Or. 18; Southwell v. Beesley, 5 Or. 143; Thomas v. Hammond, 47 Tex. 42; Rogers v. Brightman, 10 Wis. 56. But see Day v. New York C. R. Co. 22 Hun, 412, where the agreement was to build a side track to the plaintiff's land, and bring all cattle freight there to be fed by the plaintiff. The court held that, as no performance within a year was expressed or implied, the statute applied.

So, an agreement to enter into a partnership is not within the statute, although it may continue much beyond the year. M'Kay v. Rutherford, 6 Moore, P. C. C. 414; Essex v. Essex, 20 Beav. 449; Jordan v. Miller, 75 Va. 442. But if by the agreement the partnership is to continue to a time certain more than a year distant, it has been held that the statute does apply. Tomkins v. Randell, 19 Week. Rep. 413.

So, too, where a person declared that he was unable to pay a debt, but had so arranged that his executors should pay, it was held that the statute did not apply to this promise. Wells v. Horton, 4 Bing. 40. For other cases, see Heflin v. Milton, 69 Ala. 354; Parker v. Siple, 76 Ind. 345; Niagara Fire Ins. Co. v. Greene, 77 Ind. 590; Sutphen v. Sutphen, 30 Kan. 510; Linscott v. McIntire, 15 Me. 201, 33 Am. Dec. 602; Cole v. Singerly, 60 Md. 348; Randall v. Turner, 17 Ohio St. 262; Hodges v. Richmond Mfg. Co. 9 R. I. 492.

The statute does not apply where the performance is upon a contingency which may by possibility fall within a year.

Thus, a promise to pay on the marriage of an-



Digitized by Google

court, that it will be useful, before considering the particular contract now in question, to refer to some of the principal decisions upon the subject in the courts of England, and of the several states.

In the earliest reported case in England upon this clause of the statute, regard seems to have been had to the time of actual performance, in deciding that an oral agreement that if the plaintiff would procure a marriage between the defendant and a certain lady, the defendant would pay him 50 guineas, was not within the statute; Lord Holt saying: "Though the promise depends upon a contingent, the which may not happen in a long time, yet if the contingent happen within a year, the action shall be maintainable, and is not within the statute." *Francam* v. *Foster* (1692), Skin. 326; Holt, 25.

A year later, another case before Lord Holt presented the question whether the words "agreement not to be performed within one year" should be construed as meaning every agreement which *need* not be performed within the year, or as meaning only an agreement which *could* not be performed within the year, and thus, according as the one or the other construction should be adopted, including or excluding an agreement which might or might not be performed within the year, without regard to the time of actual performance. The latter was decided to be the true construction.

That was an action upon an oral agreement, by which the defendant promised, for one guinea paid, to pay the plaintiff so many at the day of his marriage; and the marriage did not happen within the year. The case was considered by all the judges. Lord Holt "was of opinion that it ought to have been in writing, because the design of the statute was, not to trust to the memory of witnesses for a longer time than one year." But the great majority of the judges were of opinion that the statute included those agreements only that were impossible to be performed within the year, and that the case was not within the statute, because the marriage might have happened within a year after the agreement; and laid down this rule: "Where the agreement is to be performed upon a *contingent, and it does not ap- [422 pear within the agreement that it is to be performed after the year, then a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenor of the agreement that it is to be performed after the year, there a note is necessary." *Peter* v. *Compton* (1693) Skin. 353, Holt, 326, cited by Lord Holt in *Smith* v. *Westall*, 1 Ld. Raym. 316, 317; *Anonymous*, Comyns, 40, 50, Comb. 463.

Accordingly, about the same time, all the judges held that a promise to pay so much money upon the return of a certain ship, which ship happened not to return within two years after the promise made, was not within the statute, "for that by possibility the ship might have returned within a year; and although by accident it happened not to return so soon, yet, they said, that clause of the statute extends only to such promises where, by the express appointment of the party, the thing is not to be performed within a year." *Anonymous*, 1 Salk, 280.

---

other is not within the statute (Peter v. Compton, Skin. 353, Holt, 326); nor a contract of insurance, which is a promise to pay at a moment which may come within a year (Walker v. Metropolitan Ins. Co. 56 Me. 371; Wiebeler v. Milwaukee Mechanics' Mut. Ins. Co. 30 Minn. 464); nor a promise to leave by will (Fenton v. Emblers, 3 Burr. 1278; Ridley v. Ridley, 34 Beav. 478; Maddison v. Alderson, L. R. 8 App. Cas. 467; Bell v. Hewitt, 24 Ind. 280; Izard v. Middleton, 1 Desauss. Eq. 116; Jilson v. Gilbert, 26 Wis. 637, 7 Am. Rep. 100); to pay when a suit is determined (Derrick v. Brown, 66 Ala. 162; Dougherty v. Rosenberg, 62 Cal. 32; Gonzales v. Chartier, 63 Tex. 36); or when money is received from a third person (Artcher v. Zeh, 5 Hill, 200).

Nor where the agreement is to continue to do, or refrain from doing, a particular thing until a contingency, express or implied, occur, if that may happen within a year.

For instance, a promise to maintain a child so long as the defendant thinks proper is not within the statute; for, although possibly it may extend over many years, yet the contingency on which it is to determine—the change in the defendant's mind—may occur within a year. Souch v. Strawbridge, 2 C. B. 808; Knowlman v. Bluett, L. R. 9 Exch. 1.

So, an agreement to labor for five years, or so long as A shall be agent of a company (Roberts v. Rockbottom Co. 7 Met. 46); to use a patent upon a steamboat at a certain price per annum for twelve years if the vessel last so long (Washington, A. & G. Steam Packet Co. v. Sickles, 72 U. S. 5 Wall. 580 ([18: 550]); to continue to supply materials so long as wanted (Walker v. Johnson, 96 U. S. 424 (24: 834)); to pay during coverture (Houghton v. Houghton, 14 Ind. 505, 77 Am. Dec. 69).

Where the contract is to continue during the life of a person, the statute clearly does not apply, as that life may end at any moment. Thus, to support during life (Murphy v. O'Sullivan, 11 Ir. Jur. N. S. 111; Harper v. Harper, 57 Ind. 547; Howard v. Burgen, 4 Dana, 137; Bull v. McCrea, 8 B. Mon. 422; Carr v. McCarthy, 70 Mich. 258; Heath v. Heath, 31 Wis. 223); to pass one over a railroad for life (Atchison, T. & S. F. R. Co. v. English, 38 Kan. 110); to pay during the life of some person (Gilbert v. Sykes, 16 East, 150; Burney v. Ball, 24 Ga. 505; Wiggins v. Keizer, 6 Ind. 252; Hutchinson v. Hutchinson, 46 Me. 154); or, to work for another for his life (Updike v. Ten Broeck, 32 N. J. L. 105; Dresser v. Dresser, 35 Barb. 573; Kent v. Kent, 62 N. Y. 560, 20 Am. Rep. 502; Berry v. Doremus, 30 N. J. L. 399).

The possibility of the death of a party concerned was not considered sufficient to take the following cases out of the statutes: Shute v. Dorr, 5 Wend. 204 (a promise that a youth then sixteen shall serve until twenty-one); Baker v. Lauterbach, 68 Md. 64 (a contract of apprenticeship for five years); Freeman v. Foss, 145 Mass. 361 (for two years); Hill v. Hooper, 1 Gray, 131 (an agreement to hire an infant for five years).

On the other hand, it was held, in Peters v. Westborough, 19 Pick. 364, 31 Am. Dec. 142, that an agreement to support a child, then known to be twelve years of age, until she became eighteen, was not within the statute, as the death of the child within a year would put an end to the contract. And a like decision has been reached in McKinney v. McCloskey, 8 Daly, 368, where the agreement was to take charge of a child until its majority.

The year in all cases is to be computed from the day of making the contract. Bracewirdle v. Heald, 1 Barn. & Ald. 726; Snelling v. Lord Huntingfield, 1 Cromp. M. & R. 20; Cawthorne v. Cordrey, 13 C. B. N. S. 406; Kelly v. Terrell, 26 Ga. 551; Hearne v. Chadbourne, 65 Me. 302.



Digitized by Google

Again, in a case in the King's bench, in 1762, an agreement to leave money by will was held not to be within the statute, although uncertain as to the time of performance. Lord Mansfield said that the law was settled by the earlier cases. Mr. Justice Denison said: "The statute of frauds plainly means an agreement *not* to be performed within the space of a year, and expressly and specificially so agreed. A *contingency* is not within it; nor any case that depends upon contingency. It does not extend to cases where the thing only *may* be performed within the year; and the act cannot be extended further than the words of it." And Mr. Justice Wilmot said that the rule laid down in 1 Salk. 280, above quoted, was the true rule. *Fenton* v. *Emblers*, 3 Burr. 1278, 1 W. Bl. 353.

It thus appears to have been the settled construction of this clause of the statute in England, before the Declaration of Independence, that an oral agreement which, according to the intention of the parties, as shown by the terms of the contract, might be fully performed within a year from the time it was made, was not [423] within the statute, although the time *of its performance was uncertain, and might probably extend, and be expected by the parties to extend, and did in fact extend, beyond the year.

The several states of the Union, in re-enacting this provision of the statute of frauds in its original words, must be taken to have adopted the known and settled construction which it had received by judicial decisions in England. *Tucker* v. *Oxley*, 9 U. S. 5 Cranch, 34, 42 [3: 29, 31]; *Pennock* v. *Dialogue*, 27 U. S. 2 Pet. 1, 18 [7: 327, 333]; *McDonald* v. *Hovey*, 110 U. S. 619, 628 [28: 269, 271]. And the rule established in England by those decisions has ever since been generally recognized in England and America, although it may in a few instances have been warped or misapplied.

The decision in *Boydell* v. *Drummond* (1809), 11 East, 142, which has been sometimes supposed to have modified the rule, was really in exact accordance with it. In that case, the declaration alleged that the Boydells had proposed to publish by subscription a series of large prints from some of the scenes of Shakespeare's plays, in eighteen numbers containing four plates each, at the price of 3 guineas a number, payable as each was issued, and one number, at least, to be annually published after the delivery of the first; and that the defendant became a subscriber for one set of prints, and accepted and paid for two numbers, but refused to accept or pay for the rest. The first prospectus issued by the publishers stated certain conditions, in substance as set out in the declaration, and others showing the magnitude of the undertaking, and that its completion would unavoidably take a considerable time. A second prospectus stated that one number at least should be published annually, and the proprietors were confident that they should be enabled to produce two numbers within the course of every year. The book in which the defendant subscribed his name had only, for its title, "Shakespeare subscribers, their signatures," without any reference to either prospectus. The contract was held to be within the statute of frauds, as one not to be performed within a year, because, as was demonstrated in concurring opinions of Lord Ellenborough and Justices Grose, Le Blanc and Bayley, the *contract, according to [424] the understanding and contemplation of the parties, as manifested by the terms of the contract, was not to be fully performed (by the completion of the whole work) within the year; and consequently, a full completion within the year, even if physically possible, would not have been according to the terms or the intent of the contract, and could not have entitled the publishers to demand immediate payment of the whole subscription.

In *Wells* v. *Horton* (1826) 4 Bing. 40, 12 J. B. Moore, 177, it was held to be settled by the earlier authorities that an agreement by which a debtor, in consideration of his creditor's agreeing to forbear to sue him during his lifetime, promised that his executor should pay the amount of the debt, was not within the statute; and Chief Justice Best said: "The present case is clearly distinguishable from *Boydell* v. *Drummond*, where upon the face of the agreement it appeared that the contract was not to be executed within a year."

In *Souch* v. *Strawbridge* (1846) 2 C. B. 808, a contract to support a child, for a guinea a month, as long as the child's father should think proper, was held not to be within the statute, which, as Chief Justice Tindal said, "speaks of 'any agreement that is not to be performed within the space of one year from the making thereof;' pointing to contracts the complete performance of which is of necessity extended beyond the space of a year. That appears clearly from the case of *Boydell* v. *Drummond*, 11 East, 142, the rule to be extracted from which is, that, when the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but that, where the contract is such that the whole *may* be performed within a year, and there is no express stipulation to the contrary, the statute does not apply."

In *Murphy* v. *O'Sullivan* (1866) 11 Ir. Jur. N. S. 111, the court of exchequer chamber in Ireland, in a series of careful opinions by Mr. Justice O'Hagan (afterwards Lord Chancellor of Ireland), Baron Fitzgerald, Chief Baron Pigot and Chief Justice Monahan, reviewing the English cases, held *that under the [425] Irish statute of frauds of 7 Wm. III., chap. 12 (which followed in this respect the words of the English statute), an agreement to maintain and clothe a man during his life was not required to be in writing.

In the recent case of *McGregor* v. *McGregor* (1888) L. R. 21 Q. B. Div. 424, the English court of appeals held that a lawful agreement made between husband and wife, in compromise of legal proceedings, by which they agreed to live apart, the husband agreeing to allow the wife a weekly sum for maintenance, and she agreeing to maintain herself and her children, and to indemnify him against any debts contracted by her, was not within the statute. Lord Esher, M. R., thought the true doctrine on the subject was that laid down by Chief Justice Tindal in the passage above quoted from *Souch* v. *Strawbridge*. Lord Justice Lindley said: "The provisions of the statute have been construed in a



Digitized by Google

series of decisions from which we cannot depart. The effect of these decisions is that, if the contract can by possibility be performed within the year, the statute does not apply." Lord Justice Bowen said: "There has been a decision which for 200 years has been accepted as the leading case on the subject. In *Peter* v. *Compton*, it was held that 'an agreement that is not to be performed within the space of a year from the making thereof' means, in the statute of frauds, an agreement which appears from its terms to be incapable of performance within the year." And each of the three judges took occasion to express approval of the decision in *Murphy* v. *O'Sullivan*, above cited, and to disapprove the opposing decision of Hawkins, J., in *Davey* v. *Shannon*, 4 Exch. Div. 81.

The cases on this subject in the courts of the several states are generally in accord with the English cases above cited. They are so numerous, and have been so fully collected in Browne on the Statute of Frauds (5th ed.) chap. 13, that we shall refer to but few of them, other than those cited by counsel in the case at bar.

In *Peters* v. *Westborough*, 19 Pick. 364, 31 Am. Dec. 142, an agreement to support a girl twelve years old until she was eighteen was held not to be within the statute. Mr. Justice Wilde, 426] in *delivering judgment, after quoting *Peter* v. *Compton*, Skin. 353; *Fenton* v. *Emblers*, 3 Burr. 1278, and *Boydell* v. *Drummond*, 11 East, 142, said: "From these authorities it appears to be settled that in order to bring a parol agreement within the clause of the statute in question, it must either have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year. And this stipulation or understanding is to be absolute and certain, and not to depend on any contingency. And this, we think, is the clear meaning of the statute. In the present case, the performance of the plaintiff's agreement with the child's father depended on the contingency of her life. If she had continued in the plaintiff's service, and he had supported her, and she had died within a year after the making of the agreement, it would have been fully performed. And an agreement by parol is not within the statute, when by the happening of any contingency it might be performed within a year."

In many other states, agreements to support a person for life have been held not to be within the statute. Browne, Stat. Fr. § 276. The decision of the supreme court of Tennessee in *Deaton* v. *Tennessee Coal & R. Co.* 12 Heisk. 650, cited by the defendant in error, is opposed to the weight of authority.

In *Roberts* v. *Rockbottom Co.* 7 Met. 46, Chief Justice Shaw declared the settled rule to be that "when the contract may, by its terms, be fully performed within the year, it is not void by the statute of frauds, although in some contingencies it may extend beyond a year;" and stated the case then before the court as follows: "The contract between the plaintiff and the company was that they should employ him, and he should serve them, upon the terms agreed on, five years, or so long as Leforest should continue their agent. This is a contract which might have been fully performed within the year. The legal effect is the same as if it were expressed as an agreement to serve the company so long as Leforest should continue to be their agent, not exceeding five years; though the latter expression shows a little more *clearly that the contract might [427 end within a year, if Leforest should quit the agency within that time."

In *Blanding* v. *Sargent*, 33 N. H. 239, 66 Am. Dec. 720, the court stated the rule, as established by the authorities elsewhere, and therefore properly to be considered, as adopted by the legislature of New Hampshire when re-enacting the statute, to be that "the statute does not apply to any contract, unless by its express terms or by reasonable construction it is not to be performed, that is, incapable in any event of being performed, within one year from the time it is made;" and that "if by its terms, or by reasonable construction, the contract can be fully performed within a year, although it can only be done by the occurrence of some contingency by no means likely to happen, such as the death of some party or person referred to in the contract, the statute has no application, and no writing is necessary;" and therefore that an agreement by a physician to sell out to another physician his business in a certain town, and to do no more business there, in consideration of a certain sum to be paid in five years, was not within the statute, because "if the defendant had died within a year from the making of the contract, having kept his agreement while he lived, his contract would have been fully performed." The decisions in other states are to the same effect. Browne, Stat. Fr. § 277.

In *Hinckley* v. *Southgate*, 11 Vt. 428, cited by the defendant in error, the contract held to be within the statute of frauds was in express terms to carry on a mill for a year from a future day; and the suggestion in the opinion that if the time of performance depends upon a contingency, the test is whether the contingency will probably happen, or may reasonably be expected to happen, within the year, was not necessary to the decision of the case, and cannot stand with the other authorities. Browne, Stat. Fr. § 279.

In *Linscott* v. *McIntire*, 15 Me. 201, 33 Am. Dec. 602, also cited by the defendant in error, an agreement to sell a farm at the best advantage, and to pay to the plaintiff any sum remaining after refunding the defendant's advances and paying him for his trouble, was held not to be within the statute of frauds, Chief *Justice Weston saying: "The sale did[428 not happen to be made until a year had expired; but it might have taken place at an earlier period, and there is nothing in the case from which it appears that, in the contemplation of the parties at the time, it was to be delayed beyond a year. This clause of the statute has been limited to cases where, by the express terms of the agreement, the contract was not to be performed within the space of a year. And it has been held to be no objection that it depended on a contingency, which might not and did not happen until after that time."

In *Herrin* v. *Butters*, 20 Me. 119, likewise cited by the defendant in error, the contract held to be within the statute could not possibly have been performed within the year, for it



Digitized by Google

was to clear 11 acres in three years, 1 acre to be seeded down the present spring, 1 acre the next spring, and 1 acre the spring following, and to receive in consideration thereof all the proceeds of the land, except the 2 acres first seeded down.

In *Broadwell* v. *Getman*, 2 Denio, 87, the supreme court of New York stated the rule thus: "Agreements which may be completed within one year are not within the statute; it extends to such only as by their express terms are not to be, and cannot be, carried into full execution until after the expiration of that period of time." The contract there sued on was an agreement made in January, 1841, by which the defendant agreed to clear a piece of woodland for the plaintiff, and to partly make a fence at one end of it, which the plaintiff was to complete, the whole to be done by the spring of 1842; and the defendant was to have for his compensation the wood and timber, except that used for the fence, and also the crop to be put in by him in the spring of 1842. The court well said: "As this agreement was made in January, 1841, and could not be completely executed until the close of the season of 1842, it was within the statute, and not being in writing and signed was void. Upon this point it would seem difficult to raise a doubt upon the terms of the statute."

In *Pitkin* v. *Long Island R. Co.* 2 Barb. Ch. 221, cited by the defendant in error, a bill in [429] equity to compel a railroad *company to perform an agreement to maintain a permanent turnout track and stopping place for its freight trains and passenger cars in the neighborhood of the plaintiff's property, was dismissed by Chancellor Walworth upon several grounds, the last of which was that, as a mere executory agreement to continue to stop with its cars at that place, "as a permanent arrangement," the agreement was within the statute of frauds, because from its nature and terms it was not to be performed by the company within one year from the making thereof.

In *Kent* v. *Kent*, 62 N. Y. 560, 20 Am. Rep. 502, an agreement by which a father, in consideration of his son's agreeing to work for him upon his farm, without specifying any time for the service, agreed that the value of the work should be paid out of his estate after his death, which did not in fact happen until twenty years after the son ceased work, was not within the statute. Judge Allen, delivering the judgment of the court of appeals, said: "The statute, as interpreted by courts, does not include agreements which may or may not be performed within one year from the making, but merely those which within their terms, and consistent with the rights of the parties, cannot be performed within that time. If the agreement may consistently with its terms be entirely performed within the year, although it may not be probable or expected that it will be performed within that time, it is not within the condemnation of the statute."

In *Saunders* v. *Kastenbine*, 6 B. Mon. 17, cited by the defendant in error, the contract proved, as stated in the opinion of the court, was to execute a bill of sale of a slave when the purchaser had paid the price of $400, in monthly instalments of from $4 to $8 each, which would necessarily postpone performance, by either party, beyond the year.

In *Arkansas M. R. Co.* v. *Whitley*, 54 Ark. 199, 11 L. R. A. 621, a contract by which a railway company, in consideration of being permitted to build its road over a man's land, agreed to construct and maintain cattle guards on each side of the road, was held not to be within the statute, because it was contingent upon the continuance of the use of the land for a railroad, which might have ceased within a year. And a like decision was *made in [430] *Sweet* v. *Desha Lumber Co.* 56 Ark. 629, upon facts almost exactly like those in the case at bar.

The construction and application of this clause of the statute of frauds first came before this court at December term, 1866, in *Washington, A. & G. Steam Packet Co.* v. *Sickles*, 72 U. S. 5 Wall. 580 [18: 550], which arose in the District of Columbia under the statute of 29 Car. II., chap. 3, § 4, in force in the state of Maryland and in the District of Columbia. Alexander's British Statutes in Maryland, 509; *Ellicott* v. *Peterson*, 4 Md. 476, 487; D. C. Comp. Stat. chap. 23, § 7.

That was an action upon an oral contract by which a steamboat company agreed to attach a patented contrivance, known as the Sickles cut off, to one of its steamboats, and, if it should effect a saving in the consumption of fuel, to use it on that boat during the continuance of the patent, if the boat should last so long; and to pay the plaintiffs weekly, for the use of the cut-off, three fourths of the value of the fuel saved, to be ascertained in a specified manner. At the date of the contract, the patent had twelve years to run. The court, in an opinion delivered by Mr. Justice Nelson, held the contract to be within the statute, and said: "The substance of the contract is, that the defendants are to pay in money a certain proportion of the ascertained value of the fuel saved at stated intervals throughout the period of twelve years, if the boat to which the cut-off is attached should last so long. . . . It is a contract not to be performed within the year, subject to a defeasance by the happening of a certain event, which might or might not occur within that time. *Washington, A. & G. Steam Packet Co.* v. *Sickles*, 72 U. S. 5 Wall. 594-596 [18: 554, 555]. And reference was made to *Birch* v. *Liverpool*, 9 Barn. & C. 392, and *Dobson* v. *Collis*, 1 Hurlst. & N. 81, in each of which the agreement was for the hire of a thing, or of a person, for a term specified of more than a year, determinable by notice within the year, and therefore within the statute, because it was not to be performed within a year, although it was defeasible within that period.

In *Washington, A. & G. Steam Packet Co.* v. *Sickles*, it appears to have been assumed, almost without discussion, that the contract, according to its true construction, was not to be performed in less than twelve years, but was defeasible by an event which might or might not happen within *one year. It may [431] well be doubted whether that view can be reconciled within the terms of the contract itself, or with the general current of the authorities. The contract, as stated in the fore part of the opinion, was to use and pay for the cut-off upon



Digitized by Google

the boat "during the continuance of the said patent, if the said boat should last so long." 72 U. S. 5 Wall. 581, 594 [18: 552, 554]. The terms "during the continuance of" and "last so long" would seem to be precisely equivalent; and the full performance of the contract to be limited alike by the life of the patent and by the life of the boat. It is difficult to understand how the duration of the patent and the duration of the boat differed from one another in their relation to the performance or the determination of the contract; or how a contract to use an aid to navigation upon a boat, so long as she shall last, can be distinguished in principle from a contract to support a man, so long as he shall live, which has been often decided, and is generally admitted, not to be within the statute of frauds.

At October term, 1875, this court, speaking by Mr. Justice Miller, said: "The statute of frauds applies only to contracts which, by their terms, are not to be performed within a year, and does not apply because they may not be performed within that time. In other words, to make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made." And it was therefore held, in one case, that a contract by the owner of a valuable estate, employing lawyers to avoid a lease thereof and to recover the property, and promising to pay them a certain sum out of the proceeds of the land when recovered and sold, was not within the statute, because all this might have been done within a year; and in another case, that a contract, made early in November, 1869, to furnish all the stone required to build and complete a lock and dam which the contractor with the state had agreed to complete by September 1, 1871, was not within the statute, because the contractor, by pushing the work, might have fully completed it before November, 1870. *McPherson v. Cox, 96 U. S.[432 404, 416, 417 [24: 746, 750]; *Walker v. Johnson*, 96 U. S. 424, 427 [24: 834, 835].

In Texas, where the contract now in question was made, and this action upon it was tried, the decisions of the supreme court of the state are in accord with the current of decisions elsewhere.

In *Thouvenin v. Lea*, 26 Tex. 612, the court said: "An agreement which may or may not be performed within a year is not required by the statute of frauds to be in writing; it must appear from the agreement itself that it is not to be performed within a year." In that case, the owner of land orally agreed to sell it for a certain price, payable in five years; the purchaser agreed to go into possession and make improvements; and the seller agreed, if there was a failure to complete the contract, to pay for the improvements. The agreement to pay for the improvements was held not to be within the statute; the court saying: "There is nothing from which it can be inferred that the failure to complete the contract (by reducing it to writing, for instance, as was stipulated should be done), or its abandonment, might not occur within a year from the time it was consummated. The purchaser, it is true, was entitled by the agreement to a credit of five years for the payment of the purchase money, if the contract had been reduced to writing. But appellant might have sold to another, or the contract might have been abandoned by the purchaser, at any time; and upon this alone depended appellant's liability for the improvements." See also *Thomas v. Hammond*, 47 Tex. 42.

In the very recent case of *Weatherford, M. W. & N. W. R. Co. v. Wood*, 88 Tex. 191, 28 L. R. A. 526, it was held that an oral agreement by a railroad company to issue to one Wood annually a pass over its road for himself and his family, and to stop its trains at his house, for ten years, was not within the statute. The court, after reviewing many of the authorities, said: "It seems to be well settled that where there is a contingency, expressed upon the face of the contract or implied from the circumstances, upon the happening of which within a year the contract or agreement will be performed, the contract is not *within[433 the statute, though it be clear that it cannot be performed within a year except in the event the contingency happens. . . . If the contingency is beyond the control of the parties, and one that may, in the usual course of events, happen within the year, whereby the contract will be performed, the law will presume that the parties contemplated its happening, whether they mention it in the contract or not. The statute only applies to contracts '*not to be performed* within the space of one year from the making thereof.' If the contingency is such that its happening may bring the performance within a year, the contract is not within the terms of the statute; and this is true whether the parties at the time had in mind the happening of the contingency or not. The existence of the contingency in this class of cases, and not the fact that the parties may or may not have contemplated its happening, is what prevents the agreement from coming within the scope of the statute. Applying these principles to the case under consideration, we think it clear that the contract above set out was not within the statute. The agreement to give the pass and stop the trains was personal to Wood and his family. He could not transfer it. In case of his death within the year, the obligation of the company to him would have been performed, and no right thereunder would have passed to his heirs or executors. If it be held that each member of his family had an interest in the agreement, the same result would have followed the death of such member, or all of them, within the year. If the agreement had been to give Wood a pass for life, it would, under the above authorities, not have been within the statute; and we can see no good reason for holding it to be within the statute because his right could not have been extended beyond ten years. The happening of the contingency of the death of himself and family within a year would have performed the contract in one case as certainly as in the other." 88 Tex. 195, 196, 28 L. R. A. 527, 528.

In the case at bar the contract between the railroad company and the plaintiff, as testified to by the plaintiff himself, who was the only witness upon the point, was that if he would furnish the ties and grade the ground for the switch at *the place where he proposed to[434 erect a sawmill, the railroad company would



Digitized by Google

"put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it."

The parties may well have expected that the contract would continue in force for more than one year; it may have been very improbable that it would not do so; and it did in fact continue in force for a much longer time. But they made no stipulation which in terms, or by reasonable inference, required that result. The question is not what the probable, or expected, or actual performance of the contract was, but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year. No definite term of time for the performance of the contract appears to have been mentioned or contemplated by the parties; nor was there any agreement as to the amount of lumber to be sawed or shipped by the plaintiff, or as to the time during which he should keep up his mill.

The contract of the railroad company was with, and for the benefit of, the plaintiff personally. The plaintiff's own testimony shows (although that is not essential) that he understood that the performance of the contract would end with his own life. The obligation of the railroad company to maintain the switch was in terms limited and restricted by the qualification "for the plaintiff's benefit for shipping purposes as long as he needed it;" and no contingency which should put an end to the performance of the contract, other than his not needing the switch for the purpose of his business, appears to have been in the mouth or in the mind of either party. If, within a year after the making of the contract, the plaintiff had died, or had abandoned his whole business at this place, or for any other reason had ceased to need the switch for the shipping of lumber, the railroad company would have been no longer under any obligation to maintain the switch, and the contract would have been brought to an end by having been fully performed.

The complete performance of the contract depending upon a contingency which might hap-
435] pen within the year, the *contract is not within the statute of frauds as an "agreement which is not to be performed within the space of one year from the making thereof."

Nor is it within the other clause of the statute of frauds, relied on in the answer, which requires certain conveyances of real estate to be in writing. The suggestion made in the argument for the defendant in error, that the contract was, in substance, a grant of an easement in real estate, and as such within the statute, overlooks the difference between the English and the Texan statutes in this particular. The existing statutes of Texas, while they substantially follow the English statute of frauds, so far as to require a conveyance of any "estate of inheritance or freehold, or for a term of more than one year, in lands and tenements," as well as "any contract for the sale of real estate, or the lease thereof for a longer term than one year," to be in writing, omit to re-enact the additional words of the English statute, in the clause concerning conveyances, "or any uncertain interest of, in, to, or out of" lands or tenements, and, in the other clause, "or any interest in or concerning them." Stat. 29 Car. II. chap. 3, §§ 1, 4; Tex. Rev. Stat. 1879, arts. 548, 2464; Paschal's Dig. arts. 997, 3875; *James* v. *Fulcrod*, 5 Tex. 512, 516, 55 Am. Dec. 743; *Stuart* v. *Baker*, 17 Tex. 417, 420; *Anderson* v. *Powers*, 59 Tex. 218.

*Judgment reversed*, and case remanded to the circuit court, with directions to set aside the verdict and to order a new trial.

---

ELVERTON R. CHAPMAN, *Plf. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 436-452.)

*Jurisdiction over court of appeals of the District of Columbia.*

This court has no jurisdiction to review on writ of error a judgment of the court of appeals of the District of Columbia in a criminal case under § 8 of the act of February 9, 1893, establishing that court; nor is such jurisdiction conferred by the judiciary act of 1891, § 5.

[No. 513.]

*Submitted November 2, 1896. Decided November 30, 1896.*

IN ERROR to the Court of Appeals for the District of Columbia to review a judgment of that court affirming the judgment of the Supreme Court of the District of Columbia overruling a demurrer to an indictment charging Elverton R. Chapman with a violation of U. S. Rev. Stat. § 102, in refusing to answer questions put to him by a committee of the Senate of the United States. On motion to dismiss. *Dismissed.*

See same case below, 5 D. C. App. 123, 24 Wash. L. Rep. 251, 297.

Statement by Mr. Chief Justice **Fuller:**

Chapman was indicted in the supreme court of the District of Columbia for an alleged violation of U. S. Rev. Stat. § 102, in refusing to answer certain questions propounded to him by a special committee of the Senate of the United States, appointed to investigate charges in connection with proposed legislation then pending in the Senate. To this indictment the defendant demurred on the ground, among others, that U. S. Rev. Stat. § 102, was unconstitutional, and that therefore the court was without jurisdiction in the premises. This demurrer was overruled by the trial court, and its judgment thereon affirmed by the court of appeals of the District. 5 D. C. App. 123. Defendant was thereupon tried and convicted, and motions for new trial and in arrest of judgment having been made and overruled (the question of the constitutionality of § 102 being raised throughout the proceedings), was sentenced to be imprisoned for one month in jail and to pay a fine of $100, which judgment was affirmed on appeal. 24 Wash. L. Rep. 251.

A writ of error from this court was then al-

NOTE.—*As to review by United States Supreme Court of territorial decisions: extent and manner of; distinction between an appeal and a writ of error,*—see note to Miners' Bank v. Iowa, 13: 867.



Digitized by Google

lowed (24 Wash. L. Rep. 297), which the United States moved to dismiss.

*Mr.* **Holmes Conrad,** Solicitor General, for defendant in error, in favor of motion to dismiss:

This court has no jurisdiction to review, on writ of error, a judgment of the court of appeals of the District of Columbia in a criminal case.

*Cross* v. *Burke*, 146 U. S. 84 (36: 897); *Re Heath*, 144 U. S. 92 (36: 358); *Cross* v. *United States*, 145 U. S. 571 (36: 821); *Farnsworth* v. *Montana*, 129 U. S. 104 (32: 616); *Washington & G. R. Co.* v. *District of Columbia*, 146 U. S. 231 (36: 953).

*Messrs.* **George F. Edmunds, Jeremiah M. Wilson,** and *A. A. Hoehling, Jr.*, for plaintiff in error, in opposition to motion:

After the plaintiff in error had been so indicted, and before trial was had, he prayed leave of this court to file a petition for writ of habeas corpus. 156 U. S. 211, 218 (39: 401, 403). That application was denied.

In the case of *Ex parte Belt*, 159 U. S. 95, 100 (40: 88, 90), subsequently decided by a this court, in the opinion of the Chief Justice, it is said:

"We have heretofore decided that this court has no appellate jurisdiction over the judgments of the supreme court of the District of Columbia in criminal cases, or on habeas corpus; but whether or not the judgments of the supreme court of the District, reviewable in the court of appeals, may be reviewed ultimately in this court in such cases when the validity of a statute of, or an authority exercised under, the United States is drawn in question, we have as yet not been obliged to determine."

*Re Chapman*, 156 U. S. 211 (39: 401).

Prior to the passage of the act of the 9th of February, 1893 (27 Stat. at L. 434), establishing the court of appeals of the District of Columbia, this court had held that it had no jurisdiction to review criminal cases from the supreme court of said District. *Re Heath*, 144 U. S. 92 (36: 358); *Cross* v. *United States*, 145 U. S. 571 (36: 821). In neither of these cases, however, was jurisdiction sought to be maintained by reason of the fact that there was drawn in question the validity of a statute of, or an authority exercised under, the United States.

Section 8 of said act of February 9, 1893, provides as follows:

"Any final judgment or decree of the said court of appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of $5,000, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgments or appeals from decrees rendered in the supreme court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

In § 5 of the judiciary act of the 3d of March, 1891 (26 Stat. at L. 827), appeals and writs of error are provided for from the district courts, or from the existing circuit courts of the United States, to this court, in the following cases:

"In cases of conviction of a capital or otherwise infamous crime. In any case that involves the construction or application of the Constitution of the United States. In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. In any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

If, under the law of any state, a citizen thereof is convicted, and it is claimed that the law of such state, under which he is so convicted, is in contravention of the Constitution of the United States, he is entitled to a writ of error for the purpose of having his case reviewed in this court. Therefore, if the contention of the government in the present case is correct and well founded, namely, that no writ of error will lie to the court of appeals of the District of Columbia in a case such as the one at bar, then it must result that Congress has discriminated between the said citizens of the said District and the citizens of every state in the Union, because it has provided that every citizen of a state who has been indicted and convicted under a law of the United States which is claimed to be in contravention of the Constitution may have his case reviewed by this court, while a citizen of the District of Columbia (if this contention be correct), indicted and convicted under the same law, may not have his case so reviewed.

Prior to the passage of the act creating the circuit courts of appeals (*supra*) this court had no appellate jurisdiction in criminal cases arising in the circuit courts; but by said act (enacted in 1891) jurisdiction was conferred upon this court to review the decisions of said courts in all cases of conviction of a capital or otherwise infamous crime, in any case that involves the construction or application of the Constitution of the United States, and in any case in which the constitutionality of any law of the United States is drawn in question. The cases of *Re Heath*, 144 U. S. 92 (36: 358); *Cross* v. *United States*, 145 U. S. 571 (36: 821); and *Re Schneider* (No. 1), 148 U. S. 157 (37: 404),—did not involve the question of the validity of any law of the United States, as above stated.

Following this circuit court of appeals act, in 1893, the act creating the court of appeals of the District of Columbia was passed. The said court of appeals occupies the same relation to the supreme court of the District of Columbia that the supreme court of a state occupies to the inferior courts of such state, and it is only reasonable to interpret this act creating the court of appeals for the said District so as to give the citizens of the District of Columbia the same rights as to writs of error in criminal cases that are given to the citizens of the states in like cases. As we have above seen, in all cases where the validity of an act



Digitized by Google

of Congress is called in question, a review may be had of the decision of the court below, on writ of error, in this court, and, if the language of the statute in question is obscure, for the reasons we have stated, it should receive a liberal construction in favor of the citizen.

It must be obvious that Congress did not intend to discriminate against persons accused and convicted of crime in the District of Columbia, which would necessarily result from the contention of the solicitor general in this case, if sustained.

From the organization of the government until recently no decision of a United States court, either in the circuits or in the territories, in a criminal case, could be reviewed on appeal or writ of error by this court.

The language of the law respecting district and circuit courts of the United States was literally confined to civil cases. The language of U. S. Rev. Stat. § 1909, claimed by the learned court below and by the solicitor general to be the same as that of the District court of appeals act of 1893, is that writs of error and appeals shall be allowed under the same regulations, etc., as from the circuit courts, where the value of the property or the amount in controversy exceeds $1,000. Then comes the exception, as follows: "Except that a writ of error or appeal shall be allowed to the Supreme Court of the United States upon writs of habeas corpus." Section 1911 provides for writs of error, etc., from Washington territory "where the value of the property or the amount in controversy . . . exceeds $2,000; and such writs of error and appeals shall be allowed, in all cases, where the Constitution of the United States, or a treaty thereof, or acts of Congress are brought in question."

The act of Congress of March 3, 1885 (23 Stat. at L. 443), prohibited any writ of error, etc., to the supreme court of the District, and to the supreme courts of the territories, "unless the matter in dispute, exclusive of costs, shall exceed the sum of $5,000," and then follows the limitation: "That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

The effect of that act was to leave the law just as it was before, except in respect of the sum involved, with the addition of the new provision. As it regards the District of Columbia, that question of the validity of treaties and statutes, etc., might be reviewed without regard to the sum or value in dispute.

This was the state of the statute law, except in respect to capital cases, at the time of the passage of the act of March 3, 1891, establishing circuit courts of appeals of the United States. That act, clearly and confessedly, radically changed the course of jurisprudence in the courts of the United States, in respect of criminal cases, by prescribing a review in this court in all cases of constitutional construction, or the validity of any law or treaty of the United States, etc., thus changing, in the interests of justice and uniformity and supreme authority of decision, the practice of a century. Before that date the supreme court of the District of Columbia and the circuit courts of the United States stood on precisely the same ground in respect of the finality of their jurisdiction in criminal cases.

Then came the act of February 9, 1893 (27 Stat. at L. 434), establishing the court of appeals of the District of Columbia and reducing the supreme court of the District to substantially the same relation to the new court as inferior courts in the states, and as the district courts before the act of 1891 bore to the highest courts of the states, and to the circuit courts of the United States. By this act nothing could be taken from the supreme court of the District directly to this court, and it put the District court of appeals in precisely the same attitude as to the supreme court of the District that the circuit courts of the United States, before the act of 1891, held in respect to the district courts of the United States.

Then § 8 of the act of 1893 provided for a review of the judgments of the District court of appeals, "in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of $5,000, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgments or appeals from decrees rendered in the supreme court of the District of Columbia." Then, instead of providing as the principal territorial acts had provided, an exception relating to the same class of subjects, it provided in a distinct clause, and affirmatively, as follows: "And also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

This language and the construction of the section differ essentially from the previous statute in respect of writs of error, etc., to the supreme court of the District of Columbia and from the acts relating to all the territories except Washington. The Washington act is constructed in the same manner as the section now under consideration, except that it does not contain the word "also."

The words "and also," used together, are those of almost immemorially precise and technical meaning. They are words of legal art and import, not a restriction or qualification of matter previously stated, but an affirmative and an additional independent proposition. They are the literal translation of the words "*ac etiam*," used in ancient and in comparatively modern pleading as importing a distinct movement and transition from what had been previously declared to a new and independent subject, capable of standing, and intended to stand, by itself.

3 Sharswood's Bl. Com. p. 288; Webster, International Dict. *Also.*

The grammatical construction, therefore, of this 8th section of the act of 1893 gives this court appellate jurisdiction in every case decided by the District court of appeals in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, without any reference or regard to the previous clause in the section defining and limiting the mere pecuniary jurisdiction



Digitized by Google

of the courts of the District of Columbia—a jurisdiction wider, indeed, than any other court of the United States—and requiring that it should not be exercised in constitutional cases without the same power of review by this court that the act of 1891 had provided with respect of all circuit courts of the United States.

It is monstrous to suppose that Congress ever had any other purpose in view, and it used the very language and construction of the section precisely adequate to that end.

There cannot be a civil suit in which there is not "a sum or value" in dispute. And therefore it follows that when the statute declares that neither, "sum nor value" shall be the test in respect of questions of constitutional consideration, etc., there is nothing to which the authority to review can be applied other than to criminal cases in which such constitutional questions arise. If there had been no money limit to the 1st clause of the section, no one, we think, would question that the 2d clause gave appellate jurisdiction to this court in all cases in which constitutional questions, etc., arose. But the 2d clause stands precisely the same in respect to the 1st as it would have stood if the 1st had made no reference to pecuniary amounts, for as we have shown, the clause is not one of limitation or qualification, but of addition and transition.

This court has never yet decided, even in the case of the former statutes for the District of Columbia or the territories, that it did not have appellate jurisdiction in criminal cases involving constitutional questions and the like. There is not even an intimation of the character in all the decided cases, excepting that remark of the late Mr. Justice Blatchford, in *Farnsworth* v. *Montana*, 129 U. S. 111 (32: 617). That case showed that the pecuniary limit had not been reached, and it showed that no question of constitutional consideration existed in it. The learned justice, in deciding it, referred to *Watts* v. *Washington*, 91 U. S. 580 (23: 328), and said that the language of the court in that case was *obiter dictum*.

It is submitted that in making that observation he was mistaken. This court in deciding the *Watts' Case*, through Chief Justice Waite said, as the fundamental and only ground of the decision, that "this court can only review the final judgment of the supreme court of the territory of Washington in criminal cases when the Constitution or a statute or treaty of the United States is drawn in question. This is a criminal case; but the record does not present for our consideration any question of which we can take jurisdiction. It nowhere appears that the Constitution or any statute or treaty of the United States is in any manner drawn in question."

The foregoing is the whole of the decision. If, then, anything was *obiter* in the decision, it must have been the whole of it. That case was decided in 1875.

*Kurtz* v. *Moffitt*, 115 U. S. 487 (29: 458), decided in 1885, has no application to the present case. All that was held there was that the law did not provide for removing a habeas corpus proceeding from the state to the circuit court, and that a private citizen had no right to arrest a deserter from the army without warrant. It was a case depending entirely upon whether the statutes for removal of cases applied to habeas corpus, a civil procedure having no money value concerned in it.

In *Snow* v. *United States*, 118 U. S. 347 (30: 207), decided in 1885, it was held that the appellate jurisdiction of this court did not exist, because the validity of a statute of the United States, etc., was not drawn in question; and this upon the construction of U. S. Rev. Stat. § 702, to which we have already referred; and the court expressly said that Utah does not fall within the clause concerning constitutional questions, because the section is in terms limited to Washington alone. p. 348 (208).

In *Re Schneider* (No. 1), 148 U. S. 157 [37: 404], decided in 1892, no question of the validity of a statute or of constitutional right was involved, and the application for a writ of error was denied, the court holding that the proceeding in habeas corpus below was a civil proceeding, and that the pecuniary clause in the statute did not apply.

All these decisions, and others of the same character, were made before the passage of the District court of appeals act of 1893. It must be presumed that Congress was familiar with the course of these decisions when, in defining the jurisdiction of this court by the act of 1893, it reformed the language of former acts, and that it intended thereby to put its appellate jurisdiction on the same footing in respect to the highest court in the District of Columbia, with its almost illimitable jurisdiction, upon the same footing that Congress had provided by the act of 1891, in respect to all the circuit courts of the whole country.

The present case is one over which this court had jurisdiction, because there is a sum of money in dispute.

The statute under which the plaintiff in error was indicted, tried, and convicted is one which provides, in § 1, that, upon conviction, the party shall be punished "by a fine of not more than $1,000, nor less than $100, and imprisonment of not less than one month nor more than twelve months." There is therefore necessarily involved in this case a sum in dispute.

The language of the act, in substance, is that if the validity of a statute is drawn in question in any case, the court shall have jurisdiction regardless of the amount in question; but in cases where the validity of a statute is not drawn in question, the amount in dispute must be not less than $5,000.

This is a case in which a money value is involved, because the statute is imperative that there shall be a judgment, in case of conviction, for at least $100 and it may be $1,000, depending upon the decision of the court in view of the gravity of the offense. This question, so far as we have been able to find, has never been decided by this court.

In the said case of *Farnsworth* v. *Montana*, 129 U. S. 104 (32: 616), the punishment inflicted was a fine of $50 and $17.50 costs. The statute under which that case was prosecuted provided that the case could not be reviewed in this court unless the matter in dispute amounted to $5,000, and this court, in that case, said:

"The judgment of the probate court was



Digitized by Google

imprisonment until the payment of the fine and the costs, and, if the fine covered by the judgment of any one of the courts could be called a 'matter in dispute' within the 1st section of the act of 1885, the pecuniary value involved did not exceed $5,000. So it is plain that the 1st section of the act of 1885 does not cover the case."

So it appears, in the above-named case, that it was decided solely upon the ground that the amount involved did not reach the statutory limit.

In the case of *Snow* v. *United States*, 118 U. S. 354 [30: 209], the plaintiff in error was convicted in the territory of Utah on indictments found under § 8 of the act of March 22, 1882, for cohabiting with more than one woman, the judgment of the court being imprisonment for six months and a fine of $300. Section 1909 of the Revised Statutes of the United States provides that writs of error and appeals from the final decisions of the supreme court of any one of eight named territories, of which Utah was one, "shall be allowed to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property or the amount in controversy . . . exceeds $1,000."

In the opinion of the court, by Mr. Justice Blatchford, it is said:

"In each of the present cases the pecuniary value involved does not exceed $300, even if the fine could be called a 'matter in dispute,' within the statute."

In each of said cases, this court did not decide that the imposition of a fine could not be regarded as a matter in dispute capable of being valued in money, but merely decided that, in the cases presented, the amount of the fine did not equal the jurisdictional sum required by the statutes regulating the review upon writ of error. In the case at bar no such difficulty arises, as the statute provides for a review in this court of the cases enumerated "without regard to the sum or value of the matter in dispute."

There is $100 in amount and value in dispute in this case—just as much and more than it could be in an ordinary civil case, and in connection with it there is the question of the validity of the statute which the court below has said authorized it to exact that sum from the plaintiff in error. This brings the case literally within § 8 of the act of 1893, even upon the contention of the other side in respect of its meaning.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The appellate jurisdiction of this court rests on the acts of Congress, and the question is whether we have jurisdiction to review on writ of error a judgment of the court of appeals of the District of Columbia in a criminal case under § 8 of the act of February 9, 1893, establishing that court. 27 Stat. at L. 434, chap. 74. And the proper construction of that section is to be arrived at in the light of previous decisions in respect of similar statutory provisions conferring appellate jurisdiction.

Section 8 of the act of February 27, 1801, entitled "An Act Concerning the District of Columbia" (2 Stat. at L. 103, chap. 15), and creating a circuit court for the District, provided: "That any final judgment, order, or decree in said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value of $100, may be re-examined *and re- [447 versed or affirmed in the Supreme Court of the United States, by writ of error or appeal, which shall be prosecuted in the same manner, under the same regulations, and the same proceedings shall be had therein, as is or shall be provided in the case of writs of error on judgments, or appeals upon orders or decrees, rendered in the circuit court of the United States."

In *United States* v. *More*, 7 U. S. 3 Cranch, 159, 173 [2: 397, 402] (decided in 1805), it was held that this court had no jurisdiction under that section over the judgments of the circuit court of the District in criminal cases, and Chief Justice Marshall said: "On examining the act, 'concerning the District of Columbia,' the court is of opinion that the appellate jurisdiction, granted by that act is confined to civil cases. The words, 'matter in dispute,' seem appropriated to civil cases, where the subject in contest has a value beyond the sum mentioned in the act. But, in criminal cases, the question is the guilt or innocence of the accused. And although he may be fined upwards of $100, yet that is, in the eye of the law, a punishment for the offense committed, and not the particular object of the suit."

The section, as thus construed, was carried forward in the subsequent legislation on the subject, which is referred to at length and considered in cases hereafter cited, and need not be again reviewed.

The act of March 3, 1885 (23 Stat. at L. 443, chap. 355), consists of two sections, reading:

"That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of $5,000.

"Sec. 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

*We have decided that this court has [448 no jurisdiction to grant a writ of error to review the judgments of the supreme court of the District of Columbia in criminal cases either under the judiciary act of March 3, 1891, 26 Stat. at L. 826, chap. 517 (*Re Heath*, 144 U. S. 92 [36: 358]); or under the act of February 6, 1889, 25 Stat. at L. 599, chap. 15 (*Cross* v. *United States*, 145 U. S. 571 [36: 821]); or on habeas corpus (*Cross* v. *Burke*, 146 U. S. 82 [36: 896]). And although the validity of any patent or copyright, or of a treaty or statute of, or an authority exercised under, the United States, was not drawn in question in those cases, it was distinctly ruled in reaching the conclusions announced that neither of the sections of the act of March 3, 1885, applied to any criminal case, and *Farnsworth* v. *Montana*, 129 U. S. 104 [32: 616];



Digitized by Google

*United States* v. *Sanges*, 144 U. S. 310 [36:445]; and *United States* v. *More*, 7 U. S. 3 Cranch, 159 [2:397],—were cited with approval. *Cross* v. *United States*, 145 U. S. 574 [36:822]; *Cross* v. *Burke*, 146 U. S. 87 [36:893].

In *Farnsworth* v. *Montana*, in which it was claimed that the validity of an authority exercised under the United States was drawn in question, it was held that the 2d section of the act did not extend to criminal cases, but that both sections applied to cases where there was a matter in dispute measurable by some sum or value in money. The view taken was that the 2d section contained an exception or limitation carved out of the 1st section, and that the words, that in the enumerated cases, "an appeal or writ of error may be brought without regard to the sum or value in dispute," clearly implied that in those cases also there must be a pecuniary matter in dispute measurable by some sum or value, though not restricted in amount.

In *United States* v. *Sanges*, referring to *Snow* v. *United States*, 118 U. S. 346 [30:207], we said: "The question whether the provision of the act of March 3, 1885, chap. 355, § 2, authorizing a writ of error from this court to the supreme court of any territory in any case 'in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States,' extended to criminal cases, was then left open, but at October term, 1888, it was decided in the negative. *Farnsworth* v. *Montana*, 129 U. S. 104 [32:616]."

449]*And in *Washington & G. R. Co.* v. *District of Columbia*, 146 U. S. 227, 231 [36:951,953], it was said: "Both sections of the act of March 3, 1885, regulating appeals from the supreme court of the District of Columbia, apply to cases where there is a matter in dispute measurable by some sum or value in money. *Farnsworth* v. *Montana*, 129 U. S. 104, 112 [32:616, 618]; *Cross* v. *Burke*, 146 U. S. 82 [36:896]. By that act no appeal or writ of error can be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, unless the matter in dispute, exclusive of costs, shall exceed the sum of $5,000, except that where the case involves the validity of any patent or copyright, or the validity of a treaty or statute of, or an authority exercised under, the United States, is drawn in question, jurisdiction may be maintained irrespective of the amount of the sum or value in dispute."

*Watts* v. *Washington*, 91 U. S. 580 [23:328], decided at October term, 1875, is cited as sustaining a different construction, but the point of decision there was that it nowhere appeared that the Constitution or any statute or treaty of the United States was in any manner drawn in question, and the broad language of the opinion was plainly *obiter*, as pointed out in *Farnsworth* v. *Montana*.

The 8th section of the act of February 9, 1893, establishing the court of appeals of the District of Columbia, is as follows:

"Sec. 8. That any final judgment or decree of the said court of appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of $5,000, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the supreme court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of *a treaty or statute of, or an [450 authority exercised under, the United States."

We regard this section and the act of 1885 as the same in their meaning and legal effect. The act of 1885 prohibits appeals or writs of error unless the matter in dispute exceeds the sum of $5,000, and provides that the restriction shall not apply to certain enumerated cases, "but that in all such cases an appeal or writ of error shall be brought without regard to the sum or value in dispute."

The act of 1893 allows appeals or writs of error whenever the matter in dispute exceeds the sum of $5,000, and also in cases "without regard to the sum or value of the matter in dispute," wherein the validity of any patent or copyright or of a treaty or statute of, or an authority exercised under, the United States is drawn in question, being the same cases mentioned in the 2d section of the act of 1885. We think as that section clearly applied to cases where there was a pecuniary matter in dispute, measurable by some sum or value, as has been repeatedly decided, the last clause of § 8 of the act of 1893 must receive the same construction. The meaning of both statutes is that in the cases enumerated the limitation on the amount is removed, but both alike refer to cases where there is a pecuniary matter in dispute, measurable by some sum or value, and they alike have no application to criminal cases. The suggestion that because the punishment for conviction by the statute under which plaintiff in error was indicted, tried, and convicted embraced a fine, there was therefore a sum of money in dispute, was disposed of by Chief Justice Marshall in *United States* v. *More*, 7 U. S. 3 Cranch, 159 [2:397]. We repeat the language of the Chief Justice: "In criminal cases, the question is of the guilt or innocence of the accused. And although he may be fined upwards of $100 yet that is, in the eye of the law, a punishment for the offense committed, and not the particular object of the suit."

It is contended that the words "and also" as used in the section under consideration are words "of legal art," of "almost immemorially precise and technical meaning," and import, *not a restriction of matter previously [451 stated, but a transition from what had been previously declared to a new and independent subject intended to stand by itself.

We do not care to go into the struggle between the courts of King's bench and common pleas on the question of the jurisdiction of the former over civil actions, which led to the curious device of the *ac etiam*, more particularly to avoid the effect of 13 Car. II. 2 Stat. chap. 2. It was invented in order to couple with a cause of action over which the court of King's bench had jurisdiction, another cause of action, over which, without being joined with the first, the court would not have



Digitized by Google

had jurisdiction. 2 Sellon, Pr. Appx. 625, 630; Burges, Insolv. 135, 149.

We are unable to conclude that Congress, which might easily have conferred jurisdiction in plain and explicit language, resorted to this ancient contrivance to effect it.

The argument is pressed that as by § 5 of the judiciary act of 1891, cases of conviction of capital or otherwise infamous crimes; cases involving the construction or application of the Constitution of the United States; or cases in which the constitutionality of any law of the United States is drawn in question,—can be brought to this court directly from the district and circuit courts of the United States, therefore this section should be construed as giving the same right of review in the District of Columbia.

But we think the section too plain to admit of this. No mention of the courts of the District of Columbia is made in the act of March 3, 1891, and there is nothing in the 8th section to justify its expansion so as to embrace the provisions of that act. *Re Heath*, 144 U. S. 92, 96 [36: 358, 360].

The writ of error was granted by the court of appeals in this case with reluctance, as appears from the opinion of Chief Justice Alvey, in passing upon the application therefor, given in the record, and out of deference to the supposed intimation in *Re Chapman*, 156 U. S. 211 [39: 401], and *Ex parte Belt*, 159 U. S. 95 [40: 88], that it might lie. It is quite possible that the language used in the opinions in those cases was somewhat too cautiously worded, but it was with the purpose, as the question 452] was not *raised for decision, of avoiding rather than expressing any views upon it.

We are of opinion that the writ of error cannot be maintained.

*Writ of error dismissed.*

---

WILKES C. PRATHER, *Plff. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 452.)

*Chapman* v. *United States* [*ante*, 504] followed.

[No. 546.]

*Submitted November 2, 1896. Decided November 30, 1896.*

IN ERROR to the Court of Appeals of the District of Columbia. On motion to dismiss. *Dismissed.*

*Mr.* **Holmes Conrad**, Solicitor General, for defendant in error, in favor of motion to dismiss.

*Messrs.* **H. E. Davis** and **Jeremiah M. Wilson** for plaintiff in error, in opposition to motion.

THE CHIEF JUSTICE: On the question of our appellate jurisdiction this case differs in no material respect from *Chapman* v. *United States*, just decided. The motion to dismiss the writ of error is sustained.

*Writ of error dismissed.*

LEWIS PERRINE *et al.*, *Plffs. in Err.*,
*v.*
MARY KEMBLE SLACK.

(See S. C. Reporter's ed. 452-454.)

*Jurisdictional amount.*

A decision of the court of appeals of the District of Columbia as to the custody and care of children, in a controversy between their mother and a testamentary guardian, cannot be reviewed by this court, as the matter in dispute is incapable of being reduced to a pecuniary standard of value.

[No. 549.]

*Submitted October 13, 1896. Decided November 30, 1896.*

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment of that court reversing the judgment of the Supreme Court of that District discharging a writ of habeas corpus. *Dismissed.*

The facts are stated in the opinion.

*Messrs.* **Jeremiah M. Wilson, Calderon Carlisle,** and **William G. Johnson** for plaintiffs in error.

*Messrs.* **George E. Hamilton** and **A. S. Worthington** for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This proceeding involves a controversy as to the custody of two children of tender years. Mrs. Perrine is the sister of the deceased father of the children and her coplaintiff in error is her husband. She had the custody of the children under their father's will. Mrs. Slack, defendant in error, is their mother, and filed a petition for a writ of habeas corpus in the supreme court of the District of Columbia to obtain custody of them. The writ was issued, and return made by plaintiffs in error, which was demurred to, the demurrer overruled, and the writ discharged. From this judgment Mrs. Slack appealed to the court of appeals of the District of Columbia, which reversed the judgment, and remanded the case, with directions to sustain the demurrer to the return, and to proceed with the case in conformity with the opinion of the court. Thereupon a writ of error, to operate as a supersedeas upon the filing of a bond in the penal sum of $10,000 was allowed, and the bond required was filed and approved. After this, an order was entered by the court of appeals, the Chief Justice dissenting, as he had from the judgment, directing the judge of the supreme court of the District, who had entered the order discharging the writ, to place the children in the custody of their mother, pending the prosecution of the writ of error, upon her giving satisfactory security. This order was entered and complied with, and the children were taken from their *aunt, their testamentary [453 guardian, and placed in their mother's custody.

The situation being thus, application was made to this court for the issue of a writ of

NOTE.—*As to what questions the United States Supreme Court will review on writ of error; bill of exceptions,*—see note to Parks v. Turner, 12: 863.



Digitized by Google

supersedeas, or other proper writ, to the court of appeals, or to the judge of the supreme court of the District who had entered the order as directed by that court, to supersede, annul, and set aside the proceedings taken after the writ of error to this court had been allowed and made a supersedeas. That application having been submitted, we found it necessary to request counsel to file briefs on the question of the jurisdiction of this court to entertain the writ, and this has been done.

We are of opinion that the writ of error will not lie. The controversy is between the mother and the testamentary guardian of the infant children, each claiming the right to their custody and care, and the matter in dispute is of such a nature as to be incapable of being reduced to any pecuniary standard of value. *Barry* v. *Mercein*, 46 U. S. 5 How. 103 [12: 70].

For the reasons given, and on the authorities cited in *Chapman* v. *United States*, 164 U. S. 436 [*ante*, 504], we hold that this court has no jurisdiction to review the judgments of the court of appeals under such circumstances, and, as the writ of error must be dismissed, we ought not to consider the question whether the action of the court of appeals, after the writ of error had been granted and the judgment of that court superseded, was improvident or not.

*Writ of error dismissed.*

---

## CHICAGO & NORTHWESTERN RAILWAY COMPANY, *Plff. in Err.*,
*v.*
## CITY OF CHICAGO.

(See S. C. Reporter's ed. 454-458.)

*Jurisdiction—Federal question.*

**This court has no jurisdiction to review a state judgment in condemnation proceedings, where the assignments of error in the state court were that no compensation, or a grossly inadequate one, was awarded for the land taken, and the record does not show that the owner set up or claimed any right under the Federal Constitution; although in this court it is assigned for error that the judgment deprived the owner of his property without due process of law, in violation of such Constitution.**

[No. 11.]

*Argued November 6, 9, 1896. Decided November 30, 1896.*

IN ERROR to the Supreme Court of the State of Illinois to review a judgment of that court affirming the judgment of the Circuit Court of Cook County, Illinois, fixing the just compensation to be paid for the condemnation of certain real estate in proceedings for that purpose by the city of Chicago against the Chicago & Northwestern Railway Company *et al.* *Dismissed.*

The facts are stated in the opinion.

*Messrs.* **E. E. Osborn** and *L. W. Bowers* for plaintiff in error.

*Mr.* **W. C. Goudy** for plaintiff in error filed a brief on motion to dismiss.

*Messrs.* **John S. Miller** and *William G. Beale* for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This was a proceeding instituted by the city of Chicago in the circuit court of Cook county, Illinois, for the condemnation of certain real estate. The object of the proposed condemnation was to open West Taylor street in that city.

The Chicago & Northwestern Railway Company and the Chicago, St. Louis, & Pittsburg Railroad Company, being the owners of the property, appeared and filed a cross-petition, in which they alleged:

"That in addition to the land described in the above-entitled cause, which will be taken for the opening of the street mentioned in said petition, they are the owners of land on each side of the said strip of lands to be taken for said street, which land is used by them as a right of way for their railroad tracks necessary in the carrying on of their railroad business; that the taking of the said strip of land mentioned in said petition for the opening of said street will damage the other land owned by said companies, and used by them as right of way for their main tracks through the city of Chicago, and for side tracks used by them in carrying on their business as common carriers.

"That the taking of said land and the opening of said street will interrupt the business of your cross-petitioners.

"Your cross-petitioners further show that the taking of said land and the opening of said street across the same will necessitate the construction by your cross-petitioners of approaches to such crossings, the planking [456] of their tracks, the draining of the side crossings and the adjoining land, owned by said petitioners, the erection of gates at said crossing, and the keeping of a flagman thereat; all of which will cause the said cross-petitioners great expense, to the great damage of your cross petitioners.

"Wherefore your cross-petitioners say that the damage to your cross-petitioners to their business and to the lands of your cross-petitioners not proposed to be taken in the said petition, and all damages caused by the opening of said street and the taking of said lands therefor be assessed as by the statute in such case made and provided."

By consent of the parties entered of record the cause was tried by the court without the intervention of a jury. The court found and adjudged that the just compensation to be paid by the city for the taking of the property described for the opening of West Taylor street was $1.

---

NOTE.—*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question.*—see note to Hamblin v. Western Land Co. 37: 267.

*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution,* see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.



Digitized by Google

Thereupon the Chicago & Northwestern Railway Company moved—without stating the grounds for its motion—that a new trial be awarded. That motion was overruled, the company excepting, and it was adjudged and decreed "that the sum of money awarded by the court by its finding to the owner of said lot, piece, or parcel of land and property is a just compensation and the value thereof for the taking and damaging said lot, piece, or parcel of land and property by the proposed public improvement mentioned in said petition, and the said owner shall accept from said city of Chicago such sum as so awarded on account of the lot, piece, or parcel of land and property so owned by it, all of said lot, piece, or parcel of land and property being in the city of Chicago, county of Cook, and state of Illinois, and that upon payment into this court by the said city of Chicago of the said sum of money for the use of the owner of the said lot, piece, or parcel of land and property, or upon proof made to or before the court that the said sum of money has been paid to the owner of said lot, piece, or parcel of land or property, the said city of Chicago shall have the right at any time thereafter to take possession of and damage the property in respect to 457] which *such compensation shall have been paid or deposited." The company excepted to the entry of that judgment.

Upon appeal to the supreme court of Illinois the judgment was affirmed.

This court has no authority to review the final judgment of the highest court of a state in which a decision of the case could be had, and to determine whether that judgment is in derogation of a title, right, privilege, or immunity protected by the Constitution of the United States, unless the party, against whom such judgment was rendered, "specially set up or claimed" such right under that instrument. U. S. Rev. Stat. § 709.

It is assigned in this court for error that the judgment of the court of original jurisdiction had the effect to deprive the railroad company of its property without due process of law, in violation of the 14th Amendment of the Constitution of the United States. But the record does not show that the company specially set up or claimed in the state courts or either of them any right under the Constitution of the United States. It does not appear that the attention even of the trial court was called to the fact that the company, in any form or for any purpose, invoked the protection of that instrument. Nor does it appear from the record that any Federal right was specially set up or claimed in the supreme court of the state. The assignments of error in the latter court are that the circuit court erred in finding that the company "was not entitled to any compensation for the land taken in said proceeding;" in finding that the just compensation to the company "was not more than $1;" in failing to allow it "any sum as damages sustained by it in the operation of its road and to its property caused by the taking of the land in the petition described;" and that the amount awarded as just compensation was "grossly inadequate."

In view of these assignments of error, it is not strange that the supreme court of Illinois made no reference in its opinion to the clause of the Constitution of the United States which, in this court for the first time, is invoked to sustain the proposition that the company's property has been taken without *due process [458 of law. It disposed of the case upon general principles of law, and does not appear to have considered it with reference to any provision of the Constitution of the United States. At any rate, as the company did not specially set up or claim any right, title, privilege, or immunity under the Constitution of the United States, this court is without jurisdiction to review the final judgment of the state court.

*The writ of error is therefore dismissed.*

---

## THE KATE.

(See S. C. Reporter's ed. 458-471.)

*Lien against vessel—New York law.*

1. A lien cannot be enforced under the maritime law against a vessel for the value of coal supplied to it under an order of the charterer by one who knew or is to be charged with knowledge that under the charter party the charterer is obliged to provide and pay for the coal, even if it was furnished upon the credit both of the charterer and of the vessel.
2. Debts contracted by the charterer of a vessel for which a lien is given by N. Y. Laws 1862, chap. 482, p. 956, do not include, by reasonable construction of that statute, a debt for coal furnished on the order of a charterer by one who knows that the charterer does not represent the owners, but has agreed to furnish supplies at his own cost.

[No. 106.]

*Argued January 6, 7, 1896. Decided November 30, 1896.*

ON WRIT OF CERTIORARI from the United States Circuit Court of Appeals for the Second Circuit to review a judgment of the United States District Court for the Southern District of New York dismissing an action brought by the Berwind-White Coal Mining Company to enforce a lien or claim against the steamship Kate for certain coal furnished to her. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **George Bethune Adams,** for appellant:

The coal supplied to the chartered steamships was furnished upon the credit of the vessels.

*The Nestor*, 1 Sumn. 73; *Berwind* v. *Shultz*, 28 Fed. Rep. 110.

The statute of the state of New York created liens upon the vessels, whether domestic or foreign. The vessel in question, though foreign-owned, was to all intents and purposes a domestic vessel.

*Drinkwater* v. *The Spartan*, 1 Ware, 149;

NOTE.—*As to lien for freight, who has, and how waived or lost*, see note to Raymond v. Tyson, 15: 47.

*As to lien of the contract of affreightment on the vessel and for damages to goods*, see note to The Freeman v. Buckingham, 15: 341.

*As to lien for repairs and necessaries for vessels, domestic and foreign, and for supplies salvage, and freight; proceeding in rem for*,—see notes to Blaine v. The Charles Carter, 2: 636; The Palmyra, 6: 581, and The General Smith, 4: 6C9.



Digitized by Google

makee v. Kettell, 1 Cliff. 135, 139; The ka, 14 Fed. Rep. 476, Aff'd 16 Fed. Rep. 1; Reed v. United States, 78 U. S. 11 all. 591, 600 (20: 220); Thorp v. Hammond, U. S. 12 Wall. 408, 416 (20: 419, 422); Leary United States, 81 U. S. 14 Wall. 607, 611 : 756, 757); Webster v. Disharoon, 64 Fed. p. 143; Williams v. Hays, 143 N. Y. 442, l. 445, 26 L. R. A. 153; United States v. es, 152 U. S. 178, 190 (38: 403, 408).

The statute also imposed a lien on foreign ssels, and if this vessel remained foreign, by ason of her registry and general ownership, it plied to her.

Walker v. Blackwell, 1 Wend. 557; Pacific il S. S. Co. v. Joliffe, 69 U. S. 2 Wall. 450 : 805); Frost v. Wenie, 157 U. S. 46 (39: 614); ndleton v. Franklin, 7 N. Y. 508; The Robert ilton, 1 Paine, 620.

It is well settled that, with respect to supies, each state is foreign to every other.

The General Smith, 17 U. S. 4 Wheat. 438 : 609); The Nestor, 1 Sumn. 73; Hazlehurst v. he Lulu ("The Lulu") 77 U. S. 10 Wall. 192, 0 (19: 906, 907); Burke v. The M. P. Rich, 1 liff. 308; The General Burnside, 3 Fed. Rep. 8; The Patapsco v. Boyce ("The Patapsco") U. S. 13 Wall. 329 (20: 696).

The act was constitutional as to both domestic and foreign vessels.

As to domestic vessels, no room exists for iscussion.

The Chusan, 2 Story, 455; The Sylvan tream, 35 Fed. Rep. 314; The William T. raves, 14 Blatchf. 189; Meyer v. Tupper, 66 . S. 1 Black, 522 (17: 180); The Unadilla, 8 en. 478; Norton v. Switzer, 93 U. S. 355 (23: 03); The J. E. Rumbell, 148 U. S. 1 (37: 345).

As to foreign vessels, its constitutionality hould not be any more doubtful.

No doubt can be entertained as to the power of the state to create liens upon property within its borders in such cases.

Pennoyer v. Neff, 95 U. S. 714 (24: 565); Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204 (38: 962, 4 Inters. Com. Rep. 649).

Assuming, however, that the statute amounted to a regulation of commerce, it was constitutional.

The Chusan, 2 Story, 455; The Madrid, 40 Fed. Rep. 677; Walker v. Blackwell, 1 Wend. 557; Many v. Noyes, 5 Hill, 34; Pendleton v. Franklin, 7 N. Y. 508.

Liens on vessels for pilotage have been uniformly sustained.

The Aleena, 14 Fed. Rep. 174; The William Law, 14 Fed. Rep. 792; The Charles A. Sparks, 16 Fed. Rep. 480; The South Cambria, 27 Fed. Rep. 525; The Alcalde, 30 Fed. Rep. 133; The Mascotte, 39 Fed. Rep. 871; The Nebraska, 61 Fed. Rep. 514; The J. E. Rumbell, 148 U. S. 12 (37: 347); Parkersburg & O. R. Transp. Co. v. Parkersburg, 107 U. S. 691 (27: 584); Barton v. Brown ("The Corsair") 145 U. S. 335 (36: 727).

Nonmaritime lines—*e. g.*, for supplies in the absence of a credit to the vessel,—have been frequently imposed by virtue of statutes of a similar character to the one under consideration, without question as to the constitutionality of such statutes and without regard to the foreign character of the vessels.

Pendleton v. Franklin, 7 N. Y. 508; The J. F. Warner, 22 Fed. Rep. 842; The Electron, 56 Fed. Rep. 304.

The libellant acquired a valid lien under the statute, enforceable in admiralty.

The statute being constitutional, libellant acquired a valid lien thereunder.

The Hull of a New Ship, Davels, 199; The Young Mechanic, 2 Curt. C. C. 404; The Highlander, 4 Blatchf. 55; The Virginia Rulon, 13 Blatchf. 519; White v. The Cynthia, 2 Fed. Rep. 112; The City of Salem, 10 Fed. Rep. 843; The Julia L. Sherwood, 14 Fed. Rep. 590; Meyer v. Tupper, 66 U. S. 1 Black, 522 (17: 180); Rodd v. Heartt ("The Lottawanna") 88 U. S. 21 Wall. 558 (22: 654); The J. E. Rumbell, 148 U. S. 1 (37: 345).

The law of New York entered into and formed part of the contract between the owner of the vessel and the charterer, and between the charterer and the libellant.

Central Trust Co. v. Charlotte, C. & A. R. Co. 65 Fed. Rep. 257, 259; The China v. Walsh ("The China") 74 U. S. 7 Wall. 53 (19: 67); The Maggie Hammond v. Morland ("The Maggie Hammond") 76 U. S. 9 Wall. 435 (19: 772); The Kate Tremaine, 5 Ben. 60, Approved Ex parte Easton, 95 U. S. 68, 76 (24: 373, 376); The Scotia, 35 Fed. Rep. 907; The Angela Maria, 35 Fed. Rep. 430; Moore v. Robilant, 43 Fed. Rep. 162; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. ("The Montana"), 129 U. S. 397 (32: 788).

The lien was enforceable in a court of admiralty.

The Electron, 56 Fed. Rep. 304; The John Walls, Jr., Sprague, 178; The Nebraska, 61 Fed. Rep 514; Meyer v. Tupper, 66 U. S. 1 Black, 529 (17: 184); The Calisto, Daveis, 29; The J. F. Warner, 22 Fed. Rep. 344; Ex parte McNiel, 80 U. S. 13 Wall. 236 (20: 624).

The stipulation in the charter party was not intended by the parties to withdraw the vessel from the operation of the law; and it could not have that effect if they so intended.

Urann v. Fletcher, 1 Gray, 125; Arthur v. The Cassius, 2 Story, 93; Webb v. Peirce, 1 Curt. C. C. 107; The Phœbe, 1 Ware, 271; Richardson v. Winsor, 3 Cliff. 406; The Stroma, 41 Fed. Rep. 601; The Centurion, 57 Fed. Rep. 412.

The general owner, when he transfers the possession and control to the charterer, is deemed to assent to the creation of liens for necessary supplies.

The Nestor, 1 Sumn. 73; The Monsoon, 1 Sprague, 37; Flaherty v. Doane, 1 Low. Dec. 148; The City of New York, 3 Blatchf. 187; The India, 14 Fed. Rep. 476, Aff'd 16 Fed. Rep. 262; Harney v. The Sydney L. Wright, 5 Hughes, 474; The George Dumois, 68 Fed. Rep. 926.

The libellant acquired a maritime lien upon the vessel for the coals delivered to her.

The Phœbe, 1 Ware, 267; Webb v. Peirce, 1 Curt. C. C. 105; The Scotia, 35 Fed. Rep. 909; Re Insurance Co. 22 Fed. Rep. 115.

*Messrs.* **J. Parker Kirlin** and **William Pierrepont Williams,** for appellee:

No lien under the general maritime law arose against the Kate for the coals in question.

*People's Ferry Co.* v. *Beers*, 61 U. S. 20 How. 393 (15: 961); *The Larch*, 2 Curt. C. C. 427.



Digitized by Google

Lien may arise from a master's order by implication of law.

*The St. Jago de Cuba*, 22 U. S. 9 Wheat. 409 (6: 122); *Hazlehurst* v. *The Lulu* ("*The Lulu*"), 77 U. S. 10 Wall. 192 (19: 906); *Merchants' Mut. Ins. Co.* v. *Baring*, 87 U. S. 20 Wall. 159 (22: 250); *Pendergast* v. *The Kalorama*, 77 U. S. 10 Wall. 204 (19: 941); *Thomas* v. *Osborn*, 60 U. S. 19 How. 22 (15: 534); *Pratt* v. *Reed*, 60 U. S. 19 How. 359 (15: 660).

The libellant has not proved any agreement for a lien.

*Pendergast* v. *The Custer*, 77 U. S. 10 Wall. 204 note (19: 944); *The Mary Morgan*, 28 Fed. 196; *The Now Then*, 3 U. S. App. 559, 55 Fed. Rep. 523.

There must be actual or presumptive authority in the person ordering the supplies; necessity for the supplies; credit to the vessel and need of credit by the vessel, in order that a lien may be presumed to have been intended.

*The Samuel Marshall*, 6 U. S. App. 389; *The Stroma*, 11 U. S. App. 673; *The Now Then*, 3 U. S. App. 559, 55 Fed. Rep. 523; *The Cumberland*, 30 Fed. Rep. 449; *The Pirate*, 32 Fed. Rep. 486; *The Aeronaut*, 26 Fed. Rep. 497; *The Mary Morgan*, 28 Fed. Rep. 196; *The Young Mechanic*, 2 Curt. C. C. 404; *The Curlew*, 54 Fed. Rep. 899.

The charterer, upon whose order these supplies were furnished, was without authority to bind the vessel therefor, and the libellant was chargeable with notice of this fact.

*Stephenson* v. *The Francis*, 21 Fed. Rep. 715.

So far as concerned the interest of the Kate's owners, no coals were necessary at the time they were furnished.

*The Turgot*, L. R. 11 Prob. Div. 21; *Stephenson* v. *The Francis*, 21 Fed. Rep. 715; *Thomas* v. *Osborn*, 60 U. S. 19 How. 22 (15: 534); *The Howard*, 29 Fed. Rep. 604.

The Kate was in no need of credit.

*The Grapeshot* v. *Wallerstein*, 76 U. S. 9 Wall. 129 (19: 651); *The William Cook*, 12 Fed. Rep. 919.

No lien against a foreign vessel arises under or by virtue of the New York statute for supplies furnished by a foreign corporation to a domestic charterer under circumstances which would not give rise to a lien therefor under the general maritime law.

The statute is not designed to apply to foreign vessels.

*The General Smith*, 17 U. S. 4 Wheat. 438 (4: 609); *The Chusan*, 2 Story, 455, 462; *The Robert Fulton*, 1 Paine, 620; *The Alida*, Abb. Adm. 165; *The Columbus*, 5 Sawy. 487; *The Alvira*, 63 Fed. Rep. 144; *The Lyndhurst*, 48 Fed. Rep. 839; *The Belfast* v. *Boon*, 74 U. S. 7 Wall. 624, 625 (19: 266); *Rodd* v. *Heartt* ("*The Lottawanna*") 88 U. S. 21 Wall. 558 (22: 654).

If the New York statute was intended to apply to cases of supplies furnished by a foreign corporation to a foreign vessel, upon a charterer's order, it is unconstitutional as an attempted enlargement and infringement of the admiralty and maritime jurisdiction vested in the courts of the United States.

*Rodd* v. *Heartt* ("*The Lottawanna*") *supra*; *The New York* v. *Rae*, 59 U. S. 18 How. 223 (15: 359).

The libellant cannot claim a lien against the vessel thereunder, because it is chargeable with knowledge that the bill for the coals was the charterer's debt, and that the charterer was without authority to hypothecate the ship therefor by a lien.

*The Samuel Marshall*, 6 U. S. App. 389; *Lighters Nos. 27 and 28*, 57 Fed. Rep. 664, 665; *The Alexander*, 1 W. Rob. Adm. 347; *The Stroma*, 11 U. S. App. 681; *Hazlehurst* v. *The Lulu* ("*The Lulu*") 77 U. S. 10 Wall. 192 (19: 906); *The Howard*, 29 Fed. Rep. 604; *Smith* v. *The Eastern Railroad*, 1 Curt. C. C. 253; *The Esteban de Antunano*, 31 Fed. Rep. 920; *The Columbus*, 5 Sawy. 487.

Mr. Justice **Harlan** delivered the opinion of the court:

This is a proceeding in admiralty for a decree condemning the steamship Kate, an English vessel, her boilers, engines, tackle, apparel and furniture, to be sold in satisfaction of the claim of the Berwind-White Coal Mining Company, the libellant herein, for the alleged value of 766 tons of coal furnished to and delivered on board of that vessel at the city of New York on the 23d day of December, 1892.

The owner, a British subject, intervened and filed an answer denying the liability of the vessel. The district court having dismissed the libel (56 Fed. Rep. 614), the cause was transferred by appeal to the United States circuit court of appeals, in which court certain questions of law arose which were certified to this court under the 6th section of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517). Upon examining the questions so certified, as well as the statement of facts that accompanied them, this court, by appropriate order, required the whole record to be sent up that the cause might be here determined, as fully as if it had been brought here for review by appeal.

The case made by the pleadings and proofs is substantially as stated by the circuit court of appeals, and is as follows:

The United States & Brazil Mail Steamship Company, a New York corporation having a place of business at the city of New York, [460 owned and operated vessels plying between that city and ports in Brazil. Coal for their use was obtained from the libellant, a Pennsylvania company, which was engaged in mining and selling coal and had a place of business in the city of New York. The coal was furnished upon the order of the steamship company, and, in each instance, was charged upon the libellant's account books to that company as well as to the respective vessels.

In June, 1891, the steamship company being indebted to the libellant for coal delivered in the sum of $25,000, the latter for its security filed specifications of lien against the vessels under a statute of New York providing for the collection of demands against ships and vessels. N. Y. Laws 1862, chap. 482, p. 956. Subsequently, upon an adjustment of accounts between the parties, it was agreed that the libellant should continue to furnish coal to the vessels of the steamship company, and in its discretion and for its security to file in the proper office specifications of lien against each vessel for the coal supplied to it. All the vessels, for which the libellant had, up to that time, furnished coal, upon the order of the steamship



Digitized by Google

company, were owned by that company. But shortly thereafter the steamship company began to employ in its business steamers obtained under time charter parties. Among the vessels so employed was the steamship Kate.

The charter party under which the steamship company obtained the possession and control of the Kate was executed December 15, 1892. It contained, among other conditions, the following:

"1. That the owners shall provide and pay for all provisions, wages, consular shipping and discharging fees of the captain, officers, engineers, firemen, and crew, and shall pay for the insurance of the vessel; also for all engine room and deck stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service.

"*That the charterers shall provide and pay for all coals*, port charges, pilotages, agencies, commissions, *and all other charges whatsoever, except* 461] *those above stated.* That the *charterers shall accept and pay for all coal in the steamer's bunkers on delivery, and the owners shall, on the expiration of this charter party, pay for all coal left in the bunkers each, at the current market prices at the respective ports when she is delivered to them."

"That the charterers shall pay for the use of said vessel at the rate of 6 shillings and 6 pence per gross register ton per calendar month, commencing from the time the vessel (after entry at the customhouse) is placed with clean holds at charterers' disposal, and at and after the same rates for any part of a month. . . ."

"Owners to provide rope, falls, block, and slings necessary for handling ordinary cargoes up to 8-ton weight."

"That the captain shall prosecute his voyage with the utmost despatch, and take every advantage of wind, by using the sails with a view to economize fuel, and shall render all possible assistance with ship's crews and boats.

"*That the captain* (although appointed by the owners) *shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements;* and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading, or otherwise complying with their orders and directions. That if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, they shall make such complaint in writing to the agent in New York, specially appointed by owners, who shall have full power to act on their behalf, and, if necessary, dismiss any of the officers should they find the complaints made by charterers are justified and proved.

"That the charterers shall have permission to appoint a supercargo or purser, who shall accompany the steamer, and be furnished free of charge with first-class fare and accommodation, and see that the voyages are prosecuted with the utmost despatch.

"That the master shall be furnished, from time to time, with all requisite instructions and sailing directions, and shall keep a full and correct log of the voyage or voyages in 462] which *the consumption of coal shall be correctly entered, which are always to be open to inspection of the charterers or their agents."

"That the owners shall have a lien upon all cargoes and all subfreights for any amount due under this charter; and the charterers shall have a lien on the ship for all moneys paid in advance and not earned."

The owners of each chartered vessel, as the libellant knew, had an agent for the business of the vessel at New York city. The libellant knew or could easily have known what vessels belonged to the steamship company and what vessels were operated by the latter under time charters. It is true that its agents did not examine the charter parties, nor make any inquiry as to their provisions; but from what they had always heard about such instruments they believed and assumed, or took it for granted, that they contained conditions requiring the charterers, at their own expense, to provide and pay for all coals needed by the vessel. It was under these circumstances that the libellant furnished each vessel operated by the steamship company with coal as ordered by that company, charging the company and the vessel therefor, without making any distinction in the mode of keeping its accounts between the vessels owned by the steamship company and those operated by it under time-charter parties. Specifications of lien were filed in the proper office against each vessel to which coal was delivered.

None of the coal furnished to the chartered vessels was ordered by the master of the vessel, nor were any of the bills therefor submitted to him for approval. They were submitted only to the steamship company. Nor did the agents of the chartered vessels know that coal was supplied by the libellant on the credit of the vessel, or that any specifications of lien were filed under the local statute.

The coal received by the chartered vessels was delivered at different dates, between August 17, 1892, and December 31, 1892; that received by the Kate and referred to in the libel being delivered on the 23d of December, 1892.

The steamship company was not informed until after *December 31, 1892, of speci- [463 fications of lien having been filed under the statute against the chartered vessels.

In January, 1893, the libellant having been advised by the steamship company not to remain unprotected in the future, the latter was then informed by the libellant that it had filed specifications of lien against all the vessels, including those chartered.

The coal furnished to the chartered vessels was contracted for and delivered at a time when nothing was due to the owners from the charterer, the hire of the vessels having been paid in advance.

Coal was not required in the interest of the owners of the chartered vessels at the time it was furnished; for the agent of each vessel had sufficient funds in hand, or could have obtained sufficient funds upon the credit of the vessel, to supply coal for any given voyage.

It may be assumed, for the purposes of the present case,—although the evidence upon this point is not very satisfactory,—that the libellant in fact relied upon the credit both of the charterer and the vessel, and believed that it acquired a lien, in each instance, by the filing of specifications under the statute of New York



Digitized by Google

of 1862, which statute was subsequently amended, but not in any particular affecting the determination of this case. Its provisions, as far as it is material to refer to them, are as follows:

"§ 1. Whenever a debt, amounting to $50 or upwards, as to a sea-going or ocean-bound vessel, or amounting to $15 or upwards, as to any other vessel, shall be contracted by the master, owner, charterer, builder, or consignee of any ship or vessel, or the agent of either of them within this state, for either of the following purposes:

"1st. On account of work done or materials or other articles furnished in this state for or towards the building, repairing, fitting, furnishing, or equipping such ship or vessel.

"2d. For such provisions and stores furnished within this state as may be fit and proper and for the use of such vessel at the time when the same were furnished. . . . Such debt shall be a lien upon such vessel, [464] her tackle, *apparel, and furniture, and shall be preferred to all other liens thereon, except mariner's wages."

"3. Such specification shall be filed in the office of the clerk of the county in which such debt shall have been contracted, except that when such debt shall have been contracted in either of the counties of New York, Kings, or Queens, such specification shall be filed in the office of the clerk of the city and county of New York."

The charterers of the Kate having failed to pay for the coal delivered to it, the present libel was filed.

The decree of the district court dismissing the libel proceeded upon two principal grounds: 1. That as the libellant did not deal with the owner of the vessel, or with its master or other officer, but only with the charterer, which had no authority to charge the vessel with liability for coal, and as the the libellant knew, or must under the circumstances be assumed to have known, that the charterer himself had undertaken, with the owners, to furnish such coal as the vessel required, there was no lien under the maritime law, citing *The Stroma*, 11 U. S. App. 678; *The Samuel Marshall*, 49 Fed. Rep. 754, Affirmed in 6 U. S. App. 389; *The Turgot*, L. R. Prob. Div. 21; *The Aeronaut*, 36 Fed. Rep. 497. 2. That the statute of New York, properly construed, presupposes for its application a relation of express or implied authority, and if that authority does not exist, and that fact is known to the materialman, or if he is legally chargeable with knowledge of it, no lien arises, by virtue of the statute, when the transaction is with a charterer, any more than when the dealing is with any other agent or consignee known to be unauthorized and forbidden to contract the debt; that if the statute be considered as imposing a lien upon the vessel, notwithstanding the libellant knew, or should be held to have known, that the charterer was required by the charter party under which he controlled the vessel to provide himself the coal needed by it, then such statute is unconstitutional and void in its application to commercial and maritime transactions "as an unreasonable and unjust interference with commerce, and as imposing an unjust burden on ships as the instruments *of com- [465 merce, beyond the power of state authority." 56 Fed. Rep. 614.

Touching the first of these grounds the contention of the libellant is, that the stipulation in the charter party binding the charterer to pay for all coal was only an executory agreement, for the breach of which the owner could hold the charterer personally responsible; that the law will not permit the owner and the charterer, by agreement, express or implied, to withdraw the vessel from the operation of a lien in favor of those who furnish supplies to it in a foreign port; that even actual knowledge, upon the part of the person furnishing supplies, that the charterer had agreed himself to furnish, at his own expense, the coal needed by the vessel, was wholly immaterial under the New York statute.

We are of opinion that, as the libellant knew, or, under the circumstances, is to be charged with knowledge, that the charter party under which the Kate was operated obliged the charterer to provide and pay for all the coal needed by that vessel, no lien can be asserted under the maritime law for the value of coal supplied under the order of the charterer, even if it be assumed that the libellant in fact furnished the coal upon the credit both of the charterer and of the vessel. As the charterer had agreed to provide and pay for all coal used by the vessel, he had no authority to bind the vessel for supplies furnished to it. His want of authority to charge the vessel for such an expense was known or could have been known to the libellant by the exercise of due diligence on its part. Under the circumstances, the libellant was not entitled to deliver the coal on the credit of the vessel, and its attempt to hold the vessel liable is in bad faith to the owner. The law cannot approve or encourage such an attempt to wrong the owners of the vessel. Neither reason nor public policy forbade the owner and the charterer from making the arrangement evidenced by the charter party of December 15, 1892. The master of a ship is regarded as "the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other *necessaries [466 furnished for her use. This rule is established as well upon the implied assent of the owners, as with a view to the convenience of the commercial world." *The Aurora*, 14 U. S. 1 Wheat. 96, 101 [4: 45, 46]. "The vessel must get on," and "the necessities of commerce require that when remote from the owner, he [the master] should be able to subject his owner's property to that liability, without which, it is reasonable to suppose, he will not be able to pursue his owner's interests." *The St. Jago de Cuba*, 22 U. S. 9 Wheat. 409, 416 [6: 122, 124]; *The J. E. Rumbell*, 148 U. S. 1 [37: 345]. When, therefore, supplies are furnished to a vessel in a foreign port, upon the order of the master, nothing else appearing, the presumption is that they were furnished on the credit of the vessel and of the owners, and an implied lien is given. But no such necessity can be suggested, and no such reason urged, in support of an implied lien for supplies furnished to a



Digitized by Google

charterer, when the libellant at the time knew, or by such diligence as good faith required could have ascertained, that the party upon whose order they were furnished was without authority from the owner to obtain supplies on the credit of the vessel, but had undertaken, as between itself and the owner, to provide and pay for all supplies required by the vessel.

There are many cases in which the recognition or rejection of liens under the maritime law has depended upon the diligence of parties in ascertaining the limitations imposed by the owners of vessels upon the authority of masters. These cases proceed upon the ground that good faith must have been exercised by the party seeking to enforce a lien upon the vessel. As they throw light upon the present inquiry, it is proper to refer to some of them.

In *Thomas* v. *Osborn*, 60 U. S. 19 How. 22, 31, 32 [15: 534, 538], the court said that all the commentators agree "that if one lend money to a master, knowing he has not need to borrow, he does not act in good faith, and the loan does not oblige the owner. Valin, art. 19; Emérigon, Contrat à la Grope, chap. 4, § 8, and the older commentators cited by him. Boulay-Paty, Cours de Droit Com. tit. 1, § 2; Boulay-Paty, Cours de Droit Com. tit. 4, § 14; and see the authorities cited by him in note 1, 467] page 153. . . . If," the court *said, "the master has funds of his own which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself, and if he has funds of the owners which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists. And if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit, and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel." In the same case it was said: "We are of opinion Loring & Co. [merchants who had given a credit to Leach, to whom had been committed the entire possession, command, and navigation of the vessel] had no right to lend Leach money or furnish him with supplies on the credit of the ship, and cannot be taken to have done so. Our opinion is, that inasmuch as the freight money earned by the vessel was sufficient to pay for all the needful repairs and supplies, and might have been commanded for that use, if they had not been wrongfully diverted, no case of actual necessity to encumber the vessel existed; and as Loring & Co. not only knew this, but aided Leach to divert the freight money to other objects, they obtained no lien on the vessel for their advances."

In *The Grapeshot* v. *Wallerstein*, 76 U. S. 9 Wall. 129, 136 [19: 651, 654], the court, observing that courts of admiralty do not scrutinize narrowly the account against the ship, said: "They will reject, undoubtedly, all unwarranted charges, but upon proof that the furnishing [of supplies and materials] was in good faith, on the order of the master, and really necessary, or honestly and reasonably believed by the furnisher to be necessary for the ship while lying in port, or to fit her for an intended voyage, the lien will be supported; unless it is made to appear affirmatively that the credit to the ship was unnecessary, either by reason of the master having funds in his possession applicable to the expenses incurred, or credit of his own or of his owners, upon which funds could be raised by the use of reasonable diligence; and that the materialman knew, or could, by proper inquiry, have readily informed himself of the facts."

So, in *Hazlehurst* v. *The Lulu*, 77 U. S. 10 Wall. 192, 201–204 [19: 906, 908, 909], the court said: "Good *faith is undoubtedly[468 required of a party seeking to enforce a lien against a vessel for such a claim [for advances to the master, or for repairs or supplies furnished at his request], but the fact that the master had funds which he ought to have applied to that object is no evidence to establish the charge of bad faith in such a case unless it appears that the libellant knew that fact, or that such facts and circumstances were known to him as were sufficient to put him upon inquiry within the principles of law already explained. Express knowledge of the fact that the master had sufficient funds for the purpose is not necessary to maintain the charge of bad faith, as it is well-settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot wilfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received; or, in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made." Again: "Viewed in any light, it is clear that necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship when lying in port or to fit her for an intended voyage, unless it is shown that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher, or lender knew those facts or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel."

In *The Emily Souder* v. *Pritchard*, 84 U. S. 17 Wall. 666, 671 [21: 683, 684], the court said that the presumption of law in the absence of fraud or collusion, where advances are made to a captain in a foreign port, upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or *for pilotage, towage, and[469 like services rendered to the vessel, that they are made upon the credit of the vessel as well as upon that of her owners, "can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses, or of a credit of his own or of the owners of his vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the



Digitized by Google

advances, or could readily have been ascertained by proper inquiry."

In *The Sarah Starr*, 1 Sprague, 453, 455, the court said that "in giving credit to the vessel and owners, the materialman should act in good faith, and he would not be deemed to act in good faith if he knew that the master had funds wherewith to pay for the supplies, or, if facts were known to him which would create suspicion and put him upon inquiry, when such inquiry would have led to the knowledge that the master had funds, and had no right, therefore, to obtain supplies on credit. That is, if the materialman had knowledge that the master was acting in bad faith towards his employers, or knew of circumstances which ought to admonish him to make inquiry that would have led to such knowledge, then he would be affected with bad faith, as colluding with the master, and aiding him in violating his duty to his owner. But if the materialman had no reason to suppose that the master was violating his duty in obtaining a credit, he might, upon request of the master, trust to the vessel and owners, and a lien would thereby be created."

The principle would seem to be firmly established that when it is sought to create a lien upon a vessel for supplies furnished upon the order of the master, the libel will be dismissed if it satisfactorily appears that the libellant knew, or ought reasonably to be charged with knowledge, that there was no necessity for obtaining the supplies, or, if they were ordered on the credit of the vessel, that the master had, at the time, in his hands, funds which his duty required that he should apply in the purchase of needed supplies. Courts of admiralty will not recognize and enforce a lien upon a vessel when the transaction upon which the claim rests originated in the fraud of the mas-

[470] ter *upon the owner, or in some breach of the master's duty to the owner, of which the libellant had knowledge, or in respect of which he closed his eyes, without inquiry as to the facts.

If no lien exists under the maritime law, when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the vessel for such supplies, much less one is recognized under that law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent the owner in the business of the vessel, but who, as the claimant knew, or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them.

2. But a lien is claimed in virtue of the statute of New York giving a lien upon the vessel for a debt contracted by the master, owner, charterer, builder, or consignee, on account of work done or materials or other articles furnished in the state "for or towards the building, repairing, fitting, furnishing, or equipping" the vessel, or for such provisions and stores furnished within the state "as may be fit and proper for the use of such vessel at the time when the same were furnished." Literally or narrowly construed, the statute takes no account of any arrangement or agreement between the charterer and the owner whereby the authority of the former to pledge the credit of the vessel is restricted, although the conditions under which the charterer obtained possession and control of the vessel were known or could reasonably have become known to the person with whom the charterer contracted.

We are of opinion that the statute need not and should not be so construed. It ought not to be so interpreted as to put it in the power of the charterer and the person with whom he contracts to combine for the purpose of accomplishing a result inconsistent with the known agreement between the charterer and the owner.

If the libellant in this case had furnished the coal upon the *order of the master, and [471] without knowledge or notice that the vessel was operated under a charter party, or if coal had been furnished upon the order of the charterer as well as upon the credit of the vessel, under circumstances which did not charge libellant with knowledge of the terms of the charter party, but charged it only with knowledge of the fact that the vessel was being operated under a charter-party, a different question would be presented.

It is unnecessary for the decision of this case to consider whether the statute of New York, if interpreted as claimed by the libellant, would be repugnant to the commerce clause of the Constitution. We decide only that libellant has no lien on the vessel under the maritime law, and that the statute of New York, reasonably construed, does not assume to give a lien where supplies are furnished to a foreign vessel upon the order of the charterer, with knowledge upon the part of the person or corporation furnishing them that the charterer does not represent the owners, but by contract with them has undertaken to furnish such supplies at his own cost.

*The decree of the District Court dismissing the libel is therefore affirmed.*

---

## NEW ORLEANS WATERWORKS COMPANY, *Appt.*,
*v.*
## CITY OF NEW ORLEANS.

(See S. C. Reporter's ed. 471–482.)

*Want of necessary parties—discretion of a municipal body—enjoining ordinances.*

1. A decree declaring ordinances of a city granting franchises or privileges to be null and void will not be made if none of the persons interested and for whose benefit the ordinances were passed are made parties.

2. A court of equity cannot properly interfere

Note.—*As to when a judgment at law will be enjoined by a bill in equity*, see note to Davis v. Tileston, 12: 386.

*As to necessary parties in equity*, see note to Marshall v. Beverley, 5: 97.

*As to equity jurisdiction after trial at law*, see note to Smith v. M'Iver, 6: 152.



Digitized by Google

with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character.

2. The passage of ordinances by municipal bodies by virtue of powers delegated by the legislature are legislative acts which a court of equity will not enjoin.

[No. 134.]

*Argued November 4, 1896. Decided November 30, 1896.*

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana sustaining a demurrer to the complaint and dismissing a suit in equity brought by the New Orleans Waterworks Company, plaintiff, against the city of New Orleans, to compel the city to cancel certain ordinances and grants made and granted by it to various persons to lay pipes through which to draw water for their own use from the Mississippi river and also to restrain the city from granting other like grants or privileges to others.

The facts are stated in the opinion.

*Mr.* **J. R. Beckwith** for appellant.

*Messrs.* **Samuel L. Gilmore, Henry J. Leovy,** and *Thomas J. Semmes* for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit was determined in the court below upon demurrer to the bill. The question presented is whether the bill set forth a cause of action entitling the appellant, who was the plaintiff below, to the relief asked.

The case made by the bill is substantially as follows: By the 5th section of the act of the general assembly of Louisiana, commonly known as act No. 33, extra session of 1877, it was provided that the New Orleans Waterworks Company, in its corporate capacity, should own and possess the privileges acquired by the city of New Orleans from the Commercial Bank; that it should have, for fifty years from the passage of the act, the exclusive privilege of supplying the city of New Orleans and its inhabitants with water from the Mississippi river, or any other stream or river, by means of pipes and conduits, and for erecting or constructing any necessary works or engines or machines for that purpose; that it might contract for, purchase, or lease any land or lots of ground, or the right to pass over and enter the same from time to time as occasion required, through which it might be necessary to convey the water into said city, or to distribute the same to the inhabitants of said city, and con-

---

*Municipal ordinances, authority to make; reasonableness; must be consistent with general laws; must be impartial and general, certain and definite; must not contravene common right nor restrain trade, nor authorize a nuisance; when equity will enjoin.*

Ordinances passed by a municipal corporation under the powers conferred by its charter derive their authority from the legislative power of the state, and not merely from the municipal authority passing them. The legislature of a state may delegate to municipal corporations the power to make by-laws and ordinances, and when so passed they have the force and effect of the legislative act within the limits prescribed for it. State, Burton, v. Williams, 11 S. C. 288; Taylor v. Carondelet, 22 Mo. 105; Heland v. Lowell, 3 Allen, 407, 81 Am. Dec. 670; McDermott v. Board of Police, 5 Abb. Pr. 422; Jones v. Firemen's Fund Ins. Co. 2 Daly, 307; St. Louis v. Manufacturers' Sav. Bank, 49 Mo. 574; St. Louis v. Boffinger, 19 Mo. 13, 15; Brick Presbyterian Church Corp. v. New York, 5 Cow. 538; Mason v. Shawneetown, 77 Ill. 533; Starr v. Burlington, 45 Iowa, 87; Indianapolis v. Indianapolis Gaslight & C. Co. 66 Ind. 396; State v. Tryon, 39 Conn. 183; Des Moines Gas Co. v. Des Moines, 44 Iowa, 505, 24 Am. Rep. 756; Milne v. Davidson, 5 Mart. N. S. 409, 16 Am. Dec. 189; Gabel v. Houston, 29 Tex. 336; Bearden v. Madison, 73 Ga. 184; Burmeister v. Howard, 1 Wash. Terr. 208; Wright v. Chicago & N. R. Co. 7 Ill. App. 438; St. Louis v. Foster, 52 Mo. 513; Bott v. Pratt, 33 Minn. 323, 53 Am. Rep. 47; Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368; Smith v. Marston, 5 Tex. 426.

The power to make ordinances, when not expressly given, is implied as incident to the very existence of a corporation, but in the case of an express grant of the power to enact by-laws limited to certain specified cases and for certain purposes, the corporate power of legislation is confined to the objects specified. State v. Ferguson, 33 N. H. 424; Child v. Hudson Bay Co. 2 P. Wms. 207.

A municipal corporation must act within the limits of its delegated powers, but may pass all laws necessary or proper to carry into effect a given power. *Ex parte* Burnett, 30 Ala. 461.

The enumeration of special cases, however, does not, unless the intent be apparent, exclude the implied power any further than necessarily results from the nature of the special provisions. Dill. Mun. Corp. § 316; Heisembrittle v. Charleston, 2 McMull. L. 238; Wadleigh v. Gilman, 12 Me. 408, 28 Am. Dec. 188; State v. Freeman, 38 N. H. 426; State v. Clark, 28 N. H. 176, 61 Am. Dec. 611; Collins v. Hatch, 18 Ohio, 523, 51 Am. Dec. 465; Com. v. Turner, 1 Cush. 493; New Orleans v. Philippi, 9 La. Ann. 44; *Re* Wan Yin ("Laundry License Case") 22 Fed. Rep. 701; Indianapolis v. Indianapolis Gaslight & C. Co. 66 Ind. 396.

In State, Taintor, v. Morristown, 33 N. J. L. 57, Depue, J., said that "a special grant of power to a municipal corporation . . . is a delegation of an authority to legislate by ordinance on the enumerated subjects, and does add to the powers incident to the creation of a corporation."

The power vested by legislation in a city corporation to make ordinances for its own government does not give the power to enlarge, diminish, or vary its powers by its ordinances. Andrews v. Union Mut. F. Ins. Co. 37 Me. 256; Thompson v. Roe, 63 U. S. 22 How. 422 (16: 337); Thomas v. Richmond, 79 U. S. 12 Wall. 349 (20: 453); State, Farnsworth, v. Municipal Court of St. Paul, 32 Minn. 329; Com. v. Roy, 140 Mass. 432; State, Kercheval, v. Nashville, 15 Lea, 697, 54 Am. Rep. 427; Mays v. Cincinnati, 1 Ohio St. 268; State, Breniger, v. Belvidere, 44 N. J. L. 350; St. Luke's Church v. Mathews, 4 Desauss. Eq. 585, 6 Am. Rep. 619; Lake View v. Letz, 44 Ill. 81; Amboy v. Sleeper, 31 Ill. 499; Third Municipality v. Ursuline Nuns, 2 La. Ann. 611.

Where, by statute, power is granted to the common council of a municipal corporation, without authority to delegate the same, and the common council attempt to delegate the power to a subordinate by ordinance, the ordinance is void. Thompson v. Schermerhorn, 66 N. Y. 92, 55 Am. Dec. 385.

Power was given to a municipal corporation to sell and alienate all public lots or parcels of land within their jurisdiction; and they afterwards passed an ordinance alleged to be a dedication of certain timbered lands to the common use of the citizens. Held, that the corporation had no au-



Digitized by Google

struct, dig, or cause to be opened any canals or trenches whatsoever for the conducting of the water of the rivers from any place or places it deemed fit, and raise and construct such dykes, mounds, and reservoirs as might be required for securing and carrying a full supply of pure water to the city and its inhabitants; enter upon and survey such lands as it might [473] think proper, in order to ascertain *the best mode of furnishing a supply of water, and lay and place any number of conduits or pipes or aqueducts, and cleanse and repair the same through or over any of the lands or streets of the city, provided the same should not be an obstruction to commerce or free circulation.

The 18th section of the same act provided: "That nothing in this act shall be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river exclusively for his own or their own use."

While the New Orleans Waterworks Company was proceeding under the above legislative enactment constituting its charter, the Louisiana Constitution of 1879 was adopted. By article 258 of that Constitution it was provided: "All rights, actions, prosecutions, claims, and contracts, as well of individuals as of bodies corporate, and all laws in force at the time of the adoption of this Constitution, and not inconsistent therewith, shall continue as if the said Constitution had not been adopted. But the monopoly features in the charter of any corporation now existing in the state, save such as may be contained in the charters of railroad companies, are hereby repealed."

After this constitutional provision took effect, the city council of New Orleans passed, November 15, 1882, an ordinance allowing Robert E. Rivers, the lessee of the St. Charles Hotel in New Orleans, "the right of way and privilege to lay a water pipe from the Mississippi river, at any point opposite the head of Common or Gravier streets, through either of these streets to said hotel, its front and side streets, with all needed attachments and appurtenances, and to distribute said water through said hotel as said Rivers, or lessee, may desire from said pipes," etc.

Rivers being about to take the benefit of this ordinance, the waterworks company commenced suit against him in the circuit court of the United States for the eastern district of Louisiana, in which it sought a decree perpetually restraining him from laying pipes, conduits, or mains in the public streets of New Orleans for the purpose of conveying water from the Mississippi river to his hotel. The company proceeded in *that suit upon the [474] ground that it had a valid contract with the state and city for an exclusive right for the full term of fifty years, from March 31, 1877, of supplying the city of New Orleans and its inhabitants, other than those contiguous to the

---

thority to dedicate these lands to the common use of the citizens; and that an injunction ought not to be granted restraining the alienation of them. Wright v. Victoria, 4 Tex. 375.

Nor can the presumption be indulged that the legislature intended that ordinances passed by the city should be superior to, and take the place of, the general law of the state upon the same subject. March v. Com. 12 B. Mon. 25; Rothschild v. Darien, 69 Ga. 503; Jefferson City v. Courtmire, 9 Mo. 683; *Re* Sic, 73 Cal. 142; State v. Oleson, 26 Minn. 507.

City authorities cannot, by ordinance, declare those acts offenses against the city which, by the general law, are defined and made punishable as offenses against the state. New Orleans v. Miller, 7 La. Ann. 651; Brooklyn v. Toynbee, 31 Barb. 282.

Ordinances other than those passed by virtue of an express grant or power must be reasonable and not oppressive. Boston v. Shaw, 1 Met. 130; Com. v. Worcester, 3 Pick. 462; State, Delaware, L. & W. R. Co. v. East Orange, 41 N. J. L. 127; Kip v. Paterson, 26 N. J. L. 298; Dayton v. Quigley, 29 N. J. Eq. 77; People v. Throop, 12 Wend. 183; Com. v. Steffee, 7 Bush, 161; *Ex parte* Frank, 52 Cal. 606, 28 Am. Rep. 642; Memphis v. Winfield, 8 Humph. 707; Waters v. Leech, 3 Ark. 110; Com. v. Robertson, 5 Cush. 438; Fisher v. Harrisburg, 2 Grant, Cas. 291; Northern Liberties Comrs. v. Northern Liberties Gas Co. 12 Pa. 318; Columbia v. Beasley, 1 Humph. 232, 34 Am. Dec. 646; Pedrick v. Bailey, 12 Gray, 161; Whyte v. Nashville, 2 Swan, 364; State v. Freeman, 38 N. H. 426; Dunham v. Rochester, 5 Cow. 462; Tugman v. Chicago, 78 Ill. 405; Clason v. Milwaukee, 30 Wis. 316; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Kirkham v. Russell, 76 Va. 956; State v. Jersey City, 37 N. J. L. 348; Corrigan v. Gage, 68 Mo. 541.

An ordinance cannot be held to be unreasonable which is expressly authorized by the legislature. A Coal Float v. Jeffersonville, 112 Ind. 19; Chamberlain v. Evansville, 77 Ind. 542; State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471.

Whenever an ordinance appears to be unreasonable or oppressive it may be declared void. Cooley, Const. Lim. 4th ed. 243.

The question of reasonableness is to be decided by the court and on the facts of each special case. Hudson v. Thorne, 7 Paige, 261; Austin v. Murray, 16 Pick. 121; Boston v. Shaw, 1 Met. 130; Com. v. Worcester, 3 Pick. 462; *Re* Vandine, 6 Pick. 187, 17 Am. Dec. 351; Paxson v. Sweet, 13 N. J. L. 196; Com. v. Stodder, 2 Cush. 562, 48 Am. Dec. 679; Brooklyn v. Breslin, 57 N. Y. 591; *Ex parte* Frank, 52 Cal. 606, 28 Am. Rep. 642; Buffalo v. Webster, 10 Wend. 100; Dunham v. Rochester, 5 Cow. 462; Kneedler v. Norristown, 100 Pa. 368, 45 Am. Rep. 384; State v. Jersey City, 37 N. J. L. 348; Clason v. Milwaukee, 30 Wis. 316.

And the presumption is in favor of its reasonableness unless the contrary appears on the face of the ordinance, or is established by proper evidence. Van Hook v. Selma, 70 Ala. 361, 45 Am. Rep. 85.

The power to make ordinances must not only be exercised strictly within the limits of the charter but in perfect subordination to the Constitution and general law of the land and the rights dependent thereon. Burlington v. Kellar, 18 Iowa, 65; Waters v. Leech, 3 Ark. 115; State v. Langston, 88 N. C. 692; Washington v. Hammond, 76 N. C. 33; Philadelphia & R. R. Co. v. Ervin, 89 Pa. 71, 33 Am. Rep. 726; Savannah v. Hussey, 21 Ga. 80; State v. Caldwell, 3 La. Ann. 435.

An ordinance which is repugnant either to the Constitution or general laws is *ipso facto* void. *Ex parte* Kuback, 85 Cal. 274, 9 L. R. A. 432; Illinois C. R. Co. v. Bloomington, 76 Ill. 447; Cullinan v. New Orleans, 28 La. Ann. 102; State, Hahn, v. Hardy, 7 Neb. 377; Wood v. Brooklyn, 14 Barb. 425; Livingston v. Albany, 41 Ga. 22; Wilkesbarre City Hospital v. Luzerne County, 84 Pa. 59; Indianapolis v. Indianapolis Gaslight & C. Co. 66 Ind. 396; Pesterfield v. Vickers, 3 Coldw. 205; State v. Caldwell, 3 La. Ann. 435; Haywood v. Savannah, 12 Ga. 404; Savannah v. Hussey, 21 Ga. 80; New York v. Nichols, 4 Hill, 209; Philips v. Wickham, 1 Paige, 590; Cowen v. West Troy, 43 Barb. 48; Schenley v. Com. 36



Digitized by Google

Mississippi river, with water from that stream by means of pipes and conduits placed in the streets of that city, and that the obligation of that contract was protected by the Constitution of the United States against impairment by any act of the state. Rivers claimed the right to proceed with the construction of pipes, mains, and conduits under the authority of the ordinance above referred to, which rested for its validity, as he claimed, upon the Constitution and laws of Louisiana.

The bill filed by the Waterworks Company against Rivers was dismissed in the circuit court, and upon appeal to this court the judgment of dismissal was reversed, with the direction to enter a decree perpetually restraining Rivers, as prayed for in the bill filed by the waterworks company. The opinion in *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674 [29: 525], states fully the grounds upon which this court proceeded.

In 1882 the St. Tammany Waterworks Company was organized under the general laws of Louisiana for the purpose of furnishing and supplying the inhabitants of the city of New Orleans and other localities contiguous to the line of its works with an ample supply of clear and wholesome water from such rivers, streams, and other fountain sources as might be found most available for such purpose by means of pipes and conduits. The company being about to take steps to obtain authority for bringing into New Orleans the waters of the Bogue Falaya river in the parish of St. Tammany, and distributing the same by means of pipes, mains, and conduits placed in the streets of the city parallel with those constructed by the New Orleans Waterworks Company, the latter corporation instituted, in the circuit court of the United States for the eastern district of Louisiana, a suit for an injunction to restrain the other company from carrying out its scheme. On appeal from the decree of the circuit court granting the injunction, *this court reaffirmed the principle [475 announced in the *Rivers Case*, saying: "As the exclusive right of the appellee to supply the city of New Orleans and its inhabitants with water was not restricted to water drawn from the Mississippi river, but embraced water from any other stream, it is impossible to distinguish this case in principle from that of *New Orleans Waterworks Co.* v. *Rivers*, *supra*. Upon the authority of the latter case it must be held that the carrying out by the appellant of its scheme for a system of waterworks in New Orleans would be in violation of the rights of the appellee, and that the state Constitution of 1879, so far as it assumes to withdraw the exclusive privileges granted to the appellee, is inconsistent with the clause of the national Constitution forbidding a state from

---

Pa. 29, 78 Am. Dec. 359; State v. Lindsay, 34 Ark. 372; State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471; Clarke v. Rochester, 28 N. Y. 605; State, White, v. Bayonne, 49 N. J. L. 311; Newton v. Belger, 143 Mass. 598; State, Lozier, v. Newark Bd. of Health, 48 N. J. L. 452; *Ex parte* Kearney, 55 Cal. 212; Volk v. Newark, 47 N. J. L. 117; State v. Brittain, 89 N. C. 584; Cape Girardeau v. Riley, 72 Mo. 220.

Ordinances must be impartial and of general application; special and unwarranted discriminations in particular cases are not to be allowed. Dill. Mun. Corp. § 322; Soon Hing v. Crowley, 113 U. S. 703 (28: 1145); *Ex parte* Chin Yan, 60 Cal. 78; Baton Rouge v. Cremonini, 36 La. Ann. 247; Hudson v. Thorne, 7 Paige, 261; Chicago v. Rumpff, 45 Ill. 90, 92 Am. Dec. 196; De Ben v. Gerard, 4 La. Ann. 30; Whyte v. Nashville, 2 Swan, 364; Zanone v. Mound City, 103 Ill. 552; Citizens' Gas & Min. Co. v. Elwood, 114 Ind. 332.

An ordinance must be certain and definite. It must be certain in its definition of the offense and certain in the penalty inflicted. Becker v. Washington, 94 Mo. 360; Tappan v. Young, 9 Daly, 357; Shreveport v. Roos, 35 La. Ann. 1010; San Francisco Pioneer Woolen Factory v. Brickwedel, 60 Cal. 166; McConvill v. Jersey City, 39 N. J. L. 42.

An ordinance in contravention of a common right is void. Hayden v. Noyes, 5 Conn. 391; Willard v. Killingworth, 8 Conn. 247; Taylor v. Griswold, 14 N. J. L. 222, 27 Am. Dec. 33; Clason v. Milwaukee, 30 Wis. 316; State v. Mott, 61 Md. 297, 43 Am. Rep. 105.

Power to pass ordinances in restraint of trade will not be presumed under a general grant of power to a municipal corporation to pass ordinances. *Ex parte* Frank, 52 Cal. 606, 28 Am. Rep. 642; St. Louis v. Grone, 46 Mo. 574; State v. Fisher, 52 Mo. 174; St. Paul v. Traeger, 25 Minn. 248, 33 Am. Rep. 462; Hayes v. Appleton, 24 Wis. 543.

No ordinance of a municipal corporation can lawfully authorize the creation of a private nuisance, and it follows that no such ordinance will justify him who creates one. Masterson v. Short, 7 Robt. 241.

Though generally equity will not interfere with proceedings brought to punish a violation of municipal ordinances, yet there are exceptions to this rule. Morris Canal & B. Co. v. Jersey City, 12 N. J. Eq. 252; Marvin Safe Co. v. New York, 38 Hun, 146; Schwab v. Madison, 49 Ind. 329; Dodge v. Council Bluffs, 57 Iowa, 560.

Equity will not restrain legislation by the council of a municipal corporation, but may enjoin the officers or members from carrying out illegal legislation. Poyer v. Des Plaines, 20 Ill. App. 30; Moore v. Hoffman, 2 Cin. Super. Ct. 453; Whitney v. New York, 28 Barb. 233.

When an ordinance on appeal or error has been declared void by a court of competent jurisdiction, subsequent actions begun under the same ordinance may be enjoined on the ground that they are vexatious and oppressive. Taylor v. Pine Bluff, 34 Ark. 603; Marvin Safe Co. v. New York, 38 Hun, 146.

Equity has jurisdiction to enjoin a municipal corporation from enforcing a void ordinance at the suit of any person injuriously affected thereby. Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239.

But in all cases before an injunction can be decreed to restrain a corporation from the abuse of its franchises by the adoption of ordinances or acts which will produce injury to individuals it must appear that the acts complained of are unauthorized and injurious, and of such a character that full and adequate relief cannot be had at law. West v. New York, 10 Paige, 539; Morris Canal & B. Co. v. Jersey City, 12 N. J. Eq. 258.

An injunction does not lie to prevent a mayor from signing an ordinance when the intended ordinance is a repeal of one under which a valid contract has been entered into. New Orleans Elev. R. Co. v. New Orleans, 39 La. Ann. 127.

Equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation restraining an act, unless the act is shown to be a nuisance *per se*. Waupun v. Moore, 34 Wis. 450; Hudson v. Thorne, 7 Paige, 261.



Digitized by Google

passing any law impairing the obligation of contracts." *St. Tammany Waterworks Co.* v. *New Orleans Waterworks Co.* 120 U. S. 64, 67 [30: 568, 564].

The present suit was brought February 8, 1894, by the New Orleans Waterworks Company against the city of New Orleans. The bill sets out the foregoing facts, and gives the history of the two cases to which reference has been made.

It further alleged that after the above adjudications the defendant continued to make and promulgate ordinances conferring upon individuals and corporations the right to lay pipes and mains through the streets and public ways of New Orleans to premises not contiguous to the rivers and waters with which said pipes and mains connected, from which the water supply is drawn and consumed within the city of New Orleans, such premises not being included in the proviso in the plaintiff's charter relating to the owners of property contiguous to said waters; that the defendant has continued to pass and promulgate such ordinances, and threatens to continue to do so in the future; that the ordinances set forth by copy, and contained in Exhibit "C," filed with and made a part of the bill, had been adopted and promulgated by the defendant in open defiance and disregard of the plaintiff's rights; that the plaintiff is advised and believes that the said ordinances set forth in said Exhibit "C" constitute but a portion of those of like character adopted and promulgated by the defend-
476] ant; *that in nearly all instances where said ordinances have been adopted and promulgated the parties named as the beneficiaries or grantees therein have availed themselves of the said act of the city to lay pipes and mains through the streets and public ways of the city, and established pumping machinery to draw water through said mains for a water supply; that in the instances where they have not already availed themselves of this supposed warrant to establish waterworks of their own they are intending to so establish pipes and mains, and will do so unless restrained therefrom by the courts; and that none of the premises referred to in said ordinances are contiguous to the Mississippi river, or within the proviso contained in the plaintiff's charter and contract with the state relating to or affecting the owners of property contiguous to the river.

The bill also alleged that most of the persons and corporations named as grantees in said ordinances are large consumers of water, and but for said wrongful act of the city would be customers of and consumers of the water provided as public water supply by the plaintiff; that the plaintiff has pipes and mains so located that it could supply all of said premises with water, and should receive recompense and profit thereby; that its franchises, and the income that should accrue to it from public water supply, have been lessened and its revenues diminished by a sum exceeding $30,000 in the past, and that such loss of income and revenue is continuing, and if continued during the lifetime or corporate existence of the plaintiff, would amount to many thousand dollars more; that many of the said ordinances of the city of New Orleans complained of contain on the face thereof a condition that said license or grant of the right to lay pipes and mains and pump water from the river shall continue only during the will of the defendant; that in the cases where that provision is not contained in the text of the ordinances, the city has full and complete power to revoke and recall such fraudulent and wrongful grants and permissions at its will, and thereby cease to countenance said wrongdoers, or furnish them with any colorable right to continue and maintain said pipes and mains *so wrongfully established, [477 and in good conscience should recall, revoke, and expunge all of said pretended ordinances and regulations, of its own motion, without compulsion, that by reason of the said wrongful acts of the defendant, and the large number of grants and privileges made by the city, it is practically impossible for the plaintiff to obtain full and adequate relief through proceedings instituted against the said several persons and corporations receiving said supposed grants and authority to establish pipes and pumping machinery for the purpose of drawing water from the Mississippi river by reason of the great delays and the enormous expense of litigating with so many several defendants, and the multiplicity of suits and actions necessary to restrain said wrongful acts by proceeding against the several supposed grantees.

It was further alleged that the defendant and other persons proposing to assail the plaintiff's rights contend that there are ambiguity and uncertainty in the 18th section of plaintiff's charter; that at the time of the acceptance of its charter and grant the plaintiff was advised, and it believes correctly, that said § 18 could only lawfully be construed as conferring upon the city the right to grant the privilege of laying pipes to such person or persons, or corporations, as may, at the time of such grant, be the owner of, or in the lawful possession of, real estate or property extending down to the river front and touching the said river, and having riparian rights on the banks of said river, subject only to such public servitude or right of way as may be impressed upon said property by the operation of the general statutes of Louisiana, bearing upon servitudes attaching to public waters, relating to the right of the public to moor and unload vessels at such banks, and a right of way for travel, or public roads on or along the banks of such waters, and the servitude or right the public may have to occupy the banks of rivers, and to establish levees or embankments to prevent overflow, where such public waters are subject or liable to overflow, from any cause; that the defendant and others allege and insist that such construction does not express the intent of the legislature of the state in granting said franchises, and insist upon a construction and range *for § 18, which, if correct, [478 would destroy the plaintiff's rights and privileges conferred under and by its charter, in so far as the same relate to the territory and limit within which the plaintiff has the exclusive right to furnish public water supply through pipes and mains; that this alleged ambiguity has given rise to serious contention, has already caused, and, if continued, will in the future cause, the plaintiff much contention, litigation, expense, loss, and damage; that it is important that the true, actual, and proper



Digitized by Google

construction of said § 18, and the proviso therein contained, should be judicially ascertained and decreed; that the court should adjudge, decree, and declare, as between the plaintiff and the defendant, the true and actual meaning and construction of said section and proviso, in order that all future disputes and contentions in relation thereto may be at an end, and the plaintiff have knowledge of its actual rights in the premises; that the plaintiff is remediless in a court of law, and therefore applies and appeals to the court sitting in equity, having peculiar and full power and jurisdiction in the premises by virtue of the Constitution and laws of the United States; and that all of said actings and doings of the defendant are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of the plaintiff.

The relief sought by the bill is a decree determining to what class the property, ownership, or possession of the property specified contained in that § 18 applies, and establishing and defining the limit beyond which the defendant has no power under said state legislation to authorize any person or corporation to invade the plaintiff's exclusive rights by laying pipes and drawing water from the Mississippi river or other public waters; that it be also adjudged and decreed that the rights conferred upon the plaintiff are those declared in *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674 [29: 525], and in the case of *New Orleans Waterworks Co.* v. *St. Tammany Waterworks Co.* 120 U. S. 64, 67 [30: 563, 564]; that the plaintiff is lawfully entitled to have for and during the period named in said act of incorporation all of the exclusive rights and privileges named and set forth therein; that all the 479] said acts, *resolutions, and grants sought to be made by the defendant to persons or corporations, not being possessors or owners of property not touching the banks of the Mississippi river within the parish of Orleans, are null, void, and of no effect; that defendant be ordered, adjudged, and decreed, within a time certain, to be named in the decree, to recall, expunge, repeal, and cancel each and all of said alleged ordinances, resolutions, grants, or licenses so made by it, since the date the plaintiff became invested with said exclusive rights, save only such grants, permits, ordinances, or resolutions as relate to or are confined to property and premises contiguous to the Mississippi river; and that in the event defendant shall neglect or refuse in some public way to declare the same recalled, canceled, annulled, and avoided within a time specified in such decree, the court will declare, adjudge, and decree the same, and each and all of them, to be absolutely null and void and of no effect, and as conferring no rights or authority whatsoever, nor lawful reason for the invasion of the plaintiff's said exclusive rights.

The plaintiff asked that a writ of injunction be issued, inhibiting and forbidding the city of New Orleans, its council, officers, agents, or departments, from granting or allowing to any person, persons, or corporation any further or other like grants, licenses, privileges, or warrants in any form, on the face thereof assuming to grant unto any person, persons, or corporation any right or privilege to lay or maintain any pipes, mains, or conduits from the Mississippi river across, along, or through any public place or territory within the limits of New Orleans, where said premises are not contiguous to the Mississippi river; also, that it be adjudged and decreed that in so far as the matters were in issue and litigated in said cause of the said New Orleans Waterworks Company against the St. Tammany Waterworks Company, the judgment and decree therein determined the rights of the plaintiff, as between it and the city of New Orleans, beyond further contention and dispute, and that the defendant "be compelled to abide by, observe, and enforce the same;" and that such decree be carried into full force and effect by such proper order, judgment, *or decree [480 therein as might be necessary to accomplish that end and compel obedience to its provisions.

The circuit court sustained a demurrer to the bill, and dismissed the suit with costs to the city.

It appears from the bill of complaint—the facts therein set forth being admitted by demurrer—that the city of New Orleans has by ordinances granted to a large number of corporations, associations, and individuals the privilege of laying pipes in its streets for the purpose of conveying water to their respective premises from the Mississippi. These ordinances, the plaintiff contends, are in derogation of its rights and privileges as heretofore declared and adjudged by this court in the *Rivers* and *St. Tammany Cases*. None of the parties for whose benefit the ordinances above referred to were passed were brought before the court or given an opportunity to be heard. Nevertheless, the plaintiff seeks a decree not only declaring those ordinances to be null and void, but requiring the city, within a named time, to recall, expunge, repeal, and cancel each ordinance that does not relate to premises contiguous to the Mississippi river, and if the city does not, within such time, and in some public way, cancel and annul those ordinances, then that the court, in this suit, shall adjudge and decree them to be null and void as illegally interfering with the rights of the plaintiff.

We do not suppose that any precedent can be found that would justify a court of equity in giving such relief. A decree declaring the ordinances in question void would have no effect in law upon the rights of the beneficiaries named in the ordinances; for in the absence of the parties interested and without their having an opportunity to be heard, the court would be without jurisdiction to make an adjudication affecting them. Such a decree would appear, upon the very face of the record, not to be due process of law, and could be treated everywhere as a nullity. *Windsor* v. *McVeigh*, 93 U. S. 274, 277 [23: 914, 916]; *Pennoyer* v. *Neff*, 95 U. S. 714, 733 [24: 565, 572]; *Scott* v. *McNeal*, 154 U. S. 34, 46 [38: 896, 902].

Ought the court to have proceeded to a decree, or held the bill to be sufficient for relief, as between the plaintiff and the *city? In [481 effect, a decree is asked against the city reasserting, for its guidance in the future, the principles announced in the *Rivers* and *St. Tammany Cases*, and informing it that, in passing the



Digitized by Google

ordinances complained of, it had done violence to those principles. But of what avail would such a decree be, if the city council, the members of which are not before the court, were left free to enact ordinances granting to other parties, in violation of the plaintiff's rights, the privilege of placing pipes in the streets of the city through which to convey water from the Mississippi river to their respective premises? If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council of New Orleans, and will therefore tend to protect the plaintiff in its rights, our answer is that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. It ought not to attempt to do indirectly what it could not do directly. In view of the adjudged cases, it cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the legislature of the state, and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if by any order or in any mode they assume to control the discretion with which municipal assemblies are invested, when deliberating upon the adoption or rejection of ordinances proposed for their adoption. The passage of ordinances by such bodies are legislative acts which a court of equity will not enjoin. *Chicago* v. *Evans*, 24 Ill. 52, 57; *Des Moines Gas Co.* v. *Des Moines*, 44 Iowa, 505, 1 Am. Rep. 256; 1 Dill. Mun. Corp. § 308, and notes; 2 High, Inj. § 1246. If an ordinance be passed and is invalid, the jurisdiction of the courts may then be invoked for the protection of private rights that may be violated by its enforcement. *Page* v. *Baltimore*, 34 Md. 558, 564; *Baltimore* v. *Radecke*, 49 Md. 217, 231, 33 Am. Rep. 239.

As no decree can be properly rendered that [482]will affect the *rights of the beneficiaries named in the ordinances enacted before this suit was commenced,—such beneficiaries not being before the court,—a court of equity ought not, by any form of proceeding, to interfere with the course of proceedings in the city council of New Orleans, and enjoin that branch of its municipal government from hereafter passing ordinances similar to those heretofore enacted and which are alleged to be obnoxious to the plaintiff's rights. The mischievous consequences that may result from the attempt of courts of equity to control the proceedings of municipal bodies when engaged in the consideration of matters entirely legislative in their character are too apparent to permit such judicial action as this suit contemplates. We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the state, it will be time enough for equity to interfere, and by injunction prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of actions. But that circumstance cannot justify any such decree as it asks.

Upon the grounds we have indicated, and without considering the merits of the case, *the decree below must be affirmed.*

---

## W. B. GRIMES DRY GOODS COMPANY, *Plff. in Err.*, [483]

*v.*

## JOHN MALCOLM and Paul Waples, Trustee.

(See S. C. Reporter's ed., "*Grimes Dry Goods Co.* v. *Malcolm*," 483-492.)

*Instrument construed to be a mortgage—special questions for a jury—statements of mortgagor, when not evidence.*

1. An instrument which transfers property to another in trust, and provides that if the maker shall pay certain debts therein named by a certain time it shall be void, but if he fails to so pay, then the other party is to sell the property and pay the expenses and those debts, and the balance, if any, to the maker, is a mortgage, and not an assignment for creditors, under the laws of Arkansas, although it transfers the possession of the property.
2. The submission of special questions of fact to the jury, in accordance with the state practice, is in the discretion of a Federal court.
3. Statements by the mortgagor, made after the execution of a mortgage and delivery of possession under it, as to what he intended the instrument to be, cannot be given in evidence to affect the rights of the mortgagee.
4. Refusal of the court to permit one of the jurors who have handed in a sealed verdict to change his vote is not ground of reversal, if on the evidence the court could have peremptorily instructed the return of such a verdict.

[No. 60.]

*Argued and Submitted October 21, 1896. Decided November 30, 1896.*

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that court affirming the judgment of the United States Court for the Indian Territory, Second Judicial Division, in favor of the defendants, John Malcolm and Paul Waples, Trustee, as to the property in controversy, in an action brought by the W. B. Grimes Dry Goods Company, plaintiff. *Affirmed.*

See same case below, 19 U. S. App. 229, 58 Fed. Rep. 670.

The facts are stated in the opinion.

*Messrs.* **G. B. Denison,** *Ellis & Cook*, and *N. B. Maxey* for plaintiff in error.

*Mr.* **Arthur G. Moseley** for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought by the plaintiff in error, a Missouri corporation, in the United



Digitized by Google

States court for the Indian territory, second judicial division, to recover from Malcolm, one of the defendants in error, the sum of $1,845, alleged to be due the plaintiff on open account for goods, wares, and merchandise 484]*sold and delivered by it to Malcolm. The plaintiff alleged that $1,200 of the account was due, and that the remainder thereof was to become due; also, that Malcolm had sold, conveyed, or otherwise disposed of his property or suffered or permitted it to be sold with the intent to cheat or defraud his creditors or to hinder or delay them in the collection of their debts. A writ of attachment based upon affidavit was issued and levied upon one storehouse and fixtures, one stock of general merchandise, and one gin house and sawmill as the property of Malcolm. Malcolm filed an affidavit controverting the grounds of the attachment.

By leave of the court the appellee Waples interpleaded, alleging that at the time of the filing of the suit and of the levying of the attachment, he was rightfully in possession and control of the attached property in virtue of an instrument of writing executed by Malcolm on the 19th day of January, 1891, at Durant, in the Indian territory, at which time Malcolm was in rightful possession and control of the property; that at the time of the execution and delivery of that instrument Malcolm delivered to him, Waples, actual possession of such property; that when the property was seized he notified the United States marshal of his claim to it, and demanded possession; that said instrument "was and is a mortgage with power of sale; that the same was intended by said defendant, John Malcolm, as a security for certain debts therein enumerated, and was so accepted by interpleader."

The above instrument recited that Malcolm does "bargain, sell, and deliver" to Paul Waples certain described personal property, including the property attached in this case, "to have and to hold the same unto the said Paul Waples, and his successors in this trust forever." The condition of the conveyance is recited to be: "Whereas I am indebted to the Leeper Hardware Company $2,552.28; and to Waples Platter Company, two notes aggregating $745, not including interest or attorney's fees and an open account for $259.39; and to Lingo, Waples, & Company, two notes aggregating $399.20, not including interest or attorney's fees; and to Waterman, Starr, & Company, $224.95; and to Burton, Lingo, & 485]Company, *$184; and to John R. Garr estate $142.90; and to various other parties, named in schedules 'A' and 'B' hereto annexed and made a part hereof, in the sums set opposite their respective names. Now if, at any time within sixty days from this date, I pay off and discharge all of the indebtedness described aforesaid, including interest, then this conveyance shall be null and void, and of no further force or effect, and said goods, merchandise, and property shall be restored to me. But if I fail to pay all of said indebtedness with accrued interest, if any, within sixty days aforesaid, then said Paul Waples, or his successors, shall have the right, and it shall be his duty at the expiration of said sixty days, after first advertising the time, terms, and place of sale for ten days previous to the day of sale, . . . to sell all of the aforesaid property then on hand at public outcry, for cash."

It was further provided in that instrument that Waples should take exclusive possession of the personal property in person or by his agents or employees, and should have the right to sell the merchandise in the due course of business for cash only. The money realized from the sale of the property, or any portion thereof, was to be appropriated first to the payment of the reasonable expenses "of executing this trust;" next to the payment of the claims of certain parties named; then to the payment of creditors, first those named in schedule "A," then those named in schedule "B," each set to be paid in full, and if not enough to pay all, then to be paid *pro rata;* the balance, if any, left in the hands of Waples was to be paid to Malcolm.

The plaintiff filed a reply, controverting all the allegations of Waples' pleading, and denying that Waples was in possession and control, and entitled to possession and control, of the attached property, or that the instrument referred to was, or is or was intended to be, a mortgage with power of sale. It averred that, as to it, "the said instrument and all acts done by said Malcolm and said Waples in connection with the execution thereof, and all acts done by either of them or by any person under and by virtue of it, are and ever have been fraudulent and tended to hinder and delay plaintiff in the *collection of *their* [486 debt, and was contrived and intended with the fraudulent intent to cheat, hinder, or delay the plaintiff and the creditors in the collection of its and their debt, and was and is void."

The reply further alleged "that the said instrument was and is a deed of assignment, and as such is in violation of the law governing voluntary assignments, and was and is wholly void, and the said interpleader never acquired any rights under the same, and it never gave him any right to the possession of the property attached in this action, and that said Waples never had, and has not now, under and by virtue of the said instrument, any right to take or hold possession of the said property, and has no right to recover the same in this action."

Judgment was taken by the plaintiff against Malcolm for the amount of the debt due from him, and the cause having been tried between the plaintiff and Waples, as well as upon the issue raised by the attachment, the jury found for Malcolm on the latter issue and for Waples as to the property in controversy. Judgment upon that verdict having been entered, a writ of error was prosecuted to the United States circuit court of appeals for the eighth circuit, and the judgment of the court in the Indian territory was affirmed. 19 U. S. App. 229, 58 Fed. Rep. 670.

The fundamental question in this case is whether the instrument of January 19, 1891, executed by Malcolm, is a deed of trust in the nature of a mortgage, or of a deed of assignment for the benefit of creditors. This instru-



Digitized by Google

ment was before the circuit court of appeals of the eighth circuit in *Rainwater-Boogher Hat Co.* v. *Malcolm*, 10 U. S. App. 249, 51 Fed. Rep. 734, 737, and that court held it to be a deed of trust in the nature of a mortgage—the legal equivalent of a mortgage with a power of sale—upon the authority of the decisions of the supreme court of Arkansas construing the statute of that state regulating assignments for the benefit of creditors; which statute became a part of the law of the Indian territory under the act of Congress of May 2, 1890 (26 Stat. at L. 81, 94, chap. 182, § 31).

By the statutes of Arkansas relating to assign-**487** ]ments it is *provided: "Sec. 305. In all cases in which any person shall make an assignment of any property, whether real, personal, mixed, or choses in action for the payment of debts before the assignee thereof shall be entitled to take possession, sell, or in any way manage or control any property so assigned, he shall be required to file in the office of the clerk of the court exercising equity jurisdiction a full and complete inventory and description of such property, and also make and execute a bond to the state of Arkansas in double the estimated value of the property in said assignment, with good and sufficient security, to be approved by the clerk of said court, conditioned that such assignee shall execute the trust confided to him, sell the property to the best advantage, and pay the proceeds thereof to the creditors mentioned in said assignment according to the terms thereof, and faithfully perform the duties according to law." Act Feb. 16, 1859, § 1, as amended by act Feb. 23, 1883, Mansfield, Dig. 1884, p. 219.

If the instrument executed by Malcolm was, within the meaning of the statute, an assignment for the benefit of creditors, then Waples' possession of the property was unauthorized, for he did not comply with the provisions of the statute by filing the inventory and giving the bond required.

In *Richmond* v. *Mississippi Mills*, 52 Ark. 31 [4 L. R. A. 413], the court said: "We do not hold that the giving of one or more mortgages, the confession of judgments or other means adopted to give security or preference, constitute necessarily or even ordinarily an assignment. But we do hold that where one or more instruments are executed by a debtor, in whatsoever form or by whatsoever name, with the intention of having them operate as an assignment, and with the intention of granting the property conveyed absolutely to the trustee to raise a fund to pay debts, the transaction constitutes an assignment." The doctrines of that case were affirmed in *Fecheimer* v. *Robertson*, 53 Ark. 101, 104, the court saying: "The confidence of the mortgagors that no surplus would result to them in this case is apparent from the deeds, as also from the testimony. The purpose was to devote the property to the payment of debts. This may be accomplished **488** ]by either a *mortgage or an assignment. The question is, Have the grantors by stipulations in the deeds or by their agreements and acts impressed the character of a trust for creditors upon this transaction?" In *Robson* v. *Tomlinson*, 54 Ark. 229, 233, 234, where the question was whether a certain instrument was to be taken as a mortgage given to secure a debt or a deed of assignment for the benefit of creditors, the court said: "The instrument relied upon by Tomlinson, the interpleader, is in form a mortgage and not an assignment for the benefit of creditors. The presumption, until overcome by proof, is that the parties intended it to have the effect the law gives to a mortgage—that is, that it should stand as security for a debt. The fact that it provides that the mortgagor should surrender immediate possession to the trustee for the mortgagee does not convert it into an assignment. To accomplish that result it must be shown that it was the intention of the parties that the debtor should be devested, not only of his control over the property, but also of his title. *Cadwell's Bank* v. *Crittenden*, 66 Iowa, 287. The equity of redemption may be mortgaged or sold, and so be of value to a debtor who has not the pecuniary ability to redeem; and he has a right to reserve it in dealing with his creditor, regardless of his solvency. . . . Neither the possession of the goods, nor the unreasonableness of the debtor's expectation of paying the debt at maturity, nor his intent never to pay, is the criterion for distinguishing a mortgage from an assignment. The controlling guide, according to the previous decision of the court, is, Was it the intention of the parties, at the time the instrument was executed, to devest the debtor of the title and so make an appropriation of the property to raise a fund to pay debts? . . . If the equity of redemption remains in the debtor, his title is not devested, and an absolute appropriation of the property is not made. In arriving as the intent of the parties, therefore, the question is, not whether the debtor intended to avail himself of the equity of redemption by payment of the debt, but, Was it the intention to preserve the equity? If so, the instrument is a mortgage and not an assignment." See also *Penzel Co.* v. *Jett*, 54 Ark. 430.

*These cases, as was said in *Appolos* v. [**489** *Brady*, 4 U. S. App. 209, 49 Fed. Rep. 401, 403, "declare the test to be: Has the party made an absolute appropriation of property as a means for raising a fund to pay debts, without reserving to himself, in good faith, an equity of redemption in the property conveyed?"

Accepting, as we properly may, the law of Arkansas, upon the subject of assignments for the benefit of creditors and mortgages given to secure the payment of debts, to be as declared by the supreme court of that state, we are of opinion that the instrument executed by Malcolm to Waples, tested alone by its words is a deed of trust in the nature of a mortgage. It does not make an absolute appropriation of the property for the purpose of creating a fund for the payment of the debts named, but creates a lien to secure those debts, subject to an express reservation by the grantor of a right, within a specified time, to pay the debts, and have possession of such of the property as then remained unsold restored to him. Clearly, this instrument, upon its face, is nothing more than a security for certain debts—an equity of redemption remaining in the debtor. It did not make an absolute, fixed appropriation of the property for the payment of debts.

An effort was made to show that the parties



Digitized by Google

really intended the instrument to operate as an assignment for the benefit of creditors. Without stopping to consider whether parol proof could be properly admitted for such a purpose, we content ourselves with saying, as did the circuit court of appeals, that the proof wholly fails to show that either of the parties to the instrument intended it to be other than what it purports to be on its face, namely, a mortgage.

It is assigned for error that the trial court refused to submit to the jury certain special questions framed and presented by the plaintiff after the charge to the jury and before the argument. This contention rests upon certain provisions of the statutes of Arkansas relating to pleading and practice (chap. 119), which are made part of the law of the Indian territory by the above act of Congress of May 2, 1890 (26 Stat. at L. 81, 94, chap. 182). Those provisions are: "Sec. 5141. A special verdict is that by which the jury finds the facts only. It must [490] present the *facts as established by the evidence, and not the evidence to prove them, and they must be so presented as that nothing remains to the court but to draw from them conclusions of law. Sec. 5142. In all actions, the jury, in their discretion, may render a general or special verdict, but may be required by the court in any case in which they render a general verdict to find specially upon particular questions of fact to be stated in writing. This special finding is to be recorded with the verdict." The submission of special questions to the jury is, under the statute, in the discretion of the court. It was so held in *Little Rock & Ft. S. R. Co.* v. *Pankhurst*, 36 Ark. 371, 378. Independently of the statute of Arkansas, this court has held that "the personal conduct and administration of the judge in the discharge of his separate functions was neither practice, pleading, nor a form or mode of proceeding" within the meaning of the practice act of June 1, 1872 (17 Stat. at. L. 197, now § 914 of the Revised Statutes), and that "the statute was not intended to fetter the judge in the personal discharge of his accustomed duties, or to trench upon the common-law powers with which in that respect he is clothed." *United States Mut. Acci. Asso.* v. *Barry*, 131 U. S. 100, 119 [33: 60, 66].

One of the exceptions taken by the plaintiff at the trial was to the action of the court in not permitting Malcolm to state what he said to one Wiswell, within two days after the execution of the instrument in question, as to what he intended that instrument to be, whether a mortgage or a deed of assignment. What the mortgagor said to others, after the execution of the mortgage and delivery of possession under it, could not affect the rights of the mortgagee. *Winchester & P. Mfg. Co.* v. *Creary*, 116 U. S. 161, 165 [29: 591, 592].

The bill of exceptions contains the following statement of what occurred in the trial court before the jury retired to consider their verdict:

"And after the court had delivered its charge, and plaintiff had saved its exception thereto, as above set forth, the case was argued to the jury by the attorneys of the respective parties, and when the argument had closed, it being near adjourning hour, it was agreed between the parties in open *court that in [491] case the jury agreed upon a verdict during the recess of court they might seal their verdict and give it to their foreman, and report it at the meeting of court to morrow morning. And at the meeting of court the following morning, being the 24th day of September, 1892, said jury returned into court, and upon being asked by the court if they had agreed upon a verdict, the foreman of the jury, ——— Oaks, replied: 'We have.' And thereupon ——— Sheimer, one of the jurors, arose and said: 'Your Honor, I agreed to a verdict last night, but would like to change my vote, if I can do so.' Whereupon the court replied: 'That is a very strange proceeding,' and ordered the jury to return to their juryroom; and one of the jurors thereupon arose and said if he was permitted to introduce evidence he could prove that Sheimer was not a competent juror. And thereupon A. G. Mosley, counsel for the interpleader, rose and said that we had agreed that the jury might seal their verdict and report it at the opening of the court this morning, and insisted that the jury should return the verdict they had given their foreman. And thereupon the court ordered the jury to take their seats in the box, and said that he would not permit any such conduct, and ordered the foreman to hand the sealed verdict to the clerk and the clerk to read it. And after the clerk had read the verdict, plaintiff, by its counsel, requested that the jury be polled, and the court thereupon asked each juror separately if that was his verdict, and each of them answered 'Yes, sir,' with the exception of the juror Sheimer, who replied, in answer to the court's question, 'Is that your verdict?' 'Yes, sir; I suppose so.' Plaintiff, by its counsel, excepted to the action of the court in not permitting the jury to again retire to their juryroom to again consider of their verdict, and also to the action of the court in directing the foreman of the jury to hand said sealed verdict to the clerk, and ordering the clerk to read it, and to the entering of said verdict as the verdict of the jury in the case. This exception was taken in open court before the jury had retired from the bar of the court or from their jurybox."

The bill of exceptions brings before the court all the *evidence, and it is clear that the [492] trial court could properly have instructed the jury peremptorily to return a verdict for the defendant. *Delaware. L. & W. R. Co.* v. *Converse*, 139 U. S. 469, 472 [35: 213, 215]; *Anderson County Comrs* v. *Beal*, 113 U. S. 227, 241 [28: 966, 971]; *North Pennsylvania R. Co.* v. *Commercial Nat. Bank*, 123 U. S. 727, 733 [31: 287, 288]. In this view of the case the circuit court of appeals well said that it was not error for the court to direct one juror to do what it ought to have directed all of them to do.

Other questions are presented by the assignments of error, but it is not necessary to discuss them. None of them furnish a ground for reversal. We perceive no error in the record, and *the judgment of the Circuit Court of Appeals is affirmed.*



Digitized by Google

ALEXANDER ALLEN, *Plff. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 492-500.)

*Charge to the jury on trial for murder—malice aforethought—intent to kill—aggravating words—justifiable homicide—duty to retreat—flight of accused—false evidence—presumption of innocence—deference to the opinions of each other.*

1. A charge to the jury on a trial for murder that wilfulness and malice aforethought may be inferred from the facts stated by certain witnesses if they are believed is not error, when their testimony, if true, is sufficient to support the finding.
2. The intent necessary to constitute malice aforethought under the common law of murder need not have existed for any particular time before the killing, but may spring up at the instant, and be inferred from the fact of killing.
3. The intent to commit a homicide may be inferred from the fact of firing a bullet that causes the death of a person.
4. Mere words, however aggravating, are not sufficient to reduce a homicide from murder to manslaughter.
5. An assault which will justify the homicide of the assailant must be something more than an ordinary assault, and must be such as would lead a reasonable person to believe that his life is in peril.
6. A person assaulted is, in general, bound to retreat as far as he can before slaying his assailant in order to constitute justifiable homicide.
7. The flight of an accused person is competent evidence against him, as having a tendency to establish his guilt.
8. False evidence purposely and intentionally invoked by an accused person is evidence against him as the basis of a presumption of guilt.
9. After a court has charged the jury on the presumption of innocence it cannot be required to repeat the charge in a separate instruction at the request of the defendant.
10. A charge that jurors should examine the questions submitted, with candor and with a proper regard and deference to the opinions of each other, and decide the case, if they could conscientiously do so, is not erroneous.

[No. 871.]

*Submitted October 23, 1896. Decided December 7, 1896.*

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment of that court convicting Alexander Allen of the murder of Philip Henson. *Affirmed.*

See same case, 150 U. S. 551 (37: 1179), and 157 U. S. 675 (39: 854).

Statement by Mr. Justice **Brown**:

This was a writ of error to a judgment of the circuit court of the United States for the western district of Arkansas sentencing the plaintiff in error to death for the murder of Phil-494]ip *Henson, a white man, in the Cherokee nation of the Indian territory. The defendant was tried and convicted in 1893, and, upon such conviction being set aside by this court (150 U. S. 551 [37: 1179]), was again tried and convicted in 1894. The case was again reversed (157 U. S. 675 [39:854]), when Allen was tried for the third time and convicted, and this writ of error was sued out.

The facts are so fully set forth in the previous reports of the case that it is unnecessary to repeat them here.

No counsel for plaintiff in error.

*Mr.* **Holmes Conrad**, Solicitor General, for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

We are somewhat embarrassed in the consideration of this case by the voluminousness of the charge, and of the exceptions taken thereto, as well as by the absence of a brief on the part of the plaintiff in error; but the principal assignments of error, set forth in the record, will be noticed in this opinion.

1. The 3d assignment of error is taken to certain language in the charge, the material portion of which is as follows:

"If you believe the story as narrated by the two Erne boys, who testified as witnesses, is true—that is, that the defendant went up the fence with his pistol; that he went through the wire fence, and went out in the wheat field where Philip Henson was, and met him, first holloed at him, placed his pistol upon the fence and stopped the boys, and then went through the wire fence and went out to where he was, and struck him first in the mouth with his left fist, and at the same time undertook to fire upon him, and that that firing was prevented by the action of Henson in taking hold of the pistol, and it went off into the ground, and then he fired at him and struck him in the side, and then he fired at him and struck him in the back,—you have a state of facts which would authorize you to say that the killing was done wilfully; and, not only that, but to say that it was done with malice aforethought, because that state of case, if that be true, would show the doing of a wrongful act, an illegal act, without just cause or excuse, and in the absence of mitigating facts to reduce the grade of the crime."

The learned judge was stating in this connection the theory of the prosecution, and if the facts were as stated by the *Ernes, [495 there was no error in saying to the jury, not that they were bound to, but that they were at liberty to, infer not only wilfulness but malice aforethought.

2. The 4th assignment was to the following language:

"How can you find a deliberate intent to kill? Do you have to see whether or not the man had that intent or not in his mind a year or month or day or an hour? Not at all, for in this age of improved weapons, when a man can discharge a gun in the twinkling of an eye, if you see a man draw one of these weapons and fire it, and the man toward whom he presents it falls dead, you have a deliberate intent to kill, as manifested by the way he did that act. You have the existence of a deliberate intent, though it may spring up on the

NOTE.—*As to homicide, when justifiable in self-defense*, see note to Gourko v. United States, 38: 680.



Digitized by Google

spur of the moment,—as it were, spring up contemporaneous with the doing of it,—evidenced by shooting of the man, if the act was one he could not do under the law and then claim it was manslaughter, or an act that he could not do in self-defense from the fact that it was done without just cause or excuse, or in the absence of mitigating facts, and that is precisely the definition of this characteristic of murder, known as malice aforethought. It does not, as I have already told you, necessarily import any special malevolence towards the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and a mind deliberately bent on mischief. It imports premeditation. Malice, says the law, is an intent of the mind and heart."

The substance of this instruction is that the intent necessary to constitute malice aforethought need not have existed for any particular time before the act of killing, but that it may spring up at the instant and may be inferred from the fact of killing. This is within the authorities as applied to the common-law crime of murder, though where the crime is classified as in some states, proof of deliberate premeditation is necessary to constitute murder in the first degree. *United States* v. *Cornell*, 2 Mason, 91; *People* v. *Clark*, 7 N. Y. 385; Whart. Hom. § 33; Whart. Crim. Law, 10th ed. § 117.

**496]** *3. The 6th assignment is to the following language:

"The law says we have no power to ascertain the certain condition of a man's mind. The best we can do is to infer it more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act which it is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it. Therefore we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, that it is not necessary to prove that such design existed for any definite period before the fatal blow was fired. From the very fact of a blow being struck, from the very fact that a fatal bullet was fired, we have the right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant."

This is nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act. 1 Greenl. Ev. § 18; *Reg.* v. *Jones*, 9 Car. & P. 258; *Reg.* v. *Hill*, 8 Car. & P. 274; *Reg.* v. *Beard*, 8 Car. & P. 143; *People* v. *Herrick*, 13 Wend. 87, 91.

4. The 8th assignment is taken to the following definition of manslaughter:

"It is the killing of a man unlawfully and wilfully, but without malice aforethought. Malice aforethought, as I have defined it to you, must be excluded from it; that is the doing of a wrongful act without just cause or excuse and in the absence of mitigating facts, in such a way as to show a heart void of social duty and a mind fatally bent upon mischief, must be out of the case. If that is driven out of the case, then if it is a crime at all it must come under this statute; it must come under this definition of the crime of manslaughter. The common law, which I will read to you, defines it in the same way. It tells you in a little broader terms what kind of conditions it springs out of. Speaking of voluntary manslaughter, it says it is the wilful and unlawful killing of another on sudden quarrel or in the heat of passion. Let us see what is meant by *this definition. The party who is killed, **[497** at the time of the killing, must offer some provocation to produce a certain condition of mind. Now, what is the character of that provocation that can be recognized by the law as being sufficient to reduce the grade of the crime from murder to manslaughter? He cannot produce it by mere words, because mere words alone do not excuse even a simple assault. Any words offered at the time do not reduce the grade of the killing from murder to manslaughter. He must be doing some act—that is, the deceased, Philip Henson in this case, the party killed—which at the time is of a character that would so inflame the mind of the party who does the killing as that the law contemplates he does not act deliberately, but his mind is in a state of passion; in a heat of passion where he is incapable of deliberating."

There is no error in this instruction. It is well settled by the authorities that mere words, however aggravating, are not sufficient to reduce the crime from murder to manslaughter. *Com.* v. *York*, 9 Met. 93, 103, 43 Am. Dec. 373; Whart. Hom. § 393; Whart. Crim. Law, 10th ed. § 455*a*.

5. The 9th alleged error turned upon the statement made by the court of the circumstances under which the killing would be justifiable:

"It does not mean that defendant was assaulted in a slight way, or that you can kill a man for a slight attack. The law of self-defense is a law of proportions as well as a law of necessity, and it is only danger that is deadly in its character, or that may produce great bodily harm, against which you can exercise a deadly attack. If he is attacked by another in such a way as to denote a purpose to take away his life, or to do him some great bodily harm from which death or permanent injury may follow, in such a case he may lawfully kill the assailant. When? Provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling him without killing him, if it be in his power. The act coming from the assailant must be a deadly act, or an act that would produce great violence to the person, under this proposition. It means an act that is hurled against him, and *that **[498** he has not created it, or created the necessity for it by his own wrongful, deadly, or dangerous conduct—conduct threatening life. It must be an act where he cannot avoid the consequences. If he can, he must avoid them, if he can reasonably do so with due regard to his own safety."

It is clear that to establish a case of justifiable homicide it must appear that something more than an ordinary assault was made upon the prisoner; it must also appear that the assault was such as would lead a reasonable person to believe that his life was in peril. *Wal-*



Digitized by Google

*lace* v. *United States*, 162 U. S. 466 [40: 1039].

Nor is there anything in the instruction of the court that the prisoner was bound to retreat as far as he could before slaying his assailant that conflicts with the ruling of this court in *Beard* v. *United States*, 158 U. S. 550 [39: 1086]. That was the case of an assault upon the defendant upon his own premises, and it was held that the obligation to retreat was no greater than it would have been if he had been assailed in his own house. So, too, in the case of *Alberty* v. *United States*, 162 U. S. 499 [40: 1051], the defendant found the deceased trying to obtain access to his wife's chamber through a window, in the night-time, and it was held that he might repel the attempt by force, and was under no obligation to retreat if the deceased attacked him with a knife. The general duty to retreat instead of killing when attacked was not touched upon in these cases. Whart. Hom. § 485.

6. The 14th assignment is to the following language of the court upon the subject of the flight of the accused after the homicide: "Now, then, you consider his conduct at the time of the killing and his conduct afterwards. If he fled, if he left the country, if he sought to avoid arrest, that is a fact that you are to take into consideration against him because the law says unless it is satisfactorily explained,—and he may explain it upon some theory, and you are to say whether there is any effort to explain it in this case,—if it is unexplained the law says it is a fact that may be taken into account against the party charged with the crime of murder upon the theory that I have named, upon the existence of this mon-[499]itor *called conscience that teaches us to know whether we have done right or wrong in a given case."

In the case of *Hickory* v. *United States*, 160 U. S. 408, 422 [40: 474, 479], where the same question, as to the weight to be given to flight as evidence of guilt, arose, the court charged the jury that "the law recognizes another proposition as true, and it is that 'the wicked flee when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it to this case." It was held that this was error, and was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and conclusive that it was the duty of the jury to act on it as an axiomatic truth. So, also, in the case of *Alberty* v. *United States*, 162 U. S. 499, 509 [40: 1051, 1056], the court used the same language, and added that from the fact of absconding the jury might infer the fact of guilt, and that flight was a silent admission by the defendant that he was unwilling or unable to face the case against him, and was in some sense feeble or strong, as the case might be, a confession. This was also held to be error. But in neither of these cases was it intimated that the flight of the accused was not a circumstance proper to be laid before the jury as having a tendency to prove his guilt. Several authorities were quoted in *Hickory* v. *United States*, 160 U. S. 417 [40: 477], as tending to establish this proposition. Indeed the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt. Whart. Hom. § 710; *People* v. *Pitcher*, 15 Mich. 397.

This was the substance of the above instruction, and although not accurate in all its parts we do not think it could have misled the jury.

7. In the 15th assignment exception is taken to the following instruction: "You will understand that your first duty in the case is to reject all evidence that you may find to be false; all evidence that you may find to be fabricated, because it is worthless; and if it is purposely and intentionally invoked by the defendant it is evidence against him; it is the basis for *a presumption against him, because[500] the law says that he who resorts to perjury, he who resorts to subornation of perjury to accomplish an end, this is against him, and you may take such action as the basis of a presumption of guilt." There was certainly no error in instructing the jury to disregard evidence that was found to be false, and the further charge that false testimony, knowingly and purposely invoked by defendant, might be used against him, is but another method of stating the principle that the fabrication of testimony raises a presumption against the party guilty of such practice. 1 Phillips, Ev. 448; *State* v. *Williams*, 27 Vt. 724; 3 Russell, Crimes, 6th ed. 358.

8. The 16th assignment was to the refusal of the court to charge the jury that where there is a probability of innocence there is a reasonable doubt of guilt. In the case of *Coffin* v. *United States*, 156 U. S. 432, 452 [39: 481, 490], it was held that a refusal of the court to charge the jury upon the subject of the presumption of innocence was not met by a charge that they could not convict unless the evidence showed guilt beyond a reasonable doubt.

In the case under consideration, however, the court had already charged the jury that they could not find the defendant guilty unless they were satisfied from the testimony that the crime was established beyond a reasonable doubt. That this meant, "first, that a party starts into a trial, though accused by the grand jury with the crime of murder, or any other crime, with the presumption of innocence in his favor. That stays with him until it is driven out of the case by the testimony. It is driven out of the case when the evidence shows, beyond a reasonable doubt, that the crime as charged has been committed, or that a crime has been committed. Whenever the proof shows, beyond a reasonable doubt, the existence of a crime, then the presumption of innocence disappears from the case. That exists up to the time that it is driven out in that way by proof to that extent." The court having thus charged upon the subject of the presumption of innocence, could not be required to repeat the charge in a separate instruction at the request of the defendant.

*9. The 17th and 18th assignments were[501] taken to instructions given to the jury after the main charge was delivered, and when the jury had returned to the court, apparently for further instructions. These instructions were quite lengthy, and were, in substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must



Digitized by Google

be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. These instructions were taken literally from a charge in a criminal case which was approved of by the supreme court of Massachusetts in *Com.* v. *Tuey*, 8 Cush. 1, and by the supreme court of Connecticut in *State* v. *Smith*, 49 Conn. 376, 386.

While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury-room. The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go the juryroom with a blind determination that the verdict shall represent his opinion of the case at that moment; or that he should close his ears to the arguments of men 502] who are equally *honest and intelligent as himself. There was no error in these instructions.

Several other assignments were made, to which it is unnecessary to call attention.

For the reasons above stated *the judgment of the court below will be affirmed.*

---

HENRY K. WILLARD, Administrator of the Estate of Frederick L. Christmas, Deceased, *Appt.*,

*v.*

THOMAS N. WOOD, Executor of the Last Will and Testament of William W. W. Wood, Deceased, and Thomas B. Bryan.

(See S. C. Reporter's ed. 502-526).

*Limitation of liability of covenant—reinstatement of suit—law of domicil—dismissal—laches—circumstances establishing it.*

1. The grantee's liability by reason of his acceptance of a deed without executing it, containing a covenant on his part to assume a mortgage on the premises, is subject to the limitation prescribed by the law of the forum as to simple contracts; and is barred in equity by the application, by analogy, of the bar of the statute at law.
2. A suit in equity voluntarily dismissed by plaintiff will not be allowed to be reinstated by him, unless surprise or mistake is shown.
3. The law of the place where a covenant was made between residents governs the limitation of an action brought there to enforce the covenant, although the covenant was to be performed elsewhere.
4. The dismissal of an action during the pendency of which the limitation has run will bar the remedy in the absence of any statutory provision to the contrary.
5. The mere fact that a bill of complaint is left on the files will not relieve from the effect of laches when there is failure in diligent prosecution.
6. A grantee's covenant assuming a mortgage will not be enforced in equity after sixteen years' delay to issue process against him, during seven of which he resided in the jurisdiction and for as long a period in a near state where he could have been sued, although several years before process was issued against him suit was brought against another party, but subsequently dismissed, and during the delay the remedy against several other parties who were liable on the mortgage had been lost by bankruptcy, death, and lapse of time, while the property had diminished in value one-half and had passed into the ownership of the heirs of the mortgagee.

[No. 61.]

*Argued October 26, 27, 1896. Decided November 30, 1896.*

APPEAL from a decree of the Court of Appeals of the District of Columbia dismissing a suit in equity brought by Henry K. Willard, administrator, etc., to charge William W. Wood and Thomas B. Bryan, defendants, with the deficiency arising upon a sale and foreclosure of a mortgage, upon their several assumptions to pay the mortgage debt by covenants or obligations inserted in their deeds. *Affirmed.*

See same case below, 1 App. D. C. 44.

Statement by Mr. Chief Justice **Fuller:**

Charles Christmas, a citizen of Brooklyn, New York, sold and conveyed certain real estate there situated, for the consideration of $17,000, to one Dixon, who, to secure $14,000 of the purchase money, executed July 7, 1868, a bond to Christmas for twice that amount, payable July 7, 1873, with semi-annual interest at the rate of 7 per cent per annum, and also a mortgage in fee of the property with power of sale in case of default. Charles Christmas died, and January 20, 1869, Charles H. Christmas, his executor, and Elizabeth Gignoux, his executrix (two of his children), on dividing the estate of the deceased, assigned the bond and mortgage to their brother, Frederick L. Christmas, who died at Brooklyn, November 13, 1876, and of whose estate Charles H. Christmas was appointed administrator June 28, 1877. April 19, 1869, for the consideration of $17,000, Dixon conveyed the real estate to W. W. W. Wood, in fee, by a deed which declared that the conveyance was subject to the mortgage above mentioned, "which said mortgage, with the interest due and to grow due thereon, the party of the second part hereby assumes and covenants to pay, satisfy, and discharge, the amount thereof forming a part of the consideration herein expressed and having been deducted therefrom."



Digitized by Google

504] *This conveyance from Dixon to Wood was not executed by Wood, but he entered into possession of the mortgaged premises, paid interest on the mortgage debt up to February 1, 1874, and diminished the principal of the debt through two payments of $2,000 each, the last being made February 16, 1874.

By deed dated March 14, 1874, acknowledged March 17, 1874, and recorded in April, 1874, Wood, for the recited consideration of $17,583, conveyed the mortgaged premises, in fee, to Thomas B. Bryan, "subject, however, to a certain indenture of mortgage made by the former owner of said property, Martin Dixon, to Charles Christmas to secure fourteen thousand dolls. (14,000), dated July 7, 1868, recorded in the office of the register of Kings county, New York, in liber 784 of Mortgages, page 542, upon which principal sum there has been paid the sum of four thousand dolls. (4,000), the said Thos. B. Bryan hereby assuming and expressly agreeing to pay the balance with the interest at 7 per ct., he signing this deed in evidence of his said covenant." The deed was signed by Bryan, as well as Wood and his wife, and at this date the mortgage debt had been overdue for about eight and one half months.

By deed dated the same day, March 14, 1874, acknowledged March 14, and recorded March 21, 1874, and for a like consideration of $17,583, Bryan conveyed certain lots in Washington to Wood, in fee, subject to three certain encumbrances to secure an aggregate indebtedness of $7,500, "which said indebtedness with the interest thereon at ten (10) p'r c't p'r annum the said party of the second part hereby expressly assumes, and he executes this deed, as one of the parties thereto in evidence of his covenant to pay the same," but the conveyance was not executed by Wood. The transaction between Wood and Bryan was an exchange of property, the property of Wood being encumbered with the debt of $10,000 with interest at 7 per cent and that of Bryan with an indebtedness of $7,500 with interest at 10 per cent per annum, the consideration of the two being identical, and Wood paid to Bryan $2,000 in money to equalize the exchange. This 505] *transaction occurred in the district of Columbia where Wood and Bryan resided and where the conveyances were executed and delivered. It appeared in evidence that Bryan resided in the District in and after 1874; in the state of Colorado from 1881 to 1883; and from 1883 in the state of Illinois.

On March 20, 1874, the Brooklyn property with other real estate was conveyed by Bryan to Waterman Palmer, in fee, by a deed bearing that date, acknowledged March 28, and recorded April 9, 1874, and executed by both Bryan and Palmer, subject to the mortgage and reciting that the principal of the mortgage debt had been reduced to $10,000, and declaring that the balance and interest was "hereby expressly assumed by said Palmer." The copy of the Dixon bond shows payment of interest thereon for two years later than the period up to which interest was paid by Wood. Bryan paid neither principal nor interest upon the mortgage debt, nor was he shown to have taken possession of the property.

Charles H. Christmas, as administrator of Frederick L. Christmas, filed a complaint August 28, 1877, in the county court of King's county, for the foreclosure and sale of the mortgaged premises against Dixon, Palmer and wife, and some others, averring that the codefendants of Dixon had or claimed to have some interest acquired subsequent to the mortgage, and praying against Dixon only a personal judgment in case of deficiency of proceeds of sale. To this suit neither Wood nor Bryan was made a party, and none of the defendants appeared, but some were brought in by personal service of summons and some by publication. November 13, 1877, the cause was sent to a referee, who reported the next day that the debt, with interest, amounted to $11,307.92, and on November 15, 1877, the report was confirmed and a sale of the mortgaged premises by or under the direction of the sheriff was ordered. The sheriff's report of sale was dated January 5, 1878, and represented that he had on December 10, 1877, sold the mortgaged property for $5,000 to Charles H. Christmas, Elizabeth A. Gignoux, and Harriet Gignoux, to whom he had executed a deed (who were the heirs at law of Frederick L. Christmas); that the proceeds of sale applied to *the payment of the mortgage debt were [506 $4,556.61, and that the debt itself with interest amounted to $11,422.14; that the deficiency was $6,865.63, and that this sum "should be docketed as judgment against Martin Dixon, one of the defendants herein."

Some evidence was given of notices of a proposed sale in May, 1877, being mailed in April, 1877, to Wood and Bryan at Washington, and of an intention to hold them for any deficiency, but Wood was dead many years before proofs were taken in this cause, and Bryan could not recall having received any such notice or having been otherwise notified in any way.

The property had diminished in value from $17,000 when Wood purchased to $8,000 when the sale took place.

Dixon died intestate March 18, 1878, domiciled at Brooklyn, and on March 25, 1878, letters of administration were issued there to his widow. The sheriff's report of the sale was filed March 9, 1879, and confirmed April 17, 1879, and on November 11, 1880, the report of the sheriff was docketed as a judgment against Dixon.

Dixon had been discharged in bankruptcy March 1, 1878, from all claims provable against his estate on December 7, 1877. In the schedule of his obligations appeared a debt of $12,000 as due by the bankrupt to Charles H. Christmas as administrator of Frederick L. Christmas, on the bond and mortgage, and it was therein represented that the mortgaged premises were equal in value to the debt.

Palmer died in 1878 or 1879, having exhausted his estate.

Charles H. Christmas, as administrator of Frederick L. Christmas, obtained leave from the supreme court of Brooklyn in April, 1879, to bring a suit against Wood and Bryan, or either of them, to recover the deficiency reported by the sheriff in the foreclosure proceeding, and July 24, 1879, an action of covenant was commenced in this District against Bryan in respect of the unpaid balance of the mortgage debt, in the name of Wood for the



Digitized by Google

507] use of Charles H. Christmas, *administrator of Frederick L. Christmas, to which Bryan pleaded but which was subsequently dismissed.

February 27, 1880, letters of administration on the estate of Dixon were issued in this District to Henry K. Willard in order to enable Willard as ancillary administrator of Dixon to proceed against Wood for the sum of about $7,000, which Willard claimed in his application to be due to the estate of Dixon in law, but equitably to Charles H. Christmas, administrator. The petition averred the death of Dixon intestate, that he "did not die insolvent," that his estate had been settled up in New York, and that his widow renounced her right of administration in this district.

March 9, 1880, Willard, as administrator of Dixon for the use of Charles H. Christmas, as administrator, commenced an action of assumpsit against Wood.

October 25, 1880, Willard was appointed in this District the administrator also of Frederick L. Christmas, and on November 11, 1880, commenced an action of assumpsit as such administrator against Wood. Issues were joined in the last two actions on pleas of the statute of limitations and the general issue. The plaintiff filed to the pleas of limitation an additional replication, to the effect that the defendant, by accepting the conveyance from Dixon and entering into possession, had become bound by the deed.

On July 15, 1881, Willard as administrator of Frederick L. Christmas filed the present bill against Wood and Bryan, seeking to charge them under their several assumptions of the mortgage debt with a deficiency arising upon the sale and foreclosure, averring that such deficiency had been docketed as a personal judgment against Dixon; that Wood as grantee of Dixon had paid $4,000 of the principal of the mortgage debt; that Bryan as grantee of Wood had entered into possession and enjoyed the rents and profits; and that Wood when he conveyed to Bryan had paid to the latter the sum of $2,000 to be applied to the reduction of the mortgage debt, but that Bryan, although agreeing to do so, had failed to so apply that sum. The subpœna was returned August 18, 1881, served on Wood only.

508] *Wood answered the bill October 10, 1881, setting up, among other things, laches and the statute of limitations, and insisting that the plaintiff as against Wood should be required to elect between his remedy under the bill and his remedy in the action at law, the causes of action in each of these proceedings being claimed to be identical against Wood. On June 26, 1882, Wood filed a motion to compel the election upon which his answer had insisted. He died August 31, 1882, and the motion was renewed in effect October 25, 1883, by his executor and executrix. At their instance the equity cause was placed on the calendar for final hearing, September 16, 1884, but it was taken off the calendar on the suggestion by complainant's solicitor, as shown by docket entry of November 12, 1884, that another suit was to be brought by complainant, and it appears that it was because the solicitor of the personal representatives of Wood learned that the bill against Wood was to be dismissed, that he refrained from insisting upon a hearing.

December 30, 1884, an action of covenant was brought in the supreme court of the District by Willard, as administrator of Frederick L. Christmas, against Mrs. Wood, as executrix of her husband.

On January 5, 1885, counsel for Willard, administrator, filed in the present cause the following: "And now comes the said complainant and dismisses his said bill, so far as the same relates to the defendant Mary L. C. Wood, executrix, but without prejudice. The clerk will please make the entry on the docket accordingly." And on the same day the clerk made this entry on the docket: "Dismissal of bill as to Mary L. C. Wood, ex., ordered by compl't, precipe filed." On the same day Willard, administrator, also dismissed, without prejudice, the three actions at law pending in the supreme court of the District at the time of the filing of the bill, the counsel for Wood's representatives being informed in advance by the counsel of Willard, administrator, that this would be done.

In the action of covenant brought against the executrix of Wood, the supreme court of the District in general term gave judgment for the defendant, January 17, 1887, holding that *the action should have been in assumpsit [509 and was barred. 4 Mackey, 538. To review this judgment, a writ of error from this court was sued out, and, pending its decision, the estate of Wood was completely distributed. The judgment of the District supreme court was affirmed by this court May 5, 1890. 135 U. S. 309 [34: 210]. Meanwhile and on March 10, 1890, a subpœna against Bryan was issued in the present suit and was served on him on that day. April 30, 1890, Bryan answered the bill, not admitting the right or authority of plaintiff as administrator to maintain the suit against him; he denied the right of plaintiff to compel him to pay any balance due upon the mortgage; he set up, among other things, his continuous residence beyond the District; the service of process on him during his appearance in the District on business; that the transaction between him and Wood was an exchange of equities of redemption, which the $2,000 was paid to equalize, any claim in respect of which was, moreover, barred; the defense of the bar of the statute of limitations, existing and pleaded in favor of Wood; the dismissal of the bill as to the executrix of Wood; the judgment rendered in her favor by the court in general term; the distribution made of the estate of Wood; the nonliability of Wood and his estate and the consequent nonliability of Bryan. July 1, 1890, a replication was filed, without leave, to the answer filed by Wood on October 10, 1881. Wood had died August 31, 1882, and Mrs. Wood, his executrix, had deceased as early as the middle of March, 1887. July 31, 1890, counsel for complainant, without leave of court, filed in the cause the following: "And now comes the said complainant and withdraws his direction to the clerk to dismiss the bill, so far as it relates to Mary L. C. Wood, executrix, filed January 5, 1885, the same having been filed through mistake and misapprehension."

By Wood's will, Mrs. Wood was appointed executrix and Thomas N. Wood, his son, executor, and letters testamentary were granted



Digitized by Google

to them October 27, 1882. The son, after qualifying as executor, performed no duties as such during the lifetime of his mother, who administered upon the estate. In March, 1887, after his mother's decease, the son filed as ex-
510] ecutor *a new appraisement and inventory and wound up the estate.

In the action of assumpsit brought by Willard, as administrator of Frederick L. Christmas, against Wood, the clerk was directed by plaintiff's attorney, on the suggestion of the death of defendant, to issue summons to Mrs. Wood as executrix to appear and defend, so in this cause a subpœna was directed to bring in Mrs. Wood as executrix, and so in the action brought by Willard in Wood's name for the use of Charles H. Christmas, administrator, the death of Wood was suggested, and on application of plaintiff's attorney the suit was revived in the name of Mrs. Wood as executrix. The action of covenant brought by Willard, as administrator of Christmas, against Mrs. Wood, as executrix, was conducted and tried throughout on the theory of her exclusive representative character; and, similarly, the dismissal of this bill, January 5, 1885, was as to Mrs. Wood as executrix.

Willard's counsel had notice of the executorship of the son, whose appearance as executor was entered in the present suit, with that of his mother as executrix, October 25, 1888, but both sides went on with the proceedings as if Mrs. Wood was sole executrix.

This suit was on January 12, 1892, ordered to be heard by the supreme court of the District at the general term in the first instance, but, before such hearing, became transferred under the act of Congress of February 9, 1893 (27 Stat. at L. 434, chap. 74), to the court of appeals of the District of Columbia, where the bill was dismissed with costs in accordance with an opinion delivered by Mr. Chief Justice Alvey, made part of the record and reported in 1 D. C. App. 44.

The court of appeals held that the bill was effectually dismissed as to the estate of Wood by the order of January 5, 1885; that the right, if any, attempted to be enforced against the estate of Wood by reason of the assumption in favor of Dixon was fully barred by the statute of limitations or the lapse of time before the bringing of this suit; that plaintiff as the representative of the mortgagee could not be substituted to the position of Wood with
511] the right to enforce the covenant *Bryan made with and for the benefit of Wood, under the circumstances; and that the covenant of Bryan in the deed from Wood, if it could be availed of at all, could not be deemed a lawful asset of the estate of the deceased in this District, which vested in the administrator here and entitled him to sue Bryan therefor.

*Messrs.* **Enoch Totten, William Henry Dennis,** and *Stephen Condit*, for appellant:

In equity a creditor is entitled to avail himself of a security which his debtor holds from a third person for the payment of the debt.

*Willard* v. *Wood*, 135 U. S. 314 (34: 214); *Keller* v. *Ashford*, 133 U. S. 624 (33: 673); *Union Mut. L. Ins. Co.* v. *Hanford*, 143 U. S. 190 (36: 120); *Shepherd* v. *May*, 115 U. S. 505 (29: 456).

Payment to a foreign administrator is a good plea as against even the domiciliary administrator.

*Wilkins* v. *Ellett*, 108 U. S. 256 (27: 718).

Apart from technical objections urged by the defendants, the court of appeals denied relief on the grounds:

(a) That the right sought to be enforced against the estate of Wood was barred by time, by analogy to the statute of limitations, before this suit was brought.

(b) That this suit was dismissed as to the estate of Wood by the *præcipe* as to Mrs. Wood.

(c) That the remedy against Bryan was lost when the remedy against Wood's estate was lost.

All these propositions are controverted by complainant.

Such a theory of subrogation might be carried even further, and the right to recover against Wood be denied, because Dixon was discharged in bankruptcy from his debt to the mortgagee. The answer to that, of course, is that a discharge in bankruptcy results merely by operation of law, is an act *in invitum* as regards the creditor, avails only the bankrupt, and does not discharge any other person liable for the same debt.

U. S. Rev. Stat. § 5118, title, *Bankruptcy;* Story, Promissory Notes, § 428.

The estate of William W. W. Wood is liable notwithstanding the lapse of time. His bargain with Dixon to buy the house and assume the mortgage was a New York contract and governed by the laws of New York.

To the law of the state in which land is situated must we look for the rules which govern its descent, alienation, and transfer, and and for the effect and construction of conveyances.

*McGoon* v. *Scales*, 76 U. S. 9 Wall. 27 (19: 546); *Orvis* v. *Powell*, 98 U. S. 176 (25: 238); *Brine* v. *Hartford F. Ins. Co.* 96 U. S. 627 (24: 858); *Pritchard* v. *Norton*, 106 U. S. 129 (27: 106); *Canada S. R. Co.* v. *Gebhard*, 109 U. S. 527 (27: 1020); *Denniok* v. *Central R. Co.* 103 U. S. 11 (26: 439).

By the law of the state of New York a purchaser of mortgaged real estate who accepts a deed thereto, by the terms of which he assumes, covenants, and agrees to pay the mortgage as a part of the purchase money, is liable for the amount of the encumbrance, and his liability is precisely the same, whether he actually signs and seals the deed or not He is bound by the covenants in the instrument in either case, and an action may be maintained on the contract by the mortgagee.

*Trotter* v. *Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *Burr* v. *Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Thorp* v. *Keokuk Coal Co.* 48 N. Y. 257; *Hand* v. *Kennedy*, 83 N. Y. 149; *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Bowen* v. *Beck*, 94 N. Y. 86, 46 Am. Rep. 124; *Vrooman* v. *Turner*, 69 N. Y. 280, 25 Am. Rep. 195.

The precise question involved here was decided by the court of appeals of New York in *Bowen* v. *Peck*, *supra*. The purchaser who assumed the mortgage debt in that case did not sign the deed, but accepted it and its benefits; the deed purported, as here, to be a deed of "indenture," and the statute of limitations was



Digitized by Google

pleaded; that statute as applicable to simple contracts barred the action, but as applicable to a *specialty* it did not. That case was in all respects undistinguishable from this, and the court held that the statute was not a defense. If this action were pending in New York, it would clearly be controlled by that case.

See also *Hoff's Appeal*, 24 Pa. 200.

This court, in *Willard* v. *Wood*, 135 U. S. 309 (34: 210), declined to decide this question, although it was argued at length at the bar.

The court of appeals concedes that such is the law of New York, and that international jurisprudence requires it to be respected in this case, but undertakes to say that the liability of Wood was not what the law of New York declares it to be, that of a party to the deed, but only a "simple contract" on Wood's part. It is submitted that this fails to give due effect to the *lex loci contractus*. It changes the nature of the contract, and makes a different one.

*Bank of United States* v. *Donnally*, 33 U. S. 8 Pet. 361 (8: 974).

The case at bar is not an action of covenant at law, but in equity upon the obligation imposed by the law of New York. If Wood was liable (and it is conceded he was), he was liable as the law of New York said he was,—as if he had joined in executing the deed he accepted,—and there was no mere "simple contract."

It is quite supposable that Wood did not sign the deed because the law of New York made that form superfluous.

There is nothing in the statute of limitations of the District of Columbia (Md. act of 1715, chap. 23) which excludes or conflicts with the New York doctrine. Section 6 expressly includes a "recognizance," which, like the assumption of a mortgage in New York, does not need to be sealed or even signed by the obligor.

2 Bl. Com. 342; *Re Brown*, 35 Minn. 307; *Com.* v. *Emery*, 2 Binney, 431; *Madison* v. *Com.* 2 A. K. Marsh. 131.

Section 2 of the same act, on which defendants rely, provides as follows:

"All actions of trespass *quare clausum fregit*, all actions of trespass, detinue, surtrover, or replevin for taking away goods or chattels, all actions of account, contract, debt, book or upon the case, other than such accounts as concern the trade or merchandise between merchant and merchant, their factors and servants which are not residents within this province, all actions of debt for lending, or contract without specialty, all actions of debt for arrearages of rent, all actions of assault, menaces, battery, wounding, and imprisonment, or any of them, shall be sued or brought by any person or persons within this province, at any time after the end of this present session of assembly, shall be commenced or sued within the time or limitation hereafter expressed, and not after; that is to say, the said action of account, and the said actions upon the case, upon simple contract, book debt, or account, and the said actions for debt, detinue, and replevin for goods and chattels, and the said actions for trespass *quare clausum fregit*, within three years ensuing the cause of such action, and not after."

Moreover, this suit does not assert a claim of Willard directly against Wood, but, by subrogation, the claim of Dixon, surety, against Wood, principal, for the obligation under the mortgage.

*Keller* v. *Ashford*, 133 U. S. 625 (33: 674).

The statute does not begin to run on the surety's claim against his principal until the surety is compelled or compellable to pay the debt, *i. e.*, in this case not until the sheriff's report of sale was confirmed (April 11, 1879), or when the deficiency was ascertained. This suit was filed in 1881.

Wood, Lim. Ac. § 145; *Elwood* v. *Deifendorf*, 5 Barb. 410.

The court below appears to have cited no authority for declaring that, "according to the principles of the common law, no mere agreement or assumption to pay, by a grantee in a deed, neither signed nor sealed by him, can be deemed or treated as a specialty or covenant in this District." There appears to be no decision in Maryland prior to the cession of this District in 1801, and no District decision prior to the case at bar, that declares such to be the common law in this District. The states which have adopted the same doctrine as that declared in New York have adopted it as being part of the common law of England, and no reason is perceived why it is not the common law in this jurisdiction. The learned court below took an erroneous view as to the common law of England on this subject.

Finch, Book of the Law, 109; *Staines* v. *Morris*, 1 Ves. & B. 43; Comyn, Dig. title, *Covenant*, A I. pl. 5, 6; *Finley* v. *Simpson*, 22 N. J. L. 311.

Certainly in equity there should be no technical difficulty, arising from the "form of the action," in treating Wood as if he had signed and sealed the indenture.

The *præcipe* was wholly ineffectual to dismiss the suit as against the estate of Wood, and was certainly subject to the withdrawal filed by the complainant. It referred only to "Mary L. C. Wood, executrix," who is since deceased, and not to Thomas N. Wood, the executor, against whom this suit is now pending.

The dismissal of a bill in equity as to one of two executors is inoperative. Executors are joint tenants and not tenants in common. An equity suit against one of two executors would support a judgment or decree binding on the estate, if no objection were made or want of parties suggested by the defendant.

The plaintiff in an equity suit cannot effectually dismiss his suit, especially after answer, except by means of an order of the court.

1 Daniell, Ch. Pl. & Pr. 795; *Fisher* v. *Quick*, 9 N. J. Eq. 812.

In *Orphan Asylum* v. *McCartee*, 1 Hopk. Ch. 372, cited by the court below, the dismissal was by order of court, after argument, and the court was asked to vacate its own order.

Thomas N. Wood having duly qualified as coexecutor, the question how much actual service he performed during the life of the coexecutrix was one merely between themselves. He did not cease at any time to be coexecutor.

*Re Patten's Estate*, 7 Mackey, 392; *Richardson* v. *Stansbury*, 4 Harr. & J. 275.

Whatever may be the case as to Dixon and Wood, the defendant Bryan should be held lia-



Digitized by Google

ble in equity upon his signed and sealed covenant.

He intentionally bought the property *cum onere*. If it had risen in value above the price at which he bought it, including the mortgage he assumed, he would have reaped what some have called "the unearned increment." As it has fallen below the amount of debt secured upon it, he should bear the loss. His liability is not merely technical, but founded in equity and good conscience, and it should not be canceled, even if it be held that Dixon's estate or even Wood's estate for any reason is no longer liable.

It is established and conceded that as between themselves Bryan was principal and Wood was surety. The fact that the right to sue the surety has been barred by the statute of limitations, if it be a fact, should not and does not destroy in equity the right to be subrogated to any security held by the surety.

An apt illustration of this is afforded by *Eastman* v. *Foster*, 8 Met. 19, per Shaw, Ch. J., where the maker of a note had given a mortgage to his surety to secure him, and it was decided, after argument and full consideration, that the holder of the note was entitled by subrogation to the benefit of the mortgage, even though his right to sue the surety was barred by limitation. The court said (p. 24):

"The effect of the mortgage was, in equity, to pledge the property in the form of a hypothecation to the surety, for the payment of the mortgagor's debt; and the pledge is not redeemed, nor the equitable lien upon it discharged, until the debt is paid."

In the case at bar Bryan, in the view of equity, is the principal debtor, Wood is the surety, and the covenant in the deed between Wood and Bryan is the security held by the surety, and which is not discharged until the debt is paid.

The only effect of limitations, if any, in this case, is to take away the remedy against Wood's estate. It does not affect the right, and should not have any collateral effect on claims against another.

*Michigan Ins. Bank* v. *Eldred*, 130 U. S. 693, 696 (33: 1080, 1082); *Campbell* v. *Holt*, 115 U. S. 620, 625 (29: 483, 486); *Sturges* v. *Crowninshield*, 17 U. S. 4 Wheat. 122 (4: 529).

Pom. Eq. Jur. § 1206, says that the "mortgagee may release the mortgagor without releasing the purchaser."

In *Keller* v. *Ashford*, 133 U. S. 610, 623 (33: 667, 673), this court said: "If the person who is admitted to be the creditor's (mortgagee's) debtor stands, *at the time of receiving the security*, in the relation of surety to the person from whom he receives it, it is quite immaterial whether that person is or ever has been a debtor of the principal creditor, or whether the relation of suretyship or the indemnity to the surety existed, or was known to the creditor, when the debt was contracted. In short, if one person agrees with another to be primarily liable for a debt due from that other to a third person, so that as between the parties to the agreement the first is the principal and the second the surety, the creditor of such surety is entitled, in equity, to be substituted in his place for the purpose of compelling such principal to pay the debt."

And the court quotes and adopts this language: "But the right of the mortgagee to this remedy does not result from any fixed or vested right in him, arising either from the acceptance by the subsequent purchaser of the conveyance of the mortgaged premises, or from the obligation of the grantee to pay the mortgage debt as between himself and his grantor. . . . And it will not in any case be available to the mortgagee, unless the grantor was [not *is*] himself personally liable for the payment of the mortgage debt."

In *Keller* v. *Ashford*, *supra*, the mortgagor was not made a party to the suit against the mortgagor's grantee, and this court said that this omission could not prejudice any interest of his, or any right of either party to that suit.

The plain deduction from the language and action of this court in that case is that the subrogation in question takes place, in the contemplation of equity, when the grantee takes the property, and assumes the mortgage debt, if the claim of the mortgagee is then valid against the mortgagor. The mortgagee, having notice on the public records of the assumption of the debt by the new owner of the property, may very well rely upon the right which he is advised equity gives him against such owner and elect to take him as the debtor in equity. Why should the mortgagee then be obliged to keep his claim alive indefinitely against the original mortgagor, and against a chain of intermediate owners, who may be dead or bankrupt, or in foreign parts, under penalty of being told, if he fails to do so in regard to any one of them, "Oh, the *vinculum* of obligation is broken, there is a missing link, and you are not entitled to the benefit of subrogation." Why should he not rather have an equitable right similar to that of the holder of a promissory note who can strike off intermediate indorsers and sue any particular one?

In the rapid transfer of real estate from owner to owner in modern times, any other construction of the equitable doctrine so carefully built up by the courts would, in many cases, reduce it to a nullity. That it is a salutary doctrine in aiding to make real estate a subject of commerce none will deny who consider how it tends to shift the burden of a mortgage debt from the mortgagor to the purchaser who assumes the mortgage, thereby accomplishing the very object which those parties have in mind, without the necessity of asking the consent of the mortgagee to the change of debtor.

*Messrs.* **John Sidney Webb,** *H. Randall Webb*, and *Harris Lindsley*, for Wood, appellee:

The court below decided that the bill was effectually dismissed as against the estate of Wood:

1. Because there was at the same time an action at law pending in respect to the same subject, and Wood had raised the question of the right of the plaintiff to pursue both remedies. The dismissal of the bill was therefore but a concession of the right and demand of Wood.

2. He intended to dismiss it and after a voluntary dismissal he will not be allowed to reinstate it, unless it be shown that there was surprise or mistake. It is noticeable that the brief for the appellant is silent on the point of



Digitized by Google

surprise and mistake in entering this order. (*Orphan Asylum* v. *McCartee*, 1 Hopk. Ch. 423.)

8. That Mrs. Wood was the active executor, and had been the only one who had administered, and a suit against her alone would have been equally effective in law and in equity, and hence a dismissal would be effectual as to the estate if entered against the only active representative. (3 Wms. Exrs. 7th Am. ed. *1831, *1879; *Strickland* v. *Strickland*, 12 Sim. 463; *Dyson* v. *Morris*, 1 Hare, 413; *Willard* v. *Wood*, 1 App. D. C. 44).

Executors residing abroad or who never acted on the estate are not necessarily made parties to the suit.

*Clifton* v. *Haig*, 4 Desauss. Eq. 330.

It is difficult to see how a plaintiff can avail himself of the fact that a formal order was not entered in accordance with the *præcipe* and order on the clerk to make the entry on the docket accordingly.

The order follows as a matter of course, and can only be stayed by the defendant on the ground of nonpayment of costs, and no objection herein was made.

*Curtis* v. *Lloyd*, 4 Myl. & C. 193; *Booth* v. *Lycester*, 1 Keen, 247; *Sea Ins. Co.* v. *Day*, 9 Paige, 247; *Simpson* v. *Brewster*, 9 Paige, 245.

It is a matter of course to permit a complainant to dismiss his bill at any time before an interlocutory or final decree has been made in the cause, on payment of costs.

*Cummins* v. *Bennett*, 8 Paige, 80.

*Mr.* **John Selden**, for Bryan, appellee:

The complainant below was without title or interest to institute the suit as to Bryan.

Simple contracts, though evidenced by negotiable paper, are *bona notabilia* where the debtors reside.

*Wyman* v. *United States*, 109 U. S. 656 (27: 1069); *New England Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 145 (28: 381).

Specialties are *bona notabilia* where they may happen to be found at the death of the intestate.

*Slocum* v. *Sanford*, 2 Conn. 534; *Holcomb* v. *Phelps*, 16 Conn. 135, 136; *Taylor* v. *Barron*, 35 N. H. 495; *Beers* v. *Shannon*, 73 N. Y. 292; *Smith* v. *Union Bank*, 30 U. S. 5 Pet. 525 (8: 215); Schouler, Exrs. & Admrs. § 24; 1 Woerner, Law of Administration, 440, 441; 2 Woerner, Law of Administration, 650.

A plea that the subject of action constituting such *bona notabilia* was, on the death of the decedent, in another jurisdiction than the one which appointed the administrator suing as plaintiff, has always been a good answer to the action.

*Noonan* v. *Bradley*, 76 U. S. 9 Wall. 405 (19: 761).

A release of the bond by the administrator appointed in this district would constitute no bar to the enforcement of the bond by the administrator appointed in Brooklyn.

*Daniel* v. *Luker*, Dyer, 305*a*; *Byron* v. *Byron*, Cro. Eliz. 472; 1 Rolle, Abr. London, 1668, p. 906.

Between these administrators there exists no privity.

*Stacy* v. *Thrasher*, 47 U. S. 6 How. 44, 58, 60 (12: 337, 342, 343); *Hill* v. *Tucker*, 54 U. S. 13 How. 467 (14: 226); *McLean* v. *Meek*, 59 U. S. 18 How. 18 (15: 278); *Johnson* v. *Powers*, 139 U. S. 159 (35: 114).

And if Willard should recover against Bryan, in the present suit, Bryan would still be exposed to a second recovery, at the suit of the administrator at Brooklyn, or his assignee, as lawful holder of the bond.

*Union Mut. L. Ins. Co.* v. *Lewis*, 97 U. S. 684 (24: 1114).

The bond, though it constitutes the foundation of the suit, has been neither produced nor properly accounted for.

*Clark* v. *Van Riemsdyk*, 18 U. S. 9 Cranch, 160 (3: 690); *Simpson* v. *Dall*, 70 U. S. 3 Wall. 475 (18: 267).

The personal representative of the assignee of the mortgagee is without remedy, in equity, against the defendant Bryan.

*Episcopal City Mission* v. *Brown*, 158 U. S. 223 (39: 960); *Excell* v. *Dagge*, 108 U. S. 143 (27: 682); *Drury* v. *Hayden*, 111 U. S. 227 (28: 410).

The contract between the mortgagor and his vendee creates no direct obligation on the part of the latter to the mortgagee, and is hence not actionable at law by the mortgagee, but since, as between the mortgagor and his vendee, the vendee, by force of his assumption and agreement, has become in equity the principal and the mortgagor merely the surety, for payment of the mortgage debt, the mortgagee, as creditor of such surety, is entitled in equity to stand in the place and to be subrogated to the rights and remedies of the mortgagor, under the contract which the mortgagor, for his indemnity, has obtained from his vendee.

*Keller* v. *Ashford*, 133 U. S. 610, 624 (33: 667, 673); *Willard* v. *Wood*, 135 U. S. 309, 313 (34: 210, 213); *Union Mut. L. Ins. Co.* v. *Hanford*, 143 U. S. 190 (36: 120); *Episcopal City Mission* v. *Brown*, 158 U. S. 227 (39: 961).

From all debts and claims provable against his estate on the 7th day of December, 1877, it has been shown by the complainant in the present suit that Dixon was discharged in bankruptcy, on March 1, 1878.

If, notwithstanding such proof of the mortgage debt in bankruptcy, a judgment for any deficiency was obtained against Dixon by the plaintiff in foreclosure, "it was obtained under circumstances which amounted to a fraud in law."

*Scott* v. *Ellery*, 142 U. S. 385 (35: 1051).

His discharge was effective to relieve his estate from any deficiency arising upon the sale in foreclosure.

*Fleitas* v. *Richardson* (No. 2), 147 U. S. 550 (37: 276); *Hennequin* v. *Clews*, 111 U. S. 676 (28: 565); *Upshur* v. *Briscoe*, 138 U. S. 365 (34: 931).

The assignee in bankruptcy of Dixon would have been protected by the limitation of two years contained in U. S. Rev. Stat. § 5057.

*Bailey* v. *Glover*, 88 U. S. 21 Wall. 342 (22: 636).

In the case of the mortgagee, "the equity on which his relief depends is the right of the mortgagor against his vendee, to which he is permitted to succeed by substituting himself in the place of the mortgagor."

*Keller* v. *Ashford*, 133 U. S. 625 (33: 674).

He stands in the debtor's shoes, and is sub-



Digitized by Google

stituted to the rights and remedies of the latter, but to nothing else.

*Willard* v. *Worsham*, 76 Va. 402; *Osborne* v. *Cabell*, 77 Va. 468.

He can therefore only have a personal judgment against the purchaser, for his debt, when the mortgagor holds an obligation which will support such a judgment.

*Crowell* v. *Currier*, 27 N. J. Eq. 155; *Keller* v. *Ashford*, 133 U. S. 624 (33: 674).

The mortgagee is entitled to such remedy only as the mortgagor had against the purchaser when the bill was filed.

*Crowell* v. *Hospital of Barnabas*, 27 N. J. Eq. 650; *Bull* v. *Titsworth*, 29 N. J. Eq. 73; *Willard* v. *Wood*, 4 Mackey, 538.

Upon each alienation, the vendee becomes bound as principal and the vendor as surety, as between themselves, in equity, for payment of the mortgage debt.

I Jones, Mortg. 4th ed. p. 741, § 755.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The action of covenant brought by Willard against Wood, December 30, 1884, was heard by the supreme court of the District of Columbia in general term in the first instance, and it was held that the acceptance by Wood of the deed of Dixon to him created no specialty obligation on the part of Wood, though he might be held liable on it in assumpsit, as on a simple contract, and that the act of limitations of the District barred such action because brought more than three years after the cause of action accrued. 4 Mackey, 538.

The case being brought on writ of error to this court, it was ruled that whether an agreement by the grantee of a mortgagor to assume the mortgage debt could be enforced at law or in equity was governed by the law of the place where the action was brought, and that by the law of the District of Columbia, whether such an agreement was or was not considered as under seal, it was an agreement made with the grantor only, and created no direct obligation to the mortgagee upon which the latter could sue at law. If the agreement of the grantee was considered under seal, by reason of the deed being sealed by the grantor, it fell within the settled rule in force in the District of Columbia, that no one could maintain an action at law on a contract under seal, to which he was not a party; and if the agreement of the grantee was considered as in the nature of assumpsit, implied from his acceptance of the deed, "still, being made with the grantor only and for his benefit, upon a consideration moving from him alone, there being no privity of contract between the grantee and the mortgagee, **519**] and the latter not having known *of or assented to the agreement at the time it was made, nor having since done or omitted any act on the faith of it, it follows that, by the law as declared by this court, and prevailing in the District of Columbia, the mortgagee cannot maintain an action at law against the grantee. *Keller* v. *Ashford*, 133 U. S. 610, 620, 622 [33: 667, 672, 673], and *Second Nat. Bank* v. *Grand Lodge of F. & A. Masons*, 98 U. S. 123 [25: 75], there cited. . . . Moreover, if the grantee's liability was in assumpsit only, it was, in any view of the case, barred by the statute of limitations in three years." And the judgment of the supreme court of the District was accordingly affirmed. *Willard* v. *Wood*, 135 U. S. 309 [34: 210].

In *Keller* v. *Ashford*, above referred to, it was held that although the contract of the purchaser to pay the mortgage, being made to the mortgagor and for his benefit only, created no direct obligation of the purchaser to the mortgagee, yet that in a court of equity the mortgagee may avail himself of the right of the mortgagor against the purchaser upon the familiar principle in equity that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt. And it was said: "The doctrine of the right of a creditor to the benefit of all securities given by the principal to the surety for the payment of the debt does not rest upon any liability of the principal to the creditor, or upon any peculiar relation of the surety towards the creditor; but upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt, which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor. Where the person ultimately held liable is himself a debtor to the creditor, the relief awarded has no reference to that fact, but is grounded wholly on the right of the creditor to avail himself of the right of the surety against the principal. If the person who is admitted to be the creditor's debtor stands, at the time of receiving the security, in the relation of surety to the person from whom he receives it, it is quite immaterial whether that person is or ever has been a debtor of the principal creditor, or whether *the relation of [**520** suretyship or the indemnity to the surety existed, or was known to the creditor, when the debt was contracted. In short, if one person agrees with another to be primarily liable for a debt due from that other to a third person, so that as between the parties to the agreement the first is the principal and the second the surety, the creditor of such surety is entitled, in equity, to be substituted in his place for the purpose of compelling such principal to pay the debt." 133 U. S. 623 [33: 673].

After citing many cases and quoting from *Crowell* v. *St. Barnabas Hospital*, 27 N. J. Eq. 650, 655, the opinion continued: "The decisions of this court, cited for the defendant, are not only quite consistent with this conclusion, but strongly tend to define the true position of a mortgagee, who has in no way acted on the faith of, or otherwise made himself a party to, the agreement of the mortgagor's grantee to pay the mortgage; holding, on the one hand, that such a mortgagee has no greater right than the mortgagor has against the grantee, and therefore cannot object to the striking out by a court of equity, or to the release by the mortgagor, of such an agreement when inserted in the deed by mistake (*Elliott* v. *Sackett*, 108 U. S. 132 [27: 678]; *Drury* v. *Hayden*, 111 U. S. 223 [28: 408]); and, on the other hand, that such an agreement does not, without the mortgagee's assent, put the grantee and the mortgagor in the relation of



Digitized by Google

principal and surety towards the mortgagee, so that the latter, by giving time to the grantee, will discharge the mortgagor. *Shepherd* v. *May*, 115 U. S. 505, 511 [29: 456, 458]."

The court of appeals rightly held that remedies are determined by the law of the forum; that Wood's liability by reason of his acceptance of Dixon's deed was subject to the limitation prescribed as to simple contracts; and was barred by the application in equity, by analogy, of the bar of the statute at law.

We also concur with the court of appeals that the bill was effectually dismissed as against the estate of Wood on the 5th of January, 1885. That court held that there could be no doubt that it was the intention of plaintiff by the order of that date to dismiss the bill as to the representatives of Wood's estate, and that **521**]it was supposed at the time to have *been effectually done; that this dismissal was a concession to the demand of Wood that plaintiff should elect as between his action at law then pending against the representatives and the bill in equity; that it could not be urged that the defendant or his representative might object to the dismissal; and that after a voluntary dismissal of the bill by plaintiff he would not be allowed to reinstate it unless it was shown that there was surprise or mistake. It was further held that though the order of dismissal referred alone to Mrs. Wood, she was the only active representative of the estate, and that the fair construction of the order of dismissal would not permit of the contention that the bill was still intentionally retained as against the coexecutor, the son; and that indeed, being dismissed voluntarily as against the active representative, it was left fatally defective, even though technically still pending against the son.

The proceedings show that Mrs. Wood was regarded as the sole representative, she only having administered; and the attempts by filing a replication July 1, 1890, without leave of court, to the answer filed by Wood, who had then been dead nearly eight years, and by filing a paper signifying the withdrawal of the direction to dismiss the bill, July 31, 1890, also without leave of court, were unavailing in the premises.

But it is insisted that, conceding the remedy as to Wood was barred, it does not follow that Bryan was entitled to avail himself of that bar, since the right was not extinguished; that Bryan joined in the execution of the deed of Wood, and thereby expressly agreed to pay the balance due on the mortgage; that this was an absolute promise to pay and not merely a contract of indemnity; and that it could be proceeded on as a specialty irrespective of whether the remedy on Wood's contract with Dixon was barred in the District or not.

It is not denied that the enforcement of the contract was open to all defenses existing between Wood and Bryan. *Episcopal City Mission* v. *Brown*, 158 U. S. 222 [39: 960]. Christmas had not been deprived by either of them of any security he ever had; there was no mutual agreement between him and them; and he had in no way acted on the faith of the agreement between them in such a way as to bind either of them by estoppel.

**522**] *The 6th section of chapter 23 of the Act of 1715 of the state of Maryland, and which is in force in this District, is as follows:

"No bill, bond, judgment, recognizance, statute merchant, or of the staple, or other specialty whatsoever, except such as shall be taken in the name or for the use of our Sovereign Lord the King, his heirs and successors, shall be good and pleadable, or admitted in evidence against any person or persons of this province, after the principal debtor and creditor have been both dead twelve years, or the debt or thing in action above twelve years' standing; saving to all persons that shall be under the aforementioned impediments of infancy, coverture, insanity of mind, imprisonment, or being beyond the sea, the full benefit of all such bills, bonds, judgments, recognizances, statutes merchant, or of the staple, or other specialties, for the space of five years after such impediment removed, anything in this act before mentioned to the contrary notwithstanding." 1 Kilty, Laws of Maryland.

This section was peculiar to the state of Maryland, and in effect went to the cause of action. In some aspects it has often received the consideration of the courts of that state. Some of the decisions are referred to by Chief Justice Alvey in *Mann* v. *Cooper*, 2 D. C. App. 226, 22 Wash. L. Rep. 98, and it is there said: "Unlike the construction that has been placed upon the terms of the statute employed in the 2d section thereof in regard to simple contract debts, the construction uniformly placed upon the terms employed in the 6th section in regard to judgments, recognizances, and specialties of various kinds, owing to the peculiar force and prohibitory nature of the language employed in this latter section, has been different, and unyielding to circumstances that would remove the bar of the statute as applied to simple contract debts; hence it has been uniformly held that a mere acknowledgment of the debt due on judgment, or even an express promise to pay the same, will not arrest the running of the statute, or remove the bar, as against the judgment or specialty mentioned in the act; though such judgment or specialty may form the basis or inducement to a new express promise to pay, upon which an action may be maintained. *Lamar* v. *Manro*, 10 Gill & J. 50; **Young* v. *Mackall*, 4 Md. 367.[**523** And so the payment of interest, or even part of the principal of the judgment debt will not have the effect of avoiding the operation of the statute as applied to proceedings on the judgment to revive, or to recover on the judgment by action of debt. In the case of *Carroll* v. *Waring*, 8 Gill & J. 491, it was held that the payment of interest upon a bond was no avoidance of the bar of the act of limitations of 1715, chap. 23; nor would even an express acknowledgment of the debt revive the remedy upon a bond barred by that act." And see *Digges* v. *Eliason*, 4 Cranch, C. C. 619 *Thompson* v. *Beveridge*, 3 Mackey, 170; *Galt* v *Todd*, 23 Wash. L. Rep. 98.

The saving clause of the section relates to creditors only, and by D. C. Rev. Stat. § 466, all exceptions in favor of parties beyond the District were repealed. However, as this 6th section of the act of 1715 was not pleaded we need not consider whether its benefits are denied to nonresident debtors by the 4th and 5th sec-



Digitized by Google

tions relating to "persons absenting the province, or wandering from county to county," or by the act of November, 1765, chap. 12, as to persons who "may be absent out of this province at the time when the cause of action hath arisen or accrued" (Kilty, Laws of Maryland; *Hysinger* v. *Baltzell*, 3 Gill & J. 158; *Maurice* v. *Worden*, 52 Md. 283), or other statutory provision.

But it is well to observe that this covenant was entered into in the District between residents thereof, and, although its performance was required elsewhere, the liability of nonperformance was governed by the law of the obligee's domicil, operating to bar the obligation, unless suspended by the absence of the obligor.

The general rule in respect of limitations must also be borne in mind, that if a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where from any cause a plaintiff becomes nonsuit or the action abates or is dismissed, and, during the pendency of the action, the limitation runs, the remedy is barred. *Alexander* v. *Pendleton*, 12 U. S. 8 Cranch, 462, 470 [3: 624, 627]; *Young* v. *Mackall*, 4 Md. 367; Wood, Lim. Ac. § 293, and cases cited.

524] *In his answer Bryan relied on Wood's answer, which set up laches and the statute of limitations. But the recognized doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the court, even though the laches are not pleaded or the bill demurred to. *Sullivan* v. *Portland & K. R. Co.* 94 U. S. 806, 811 [24: 324, 326]; *Lansdale* v. *Smith*, 106 U. S. 391, 394 [27: 219, 220]; *Badger* v. *Badger*, 69 U. S. 2 Wall. 87, 95 [17: 836, 839]; *Syester* v. *Brewer*, 27 Md. 288, 319; *Williams* v. *Rhodes*, 81 Ill. 571.

The deed of Wood to Bryan was executed March 14, 1874, and at that time the mortgage bond was overdue, having matured according to its terms, July 7, 1873, but interest up to February 1, 1874, had been paid on it by Wood. Bryan's obligation to Wood was to pay forthwith, or within a reasonable time, a distinction of no importance here, and lapse of time and changes in condition began immediately to affect it.

Frederick L. Christmas, the owner of the bond, was then living. He accepted interest for two years thereafter, but this was not paid by either Wood or Bryan, and if such payment operated as an extension of time, it does not appear to have been with the assent of either of them.

Bryan sold within a few days of his purchase, and conveyed to Palmer, the deed being recorded in Kings county, April 9, 1874, and Palmer covenanted to pay the outstanding balance. To the foreclosure proceedings Christmas did not make Wood and Bryan parties, or either of them, but made Palmer a defendant, though asking a deficiency decree against Dixon only.

Wood gave $17,000 for the property, but its value had been gradually declining, and it was bid in December 10, 1877, at the foreclosure sale by the heirs of Christmas for $5,000, the testimony showing that $8,000 was then a fair price.

Palmer died in 1878 or 1879, being reputed to have parted with "most of his estate."

The various law suits which had been previously commenced, except the action of covenant of December 30, 1884, *against [525 Wood's executrix, were abandoned and dismissed January 5, 1885, on which day this bill was also dismissed, as we have seen.

The bill was filed July 15, 1881, against Wood and Bryan, as alike liable to Christmas as principal debtors, and service of process was had on Wood only, August 18, 1881. The mere fact that the bill was left on the files would not, in itself, relieve from the effects of laches, for failure in diligent prosecution may have the same consequences as if no suit had been instituted. *Johnston* v. *Standard Min. Co.* 148 U. S. 360, 370 [37: 480, 486].

Nearly sixteen years had elapsed since Bryan entered into the covenant with Wood, when, on March 10, 1890, over eight years after the issue of the first subpœna, alias process was issued against Bryan and service had. For seven years of this period he had resided in the District. For seven years he had been a citizen of Illinois as he still remained. By the law of Illinois the mortgagee may sue at law a grantee, who, by the terms of an absolute conveyance from the mortgagor, assumes the payment of the mortgage debt. *Dean* v. *Walker*, 107 Ill. 540, 545, 550; *Thompson* v. *Dearborn*, 107 Ill. 87, 92; *Bay* v. *Williams*, 112 Ill. 91; *Union Mut. L. Ins. Co.* v. *Hanford*, 143 U. S. 187, 190 [36: 118, 120]. But Christmas did not see fit to bring a suit against Bryan in Illinois, nor was this bill filed during Bryan's residence in the District, and when filed it was allowed to sleep for years without issue of process to Bryan, and for five years after it had been dismissed as to Wood's representatives, Wood having been made a defendant by Christmas's ancillary administrator, as a necessary party.

In the meantime Dixon had been discharged in bankruptcy and had died; Palmer had also departed this life, leaving but little if any estate; Wood had deceased, his estate been distributed, and any claim against him had been barred, and the mortgaged property had diminished in value one-half and had passed into the ownership of Christmas's heirs. In view of the laches disclosed by this record, we do not think the equitable jurisdiction of the court ought to be extended to enforce a covenant plainly not made for the benefit of Christmas, and in respect of which he possessed no superior equities. The changes which the lapse of time had wrought in the value *of the property and in the situation of [526 the parties were such as to render it inequitable to decree the relief sought as against Bryan. So that whether the barring in this jurisdiction of the remedy merely as against Wood would or would not in itself defeat a decree against Bryan, without more, we hold that relief was properly refused, and *the decree is affirmed.*



Digitized by Google

UNITED STATES, *Appt.*,
*v.*
OREGON & CALIFORNIA RAILROAD COMPANY and the Oregon Central Railroad Company.

(See S. C. Reporter's ed. 526-540.)

*Grants of land in aid of railroads—road from Astoria and McMinnville—title of the act—construction—intent of act—two distinct roads—acceptance of completed section—act forfeiting unearned lands.*

1. All grants of land in aid of railroads must be construed favorably to the government, and nothing passes but what is conveyed in clear and explicit language.
2. The title of the act of Congress of May 4, 1870, describing the railroad line to be aided by a land grant as "from Portland to Astoria and McMinnville" does not control the text, which is to aid a line "from Portland to Astoria and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville," to the extent of showing that the grant was for a single railroad, instead of a main road and a separate branch road.
3. To render the title of an act of any avail in its construction the language of the act must be doubtful or ambiguous, and the ambiguity must be in the context, and not in the title.
4. The use of the singular number in the title of the act forfeiting a grant to aid a "railroad" does not show that the intent in the original act to make the grant for a main road and a branch road is to be ignored, and that all is to be taken as a single road.
5. The grant of lands to aid a railroad and telegraph line "from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville," which was made by the act of Congress of May 4, 1870, contemplates, for the purposes of selecting adjacent sections of granted land, two distinct roads, one from Portland to Astoria and a branch road from the junction near Forest Grove to McMinnville.
6. The acceptance of a completed section of the railroad from Hillsboro to McMinnville, curving around near Forest Grove, which was named as the point of junction of the roads for which lands were granted under the act of May 4, 1870, does not amount to a construction by the Secretary of the Interior of the act as providing for one continuous railroad to McMinnville, instead of a separate road to that place from the junction, when at the time of the acceptance the entire line of both main and branch roads had been definitely located and the lands withdrawn. The same is true with respect to the Secretary's approval of the map of definite location.
7. Under the act of May 4, 1870, granting lands in aid of a railroad from Portland to Astoria, etc., the termini of the main road were Portland and Astoria, and of the branch, the junction and McMinnville. And lands lying north of a line drawn at right angles with the branch at its northern terminus were not within the grant made in aid of the branch, and lands lying west of a line drawn at right angles with the main road at the junction were not within the grant for the main road east thereof; and all such lands were forfeited to the United States by the act of January 31, 1885, and the railroad company is not entitled to them for building the main road from Portland to the junction, on a circuitous route near that point, and building the branch from that point to McMinnville.

[No. 318.]

*Argued November 12, 1896. Decided December 14, 1896.*

APPEAL from a decree of the United States Circuit Court of Appeals for the Ninth Circuit reversing a decree of the Circuit Circuit of the United States for the District of Oregon that certain lands were forfeited to the government out of the grant to the Oregon Central Railroad of May 4, 1870, in an action brought by the United States against that company *et al.* to quiet title to land in Oregon. *Reversed*, and decree of the circuit court affirmed, and cause remanded to that court.

See same case below, 57 Fed. Rep. 426, 29 U. S. App. 497.

Statement by Mr. Chief Justice Fuller:

This was a bill brought by the United States against the Oregon Central Railroad Company and the Oregon & California Railroad Company, in the circuit court of the United States for the district of Oregon, to quiet title to about 90,000 acres of land in the state of Oregon; and a cross bill filed by the defendants to quiet title to the same land in the Oregon & California Railroad Company. The [527 cause was heard on the pleadings and a stipulation as to the facts with accompanying maps and documents.

On May 4, 1870, an act of Congress was approved, which is as follows (16 Stat. at L. 94):

"Chap. LXIX.—An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Portland to Astoria and McMinville, in the State of Oregon.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamkill river, near McMinville, in the state of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of 100 feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, side tracks, and other needful uses in operating the road, not exceeding 40 acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of 10 such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act. And in case the quantity of 10 full sections per mile cannot be found on each side of said road, within the said limits of 20 miles, other lands designated as aforesaid

NOTE.—*As to land grants to railroads*, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 194.

*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 735.



Digitized by Google

shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than 25 miles from the track of said road to make up such deficiency.

Sec. 2. *And be it further enacted*, That the Commissioner of the General Land Office shall 528] cause the lands along the line *of the said railroad to be surveyed with all convenient speed. And whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of 20 or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands: *And provided also*, That settlers under the provisions of the homestead act who comply with the terms and requirements of said act, shall be entitled, within the said limits of 20 miles, to patents for an amount not exceeding 80 acres each of the said ungranted lands, anything in this act to the contrary notwithstanding.

"Sec. 3. *And be it further enacted*, That whenever and as often as the said company shall complete and equip 20 or more consecutive miles of the said railroad and telegraph, the Secretary of the Interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said *completed* [completed] sections.

"Sec. 4. *And be it further enacted*, That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding 160 acres or a quarter-section to any one settler, and at prices not exceeding $2.50 per acre.

"Sec. 5. *And be it further enacted*, That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be 529] kept *invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first-mortgage construction bonds of the company, on the road, depots, stations, side tracks, and wood yards, not exceeding $30,000 per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semi-annually in coin not exceeding the [rate] of 7 per cent per annum; and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and canceled, and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the district court of the United States, concurrently with the state courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section.

"Sec. 6. *And be it further enacted*, That the said company shall file with the Secretary of the Interior its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of 20 or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date."

Within one year from the passage of this act, the Oregon Central Railroad Company filed with the Secretary of the Interior its assent to the act, and prior to July 31, 1871, and February 2, 1872, filed in that department maps of survey and definite location of its line of railroad, being a location from Portland to the Yamhill river near McMinnville *via* a point near Forest Grove, and from that point to Castor creek, a point 20 miles toward Astoria; and from Castor creek to Astoria; the distances being about 26 miles from Portland to Forest Grove; about 22¾ miles from there to the Yamhill river; and about 102¼ miles from Forest Grove to Astoria. The lands adjacent to and coterminous with the entire line of definite location were segregated and withdrawn from the *public lands. Twenty miles of road [530 from Portland, running due west and terminating at a point near the town of Hillsboro, in Washington county, Oregon, were constructed, and about 6 miles more to a point near Forest Grove; and from that point something over 21 miles running almost directly south to a point near McMinnville in Yamhill county. The line was constructed on a curve as it approached Forest Grove.

The Secretary of the Interior on February 16, 1872, accepted the first 20 miles as completed under the act, and on June 23, 1876, he accepted another 27¼ miles as so completed, being the distance from Hillsboro to a point near Forest Grove, and from that point to McMinnville.

On October 6, 1880, the Oregon Central Railroad Company, for value, sold and conveyed to the Oregon & California Railroad Company all the title and interest which it had acquired in and to the lands granted under the act, and all its road, franchises, and privileges; but it was not admitted by the United States that the Oregon Central Railroad Company had a legal right to make said sale and conveyance. On that day the Oregon Central Railroad Company was insolvent and went into liquidation, and the conveyance was made to settle its business and dispose of its property. Neither of these railroad companies nor anyone else has ever constructed or equipped any portion or part of any railroad from the point near Forest Grove to Astoria.

January 31, 1885, Congress passed an act (23 Stat. at L. 296, chap. 46), the 1st section of which is as follows:

"That so much of the lands granted by an act of Congress entitled 'An Act Granting Land to Aid in the Construction of a Railroad



Digitized by Google

and Telegraph Line from Portland to Astoria and McMinnville, in the State of Oregon,' approved May 4th, 1870, as are adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, be, and the same are, hereby declared to be forfeited to the United States and restored to the public domain, and made subject to disposal under the general land laws of the United States as though said grant had never been made."

531] *July 8, 1885, the Commissioner of the General Land Office issued to the local land office at Oregon City instructions for its guidance under the act of January 31, 1885, and a diagram showing the limits of the forfeited lands and that portion of the grant which was not affected by the act. 4 U. S. Land Dec. 15. These instructions were approved by the acting Secretary of the Interior. The diagram showed that the road ran from Portland west to a point near Forest Grove where it turned almost at a right angle and ran south to McMinnville. From that point two lines were drawn, one due north and the other due west, both terminating at the 20-mile limits. The granted lands lying within the quadrant formed by these lines and the 20-mile limits, and also the indemnity lands within said lines and the 25-mile limits, were designated on the diagram as "forfeited." The forfeited lands on the line from Forest Grove to Astoria were also shown.

In November, 1885, the Oregon & California Railroad Company, assignee of the Oregon Central Railroad Company, presented to the land office a list of lands embraced within the territory claimed in this suit to be forfeited to the United States, and tendered the fees for locating the same, which were declined and the list rejected upon the ground that the lands had been forfeited.

About the same time there was filed in the land department a petition of the receiver of the Oregon & California Railroad Company, praying that the instructions in so far as they applied to the granted lands in said quadrant be revoked. This petition was referred to the commissioner for examination and report, and a report was subsequently submitted recommending "that the restoration remain in force as per instructions of July 8, 1885," and transmitting a second diagram, "showing the accurate limits of the grant." On April 5, 1887, the Secretary of the Interior passed upon the matter of the application of the receiver and held that the road from Portland to Forest Grove, and from the latter point to McMinnville, were to be treated as two distinct roads, the limits of which should be adjusted separately. 5 U. S. Land Dec. 549. By that adjustment the 532] quadrant northwest from Forest *Grove fell within the lands forfeited, which was in accordance with the restoration of July 8, 1885.

Some of the lands claimed to have been forfeited to the United States have been patented and are in the actual occupation of the patentees or persons claiming under them, and other portions of said lands for which patents have been issued are unoccupied and are wild lands, as is true of some of the lands claimed by the United States, which have not been sold or patented, and are not in the actual physical possession of any person or party.

On the following page is a sufficient reproduction of the diagram.

*The circuit court, Bellinger, J., held [533 that the lands within the quadrant were included within the lands forfeited to the government, and decreed accordingly. 57 Fed. Rep. 426. The circuit court of appeals for the ninth circuit reversed this decree and directed a decree in favor of the Oregon & California Railroad Company. 29 U. S. App. 497. Thereupon the present appeal was prosecuted.

*Messrs.* **J. M. Dickinson,** Assistant Attorney General, and **George H. Williams** for appellant.

*Messrs.* **Joseph H. Choate, J. Hubley Ashton,** *Charles H. Tweed,* and *William F. Herrin* for appellees.

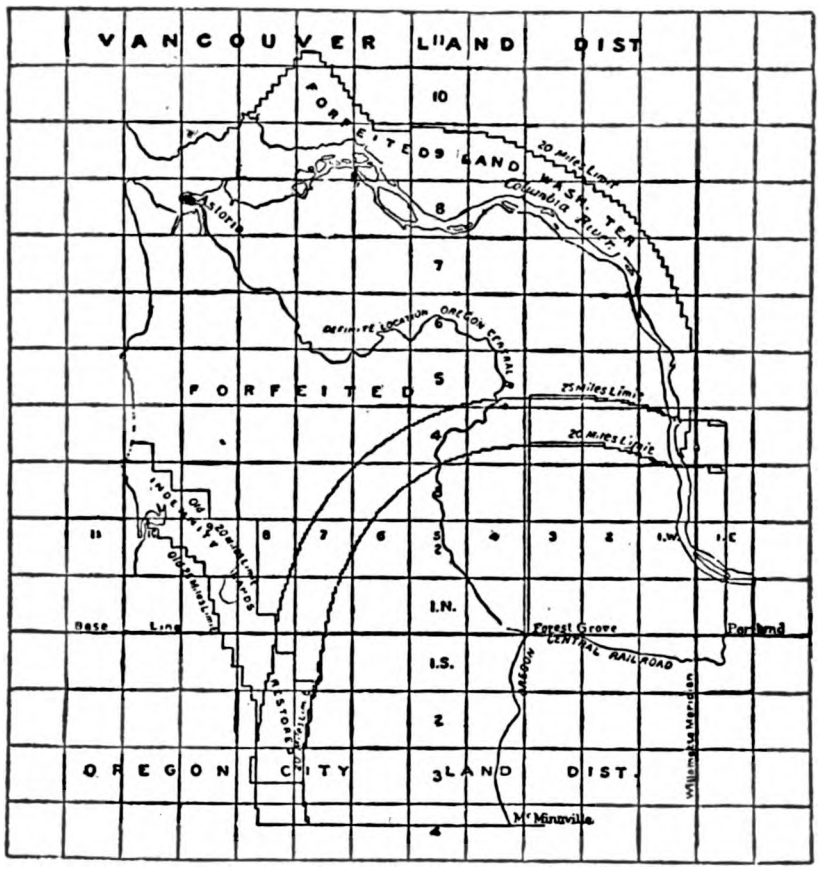
*Mr. Chief Justice **Fuller** delivered [537 the opinion of the court:

If the act of May 4, 1870, should be held to have authorized the construction of a main road from Portland to Astoria, and that the lands adjacent to, and coterminous with, such main road, on both sides, were granted in order to accomplish that purpose; and also to have authorized the construction of a branch from the main line, at a junction near Forest Grove, to McMinnville,—then it would follow that all of the lands available on both sides as far as Forest Grove, and to an extent of 20 miles on each side, would be absorbed in aiding to build the main line; and so of the lands along the main line from Forest Grove to Astoria. And inasmuch as the line from Forest Grove to Astoria, and from Forest Grove, at the junction with the main line, south toward McMinnville, was, in its general bearing, at right angles to the main line from Portland to Forest Grove, the line from Portland to Forest Grove would absorb nearly all of the lands lying east of the branch line to McMinnville and a part of the lines lying east of the line from McMinnville through Forest Grove, the point of junction, northwards toward Astoria. Hence but little could be earned for building the branch line except the lands lying west of it and south of the point of junction at Forest Grove, and none of the land lying north of a line drawn from Portland through Forest Grove could be held to have been within the contemplation of the act as donated for the purpose of building a branch road from the junction to McMinnville.

In this aspect, as no road was built from Forest Grove toward Astoria, substantially all that was earned was the land lying within the 20-mile limits on each side of the main road from Portland to Forest Grove, and the land lying west of the McMinnville branch and south of a line drawn from Portland through Forest Grove; and all of the lands lying in the quadrant north and west of Forest Grove were unearned lands, and forfeited under the act of January 31, 1885. These lands "are adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits *of said grant for the completed [538 portions of said road." But although a part of the lands lying east of this quandrant "are adjacent to and coterminous with the uncom-



Digitized by Google




pleted portions of said road," yet they are "embraced within said grant for the completed portions of said road," for they lie within the 20-mile limits of the completed portion from Portland to Forest Grove.

The railroad companies contend that no such thing as a branch road or a junction in the ordinary sense of the word were contemplated, and that, having a right to build from Portland to Astoria, and "from a suitable point of junction near Forest Grove to the Yamhill river near McMinnville," they could treat the act as if it authorized the building of a continuous road from Portland *via* Forest Grove to McMinnville, without regard to the provisions for a road beyond Forest Grove to Astoria; and by constructing their road with a curve at Forest Grove, could properly claim all of the lands falling within 20 miles of this circuitous route from Portland to McMinnville as intended to be granted for the construction of such a road. And, having actually so built, that they were entitled to all the lands lying within a quadrant produced by a radius reaching 20 miles from the curve.

Secretary Lamar rejected this contention and held that the act of May 4, 1870, contemplated two distinct roads, a road from Portland to Astoria, and a road from Forest Grove to McMinnville; that the words "point of junction" were to be given their usual meaning of a point where two or more roads join; that had the words of forfeiture "so much of the lands granted . . . as are adjacent to and coterminous with, the uncompleted portion of said road," been unqualified, the line dividing the forfeited lands from those not forfeited would have been drawn through Forest Grove at right angles to the unconstructed road at that point and terminating at the lateral limits of the grant, but that as this would have thrown out of the grant large tracts of land that were opposite to the constructed portions of the road, Congress qualified the words of forfeiture by adding "and not embraced within the limits of said grant for the completed por-[539 tions of said road," which saved to the grant a full complement of lands granted for every mile of road actually constructed, and the Secretary remarked that this view of the act was much strengthened "when it is observed that the lands in said quadrant lie along the uncompleted portion on both sides thereof, and could have been earned, if at all, by that line."

The rule of construction applicable to the granting act is the familiar rule that all grants



Digitized by Google

of this description must be construed favorably to the government, and that nothing passes but what is conveyed in clear and explicit language. *Dubuque & P. R. Co.* v. *Litchfield*, 64 U. S. 23 How. 88 [16: 509]; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 740 [23: 637]; *Slidell* v. *Grandjean*, 111 U. S. 437 [28: 329]; *Coosaw Min. Co.* v. *South Carolina*, 144 U. S. 562 [36: 542]. And that the construction should be such as will effectuate the legislative intention, avoiding, if possible, an unjust or absurd conclusion, is also well settled.

In *Sioux City & St. P. R. Co.* v. *United States*, 159 U. S. 349, 360 [40: 177, 181], it was said by Mr. Justice Harlan, speaking for the court: "If the terms of an act of Congress, granting public lands, 'admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.' *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 740 [23: 634, 637]. Acts of this character must receive such construction 'as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance.' *Winona & St. P. R. Co.* v. *Barney*, 113 U. S. 618, 625 [28: 1109, 1111]. 'Nothing is better settled,' this court has said, 'than that statutes should receive a sensible construction such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.' *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59 [36: 340, 344]. Giving effect to these rules of statutory interpretation, [540] we cannot suppose that Congress *intended that the railroad company should have the benefit of more lands than it earned."

In the light of these principles we have no difficulty in arriving at the same result as that reached by the Secretary of the Interior and by the circuit court.

The act declares that the grant is made "for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville." This does not describe a road from Portland to the Yamhill river, but a road from Portland to Astoria, and a road expressly stated to be from a point of junction near Forest Grove to the Yamhill river.

We are unable to see why any other than their usual meaning should be attributed to the words "point of junction." Junction in the ordinary acceptation as applied to railroads is the point or locality where two or more lines of railway meet. Two lines of distinct companies, or separate roads of the same company, or a main line and a branch road of the same company, may have points of union or meeting, styled junctions, but this can hardly be predicated of a single continuous road from one point to another. If the act had not used the word "junction" and had defined the line as running from Portland to Astoria, and to McMinnville *via* Forest Grove, there would be more force in the suggestion that Forest Grove was a point of bifurcation of one road rather than a point of junction of two roads, but the act was not couched in those terms, and the word "junction" cannot be rejected, or wrested from its obvious meaning.

As the road from Portland to Astoria and the road from Forest Grove to McMinnville were to be constructed by and belong to one company and together constituted a single enterprise, they were naturally spoken of as one railroad, as, in that sense, they were. But this is of no special significance in the present inquiry, which is whether, in view of the language of the act and the purposes to be accomplished, a main road and a branch road were provided for, in aid of which the lands were granted subject to the adjustment applicable to two *roads. And the general rule is [541 that "words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular," as provided in U. S. Rev. Stat. § 1.

Nor are we impressed with the argument that the title of the act compels to another conclusion. The title is: "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Portland to Astoria and McMinnville in the State of Oregon." The text of the act is: "That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river near McMinnville in the state of Oregon," the grant is made. Insert the comma after Astoria in the title, which appears after that word in the act, —and for the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required (*Hammock* v. *Farmers' Loan & T. Co.* 105 U. S. 77, 84 [26: 1111, 1113]; *United States* v. *Lacher*, 134 U. S. 624, 628 [33: 1080, 1088]),—and the title is sufficiently comprehensive to fairly describe a road from Portland to Astoria, and a road to McMinnville, as the subject of the act. The title is no part of an act and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous. *United States* v. *Fisher*, 6 U. S. 2 Cranch, 358, 386 [2: 304, 313]); *Yazoo & M. V. R. Co.* v. *Thomas*, 132 U. S. 174, 188 [33: 302, 307]. The ambiguity must be in the context, and not in the title, to render the latter of any avail.

And so of the title of the act of January 31, 1885. That title is: "An Act to Declare Forfeiture of Certain Lands Granted to Aid in the Construction of a Railroad in Oregon," and the granting act is referred to in the text by its title. We do not regard the use of the singular number as persuasive of the intention of Congress that, in the adjustment of the grant as affected by the forfeiture, the fact that a main road and a branch road were provided for should be ignored.

It seems to us quite clear that a main road was to be built from Portland, the principal city of Oregon, situated on the *Columbia river, [542 to Astoria, a port on the Pacific Ocean at the mouth of that river, a distance of some 128½ miles, being over 100 miles beyond Forest Grove; and a branch from Forest Grove to McMinnville, a distance somewhat exceeding 21



Digitized by Google

miles. It is not denied that, as stated in the opinion of the circuit court, "four fifths of the line of road from Portland to Astoria traversed a rough and wholly unsettled district, but one known to be rich in timber, and believed to be in iron and coal, with considerable areas of agricultural land," while the 21 miles from Forest Grove to McMinnville ran through "the heart of the Willamette Valley and through the oldest settled portion of the country." The opening up to settlement of unoccupied and inaccessible territory, and the establishment of railroad communication between Portland and Astoria by the construction of the main line, were the obvious inducements to and the primary objects of the grant, and the construction of the branch, though included in the act, was subordinate and subsidiary. The line, both main and branch, was wholly within the state of Oregon, and we cannot assume that if the promoters had sought aid merely for a road running from Portland by way of Forest Grove to McMinnville, the application would have been granted.

The grant contemplated a main line which ran from Portland west to the point of junction and a branch from the point of junction nearly south, substantially at right angles, and devoted the lands north of the junction, not absorbed by the road from Portland to that point, to the building of the road to the north; and while the company was left free to construct parts of the road as might suit its convenience its action could not change the effect of the grant or control its administration to the contrary of the manifest intention of Congress.

On the 20th of May, A. D. 1871, a map of definite location was filed with the Secretary of the Interior, described in the certificate of the company's officers as showing "the location of the Oregon Central Railroad from the city of Portland, Oregon, to the Yamhill river near McMinnville, a distance of forty-seven and 543] three fourths (47¾) miles, and also *from a junction near Forest Grove towards Astoria to a point 1 mile north of the summit of the range of hills dividing the Tualatin from the Nehalem valley, a distance of 20 miles, as definitely fixed in compliance with said act of Congress."

Subsequently the company certified a map of definite location of the road between Astoria and Castor creek (the western point in the preceding map), which was filed with the Secretary of the Interior, and transmitted by him, February 2, 1872, to the Commissioner of the General Land Office. The lands were withdrawn under both these maps.

The first section of constructed road from Portland 20 miles west to Hillsboro was accepted February 16, 1872. The second section was accepted June 28, 1876. This was a section of 27½ miles from Hillsboro *via* Forest Grove to McMinnville, constructed on a curve thus described by counsel for the railroad companies: "The line of this section of the road runs from the 20th mile post for about 2 miles (for the most part upon indicated curves) to a point a little south of the Portland base line, and thence extends west about 2 miles—almost entirely upon a tangent until it passes Cornelius—to a point about 3 miles east of Forest Grove, when it begins to curve upon a radius of 8,564 feet (equal to about 1.6 miles) until it reaches about a southwest by west direction, in which it runs upon a tangent 8,956 feet (equal to about 1.7 miles), passing the town of Forest Grove at a distance of about ¼ or ⅓ of a mile; from the end of this tangent it again curves until it reaches a southwesterly direction, and then proceeds on southerly by various curves to the Yamhill river."

If these maps of definite location and the construction of the road from Hillsboro to McMinnville *via* Forest Grove in the manner described are to be regarded as an attempt to make a part of the main road from Portland to Astoria and the branch a continuous and single road from Portland to McMinnville, eliminating Astoria altogether, and to entitle the company to claim all the lands within the quadrant by reason of the construction of the railroad on the above stated curve, we can only say that that attempt was unsuccessful, and *the rights of the government remained [544 unaffected by the course pursued by the company.

It is forcibly argued that the acceptance of the completed section from Hillsboro to McMinnville amounted to a construction by the Secretary of the Interior of the granting act as providing for one continuous railroad from Portland *via* Forest Grove to McMinnville. But we cannot accede to this view. At the time of that acceptance the entire line of both main and branch roads had been definitely located and the lands withdrawn. It could not be presumed that all the lands would not be earned or that a forfeiture would be declared. Still less can it be supposed that it occurred to the Secretary that what the company was apparently doing for its own convenience was being done with the design of committing the department to the recognition of the untenable position that the lands within the quadrant passed by virtue of the building of the road to McMinnville. This was a matter not then before the Secretary for determination, and when it did arise was otherwise disposed of.

And this is true as respects the approval of the first map of definite location. Such approval was *diverso intuitu* and should be given no effect as contemporaneous construction. Under that location lands were withdrawn from Portland to Castor creek, as well as to McMinnville, and the overlap at the east of the road to McMinnville was inevitable and was not a loss to be made up from lands belonging to other parts of the grant.

In the view we take of the grant the termini of the main road were Portland and Astoria, and of the branch, the junction and McMinnville. Lands lying north of a line drawn at right angles with the branch at its northern terminus were not within the grant made in aid of the branch. Lands lying west of a line drawn at right angles with the main road at the junction were not within the grant for the main road east thereof.

As heretofore remarked, however, some of the lands lying east of the quadrant were not only coterminous with the uncompleted portion of the main road beyond Forest Grove, but *were embraced within the limits of the [545 completed road from Portland to the junction,



Digitized by Google

and therefore Congress, in the act of forfeiture, was careful to save those lands from its operation. There is nothing in the language used from which it can properly be concluded that Congress intended to accept the theory of the railroad companies that the circuitous route adopted in construction entitled them to the lands in the quadrant because thereby brought within the grant, or to do anything more than so qualify the phraseology as to prevent an unintended forfeiture. So far as the act operated as a legislative interpretation, it was in harmony with the granting act as subsequently construed by Secretary Lamar, and cannot be treated as proceeding on the theory of prior construction which we do not agree had been had. And although the failure of the company to build beyond Forest Grove towards Astoria left but one road, and that from Portland to McMinnville, it would be quite inadmissible to make the defeat of the primary object of Congress the basis of imputing to that body the intention of narrowing the forfeiture declared for noncompliance with the conditions imposed.

In *United States* v. *Union P. R. Co.* 148 U. S. 562 [37: 560], the question before us was not presented. The decision there was controlled by the determination that the whole line was a continuous main line and that the grant was not cut in two by one company being authorized to contract with another for the construction of part of the line and a proportionate share of the grant. The whole line was built. Here the grant for building the line from Portland beyond Forest Grove to Astoria became fixed by the location of the road as did the grant in aid of the road from the junction to McMinnville. The main line was not constructed beyond the junction. The lands in controversy were not adjacent to nor coterminous with the branch road between lines drawn perpendicularly to its termini; were not coterminous with the road from Portland to the junction; and were donated to build the portion of the main line which was abandoned. The ruling in the former case has no decisive bearing under the facts in this.

546] **The decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is affirmed*, and the cause remanded to that court accordingly.

Mr. Justice **Field** and Mr. Justice **Shiras** dissented.

---

## CUL ROWE, *Plff. in Err.*, v. UNITED STATES.

(See S. C. Reporter's ed. 546-558.)

*Right of self-defense—question for jury—guest in hotel.*

1. One who, under the provocation of offensive language, assaults the person uttering it, but in such a way as to show that he has no intention to do him serious bodily harm, and then retires under such circumstances as show that he does not intend to do anything more, and in good faith withdraws from further contest, has the right of self-defense when the person assaulted, in violation of law, pursues him with a deadly weapon and seeks to take his life or do him great bodily harm.

2. It is for the jury to say whether the withdrawal was in good faith, or was a mere device by the accused to obtain some advantage of his adversary.

3. A guest in the office of a hotel, who has the right to be there, is not required to step aside when an assailant is rapidly advancing upon him with a deadly weapon, but has a right to remain where he is and resist the attack and do whatever is necessary, or what he has reasonable grounds to believe at the time is necessary, to save his life or to protect himself from great bodily harm.

[No. 489.]

*Submitted October 22, 1896. Decided November 30, 1896.*

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment of that court convicting Cul Rowe of manslaughter in killing Frank Bozeman. *Reversed*, and case remanded for a new trial.

The facts are stated in the opinion.

*Messrs.* **Benjamin T. Duval** and **William M. Cravens**, for plaintiff in error:

A man may commence an affray and if he withdraws he can invoke the law of self-defense.

*Parker* v. *State*, 88 Ala. 4.

And so he might have brought on the quarrel provided in doing so he was not actuated by a design to kill deceased.

*State* v. *Parker*, 96 Mo. 382, also *Varnell* v. *State*, 26 Tex. App. 56.

The court erred in saying to the jury that the law of self-defense required the defendant "to use all means in his power" otherwise to save his own life, or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him if it be in his power, because the defendant could not have retreated further than he had, and the fierceness of the attack made it impossible to save his own life by other means than by slaying his adversary. He was not in a position to make a choice of means.

1 Bishop, New Crim. Law, § 850; *Beard* v. *United States*, 158 U. S. 563 (39: 1092).

The court below in this case is justly open to the criticism of this court to his charge in the case of *Allison* v. *United States*, 160 U. S. 212 (40: 399), in which it says: "Justice and the law demanded that so far as reference was made to the evidence that which was favorable to the accused should not be excluded. His guilt or innocence turned on a narrow hinge and great caution should be used not to complicate and confuse the issue."

The court intimates that under no possible circumstances where the defendant commenced the affray could he be justified in killing the deceased.

*People* v. *Button*, 106 Cal. 628.

The charge excepted to relates to other er-

NOTE.—*As to threats by deceased in cases of homicide, when admissible in evidence*, see note to Wiggins v. Utah, 23: 941.



Digitized by Google

rors in the court's charge upon the law of self-defense.

*Fitzgerald* v. *Com.* (Ky.) 6 S. W. 152.

The charge takes away from the jury the character of the deceased, which was dangerous, and the reputation of Thomas Bozeman, which is bad for truth, but invites the jury to forget also the general reputation of the defendant as a peaceable and law-abiding man.

*Smith* v. *United States*, 161 U. S. 89, 90 (40: 627, 628); *Allison* v. *United States*, 160 U. S. 209 (40: 398).

The jury were not correctly nor fairly instructed in regard to the presumption of innocence.

*Coffin* v. *United States*, 156 U. S. 432 (39: 481); *Cochran* v. *United States*, 157 U. S. 286 (39: 704); *Com.* v. *Silcox*, 161 Pa. 484.

A man may even provoke a quarrel if his design is not to kill, and withdraw from the struggle, and if the deceased pursue the defendant in such a manner that the life of the defendant is in peril, the right of self-defense is revived in favor of the defendant.

*People* v. *Button*, 106 Cal. 628; *Parker* v. *State*, 88 Ala. 4; *State* v. *Parker*, 96 Mo. 382; *Varnell* v. *State*, 26 Tex. App. 56; *Fitzgerald* v. *Com.* (Ky.) 6 S. W. 152.

*Mr.* **J. M. Dickinson**, Assistant Attorney General, for defendant in error:

Malice must, as he properly charged, be gathered as an inference of law from the facts and circumstances proved.

Clark, Crim. Law, 44; 2 Bishop, New Crim. Law, § 673*a*, I.

The court was correct in saying that a man is presumed to intend the natural and probable consequence of his voluntary acts.

*First Nat. Bank* v. *Jones*, 88 U. S. 21 Wall. 337 (22: 545); *Com.* v. *York*, 9 Met. 93, 103, 43 Am. Dec. 373; *Com.* v. *Webster*, 5 Cush. 295, 305, 52 Am. Dec. 711; *People* v. *Potter*, 5 Mich. 1, 8, 71 Am. Dec. 768; *People* v. *Scott*, 6 Mich. 287, 296; *United States* v. *Taintor*, 11 Blatchf. 374, 375; 1 Bishop, New Crim. Law, § 734; 2 Bishop, New Crim. Law, § 679.

The court accurately defined manslaughter, murder, and the right of self-defense. The jury was fully instructed as to the elements going to make up the crime.

*Brown* v. *United States*, 150 U. S. 94 (37: 1011).

The charge was not upon the particular facts of this case, or upon the theory of either the government or the defense. It was a general declaration of the law of self-defense, confined to a state of facts where the one who does a wrongful act "which immediately contributes to the result" kills his adversary who followed up this act with an attack.

There was no error in what the court said.

Self-defense is no excuse for a homicide if the accused brought on the difficulty and was himself the aggressor.

1 Hale, P. C. 482; *Gibson* v. *State*, 89 Ala. 121; *People* v. *Robertson*, 67 Cal. 646; *Kinney* v. *People*, 108 Ill. 519; *State* v. *Neeley*, 20 Iowa, 108; *State* v. *Murdy*, 81 Iowa, 603; *State* v. *Scott*, 41 Minn. 365; *Allen* v. *State*, 66 Miss. 385; *State* v. *Brittain*, 89 N. C. 481; *Stewart* v. *State*, 1 Ohio St. 66; *Stoffer* v. *State*, 15 Ohio St. 47, 86 Am. Dec. 470; *State* v. *Hawkins*, 18 Or. 476.

The foregoing part of the charge had no application to the case of withdrawal from combat assumed in the brief and which is the foundation of the criticism. If the judge did not charge sufficiently, or at all, on that theory, he should have been so requested. No request was preferred.

Therefore, if he charged the law of self-defense correctly as far as he went, the case should not be reversed because he did not extend the charge to a particular theory advanced by defendant. This theory rests on the narrowest of grounds.

There was nothing in the proof for defendant tending to disprove the evidence for the government which tended to show that after they came out of the diningroom defendant accosted deceased. The evidence for the defendant tended to show that immediately after the remark of deceased, which followed this accosting, defendant kicked deceased, and stepped back and leaned up against the counter, and deceased sprang at him, cutting him with a knife, and then defendant shot him. There was no evidence here tending to show a retirement from the affray. The whole tragedy was in one act. There is nothing to indicate any interval.

Even if there be any grounds for saying this evidence might have indicated such a purpose, it is so slight that the judge ought not to be put in error for not charging upon that aspect of the right of self-defense without a special request. Counsel for defendant were not asleep when the charge was given. They must have been very alert, for they took fifty exceptions.

The facts which the proof tended to show do not by any means approach what is required to predicate a theory of withdrawal. There must be a withdrawal in good faith, and it must be such as to show the adversary that it is not desired to continue the conflict. The adversary must pursue him.

*Parker* v. *State*, 88 Ala. 4; *People* v. *Wong Ah Teak*, 68 Cal. 544; *Hittner* v. *State*, 19 Ind. 48; *State* v. *Dillon*, 74 Iowa, 653; *Brazil* v. *State*, 28 Tex. App. 584; 1 Hale, P. C. 480.

Here there was no retreat, no withdrawal, and no pursuit. Can it be that a man can strike another, merely step back and stand his ground, and when the party assailed strikes back with a deadly weapon, or attempts to shoot, kill him and go entirely free on the plea of self-defense?

What the judge said about retreating was in the way of a general disquisition. When he came to consider defendant's rights he plainly said that he, being a guest of the hotel, was not bound to retreat at all, as follows: "Upon the question of retreating as far as he can, there is a law which says that if a man is in his dwelling house he need not retreat; and that hotel where this defendant was lodging as a guest or was about to lodge—was there for his supper anyway—and where the other man was, put them both upon the same place. Neither one of them was required to retreat under such circumstances, because the hotel or temporary stopping place of a man may be regarded as his dwelling place, and the law of retreat in a case like that is different from what it would be on the outside."



Digitized by Google

The judge had a right to comment on the weight of evidence, provided he left the determination of all of the facts to the jury.

*United States* v. *Philadelphia & R. R. Co.* 123 U. S. 113 (31: 138); *Williams* v. *Conger*, 125 U. S. 397 (31: 778); *Rucker* v. *Wheeler*, 127 U. S. 85 (32: 102); *Lovejoy* v. *United States*, 128 U. S. 171 (32: 389); *California Ins. Co.* v. *Union Compress Co.* 133 U. S. 387 (33: 780); *Wiborg* v. *United States*, 163 U. S. 656 (41: 298).

If from the proof the jury were satisfied as to how the affray was, then their conclusions, based on evidence, could not be affected by proof of bad character of the deceased, for that would make the character of the man displace actual testimony which satisfied their minds.

*Mize* v. *State*, 36 Ark. 653; *State* v. *Morey*, 25 Or. 241.

**547]** *Mr. Justice **Harlan** delivered the opinion of the court:

This is an indictment for murder alleged to have been committed by the plaintiff in error, in the Cherokee Nation, Indian territory, on the 30th day of March, 1895,—the person killed, Frank Bozeman, being a white man and not an Indian. The verdict was guilty of manslaughter, and a motion for new trial having been overruled, the accused was sentenced to imprisonment in the penitentiary at Columbus, Ohio, for the term of five years, and to pay to the United States a fine of $500.

We extract from the record the following agreed statement as to the evidence:

"The testimony on the part of the government tended to show that on the evening of the 30th of March, 1895, the defendant, David Cul Rowe, who is a Cherokee Indian, and the deceased, Frank Bozeman, a white man, a citizen of the United States, and not an Indian, met at an hotel at Pryor's creek, Indian territory, at the supper table; that the defendant appeared to be drinking, but was not much intoxicated; that defendant said that he had his gun, and that he had a right to carry it, as he was a 'traveler;' that he had made a gun play in that town on one occasion and he would make another one; that he said to deceased, 'What do you think of that?' The deceased did not reply, and defendant said to him, 'God damn you, I'll make you hide out or I'll make you talk to me;' that in a short time deceased got through his supper and walked out into the office of the hotel, and presently defendant came out of the dining-room; that defendant said something to deceased, which was not understood by the witnesses, but the deceased did not answer; that defendant turned to some other parties present and said, 'He (meaning deceased) will not talk to me;' that one of the parties addressed said to defendant, 'Talk Cherokee to him;' that the deceased then said, 'He has got too damn much nigger blood in him to talk anything with any sense;' that defendant then kicked at deceased, hitting him lightly on the lower part of the leg; that immediately deceased sprang at defendant, striking him with a knife and cutting him in two places on the face; that after deceased began cutting defendant the lat-**548]**ter *drew his pistol and fired, shooting deceased through the body; that at the time the defendant fired the two men were in striking distance of one another. The shot struck deceased in the right arm, near the elbow, and ranged through the body from right to left side; that when shot was fired deceased ran, and when defendant turned round the blood was streaming from his face, where he had been cut by deceased, and he said to the bystanders to go for a doctor, that he was killed; that a short time after the difficulty the knife used by deceased on defendant was found near the place where the trouble occurred; that a knife was also found on the person of deceased after his death.

"The testimony on the part of the defense tended to show that on the day of the difficulty defendant came into town from his home, about 20 miles distant, with his wife to do some shopping; that he brought his pistol with him and left it at the livery stable where he put up his team, and at supper time went by the stable and got his pistol, fearing that it might be stolen; that defendant did not have anything to say to deceased in the dining-room, but was talking with the father of the deceased, and that defendant was not intoxicated; that when defendant came out in the office deceased used the language indicated in the statement for the government, or words to that effect, and defendant kicked at him and probably struck him lightly; that when defendant kicked he stepped back and leaned up against the counter and deceased sprang at him and began cutting him with a knife; that deceased cut him in the face and kept on striking at him with the knife, and after he was cut in the face defendant drew his pistol and fired at deceased, who was in the act of striking him again with the knife. The foregoing is in substance the statement of the defendant, who testified in his own behalf.

"Proof was also offered tending to show that the reputation of the deceased as a dangerous and lawless man was bad; that the reputation of the defendant as a peaceable and law-abiding man was good, and that the reputation of prosecuting witness Thomas Boseman was bad for truth in the communities where he had resided."

*The court delivered an oral charge, oc- **[549** cupying twenty-seven pages of the printed record, and embracing a discussion of most of the leading principles in criminal law, as well as many extracts from adjudged cases and elementary treatises.

Referring to the law of self-defense, the court said to the jury:

"A man might be to some extent in the wrong, and yet he might avail himself of the law of self-defense, but what is meant by his being in the lawful pursuit of his business means that he is not himself attempting to kill, or that he is not doing an act which may directly and immediately produce a deadly affray between himself and his adversary. He is not allowed to do either. The only time when he can do an act of that kind is when the condition exists which gives him the right to invoke this law. I say if he is attempting directly to kill, he is not in the lawful pursuit of his business unless it is in his own defense under this law; and when he is doing a wrong-



Digitized by Google

ful act which immediately contributes to the result—brings into existence an affray in which violence may be used by the adversary and he may kill because of that violence—when that is the case, the law says he is so far the author of that violent condition as that he cannot invoke this law of self-defense, and it depends upon the circumstances and conditions of the case whether or not he can invoke the law so far as to have his crime mitigated from murder to manslaughter. Then, when he is in the lawful pursuit of his business—that is, when he is occupying the relation to the state of case where the killing occurred which I have named,—and then is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power. Now, let us go over that again and see what these propositions are. He must be measurably in the right—and I have defined to you what that means—and if when he is so situated he is attacked, in this case, by Frank Bozeman, the man who was [550]*killed, and attacked under circumstances which denoted an intention to take away his life or to do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power. This proposition implies that he is measurably in the right. If he is doing any of these things which I will give you after awhile, which deprive him of the law of self-defense because of his own conduct in precipitating a conflict in which he kills, then he is not in the right; he is not doing what he had a right to do, and this proposition of the law of self-defense would not avail him; he could not resort to it, because his own conduct puts him in an attitude where, in the eye of the law, he is by his own wrong the creator of the necessity under which he acts, and he cannot invoke that necessity. The necessity must be one created by the man slain and which was not brought into existence by the direct act of the defendant contributing to that necessity."

After saying that both the accused and the deceased were upon the same plane in respect of the place or house in which they were at the time, each having the right to be there, the court proceeded: "Neither one of them was required to retreat under such circumstances, because the hotel or temporary stopping place of a man may be regarded as his dwelling place, and the law of retreat in a case like that is different from what it would be on the outside. Still, situated as was the defendant and as was the deceased, there was a rule incumbent upon both of them which required that they should use all reasonable means to avoid the condition which led to a deadly conflict, whether that means could have been avoided by keeping out of the affray or by not going into it or by stepping to one side; and this law says again that if a man is in the right, if he stands without being the creator of that condition and that condition is created by the man whom he kills, and the man is doing that in the shape of exercising an act of violence which may destroy his life or inflict great injury upon his person, yet if he could have paralyzed that *arm, if he could have [551 turned aside that danger by an act of less deadly character than the one he did exercise, the law says he must do that. If he could have inflicted a less dangerous wound upon the man under the circumstances the law commands him to do that, because when he is doing that he is accomplishing the only purpose the law of self-defense contemplates he has right to accomplish—that is, to protect himself and not to execute vengeance, not to recklessly, wantonly, and wickedly destroy human life, but to protect his own life when he is in the right and the other party is in the wrong."

We think that these portions of the charge (to which the accused duly excepted) were well calculated to mislead the jury. They expressed an erroneous view of the law of self-defense. The duty of the jury was to consider the case in the light of all the facts. The evidence on behalf of the government tended to show that the accused sought a difficulty with someone; that on behalf of the accused would not justify any such conclusion, but rather that he had the reputation of being a peaceable and law-abiding man. But the evidence on both sides was to the effect that the deceased used language of an offensive character for the purpose of provoking a difficulty with the accused, or of subjecting him to the indignity of a personal insult. The offensive words did not, it is true, legally justify the accused in what he did—the evidence of the government tending to show that "he kicked at deceased, hitting him lightly on the lower part of the leg;" that on the part of the accused tending to show that he "kicked at" the deceased and "probably struck him lightly." According to the evidence of the defense, the accused then "stepped back, and leaned up against the counter," indicating thereby, it may be, that he neither desired nor intended to pursue the matter further. If the jury believed the evidence on behalf of the defense, they might reasonably have inferred from the actions of the accused that he did not intend to make a violent or dangerous personal assault upon the deceased, but only, by kicking at him or kicking him lightly, to express his indignation at the offensive language of the deceased. It should have been submitted to the jury whether the act of the accused in stepping back and leaning against the counter, not in an attitude for personal conflict, was intended to be, and should have been reasonably *interpreted as being, a withdrawal by the [555 accused in good faith from further controversy with the deceased. On the contrary, the court, in effect, said that if, because of words used by the deceased, the accused kicked at or kicked the deceased, however lightly, and no matter how offensive those words were, he put himself in a position to make the killing manslaughter, even if the taking of life became, by reason of the suddenness, rapidity, and fierceness of the assault of the deceased, absolutely necessary to save his own. By numerous quotations from adjudged cases, the court,



Digitized by Google

y every form of expression, pressed upon the ury the proposition that "a person who has lain another cannot urge in justification of he killing a necessity produced by his own nlawful and wrongful acts." But that abtract principle has no application to this case, f it be true—as the evidence on behalf of the lefense tended to show—that the first real provocation came from the deceased when he sed towards the accused language of an offensive character, and that the accused immeliately after kicking at or lightly kicking the leceased, signified by his conduct that he no onger desired controversy with his adversary; whereupon the deceased, despite the efforts of the accused to retire from further contest, sprang at the latter, with knife in hand, for the purpose of taking life, and would most probably have accomplished that object, if the accused had not fired at the moment he did. Under such circumstance, did the law require that the accused should stand still, and permit himself to be cut to pieces, under the penalty that if he met the unlawful attack upon him and saved his own life, by taking that of his assailant, he would be guilty of manslaughter? We think not.

If a person, under the provocation of offensive language, assaults the speaker personally, but in such a way as to show that there is no intention to do him serious bodily harm, and then retires under such circumstances as show that he does not intend to do anything more, but in good faith withdraws from further contest, his right of self-defense is restored when the person assaulted, in violation of law, pursues him with a deadly weapon and seeks to take 556] his life or do him great *bodily harm. In *Parker* v. *State*, 88 Ala. 4, 6, the court, after adverting to the general rule that the aggressor cannot be heard to urge in his justification a necessity for the killing which was produced by his own wrongful act, said: "This rule, however, is not of absolute and universal application. An exception to it exists in cases where, although the defendant originally provoked the conflict, he withdraws from it in good faith, and clearly announces his desire for peace. If he be pursued after this, his right of self-defense, though once lost, revives. 'Of course,' says Mr. Wharton, in referring to this modification of the rule, 'there must be a real and bona fide surrender and withdrawal on his part; for if there be not, then he will continue to be regarded as the aggressor.' 1 Whart. Crim. Law, 9th ed. § 486. The meaning of the principle is that the law will always leave the original aggressor an opportunity to repent before he takes the life of his adversary. Bishop, Crim. Law, 7th ed. § 871." Recognizing this exception to be a just one, the court properly said, in addition: "Due caution must be observed by courts and juries in its application, as it involves a principle which is very liable to abuse. The question of the good or bad faith of the retreating party is of the utmost importance, and should generally be submitted to the jury in connection with the fact of retreat itself, especially where there is any room for conflicting inferences on this point from the evidence." Both parties to a mutual combat are wrongdoers, and the law of self-defense cannot be invoked by either, so long as he continues in the combat. But, as said by the supreme court of Iowa in *State* v. *Dillon*, 74 Iowa, 653, 658, if one "actually and in good faith withdraws from the combat, he ceases to be a wrongdoer; and if his adversary have reasonable ground for holding that he has so withdrawn, it is sufficient, even though the fact is not clearly evinced." See also 1 Bishop, New Crim. Law, § 702; *People* v. *Robertson*, 67 Cal. 646, 650; *Stoffer* v. *State*, 15 Ohio St. 47. In 1 Wharton on Homicide, § 488, the author says that "though the defendant may have thus provoked the conflict, yet, if he withdrew from it in good faith and clearly announced his *desire for peace, then, [557 if he be pursued, his rights of self-defense revive."

We do not mean to say that the jury ought to have found that the accused, after kicking the deceased lightly, withdrew in good faith from further contest and that his conduct should have been so interpreted. It was for the jury to say whether the withdrawal was in good faith, or was a mere device by the accused to obtain some advantage of his adversary. But we are of opinion that, under the circumstances, they might have found that the accused, although in the wrong when he kicked or kicked at the deceased, did not provoke the fierce attack made upon him by the latter, with knife in hand, in any sense that would deprive him altogether of the right of self-defense against such attack. If the accused did, in fact, withdraw from the combat, and intended so to do, and if his conduct should have been reasonably so interpreted by the deceased, then the assault of the latter with a deadly weapon, with the intent to take the life of the accused or to do him great bodily harm, entitled the latter to the benefit of the principle announced in *Beard* v. *United States*, 158 U. S. 550, 564 [39: 1086, 1092], in which case it was said: "The defendant was where he had the right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such a way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury."

The charge, as above quoted, is liable to other objections. The court said that both the accused and the deceased had a right to be in the hotel, and that the law of retreat in a case like that is different from what it would be if they had been on the outside. Still, the court said that, under the *circumstances, [558 both parties were under a duty to use all reasonable means to avoid a collision that would lead to a deadly conflict, such as keeping out of the affray, or by not going into it, or "by stepping to one side;" and if the accused could have saved his life, or protected himself



Digitized by Google

against great bodily harm, by inflicting a less dangerous wound than he did upon his assailant, or "if he could have paralyzed that arm," without doing more serious injury, the law commanded him to do so. In other words, according to the theory of the charge, although the deceased sprang at the accused, with knife in hand, for the purpose of cutting him to pieces, yet if the accused could have stepped aside or paralyzed the arm of his assailant, his killing the latter was not in the exercise of the right of self-defense. The accused was where he had the right to be, and the law did not require him to step aside when his assailant was rapidly advancing upon him with a deadly weapon. The danger in which the accused was, or believed himself to be, at the moment he fired, is to some extent indicated by the fact, proved by the government, that immediately after he disabled his assailant (who had two knives upon his person) he said that he, the accused, was himself mortally wounded and wished a physician to be called. The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary or what he had reasonable grounds to believe at the time was necessary, to save his life or to protect himself from great bodily harm. And under the circumstances, it was error to make the case depend in whole or in part upon the inquiry whether the accused could, by stepping aside, have avoided the attack, or could have so carefully aimed his pistol as to paralyze the arm of his assailant without more seriously wounding him.

Without referring to other errors alleged to heve been committed, the judgment below is reversed and the case is remanded for a new trial.

*Reversed.*

Mr. Justice **Brown** and Mr. Justice **Peckham** dissent.

---

**559]** ROGERS LOCOMOTIVE MACHINE WORKS *et al., Plffs. in Err.,*
*v.*
AMERICAN EMIGRANT COMPANY.

(See S. C. Reporter's ed. 559-577.)

*Swamp land act of 1850—certificate of the Secretary of the Interior—acceptance of lands by state under railroad grants—contract with county.*

1. The swamp land act of 1850 gave an inchoate title to the state, but the identification of the lands by the Secretary of the Interior was necessary before the title became perfect or the state was entitled to a patent which vested the fee-simple title.
2. The certificate of the Secretary of the Interior in 1858, that certain lands inured to the state under the railroad act of 1856, was a decision that they were not embraced by the swamp land act of 1850.
3. The acceptance by the state of lands certified to it by the Secretary of the Interior as included in the railroad grant of 1856 is conclusive upon the state and upon a county therein and upon persons deriving their rights from the county, against a claim to the lands under the swamp land act of 1850, where no patent had been issued or identification of these lands made by the Secretary of the Interior under the latter act.
4. A contract with a county for swamp and overflowed land gives no better right than the county had to lands which had previously been certified to the state by the Secretary of the Interior as included in a railroad grant.

[No. 23.]

*Argued March 24, 1896. Decided December 7, 1896.*

IN ERROR to the Supreme Court of the State of Iowa to review a decree of that court affirming the decree of the District Court of Calhoun County, Iowa, adjudging the plaintiff, the American Emigrant Company, to be the owner of certain tracts of land in Calhoun county, Iowa, and dismissing the action as to other tracts of land, the defendants being the Rogers Locomotive Machine Works *et al. Reversed*, and cause remanded for further proceeding.

See same case below, 83 Iowa, 612.

The facts are stated in the opinion.

*Mr.* **Charles A. Clark,** for plaintiffs in error:

The Emigrant Company must recover upon the strength of its own title.

*McCormick* v. *Hayes*, 159 U. S. 332 (40: 171).

The certification under the railroad grant was sufficient to vest the legal title under that grant.

*Ard* v. *Brandon*, 156 U. S. 540 (39: 525); *Buena Vista County* v. *Iowa Falls & S. C. R. Co.* 112 U. S. 176 (28: 684); *Kansas City, L. & S. K. R. Co.* v. *Brewster*, 118 U. S. 682 (30: 281); *Frasher* v. *O'Connor*, 115 U. S. 116 (29: 316); *Mower* v. *Fletcher*, 116 U. S. 385 (29: 595); *Williams* v. *United States*, 138 U. S. 516 (34: 1028).

Such certification under the railroad grant passed the legal title so that the holder of the alleged swamp title, without a patent, could not assail such legal title by parol evidence in an action at law.

*French* v. *Fyan*, 93 U. S. 169 (23: 812); *Buena Vista County* v. *Iowa Falls & S. C. R. Co.* 112 U. S. 176 (28: 684); *Iowa R. Land Co.* v. *Antoine*, 52 Iowa, 429; *American Emigrant Co.* v. *Iowa R. Land Co.* 52 Iowa, 326.

Defendant in error shows no title.

This contract was required to be submitted to a vote of the people before it could become operative.

The record shows that the two propositions in this contract were submitted to the people as a whole, and voted upon as a whole.

The electors were given no opportunity to accept one proposition and reject the other.

*Gray* v. *Mount*, 45 Iowa, 595; *McMillan* v. *Lee County*, 8 Iowa, 311.

---

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

*That patents for land may be set aside for fraud*, see note to Miller v. Kerr, 5: 881.

*As to errors in surveys and descriptions in patents for lands, how construed*, see note to Watts v. Lindsey, 5: 423.

*As to land grants to railroads*, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.



Digitized by Google

The schedules annexed to the contract of improvements to be made have been suppressed by the defendant in error. The presumption must be, therefore, that these improvements were not of that character which the law authorized the county to devote to the swamp lands to the procurement of.

*Savery* v. *Moore*, 61 Iowa, 506; *Owen* v. *Flack*, 2 Sim. & Stu. 606.

It is not shown that the American Emigrant Company ever performed the conditions upon which the deed was held in escrow, or that the deed was, in fact, ever delivered to it.

*Calhoun County* v. *American Emigrant Co.* 93 U. S. 127 (23: 828); *American Emigrant Co.* v. *Wright County*, 97 U. S. 341 (24: 915); *American Emigrant Co.* v. *Adams County*, 100 U. S. 61 (25: 563).

The title of the emigrant company was not validated by decree. It was strictly a consent decree outside the pleadings.

The pleadings are not put in evidence to enable the court to know what was in controversy. The decree does not describe any of the lands in controversy in the suit at bar.

*Russell* v. *Place*, 94 U. S. 606 (24: 214); *Masters* v. *Varner*, 5 Gratt. 168, 50 Am. Dec. 114; *Vaughan* v. *O'Brien*, 39 How. Pr. 519; *Chamberlain* v. *Gaillard*, 26 Ala. 510; *Long* v. *Baugas*, 1 Ired. L. 290, 38 Am. Dec. 694; *McCravey* v. *Remson*, 19 Ala. 430, 54 Am. Dec. 194.

The ground on which a judgment rests is a question which cannot be left to conjecture.

*Aiken* v. *Peck*, 23 Vt. 260; *Felton* v. *Smith*, 88 Ind. 157, 45 Am. Rep. 454; *Burlen* v. *Shannon*, 99 Mass. 203, 96 Am. Dec. 738; *Washington, A. & G. Steam Packet Co.* v. *Sickles*, 72 U. S. 5 Wall. 592 (18: 554).

Besides, the decree upon its face purports to be a mere consent decree. The officers of the county had no authority or power to authorize it.

*Manhattan L. Ins. Co.* v. *Broughton*, 109 U. S. 121 (27: 878); *Kelley* v. *Milan*, 127 U. S. 159 (32: 85).

No facts are shown authorizing courts to administer the swamp-land grant. Fee-simple title did not pass under that grant.

*American Emigrant Co.* v. *Fuller*, 88 Iowa, 610.

In *French* v. *Fyan*, 93 U. S. 169 (23: 812), this court decided that by the 2d section of the swamp land act the power and the duty devolved upon the Secretary of the Interior, as the head of the department which administered the affairs of the public lands, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on the subject was to be controlling.

*Ehrhardt* v. *Hogaboom*, 115 U. S. 68 (29: 346); *Wright* v. *Roseberry*, 121 U. S. 494 (30: 1040).

The words, "are hereby granted," in the act, imported a present grant, and not a promise of one in the future; and the title to the lands, therefore, passed to the state at once, their identification to be made by the action of the Secretary of the Interior, but when identified, the title to relate back to the date of the act.

*Tubbs* v. *Wilhoit*, 138 U. S. 137 (34: 888); *Chandler* v. *Calumet & H. Min. Co.* 149 U. S. 91 (37: 662).

Lands which may be cultivated in tame grasses are not swamp lands.

*San Francisco* v. *LeRoy*, 138 U. S. 670 (34: 1101); *Heath* v. *Wallace*, 138 U. S. 580 (34: 1067).

The lands should have been decreed to the plaintiffs in error.

*Iowa R. Land Co.* v. *Antoine*, 52 Iowa, 429; *American Emigrant Co.* v. *Iowa R. Land Co.* 52 Iowa, 826; *Buena Vista County* v. *Iowa Falls & S. C. R. Co.* 112 U. S. 176 (28: 684); *French* v. *Fyan*, 93 U. S. 169 (23: 812); *Frasher* v. *O'Connor*, 115 U. S. 116 (29: 316); *Mower* v. *Fletcher*, 116 U. S. 385 (29: 595); *Williams* v. *United States*, 138 U. S. 516 (34: 1028).

*Mr.* **J. J. Davis**, for defendant in error:

The selection of the lands by the duly authorized agents of the state, and the approval thereof by the surveyor general of the United States, and the report of the same to the general land office, and the reception and recognition thereof by said office, constitute an identification and segregation of the lands as swamp lands pursuant to the laws of the state, and the instructions of the Secretary of the Interior, and are evidence of the swamp character of the land, and that the title thereto vested in the state of Iowa under the swamp-land grant.

In a case of contest of swamp lands, the selection of land by the state under the swamp-land grant establishes a prima facie case that the land so selected is swamp land within the meaning of the act of September 28, 1850.

*Re E. G. Cook*, 2 Copp's Land Laws, 1042; *Page County* v. *Burlington & M. R. R. Co.* 40 Iowa, 522; *Martin* v. *Marks*, 97 U. S. 345 (24: 940).

Officers who were acting under the law of the state, and under the instructions of the Department of the Interior, in the selection, certification, and return of the lands in controversy, must be presumed to have done their duty and to have acted rightly; and therefore the lands in controversy are shown by their acts to be swamp lands.

*Clarkson* v. *Buchanan*, 53 Mo. 571; *Jasper County* v. *Wadlow*, 82 Mo. 172; *Piatt County* v. *Gumley*, 81 Ill. 350.

The swamp land act of 1850 *ex proprio vigore*, was a grant *in præsenti* to the states of all the swamp and overflowed lands therein situated.

The title to the lands vested in the state at once on the passage of the act. The title was not inchoate and was not merely equitable, but was absolute and complete. The requirement of the 2d section of the act that a patent be thereafter issued is not to be deemed as withholding the vesting of the title under the language of the 1st section of the grant. The patent when issued is merely evidential of what was granted, the title to which had theretofore vested.

The holder of the swamp land title, even before patent has been issued, can maintain an action at law to recover swamp lands against a subsequent patent held by a pre-emptioner under the pre-emption laws of the United States.

*Wright* v. *Roseberry*, 121 U. S. 488 (30: 1039); *Irwin* v. *San Francisco Sav. Union*, 136 U. S. 578 (34: 540); *Hannibal & St. J. R. Co.* v. *Smith*, 76 U. S. 9 Wall. 95 (19: 599); *Bailey* v. *Callanan*, 87 Iowa, 107; *Allison* v. *Halfaree*, 11 Iowa, 450; *Connors* v. *Meservey*, 76 Iowa, 691; *American Emigrant Co.* v. *Fuller*, 88 Iowa,



Digitized by Google

599; *Courtright* v. *Cedar Rapids & M. R. R. Co.* 35 Iowa, 386.

The swamp grant was a present grant and vested an immediate title in the state upon its passage.

*Fletcher* v. *Pool*, 20 Ark. 100; *Daniel* v. *Purvis*, 50 Miss. 261; *Keller* v. *Brickey*, 78 Ill. 133; *Busch* v. *Donohue*, 31 Mich. 481; *Burlington & M. R. R. Co.* v. *Fremont County*, 76 U. S. 9 Wall. 94, 95 (19:564).

Not only was the swamp grant a grant *in præsenti*, vesting the title of the land in the state immediately upon the passage thereof, but by its terms and the nature of the case it furnished a means of identifying the subject-matter of the grant; and anyone who, subsequently to the date of the grant, attempts to enter upon such land, or to claim any rights thereto, does so with notice and knowledge of the fact that the land is of the character embraced within the terms of the grant, and that he can obtain no right, title, or interest thereto.

It is the province of the Secretary of the Interior, or of the land department acting for him, in the first instance, to determine the character of land claimed to be swamp, but if he fails, refuses, or neglects to do his duty, or if he deprives himself of jurisdiction in the premises, then the question is for the courts to determine. It will not be disputed that parol evidence is admissible before the Secretary of the Interior, and when the courts are vested with jurisdiction to determine the question, the same evidence that is admissible before the Secretary of the Interior is necessarily admissible before the court.

*San Francisco Sav. Union* v. *Irwin*, 28 Fed. Rep. 711, Aff'd 136 U. S. 578 (34:540); *State* v. *Portsmouth Sav. Bank*, 106 Ind. 435; *American Emigrant Co.* v. *Fuller*, 83 Iowa, 599.

In the case now here the Secretary of the Interior has neglected and failed to pass upon the question of the character of the lands in controversy; and by certifying them to the railroad company subsequently to the swamp grant and prior to the presentation to him of the swamp selection, has deprived himself of jurisdiction to act in the premises, thereby bringing the case within the exact rule of the case of *Hannibal & St. J. R. Co.* v. *Smith*, 76 U. S. 9 Wall. 95 (19: 599).

Where there is a conflict between two titles derived from the same source, either of which would be good if the other were out of the way, the elder one must prevail.

Lester, Land Laws, 564, No. 595.

The swamp lands in this suit, having been granted to the state by the act of Congress of 1850, were not of the character intended to be granted by the railroad act of 1856; and they were not granted by that act, but were expressly reserved by the terms of the railroad act, and therefore the lists and certificates of these swamp lands under the railroad grant are absolutely null and void, and convey no title, right, claim, or interest in said lands under the railroad grant.

*Fremont County* v. *Burlington & M. R. R. Co.* 23 Iowa, 91.

There is nothing in the terms of the railroad certification which determined the land to be railroad land and not swamp land. The question of the character of the land as swamp or nonswamp was not before the department, and was not passed upon at the time the certification was made.

*American Emigrant Co.* v. *Fuller*, 83 Iowa, 599.

The certification was an *ex parte* proceeding wherein the grantee under the swamp grant had no voice or opportunity to be heard.

*United States* v. *Minor*, 114 U. S. 233 (29: 110); *Glidden* v. *Union P. R. Co.* 30 Fed. Rep. 660; *Lake Superior Ship Canal, R. & I. Co.* v. *Cunningham*, 155 U. S. 354 (39: 183).

General terms in a subsequent grant are always held not to include lands embraced within the terms of the prior grant. Even a patent may be declared void if issued for lands theretofore reserved from sale.

*Wilcox* v. *Jackson, McConnel*, 38 U. S. 13 Pet. 498 (10:264); *Bissell* v. *Penrose*, 49 U. S. 8 How. 317 (12:1095); *Minter* v. *Crommelin*, 59 U. S. 18 How. 87 (15: 279); *Easton* v. *Salisbury*, 62 U. S. 21 How. 426 (16: 181); *Morton* v. *Nebraska*, 88 U. S. 21 Wall. 660 (22: 639); *Shepley* v. *Cowan*, 91 U. S. 330 (23: 424); *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733 (23: 634); *Sherman* v. *Buick*, 93 U. S. 209 (23: 849); *St. Louis Smelt. & Ref. Co.* v. *Kemp*, 104 U. S. 636 (26: 875); *Steel* v. *St. Louis Smelt. & Ref. Co.* 106 U. S. 447 (27: 226); *Reynolds* v. *Iron Silver Min. Co.* 116 U. S. 687 (29: 774); *Doolan* v. *Carr*, 125 U. S. 618 (31: 844).

When the land department of the United States certified the lands in suit under the railroad grant, it deprived itself of jurisdiction to investigate and determine the character of the lands, or to patent the same under the swamp grant. In this connection, it will be remembered that the certifications under the railroad grant were made before the swamp-land selections had reached the department. The executive department had no power to recall the certifications after they were issued, however wrongful they may have been; nor could it cancel these certifications; nor had it any right or authority to issue patents under the swamp grant after the certifications had been issued.

*Stone* v. *United States*, 69 U. S. 2 Wall. 535 (17: 767); *Buena Vista County* v. *Iowa Falls & S. C. R. Co.* 112 U. S. 166 (28: 681); *Bicknell* v. *Comstock*, 113 U. S. 149 (28: 962); *Mullan* v. *United States*, 118 U. S. 271 (30: 170).

The lands in suit have been certified as railroad lands, but they should have been patented as swamp lands. The railroad claimant is a trustee of the rightful owner, who is entitled to any appropriate relief that a court of equity has power to grant. The swamp title may be established and quieted, and the railroad claimant enjoined from asserting any adverse claim, as has been done in this case, or the railroad may be compelled to convey to the rightful owners.

*Stark* v. *Starr*, 73 U. S. 6 Wall. 413 (18: 927); *Silver* v. *Ladd*, 74 U. S. 7 Wall. 219 (19: 138); *Lytle* v. *Arkansas*, 50 U. S. 9 How. 314 (13: 153); *Warren* v. *Van Brent*, 86 U. S. 19 Wall. 646 (22: 219).

The lands in controversy herein have been found to be swamp and overflowed lands within the meaning of the act of September 28, 1850, by the referee, the trial court, and the supreme court of the state. And, so far as relates to any question of fact, these findings will not be



Digitized by Google

disturbed by this court in this proceeding in error.

*Dower* v. *Richards*, 151 U. S. 658 (38: 305); *Poweshiek County* v. *United States*, 9 U. S. Land Dec. 127; *Boyd* v. *Oregon*, 10 U. S. Land Dec. 311; *Keeran* v. *Griffith*, 31 Cal. 461; *Keeran* v. *Allen*, 33 Cal. 542; *Thompson* v. *Thornton*, 50 Cal. 142; *Keller* v. *Brickey*, 78 Ill. 188; *Merrill* v. *Tobin*, 30 Fed. Rep. 741.

Mr. Justice **Harlan** delivered the opinion of the court:

The present suit was brought by the American Emigrant Company for the purpose of obtaining a decree quieting its title to certain lands in Calhoun county, Iowa. The plaintiff asserts title under the act of Congress known as the swamp-land act of 1850 (9 Stat. at L. 519, chap. 84); the defendants, under the act of Congress of May 15, 1856 (11 Stat. at L. 9, chap. 28), granting land to Iowa in aid of the construction of various railroads in that state, among others a railroad from Dubuque to Sioux City with a branch from the mouth of Tête des Morts to the nearest point on that road.

The principal contention of the plaintiff is that the lands passed to the state under the act of 1850, and were not embraced by the railroad act of 1856.

A decree was passed adjudging the plaintiff to be the owner of some of the tracts described in its petition. As to other tracts the suit was dismissed. Upon appeal by the defendants to the supreme court of Iowa the decree was affirmed. 88 Iowa, 612. The present writ of error brings that decree before us for examination.

By the above act of September 28, 1850, all swamp and overflowed lands made unfit thereby for cultivation were granted to the respective states in which they were situated that they might be reclaimed by the construction of the necessary levees and drains. By the 2d section of that act it was made the duty of the Secretary of the Interior, as soon as practicable after the passage of the act, to make out an accurate list and plats of such lands, and transmit the same to the governor of the state, and at the request of the latter, "cause a patent to be issued to the state therefor; and on that patent, the fee simple to said lands shall vest in the said state"—the proceeds of the lands, whether from sale or by direct appropriation in kind, to be applied, exclusively, as far as necessary, to the purpose of reclaiming the lands by means of the levees and drains. By the 3d section it was provided that "in making out a list and plats of the land [562] aforesaid, all *legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it should be excluded therefrom." 9 Stat. at L. 519.

The legislature of Iowa, by an act passed February 5, 1851, authorized the commissioner of the state land office to take steps necessary to secure to the state the lands granted by the above act. To that end, the commissioner, having reason to believe there were any tracts of swamp land within the state not reported as such by the United States surveyor, sufficient to justify a more particular examination, was to direct the county surveyor of any county in which the lands were located "to make the examination and provide the proofs necessary to secure such lands to the state, a list of which shall be returned to the land commissioner or the authority acting in that capacity, verified by affidavit," etc. Iowa Laws 1850–51, chap. 69, p. 169.

By a subsequent statute of Iowa, passed January 18, 1853, the swamp and overflowed lands granted to the state by the act of 1850 were granted "to the counties respectively in which the same may lie, or be situated, for the purpose of constructing the necessary levees and drains, to reclaim the same; and the balance of said lands, if any there be after the same are reclaimed as aforesaid, shall be applied to the building of roads and bridges, when necessary, through or across said lands, and if not needed for this purpose, to be expended in building roads and bridges within the county." The same act provided that whenever "it shall appear that any of the lands granted to the state by the aforesaid act of Congress, shall have been sold by the United States since the passage of that act, it shall be lawful for the said counties to convey said lands to the purchasers thereof." It also provided that in all the counties where the county surveyor had made no examination and report of the swamp lands within his county, in compliance with the instructions from the governor, the county court should appoint some competent person, who should proceed "to examine said lands, and make due report, and plats, upon which the topography of the *country shall be carefully noted, [563] and the places where drains or levees ought to be made, marked on the said plats, to the county courts respectively, which courts shall transmit to the proper officers lists of all said swamp lands in each of the counties in order to procure the proper recognition of the same on the part of the United States, which lists, after an acknowledgment of the same by the general government, shall be recorded in a well-bound book provided for that purpose, and filed among the records of the county court." Iowa Laws 1852, chap. 12, p. 29.

By an act passed January 25, 1855, the governor of Iowa was authorized and empowered to draw from the Treasury of the United States all moneys arising from the disposition of the swamp lands of Iowa by the government of the United States. The same act provided: "3. That the governor is hereby authorized to adopt such measures as to him may seem expedient, to provide for the selection of the swamp lands of this state, and to secure to the state the title to the same, and also for the selection, in the name of the state, [of] other lands, in lieu of such swamp lands as may have been or may hereafter be entered with warrants: *Provided*, That the provisions of this act shall not be construed to apply to any swamp lands which have already been selected by any organized county of this state under the provisions of any previous law: *And provided further*, That this act shall not be construed to impair the rights of the counties of this state to any swamp lands within



Digitized by Google

said counties under the provisions of any law in force in relation to the same, and that the selections made by the organized counties shall be reported by the governor to the authorities at Washington." Iowa Laws 1854–56, chap. 188, p. 261; Iowa Revision 1860, chap. 47, p. 154, art. 4.

By another act also passed January 25, 1855, amendatory of the act of January 18, 1853, it was provided: "Sec. 1. That no swamp or overflowed lands granted to the state, and situate in the present unorganized counties, shall be sold or disposed of till the title to said lands shall be perfected in the state, whereupon the title to said lands shall be transferred to the said counties where they are situated: *Pro-*
564] *vided*, That *said counties shall refund to the state the expenses incurred in selecting said lands, under the provisions of an act of the general assembly, authorizing the governor to cause said lands to be surveyed and selected, with 10 per cent interest thereon. Each county to refund its proportional amount of said expenses. Iowa Laws 1854–56, chap. 110, p. 173; Iowa Revision 1860, chap. 47, p. 154, art. 5.

It appears that in 1856 the county court of Calhoun county appointed Charles Amy to select and survey the swamp lands in that county, in accordance with the provisions of the above act of January 18, 1853.

This was after the passage by Congress of the railroad act of May 15, 1856, granting lands to the state of Iowa to aid in the construction of certain railroads in that state. 11 Stat. at L. 9, chap. 28. By that act there was granted to Iowa, to aid in the construction of railroads, among them a railroad from Dubuque to Sioux City, with a branch, every alternate section of land, designated by odd numbers, for 6 sections in width on each side of the respective roads named by Congress. If it appeared at the time the route of a road was definitely fixed that the United States had sold any of the sections or parts of sections granted, or that the right of preemption had attached to the same, then the state, "subject to the approval of the Secretary of the Interior," was entitled to select other lands nearest to the sections granted to supply the deficiency. But it was declared "that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

The above act of May 15, 1856, with its provisions and restrictions, was accepted by the state by an act approved July 14, 1856, and the lands, interests, rights, powers, and privi-
565] leges *granted by Congress, so far as they related to the proposed road from Dubuque to Sioux City, were granted and transferred to the Dubuque & Pacific Railroad Company, to aid in the construction of its railroad and branch, subject to the conditions and encumbrances prescribed by Congress. These lands were transferred to the railroad company upon the express condition that, if it did not complete and equip a given number of miles of its road within a named time, and its entire line on or before such certain date, then the state might resume all rights to the lands so granted and remaining undisposed of by the company. Iowa Revision 1860, chap. 55, p. 215, art. 2.

By a supplementary act, passed January 28, 1857, the companies obtaining the benefits of the act of Congress of 1856, and of the act of the Iowa legislature of July 14, 1856, were authorized to make such disposition, by mortgage or deed of trust, of the lands granted by the act of 1855, as might be deemed proper to secure construction bonds necessary for the completion of their roads, such mortgage or deed of trust to be a binding and valid lien upon all the property mentioned therein, including rolling stock, and the purchasers, under a trustee's sale or foreclosure of mortgage, to have and enjoy all the rights of a purchaser on execution sale. Iowa Revision 1860, chap. 55, p. 222, art. 5.

It was stipulated by the parties that the lands in controversy "are within the limits of the railroad grant of May 15, 1856, to aid in building a railroad from Dubuque to Sioux City, and were earned by the building of said road if they were subject to said grant; and that the various defendants hold by apt and sufficient conveyance all the title and interest in said lands which passed under and by said grant, if any title or interest did pass thereunder or thereby." This, of course, implies that the railroad company performed all the conditions prescribed in reference to these lands either by the act of Congress of May 15, 1856, or by the acts of the Iowa legislature.

It appears in evidence that the lands in controversy and other lands were certified to the state by the General Land Office of the United States, under date of December 25, 1858, as lands *within the 6-mile or place limits defined [566
by the act of Congress of May 15, 1856, "being the vacant and unappropriated lands in the alternate sections designated by odd numbers, for 6 sections in width on each side of the Dubuque & Pacific Railroad and branch within the state of Iowa." The lists of those tracts were first submitted by the Commissioner of the General Land Office "for the approval of the Secretary of the Interior, in accordance with the requirements of the said act of May 15, 1856, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list." The certificate of December 25, 1858, was indorsed by the Secretary of the Interior: "Approved, subject to the conditions and rights above mentioned."

It was further stipulated, in this case, that "all of the lands in controversy were selected by duly authorized and appointed agents of Calhoun county as swamp lands under the act of Congress, September 28, 1850, and reported the same to the county court of Calhoun county September 30, 1858."

On the 27th of March, 1860, the surveyor general for the state of Iowa certified that the



Digitized by Google

lists of lands that had been selected by the county surveyors or state locating agents as swamp lands had been carefully compared with field notes, plats, and other evidence on file in his office, and, "by the affidavits of said county surveyors or state locating agents, it appears that the greater part of each smallest legal subdivision of the lands embraced in said list is swampy or subject to such overflow as to render the same unfit for cultivation, and is therefore of the character contemplated by the act of 28th of September, 1850." The list was indorsed in the General Land Office: "Received with the Surveyor General's letter of March 27, 1860."

The list of the lands selected in the manner above stated by the agent of Calhoun county, together with a letter from the Commissioner of the General Land Office, dated February 12, 1874 (this date is erroneously stated in the record to be 1884), was received at the local land office at Des Moines, Iowa, on the 18th day of February, 1874.

**567]** *It does not appear that the Secretary of the Interior ever took any action in respect to the lists made by the agent of Calhoun county of lands selected by him as swamp lands, nor that the state or the county, nor anyone claiming under the county, ever directly sought any action by the General Land Office or by the Secretary of the Interior in respect of such selections.

It should be here stated that on the 12th day of December, 1861, a written contract was made between the county of Calhoun, Iowa, and the American Emigrant Company, in relation to the swamp and overflowed lands in that county. Subsequently, in 1863, the county conveyed to the company, subject to the provisions of the swamp land act of 1850, the lands in controversy and other lands, upon certain conditions, which it is unnecessary to set forth.

**570]** *In the light of these facts and of the Federal and state legislature relating to the matters in controversy, we proceed to the consideration of the questions presented for our determination.

As the railroad act of 1856 excepted from its operation all lands theretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for any purpose whatever, the certification to the state by the Department of the Interior of the lands in controversy as having inured, under the railroad act of May 15, 1856, to the state for the benefit of the Dubuque & Pacific Railroad Company, was unauthorized, if at the date of the swamp-land act of 1850 the lands were swamp and overflowed lands, whereby they were unfit for cultivation; for, lands of that character were expressly reserved from the operation of the railroad grant of 1856. If they were not granted to the state for the benefit of the railroad company, because previously granted to the state as swamp and overflowed lands, they could not properly have been certified or transferred to the state to be applied in aid of the construction of the railroad. *McCormick* v. *Hayes*, 159 U. S. 332, 338 [40: 171, 173].

But it is equally true that the act of 1850 made it the duty of the Secretary of the Interior, as soon as practicable after the passage of that act, to make out an accurate list and plats of the swamp and overflowed lands granted to any state and transmit them to the executive of such state, "and, at the request of said governor, cause a patent to be issued to the state therefor; and *on that patent* the fee simple to said lands shall vest in said state," subject to the disposal of its legislature. While, therefore, as held in many cases, the act of 1850 was *in præsenti*, and gave an inchoate title, the lands needed to be identified as lands that passed under the act; which being done, and not before, the title became perfect as of the date of the granting act. *Wright* v. *Roseberry*, 121 U. S. 488, 494 [30: 1039, 1040] *et seq.*; *Tubbs* v. *Wilhoit*, 138 U. S. 134, 137 [34: 887, 888]; *Chandler* v. *Calumet & H. Min. Co.* 149 U. S. 79, 91 [37: 657, 661]. So, in *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 68 [29: 346]. "In *French* v. *Fyan*, 93 U. S. 169 [23: 812], this court decided that, by the 2d section of the swamp-land act, the power and the duty devolved upon the Secretary of the Interior, as the head of the department which administered the affairs of the public lands, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling." The identification of lands as lands embraced by the swamp-land act was therefore necessary before the state could claim a patent or exercise absolute control of them.

In *McCormick* v. *Hayes*, above cited, it appeared that the Secretary of the Interior, proceeding under the railroad act of May 15, 1856, had certified certain lands as inuring to Iowa under that act. It was insisted in that case that the lands were covered by the act of 1850, and, therefore, that they were improperly certified under the railroad act of 1856; a fact which, it was contended, could be established by parol evidence, so as to fix the title in certain parties, independently of any action that may have been taken by the Interior Department upon the subject. The precise nature of that case is shown by this extract from the opinion of the court: "The controlling question, therefore, in this case, so far as the plaintiff is concerned—and he must recover upon the strength of his own title, even if that of the defendant be defective—is whether, under the circumstances disclosed by the record, the particular lands in controversy, in the absence of any selection and certification of them by the United States to the state, under the swamp-land act, can be shown by parol testimony to have been, in fact, at the date of that act, swamp and overflowed lands. Congress having made it the duty of the Secretary of the Interior to make out accurate lists and plats of the lands embraced by the swamp-land act, and transmit the same to the governor of the state, and, at the request of the latter, to cause a patent to be issued to the state therefor, and having provided that 'on that patent the fee simple to said lands shall vest in said state subject to *the disposal of **[572** the legislature thereof,' did the title vest in the state, by virtue alone, and immediately upon the passage, of the act, without any selection by or under the direction of the Department of the Interior, so that the state's grantees



Digitized by Google

could maintain an action to recover the possession of them?"

In determining that question this court, after an extended review of former decisions, thus stated (*McCormick* v. *Hayes*, 159 U. S. 346, 347 [40: 175, 176]) its conclusions: "The case before us is not like that of *Hannibal & St. J. R. Co.* v. *Smith*, 76 U. S. 9 Wall. 95 [19: 599], in which, as subsequently explained in *French* v. *Fyan*, 93 U. S. 169 [23: 812], it was shown that there was an absolute neglect of duty on the part of the Interior Department, in that it neither made nor would make any selection or lists whatever, and therefore there was no action by that department that could be relied on as a determination of the question whether the particular lands then in dispute were or were not embraced by the swamp-land act. That case was exceptional in its circumstances, and seemed to justify the decision rendered, in order to prevent a total failure of justice, arising from the unexplained neglect of the land department to perform the duty imposed by the act of 1850. What was said in *French* v. *Fyan* shows that this court not only so regarded the previous case, but it was in effect said that the ruling in *Hannibal & St. J. R. Co.* v. *Smith* was not to be extended to any case in which the land department had taken action, or made a decision or determination under the swamp-land act." Again, and in reference to the certification of lands under the railroad act of 1856: "Twice the land department certified these lands to the state as inuring to it under the railroad-land-grant act, and it does not appear that the state has ever questioned the correctness of that certification or applied to the Secretary of the Interior for a re-examination as to the character of the lands. . . . Upon the authority of former adjudications, as well as upon principle, it must be held that parol evidence is admissible to show, in opposition to the concurrent action of Federal and state officers, having authority in the premises, that these lands were, in fact, at the date of the act of 1850, swamp and overflowed grounds, which should have been embraced by Linn county in its selection of land of that character, [573] *and withheld from the state as lands granted expressly in aid of railroad construction within its limits."

One of the prior adjudications referred to in *McCormick* v. *Hayes* was *Chandler* v. *Calumet & H. Min. Co.* 149 U. S. 79, 88, 89, 92 [37: 657, 661, 662]. In that case, the plaintiff claimed title under the swamp-land act of 1850; the defendant under an act of Congress of 1852 granting public lands to Michigan in aid of the construction of a ship canal around the falls of St. Mary. The lands there in controversy were not included in swamp-land selections under the act of 1850, but were included in selections under the canal grant of 1852. Referring to *Wright* v. *Roseberry*, 121 U. S. 488 [30: 1039], in connection with previous cases, this court, speaking by Mr. Justice Jackson, said: "Under the principle announced in that case, and under the foregoing facts in the present case, it would seem that there had been such affirmative action on the part of the Secretary of the Interior in identifying the lands in this particular township, containing the lands in controversy, as would amount to an identification of the lands therein, which passed to the state by the swamp-land grant, and that the selection by the state of the demanded premises under the canal grant of 1852, with the approval of the Secretary of the Interior, and the certification of the Department to the state that they were covered by the latter grant, may well be considered such an adjudication of the question as should exclude the introduction of parol evidence to contradict it. The exclusion of the land in dispute from the swamp lands, selected and patented to the state, and its inclusion in the selection of the state as land coming within the grant of 1852, with the approval of such selection by the Interior Department and the certification thereof to the state, operated to pass the title thereto as completely as could have been done by formal patent (*Frasher* v. *O'Connor*, 115 U. S. 102 [29: 311]), and being followed by the state's conveyance to the canal company, presented such official action and such documentary evidence of title as should not be open to question by parol testimony in an action at law. Under the facts of this case we are of opinion that the plaintiff in error could not properly establish by oral evidence that the land in dispute *was in fact swamp land, for the [574] purpose of contradicting and invalidating the Department's certification thereof to the state and the latter's patent to the canal company."

These decisions give much greater weight to the action of the land department in certifying the lands in dispute under the railroad grant of 1856 than was done by the judgment below.

The Emigrant Company lays much stress upon that clause of the railroad act of 1856 exempting from its operation all lands previously reserved by the United States for any purpose. And upon this foundation it rests the contention that no lands embraced by the swamp-land act of 1850 could, under any circumstances, be withdrawn by the land department from its operation, and certified to the state under the railroad act of 1856. This contention assumes that the lands in controversy were, within the meaning of the act of 1850, swamp and overflowed lands. But that fact was to be determined, in the first instance, by the Secretary of the Interior. It belonged to him, primarily, to identify all lands that were to go to the state under the act of 1850. When he made such identification, then, and not before, the state was entitled to a patent, and "on such patent" the fee-simple title vested in the state. The state's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued.

But it is equally clear that when the Secretary of the Interior certified in 1858 that the lands in controversy inured to the state under the railroad act of 1856, he, in effect, decided that they were not embraced by the swamp-land act of 1850. This, perhaps, furnishes an explanation not only of the fact that no action was taken upon the report filed in the General Land Office in 1860 showing that the agent of Calhoun county had selected these lands as swamp and overflowed lands, but of the further fact that, so far as this record discloses, the attention of the Secretary of the Interior was never directly called by the county to any



Digitized by Google

claim by it, under the act of 1850, to the lands certified under the railroad act of 1856. Nor does it appear that the American Emigrant Com-
575] pany,* whose original contract with the county was made in 1861, ever questioned before the Land Department the validity of the Secretary's certification of 1858 of these lands as passing to the state under the act of 1856, or asserted a claim to them, until it brought this suit in 1877, nearly twenty years after that officer certified them to the state under the railroad act. And it is significant that this action of the Interior Department does not seem ever to have been called in question by the state.

The case then is this: In 1858, the Secretary of the Interior decided that the lands in controversy inured to the state under the railroad act of 1856, and, if that decision was correct, then they were not reserved from the operation of that act by the swamp-land act of 1850. The state was entitled to the lands either under the act of 1850 or under that of 1856. It was open to it, before accepting the lands under the railroad act, to insist that they passed, under the act of 1850, as swamp and overflowed lands. No such claim was made. The state—the party primarily interested, and with whom the Land Department directly dealt—accepted the lands under the act of 1856, and, therefore, not as inuring to it as swamp and overflowed lands within the meaning of the act of 1850, and, as just stated, has never repudiated its action of 1858, nor sought to have reopened the question necessarily involved in the action of the Secretary when he certified the lands to the state under the act of 1856.

It would seem that, upon every principle of justice, the action of the Secretary of the Interior in certifying these lands to the state under the act of 1856 should not be disturbed. The fact that his certification was made subject "to any valid interfering rights which may exist to any of the tracts" embraced in his certificate does not affect this conclusion. That reservation could not have referred to any rights which the state acquired or could have asserted under some other act of Congress than that of 1856. Certainly, it was not intended by the Interior Department to certify the lands under the railroad act of 1856 subject to the right of the state, while holding them under that certificate, to claim them under some other and prior act. The action of the Department
576] in 1858 *was intended to be final, as between the United States and the state, in respect of the lands then certified as railroad lands. If the state considered the lands to be covered by the swamp-land act, its duty was to surrender the certificate issued to it under the railroad act. It could not take them under one act, and while holding them under that act pass to one of its counties the right to assert an interest in them under another and different act.

Are those in this action who claim under the state and under the act of 1850 in any better condition than the state? Can they be heard to question the action of the land department in 1858, if the state is estopped from so doing? We have seen that the county of Calhoun made a written agreement in 1861 with the American Emigrant Company relating to swamp and overflowed lands. But if no such agreement had been made, would the county be heard to say that the land department erred, as matter of fact, when, in 1858, it decided that these lands passed to the state under the railroad act? Would the creature of the state be permitted to say what its creator was estopped from saying? The county of Calhoun is a mere political subdivision of the state, created for the state's convenience, and to aid in carrying out, within a limited territory, the policy of the state. Its local government can have no will contrary to the will of the state, and it is subject to the paramount authority of the state, in respect as well of its acts as of its property and revenue held for public purposes. The state made it, and could, in its discretion, unmake it, and administer such property and revenue through other instrumentalities. *Jefferson County* v. *Ford*, 4 G. Greene, 367, 370; *Soper* v. *Henry County*, 26 Iowa, 264, 267; *Maryland* v. *Baltimore & O. R. Co.* 44 U. S. 3 How. 534, 550 [11: 714, 721]; *United States* v. *Baltimore & O. R. Co.* 84 U. S. 17 Wall. 322, 329 [21: 597, 600]; *Hamilton County Comrs.* v. *Mighels*, 7 Ohio St. 109, 118; *Askew* v. *Hale County*, 54 Ala. 639, 25 Am. Rep. 780; 1 Dill. Mun. Corp. §§ 22, 23, 54–71 inclusive, and authorities there cited; Ang. & A. Corp. § 31.

It would seem to be clear that the relations of the county and the state are such that the action of the latter in *accepting the lands[577 in controversy under the railroad act was binding upon the county of Calhoun, as one of the governmental agencies of the state; and that the county could not, after such acceptance, claim these lands as swamp and overflowed lands, or, by assuming to dispose of them as lands of that character, pass to the purchaser the right to raise a question which, in view of its subordination to the state, it was estopped from raising. We are of opinion that the plaintiff could not, by any agreement made with the county in 1861 or afterwards, acquire any greater rights, or better position, in respect of these lands, than the county itself had after the certification of them in 1858 as lands inuring to the state under the railroad act of 1856.

When the equities of the respective parties are considered, the view we have expressed is much strengthened by the circumstance that the defendants and those under whom they claim, or some of them, have paid taxes upon these lands ever since 1862, that is, for fifteen years before the institution of this suit in 1877.

We are of opinion that the supreme court of Iowa did not give proper effect to the action of the Interior Department in 1858. It should have been adjudged that, so far as the lands in controversy are concerned, the plaintiffs claiming under the county of Calhoun and the state, as well as under the act of 1850, were concluded by the act of the Secretary of the Interior when he certified such lands as inuring to the state under the railroad act of 1856, and by the act of the state in accepting and retaining the lands under that act; consequently, the suit should have been dismissed for want of equity, with costs to the respective defendants.

*The judgment is reversed*, and the cause is remanded for further proceedings not inconsistent with this opinion.



Digitized by Google

## 578] COVINGTON & LEXINGTON TURNPIKE ROAD COMPANY *et al., Plffs. in Err.*,

*v.*

## A. P. SANDFORD *et al.*

(See S. C. Reporter's ed. 578-598).

*Assent to amendment to charter—legislative exemption—contract with state—statute reducing tolls of turnpike company, when unconstitutional—corporations, when persons—power of legislature over turnpike road—sufficiency of pleading—state decision—just rate of toll—interests of the public—equal protection of the laws.*

1. The mere collecting by a turnpike company of tolls in conformity with rates fixed by a statute, which are lower than those fixed by the charter, does not show that the company assented to the exercise by the legislature of the power to amend its charter.
2. A grant to each of two new corporations of "the powers, rights, and capacities" which had been granted to a corporation which they succeeded, and the property of which is divided between them, does not confer on the new companies the exemption conferred upon the original company from legislation changing the rates of toll, which would prevent the company from earning as much as 14 per cent on its capital stock.
3. If a contract with a state relating to the exercise of franchises is susceptible of two meanings, the one restricting and the other extending the powers of a corporation, that construction of it should be adopted which works the least harm to the state.
4. A statute reducing the tolls that may be charged by a turnpike company, and requiring it to conform to a tariff of rates that is unjust and unreasonable, which prevents it, out of its receipts, from keeping its road in proper condition for public use or from earning any dividends whatever for stockholders, is unconstitutional as a deprivation of property without due process of law.
5. Corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.
6. The turnpike roads established by a corporation under authority of law are public highways, and the right to exact tolls from those using them comes from the state creating the corporation, and its exercise may be controlled by the legislative authority to the same extent that similar rights of railroad corporations may be.
7. An answer denying the validity of a statute reducing tolls, which discloses the average annual receipts of the company for several immediately preceding years, and the average annual expenses, and alleges that the receipts for that time have not admitted of more than 4 per cent dividend upon the par value of the stock, and that the statute in question has reduced the tolls 50 per cent below those allowed by a former statute, and that this will make the income insufficient to maintain the road and meet ordinary expenses and earn any dividend whatever,—is sufficiently full to raise the question of the validity of the statute.
8. When a party specially sets up and claims a right or privilege under the Constitution or laws of the United States, the question of the sufficiency of allegations to present that issue is not concluded by the view expressed by the state court.
9. The interests of the public as well as of the owner of the property must be considered, with all the circumstances, in determining what is a just rate to be charged by a turnpike company as toll.
10. The right of a corporation to realize a given per cent upon its capital stock cannot be claimed without reference to the interests of the public, in order to limit the power of the legislature to reduce its tolls on a turnpike.
11. A turnpike company is not deprived of the equal protection of the laws merely because it is not allowed to charge as high rates as are allowed to other companies differently located, but it can only demand the right to receive such compensation as will be just both to itself and to the public under all the circumstances of the case.

[No. 50.]

*Submitted May 7, 1896. Decided December 14, 1896.*

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment of that court affirming the judgment of the Kenton Chancery Court perpetually enjoining the Covington & Lexington Turnpike Road Company from exacting tolls in excess of those fixed by the act of 1890. *Reversed*, and cause remanded for further proceedings.

See same case below, 20 S. W. 1031.

The facts are stated in the opinion.

*Messrs.* **W. H. Mackoy** and **James W. Bryan** for plaintiffs in error.

*Mr.* **Wm. Goebel** for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The general assembly of Kentucky, by an act approved May 24, 1890, made it unlawful to demand, charge, collect, or receive tolls in excess of the rates specified in that act for travel on that portion of the Covington & Lexington Turnpike Road which was then maintained.

*The company announced its purpose [580 to disregard the provisions of the act and to charge such tolls as were prescribed by the prior statutes. Thereupon the appellees living on or near the line of the turnpike road, and accustomed to travel on it daily with animals and vehicles, brought this suit for an injunction restraining the appellant from exacting tolls in excess of those fixed by the act of 1890.

A temporary injunction, in accordance with the prayer of the petition, was granted, and the company filed its answer. A demurrer to the answer was sustained. An amended answer was then tendered by the defendant, but the court would not allow it to be filed, and by final order made the injunction perpetual. That

NOTE.—*Construction of grants to corporations; corporations have only powers granted, or those necessary to carry into effect powers granted; can act only in the mode prescribed by the law creating,* —see note to Charles River Bridge v. Warren Bridge, 9: 773.

*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.



Digitized by Google

judgment was affirmed by the court of appeals of Kentucky. 20 S. W. 1031.

The principal questions are: 1. Whether the act of 1890 impairs the obligation of any contract that the turnpike company had with the state touching the matter of tolls. 2. Whether, independently of any question of contract, the act made such a reduction in tolls as to amount to a deprivation of the company's property without due process of law, in violation of the 14th Amendment to the Constitution of the United States. 3. Whether the act is repugnant to the clause of the Federal Constitution forbidding the denial by the state to any person within its jurisdiction of the equal protection of the law.

As these questions were properly raised by the pleadings, and were decided adversely to the company, the jurisdiction of this court to review the final judgment of the court of appeals of Kentucky cannot be doubted.

It is necessary to a clear understanding of the issues presented that reference be made to the enactments preceding the statute of 1890.

The Covington & Lexington Turnpike Road Company was incorporated by an act approved February 22, 1834, with authority to construct and permanently maintain a turnpike road from Covington, Kentucky, through Williamstown and Georgetown, to Lexington in that state.

By the 19th section of that act the company [581] was *authorized to collect certain specified tolls. It is contended that the 26th section is a part of the defendant's contract with the state. That section provided: "That if at the expiration of five years after the said road has been completed, it shall appear that the annual net dividends for the two years next preceding of said company upon the capital stock expended upon said road and its repairs shall have exceeded the average of 14 per cent per annum thereof, then and in that case, the legislature reserves to itself the right, upon the fact being made known, to reduce the rates of toll, so that it shall give that amount of dividends per annum, and no more." Ky. Acts 1833, pp. 544, 548.

By an act approved February 23, 1839, amendatory of the act of 1834—the road then having been constructed from Covington to Williamstown—it was provided: Sec. 1. "That the stockholders in the Covington & Lexington Turnpike Road Company, residing south of Williamstown, in Grant county, and anywhere between that place and Georgetown, may elect a separate board of directors, to consist of the same number as authorized by the original charter; and the directors chosen by them shall have the control and shall superintend the construction of that part of the road to be located and constructed between Georgetown and Williamstown. Sec. 2. That the stockholders in said road, residing north of Williamstown, shall have power, also, to elect a separate board of directors, for the purpose of controlling and superintending that portion of the road extending from Williamstown to Covington; and each board so chosen shall exercise separate control over its own portion of the road; but nothing herein shall be construed to divide and separate the stock in said road, but the same shall continue joint and common to all the stockholders, after the completion of said road." Ky. Acts 1838-39, p. 371. This amendment, it is admitted, was accepted by the turnpike company.

Subsequently, by the 2d section of an act approved March 22, 1851, it was provided:

"Sec. 2. That so much of the 2d section of said act to amend the charter of the Covington & Lexington Turnpike *Road Company [582 [meaning the act of 1839] as declares that the stock in said road shall continue joint and common to all the stockholders, after the completion of said road, is hereby repealed, and the stockholders whose stock is now under the control and management of the board of directors having control of the road north of Williamstown shall be and are hereby constituted a separate and independent company, under the name and style of the Covington & Lexington Turnpike Road Company, who shall be and forever remain separate and independent of that portion of said company owning the stock in the road now constructed south of Williamstown; and the stockholders whose stock is now under the control and management of the board of directors having the control and construction of the road south of Williamstown, shall be and are hereby constituted a separate and independent company, under the name and style of the Georgetown & Dry Ridge Turnpike Road Company, who shall be and forever remain separate and independent of that part of said company owning the stock in the road north of Williamstown; and that neither of said companies, thus formed, shall be held as in any wise responsible for the doings or actions of the other; but each shall have the exclusive ownership and control of that portion of road which they have respectively made, or, under the provisions of this act shall make, and shall have full power and authority to elect its own president and directors, to declare its own dividends, and pay the same to its own stockholders, *each company possessing and retaining all the powers, rights, and capacities in severalty granted by the act of incorporation, and the amendments thereto, to the original company*, and subject to all the restrictions to which said company is subject, not inconsistent with the provisions of this act; and that neither company shall be in any wise liable for the debts or contracts of the other now in existence, or which may be hereafter made or contracted." Ky. Acts 1850-51, p. 479.

It is claimed that the words in this section, "possessing and retaining all the powers, rights, and capacities in severalty granted by the act of incorporation and the *amendments [583 thereto, to the original company," embraced, or carried into the charters of the two corporations created by this act, the immunity or exemption, given by the 26th section of the above act of 1834, from legislation that would preclude the company from earning as much as 14 per cent upon its capital stock.

The separate and independent company created by the last-named act as the Covington & Lexington Turnpike Road Company is the defendant in this suit. To it was committed the control of that portion of the road lying north of Williamstown. The act of 1851 further provided that it should be in force as soon as



Digitized by Google

a majority of the stockholders of each company assented to its provisions. Such assent was duly given by the stockholders.

The next statute, in point of time, relating to the Covington & Lexington Turnpike Road Company, was that of December 11, 1865, amending the charter of that company. That act provided that the company might charge tolls on their road as prescribed in that act, "instead of the rates now allowed by law." Ky. Priv. Acts 1865, p. 2. The rates so prescribed were, it is alleged, different from and lower than those prescribed by the original charter of 1834.

The petition alleged that the defendant submitted to the regulation of its tolls, as indicated by the act of 1865, "and consented to and accepted said act, and has ever since acted thereunder and exacted the rates of toll therein specified." The answer, touching this point, avers: "It (the defendant) admits, also, the passage of the act by the general assembly of the commonwealth of Kentucky mentioned in said petition as having been approved December 11, 1865, and entitled 'An Act to Amend the Charter of the Covington & Lexington Turnpike Road Company,' which provided other and different rates of toll from those authorized to be collected by the act of February 22, 1834, above mentioned, which act of December 11, 1865, this defendant accepted and has acted under, but it denies that it submitted to the regulation of its tolls by the general assembly of the commonwealth of Kentucky then or at any time, but says that it ac-
584] cepted said act and has acted *thereunder of its own volition, and that the acceptance of said act was voluntary on the part of said corporation, its stockholders and directors."

By the 6th section of an act of the general assembly of Kentucky, approved February 13, 1872, it was provided that the trustees of the Cincinnati Southern Railway, whose line extended across Kentucky, might "also for the purpose of constructing and maintaining said line of railway, occupy or use any turnpike or plank road, street, or other public way or ground, or any part thereof, upon such terms and conditions as may be agreed upon between said trustees and the municipal or other corporations, persons, or public authorities owning or having charge thereof. . . . If no agreement can be made for the right to use or occupy any road, street, or ground that may be necessary, the said trustees may take and appropriate said rights in the manner provided in the next section."

The trustees of the last-mentioned company gave the defendant notice that they required that portion of its turnpike road extending from the line between Scott and Grant counties to within about a mile of Walton, in Boone county, Kentucky, a distance of about 30 miles. Thereupon the defendant sold to the Cincinnati Southern Railway its road between Williamstown and Walton, in length 22 miles, for the consideration of $100,000, which sum was distributed among the stockholders of the turnpike company, each stockholder receiving $22 on each share of stock, which was in excess of its real or market value. Since the above sale the defendant has exercised and maintained control only over that portion of its road between Walton and Covington, a distance of 18 miles.

Then came the act of May 24, 1890, to which reference has heretofore been made.

In our consideration of the questions presented by the record we lay aside the statute of Kentucky, passed February 14, 1856, providing that "all charters and grants of or to corporations or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the *legislature, unless a [585 contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested;" and which also provided that that act "shall only apply to charters and acts of incorporation to be granted hereafter." 1 Ky. Acts 1855, chap. 148, p. 15. The provision in the General Statutes of Kentucky, which took effect on the 1st day of December, 1873, is that "all charters and grants of or to corporations or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That, whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." Ky. Gen. Stat. 1888, chap. 68, p. 861, § 3. It is clear that the statute of 1856 had no application to charters and grants of or to corporations and amendments thereof, enacted or granted prior to February 14, 1856, but only to charters and acts of incorporation granted after that date. It therefore has no application to the act of 1851, granting to the Covington & Lexington Turnpike Road Company "the powers, rights, and capacities" given by the act of 1834. Nor is there any ground for holding that the turnpike company was brought by the act of 1865 under the operation of the general statute reserving to the legislature the right to amend or repeal charters of or grants to corporations. That act did nothing more than reduce the rates of toll to be charged. It did not create a new corporation, nor give any additional franchises or privileges to the company. The mere collecting of tolls, in conformity with such rates, does not show that the company assented to the exercise, by the legislature, at will, of the power to amend or repeal its charter. Whatever authority, therefore, the general assembly had, by statute, to regulate the tolls of the plaintiff in error arose from its general power to regulate the affairs of a corporation which came into existence by its authority, and which owned and controlled a highway established for public *use. *Ruggles* v. [586 *Illinois*, 108 U. S. 526, 531 [27: 812, 815]; *Stone* v. *Farmers' Loan & T. Co.* ("*Railroad Commission Cases*") 116 U. S. 307, 325 [29: 636, 642]; *Dow* v. *Beidelman*, 125 U. S. 680, 688 [31: 841, 843, 2 Inters. Com. Rep. 56]; *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 215 [38: 962, 967, 4 Inters. Com. Rep. 649].

Was the Covington & Lexington Turnpike Road Company entitled, under its charter, to be exempt from legislation that would prevent



Digitized by Google

it from earning at least 14 per cent "upon the capital stock expended upon said road and its repairs," as prescribed in the act of 1834?

The act of 1834 having given to the original corporation an exemption or immunity from legislation that would prevent it from earning as much as 14 per cent upon the capital stock expended upon its road and for repairs, the contention of the defendant is that this exemption or immunity passed to the two corporations created by the act of 1851, and which, by the terms of that act, succeeded "to all the powers, rights, and capacities" granted by the act of 1834 to the original corporation. This view was properly rejected by the court of appeals of Kentucky. It was well said by Judge Pryor, speaking for that court, that "the liability and duties owing the state and the public by the one corporation had been severed by the act of 1839, and by the act of 1851 two new corporations were created, with the rights and powers of the one entirely distinct from the other, and no means of ascertaining what per cent the old corporation would have made upon its stock. In fact, the old corporation was extinct; and to hold that the new corporations were exempt from legislative interference would be to restrain the exercise of legislative power by implication, when a reasonable construction of the new grants must lead to a different conclusion."

These principles are in entire accord with the settled doctrines of this court. When a corporation succeeds to the rights, powers, and capacities of another corporation, it does not thereby or necessarily become entitled to an exemption from taxation. An exemption or immunity from taxation so vitally affects the exercise of powers essential to the proper conduct of public affairs and to the support of government, that immunity or exemption from [587] taxation is never sustained *unless it has been given in language clearly and unmistakably evincing a purpose to grant such immunity or exemption. All doubts upon the question must be resolved in favor of the public. There are positive rights and privileges, this court said in *Morgan* v. *Louisiana*, 93 U. S. 217 [23: 860], without which the road of a corporation could not be successfully worked, but immunity from taxation is not one of them. In a recent case (*Norfolk & W. R. Co.* v. *Pendleton*, 156 U. S. 667, 673, [39: 574, 575]), we had occasion to say, in harmony with repeated decisions, that, "in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions in restriction of the right of the state to tax the property or to regulate the affairs of its corporations do not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee;" and that this was a "salutary rule of interpretation, founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grant construed *strictissimi juris*. *Morgan* v. *Louisiana*, 93 U. S. 217 [23: 860]; *Wilson* v. *Gaines*, 103 U. S. 417 [26: 401]; *Chesapeake & O. R. Co.* v. *Miller*, 114 U. S. 176 [29: 121].

The same principles should be recognized when the claim is of immunity or exemption from legislative control of tolls to be exacted by a corporation established by authority of law for the construction of a public highway. It is of the highest importance that such control should remain with the state, and it should never be implied that the legislative department intended to surrender it. Such an intention should not be imputed to the legislature if it be possible to avoid doing so by any reasonable interpretation of its statutes. It is as vital that the state should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation. We admit there is some ground for the contention that, by the grant in the act of 1851 to each of the two corporations named in it, of "the powers, rights, and capacities" granted to the corporation of 1834, the legislature intended *to exempt the new corporations, as it [588] did the original ones, from all legislation that would prevent them from earning as much as 14 per cent on the capital stock expended on their respective roads and for repairs. But as the act of 1851 may not unreasonably be interpreted as intended only to pass to the new corporations such powers, rights, and capacities as were necessary to the successful working of the respective roads, and not an exemption from legitimate ordinary legislative control of their affairs and business, it must, in the interest of the public, be so interpreted. It is settled law that in grants by the public nothing passes merely by implication; and if a contract with a state, relating to the exercise of franchises, is susceptible of two meanings, "the one restricting and the other extending the powers of a corporation, that construction is to be adopted which works the least harm to the state." *Chenango Bridge Co.* v. *Binghamton Bridge Co.* ("*The Binghamton Bridge*") 70 U. S. 3 Wall. 51, 75 [18: 137, 143]; *Ruggles* v. *Illinois*, 108 U. S. 526 [27: 812]; *Stein* v. *Bienville Water Supply Co.* 141 U. S. 67, 80, 81 [35: 622, 627, 628].

The views we have expressed find some support in the fact that, by the act of 1865, the legislature prescribed rates of toll for the turnpike company, without any reference to the 26th section of the act of 1834, and the provisions of that statute were accepted, and have ever since been acted upon by that company. So far as the record shows, that acceptance was unconditional, and without any reservation of a right by the company, under the previous law, to earn as much as 14 per cent on its capital stock. Touching this part of the case the court of appeals of Kentucky said: "Nor ought this court, in the absence of express enactment, after the lapse of more than half a century, with legislation not only severing the old corporation, but regulating the rate of toll on these roads, to hold that this immunity from legislative interference was a perpetual right in the nature of a contract that could not be disturbed. The stockholders have consented and asked an entire change of the original grant, and submitted to legislation regulating their tolls, evidencing that with their own contention the immunities in the act of 1834 *were not regarded as forming a part [589] of the corporate grants subsequently made."



Digitized by Google

For the reasons stated, we are of opinion that when the act of 1890 was passed, the power of the general assembly over the subject of tolls to be exacted by the plaintiff in error was not impaired or restrained by any contract with the state in reference to the amount which the company might earn from the use of its road.

It is, however, contended that the act of 1890, by its necessary operation, deprives the company of its property without due process of law, in that if tolls cannot be charged in excess of those prescribed by that act, the company cannot possibly maintain its road or derive any profit whatever for stockholders. This is a more serious question than the one we have just examined, and is not so easy of solution.

In its original answer, filed in 1890, and to which a demurrer was sustained, the turnpike company referred to the section of the act of 1834 reserving to the legislature the right, in a certain contingency, to reduce rates of toll, and allege that, "at the expiration of five years after said road had been completed, the annual net dividends for the two years next preceding of said defendant company upon the capital stock expended upon said road and its repairs had not exceeded and did not exceed the average of 14 per cent per annum thereof, and that since the completion of this defendant's road the annual net dividends of the defendant company upon the capital stock expended upon said road and its repairs have not averaged to exceed 14 per cent per annum, but, upon the contrary, have averaged very much less, and for a number of years last past the average annual net dividends of said company have not exceeded 4 per cent upon the capital stock of said company."

The company further alleged that "its receipts from tolls for a number of years past under the rate of tolls prescribed by the act of December 11, 1865, mentioned in the petition, have averaged only about $16,000 per annum, and that the ordinary annual expenses of operating and maintaining its road during the 590] same time have averaged about *$8,000 per annum; that during this and the coming year it will be necessary for it to incur certain extraordinary expenses in the purchase of ground for and building a new toll house for the second gate from Covington on its road and in the purchase or condemnation of ground for straightening of its road and laying out a side road along that portion of its road between that part of the city of Covington known af Lewisburg and the first toll gate on its said turnpike road, which extraordinary expenses will amount to about $4,000; that the act of May 24, 1890, attempts to reduce the tolls on his defendant's road about 50 per cent, and that if the same were adopted the income of the company from tolls would not be more than $8,000 per annum, nor more than sufficient to enable defendant to meet the ordinary expenses of its road, and would leave nothing with which to meet said extraordinary expenses, and there would be no income out of which dividends could be paid to stockholders upon the money which they had invested in the stock of said road. This defendant also says that within the last few years the Louisville & Nashville Railroad, which has a station on the line of this company's turnpike, and the Cincinnati Southern Railway, which has several stations on the line of this defendant's turnpike, have diverted a large amount of travel from said turnpike and have diminished this company's earning capacity very largely, and that other railroad and electric roads touching defendant's road and having stations thereon have been chartered and are in contemplation, the effect and construction of which will be to still further impair the earning capacity of this defendant and to diminish the dividends of this defendant under the rate of tolls in force by an act of December 11, 1865.

"This defendant further says that the grade of the first 2½ miles of its road leading out of the city of Covington is very steep; that for a portion of said 2½ miles its road is built along the side of a hill; that the entire said 2½ miles is expensive to maintain, especially that portion along the side of the hill, the portion of the road towards the slope of the hill having frequently given away *and slipped and en-[591 tailed great expense upon the defendant in the repair of the same, and that from the nature of the soil over and along which said portion of said road is built said process of sliding and giving away is liable to continue in the future and to entail still further expense upon the defendant. It says that the adoption of the rate of tolls fixed by the act of May 24, 1890, would disable and prevent this defendant from performing the duties that it owes to the public and would prevent it from ever hereafter paying any dividends to its stockholders, and that the rate of tolls prescribed in said act of May 24, 1890, is unreasonable and unjust to defendant and its stockholders, and that to permit the same to be enforced would be to destroy entirely the value of the property of the defendant and the values of the shares of capital stock of the defendant held by its stockholders, and destroy entirely the dividend earning capacity of this defendant, and that to permit said act of May 24, 1890, to be enforced would be to exercise absolute arbitrary power over the property of the defendant and its stockholders, in violation of § 2 of the Bill of Rights of the Constitution of Kentucky, and would be depriving the defendant and its stockholders of their property without due process of law and the taking of the same for public use without the consent of the defendant and its stockholders and without just compensation being previously made to them, and that to permit the enforcement of said act of May 24, 1890, is to violate article 5 of the Amendments to the Constitution of the United States and §§ 8, 12, 14, and 15 of the Bill of Rights of the Constitution of the United States and the amendments thereto and to the Constitution of the state of Kentucky."

It was also alleged in the original answer that, under the act of 1890, sufficient income could not be earned "to maintain the road and provide for its ordinary expenses, without taking into consideration any extraordinary expenses."

We have then the case of a corporation invested by its charter with authority to construct and maintain a turnpike road, and to



Digitized by Google

collect tolls "agreeable" to certain named rates, and which is required by a subsequent 592] legislative enactment* to conform to a tariff of rates that is unjust and unreasonable, and which also prevents it, out of its receipts, from maintaining its road in proper condition for public use, or from earning any dividends whatever for stockholders. These facts are admitted by the demurrer. Is such legislation forbidden by the clause of the Constitution of the United States declaring that no state shall deprive any person of property without due process of law? We are of opinion that, taking, as we must do, the allegations of the answer to be true, this question must be answered in the affirmative.

It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws. *Santa Clara County* v. *Southern P. R. Co.* 118 U. S. 394 [30: 118]; *Pembina Consol. S. Min. Co.* v. *Pennsylvania*, 125 U. S. 181, 189 [31: 650, 653, 2 Inters. Com. Rep. 24]; *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 29 [32: 596]; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386, 391 [35: 1051, 1053]. And, as declared in *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649, 657 [39: 567, 570], upon the authority of previous decisions, "there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws"—citing *Stone* v. *Farmers' Loan & T. Co.* ("*Railroad Commission Cases*") 116 U. S. 307, 331 [29:636, 644]; *Dow* v. *Beidelman*, 125 U. S. 681 [31: 841, 2 Inters. Com. Rep. 56]; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418 [33: 970, 3 Inters. Com. Rep. 209]; *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339 [36: 176]; *Reagan* v. *Farmers' Loan & T. Co.* (No. 1), 154 U. S. 362 [38: 1014, 4 Inters. Com. Rep. 560].

In *Stone* v. *Farmers' Loan & T. Co.* ("*Railroad Commission Cases*") the court, speaking by Chief Justice Waite, recognized it as settled that "a state has power to limit the amount of charges by railroad companies for the transportation of persons and property 593] within its own *jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce." But it took care also to announce that "it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

So, in *Reagan* v. *Farmers' Loan & T. Co.* (No. 1), 154 U. S. 362, 397, 399, 410, 412 [38: 1014, 1023, 1024, 1027, 1028, 4 Inters. Com. Rep. 560], in which previous decisions were referred to, the court said that beyond doubt it was within the power and duty of the courts "to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation." Again: "These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to devest the other of any rights of person or property. In every Constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. *This, as has been often observed, is a [594 government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. . . . If the state were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take, not the title, but the use for the public benefit at less than its market value? . . . It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that everyone should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others."



Digitized by Google

The cases to which we have referred related to the power of the legislature over rates to be collected by railroad corporations. But the principles announced in them are equally applicable, in like circumstances, to corporations engaged under legislative authority in maintaining turnpike roads for the use of which tolls are exacted. Turnpike roads established by a corporation, under authority of law, are public highways, and the right to exact tolls from those using them comes from the state creating the corporation. *California* v. *Central P. R. Co.* 127 U. S. 1, 40 [32: 150, 157, 2 Inters. Com. Rep. 153]. And the exercise of that right may be controlled by legislative authority to the same extent that similar rights, connected with the construction and management of railroads by corporations, may be controlled. A statute which, by its 595] necessary operation, *compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair and from earning any dividends whatever for stockholders, is as obnoxious to the Constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls for passengers and freight.

It is suggested by counsel for the plaintiffs that neither the original nor the amended answer sufficiently disclosed the facts upon which the company rested its contention as to the invalidity of the act of 1890, and that, upon the showing made by the company, the court, under the established rule forbidding the annulment of a legislative enactment not clearly and palpably unconstitutional, was not obliged to hold that act to be repugnant to the Constitution of the United States. We do not concur in this view. The answer disclosed what had been the average annual receipts of the company under the act of 1865 for a number of years immediately preceding the passage of the act of 1890, and what during that period had been the average annual expenses; alleged that the receipts for the several preceding years had not admitted of dividends greater than 4 per cent on the par value of the company's stock; that the act of 1890 reduced the tolls 50 per cent below those allowed by the act of 1865; and that such reduction would so diminish the income of the company that it could not maintain its road, meet its ordinary expenses, and earn any dividends whatever for stockholders. These allegations were sufficiently full as to the facts necessary to be pleaded, and fairly raised for judicial determination the question,—assuming the facts stated to be true,—whether the act of 1890 was in derogation of the company's constitutional rights. It made a prima facie case of the invalidity of that statute. When a party specially sets up and claims a right or privilege under the Constitution or laws of the United States, the question of the sufficiency of allegations to present that issue is not concluded by the view expressed by the state court. In *Mitchell* v. *Clark*, 110 U. S. 596] 633, 645 [28:279, 283], this court *said: "The question whether a plea sets up a sufficient defense, when the defense relied on arises under an act of Congress, does present, and that necessarily, a question of Federal law; for the question is and must be, Does the plea state facts which under the act of Congress constitute a good defense." This principle was approved in *Boyd* v. *Nebraska, Thayer*, 143 U. S. 135, 180 [36: 103, 116]. We decide, however, nothing more on this hearing than that upon the facts alleged the demurrer to the answer should have been overruled; and upon the completion of the pleadings—unless the plaintiffs elected to stand by their demurrer—the parties should be allowed to make their proofs touching the issues involved.

It is proper to say that if the answer had not alleged, in substance, that the tolls prescribed by the act of 1890 were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than 4 per cent on its capital stock. It cannot be said that a corporation operating a public highway is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature *has the authori- [597 ty in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the plaintiff's turnpike upon payment of such tolls as, in view of the nature and value of the service rendered by the company, are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable. That inquiry also involves other considerations, such, for instance, as the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise. In short, each case



Digitized by Google

must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. What those other circumstances may be, it is not necessary now to decide. That can be best done after the parties have made their proofs.

It is further insisted by the company that the rates prescribed for it by the act of 1890 are much less than those imposed by the general statutes of Kentucky upon other turnpike companies of the state; consequently, that that act denies to it the equal protection of the laws. The proposition of the defendant is, that 598] the constitutional provision referred *to requires all turnpike companies in the state to be placed by the legislature, when exercising its general power over the subject of rates to be charged upon highways of that character, upon substantially the same footing. Upon this point the court of appeals of Kentucky said: "A turnpike road leading into and connected with a populous city like that of the city of Covington could afford to charge less toll by reason of the immense travel upon it than turnpikes in thinly settled portions of the county or state, and hence under former constitutions the legislature has seen proper to regulate the tolls as the turnpike road may happen to be located." The circumstances of each turnpike company must determine the rates of toll to be properly allowed for its use. Justice to the public and to stockholders may require, in respect of one road, rates different from those prescribed for other roads. Rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road. The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the legislature when exerting its general powers is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public. If the rates prescribed for the defendant in this case were manifestly much lower —taking them as a whole—than the legislature has, by general law, prescribed for other corporations whose circumstances and location are not unlike those of the defendant, a different question would be presented. At any rate, no case of that kind is properly presented by the pleadings, and there is no ground for holding that the act of 1890 denies to the defendant the equal protection of the laws.

For the reasons we have given, the judgment of the court below is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

*Reversed.*

FREDERICK MAISH *et al., Appts.*, [599
*v.*
TERRITORY OF ARIZONA.

(See S. C. Reporter's ed. 599–611.)

*Tax list, when evidence—jurisdiction of territorial court—reassessed taxes—taxable interest —county funding bonds—fraudulent discrimination.*

1. The fact that a printed copy of a delinquent list, and not that filed in the office of the county treasurer, was received in evidence in proceedings to collect delinquent taxes under Ariz. Rev. Stat. 1887, §§ 2684 *et seq.*, is not ground for reversal, where the objection thereto was that the list "is not a copy of the original," but did not point out wherein it was incorrect, and no objection to it was made on the ground that the original had not been first offered, or that the published list was different from the original.
2. The district court of the territory of Arizona did not lose its power to enter judgment in proceedings to collect delinquent taxes by continuing the proceedings for the determination of objections beyond the time prescribed by Ariz. Rev. Stat. 1887, §§ 2685, 2693, for the sale of the property.
3. A delinquent tax list which is made prima facie evidence by Ariz. Rev. Stat. 1887, § 2686, that the taxes therein are due, is of the same effect as evidence of taxes of prior years reassessed in that list, as of the taxes for the current year.
4. A party in possession of a tract of land under a perfect grant, such as a Mexican land grant, has a possessory and equitable right which is of value, and that is enough to sustain taxation.
5. A levy of taxes for the payment of interest on county funding bonds cannot be defeated on the ground that they exceeded the amount for which the county could lawfully become indebted, where they may have been simply a change in the form of an indebtedness which was incurred before the limitation was imposed, and all the facts concerning the indebtedness, the time when it arose, and the circumstances under which it was created, do not appear.
6. Something more than an error of judgment must be shown, something indicating fraud or misconduct, in order to defeat an assessment for taxes on the ground of a fraudulent discrimination between taxpayers.

[No. 89.]

*Submitted October 29, 1896. Decided December 21, 1896.*

APPEAL from a judgment of the Supreme Court of the Territory of Arizona affirming the decree of the District Court of the First Judicial District of that Territory establishing certain taxes and foreclosing tax liens in a suit commenced by the Territory of Arizona

NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

*As to power of states to tax*, see note to Dobbins v. Erie County, 10: 1022.

*As to sale of lands for taxes; strict compliance with statute necessary*,—see note to Williams v. Peyton, 4: 518.

*As to when an injunction to restrain the collection of a tax will be granted*, see note to Dows v. Chicago, 20: 65.

*As to what is prima facie evidence*, see note to Kelly v. Morris, 8: 523.



Digitized by Google

against Frederick Maish *et al.* to recover delinquent taxes, etc. *Affirmed.*

See same case below, 87 Pac. 870.

Statement by Mr. Justice **Brewer:**

This was a suit commenced in the district court of the first judicial district of the territory of Arizona, sitting in and for the county of Pima, to recover delinquent taxes. Several parties were included as defendants. A decree was rendered May 7, 1892, establishing the taxes and foreclosing the tax liens. The appellants, after a motion for a new trial, carried the case to the supreme court of the territory, by which, on January 17, 1894, the decree was affirmed (87 Pac. 870), and thereupon an appeal was taken to this court.

These judicial proceedings to collect delinquent taxes were authorized by statute. Ariz. Rev. Stat. 1887, §§ 2684–2688. The first of these sections provides that the tax collector on the 3d Monday of December in each year shall prepare and file in the office of the county treasurer a list of delinquent taxes. Section 2685 requires him on or before the 1st Monday in February thereafter to publish such delinquent tax list, with a notice that he will apply to the district court of the county at the next ensuing term thereof for judgment. Section 2686 directs the district attorney, upon the completion of the publication, to file a complaint in the district court setting forth the fact of the delinquent list, its publication and the notice, and praying for judgment and decree against the property described in said list for the taxes assessed thereon. It further provides:

"The delinquent list shall be prima facie evidence that the taxes therein are due against the property described in said list. Upon said publication, an advertisement being made, and the filing of said complaint, the said district [601] court shall *acquire full and complete jurisdiction over the lands, real estate, and property described and contained in said delinquent list for all purposes whatever necessary to enable the said court to carry out the purposes and intention of this act."

Section 2687 contains certain general provisions in reference to the proceedings. Section 2688 is as follows:

"The court shall examine said list, and if defense (specifying in writing, the particular cause of objection) be offered by any person interested in any of said property, to the entry of judgment against the same, the court shall hear and determine the matter in a summary manner, without pleadings, and shall pronounce judgment as the right of the case may be. The court shall give judgment for such taxes and special assessments, interests, penalties, and costs as shall appear to be due, and such judgment shall be considered as a several judgment against each parcel of property, or part of the same, for each kind of tax or special assessment included therein; and the court shall direct the clerk to make out and enter an order for the sale of such property against which judgment is given, which shall be substantially in the following form."

*Mr.* **Charles Weston Wright** for appellants.

*Mr.* **Wm. H. Barnes** for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

The statute, as will be seen, authorizes anyone interested in any of the property to defend against the taxes sought to be charged thereon, "specifying in writing the particular cause of objection," and requires the court, when such defense is made, to "hear and determine the matter in a summary manner, without pleadings," and to "pronounce judgment, as the right of the case may be." The statute also provides that the delinquent tax list is prima facie evidence that the "taxes therein are due against the property."

The appellants filed ten objections to the taxes charged *against their property, one [602] of which was that "said delinquent list as published and filed herein is not a copy of the original." It appears from the bill of exceptions that on the hearing before the court the printed copy of the delinquent list, and not that filed in the office of the county treasurer, was offered and received in evidence. To the introduction of this printed copy appellants made several objections, but not that the original was the best evidence or should be first offered, or that the printed list was not an exact copy of the original. It would seem from the findings, and the rulings made by the trial court, as well as from the motion for a new trial, that the published delinquent list was treated as though it were the original; and that in the supreme court of the territory was the question for the first time distinctly made that no judgment could be rendered except upon the evidence furnished by the original list. Be that as it may, and conceding without deciding that properly in an action like this the original list should be offered in evidence, nevertheless we are of opinion that the appellants cannot now take advantage of this. They did not in their objections point out wherein the delinquent list was incorrectly published, and they made no objection to the admission in evidence of such published list on the ground that the original had not first been offered or that the published list was different from the original. It might be that in the description of other property, or the taxes charged thereon, there were such mistakes as to defeat the proceedings as to such property, or in reference to their own property and the taxes charged thereon that there was some trifling inaccuracy so as to make it true that the published list was not a copy of the original, but it would not follow therefrom that they were entitled to a judgment. *De minimis non curat lex* might uphold the publication. As they were called upon in the challenge of these taxes to point out specifically their objections, and as they did not show wherein the published list differed from the original, we cannot assume that the variance, if any there were, was sufficient to affect their substantial rights. While in a general sense it may be true that in such a proceeding the territory is the plaintiff and is called *upon to prove its [603] case, yet the presumptions which by the statute attach to the regularity of the proceedings, and the duty cast upon the objectors to specifically point out the defects, forbid our disturbing the judgment upon such technical ground, one apparently an afterthought and



Digitized by Google

not affecting the substantial rights of the appellants.

Again it is insisted that the court had lost its power to enter judgment by reason of lapse of time. The facts upon which this contention is based are these: Section 2685, which provides for a publication of the delinquent list, requires that the collector append to and publish with the list, in addition to the notice of application for judgment, a notice that on the Monday next succeeding the day fixed by law for the commencement of the term of the district court the property will be sold. Section 2690 directs the clerk of the district court to give a duly certified copy of the judgment to the tax collector as the process under which the property is to be sold. Section 2693 requires the collector to attend on the day named in the notice, expose the property for sale, and continue the sale from day to day until all the property is sold, completing the sale within twenty days from the commencement thereof. Section 2687 makes special provisions for action by the court at an ensuing term, but is inapplicable to the questions here presented.

The court convened on the 14th of March. The notice published by the tax collector was that the sale would begin on the 20th of March. On March 15 a judgment was entered directing the sale on the 20th of all the property, to which no objection had been filed. As to those parties making objections (and included among them were the present appellants) the case was set down for hearing at a subsequent day, and a trial then had; but the judgment was not entered until the 7th day of May, 1892, and the order was to sell on the 13th day of June. Now the argument is that as this is a special statutory proceeding its exact terms must be complied with or the court loses its jurisdiction; the effect of which as applied to a case like the present would be that if the objectors present questions which the court can-
**604** not conscientiously decide at the moment and takes time for consideration, it may thereby lose its jurisdiction to act at all. We do not so understand the law. The district court is one of general jurisdiction. Section 2686 provides that upon the completion of the publication and the filing of the complaint the "court shall acquire full and complete jurisdiction" over the property for all purposes whatever necessary to enable it to carry out the purposes and intention of the act. The special provisions, to which we have heretofore referred, will doubtless guide in all cases in which no contest is made. They were evidently designed to secure prompt action on the part of the tax collector, as well as the court, and if no objections be made and a delinquent tax list, correct in form and duly published, is presented there need be no delay in entering the judgment. But inasmuch as this proceeding is one in a court of general jurisdiction it would require very precise and prohibitory language in the statute in order to withhold from that court the ordinary functions and powers of such a tribunal, among which is not only the right, but the duty, of giving such full consideration to all questions presented as its judgment determines is necessary. No such prohibitory language is found. The purposes and intention of the act are the collection of taxes, but only of such taxes as ought to be collected, and judicial determination is invoked to determine what taxes are justly due; and that the court takes time for the examination and consideration of this question does not oust it of jurisdiction.

Another objection is to the entry on this delinquent tax list of taxes for the year 1889. It appears that on the 21st of September, 1891, the board of supervisors adopted a resolution, reciting in substance that the property described therein (which included the property of appellants) was duly assessed for the taxes of the year 1889; that it became delinquent; that a suit to recover the taxes was duly brought, in which it was finally adjudged that the publication was insufficient, and that the taxes could not be recovered in such action; and that they had not been paid, and directing that the property be reassessed, and the taxes for the year 1889 be relevied upon it, and **605** that the clerk insert such taxes on the tax roll for the current year. This was done under authority of an act of the legislature (Sess. Laws 1891, p. 146), which reads as follows:

"Sec. 1. Whenever any tax or assessment, or any part thereof, levied on real or personal property, whether heretofore or hereafter levied, shall have been set aside or determined to be illegal or void, or the collection thereof prevented by the judgment of any court, or wherever any tax collector shall have been prevented by injunction from collecting or returning any such tax or assessment in consequence of any irregularity or error in any of the proceedings in the assessment of such real or personal property, the levy of such tax, or the proceedings for its collection, or of any erroneous or imperfect description of such property, or of any omission to comply with any form or step required by law, or the including of any illegal addition with the lawful tax, or for any other cause; then, if the real or personal property was properly taxable or assessable, if it be not a proper case to collect by a resale of the property, such tax, or so much thereof as shall not have been collected and as may be taxable or assessable thereto, may be reassessed or relevied upon such property at any time within four years after such judgment or the dissolution of the injunction, if any was granted as above stated; and the proper county board of supervisors shall make an order directing the same to be reassessed upon such property; and the clerk of the board of supervisors of said county shall insert the same in the tax roll, opposite such description of said property, in a separate column, as an additional tax, and the same shall be collected as a part of the tax for the year when so placed on the tax roll, in the same manner and with like penalties as other taxes are collected."

No other evidence was offered by the territory than the delinquent tax list and the above resolution. It is contended that this evidence is insufficient; that the board of supervisors have no power to act except upon the existence of certain precedent conditions which must be affirmatively shown; and, further, that if this be not so, the recital in the resolution, of itself, shows that there was no sufficient warrant for charging these taxes against **606**



Digitized by Google

the property. This contention cannot be sustained. The delinquent tax list is made prima facie evidence that the taxes charged therein are due against the property. This means all the taxes; not only these for the current year, but those for past years, and this tax list was therefore prima facie evidence of the rightfulness of the charge against the property for the taxes of the prior year. If there were any valid reason why the property should not be subjected to those taxes it was the duty of the objectors to state the reason and give evidence in support thereof. While it may be, as counsel insist, that the section quoted is "unhappily worded" and "certainly crude," yet its meaning is obvious. The clauses "the collection thereof prevented by the judgment of any "court" and "if the real or personal property was properly taxable or assessable, if it be not a proper case to collect by a resale of the property, such tax . . . may be reassessed or relevied upon such property at any time within four years after such judgment," mean that whenever a suit has been instituted in a court, as provided by the statute heretofore referred to, and fails to become operative through the judgment of the court, then, if the property is properly taxable and no resale can be had without further action of the court, the board of supervisors may place the property upon the tax roll of the current year to be collected as other taxes of that year.

From the recital in this resolution, it appears that certain proceedings for the collection of taxes for 1889 failed by reason of the judgment of the court, declaring the publication insufficient. That put an end to the suit. It was not a defect in the process issued after and upon the judgment, which, perhaps, might be obviated by the issue of new process, but a failure of the court to render judgment because of prior defects. Under those circumstances the power and the duty of the board of supervisors to renew efforts to collect such taxes were given and imposed by this section, and the procedure provided was a reassessment and the placing of the taxes on the tax roll for the current year. This was done and nothing more; and no evidence was offered to show that those **607**]*taxes were not properly chargeable upon the property, or that they had ever been paid. Evidently it was the intention of the legislature, and a just intention, that no property should escape its proper share of the burden of taxation by means of any defect in the tax proceedings, and that, if there should happen to be such defect, preventing for the time being the collection of the taxes, steps might be taken in a subsequent year to place them again upon the tax roll and collect them.

Again, it is contended that the board of equalization raised the value of the property of appellants arbitrarily and without notice or evidence. But the testimony does not sustain this contention. The only evidence in respect to the matter was that of a witness, T. A. Judd, who testified that the board of equalization added 6 per cent to the value of stock cattle; but nowhere does it appear that this was done without proof of the value, or without due notice to all parties interested. We cannot assume, in the face of the prima facie evidence furnished by the delinquent tax list, that any official failed in his duty.

Another objection is that part of the property held to be subject to taxation was an unconfirmed Mexican land grant. It was admitted on the hearing in the district court that certain tracts of land in the list described were "each Mexican land grants, and that the same are not and have never been confirmed." Upon this it is strongly insisted that no title passes until confirmation; that it may yet be adjudged that these lands are the property of the United States, and that until that question is definitely decided the lands are not subject to taxation. The cases relied upon are *Central Colorado Improv. Co.* v. *Pueblo County Comrs.* 95 U. S. 259 [24: 495]; *Botiller* v. *Dominguez*, 130 U. S. 238 [32: 926]; and *Astiazaran* v. *Santa Rita Land & M. Co.* 148 U. S. 80 [37: 376]. In the first of these cases a Mexican land grant, covering some 500,000 acres, was confirmed by Congress to the extent of 11 square leagues, with a proviso that there should be a survey of those leagues, and that the confirmation should not become legally effective until the claimant had paid the cost thereof; and it was held, following *Kansas P. R. Co.* v. *Prescott*, 83 U. S. 16 Wall. 603 [21:373], and *Union P.* *R. Co. v. *Mc*-[**608** *Shane*, 89 U. S. 22 Wall. 444 [22:747], that until the survey fees had been paid the United States retained such an interest in the land as to exempt it from taxation. In the second the decision was that no title to land in California depending upon Spanish or Mexican grants could be of any validity until submitted to and confirmed by the board provided for that purpose under the act of March 3, 1851 (9 Stat. at L. 631), but that decision was based upon § 13 of the act, which expressly provided that "all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States." In the last of these cases it was held that under the acts of July 22, 1854 (10 Stat. at L. 308), and July 15, 1870 (16 Stat. at L. 304), a private claim to land in Arizona under a Mexican grant, which had been reported to Congress by the surveyor general of the territory, could not, before Congress had acted on that report, be contested in the courts of justice. In other words, the validity of such claim could only be determined in the particular tribunal which had been provided for such purpose.

It must be borne in mind that in the record before us these land grants are not otherwise described than as Mexican land grants. For aught that appears, they may have been "perfect grants," as they are sometimes called; that is, grants absolute and unconditional in form, specific in description of the land, passing a title from the Mexican government to the grantee as certain, definite, and unconditional as a patent to a similar tract from the United States; and not "imperfect grants;" that is, grants of so many acres or leagues of land within large exterior boundaries, and based upon conditions precedent, and creating only an inchoate though equitable title to some as yet indefinite and undescribed tract. These



Digitized by Google

perfect grants vest at least an equitable title in the owner. The general rule of international law is that a mere transfer of sovereignty over a territory has no effect upon vested rights of property therein; and whatever provision may be made in the treaty or by the law of the nation [609] receiving the *transfer for purposes of identification, such provision is not to be considered as tantamount to either a denial or a suspension of these vested rights. Certainly a party in possession of a tract of land under a perfect grant has a possessory and equitable right which is of value, and that is enough to sustain taxation. The revenue act of the territory (Ariz. Rev. Stat. § 2630) provides "that all property of every kind and nature whatsoever within this territory shall be subject to taxation," and § 2631 defines the term "real estate," as used in the act, "to mean and include the ownership of, or claim to, or possession of, or right of possession to, any land within the territory."

It has been held that possessory rights founded upon mere occupation and improvements upon government land, though invalid as against the government, may be made the subject of barter and sale, and may be treated under the laws of the state and territory as having all the attributes of property. *Lamb* v. *Davenport*, 85 U. S. 18 Wall. 307 [21: 759]; *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 168 [39: 931, 936].

In *Central P. R. Co.* v. *Nevada*, 162 U. S. 512 [40: 1057], it was decided that the possessory claim of the railroad company to lands within the state of Nevada was subject to taxation, notwithstanding the fact that the lands might thereafter be determined to be mineral lands, and so excluded from the operation of the railroad grant. See also *Northern P. R. Co.* v. *Patterson*, 154 U. S. 130, 132 [38: 934, 935]. Within the reasoning of these decisions, as it does not appear that these lands were not held by perfect grants under the laws of Mexico, or that they were not in the possession of the appellants, and covered with valuable improvements, it must be held that the objection to their taxation cannot be sustained.

Another objection is that a levy of 50 cents on the $100 included in these taxes was made solely for the purpose of raising money to pay interest on bonds, and it is insisted that the bonds for which the levy was made were void under the act of Congress (24 Stat. at L. 170), which prohibits a county from becoming indebted to an amount exceeding 4 per cent of the [610] value of the taxable property *within the county. The bonds, which were in excess of the 4 per cent, were issued on June 30, 1887, and subsequently to the passage of the act. But, as is shown in the testimony, they were funding bonds. For aught that appears, the real indebtedness of the county had been created long before the passage of the act, and these funding bonds may have been, and probably were, nothing but simply a change in the form of the indebtedness. Even if it were regarded as a new indebtedness, it would not follow that the whole series was invalid, for the circumstances of the transaction might, if fully disclosed, show that even as new indebtedness they were valid for a certain amount, that is, an amount equal to 4 per cent of the value of the county's taxable property. It cannot be that, in this indirect way, and without a full disclosure of all the facts concerning the indebtedness, the time when it arose and the circumstances under which it was created, a court can strike down a levy for the payment of interest on the bonds.

A final objection is that the assessment was grossly unfair, and that there was a fraudulent discrimination in favor of the Southern Pacific Railroad Company. It appears that the assessment of ordinary range cattle was fixed by the territorial board at $7.42, while one witness testified that their value was from $6 to $6.50 per head. It also appears that the territorial board valued the property at $6,811.14 per mile, while there was testimony that to duplicate the roadbed and track alone would cost from $21,000 to $22,000 per mile; and appellants offered to prove that the railroad company stated to the board that if the valuation was fixed at about the rate which was fixed it would pay the taxes; if much higher, it would resist collection in the courts; and that the board concluded that it was better to get some taxes out of the railroad company than none, and therefore fixed the valuation at the sum named.

There is nothing tending to show that the board, in fixing the value of cattle at $7.42, acted fraudulently or with any wrongful intent, or that that valuation was not the result of its deliberate judgment upon sufficient consideration and *abundant evidence, and it [611] would be strange, indeed, if an assessment could be set aside because a single witness is found whose testimony is that the valuation was excessive. No assessment could be sustained if it depended upon the fact that all parties thought the valuation placed by the assessing board was correct. Something more than an error of judgment must be shown; something indicating fraud or misconduct. Neither is the fact that an officer of the railroad company came before the board and declared its willingness to pay taxes on a certain valuation and its intention to resist the payment of taxes on any higher valuation sufficient to impute fraudulent conduct to the board, although it finally fixed the valuation at the sum named by the railroad company. It appears from the testimony of one of the members of the equalization board that it was guided largely by the valuation placed in other states and territories upon railroad property, and that from such valuation, as well as from that given by the railroad company, it made the assessment at something like the average of the valuation of railroads in the various states and territories named. It is unnecessary to determine whether this board erred in its judgment as to the value of this property, whether it would not have been better to have made further examination and taken testimony as to the cost of construction, present condition, etc. Matters of that kind are left largely to the discretion and judgment of the assessing and equalizing board, and if it has acted in good faith its judgment cannot be overthrown. *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421–435 [38: 1031–1039].

These are all the matters presented by counsel. We find in them nothing which justifies



Digitized by Google

us in disturbing *the judgment of the court below*, and it is *affirmed*.

---

612] FRANCISCO GONZALES y BORREGO, Antonio Gonzales y Borrego, Lauriano Alarid, and Patricio Valencia, *Appts.*,
v.
WILLIAM P. CUNNINGHAM, Sheriff of Santa Fé County, Territory of New Mexico.

(See S. C. Reporter's ed. 612-627.)

*Appeal from territorial court—habeas corpus—power of judges—amendment of record in criminal case—continuance of term—postponement of sentence.*

1. The right to appeal to this court from a final order made by the supreme court of a territory in a habeas corpus case involving the question of personal freedom, given by U. S. Rev. Stat. § 1909, is not repealed by the act of March 3, 1885, chap. 355, regulating appeals from the supreme courts of territories.
2. The rule that a writ of habeas corpus cannot be used to perform the office of a writ of error applies not only to original writs of habeas corpus issued by this court, but also on appeals to it from courts below in habeas corpus proceedings.
3. Section 1852 of the Compiled Laws of New Mexico of 1884, giving to any other justice of the supreme court power to perform the duties of any justice of that court who is absent from his district or incapacitated from acting, was within the power of the legislative assembly to enact, and is not inconsistent with the provision of the act of Congress of July 10, 1890, for the assignment of the judges to particular districts and their residence therein.
4. An amendment of the record in a criminal case in a territorial court, so as to show the arraignment and pleas of the defendant, may be ordered at a subsequent term pending an appeal from a conviction, and the order returned to the appellate court.
5. The discretion of the trial judge in continuing a special term to conclude the trial of a pending case, even if it is prolonged beyond the day fixed for a regular term, is not controlled by N. M. Comp. Laws 1884, §§ 552, 552a, which provide that a special term shall not conflict with a regular term of the court in any other county in the same judicial district.
6. Postponement of a sentence from a special term at which a verdict of guilty was rendered, to a regular term about two weeks later, which is made at the request of the defendant, who moves for a new trial and in arrest of judgment, does not render the proceedings void for want of jurisdiction.

[No. 643.]

*Submitted December 7, 1896. Decided December 21, 1896.*

APPEAL from an order of the Supreme Court of the Territory of New Mexico discharging a writ of habeas corpus and remanding the petitioners, the above-named appellants, to the custody of the sheriff, to be dealt with in pursuance of a judgment, conviction, and sentence of them for the murder of one Francisco Chaves in the District Court for the County of Santa Fé, New Mexico, in the First Judicial District of that Territory, which judgment was affirmed by the Supreme Court of the Territory. On motion to dismiss or affirm. *Order affirmed.*

See same case below, 46 Pac. 211, 349, 361.

Statement by Mr. Chief Justice **Fuller**:

Appellants were indicted at the June, A. D. 1894, term of the district court for the county of Santa Fé, New Mexico, in the first judicial district of that territory, for the murder of one Francisco Chaves. On the 4th of March, A. D. *1895, Hon. N. B. Laughlin, asso- [613 ciate justice of the supreme court of the territory of New Mexico, assigned to the first judicial district thereof, the regular December term of the court not having been held, convened "a special term of the district court for the county of Santa Fé in and for the first judicial district in and for the territory of New Mexico," to be begun on March 18, 1895, "for the term of four consecutive weeks, and for such further time as in the discretion of the judge of said court may be deemed proper and necessary for the disposition of any business now pending in said court or that may come before it in the usual course of business of said court and as provided by law."

The indictment coming on for trial, April 23, 1895, the following order was entered:

"Now comes the said plaintiff, by her attorney, J. H. Crist, Esquire, and the said defendants come in their own proper person, attended by their counsel, Catron & Spiess, and the judge of the court, Honorable N. B. Laughlin, considering himself disqualified from presiding at the trial of this cause owing to the fact of his having been connected with the prosecution herein previous to his appointment as judge, resigns the bench to the Honorable H. B. Hamilton, associate justice of the supreme court of the territory of New Mexico and judge of the fifth judicial district court thereof; thereupon the said district attorney on behalf of said territory, and T. B. Catron, Esquire, on behalf of said defendants, agree that no objections shall be hereafter raised in case the Honorable N. B. Laughlin remains within this judicial district during the trial of this cause, and thereupon, a jury not having been obtained for the trial of this cause, the jurors already called are placed in the custody of the sheriff of the county of Santa Fé until to-morrow morning at 10 o'clock."

The trial of the case, commencing on that day, continued until May 29, 1895, when the jury found the defendants guilty as charged in the indictment, and, motions in arrest of judgment and for new trial having been submitted and denied, judgment was entered on

---

NOTE.—*As to review, by United States Supreme Court, of territorial decisions; extent and manner of; distinction between an appeal and a writ of error*,—see note to Miners' Bank v. Iowa, 13: 867.

*As to when habeas corpus may issue, and when not; and from what courts, and by what judges; what may be inquired into by writ of*,—see note to United States v. Hamilton, 1: 490.

*As to what questions may be considered on habeas corpus*, see note to *Ex parte* Carll, 27: 288.

*As to suspension of writ of habeas corpus*, see note to Luther v. Borden, 12: 581.



Digitized by Google

the verdict, and defendants sentenced to be executed. To review this judgment and sen-[614]tence *defendants sued out a writ of error from the supreme court of the territory, and the judgment was affirmed September 1, 1896. 46 Pac. 349. The order of affirmance was set aside September 4, and a rehearing granted, and thereupon the territory suggested diminution of the record and prayed for a certiorari, which was issued. On the 9th of September, Judge Laughlin convened a special term of the district court in and for the county of Santa Fé, to be begun September 21, for the term of two consecutive weeks, or such further time as might be deemed necessary, "for the purpose of hearing and determining all causes that may be pending in said court, both civil and criminal, and any business pending in said court or that may come before it in the usual course of business of said court will be taken up and acted upon and disposed of in the same manner as at a regular term of said court and as provided by law."

On September 22, 1896, in the said special term, Judge Hamilton presiding, the motion of the territory of New Mexico for an order directing the clerk "to make a proper and sufficient entry in the records of the proceedings of this court had on the 23d day of April, 1895, of the arraignment in said court at said time of the said defendants above named, upon the indictment in said cause, and of their respective pleas of not guilty thereto," came on to be heard, and it appearing to the court from evidence adduced, the recollection of the presiding judge, and certain notes and memoranda deposited with the clerk in pursuance of law, that the record "is not a full and correct record of the proceedings had in said court upon said date in said cause," in that the record failed to show the arraignment of the defendants and their respective pleas of not guilty, it was ordered "that the said proceedings be entered now upon the records of this court in this cause as of the 23d day of April, 1895, according to the facts thereof;" and the arraignment and pleas were set forth in said order. This order, together with the order convening the special term at which it was entered, having been returned to the supreme court of the territory, that court on September 24, 1896, the cause coming on to be heard [615]*on the rehearing, "and upon the amended record," again affirmed the judgment and sentence of the district court, and fixed a day of execution. 46 Pac. 361. Thereupon the defendants, plaintiffs in error, on the same day filed a petition in the supreme court of the territory of New Mexico for a writ of habeas corpus, alleging, among other things, that they were unlawfully restrained of their liberty pursuant to the judgment of the district court of the first judicial district of New Mexico sitting within the county of Santa Fé, inasmuch as the district court was without jurisdiction to render the judgment, the verdict and judgment thereon being *coram non judice*, because the special term of the district court at which they were rendered overreached and conflicted with the regular terms of the court; the record did not show that the defendants had been arraigned and the amendment was improperly made; the judge of the fifth judicial district court had no power or authority to preside over the first judicial district court, and that his acts, while so presiding, were absolutely null and void. The writ of habeas corpus was issued, and on consideration of the sheriff's return to the writ, and petitioners' answer thereto, it was ordered that the writ be discharged and the petitioners remanded to custody to be dealt with in pursuance of the judgment, conviction, and sentence. From this order petitioners prayed an appeal, which was denied for reasons then stated. 46 Pac. 211. Subsequently an appeal was allowed by one of the justices of this court.

*Messrs.* **H. L. Warren, Holmes Conrad,** Solicitor General, and *John P. Victory*, Solicitor General for the Territory of New Mexico, for appellee, in favor of motion to dismiss or affirm.

*Messrs.* **Thomas B. Catron, Samuel F. Phillips,** and **Frederic D. McKenney,** for appellants, in opposition to motion.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This is a motion to dismiss the appeal on the ground that *appeals will not lie to this [616 court from final orders of the supreme courts of the territories on habeas corpus; and a motion in the alternative to affirm the final order sought to be reviewed because so manifestly correct that the appeal must be regarded as taken for delay only.

In *Cross* v. *Burke*, 146 U. S. 82 [36: 896], it was held that we had no jurisdiction over the judgments of the supreme court of the District of Columbia in this class of cases. The statutes in relation to habeas corpus were there reviewed, and it is not necessary to go over them again in detail.

By U. S. Rev. Stat. § 763, it was provided that an appeal to the circuit court might be taken from decisions on habeas corpus: (1) In the case of any person alleged to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States; (2) in the case of the subjects or citizens of foreign states, when in custody, as therein set forth. By § 764 an appeal from the circuit court to this court might be taken in "the cases described in the last clause of the preceding section."

Section 705 of the Revised Statutes reads: "The final judgment or decree of the supreme court of the District of Columbia, in any case where the matter in dispute, exclusive of costs, exceeds the value of $1,000, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same manner and under the same regulations as are provided in cases of writs of error on judgments, or appeals from decrees rendered in a circuit court."

Section 846 of the Revised Statutes of the District of Columbia was as follows: "Any final judgment, order, or decree of the supreme court of the District may be re examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same cases and in like manner as provided by law in reference to the final judg-



Digitized by Google

ments, orders, and decrees of the circuit courts of the United States."

On February 25, 1879, an act was passed which provided: "The final judgment or de-[617 cree of the supreme court of the *District of Columbia in any case where the matter in dispute, exclusive of costs, exceeds the value of $2,500, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same manner and under the same regulations as are provided in cases of writs of error on judgments or appeals from decrees rendered in a circuit court." 20 Stat. at L. 320, chap. 99, § 4.

By act of Congress of March 3, 1885 (23 Stat. at L. 437, chap. 353), U. S. Rev. Stat. § 764, was so amended as to remove the restriction to the 2d clause of § 763, and restore the appellate jurisdiction of this court from decisions of the circuit courts in habeas corpus cases as it had existed prior to the passage of the act of March 27, 1868. 15 Stat. at L. 44, chap. 34. But this did not have that effect as to judgments of the supreme court of the District of Columbia in those cases for the reasons given in *Re Heath*, 144 U. S. 92 [36: 358], and *Cross* v. *Burke*, 146 U. S. 82 [36: 896].

On the same 3d of March, A. D. 1885, Congress passed an act "Regulating Appeals from the supreme court of the District of Columbia and the Supreme Courts of the Several Territories." 23 Stat. at L. 443, chap. 355. The 1st section of this act provided "that no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of $5,000;" and the 2d section, that the 1st section should not apply to any case "wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute." We have repeatedly decided that this act did not apply, in either section, to any criminal case, and that it was only applicable to judgments and decrees in suits at law or in equity in which there was a pecuniary [618 matter in dispute. *Hence, that, as it was well settled that a proceeding in habeas corpus was a civil, and not a criminal, proceeding, and was only availed of to assert the civil right of personal liberty, the matter in dispute had no money value, and an appeal would not lie. *Cross* v. *Burke*, 146 U. S. 82 [36: 896]; *Farnsworth* v. *Montana*, 129 U. S. 104 [32: 616]; *United States* v. *Sanges*, 144 U. S. 320 [36: 449]; *Washington & G. R. Co.* v. *District of Columbia*, 146 U. S. 227 [36: 951]; *Ex parte Lennon*, 150 U. S. 395, 397 [37: 1120, 1121]; *Re Chapman*, 156 U. S. 211, 215 [39: 401, 402]; *Ex parte Belt*, 159 U. S. 95, 100 [40: 88, 90]; *Chapman* v. *United States*, 164 U. S. 436 [*ante*, 504]; *Perrine* v. *Slack*, 164 U. S. 452 [*ante*, 510].

The supreme court of New Mexico declined to allow an appeal in this case because of the rule laid down in *Cross* v. *Burke* and in *Ex parte Lennon*, *supra*, and it may be admitted that the view that an appeal would not lie might well have been entertained. But we think that the legislation in respect of the review of the final orders of the territorial supreme courts on habeas corpus so far differs from that in respect of the judgments of the courts of the District of Columbia that a different rule applies.

It will be perceived that the revision of the final judgments or decrees of the supreme court of the District depended on the provision that they should be so re-examinable in the same cases and in like manner as the final judgments of the circuit courts of the United States, and that there was no special provision in relation to the review of final orders of such courts on habeas corpus.

Sections 702 and 1909 of the Revised Statutes are as follows:

"Sec. 702. The final judgments and decrees of the supreme court of any territory, except the territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party, or of other competent witnesses, exceeds $1,000, may be reviewed and reversed or affirmed in the supreme court, upon writ of error or appeal in the same manner and under the same regulations as the final judgments and decrees of a circuit court."

*"Sec. 1909. Writs of error and appeals [619 from the final decisions of the supreme court of either of the territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana, and Wyoming, shall be allowed to the Supreme Court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by the oath of either party, or of other competent witnesses, exceeds $1,000, except that a writ of error or appeal shall be allowed to the Supreme Court of the United States from the decision of the supreme courts created by this title, or of any judge thereof, or of the district courts created by this title, or of any judge thereof, upon writs of habeas corpus involving the question of personal freedom."

This section was one of those under title 23, *The Territories*, and the exception was brought forward from § 10 of the organic law of New Mexico, approved September 9, 1850. 9 Stat. at L. 446, 449, chap. 49.

As to the supreme court of the District of Columbia, its final judgments, orders, and decrees were reviewable by this court on writ of error or appeal by U. S. Rev. Stat. § 705, and U. S. Rev. Stat. for D. C. § 846, in the same cases and in like manner as provided by law in reference to the final judgments, orders, and decrees of the circuit courts of the United States, and there was no mention of final orders on habeas corpus; but as to the supreme courts of the territories, the right of appeal in habeas corpus was given in addition by the special provision of U. S. Rev. Stat. § 1909. When the Revised Statutes and the Revised Statutes of the District were approved, both on the same day, June 22, 1874, appeals could not be taken from the decisions of circuit courts on habeas corpus except in the instance of the subjects or citizens of foreign states; and the



Digitized by Google

act of March 3, 1885 (23 Stat. at L. 437, chap. 353), restoring the appellate jurisdiction of this court in respect of final decisions of the circuit courts on habeas corpus in cases of persons al-
620]leged to be restrained of their liberty *in violation of the Constitution or any law or treaty of the United States, did not operate to give the same right of appeal to the courts of the District of Columbia. And then the second act of March 3, 1885 (23 Stat. at L. 443, chap. 355), came in to furnish the exclusive rule as to appeals and writs of error to review the final judgments and decrees of the courts of the District. And this would have been equally true as to the courts of the territories if jurisdiction had depended solely on U. S. Rev. Stat. § 702; but under U. S. Rev. Stat. § 1909, an appeal would lie to this court from the decisions of the territorial supreme courts on habeas corpus when it would not lie from circuit courts or courts of the District of Columbia in like case, and the question on this record as to the right of appeal is whether Congress intended to repeal that special provision as to final orders on habeas corpus by including the supreme courts of the territories in the act of March 3, 1885 (23 Stat. at L. 443, chap. 355). The intention to do so is not expressed, and repeals by implication are not favored. The act covered substantially the entire ground as to the District of Columbia as the statutes stood, but while it might be fairly argued that it did so as to the territories, it does not necessarily follow that the exception in respect of final orders on habeas corpus was designed to be affected. The act has its obvious field of operation without being assumed to be in every respect a substitute for the earlier law in relation to the territories, and since the last clause of U. S. Rev. Stat. § 1909, was directed to a special object and applicable to particular cases, we think it may properly be held that the act of March 3, 1885, had only general cases in view, and that it was not intended to do away with the special provision. Indeed, it was distinctly ruled in *Ex parte Snow*, 120 U. S. 274 [30: 658], that an appeal would lie under U. S. Rev. Stat. § 1909, from a final order entered in 1886 on habeas corpus by the supreme court of the territory of Utah; and this notwithstanding the act of March 3, 1885 (23 Stat. at L. 443, chap. 355), which was quoted and referred to in *Snow* v. *United States*, 118 U. S. 346 [30: 207]. Jurisdiction was also entertained of such an appeal in *Ex parte Nielsen*, 131 U. S. 176 [33: 118], from a final order of a district court of the territory of Utah and in *Delgado* v.
621]*Chavés*, 140 *U. S. 586 [35: 578], from a final order of a district court of New Mexico.

This result is not affected by the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517). *Shute* v. *Keyser*, 149 U. S. 649 [37: 884]; *Folsom* v. *United States*, 160 U. S. 121 [40: 363]; *Ex parte Lennon*, 150 U. S. 393 [37: 1120]; *Re Heath*, 144 U. S. 92 [36: 358].

But although the motion to dismiss for want of jurisdiction will be overruled, we are of opinion that the motion to affirm must be sustained. The general rule is well established that a writ of habeas corpus cannot be used to perform the office of a writ of error, and that this doctrine applies, not only to original writs of habeas corpus issued by this court, but on appeals to it from courts below in habeas corpus proceedings. *Re Schneider*, 148 U. S. 162 [37: 406]; *Benson* v. *McMahon*, 127 U. S. 457, 461, 462 [32: 234, 236]; *Stevens* v. *Fuller*, 136 U. S. 468, 478 [34: 461, 463].

The contention here is that the proceedings before Judge Hamilton were *coram non judice* and void because, being the member of the supreme court assigned to the fifth district, he could not exercise judicial power in the first district.

By U. S. Rev. Stat. § 1851, it was provided that "the legislative powers of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

By U. S. Rev. Stat. § 1865, that "every territory shall be divided into three judicial districts; and a district court shall be held in each district of a territory by one of the justices of the supreme court, at such time and place as may be prescribed by law, and each judge, after assignment, shall reside in the district to which he is assigned."

By U. S. Rev. Stat. § 1874, that "the judges of the supreme court of each territory are authorized to hold court within their respective districts, in the counties wherein, by the laws of the territory, courts have been or may be established, for the purpose of hearing and determining all matters and causes except those in which the United States is a party."

Section 1907 provided that "the judicial power in New Mexico, Utah, Washington, Colorado, Dakota, Idaho, *Montana, and[622 Wyoming shall be vested in a supreme court, district courts, probate courts, and in justices of the peace."

These provisions, *mutatis mutandis*, were contained in the organic law of New Mexico.

The number of judges of that territory having been raised to five, it was provided by an act of July 10, 1890 (26 Stat. at L. 226, chap. 665): "Sec. 3. That the said territory shall be divided into five judicial districts, and a district court shall be held in each district by one of the justices of the supreme court, at such time and place as is or may be prescribed by law. Each judge, after assignment, shall reside in the district to which he is assigned. Sec. 4. That the present chief justice and his associates are hereby vested with power and authority, and they are hereby directed to divide said territory into five judicial districts, and make such assignment of the judges provided for in the 1st section of this act as shall in their judgment be meet and proper."

Section 1852 of the Compiled Laws of New Mexico of 1884 is as follows: "When any justice of the supreme court shall be absent from his district, or shall be in any manner incapacitated from acting or performing any of his duties of judge or chancellor, in his district, or from holding court therein, any other justice of the supreme court may perform all such duties, hear and determine all petitions, motions, demurrers, grant all rules and interlocutory orders and decrees, as also all extraordinary writs in said district."

It appears to us that this enactment was within the power of the legislative assembly under the Revised Statutes, and that it is not



Digitized by Google

inconsistent with the provision for the assignment of the judges to particular districts and their residence therein.

By the organic act and the Revised Statutes, the whole of the judicial power of the territory was vested in the supreme court, district and probate courts, and justices of the peace; and the supreme court and district courts possessed common-law and chancery jurisdiction. The supreme court of the territory held that the judicial power, which was thus vested in plenary terms in the district courts, was to be [623] exercised in *each district "by one of the justices of the supreme court," and that the organic law did not require that it should be exercised by any particular one of the justices; that while for the convenience of the public it was provided that a justice should be assigned to each district and reside therein, there was no express or implied prohibition upon any judge against exercising the power in any district other than the one to which he had been assigned; and that there was nothing in the language of the provision requiring such a construction as would confine the exercise of the power to the particular justice assigned to a district when he might be otherwise incapacitated. 46 Pac. 363. We concur in these views, and are unable to perceive any want of jurisdiction on the part of the district court in the proceedings had against petitioners, or any violation of the Constitution or laws of the United States in that regard.

And this disposes of the objection that the amendment of the record so as to show the arraignment and pleas of defendants was improvidently made. Jurisdiction existed, and the action of the district court and its recognition by the supreme court were in accordance with the rule as to entries *nunc pro tunc*. *Wight* v. *Nicholson*, 134 U. S. 136 [33: 865]; *United States* v. *Vigil*, 77 U. S. 10 Wall. 423 [19: 954].

It is insisted, however, that jurisdiction to render the judgment was lacking because of the expiration of the special term or its termination by conflict with the regular terms of the district court before the trial was concluded.

The sections of the Compiled Laws of New Mexico of 1884 bearing on this subject and the 1st section of the territorial act of February 22, 1893 (N. M. Laws 1893, chap. 34, p. 51), are given in the margin.†

*These Compiled Laws were prepared [624 by a commission authorized to make "a careful and accurate compilation of all the laws, general, local, and private, which shall be in force on the 5th day of May, 1884," and the commissioners were careful, as they say in the preface to their work, to avoid "making changes in any original law." The compilation of general laws embraced the Revision of 1865 and the Session Laws thereafter. Section 553 was taken from § 4 of chapter 18 of the Revised Laws of 1865, the chapter embodying the previous laws of January 13, 1862. Section 522 was § 3 of chapter 26 of the laws of 1874, approved January 3, and § 552*a* was § 3 of chapter 27 of the laws of 1874, approved January 6. N. M. Laws 1874, pp. 47, 49. The compilation of 1884 was published in accordance with the act authorizing it to be made.

June 14, 1858, Congress passed an act (carried forward as § 1874 of the Revised Statutes) providing "that the judges of the supreme court of each territory of the United States, are hereby authorized to hold court within their respective districts, in the counties wherein, by the laws of said territories, courts *have been or may be established, for the [625 purpose of hearing and determining all matters and causes, except those in which the United States is a party: *Provided*, That the expenses thereof shall be paid by the territory, or by the counties in which said courts may be held, and the United States shall in no case be chargeable therewith." 11 Stat. at L. 366, chap. 166. Accordingly terms of court in the several counties were duly provided for by the territorial legislature, and these terms in the counties in the first judicial district were fixed by the 1st section of the territorial act of February 22, 1893.

By other sections than those before given, it was provided that district courts in the several counties in which they might be held should have power and jurisdiction of all criminal cases that should not otherwise be provided for by law; of all criminal cases that might originate in the several counties, which according to law belong to the district courts, or that might be presented by indictment, information, or appeal; and that the costs, charges, and expenses of holding and maintaining the district courts and the costs in causes determined against the territory should

† "Sec. 543. The terms of the district courts shall be held in the several counties of this territory, beginning at the times hereinafter fixed and continuing until adjourned by order of the court. . . ."

"Sec. 551. Whenever any regular term of the district court for any county in this territory shall for any cause fail to be held, the judge of the district in which such failure shall have taken place, or, in the absence of any such resident judge, then any district judge in this territory, if he deem it advisable and necessary to hold a special term of said court for such county, may order a special term to be held at the court-house of said county at a certain time to be specified in said order, which shall be made in writing, and filed with the clerk of such district court, and a copy thereof posted up at the court-house door of the said county at least ten days previous to the time specified for holding said special term.

"Sec. 552. The respective district judges are hereby authorized at any time to hold special terms of the district court in any county of their judicial districts, when a term thereof in said county may have failed: *Provided*, Said special term shall not conflict with a term of said district court in any other county in the same judicial district. Said terms to be called in the same manner now provided by law for the holding of special terms of the district courts in this territory.

"Sec. 552*a*. When in the discretion of the judge of any district court a furtherance of justice may require it, a special term of the district court may be held in any county of his district; which said special term may be called in the same manner now provided by law for the calling of special terms, and any business at the time pending in said court, or that may come before it in the usual course of business of the court, may be taken up and acted upon and disposed of in the same manner as at a regular term of said court.

"Sec. 553. Any special term of the district court that may be ordered under the provisions of this act shall be held for the purpose of hearing and determining all causes that may be depending in said court, both civil and criminal, and may continue in session the same length of time that is allotted to the regular term of court for such county and no longer."



Digitized by Google

be paid by the territory. N. M. Comp. Laws, §§ 531, 532, 540.

626]*By § 20 of chapter 61 of the Acts of 1893 the respective counties of the territory were required to provide for the expenses of the district courts by levy of taxes as therein prescribed. N. M. Laws 1893, p. 108.

The supreme court of the territory held that the requirement that the respective counties should provide for the expenses of their district courts under this section, which we have not felt called upon to set forth *in extenso*, practically inhibited terms in counties in which there were no funds, and declared that it had been a frequent consequence of this system that courts could not be and were not held in some of the counties at the time fixed by the statute. The laws of New Mexico contained the usual provision for adjournment of terms to terms in course on the nonattendance of the judge (§ 537), and it was not contended here that in fact regular terms of the district court were held in the county of San Juan in April, in the county of Rio Arriba in May, and in the county of Taos in May, while the special term was in session. From the various provisions of the acts referred to, it appears that no specific duration of either regular or special terms was prescribed by law, but that they were subject, when lawfully commenced, to be continued until adjourned by order of court, and that therefore they could not be necessarily determined by the advent of the particular days designated for the commencement of regular terms; and that special terms might be ordered when regular terms failed to be held, and also whenever in the discretion of the judge of any district court a furtherance of justice required it.

Under § 552, which was § 3 of chapter 26 of the Laws of 1874, when special terms were held because the regular term had failed, it was provided that any such special term should not conflict with the regular term in any other county in the same judicial district, that is, that it should not be so called as to produce a conflict or be held in actual conflict; while by § 3 of chapter 27 of the Laws of 1874, being § 552*a*, no specific limitations were imposed in respect of a special term called thereunder. There was nothing in any of these provisions which 627]controlled the discretion*of the trial judge in continuing any special term he may have been holding until a pending case was concluded, and nothing which operated to invalidate the proceedings of such special term because prolonged beyond the day fixed for a regular term. Jurisdiction did not depend on the stroke of the clock. *Election Cases*, 65 Pa. 34; *Briceland* v. *Com.* 74 Pa. 463; *Mechanics' Bank* v. *Withers*, 19 U. S. 6 Wheat. 106 [5: 217]; *Maish* v. *Arizona*, 164 U. S. 599 [*ante*, 567].

This trial was commenced on April 23, 1895, which was, as the record declared, the 32d day of the special term, which had commenced March 18, and was concluded on May 29, 1895, the 63d day of said special term, by the return of a verdict of guilty. The motions for new trial and in arrest were denied, and the sentence pronounced on June 15, 1895, one of the days of the regular term of the district court, the postponement to that day having been granted on the request of defendants. Under these circumstances the proceedings in any view cannot be held void for want of jurisdiction. *McDowell* v. *United States*, 159 U. S. 596 [40: 271].

*Order affirmed.*

---

HENRY STARR, *Plff. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 627-632.)

*Warrant when properly signed—commissioner de facto—erroneous instruction.*

1. A warrant signed by a person as "Commissioner U. S. court" for a certain district is not inadmissible on the grounds that it does not purport to be issued by any officer authorized to issue a warrant, and that it is not issued by a commissioner of the circuit court.
2. A commissioner appointed by a district court having circuit-court powers, if continued as such by the circuit court afterwards established in that district, is an officer *de facto*, even if not expressly reappointed.
3. An instruction on a murder trial that flight raises a presumption of guilt and is a silent admission that defendant is unable or unwilling to face the case against him is erroneous.

[No. 389.]

*Submitted October 23, 1896. Decided January 4, 1897.*

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment convicting Henry Starr of the crime of murder. *Reversed*, and case remanded with directions for a new trial.

See same case, 153 U. S. 314 (38: 727).

The facts are stated in the opinion.

*Mr.* **A. H. Garland** for plaintiff in error.

*Mr.* **Holmes Conrad**, Solicitor General, for defendant in error.

---

"Sec. 557. It shall be the duty of the attorney general of this territory to attend all such special terms of the district court, having been duly notified thereof, or provide that someone learned in the law shall attend for him, and the said attorney general or his deputy shall be required to perform the same duties at such special term, as he is required by law to perform at the regular terms of the district court."

"An Act to Fix the Time of Holding the District Courts." Approved February 22, 1893.

"Sec. 1. The terms of the district court hereafter to be held in the counties of Santa Fé, San Juan, Rio Arriba, and Taos shall be held in said counties beginning at the times hereinafter fixed and continuing until adjourned by order of the court, to wit:

"In the county of San Juan, on the 3d Mondays in April and October.

"In the county of Rio Arriba, on the 1st Mondays in May and November.

"In the county of Taos, on the 3d Mondays in May and November.

"In the county of Santa Fé, on the 2d Mondays in June and December."

NOTE.—*As to acts of de facto officers, when valid*, see note to Hussey v. Smith, 25: 314.

*As to grant by officer presumed authorized*, see note to United States v. Percheman, 8: 604.

*In criminal case, right of prisoner to be present during his trial, and necessity of his being present; record must show that he was present*,—see note to Lewis v. United States, 36: 1011.



Digitized by Google

Mr. Justice White delivered the opinion of the court:

On a former trial for the crime of murder, the plaintiff in error was found guilty and sentenced, and the conviction was by this court reversed. *Starr* v. *United States*, 153 U. S. 614 [38 : 841]. The case is again here, in consequence of a second conviction, to review which a writ of error was sued out.

In the course of the first trial below the accused objected to the admissibility of a certain warrant. The matter was thus stated in the record:

The Court. If you want to urge this objection (*i. e.*, absence of a seal), I want to know the law you refer to. If you haven't got any law, say so. The court decides that the paper is competent, unless you deny the signature. What do you say as to the signature?

Mr. Cravens (of counsel for defendant). We do not deny that.

The Court. Mr. Stenographer, let the record show that the signature to this paper is admitted by counsel for the defendant to be the signature of Stephen Wheeler.

The Court (to counsel for defendant). Do you admit his office—that he is United States commissioner for the western district of Arkansas?

Mr. Cravens (of counsel for defendant). We do not deny he is a United States commissioner, but we simply make this point: In speaking as such commissioner he must speak with his seal. I am frank enough to state to the court that I am not entirely satisfied about our position myself, but I am under the impression that we are sustained by the law.

The Court. Mr. Stenographer, let the record show that it is admitted by the counsel for the defendant that Stephen Wheeler was a United States commissioner for the western [629] *district of Arkansas at the time of the issuance of this writ, and is now such commissioner, and the signature to this writ is his signature, but that defendant denies the authenticity of the writ because the commissioner's seal is not on it.

Mr. Cravens (of counsel for defendant). Yes, sir; that is the point we make on it, and it being admitted by the court we save an exception to its admission.

It was therefore apparent that the objection addressed itself solely to the want of a seal, and not only did not question the capacity of the officer by whom the warrant purported to be issued, but on the contrary expressly admitted it. Notwithstanding this fact when the case was previously here it was contended in argument that the court below erred in admitting the warrant, not only because it was without a seal, but because the officer by whom it was issued was without capacity to have done so. The question of the want of a seal was held to be untenable, but the frivolous attempt to predicate error because of the want of the capacity of the officer when such authority was admitted on the face of the record was deemed unworthy of notice, and was therefore ignored. On the second trial the admission of the warrant was again objected to as follows:

Mr. W. H. H. Clayton (of counsel for defendant). The ground of objection is, if your honor please, of course we make no objection to the fact that it has no seal, but we object to it because it does not purport to be issued by any officer authorized to issue a warrant of arrest. The warrant is signed "Stephen Wheeler, Commissioner U. S. Court, Western District of Arkansas." The statute of the United States on this subject gives a name to the commissioner who has a right to issue such warrant, and that name is "commissioner of the circuit court," and the statute says he shall be called by that name. Now, this writ is issued, not by a commissioner of the circuit court, but by a commissioner of the United States court, western district of Arkansas. We say there is no such officer as that who is authorized to issue such a writ. There are commissioners appointed by the district court who have no authority to issue writs, and commissioners of the court of claims have no such right. The commissioner who has the *right to [630] issue such a writ is designated by the statute as "commissioner of the circuit court," and the statute says that he shall be designated and called by that name. We submit that the writ is not in due form.

The overruling of this objection is assigned for error.

Passing consideration of the question whether the objections taken to the admissibility of the warrant on the second trial are not concluded by the decision on the previous writ of error, they are manifestly without merit.

The fact that the officer who issued the warrant affixed to his signature the words "Commissioner United States Court, Western District of Arkansas," did not affirmatively imply that he was not a commissioner of the circuit court of the United States for the western district of Arkansas. It is true that U. S. Rev. Stat. § 627, re-enacting the provisions of early statutes, provides that "each circuit court may appoint, in different parts of the district for which it is held, so many discreet persons as it may deem necessary, who shall be called 'commissioners of the circuit courts,' and shall exercise the powers which are or may be expressly conferred by law upon commissioners of circuit courts." But it is well known that the term "United States commissioner" is generally understood to mean a commissioner acting under the authority of U. S. Rev. Stat. § 627, and that the mere fact that a person signs himself as commissioner United States court does not imply that he is not a commissioner possessed of the authority conferred by the section just alluded to. The statute law itself contains instances where such commissioners are described in other than the express language of the section of the law which authorizes their appointment. Thus, in the act of June 1, 1872 (17 Stat. at L. 198, chap. 255, § 14), now U. S. Rev. Stat. §§ 1042, 5296, a poor convict seeking his discharge is authorized



Digitized by Google

to make application in writing "to any commissioner of the United States court in the district where he is imprisoned."

The recital in the body of the warrant that the commissioner was "appointed by the United States district court" did not imply that he was not a commissioner of the cir-
631]cuit court. *The district court for the western district of Arkansas was vested with the circuit court power. U. S. Rev. Stat. § 571. Whilst by the act of February 6, 1889 (25 Stat. at L. 665), a circuit court was established for the western district of Arkansas, it does not follow that the commissioners who were originally appointed by the district court, and who, after the creation of the circuit court, continued to be such by the approval of the court, were not commissioners thereof because primarily appointed by the district court. Clearly, the appointment of such officers being valid at the time they were made they were, in any view, if thereafter continued by the circuit court, *de facto* in the discharge of their duties even if their continuance was not evidenced by express reappointment. *McDowell* v. *United States*, 159 U. S. 596 [40: 271].

These views dispose also of the objection to the admissibility of the affidavit taken before the commissioner, as it is substantially predicated on grounds identical in reason with those made to the warrant.

All but one of the remaining assignments of error virtually depend upon or are connected with the question of the admissibility of the warrant and affidavit, and we deem it unnecessary to consider them as they will not be likely to arise on the new trial which the result of our consideration of another assignment of error makes it necessary to grant.

The instruction given by the trial judge to the jury upon the inferences to be drawn by them from flight was specifically objected to, and the objection was duly reserved. The instruction covered by this exception is as follows:

"The law says that a man is to be judged by his consciousness of the right or wrong of what he does, to some extent. If he flees from justice because of that act, if he goes to a distant country and is living under an assumed name because of that fact, the law says that is not in harmony with what innocent men do, and jurors have a right to consider it as an evidence of guilt, because he is an eyewitness to the occurrence; he knows how it did transpire; he is presumed to have a consciousness of that act, and therefore because he does abscond, because he does further become a fugitive from
632] justice, because *he goes to a distant state and is living under an assumed name, living so as to conceal himself, the law says you have a right to take that fact into consideration as one from which you may infer guilt, a presumption of fact, the law says, that is proper for the jury to take into account in passing upon the defendant's own conception of the act done by him. . . . It is impossible to deny that, logically as well as juridically, flight is always relevant evidence when offered by the prosecution, and that it is a silent admission by the defendant that he is unwilling or unable to face the case against him. It is in some sense, feeble or strong as the case may be, a confession, and it comes in with other incidents, the *corpus delicti* being proved, from which guilt may be cumulatively inferred."

The law on the subject of the weight to be given to the evidence of the flight of the accused thus stated by the trial court to the jury for their guidance is not only substantially similar, but, indeed, is identical with instructions heretofore held by this court to be fatally defective. *Alberty* v. *United States*, 162 U. S. 501, 502 [40: 1053]; *Hickory* v. *United States*, 160 U. S. 408 [40: 474]. It therefore differed from the language held not to contain reversible error in *Allen* v. *United States*, 164 U. S. 492. [*ante*, p. 174]. The error committed by the court doubtless resulted from the fact that the case was tried before the ruling in either the *Hickory Case* or the *Alberty Case* was announced.

*Judgment reversed* and case remanded, with directions to grant a new trial.

---

## *Re* ATLANTIC CITY RAILROAD COMPANY, *Petitioner*. [633

(See S. C. Reporter's ed. 633–634.)

*Mandamus, when not granted—objection to jurisdiction.*

1. Mandamus will not be granted to compel the circuit court of the United States to dismiss a suit for lack of jurisdiction of the defendant, and to vacate an order overruling a demurrer raising the question of jurisdiction, since, if a decree should pass against the defendant, he has his remedy by appeal.
2. An objection to the jurisdiction presented by filing a demurrer for the special and single purpose of raising it is not waived by answering to the merits when the demurrer is overruled.

*Submitted December 7, 1896. Decided January 4, 1897.*

APPLICATION for leave to file a petition for writ of mandamus to the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, commanding them to dismiss a suit brought by the Union Switch & Signal Company *et al.*, against the Atlantic City Railroad Company, *et al.*, for infringement of letters patent. *Denied.*

The facts are stated in the opinion.

*Mr.* **Wm. Houston Kenyon** for petitioner.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This is an application for leave to file a petition for a writ of mandamus. The petition states that the Atlantic City Railroad Company

NOTE.—*As to when mandamus will issue*, see note to M'Cluny v. Silliman, 4: 263.

*As to mandamus to control inferior courts; discretion*,—see note to *Ex parte* Morgan, 29: 135.



Digitized by Google

is a corporation created, organized, and existing under the laws of the state of New Jersey; that May 20, 1896, a bill in equity was filed by the Union Switch & Signal Company and the Fidelity Title & Trust Company, corporations organized and existing under the laws of Pennsylvania, against petitioner and Joseph S. Harris, its president, defendants, in the United States circuit court for the eastern district of Pennsylvania, for the alleged infringement of certain letters patent for improvements in electrical signaling apparatus; that July 6, 1896, petitioner appeared specially for the purpose of objecting to the jurisdiction of the court, and, on August 3, filed a demurrer raising the question, and on the same day defendant Harris also filed a demurrer to the bill of complaint; that petitioner's demurrer was overruled and defendant Harris was granted permission to withdraw his demurrer, if he so elected.

That by virtue of the order overruling the demurrer petitioner is required, "as it is advised and believes, to enter a general appearance by the 28th day of December, 1896, and file 634]* an answer by the 4th day of January, 1897, or within other reasonable time fixed by the court, or an interlocutory decree will be issued against it directing the issuance of an injunction against it and awarding damages and costs and an accounting." That petitioner has a defense on the merits which is an adequate and complete answer to the bill; "that it is advised and believes that it has no adequate remedy by appeal;" and "that if it enters a general appearance or files an answer in said case it will thereby and by that act and fact forever waive all objection to the jurisdiction of said court, and this court will be forever ousted of its jurisdiction to determine the jurisdiction of said court in said case, and that accordingly your petitioner has no adequate remedy unless this court will grant the mandamus as herein petitioned."

The prayer was for a writ of mandamus directed to the judges of the circuit court of the United States for the eastern district of Pennsylvania, commanding them to dismiss, "as against your petitioner," the bill of complaint in the suit, and "to vacate as against your petitioner, the said order of November 24, 1896, overruling the said demurrer of your petitioner, and to enter a decree to that effect, all as prayed for."

Copies of the bill of complaint, the special appearance, the demurrer, and of the order overruling the demurrer, and granting leave to withdraw the demurrer of Harris without prejudice, were annexed. The bill of complaint showed complainants to be corporations of Pennsylvania and citizens thereof; the defendant, the Atlantic City Railroad Company, to be a corporation and citizen of New Jersey, having its principal office at Philadelphia, and defendant Harris, its president, to be a citizen of Pennsylvania.

Petitioner's demurrer showed for cause "that it appears upon the face of said bill of complaint that this court has no jurisdiction over the person of this defendant, the Atlantic City Railroad Company, as it appears upon the face of the said bill of complaint that this defendant is not an inhabitant or citizen of the eastern district of Pennsylvania or *the [635 state of Pennsylvania, but is an inhabitant and citizen of the district and state of New Jersey."

The general power of the court to issue a writ of mandamus to an inferior court, to take jurisdiction of a cause when it refuses to do so, is settled by a long train of decisions; but mandamus only lies, as a general rule, where there is no other adequate remedy; nor can it be availed of as a writ of error. *Ex parte Pennsylvania Co.* 137 U. S. 451 [34: 738]; *Morrison* v. *District Court of U. S.* 147 U. S. 14 [37: 60]; *Ex parte Des Moines & M. R. Co.* 103 U. S. 794 [26: 461]; *Ex parte Baltimore & O. R. Co.* 108 U. S. 566 [27: 812].

In *Re Hohorst*, 150 U. S. 653 [37: 1211], the bill was filed in the circuit court of the United States for the southern district of New York against a corporation and certain other defendants, and was dismissed against the corporation for want of jurisdiction. From that order complainant took an appeal to this court, which was dismissed for want of jurisdiction because the order, not disposing of the case as to all the defendants, was not a final decree from which an appeal would lie. *Hohorst* v. *Hamburg-American Packet Co.* 148 U. S. 262 [37: 443]. Thereupon an application was made to this court for leave to file a petition for a writ of mandamus to the judges of the circuit court to take jurisdiction and to proceed against the company in the suit. Leave was granted and a rule to show cause entered thereon, upon the return to which the writ of mandamus was awarded.

In this case, however, the circuit court entertained jurisdiction and the petitioner has its remedy by appeal, if a decree should pass against it. The objection to the jurisdiction presented by filing the demurrer, for the special and single purpose of raising it, would not be waived by answering to the merits upon the demurrer being overruled. *Southern Pac. Co.* v. *Denton*, 146 U. S. 202 [36: 942].

To direct the exercise of jurisdiction is quite different from a mandate not to do so, and we think we should not interpose at this stage of the case in the manner desired.

*Leave denied.*

---

TEXAS & PACIFIC RAILWAY [636
COMPANY, *Plff. in Err.*,
*v.*
CHARLES MANTON, Admr. of Vic. Bloom, Deceased.

(See S. C. Reporter's ed., "*Texas & P. R. Co.* v. *Bloom's Admr.*, 636-644.)

*Action against receiver of railroad, when valid against the company—when company may be sued in assumpsit.*

1. An action for damages for personal injuries received by a passenger on a railroad in the hands of a receiver, brought against the receiver and the railroad company and pending after the restoration of the property to it by the receiver, is not cut off by failure to present and prosecute the claim by intervention in the receivership case

NOTE.—*As to powers and duties of receiver*, see note to Davis v. Gray, 21: 447.



Digitized by Google

under an order requiring such claims to be presented and prosecuted by a certain date or be barred, where the property was not judicially sold or a fund realized for distribution, but was restored by the receiver to the company enhanced in value from the earnings of the road far beyond the claim of plaintiff.

2. A railroad company which procures or acquiesces in the withdrawal of a receivership and the discharge of the receiver and the cancelation of his bond, and accepts the restoration of its road largely enhanced in value by betterments, may be sued in an action at law on a claim which was valid against the receiver, but not satisfied by him or by the court which discharged him,—at least when it does not claim that the amount of the betterments was less than the demand sued on.

[No. 88.]

*Argued and Submitted October 29, 1896. Decided January 4, 1897.*

IN ERROR to the United States Court of Appeals for the Fifth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for damages for personal injuries received by one Bloom, while traveling as a passenger on the Texas & Pacific Railway Company's road, in an action brought by said Bloom and continued by Charles Manton, administrator of said Bloom, against said company *et al.* *Affirmed.*

See same case below, 28 U. S. App. 143.

Statement by Mr. Justice **Shiras:**

In January, 1889, one Bloom, describing herself as a resident of Lamar county, Texas, brought an action in the district court of that county against the Texas & Pacific Railroad Company and John C. Brown, receiver of said company, claiming damages for personal injuries received while traveling as a passenger on said railroad. The railroad company and Brown, the receiver, respectively filed petitions for the removal of the suit into the circuit court of the United States for the eastern district of Texas. The district court refused to grant the removal, to which ruling the defendants duly excepted. Pending the making up of the issue, John C. Brown, the receiver, died. The trial resulted in a verdict and judgment in favor of the plaintiff for the sum of $6,000. The [637] cause was then *taken to the supreme court of Texas, where, for error of the district court in refusing the petition for removal, the judgment was reversed and the cause was remanded.

In June, 1893, the case came for trial in the circuit court of the United States, and the plaintiff recovered a verdict and judgment for the sum of $8,000, and, on a writ of error, that judgment was, on January 30, 1894, affirmed by the United States circuit court of appeals for the fifth circuit. 28 U. S. App. 143. The case was then brought on error to this court. The plaintiff Bloom having died, Charles Manton entered an appearance as her administrator.

*Messrs.* **David D. Duncan,** *Winslow S. Pierce,* and *John F. Dillon* for plaintiff in error.

*Messrs.* **James G. Dudley,** *A. H. Garland,* and *R. C. Garland* for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

The plaintiff's original petition in the district court of Lamar county disclosed that the injuries complained of were received in August, 1888, while the railroad was in the hands of John C. Brown, receiver, and alleged that the property of the Texas & Pacific Railway Company was placed in the hands of said John C. Brown as receiver at the instance of the said railroad company and for its own benefit, and for the purpose of avoiding its traffic liability in the carrying of passengers and freight. The petition further alleged that the property of the said railroad company was never sold by said receiver to pay its debts, and was never contemplated to be sold, and that the entire earnings and current receipts of the said railroad while in the hands of the receiver, amounting to more than $2,000,000, were applied to the payment of mortgage debts and in the betterment of the property of the company. It also alleged *that by an order made on Jan- [638 uary 2, 1889, by the United States circuit court for the eastern district of Louisiana, John C. Brown was directed to make delivery unto the said Texas & Pacific Railway Company of all property, funds, and assets in his hands as such receiver, and that he be directed to account to said company according to his account filed and approved up to June 1, 1888, and for all receipts and expenditures by him received and made since the said June 1, 1888, such delivery to be made as of October 31, 1888; and it was further ordered that said receiver be discharged on said October 31, 1888, from his receivership on payment of all costs legally taxed, and thereupon his bond vacated and canceled. The said order, a copy of which was attached as an exhibit to plaintiff's petition, contained the following further provisions:

"It is further ordered that said property, nevertheless, shall be delivered to and received by said Texas & Pacific Railway Company, subjected to and charged with all traffic liabilities due to connecting lines and all contracts for which said receiver is or might be held under or in any way liable, and subject also to any and all judgments which have heretofore been rendered in favor of interveners in this case, and which have not been paid, as well as to such judgments as may be hereafter rendered by the court in favor of interveners, while it retains the cases for their determination, or interveners now pending and undetermined, or which may be filed prior to February, 1889, together with needful expenses of defending said claims, and upon the condition that such liabilities and obligations of the receiver, when so recognized and adjudged, may be enforced against said property in the hands of said company or its assignees to the same extent they could have been enforced if said property had not been surrendered into the possession of said company and it was still in the hands of the court, and with the further condition that the court may, if needful for the protection of the receiver's obligations and liabilities so recognized by this court, assume possession of said property. The bills in these cases will be retained for the purpose of investigating such liabilities and obligations, and



Digitized by Google

639] *for such other purposes as may seem needful. It is ordered that all claims against the receiver as such, up to said October 31, 1888, be presented and prosecuted by intervention prior to February 1, 1889, and if not so presented by that date that the same be barred and shall not be a charge on the property of said company. It is further ordered that the said receiver advertise in a daily newspaper in New Orleans and in Dallas the fact of his said discharge and a notice to said claimants to make claim within the time aforesaid, to wit, before February 1, 1889, and that he post a printed notice of similar purport in the station houses of said railway."

The first contention on behalf of the plaintiff in error is that, as whatever claim plaintiff acquired by reason of her injury was one not against the defendant company but against the receiver operating the road at the time under the orders of the court appointing him, and as it was within the power of such court, on terminating the receivership, to make and provide for settlement of all claims of parties against such receiver growing out of his operation of the road, and as, in the present instance, by its order, the circuit court had made such provision by directing that all claims against the receiver should be presented and prosecuted by intervention prior to February 1, 1889, and that, if not so presented by that date, the same be barred and shall not be a charge on the property of said company, and that as the plaintiff did not so present or prosecute her claim, she was thereby precluded from maintaining an action against the company.

Undoubtedly, if this were a controversy between a party whose claim originated while a railroad was in the control of a receiver appointed during a foreclosure suit and a purchaser at a judicial sale decreed under that proceeding, the plaintiff's proposition would be a sound one. If the property sequestrated had gone to sale and a fund had been thus realized for distribution, then, upon notice appropriate to proceedings *in rem*, such a claimant would, in the absence of special and unusual circumstances, have been bound by the disposition so made.

But the present case is one in which no ju-
640]dicial sale was*made and no fund realized for distribution by final decree after notice to and a hearing of those having claims against the fund. It was not the ordinary case of a sale and purchase in which compliance with stipulated conditions forms part of the consideration, and in which the extent of the burdens assumed is defined. Here the railroad and its appurtenances, whose value was largely enhanced during the pendency of the receivership, were returned to the possession of the railroad company; and while it was proper for the court, in order to protect its receiver, to make an order for those who had claims against him to bring them forward for disposition, it by no means follows that the company took back its property free from all claims that may have originated during the receivership. Such might be the case if the claim originated in some personal delinquency of the receiver for which he and his bondsmen could be held responsible. But where the claim was incidental to the ordinary management of the railroad, not attributable to personal misconduct of the receiver, and where the court which had appointed the receiver had not been put in possession of a fund by a foreclosure sale, but had, at the request of the company and its mortgage creditors, restored its property to the railroad company while such a claim was pending, we are unable to concede that an order of the kind that was made in this case precluded the plaintiff from enforcing her claim. There is present no element of estoppel in favor of the railroad company; for the plaintiff's judgment, obtained after a trial in which the company's defense on the merits was fully heard, would have to be paid, and it would be a matter of indifference, so far as the pecuniary result is concerned, whether the claim was satisfied by the action of the court when discharging its receiver, or by remedial proceedings against the company after the foreclosure suit had been abandoned.

We think the order in question, fairly interpreted, meant that the court, when about to release the receiver and his bondsmen by a determination of the foreclosure proceedings and a discharge of the receiver, gave an opportunity to those who had claims to present them; but that, after February 1, *1889, those [641 who had not intervened would cease to be entitled to resort to the circuit court in the equity suit, and would be remitted to such other remedies as might be within their reach.

Such was the view of the nature of this order that was taken by this court in the case of *Texas & P. R. Co.* v. *Johnson*, 151 U. S. 81 [38: 81], which was a case involving the same proceedings which are now under consideration.

It was indisputably shown at the trial, by the testimony of the receiver himself, that the earnings of the railroad while operated by him largely exceeded the expenses, and that a very large sum was applied by him to improvements and new equipments, so that "the road was turned over to the company in far better condition and more valuable by far than when placed in the hands of the receiver."

Such a state of facts certainly discloses an equitable claim against the railroad on behalf of the plaintiff below.

But the very fact that the claim is an equitable one is made the basis of another contention by the plaintiff in error, and which is thus expressed in the second assignment of error:

"The circuit court of appeals erred in its judgment affirming the judgment of the circuit court in overruling the general demurrer presented by the plaintiff in error to the petition of the defendant in error, for the reason that the matters alleged in said petition, if true as stated, disclose no cause of action at common law against plaintiff in error, nor any personal liability on the part of plaintiff in error to defendant in error such as could support an action at common law in said court; but, if any cause of action or right in defendant in error was shown by such pleading, it was of an equitable nature—to wit, an equitable lien on the property of plaintiff in error—and defendant in error's remedy was an equitable one against such property, and not by a suit at common law for a personal judgment against the plain-



Digitized by Google

tiff in error, and, because the right asserted by defendant in error, and her remedies therefor could only be adjudicated and plead upon the equity side of said court and by an appeal to said court sitting as a court of chancery."

In sustaining this assignment, the counsel for 642] the plaintiff *in error complain of what is called a misapprehension by the circuit court of appeals of the case of *Texas & P. R. Co.* v. *Johnson*, 151 U. S. 81 [38-81], and they seek to distinguish that from the present case by calling attention to the fact that the former case came here by way of a writ of error to the supreme court of the state of Texas, and to the other fact that there was evidence in the *Johnson Case* tending to show that the receiver was appointed at the instigation of the railway company and in order to enable it to improve its property by making repairs to its track and additions to its rolling stock by using therefor the earnings of the company during the receivership.

It is true that, in meeting the argument that a personal judgment could not be rendered against the railway company because it was not liable for acts committed by the receiver, this court said in the *Johnson Case* that such a question was "one of general law, and for the state court to pass upon." Nevertheless, this court, in reviewing the decision of the state court, said:

"In the view of that court a railway company might be held directly liable when a receiver is appointed in an amicable suit at the instigation of the company and for the company's own purposes, and, these purposes being accomplished, the property is returned to its owner, the rights of no third persons or purchasers intervening, upon the ground that the acts of the receiver might well be regarded as the acts of its own servant, rather than those of an officer of the court, which, under such circumstances, he would only be *sub modo*. But as the court did not feel authorized to entertain a conclusion which might carry the implication that this receivership would have been created or continued, although its object had only been to place the property temporarily beyond the reach of creditors until it could be augmented in value by improvements made from earnings under the protection of the court, that rule was not applied in this case. The company was held liable upon the distinct ground that the earnings of the road were subject to the payment of claims for damages, and that as, in this instance, such earnings, to an ex-643]tent far greater than sufficient to pay *the plaintiff, had been diverted into betterments, of which the company had the benefit, it must respond directly for the claim. This was so by reason of the statute (Tex. Laws 1887, chap. 131, p. 120, § 6) and, irrespective of statute, on equitable principles applicable under the facts."

But although this court, in the *Johnson Case*, chose to rest its decision upon the well-settled ground that the decision of the state court in the construction of state statutes is binding on this court, no disapproval was suggested or implied of the reasoning of the state court. And with a similar question now before us, in a case brought from a circuit court of the United States, we see no reason to reach a different conclusion.

It will be observed that in this branch of the case the plaintiff in error is conceding that the plaintiff below had a good cause of action against the receiver; that she was not bound to prosecute her claim as part of the foreclosure proceedings; and that the earnings of the railroad, to an amount largely exceeding the claim, had been diverted by the receiver to betterments. But the contention is that the plaintiff's remedy in such circumstances was by proceedings in equity. This contention is founded on the proposition that the plaintiff's right to a remedy is solely upon the ground that the income of the road while in the hands of the receiver had been applied to the improvement of the road, and it is argued that such a remedy cannot go beyond the amount of the income so applied, and that the plaintiff must therefore follow the fund in equity, and is not entitled to sue and obtain a personal judgment against the holder of the fund, that is, the railroad company in possession of the railroad increased in value by the betterments.

There is a general principle that a party having a right to resort to a fund in the hands of a receiver or trustee may have the aid of a court of equity in following that fund, where it has been improperly mingled with other funds, or has been invested in property in which third persons have an interest. That is a rule devised for the benefit of the party invoking it, but cannot be applied, as we understand the facts of this case, to the detriment of the defendant in error. The railroad *company did not, at the trial, pretend[644 that the amount of the benefits received by reason of the betterments did not reach the amount of the plaintiff's claim—indeed, the receiver's testimony showed that the betterments amounted to several hundred thousands of dollars—but the company claimed then, as they do now, that the plaintiff's only remedy was in equity. It is obvious that the only right or advantage that would accrue to the railroad company, if the plaintiff was compelled to resort to an equitable proceeding, would be the opportunity to show that the betterments received were less than the amount of the claim. The conduct of the railroad company in procuring, or, at least, in acquiescing in, the withdrawal of the receivership, and in the discharge of the receiver and the cancelation of his bond, and in accepting the restoration of its road, largely increased in value by the betterments, well affords ground to charge an assumpsit of such valid claims against the receiver as were not satisfied by him or by the court which discharged him. The company might, even in such circumstances, have a right to show that the claims exceeded the amount of the betterments, and have the aid of a court of equity to restrict its liability to that amount. But, as we have seen, it is not pretended that there is any such equity in the present case.

*The judgment of the Circuit Court of Appeals is affirmed.*



Digitized by Google

JAMES MILLS, *Plff. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 644-649.)

*Rape—erroneous charge—nonconsent.*

1. On a trial for rape an instruction to the jury that all the force that need be exercised in order to constitute the crime is the force incident to the commission of the act is erroneous, unless limited to a case where the woman's will or her resistance has been overcome by threats or fright, or she has become helpless or unconscious.
2. Nonconsent, which is a mere lack of acquiescence, is not enough to constitute the crime of rape; and in such case the force which is only incidental to the act itself is not sufficient to constitute the crime.
3. In a capital case the conviction will be reversed if the charge to the jury was in some of its features clearly erroneous in law because not full enough on the subject, even though in some parts of the charge a more full and correct statement of the law is given; as it is impossible to determine which of the two statements was acted upon by the jury.

[No. 536.]

*Submitted December 15, 1896. Decided January 4, 1897.*

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment of that court of conviction of James Mills of the crime of rape. *Reversed*, and cause remanded for a new trial.

The facts are stated in the opinion.

No counsel for plaintiff in error.

*Messrs.* **J. M. Dickinson**, Assistant Attorney General, and *E. S. Frith* for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

The plaintiff in error was indicted in the United States district court for the western district of Arkansas at the November term, 1895, for the crime of rape committed at the Cherokee Nation, in the Indian country, within the western district of Arkansas, upon one Florence Hendrix, a white woman and not an Indian, and not a member of any Indian tribe. He was duly arraigned and pleaded not guilty, and was tried upon the indictment at the February term of the district court in 1896, was found guilty as charged in the indictment, and sentenced to be hanged on the 23d day of June, 1896. A writ of error having been allowed, the record has been removed to this court for review.

Upon the trial the government gave evidence tending to show that on the night of December 7, 1894, James P. Hendrix, the husband of the prosecutrix, occupied a home with her and their four young children in the Indian territory, about 2 miles southwest of a place called Foyle. A man named Maxwell was also at the house that night. They lived off the public road about ¼ of a mile. About 8 o'clock that night, while the moon was shining, the defendant rode up to the house and asked his way to Kepthart's. He said he was lost and asked the husband, Hendrix, if he would please come to the door and put him in the right direction. When the witness opened the door the defendant "put his gun on *him," and told witness to [646 come out. The prosecutrix said "No; you are not going out," to which the defendant answered, with an oath, "Yes; he is." The husband had on his night clothes, only drawers and shirt, and was barefooted. The defendant, he says, threatened to kill him, and told him to walk along down the road, saying, "My name is Henry Starr," who was a notorious train robber. The husband was then sent down the road by the defendant under threats to kill him if he did not go, and after he went the defendant took the woman, the prosecutrix, and, as she alleged, by threats compelled her to have connection with him twice.

Upon the cross-examination of the prosecutrix it appeared that she was, at the time of the trial, about twenty-five years old, and that she had been married nine years. She was married at Mt. Vernon, in Missouri, and from that time had lived a wandering life with her husband, moving, as she said, "so often I could not tell you just exactly where." Her testimony in regard to the commission of the offense after the husband had moved down the road was given in great detail, which it is not necessary to here set forth.

As the verdict of the jury is conclusive upon the merits of the case it becomes of the highest importance that upon an issue of this kind, maintained by evidence, such as this record presents, the court should charge the jury with accuracy regarding the ingredients of the crime and the facts necessary to be proved in order to show the guilt of the defendant. No portion of the charge of the court, under such circumstances, can be said to be harmless if it did not state correctly and fully the law applicable to the crime, even although it may be urged that in other portions of the charge the correct rule was laid down.

The crime itself is one of the most detestable and abominable that can be committed, yet a charge of that nature is also one which all judges have recognized as easy to be made and hard to be defended against; and it has been said that very great caution is requisite upon all trials for this crime, in order that the natural indignation of men which is aroused against the perpetrator of such an outrage upon a defenseless *woman may not [647 be misdirected, and the mere charge taken for proper proof of the crime on the part of the person on trial. The defendant in this case denied even being present upon the occasion in question. The credibility of the prosecutrix was put in issue by her appearing on the stand as a witness, and although the jury might have disbelieved the evidence of the defendant, when he said that he was not there at all, yet they were under no legal necessity to believe in full the account given by the prosecutrix. Assuming the presence of the defendant, the jury had the right to believe all the testimony of the prosecutrix or only part of it; that is, they might have believed her testimony as to the fact of the



Digitized by Google

connection between the defendant and herself, but were not bound to believe that it was against her consent and by the use of force overwhelming in its nature and beyond her power to resist, or by virtue of such threats against her life or safety as to overcome her will. Whether such threats were made or whether in their absence she resisted to the extent of her ability at the time and under the circumstances, was a question for the jury. The prosecutrix gave upon cross-examination a minute and extended account of the manner in which the crime was committed and of the circumstances surrounding its commission. How much of this testimony was credible and what inferences ought to be drawn from it all were matters for the sole consideration of the jury.

With evidence such as has been outlined, the court in charging the jury said: "The fact is that all the force that need be exercised, if there is no consent, is the force incident to the commission of the act. If there is nonconsent of the woman, the force, I say, incident to the commission of the crime is all the force that is required to make out this element of the crime." An exception was taken to the definition of the crime as given by the court.

In this charge we think the court did not explain fully enough so as to be understood by the jury what constitutes in law nonconsent on the part of the woman, and what is the force necessary in all cases of nonconsent to constitute this crime. He merely stated 648] that if the woman did not "give consent the only force necessary to constitute the crime in that case was that which was incident to the commission of the act itself. That is true in a case where the woman's will or her resistance had been overcome by threats or fright, or she had become helpless or unconscious, so that while not consenting she still did not resist. But the charge in question covered much more extensive ground. It covered the case where no threats were made; where no active resistance was overcome; where the woman was not unconscious, but where there was simply nonconsent on her part and no real resistance whatever. Such nonconsent as that is no more than a mere lack of acquiescence, and is not enough to constitute the crime of rape. Taking all the evidence in the case, the jury might have inferred just that amount of nonconsent in this case. Not that they were bound to do so, but the question was one for them to decide. The mere nonconsent of a female to intercourse where she is in possession of her natural, mental, and physical powers, is not overcome by numbers or terrified by threats, or in such place and position that resistance would be useless, does not constitute the crime of rape on the part of the man who has connection with her under such circumstances. More force is necessary when that is the character of nonconsent than was stated by the court to be necessary to make out that element of the crime. That kind of nonconsent is not enough, nor is the force spoken of then sufficient, which is only incidental to the act itself.

Bishop in his treatise on Criminal Law says that the proposition as to the element of consent, deducible from the authorities, is that although the crime is completed where the connection takes place without the consent of the female, yet in the ordinary case where the woman is awake, of mature years, of sound mind and not in fear, a failure to *oppose* the carnal act is consent; and though she object verbally, if she make no outcry and no resistance, she by her conduct consents, and the act is not rape in the man. 2 Bishop, Crim. Law, § 1122. This is consistent, we think, with most of the authorities on the subject. See *People* v. *Dohring*, 59 N. Y. 374 [17 Am. Rep. 349], and cases there cited. In the New York case it was "held, after an examination and review[649 of the cases, that if the woman at the time was conscious, had the possession of her natural, mental, and physical powers, was not overcome by numbers or terrified by threats, or in such place and position that resistance would have been useless, it must also be made to appear that she did resist to the extent of her ability at the time and under the circumstances.

So where the court stated that if there was no consent of the woman the force incident to the commission of the act itself is all that is required to make out this element of the crime, the court should have included in that statement of the law the kind of nonconsent which the law declares is necessary should exist. In the cases mentioned above mere nonconsent was not enough nor was the force spoken of sufficient. Although it may be claimed that other portions of the charge of the learned court stated correctly the law with reference to this particular case, yet we cannot escape the fear that the error above pointed out may have found lodgment in the minds of the jury. Where the evidence of the commission of the crime itself impresses us as being somewhat unsatisfactory, and in a case where the life of the defendant is at stake, we feel that it is impossible to permit him to be executed in consequence of a conviction by a jury under a charge of the court which, we think, in some of its features was clearly erroneous in law because not full enough on the subject herein discussed, even though in some parts of the charge a more full and correct statement of the law was given. Which of the two statements was received and acted upon by the jury it is wholly impossible for this court to determine, and as one of them was erroneous in not more fully and definitely stating what was the character of the nonconsent which rendered the mere amount of force incident to the performance of the act itself sufficient to constitute the crime, the judgment of death must be reversed, and the defendant subjected to another trial where the rules of law applicable to the case shall be correctly and fully stated to the jury.

*The judgment is therefore reversed*, and the cause remanded, with instructions to grant a new trial.



Digitized by Google

**650] F. R. OSBORNE,** *Plff. in Err.*,
*v.*
**STATE OF FLORIDA.**

(See S. C Reporter's ed. 650-656.)

*Construction by state court of state statute—express company, when subject to a state license tax—Federal question.*

1. The construction by a state court of a state license statute, holding that it does not apply to the interstate business of an express company, will be followed by the Federal courts.
2. An express company is subject to a state license tax on its local business under the Florida statute of June 2, 1893, as construed by the state supreme court, but need not take out a license or pay a tax for doing interstate business; and such statute is therefore valid.
3. The claim that a state statute imposing a license tax is void because not sufficiently determinate, definite, and certain in its character, does not involve a Federal question, and the determination of the state court as to that is conclusive upon this court.

[No. 87.]

*Argued December 8, 1896. Decided January 4, 1897.*

IN ERROR to the Supreme Court of Florida to review a judgment of that court affirming an order of the State Circuit Court remanding F. R. Osborne to the custody of the sheriff and adjudging his arrest to be legal for refusing to give a bond to appear and answer a charge for an alleged violation of a state statute in knowingly acting as agent of an express company without having paid the license provided for by statute, the said order having been made in habeas corpus proceedings. *Affirmed.*

See same case below, 33 Fla. 162 [25 L. R. A. 120, 4 Inters. Com. Rep. 731].

Statement by Mr. Justice **Peckham:**

F. R. Osborne, the plaintiff in error, was arrested in the state of Florida for an alleged violation of a statute of that state in knowingly acting as an agent, at Jacksonville, for the Southern Express Company, a corporation created under the laws of the state of Georgia and doing business in Florida, without having paid the license provided for by statute. He was required to give a bond for his appearance before the criminal court of record of Duval county, in the state of Florida, to answer the charge, and upon his refusal to give the same he was committed to the common jail of the county, there to await trial. He then applied to the judge of the state circuit court for a writ of habeas corpus, and upon the hearing his arrest was adjudged to be legal, and he was remanded to the custody of the sheriff. The case was submitted to the circuit court upon an agreed statement of facts, as follows: "That the said F. R. Osborne is the agent of the Southern Express Company, and that said company is a corporation created, existing, and being under the laws of the state of Georgia; that said Southern Express Company is doing a business in the state of Florida ordinarily done by express companies in the United States, of carrying goods and freight for hire from points within the state of Florida to points in said state, and also of carrying goods and freights for hire from points within the state of Florida to points without the state of Florida in other states in divers *parts of [651 the United States, and in carrying goods and freights for hire from points in other states of the United States to points within the state of Florida, and that it has been engaged in such business for more than twenty years, and was so engaged on the 3d day of October, 1893; that of the business done by the Southern Express Company 95 per cent thereof consists of traffic, carrying of goods and freights from the state of Florida into other states, and bringing and carrying from other states of the United States to points within the state of Florida, and 5 per cent thereof consists of carrying goods and freights between points wholly within the state of Florida; that F. R. Osborne did knowingly act as the agent of said express company on the 3d day of October, 1893, in the city of Jacksonville, Duval county, Florida, a city having more than 15,000 inhabitants, the said Southern Express Company having then and there failed and refused to pay the license tax as required by article 12, § 9, of an act entitled 'An act for the Assessment and Collection of Revenue,' of the laws of Florida, approved June 2, 1893; that the Southern Express Company does business in and has agents in more than one town in nearly every county of the state, and that said towns differ in population, and that it has an office and agent and does business in Polk county, Florida, in the following incorporated towns, with a population as follows: Bartow, 1,500 inhabitants; Fort Meade, 600 inhabitants; Columbia, 600 inhabitants; Lakeland, 800 inhabitants; and Winter Haven, 200 inhabitants. In Orange county: Apopka, 500 inhabitants; Orlando, 10,000 inhabitants; Sanford, 5,000 inhabitants; Umatilla, 3,000 inhabitants; Winter Park, 600 inhabitants; and Zellwood, 300 inhabitants. In Alachua county: Campville, 400 inhabitants; Archer, 150 inhabitants; Grove Park, 110 inhabitants; Gainesville, 5,000 inhabitants; Hawthorne, 300 inhabitants; High Springs, 500 inhabitants; and Island Grove, 200 inhabitants. In Duval county: Jacksonville, with a population of over 15,000; Baldwin, 125 inhabitants."

From the order committing plaintiff in error to the custody of the sheriff an appeal was taken to the supreme court of *the state [652 of Florida, and that court affirmed the order. *Osborne* v. *State*, 33 Fla. 162 [25 L. R. A. 120, 4 Inters. Com. Rep. 731]. The plaintiff in error then sued out a writ of error from this court.

NOTE.—*As to interstate commerce; regulation of; power of Congress; how far exclusive,*—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

*As to power of Congress to control commerce; state statute, when valid as being a regulation of commerce; drummers; vessels; railways; telegraph companies; state tax on commerce, when invalid,*—see note to Harmon v. Chicago, 37: 216.

*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,*—see note to Hamblin v. Western Land Co. 37: 267.



Digitized by Google

*Mr.* **John E. Hartridge** for plaintiff in error.

*Mr.* **W. B. Lamar,** Attorney General of Florida, for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

The criminal proceedings against the plaintiff in error were taken by virtue of a statute of Florida, known as chapter 4115, approved June 2, 1893. The 9th section of that chapter provides that "no person shall engage in or manage the business, profession, or occupation mentioned in this section, unless a state license shall have been procured from the tax collector, which license shall be issued to each person on receipt of the amount hereinafter provided, together with the county judge's fee of 25 cents for each license, and shall be signed by the tax collector and the county judge, and have the county judge's seal upon it. Counties and incorporated cities and towns may impose such further taxes of the same kind upon the same subjects as they may deem proper when the business, profession, or occupation shall be engaged in within such county, city, or town. The tax imposed by such city, town, or county shall not exceed 50 per cent of the state tax. But such city, town, or county may impose taxes on any business, profession, or occupation not mentioned in this section, when engaged in or managed within such city, town, or county. No license shall be issued for more than one year, and all licenses shall expire on the 1st day of October of each year, but fractional licenses, except as hereinafter provided, may be issued to expire on that day at a proportionate rate, estimating from the 1st day of the month in which the license is so issued, and all licenses may be transferred, with the approval of the comptroller, with the business for which they were taken out, when there is a bona fide sale and **653**] transfer *of the property used and employed in the business as stock in trade, but such transferred license shall not be held good for any longer time, or for any other place, than that for which it was originally issued."

There are various subdivisions to this section not herein set forth, and they enumerate divers occupations and professions, the members of which are required to procure a license and to pay annually therefor the amounts stated in those subdivisions.

The 12th subdivision provides, among other things, that "all express companies doing business in this state shall pay in cities of 15,000 inhabitants or more a license tax of $200; in cities of 10,000 to 15,000 inhabitants, $100; in cities of 5,000 to 10,000 inhabitants, $75; in cities of 3,000 to 5,000 inhabitants, $50; in cities of 1,000 to 3,000 inhabitants, $25; in towns and villages of less than 1,000 and more than 50 inhabitants, $10. Any express company violating this provision, and any person that knowingly acts as agent for any express company before it has paid the above tax, payable by such company, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $50, or confined in the county jail not less than six months."

In addition to the criminal penalty above set forth, § 10 provides that the payment of all licenses taxed may be enforced by the seizure and sale of property by the collector.

The plaintiff in error assigns two grounds upon which he seeks for a reversal of the judgment of the state court. One is based upon the allegation that the statute, so far as regards the Southern Express Company or himself as its agent, violates the commerce clause of the Federal Constitution, in that it assumes to regulate interstate commerce. The second ground is that the statute is not sufficiently determinate, definite, and certain in its character upon which to ascertain the amount to be paid for licenses.

It may be here assumed that if the statute applied to the *express company in re- [**654** lation to its interstate business, it would be void as an attempted interference with or regulation of interstate commerce.

The particular construction to be given to this state statute is a question for the state court to deal with, and in such a case as this we follow the construction given by the state court to the statutes of its own state. *Leffingwell* v. *Warren*, 67 U. S. 2 Black, 599 [17: 261]; *New York* v. *Weaver*, 100 U. S. 539, 541 [25: 705]; *Noble* v. *Mitchell*, 164 U. S. 367, 372 [*ante*, 472, 473] and cases there cited.

The supreme court of Florida has construed the 9th section of this act and has held in express terms that it does not apply to or affect in any manner the business of this company, which is interstate in its character; that it applies to and affects only its business which is done within the state, or is, as is termed, "local" in its character, and it has held that, under that statute, so long as the express company confines its operations to express business that consists of interstate or foreign commerce, it is wholly exempt from the legislation in question. It has added, however, that under the provisions of the statute, if the company engage in business within the state of a local nature as distinguished from an interstate or foreign kind of commerce, it becomes subject to the statute so far only as concerns its local business, notwithstanding it may at the same time engage in interstate or foreign commerce. In other words, this statute as construed by the supreme court of Florida does not exempt the express company from taxation upon its business which is solely within the state, even though at the same time the same company may do a business which is interstate in its character, and that as to the latter kind of business the statute does not apply to or affect it. As thus construed we have no doubt as to the correctness of the decision that the act does not in any manner violate the Federal Constitution.

The case of *Crutcher* v. *Kentucky*, 141 U. S. 47 [35: 649], is not in the slightest degree opposed to this view. The act which was held to be in violation of the Federal Constitution in that case prohibited the agent of a foreign express company from carrying on business at all in that state without first *obtaining a li- [**655** cense from the state. The company was thus prevented from doing any business, even of an interstate character, without obtaining the license in question. The act was held to be a regulation of interstate commerce in its appli-



Digitized by Google

cation to corporations or associations engaged in that business, and that subject was held to belong exclusively to national and not state legislation.

It has never been held, however, that when the business of the company which is wholly within the state is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute. It was stated by Mr. Justice Bradley, in the course of his opinion in the *Crutcher Case*, that "taxes or license fees in good faith, imposed exclusively on express business carried on wholly within the state, would be open to no such objection," *viz.*, an objection that the tax or license was a regulation of or that it improperly affected interstate commerce. We have no doubt that this is a correct statement of the law in that regard. The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the state whatever unless upon the payment of the fee or tax. It was said as to those cases that as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state.

The company in this case need take out no li-
**656**]cense and pay no tax for doing interstate business, and the statute is therefore valid.

The second ground for holding the statute void is that it is not sufficiently determinate, definite, and certain in its character upon which to ascertain the amount to be paid for licenses. This ground furnishes no reason for interference by this court. Whether the statute be sufficiently determinate or certain in its character upon which to ascertain the amount to be paid for a license is a question of the construction of the state statute which does not necessarily involve a Federal question, and the determination of the state court as to the proper construction and sufficiency of such a statute is conclusive upon us. The learned counsel for plaintiff in error is mistaken in assuming that this court has any more power than formerly to review, upon a writ of error from a state court, the determination of that court in regard to the particular construction to be given to the statutes of its own state. The cases of *Horner* v. *United States* (No. 2), 143 U. S. 571 [36: 267], and *Carey* v. *Houston & T. C. R. Co.* 150 U. S. 171 [37: 1041], have no bearing upon this question. They both refer to the jurisdiction of this court under the 5th section of the act of March 3, 1891, upon appeals or writs of error taken direct from the circuit or district courts of the United States to this court. By the last subdivision of § 5 of that act it is provided that "nothing in this act shall affect the jurisdiction of the supreme court in cases appealed from the highest court of a state, nor the construction of the statute providing for the review of such cases." The cases above cited originated in the circuit courts of the United States, and were brought direct by appeal or writ of error to this court. This case comes here by writ of error to the supreme court of a state, and our jurisdiction to review that judgment is embraced in U. S. Rev. Stat. § 709. In exercising jurisdiction under that section we do not review such a question as is here presented by plaintiff in error.

Upon the construction given it by the state court the statute does not violate any provision of the Federal Constitution, and *the judgment of that court is therefore affirmed.*

---

JESS NOFIRE *et al.*, *Plffs. in Err.*, [**657**
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 657-662.)

*Marriage license—clerk de facto—citizens of Cherokee Nation.*

1. The fact that an official marriage license was issued carries with it a presumption that all statutory prerequisites thereto had been complied with.
2. A person who is permitted by the clerk and his deputy to sign their names, and has charge of the office, and transacts all the business, and whose acts are recognized by them, is an officer *de facto*, if not *de jure*, and a marriage license signed by him in the clerk's name is valid.
3. A white man who sought to become a citizen of the Cherokee Nation took all the steps he supposed necessary therefor, considered himself such citizen, and whose citizenship that Nation recognized in his lifetime and still asserts after his death, was a citizen by adoption of that Nation for the purpose of determining the jurisdiction of the circuit court of an indictment for his murder.

[No. 578.]

*Submitted December 15, 1896. Decided January 4, 1897.*

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment of that court of conviction of Jess Nofire and John Nofire for the murder of Fred Rutherford, at the Cherokee Nation, in the Indian country. *Reversed*, with instructions to surrender the defendants to the authorities of the Cherokee Nation.

NOTE.—*As to acts of de facto officer, when valid*, see note to Hussey v. Smith, 25: 314.

*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1: 640.



Digitized by Google

The facts are stated in the opinion.

No counsel for plaintiffs in error.

*Mr.* **Edward B. Whitney,** Assistant Attorney General, for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

Plaintiffs in error were indicted in the circuit court of the United States for the western district of Arkansas for the murder of Fred Rutherford "at the Cherokee Nation in the Indian country," on December 15, 1895. They were tried in May, 1896, found guilty by the jury, and, on June 12, the verdict having been sustained, they were sentenced to be hanged.

The principal question, and the only one we **658**] deem it *necessary to notice, is as to the jurisdiction of the court. The defendants were full-blooded Cherokee Indians. The indictment charged that Rutherford was "a white man, and not an Indian," but testimony was offered for the purpose of showing that although a white man he had been adopted into the Cherokee Nation, which, if proved, would oust the Federal court of jurisdiction within the rule laid down in *Alberty* v. *United States*, 162 U. S. 499 [40:1051]. In that case it was held that the courts of the Nation have jurisdiction over offenses committed by one Indian upon the person of another, and this includes, by virtue of the statutes, both Indians by birth and Indians by adoption. The Cherokee Nation claimed jurisdiction over the defendants. This claim was denied by the circuit court, which held that the evidence of Rutherford's adoption by the Nation was not sufficient, and that therefore the United States court had jurisdiction of the offense. An amendment in 1866 to § 5 of article 3 of the Cherokee Constitution gives the following definition of citizenship: "All native-born Cherokees, all Indians, and whites legally members of the Nation by adoption, . . . and their descendants, who reside within the limits of the Cherokee Nation, shall be taken and be deemed to be citizens of the Cherokee Nation." Laws of Cherokee Nation 1892, p. 33. The Cherokee statutes make it clear that all white men legally married to Cherokee women and residing within the Nation are adopted citizens. Laws of Cherokee Nation 1892, pp. 329 and following, §§ 659-666, 667. Section 659 requires that before such marriage shall be solemnized the party shall obtain a license from one of the district clerks. Sections 660 and 661 provide that one applying for such license shall present to the clerk a certificate of good moral character, signed by at least ten respectable citizens of the Cherokee Nation, and shall also take an oath of allegiance. On October 4, 1894, Rutherford was married to Mrs. Betsy Holt, a Cherokee woman. The marriage license, with the certificate of the minister of the performance of the ceremony, and the indorsement of the record of the certificate, is as follows:

**659**] *Marriage License.

Cherokee Nation, Tahlequah District.

To any person legally authorized, greeting:

You are hereby authorized to join in the holy bonds of matrimony and celebrate the rites and ceremonies of marriage between Mr. Fred Rutherford, a citizen of the United States, and Mis' Betsy Holt, a citizen of the Cherokee Nation, and you are required to return this license to me for record within thirty days from the celebration of such marriage, with a certificate of the same appended thereto and signed by you.

Given under my hand and seal of office this the 28th day of August, 1894.

R. M. Dennenberg,
Deputy Clerk, Tahlequah District.

[Seal of Tahlequah District, Cherokee Nation.]

This certifies that Mr. Fred Rutherford, of Tahlequah district, C. N., I. T., and Mrs. Betsy Holt of Tahlequah dist., Cherokee Nation I. T., were by me united in the bonds of marriage at my home on the 4th day of October, in the year of our Lord eighteen hundred and ninety-four, conformable to the ordinance of God and the laws of the Cherokee Nation.

Evans P. Robertson,
Minister of the Gospel.

S. E. Robertson,
Witness present at the Marriage.

I hereby certify that the within certificate of marriage has this day been by me recorded on page 28, Record of Marriages, in the clerk's office in Tahlequah district, Cherokee Nation, this Feb. 4, 1896.

Arch Spears,
Deputy Clerk, Tahlequah District,
Cherokee Nation.

[Seal of the Tahlequah District, Cherokee Nation.]

The performance of the marriage ceremony was also proved by the minister, a regularly ordained Presbyterian preacher. T. W. Triplett was the clerk of the Tahlequah district at the date of this certificate. R. M. Dennenberg was his deputy, *but at the time [**660** of the issue of the license both the clerk and his deputy were absent and the signature of the deputy was signed by John C. Dennenberg, his son. The clerk, the deputy, and his son, each testified that the latter was authorized to sign the name of the clerk or the deputy in the absence of either, and that the business of the office was largely transacted by this young man, although not a regularly appointed deputy. He made quarterly reports, fixed up records, and issued scrip, and his action in these respects was recognized by the clerk and the Nation as valid. No petition, as required by the statute, was found among the papers of the office, but there was testimony that all the papers of the office had been destroyed by fire since the date of the marriage license, and the younger Dennenberg testified that a petition was presented containing the names of ten citizens; that he could not remember the names but, at the time, made inquiry and satisfied himself that they were all respectable Cherokee citizens. There was testimony also that Rutherford offered to vote at an election subsequent to his marriage; that his vote was challenged, and on inquiry it was ascertained that he was a Cherokee citizen,



Digitized by Google

and his vote received. Upon these facts the question is presented whether Rutherford was a Cherokee citizen by adoption. The circuit court held that the evidence was insufficient to show that fact, and that therefore that court had jurisdiction.

With this conclusion we are unable to concur. The fact that an official marriage license was issued carries with it a presumption that all statutory prerequisites thereto had been complied with. This is the general rule in respect to official action, and one who claims that any such prerequisite did not exist must affirmatively show the fact. *Bank of United States* v. *Dandridge*, 25 U. S. 12 Wheat. 64, 70 [6: 552, 554]; *Rankin* v. *Hoyt*, 45 U. S. 4 How. 327 [11: 996]; *Butler* v. *Maples*, 76 U. S. 9 Wall. 766 [19: 822]; *Weyauwega* v. *Ayling*, 99 U. S. 112 [25: 470]; *Gonzales* v. *Ross*, 120 U. S. 605 [30: 801]; *Callaghan* v. *Myers*, 128 U. S. 617 [32: 547]; *Keyser* v. *Hite*, 133 U. S. 138 [33: 581]; *Knox County* v. *Ninth Nat. Bank*, 147 U. S. 91, 97 [37: 93, 95]. In this last case it is said: "It is a rule of very general application that where an act is done which can **661** be done legally only after the performance of some prior act proof of the later carries with it a presumption of the due performance of the prior act."

It is true that the younger Dennenberg, who signed the marriage license, was neither clerk nor deputy, but he was an officer *de facto*, if not *de jure*. He was permitted by the clerk and the deputy to sign their names; he was the only person in charge of the office; he transacted the business of the office, and his acts in their behalf and in the discharge of the duties of the office were recognized by them and also by the Cherokee Nation as valid. Under those circumstances his acts must be taken as official acts, and the license which he issued as of full legal force. As to third parties, at least, he was an officer *de facto;* and if an officer *de facto*, the same validity and the same presumptions attached to his actions as to those of an officer *de jure*.

Again, it is evident that Rutherford intended to change his nationality and become a Cherokee citizen. He took the steps which the statute prescribed and did, as he supposed, all that was requisite therefor. He was marrying a Cherokee woman, and thus to a certain extent allying himself with the Cherokee Nation. He sought and obtained the license which was declared legally prerequisite to such marriage if he intended to become an adopted citizen of that Nation. That he also obtained a marriage license from the United States authorities does not disprove this intention. It only shows that he did not intend that there should be any question anywhere, by any authority, as to the validity of his marriage. He asserted and was permitted to exercise the right of suffrage as a Cherokee citizen. Suppose, during his lifetime, the Cherokee Nation had asserted jurisdiction over him as an adopted citizen, would he not have been estopped from denying such citizenship? Has death changed the significance of his actions? The Cherokee Nation not only recognized the acts of young Dennenberg as the acts of the clerk, but since the death of Rutherford it has asserted its jurisdiction over the Cherokees who did the killing—a jurisdiction which is conditioned upon the fact that the party killed was a Cherokee citizen.

*It appears, therefore, that Ruther- **[662** ford sought to become a citizen, took all the steps he supposed necessary therefor, considered himself a citizen, and that the Cherokee Nation in his lifetime recognized him as a citizen and still asserts his citizenship. Under those circumstances, we think it must be adjudged that he was a citizen by adoption, and consequently the jurisdiction over the offense charged herein is, by the laws of the United States and treaties with the Cherokee Nation, vested in the courts of that Nation.

*The judgment of the Circuit Court must be reversed*, and the case remanded, with instructions to surrender the defendants to the duly constituted authorities of the Cherokee Nation.

---

## WILLIAM G. FORD, Jr., and Louis P. Levy, *Appts.*,
*v.*
## DELTA & PINE LAND COMPANY *et al.*

(See S. C. Reporter's ed. 662-672.)

*Exemptions from taxation, extent of—assessments for local improvements—deeds, when not evidence of payment—punctuation of statute—subsequent legislation.*

1. Exemptions from taxation are to be strictly construed, and no claim of exemption can be sustained unless within the express letter or the necessary scope of the exempting clause.
2. An exemption by the charter of a corporation from the taxation of capital stock and of property and effects of the company does not extend to other property not necessary for its business, which is acquired under the authority of a subsequent act of the legislature containing no exemption clause.
3. A clause exempting from taxation does not release the property so exempted from liability for assessments for local improvements.
4. Deeds from the auditor of a state reciting that lands have been sold to the state for taxes, and that the grantee has paid a certain amount "in full of all the state and county taxes," executed in pursuance of Miss. act March 16, 1872, are not evidence of a prior payment and discharge of levee taxes payable to another tribunal.
5. Punctuation of a statute is not decisive of the construction.
6. A contract beyond the power of the state to disturb is created by the acceptance on the part of the holders of claims against a levee board of the proposition made by Miss. act Feb. 13, 1867, for the liquidation of the liabilities incurred for levee

NOTE.—*As to exemption from taxation; whether a contract or not; not implied,*—see note to Tucker v. Ferguson, 22: 805.

*As to sale of lands for taxes; strict compliance with statute necessary,*—see note to Williams v. Peyton, 4: 518.

*As to power of states to tax,* see note to Dobbins v. Erie County Comrs. 10: 1022.



Digitized by Google

purposes by the issue of bonds and assessments on the lands benefited; and the taxes received and lands sold for nonpayment of taxes are a trust fund which cannot be diverted by subsequent legislation.

[No. 25.]

*Argued October 16, 19, 1896. Decided January 4, 1897.*

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Mississippi dismissing a suit in equity brought by Wm. G. Ford, Jr., *et al.*, plaintiffs, against the Delta & Pine Land Company *et al.*, defendants, to quiet the title of the plaintiffs to certain lands therein described. *Affirmed.*

See same case below, 43 Fed. Rep. 181.

Statement by Mr. Justice **Brewer**:

This was a bill in equity filed in the circuit court of the United States for the southern district of Mississippi, on February 27, 1889, by the appellants as complainants to quiet their title to certain lands therein described. Upon final hearing, on August 15, 1890, a decree was entered dismissing the bill (43 Fed. Rep. 181), from which decree the complainants have appealed to this court.

Complainants' chain of title is as follows: 1st. A patent on March 13, 1858, from the United States to the state of Mississippi, under the act of September 4, 1841 (5 Stat. at L. 453), and September 28, 1850 (9 Stat. at L. 519). 2d. Conveyances from the state of Mississippi made during the years 1853 to 1856, inclusive, to E. F. Potts and others, these grantees having entered the lands with scrip issued by the Secretary of State under the acts of March 15 and March 16, 1852, providing for the construction of levees upon the Mississippi river. Miss. Laws 1852, pp. 33, 41. 3d. Deeds from the grantees of the state and their privies in interest, in the years 1871 and 1872, to the Selma, Marion, & Memphis Railroad Company, made under the authority of an act of the legislature of the state, approved July 21, 1870, authorizing the conveyance of lands to such company in payment of subscription to its capital stock. Miss. Laws 1870, chap. 220, p. 566. **664**]4th. Deeds from the state of *Mississippi to the railroad company, of date March 18, 1873, executed under authority of an act of the legislature, approved March 16, 1872 (Miss. Laws 1872, chap. 75, p. 313), providing that all lands which had been sold to the railroad company, and which had become forfeited to the state for nonpayment of taxes, might be bought by that company from the state at 2 cents per acre, upon satisfactory proof that not less than 25 miles of the company's road had been built; and also that in all cases in which the lands had been forfeited to or purchased by the levee boards in any of the levee districts in the state and were held and claimed by them for the nonpayment of levee taxes the said boards were required to arrange for the payment of such taxes by receiving therefor the bonds of the said districts. 5th. Deeds from the United States marshals for the northern and southern districts of Mississippi to the complainants, executed August 1, 1887, and February 5, 1889, under sales made pursuant to a judgment and decree rendered on July 6, 1886, by the circuit court of the United States for the northern district of Mississippi in the case of *Timpson* v. *Selma, M. & M. R. Co.*

The title of the defendant was based upon various statutes of the state of Mississippi, providing for repairing and perfecting the levees of the Mississippi river in certain counties, and making assessments upon all the lands within certain boundaries for the cost of such improvements, and originated in tax sales made for the nonpayment of such assessments.

*Messrs.* **Casey Young** and *Michael F. McCullen* for appellants.

*Mr.* **Frank Johnston** for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

We premise by saying that this case involves over 200 different tracts of land in nine separate counties, and amounting to 112,160 acres; that the titles to these various tracts as claimed by *complainants are not all deraigned by [**665** the same conveyances or subject to the same conditions; that in consequence the many questions discussed so elaborately by counsel in their brief and in oral arguments do not affect alike all the tracts. We shall not attempt to consider all the questions presented, but have endeavored to select those which are necessary for a final determination of the case. We believe that the title to every tract falls within the scope of those we shall discuss, and that the propositions laid down are decisive of the rights of the parties hereto.

It is insisted that the lands while held by the railroad company were, by virtue of certain clauses in its charter, exempt from the levee assessments, and we understood counsel, in their argument at the bar, to state that this question stands in the forefront of the case, and that upon its decision in favor of the complainants their rights depend. The lands were, in the years 1871 and 1872, conveyed by their former owners to the railroad company in payment of stock subscriptions. The company, originally known as the Memphis, Holly Springs, & Mobile Railroad Company, was chartered by an act of the legislature of the state, of date November 23, 1859. Miss. Laws 1859, chap. 14, p. 51. Sections 19 and 21 of that act are as follows:

"Sec. 19. That the capital stock, and all the property and effects of said company shall be exempt from taxation until said road is completed: *Provided*, Said road is commenced within two years and completed within ten years from and after the passage of this act."

"Sec. 21. That said road shall be commenced in three years and completed in twelve years after the passage of this act."

The civil war interfering with the construction of the road, on February 20, 1867 (Miss. Laws 1867, chap. 464, p. 635), an act was passed reviving the corporation. Section 2 reads: "That said company shall have sixteen years in which to construct the said road, and shall commence the same in three years from and after the passage of this act." Section 3 provides: "That it shall and may be



Digitized by Google

666] lawful for the said corporators *to receive subscriptions in land to the capital stock of the company: *Provided*, The lands shall be within 5 miles of the line of said road." On July 21, 1870 (Miss. Laws 1870, chap. 220, p. 566), a further act was passed, the 2d section of which is: "That said Selma, Marion, & Memphis Railroad Company is hereby authorized to receive, in the way of subscription to the capital stock of said company, lands lying anywhere within the limits of the state of Mississippi." Under the authority of this statute these lands, being all more than 5 miles from the line of the road, were conveyed to the company. Now, the contention is that § 19 of the original statute was operative to exempt these lands from any charge for levee assessments. It is contended that the general language, "the capital stock and all the property and effects of said company," includes all the property belonging to the railroad company, whether used for railroad purposes or not; that it includes not only all the property which it acquired under the authority of its original charter, but also all property which it acquired under the authority of the amendment of July 21, 1870; and, finally, that the exemption from taxation means, not merely exemption from all taxes levied for ordinary purposes by state, county, or city, but also all assessments for local improvements. These propositions are denied by the defendant, and certainly present the most important if not the vital questions in the case.

It is abundantly established by the decisions of this as of other courts that exemptions from taxation are to be strictly construed, and that no claim of exemption can be sustained unless within the express letter or the necessary scope of the exempting clause. *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665,668 [29: 770, 771]; *Chicago, B. & K. R. Co.* v. *Missouri, Guffey*, 120 U. S. 569 [30: 732]; *Yazoo & M. V. R. Co.* v. *Thomas*, 132 U. S. 174 [33: 302]; *Yazoo & M. V. R. Co.* v. *Yazoo-Mississippi Delta Levee Comrs.* 132 U. S. 190 [33: 308]; *New Orleans City & L. R. Co.* v. *New Orleans*, 143 U. S. 192 [36: 121]; *New York, Schurz*, v. *Cook*, 148 U. S. 397, 409 [37: 498, 503]; *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S. 301, 306 [38; 450, 453]; *Winona & St. P. Land Co.* v. *Minnesota* (No. 1), 159 U. S. 526 [40: 247].

Indeed, there has been strong judicial dissent from the doctrine of the power of the state 667] legislature to create a *permanent exemption from taxation. *Washington University* v. *Rouse*, 75 U. S. 8 Wall. 439, 443 [19: 498,500].

It has been frequently decided that a general exemption of the property of a corporation from taxation is to be construed as referring only to the property held for the transaction of the business of the company. *Ramsey County* v. *Chicago, M. & St. P. R. Co.* 33 Minn. 537; *Todd County* v. *St. Paul, M. & M. R. Co.* 38 Minn. 168; *Illinois C. R. Co.* v. *Irvin*, 72 Ill. 452; *Re Swigert*, 119 Ill. 88, 59 Am. Rep. 789; *State* v. *Mansfield Comrs.* 23 N. J. L. 510; *State, New Jersey R. & Transp. Co.*, v. *Newark*, 25 N. J. L. 315; *Vermont C. R. Co.* v. *Burlington*, 28 Vt. 193; *Railroad Co.* v. *Berks County*, 6 Pa. 70; *Worcester* v. *Western R. Corp.* 4 Met. 564; *Tucker* v. *Ferguson*, 89 U. S. 22 Wall. 527 [22: 805]; *Bank of Commerce* v. *Tennessee*, 104 U. S. 493, 497 [26: 810, 812]. In this latter case, after referring to several of the authorities just cited, it was said: "The doctrine declared in them, that the exemption in cases like the one in the charter before us extends only to the property necessary for the business of the company, is founded in the wisest reasons of public policy. It would lead to infinite mischief if a corporation, simply by investing its funds in property not required for the purposes of its creation, could extend its immunity from taxation, and thus escape the common burden of government."

The rule in Mississippi is the same. *McCulloch* v. *Stone*, 64 Miss. 378. In that case a railroad company, as here, was authorized to take subscriptions to its capital stock, payable in land. The charter also provided "that all taxes to which said company shall be subject for the period of thirty years are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road or for money borrowed, . . . and it shall be the duty of the tax collector in every county, in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from the company an affidavit made by the president or cashier of said company that the amount of said taxes has actually been paid and applied by said company, during the *year, in payment of the debts, . . . [668 which receipt so given shall be in full of all taxes—county, state, and municipal—to which said company shall be subject." Construing this provision, the supreme court held that outside lands (that is, lands not used in the business of the company) were not within the exemption, saying on page 394:

"The business of a railroad company, the property and instrumentalities ordinarily owned and employed by them, it must be assumed, were well known to the legislative department, and it must also be assumed that the language employed was used in reference to such business and property, unless a contrary intention is shown. 'All taxes to which said company shall be subject' must, therefore, we think, be construed to include only the taxes due upon the property of the company necessary to the construction, equipment, maintenance, and operation of its road. Many of the authorities upon the question here involved are collected by Cooley on Taxation, 146 to 153. From them we can deduce no principle of construction which would include in the exemption granted an exemption of the outlying lands owned by the company. The lands involved in this suit have no sort of connection with the business of the company; they are owned by it only as the same character of lands would be owned by a private individual, and for the same purposes; they were bought, not to enable the company to perform any duty it owes to the public, but that it might, by dealing in them, make a profit as a buyer and seller; in this character we find nothing in the words or spirit of the exemption clause giving immunity from taxation."

Within the scope of these decisions it is, to say the least, not clear that the general language in § 19 is to be construed as referring to



Digitized by Google

property other than that necessary for the business of the railroad company.

But passing that, it is clear that even if the exemption is properly construed as applying, not only to the property necessary for the business of the railroad company, but also to all other property which by the terms of its charter it was at liberty to acquire, it does not extend to property which, not necessary for its business, it acquired under the authority of [669] a *subsequent act of the legislature, in which is found no exemption clause. The act of 1867, reviving the charter, authorized the corporation to receive payment of subscriptions to its capital stock in lands, provided the lands were within 5 miles of the line of its road; and if the exempting clause can be construed to apply to property other than that used in the business of the company it would be limited to property which by the charter, as it then stood, it was authorized to acquire. Subsequently thereto, and in 1870, it was authorized to receive in the way of subscription to its capital stock lands lying anywhere within the limits of the state, and it was under this authority that it took title to the lands in question. Now, in this act of 1870 is no mention of any exemption, nothing to suggest that the legislature intended that this roving authority to take title to lands carried with it the right to withdraw all the lands thus taken from the burdens of taxation, and it would be clearly in violation of the accepted rule of construction in respect to contracts of exemption to extend the provisions of the exempting clause in the acts of 1859 and 1867 to property the right to acquire which was conferred solely by the subsequent act.

Again, it is insisted that § 19 of the act of 1859, which was not changed in any subsequent statute, made the exemption conditional upon the fact that the road was commenced within two years and completed within ten years; that, as a matter of fact, this condition was not complied with, and hence that the exemption failed entirely. The argument is that all tax levies and sales of these lands were only conditionally invalid, and that, the condition failing, the tax sales became operative and the title passed. On the other hand, it is said that this condition was a condition subsequent; that during the time prescribed in the condition the lands were exempt from taxation, even though after that time proceedings might be instituted under special warrant of the legislature for the assessment and collection of taxes thereon, and hence, that all proceedings instituted and carried through during the pendency of such time of exemption were absolutely void. We do not deem it necessary [670] to decide this *question, and only refer to it as suggesting equitable considerations against any expansion of the claimed exemption.

But, further and chiefly, the only exemption was from taxation, and it is a general rule of construction that a clause exempting from taxation does not release the property so exempted from liability for assessments for local improvements. *Sheehan* v. *Good Samaritan Hospital*, 50 Mo. 155, 11 Am. Rep. 412; *Buffalo City Cemetery* v. *Buffalo*, 46 N. Y. 506; *Paterson* v. *Society for Establishing Useful Manufactures*, 24 N. J. L. 385; *State, Protestant Foster Home Soc.*, v. *Newark*, 35 N. J. L. 157. This question was considered in this court in *Illinois C. R. Co.* v. *Decatur*, 147 U. S. 190 [37: 132]. The exemption in that case was "from all taxes under the laws of this state" (Illinois), and it was held that that clause did not relieve the property from the burden of special assessments imposed to pay the cost of local improvements. The question was discussed at some length and the various authorities reviewed in the opinion then delivered.

That is also the settled law of the state of Mississippi. *Daily* v. *Swope*, 47 Miss. 367; *Vasser* v. *George*, 47 Miss. 713; *Macon* v. *Patty*, 57 Miss. 378, 34 Am. Rep. 451. In the first two of these cases it was held, not only that special assessments for local improvements did not come within the constitutional limitations as to taxation, but also that the construction and repair of levees were to be regarded as local improvements for which the property specially benefited might be assessed. We quote from *Vasser* v. *George*, page 721:

"We are content to refer to our views on this subject just delivered in *Daily* v. *Swope*. In that case we reached the conclusion that local assessments for local improvements were not embraced in the 20th section of the 12th article [said section reading 'taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law'] but were referable to the general power of taxation, which was supreme, unless restrained by the Constitution of the United States, or of the state. The limitation upon the power in that section only applies and governs taxes levied for the *usual, ordinary, and general [671] purposes of the state, county, and incorporated city or town, and does not include special assessments for local public objects for the purpose of ameliorating property and enhancing its value, and also contributing to the general convenience, health, or welfare of the community. That, in apportioning such assessments, the legislature or local taxing body may levy them on the basis of special benefits received because of the improvement made. And, further, may adopt that mode which, in its discretion, seems equitable and just, either by specific taxes or according to value, or in the instance of a very small locality, as a street or square in a city, either the area of the lots, the front measurement, or value may be selected. So, too, in the levee district, composed of several counties and parts of counties, lands in the river counties, which are supposed to receive the largest benefit, may be assessed higher than those more remote. The legislature may classify the lands and tax accordingly."

That such is now the settled law in Mississippi is not denied by counsel for complainants, but it is insisted that these decisions were subsequent to the vesting of title to those lands in the railroad company; that at that time the rule of decision in the state was different, and that the rights of the railroad company were created and vested under the rule as then announced, and also that no subsequent change in decision could disturb the rights created in reliance upon the previous rule. In support of this they refer to *Southern*



Digitized by Google

*R. Co.* v. *Jackson*, 38 Miss. 334, but that case does not sustain their contention. In it the railroad company claimed under a statute providing "that the stock, fixtures, and property of said company shall be exempt from taxation," but the taxes which were held included within the exemption were the general taxes of the city for corporate purposes. There was no special assessment for local improvements on property benefited thereby, but simply the ordinary taxes levied for corporate purposes, including, it is true, among them matters of public improvement. Such taxes come strictly within the provisions in respect [672]to taxation. *A city is a municipal corporation, a political subdivision of the state, charged with certain specified duties of government within its territorial limits, and for the full discharge of those duties it is authorized to levy taxes. In this respect it does not differ from a county, and although some of the funds derived from a city tax may have been used for public improvement, that does not change the character of the tax. It does not cease to be a tax properly so called, any more than would a tax levied by the state if a portion of the funds raised thereby were invested in the building of a capitol, or any other public improvement. This is the only decision of the supreme court of the state to which our attention is directed as enunciating a doctrine different from that laid down in the cases, *Daily* v. *Swope*, *Vasser* v. *George*, and *Macon* v. *Patty*, in 47 and 57 Miss. *supra*. The rule, therefore, established in Mississippi, is in harmony with that recognized generally elsewhere, to the effect that special assessments for local improvements are not within the purview of either constitutional limitations in respect to taxation or general exemptions from taxation. It follows, therefore, that the exemption in this charter in no manner released the property from the burden of the special assessments for the construction and repair of the levees.

These special assessments for levee improvements culminated in sales and deeds under express authority of the statutes of the state, and by them a perfect title was transferred, which finally passed to the defendant. No defects are pointed out by the complainants in these proceedings—at least, none which go so far as to vitiate those proceedings if the property was subject to such assessments. This conclusion disposes of the principal question in this case.

We may, however, go further and consider some other matters in reference to these assessments. On March 16, 1872, the legislature passed an act to facilitate the construction of the railroad (Miss. Laws 1872, chap. 75, p. 313), § 3 of which reads:

"That all lands which have heretofore been purchased by or forfeited to the state of Mississippi for taxes due and unpaid thereon, and which have been sold to said Selma, Marion, & Memphis Railroad Company by the original [673] owners of the *same, shall be sold to said railroad company by the auditor of public accounts, at 2 cents per acre, upon the presentation of satisfactory evidence of titles to said railroad company, from said original owners, and satisfactory proof that not less than 25 miles of said road has been constructed: *Provided*, The title to the lands shall have been conveyed by said owners to said company, prior to the passage of this act, and that in all cases where the said lands have been forfeited to or purchased by any of the levee boards in the levee districts in this state, in which any of the said lands lie, and are now held or claimed by any of the said levee boards for the nonpayment of the levee taxes, and where the title is held by said railroad company, said levee boards are hereby required to arrange for the payment of said taxes by receiving in payment of the same any of the bonds of the levee boards: *Provided*, That if the said Selma, Marion, & Memphis Railroad shall receive the $4,000 subsidy per mile, the said railroad shall pay into the state treasury 1¼ of 1 per cent on the gross earnings of said road, for every mile of said road in this state, beginning two years after they receive the first subsidy: *Provided further*, That this tax shall only be levied until said railroad company shall be required to pay tax on its property."

Under the authority of this statute the auditor conveyed these lands to the company by deed which recited that the lands had been "sold to the state of Mississippi for taxes due the said state," and that the company had paid into the state treasury 2 cents per acre "in full of all state and county taxes due thereon to the present date." No reference was made in these deeds to the levee taxes; no recital of any payment of them, or of any adjustments with the levee commissioners. Complainants contend that the deeds are themselves evidence of a prior payment and discharge of the levee taxes, on the theory that such payment was a statutory prerequisite to the conveyance by the auditor. *Nofire* v. *United States*, 164 U. S. 657 [*ante*, 588]. We do not so understand the force of the statute. The transactions with the auditor and with the levee board were independent of each other. The auditor sold and *conveyed[674] at 2 cents an acre for all state and county taxes, *i. e.*, all taxes which the state had full authority over, and which it could compromise at any sum. The levee board held the lands in trust and the company was required to pay all levee taxes in full, either in cash or in levee bonds, the obligations for which the lands were held. The two tribunals acted separately. Neither's action was conditioned upon that of the other. And proof of the action of one is no evidence of the action of the other.

It is true that the punctuation of the statute gives plausibility to a different construction, but it is well settled that punctuation is not decisive. A colon after the word "act" in the first proviso would have made the meaning more apparent. A proviso is not always a condition, much less a condition precedent. As, for instance, the last two provisos in this section. There is no evidence in the record of the payment of the levee taxes by the railroad company, or anyone for it or for the complainants. On the other hand, it does affirmatively appear that the title held by the levee board to these lands has passed to the defendant. In order to a clear understanding of this, reference must be had to the legislation



Digitized by Google

of the state in respect to levy construction and repair.

The levee system was inaugurated prior to the civil war, and some work was done thereon and some debts contracted thereby. On February 18, 1867 (Miss. Laws 1867, p. 237), an act was passed creating a board of commissioners, consisting of three persons, for the liquidation of all outstanding liabilities incurred for levee purposes, providing for the issue of bonds in satisfaction of such liabilities, and an annual assessment of 5 cents an acre on certain lands and 3 cents per acre on certain other lands supposed to be benefited by the construction of the levees; and directing that the fund thereby created, whether in money or land, should be devoted to the payment of such bonds. All the lands in controversy were sold under the authority of this statute for delinquent levee taxes, and purchased by the levee board, and were so held at the time of the conveyances to the railroad company. Thereafter and in 1877 Josiah [675] Green, the holder of $85,000 of *the levee bonds, filed a bill in the chancery court of Hinds county, in behalf of himself and all other holders of said bonds, against the state auditor and state treasurer (who had been by statute substituted for the levee board) to subject these lands to the satisfaction of such indebtedness. On appeal to the supreme court of the state it was held (*Gibbs* v. *Green*, 54 Miss. 592) that the act of February 18, 1867, was a legislative proposition to the holders of claims against the original levy board, which, when accepted by such claimants, created a contract beyond the power of the state to disturb, and that under that contract the taxes received and the lands sold for nonpayment of taxes became a trust fund, which could not be diverted by any subsequent act of the legislature. In pursuance of that decision a decree was finally entered, ordering a sale of all such lands so conveyed to the levee board for nonpayment of delinquent levee taxes in satisfaction of the claims of these bondholders. These lands were sold under that decree, and the title acquired thereby passed by subsequent mesne conveyances to the defendant. It is insisted by the complainants that as the railroad company was not a party to these proceedings, they do not conclude its rights; that they were, as to it, and parties holding under it, *res inter alios acta*. Be that as it may, this decision, followed as it was by subsequent decisions of the supreme court, is a construction of the act of 1867, which is not only binding upon this court but also commends itself to our judgment as a just recognition of the force of legislative contracts. Inasmuch as we have seen the auditor's deeds are not to be taken as an adjudication that such levee taxes had been paid by the railroad company, and as it was, under the true construction of the statute of 1867, the intent of the legislature that in addition to the 2 per cent for general taxes all levee assessments should be paid and discharged by the railroad company, and as there is no evidence before us that such payment and discharge were made, it follows that all the title acquired by the levee board, under the act of 1867, has passed to the defendant.

The examination we have thus made of the tax questions in this case renders unnecessary any inquiry into the validity *of the judi-[676 cial sales by which the complainants claim to have acquired the title of the railroad company, for by those sales, if they took anything, they took no more than the railroad company had, and whatever title it may ever have had was, as we have seen, devested by the tax proceedings.

*The decree of the Circuit Court was right, and it is affirmed.*

---

## ALBERT L. FRANCE *et al.*, *Plffs. in Err.*, v. UNITED STATES.

(See S. C. Reporter's ed. 676-683.)

*Ticket in a lottery.*

A paper that contains nothing but figures which relate to a drawing already completed is not a paper, certificate, or instrument purporting to be or representing a ticket, chance, share, or interest in a lottery, which the act of Congress of 1895, chap. 191, makes it unlawful to bring into the United States or deposit in the mails or carry from one state to another. Such statute refers only to a paper which depends upon a lottery the drawing of which has not taken place.

[No. 495.]

*Argued November 13, 1896. Decided January 4, 1897.*

IN ERROR to the District Court of the United States for the Southern District of Ohio to review a judgment convicting Albert L. France *et al.* of the offense of conspiracy under U. S. Rev. Stat. § 5440, for conspiring to violate the act of Congress of 1895 for the suppression of lottery traffic. *Reversed*, and cause remanded, with directions to discharge the plaintiffs in error.

*Messrs.* **A. W. Goldsmith, James C. Carter,** *Edward Colston,* and *George Hoadly, Jr.*, for plaintiffs in error.

*Mr.* **Edward B. Whitney,** Assistant Attorney General, for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

The plaintiffs in error were indicted for and convicted of the offense of conspiracy, under U. S. Rev. Stat. § 5440. They were charged in the indictment with conspiring to violate the act of Congress passed March 2, 1895, for the suppression of lottery traffic through national and interstate commerce, etc. 28 Stat. at L. 963.

The section of the Revised Statutes and the 1st section of the act, above referred to, are set forth in the margin.*

*The indictment contains six counts, [677 charging overt acts on the part of plaintiffs in

* Sec. 5440. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than $1,000, and



Digitized by Google

error, to have been committed in Hamilton county, Ohio, in October, 1895.

The trial of the plaintiffs in error having been duly commenced in the district court of the United States for the southern district of Ohio, it appeared in the course of the evidence then taken that there were two lotteries, called respectively the "H" or "Henry Lottery," and the "K" or "Kentucky Lottery," both of which were carried on in Covington, Kentucky, under the management of one of the plaintiffs in error, the others being engaged in the business under his direction.

Witnesses for the government testified to the manner in which the lotteries in question were conducted. It was shown by their evidence that the main office where the drawing was done was situated on the Kentucky side of the river and in the city of Covington. There was a drawing twice in each day for each lottery. The drawing in each case was from a glass wheel in which the numbers from 1 to 78 were placed, and one number was drawn out at a time until 12 had been drawn. The betting is in regard to the sequence in which the numbers will be drawn from the wheel, and three numbers are usually chosen, such for instance as 7, 28, 16. This is called a "gig." If the player bet on these numbers and they are drawn from the wheel in that order, he has won his bet. There are agents for these lotteries, as some of the witnesses said, "in every street in Cincinnati." An agent has an office consisting of a single room, where he receives persons
679] who *propose to patronize the lottery. The person coming to the office chooses his numbers; the agent gives him a paper containing nothing but the numbers and in the sequence which he has chosen, two copies of which the agent keeps. At a certain hour before the drawing of the lottery in Covington, each agent in Cincinnati sends his messenger with a paper showing the various numbers chosen and the amounts bet, and he also sends the money, less his commissions, to the main office across the river. These messengers must arrive a certain time before the drawing or they will not be permitted to share in the drawing which is then about to take place. After the drawing what is termed an "official print" is made, which consists of a printed sheet showing the numbers in their consecutive order as they came out of the wheel, and on the line beneath the numbers are arranged in their natural order. This "official print" is in the form of a book, and after the drawing it is returned to the agent in Cincinnati, who on his part sends it back again just prior to the next drawing. In addition to the "official print," these messengers, after the drawing has been had, bring back to the agents at Cincinnati what is known as "hit-slips." These are slips of paper with nothing but the winning numbers on them, together with a statement of a sum in dollars. The agent understands this named sum to be the amount payable to those who have won upon the last drawing. The identification of the drawing at which the winning numbers came out is made by numbering each drawing. The money to the amount named on the paper is brought over by the messenger to the agent in Cincinnati.

Some of these messengers were arrested as they were coming from Covington, walking across the bridge, and just as they came to the Cincinnati side. They had with them in their pockets the official sheet and the hit-slips, as above described, containing the result of the drawing, which had just been concluded at Covington. They had the money to pay the bets, and were on their way to the various agents in the city of Cincinnati. Procuring the carrying of these papers was the overt act towards the accomplishment of the *conspiracy upon which the con- [680 viction of plaintiffs in error was based.

There was nothing on any of the papers which showed that any particular person had any interest in or claim to any money which the messengers carried. The papers were simply the means used to impart information from the main office in Covington to the agent in Cincinnati as to the result of the drawing of the particular lottery. They in fact referred entirely to a past drawing, and even as to that they furnished no evidence that any particular person or that the bearer had any interest in the result of the lottery already drawn. They were addressed to no one and were signed by no one. Nothing but figures were there. None but the agent had the necessary information as to the persons who were interested in or who might be entitled to any money by reason of the result of the drawing. The papers did not purport to be or to represent a ticket, chance, share, or interest in or dependent upon the event of any lottery.

For the purpose of determining one of the questions raised by counsel for the plaintiffs in error, it may be assumed that the evidence was sufficient to justify the jury in finding plaintiffs in error guilty of the conspiracy to do the acts above mentioned, either as managers of a lottery in Covington, or as agents in transmitting papers and books containing the matter above stated. After the evidence was all in, each of the plaintiffs in

not more than $10,000, and to imprisonment not more than two years.

ACT OF 1895.

Chap. 191. An Act for the Suppression of Lottery Traffic through National and Interstate Commerce and the Postal Service Subject to the Jurisdiction and Laws of the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:* That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one state to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one state to another in the same, shall be punishable in the first offense by imprisonment for not more than two years or by a fine of not more than $1,000 or both, and in the second and after offenses by such imprisonment only.



Digitized by Google

error asked the court to charge the jury that in regard to his individual case the jury should be directed to find a verdict of not guilty, and that as to him the United States had failed to make out a case, and that the verdict of the jury should therefore be in his favor. The court refused to charge as requested, and each defendant duly excepted to such refusal. We think the request was proper and should have been granted by the court.

Some criticism is made by the learned counsel for the defendant in error, based upon the particular language of the request to charge. He says that the only request was made on the part of the defendant A. L. France, and that such request in regard to him [681 was joined in by the other *defendants, so that their request was that he (France) should be acquitted by the direction of the court, and that no request was made in their own behalf. Possibly the language appearing in the record, when read without the context, is capable of such a construction, but it is apparent from the questions in the case and the evidence which had been taken regarding all the defendants, that such was neither the intention of the counsel for the plaintiffs in error nor the understanding of the court. The plain intention was that the same directions which were asked for in regard to the defendant A. L. France were also asked for individually and for himself by each of the other defendants, so that each made the request that the court should charge that he individually was entitled to a verdict of not guilty, upon the same grounds set forth in the special charge asked for by the defendant A. L. France.

When proper and legal evidence has been given on the part of the government in a criminal trial, which if believed is sufficient in law to make out a crime and to sustain a conviction of the person on trial, a request to the court to direct the jury to acquit must be refused, and an exception to such refusal raises no question of law, even though the evidence on the part of the defendant is much stronger and more satisfactory than that for the government. The question under such circumstances is one for the jury and not for the court. In the view we take of this case, however, the request did not depend upon the credibility of witnesses or upon the weight to be given to the evidence in the case. We assume the truth of all the evidence given on the part of the government with all proper inferences which may be drawn from it, but we do not think that such evidence brought plaintiffs in error within the provisions of the statute in regard to lotteries above set forth. Therefore a motion to direct an acquittal raised a question of law, and an exception to the denial of the motion is properly reviewable here.

We are of opinion that in this case the messengers carrying across the border from Kentucky to Ohio the books and papers above referred to did not, within the meaning of the statute, carry any paper, certificate, or instrument [682 purporting *to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes depending upon lot or chance, as provided for in such statute. The lottery had already been drawn; the papers carried by the messengers were not then dependent upon the event of any lottery. The language as used in the statute looks to the future. The papers must purport to be or represent an existing chance or interest which is dependent upon the event of a future drawing of the lottery. A paper that contains nothing but figures which in fact relate to a drawing that has already been completed, one that has passed and gone, cannot properly be said to be a paper, certificate, or instrument as described in the statute. It purports to show no interest in or dependent upon the event of any lottery. If the lottery has been drawn, the interest is no longer dependent upon it. The condition upon which the bet or the interest was dependent has happened; the solution of the problem has already been arrived at; the bet has already been determined. The bare statement of that solution or determination placed on paper does not impart to that paper the character of a certificate or instrument purporting to be or represent a ticket, etc., dependent upon the event of a lottery. From the statement upon the paper the agent may acquire the knowledge which will enable him to say who has won, but the book or the paper does not purport to be and is not a certificate, etc., within the act of Congress.

There is no contradiction in the testimony, and the government admits and assumes that the drawing in regard to which these papers contained any information had already taken place in Kentucky, and it was the result of that drawing only that was on its way in the hands of messengers to the agents of the lottery in Cincinnati.

The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, *we are compelled to construe it strict- [683 ly. Full effect is given to the statute by holding that the language applies only to that kind of a paper which depends upon a lottery the drawing of which has not yet taken place, and which paper purports to be a certificate, etc., as described in the act. If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation.

It has also been most strongly urged on the part of the plaintiffs in error that they were not, as shown by the evidence, engaged in the transaction of anything in the nature of interstate commerce, and that Congress had no constitutional right to pass an act which should be applicable to them under the circumstances disclosed by the proof in this case. It was argued that the subject was beyond the jurisdiction of Congress in the exercise of its powers concerning national or interstate commerce. The arguments upon this subject have on both sides been able and



Digitized by Google

interesting, but, as our decision in relation to the scope of the statute necessarily leads to a reversal of the judgment and a discharge of the plaintiffs in error, it is not necessary for us to decide the question as to the power of Congress, and we therefore express no opinion in regard to it.

*The judgment must be reversed*, and the cause remanded to the district court of the United States for the southern district of Ohio, with directions to set aside the judgment and discharge the plaintiffs in error.

Mr. Justice **Harlan** dissented.

---

**684]** JOHN F. BUSHNELL, *Plff. in Err.*,
*v.*
CYRUS A. LELAND, Receiver, etc.

(See S. C. Reporter's ed. 684-686.)

*Assessment, when evidence—power of comptroller of the currency.*

1. An assessment upon stockholders of a national bank, made by the comptroller of the currency, is evidence in an action brought by the receiver of the bank against a stockholder to enforce payment of the double liability imposed by law.
2. The comptroller of the currency has power to appoint a receiver of a defaulting or insolvent national bank and to call for a ratable assessment upon its stockholders, without previous judicial ascertainment of the necessity of such appointment and of the liabilities of the bank; and such authority does not give that officer judicial power in violation of the Constitution.

[No. 497.]

*Argued December 14, 15, 1896. Decided January 4, 1897.*

IN ERROR to the District Court of the United States for the District of Connecticut to review a judgment for the plaintiff, Cyrus A. Leland, receiver, etc., against John F. Bushnell, for the payment of the double liability imposed by law upon him as stockholder in a national bank. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **John J. Crawford** for plaintiff in error.

*Messrs.* **Frederick W. Holden** and **Edward Winslow Paige** for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

The plaintiff in error being a stockholder in the State National Bank of Wichita, Kansas, was sued to enforce payment of the double liability imposed by law. The pleadings aver the existence of the legal prerequisites to the stockholder's liability, *viz.*, the subscription by defendant to the stock, the due organization of and the authority conferred on the bank to engage in business, the suspension, the valid appointment of a receiver, and a ratable assessment made by the comptroller on the stockholders in conformity to law. U.S. Rev. Stat. §§ 5151, 5234.

At the trial objection was taken and reserved to the offering in evidence of the assessment made by the comptroller of the currency, and upon the close of the testimony the ground of this objection was reiterated by way of exception to the refusal of the court to give the following instruction:

"Counsel for the defendant then moved the *court to instruct the jury to return a **[685** verdict for the defendant, upon the ground that there is no evidence in the case to show that the action is brought for the purpose of enforcing any claim or lien of the United States; that, so far as appears from the evidence, the individual liability of the defendant as a stockholder of the State National Bank of Wichita is sought to be enforced merely for the purpose of paying the claims of private parties; that there is no evidence in this case to show that such parties are creditors of the State National Bank of Wichita, and there is no evidence to show that the fact that these parties are creditors of the State National Bank of Wichita has ever been established by any decision or order of a court of competent jurisdiction; that, so far as appears, the only decision on this point is that of the comptroller of the currency, and that his decision is of no force, for the reason that it is an attempt of an executive officer to exercise judicial functions."

A verdict was returned in favor of the plaintiff, and to the judgment thereon this writ of error is prosecuted.

The assignments of error are based solely on the grounds covered by the exception taken to the introduction of testimony, the refusal to charge, as above stated, and to an asserted want of jurisdiction in the court below. All these alleged errors may be reduced to the single contention that under the national banking law the comptroller of the currency is without power to appoint a receiver to a defaulting or insolvent national bank, or to call for a ratable assessment upon the stockholders of such bank, without a previous judicial ascertainment of the necessity for the appointment of the receiver and of the existence of the liabilities of the bank, and that the lodgment of authority in the comptroller, empowering him either to appoint a receiver or to make a ratable call upon the stockholders, is tantamount to vesting that officer with judicial power in violation of the Constitution. All

---

NOTE.—*Liability in equity of the stockholders to the creditors of an insolvent corporation for the unpaid amounts due on their stock; liability on new shares issued after claim of creditor arose; capital stock is trust fund; payment for stock, how made,*—see note to Handley v. Stutz, 35: 227.

*As to individual liability of stockholders for corporate debts*, see note to Hatch v. Dana, 25: 885.

*As to liability of trustees of manufacturing, mining, etc., corporations or associations, under New York statute, for not filing report*, see note to Chase v. Curtis, 28: 1038.

*As to individual liability of stockholders for corporate debts; liability contractual; limitations; repeal of statute imposing liability; damages for torts; effect of transfer of stock; during what time liability exists; judgment against corporations*,—see note to United States v. Stanford, 40: 751.



Digitized by Google

of these contentions have been long since settled, and are not open to further discussion. **686**] *Kennedy* v. *Gibson*, 75 U. S. 8 Wall. 498 [19: 476[; *Casey* v. *Galli*, 94 U. S. 674 [24: 168]; *United States* v. *Knox*, 102 U. S. 423 [26: 216]. When, after the adjudication in *Kennedy* v. *Gibson*, the questions were for a second time pressed in argument, the court contented itself with calling attention to the fact that they had been affirmatively adjudicated upon and were concluded. We see no reason now to reopen controversies which were then treated as concluded and have since been approved and in all respects fully affirmed. The contention that there is now presented in argument a grave constitutional question, which was not pressed or considered in the prior cases, is a mere assumption which has no foundation in fact. A casual inspection of the points pressed by counsel in *Casey* v. *Galli* makes evident the fact that the very arguments now advanced were then urged upon the court and held to be untenable.

*Judgment affirmed.*

---

## UNITED STATES and the Sioux Nation or Tribe of Indians, *Appts.*,
*v.*
## NORTHWESTERN EXPRESS, STAGE, & TRANSPORTATION COMPANY.

(See S. C. Reporter's ed. 686-691.)

*Corporation, when citizen of the United States.*

A corporation of a state is a "citizen of the United States," within the meaning of the act of Congress of March 3, 1891, providing for the adjudication of claims of citizens of the United States for property taken or destroyed by Indians.

[No. 218.]

*Submitted December 7, 1896. Decided January 4, 1897.*

APPEAL from a judgment of the Court of Claims awarding to the Northwestern Express, Stage, & Transportation Company a certain amount for property taken and destroyed by the Sioux Nation or Tribe of Indians. *Affirmed.*

The facts are stated in the opinion.

*Messrs.* **Charles B. Howry**, Assistant Attorney General, and *Alexander Porter Morse*, assistant attorney, for appellants.

*Messrs.* **John B. Sanborn, Charles King**, and **William B. King** for appellee.

Mr. Justice **White** delivered the opinion of the court:

This appeal was taken from a judgment of the court of claims awarding to the appellees **687**] the sum of *$750 upon the following state of facts found by the court, to wit:

"1. The claimant is and was at the time of the depredation hereinafter mentioned a corporation created under and by virtue of the laws of the state of Minnesota, and was transacting the business of a common carrier in conveying passengers and freight at the time referred to.

"2. The claimant during the year 1879 was engaged in carrying the mails and doing the business of a common carrier from Bismarck, Dakota, to Deadwood and the Black Hills, upon the territorial road from Bismarck to Cook station, in part through the Great Sioux reservation.

"3. On the 5th of February, 1879, near Cedar Canyon, property belonging to the claimant, consisting of four horses and their harness, was taken or destroyed by Indians of the defendant's tribe, the same being of the value of $750. The defendant Indians were at the time in amity with the United States, and the depredation was committed without just cause or provocation on the part of the claimant or its agents, and the property has not been returned or paid for. The claim has not been approved or allowed by the Secretary of the Interior."

The court of claims decided on the facts so found as a conclusion of law, that the claimant, by reason of its incorporation by a state of the Union, must be conclusively presumed to be a citizen of the United States for the purposes of this action.

The act of March 3, 1891 (26 Stat. at L. 851, chap. 538), is entitled "An Act to Provide for the Adjudication and Payment of Claims Arising from Indian Depredations." By the 1st section of the act jurisdiction and authority were conferred upon the court of claims, in addition to the jurisdiction already possessed by the court, to inquire into and finally adjudicate "all claims for property of citizens of the United States" taken or destroyed by Indians under circumstances specified in the act. The sole question presented by the appeal, therefore, is as to whether, under a proper construction of the act referred to, a corporation of a state for the purpose of the act is embraced within the designation "citizens of the United States."

*The act was considered in *Johnson* v. **[688** *United States*, 160 U. S. 546 [40: 529], and we there held that a person who was not a citizen of the United States at the time of an alleged appropriation of his property by a tribe of Indians was not entitled to maintain an action in the court of claims under the act in question. There was not in that case, however, any assertion that the claimant was a citizen of a state as distinguished from a citizen of the United States. It was also declared that as the court of claims had no general jurisdiction over claims against the United States, it could take cognizance only of such matters as by the terms of the act of Congress were committed to it. Whilst undoubtedly in a purely technical and abstract sense citizenship of one of the states may not include citizenship of the United States, this does not meet the question which we are to construe, which is, What is the meaning of

---

NOTE.—*As to corporations, when deemed citizens or persons,*—see note to United States v. Amedy, 6: 502.

*As to citizenship of corporations with reference to jurisdiction of courts over them*, see notes to National Steamship Co. v. Tugman, 27: 57, and Hope Ins. Co. v. Boardman, 3: 36.



Digitized by Google

the words "citizens of the United States" as used in the statute? Unquestionably, in the general and common acceptation, a citizen of the state is considered as synonymous with citizen of the United States, and the one is therefore treated as expressive of the other. This flows from the fact that the one is normally and usually the other, and where such is not the case it is purely exceptional and uncommon. These considerations give rise to an ambiguity which we must solve, not by reference to a mere abstract technicality, but by that cardinal rule which commands that we seek out and apply the evident purpose intended to be accomplished by the lawmaking power.

Congress has frequently in its legislation, as also the treaty-making power, used the words "citizens of the United States" in the broadest sense, and as embracing corporations created by state law. Thus, in U. S. Rev. Stat. § 2319, the right to purchase mineral deposits in the public lands was conferred upon "citizens of the United States and those who have declared their intention to become such." Section 2321, however, in regulating the mode by which the fact of citizenship should be established, provided that "in the case of a corporation organized under the laws of the United States, or of any state or territory [689] thereof," the fact should be *evidenced "by the filing of a certified copy of their charter or certificate of incorporation." By the French spoliation act of January 20, 1885 (23 Stat. at L. 283, chap. 25), authority was conferred on the court of claims to adjudicate upon certain claims of "citizens of the United States or their legal representatives." The court of claims, however, made no distinction in the exercise of jurisdiction between the claims of natural persons or of corporations. It entered upon no inquiry as to whether the stockholders of such corporations were composed in whole or in part of other than citizens of the United States. Congress appropriated for the payment of judgments thus rendered in favor of corporations. See 26 Stat. at L. 905, 907, where appropriations were made in favor of the receiver of a corporation styled the Baltimore Insurance Company.

In various treaties entered into by the government, the term "citizens of the United States" has been used in the general sense already referred to. Thus, in the treaty with Mexico relative to the adjustment of unsettled claims (15 Stat. at L. 679, 680), jurisdiction is granted to a commission to consider "all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the government of the Mexican Republic." Similar language was also employed in the treaties with Venezuela (16 Stat. at L. 713, 714); with Peru (16 Stat. at L. 751, 752); with Great Britain (17 Stat. at L. 863, 867); and with France (21 Stat. at L. 673, 674).

In various decisions of this court, commencing with *Louisville, C. & C. R. Co.* v. *Letson*, 43 U. S. 2 How. 497 [11: 353], it has been adjudged that for the purpose of suing and being sued in the courts of the United States a corporation of a state should be deemed a citizen of a state, and for the purposes of jurisdiction it would be conclusively presumed that all the stockholders were citizens of the state which by its laws created the corporation. *Muller* v. *Dows*, 94 U. S. 277 [24:76]; *St. Louis & S. F. R. Co.* v. *James*, 161 U. S. 545 [40: 802].

With this frequent use by Congress of the words "citizens of the United States," as embracing a corporation of a state, it remains only to be ascertained from the nature of the remedy proposed to be effected by the Indian depredation act *whether the words were used [690] in the act in their general signification.

The act in question was a provision made by the United States as the guardian of the Indians, controlling as well their persons as their property, designed to make provision for the payment of the injuries committed by its wards. It certainly contemplated that citizens of the United States, even strictly speaking, should be made whole for the losses they might have sustained. But it is evident that cases might arise, where, in order to make restitution to citizens of the United States, the term in question would require a construction embracing Federal and state corporations. For, as the legal title to the property of a corporation is generally in a corporation, claims for damages to such property could not be presented in the names of the several stockholders. To deny relief to such a corporation would be practically therefore to refuse redress to citizens of the United States.

It must have been contemplated, therefore, that a corporation thus chartered by Congress was to be treated under the terms of the act herein referred to as a citizen of the United States for the purposes thereof; and the same reasoning which thus operates to bring a Federal corporation within the terms of the act leads also to the necessity of including corporations of the several states of the Union.

It is true, as argued, that in some cases if corporations were embraced within the terms of the act an alien who was a corporator might be benefited. But the ascertainment of the purposes of Congress by this argument of inconvenience on the one hand is completely destroyed by the overwhelming preponderance of inconvenience which would exist on the other; for, doubtless, whilst the alien corporator may be an exception, the corporator who is both a citizen of the state and a citizen of the United States is the rule. To follow the argument therefore would make the exception dominate and destroy the rule.

As the settled law was that for the purposes of Federal jurisdiction such corporations are conclusively presumed to be composed of citizens of the states, and as such construction was *manifestly frequently approved by the [691] re-enactment of provisions of the statutes conferring jurisdiction without an attempt to alter the presumption thus indulged in, it is proper to consider that such corporations were within the purview of words as used in the remedial act.

*Judgment affirmed.*



Digitized by Google

## *Ex parte* CHARLES F. JONES.

(See S. C. Reporter's ed. 691-694.)

*Suits against national banks—jurisdiction of—diverse citizenship.*

1. Section 4 of the act of August 13, 1888, deprives national banks of the privilege of suing or being sued in the United States circuit and district courts except in cases where diversity of citizenship would authorize an action to be brought; and in such cases the decree of the circuit court of appeals is final.
2. Where a suit against a national bank was brought in the United States circuit court after the act of August 13, 1888, took effect, and the complaint averred the complainant to be a citizen of Pennsylvania and the bank to be a citizen of Massachusetts, the jurisdiction of the court depended on citizenship alone.
3. The judgment of the circuit court of appeals in a case in which the jurisdiction of the circuit court was originally invoked solely upon the ground of citizenship is final, even if another ground were developed in the course of the proceeding.

[Original.]

*Submitted December 7, 1896. Decided January 4, 1897.*

PETITION for a writ of mandamus to the Circuit Court of Appeals for the First Circuit to allow an appeal to this court from a decree of that court affirming a decree of the Circuit Court for the District of Massachusetts dismissing a suit brought by Charles F. Jones against the Merchants' National Bank of Boston, etc. *Petition for mandamus denied.*

Statement by Mr. Justice **Brown**:

This was a petition for an order to show cause why a writ of mandamus should not issue to the circuit court of appeals for the first circuit to allow an appeal to this court from a decree of that court affirming a decree of the circuit court for the district of Massachusetts dismissing the bill of Charles F. Jones against the Merchants' National Bank of Boston; and also for a citation to such bank to appear and show cause why such decree should not be corrected.

The petition set forth, in substance, that petitioner recovered a judgment in the circuit court for the district of Massachusetts against one Swift, for the sum of $18,876.82, upon an action of contract; that Swift paid the amount of the judgment to the clerk of the court, who entered satisfaction of the same; that the money so received by the clerk was deposited with the Merchants' National Bank for the benefit of petitioner, as he claims; that the clerk declined to instruct the bank to pay the money over, whereupon petitioner brought 692] *his bill against the bank for an account of such money, to which bill the bank demurred; that the court sustained the demurrer and dismissed his bill, whereupon petitioner appealed to the circuit court of appeals, which affirmed the decree of the circuit court.

Petitioner then claimed an appeal to this court, and presented an application for the allowance of such appeal to the court of appeals, which was denied, and he thereupon made this application for a mandamus to allow the appeal.

*Messrs.* **F. A. Brooks** and *Frank W. Hackett* for petitioner.

Mr. Justice **Brown** delivered the opinion of the court:

The circuit court of appeals refused to allow an appeal in this case, upon the ground that its jurisdiction in this case was "dependent entirely upon the opposite parties to the suit or controversy being . . . citizens of different states," and, therefore, under § 6 of the court of appeals act of March, 1891, its decree was final and not the subject of an appeal to this court.

Prior to the act of July 12, 1882 (22 Stat. at L. 162, chap. 290), and the jurisdictional act of March 3, 1887 (24 Stat. at L. 552, chap. 373), as revised by the act of August 13, 1888 (25 Stat. at L. 436, chap. 866), it had always been held that suits against corporations organized under acts of Congress were suits arising under the laws of the United States, and therefore cognizable by the circuit courts, regardless of the citizenship of the parties. This doctrine was applied to the United States Bank more than seventy years ago in *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738, 819 [6: 204, 223], and more recently to railways chartered under acts of Congress (*Union P. R. Co.* v. *Myers* ("*Pacific R. Removal Cases*"), 115 U. S. 1 [29: 319]), even since the court of appeals act was passed. *Northern P. R. Co.* v. *Amato*, 144 U. S. 465 [36: 506]; *Union P. R. Co.* v. *Harris*, 158 U. S. 326 [39: 1003].

But by the act of 1882, and more recently by § 4 of the acts of March 3, 1887, and August 13, 1888, the *privilege of suing and being[693 sued under this clause was taken away from national banks by the following language:

"Sec. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same states."

In *Leather Mfrs. Nat. Bank* v. *Cooper*, 120 U. S. 778 [30: 816], it was held by this court that, under the act of 1882, which was similar in its terms, an action against a national bank could not be removed to the Federal court, "unless a similar suit could be entertained by the same court by or against a state bank in like situation with the national bank. Consequently, so long as the act of 1882 was in force, nothing in the way of jurisdiction could be claimed by a national bank because of the source of its incorporation. A national bank was by that statute placed before the law in this respect the same as a bank not organized

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1: 649.

*As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor*,—see note to M'Donald v. Smalley, 7: 227.



Digitized by Google

under the laws of the United States." See also *Whittemore* v. *Amoskeag Nat. Bank*, 134 U. S. 527 [33: 1002]; *Petri* v. *Commercial Nat. Bank*, 142 U. S. 644 [35: 1144]. The section above cited from the act of 1888 undoubtedly deprives these banks of the privilege of suing or being sued, except in cases where diversity of citizenship would authorize an action to be brought; and in such cases the decree of the court of appeals is final.

In this case the original bill averred the complainant to be a citizen of Pennsylvania and the defendant to be a national bank duly established under the laws of the United States, having its place of business at Boston, and a citizen of the state of Massachusetts. As the bill was filed after the act of 1888 took effect, it must be deemed to be a suit dependent upon citizenship alone. But even if another ground were developed in the course of the proceedings the judgment of the court of appeals would be final if the jurisdiction of the circuit court were originally invoked solely upon the 694] ground of *citizenship. *Colorado Central Consol. Min. Co.* v. *Turck*, 150 U. S. 138 [37: 1030]; *Borgmeyer* v. *Idler*, 159 U. S. 408 [40: 199].

*The petition for mandamus must be denied.*

---

## FRANK CARVER, *Plff. in Err.*,
*v.*
## UNITED STATES.

(See S. C. Reporter's ed. 694-699.)

*Dying declarations—evidence of conversation—impeachment.*

1. Evidence that a person whose dying declarations are offered in evidence had received extreme unction is admissible as showing the circumstances under which the declaration was made.
2. Where one party has been permitted to prove a conversation the other party may prove his version of it.
3. Dying declarations may be impeached by evidence of other statements by the same person which are inconsistent therewith.

[No. 588.]

*Submitted December 15, 1896. Decided January 4, 1897.*

IN ERROR to the Circuit Court for the Western District of Arkansas to review a judgment of that court convicting Frank Carver of the murder of one Anna Maledon. *Reversed*, and new trial ordered.

See same case, 160 U. S. 553 (40: 532).

Statement by Mr. Justice **Brown**:

This was a writ of error to review the conviction of the plaintiff in error for the murder of one Anna Maledon at Muskogee, in the Creek Nation of the Indian territory. The conviction was a second one for the same offense, the first having been set aside by this court upon the ground that improper evidence had been received of an alleged dying declaration. 160 U. S. 553 [40: 532].

The evidence tended to show that Carver, a man about twenty-five years of age, was grossly intemperate in his habits, and upon the day the homicide took place had been drinking a mixture of hard cider and Jamaica ginger, and was so intoxicated that he could hardly walk; that deceased, who had been his mistress for several years, had agreed to meet him in the evening at a certain mill crossing in Muskogee. They met at about half-past eight, when he soon began to threaten her that he would, before daylight, kill her and one Walker of *whom he ap [695 peared to have been jealous. He was armed with a revolver and his conduct indicated that he was crazed with liquor. During his walk with the deceased, he met a man whom he drove off at the point of his pistol, and amused himself by firing it off at a lot of cattle, which were within range. Meeting one Crittenden, the deceased, believing that Carver was unfit to care for her and accompany her, asked Crittenden, with whom she was acquainted, to take her home. Crittenden started with them, when Carver got out his pistol again, flourished it about and fired it off twice, once in the air and once in the ground. After walking some fifty yards or more Carver again took out his pistol, flourished it around, and, either intentionally or accidentally, shot deceased in the back and mortally wounded her.

*Messrs.* **Wm. M. Cravens** and *J. Warren Reed* for plaintiff in error.

*Mr.* **J. M. Dickinson**, Assistant Attorney General, for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

1. Defendant's 4th and 5th assignments of error were taken to the action of the court in permitting the district attorney to prove that a Catholic priest was summoned for Anna Maledon; "that she took the sacrament after she was shot," and that he "performed the last rites of the Catholic church in her behalf." We see no objection to this testimony, and think it was within the discretion of the court to admit it. *Alexander* v. *United States*, 138 U. S. 353, 357 [34: 954, 957]. Dying declarations are an exception to the general rule that only sworn testimony can be received, the fear of impending death being assumed to be as powerful an incentive to truth as the obligation of an oath. The fact that the deceased had received extreme unction had some tendency to show that she must have known that she was *in articulo mortis*, and if the *jury were of opinion that [696 the fact that she received it lent an additional sanctity to her statement, it was no error to admit evidence of it. If not, it could do the defendant no harm. It was one of the facts showing the circumstances under which the declaration was made that the government was entitled to lay before the jury. In *Rex*

NOTE.—*As to dying declarations, when admissible in cases of homicide, under sense of impending death; subsequent hope of recovery; by signs or other modes; obtained by solicitation; how restricted; must relate to facts; duty of court; declaration in favor of accused,*—see note to Carver v. United States, 40: 532.



Digitized by Google

v. *Howell*, 1 Den. C. C. 1, the deceased had received a gunshot wound, and repeatedly expressed his conviction that he was mortally wounded. Evidence that he was a Roman Catholic and that an offer was made to fetch a priest, which he declined, appears to have been received without objection, as tending to show that he did not think his end was approaching, but his declaration was held to have been properly received. In *Minton's Case*, McNally's Ev. 336, cited by counsel in *Howell's Case*, the fact of a person having received extreme unction was considered evidence that she thought herself in a dying state.

2. The 6th assignment of error was taken to the refusal of the court to permit the defendant to prove by Mary Belstead and Mary Murray the declarations of defendant, and what he said to deceased, and what she said to him, at the place of the fatal shot, immediately after the shot was fired, for the reason that the same was part of the *res gestæ*, and was also a part of the conversation given in evidence by the government witnesses. We fail to understand the theory upon which this testimony was excluded. Hays and Brann, two witnesses for the government, had testified that they had heard the shots fired and the scream of a woman; that Brann started for the place, and met defendant running away; that defendant went back toward the woman, and then returned again, when Brann caught him and took him back to the woman, about thirty yards. About this time Hays came up, and both testified as to the conversation or exclamations that were made between deceased and the defendant. Defendant's two witnesses, Belstead and Murray, appear to have come up about the same time, and whether the conversation that took place between defendant and deceased at that time was part of the *res gestæ* or not, it is evident that it was practically the same conversation to which the government's witnesses had testi-
**697** fied. If it were competent for one party to prove this conversation, it was equally competent for the other party to prove their version of it. It may not have differed essentially from the government's version, and it may be that defendant was not prejudiced by the conversation as actually proved, but where the whole or a part of a conversation has been put in evidence by one party, the other party is entitled to explain, vary, or contradict it.

3. There was also error in refusing to permit the defendant to prove by certain witnesses that the deceased, Anna Maledon, made statements to them in apparent contradiction to her dying declaration, and tending to show that defendant did not shoot her intentionally. Whether these statements were admissible as dying declarations or not is immaterial, since we think they were admissible as tending to impeach the declaration of the deceased, which had already been admitted. A dying declaration by no means imports absolute verity. The history of criminal trials is replete with instances where witnesses even in the agonies of death have, through malice, misapprehension, or weakness of mind, made declarations that were inconsistent with the actual facts; and it would be a great hardship to the defendant who is deprived of the benefit of a cross-examination to hold that he could not explain them. Dying declarations are a marked exception to the general rule that hearsay testimony is not admissible, and are received from the necessities of the case and to prevent an entire failure of justice, as it frequently happens that no other witnesses to the homicide are present. They may, however, be inadmissible by reason of the extreme youth of the declarant (*Rex* v. *Pike*, 3 Car. & P. 598), or by reason of any other fact which would make him incompetent as an ordinary witness. They are only received when the court is satisfied that the witness was fully aware of the fact that his recovery was impossible, and in this particular the requirement of the law is very stringent. They may be contradicted in the same manner as other testimony, and may be discredited by proof that the character of the deceased was bad, or that he did not believe in a future state of rewards or punishment. *State* v. *Elliott*, 45 Iowa, 486; *Com.* v. *Cooper*, 5 Allen, 495 [81 Am. Dec. 762]; *Goodall* v. *State*, 1 Or. *333 [80 Am. Dec. 396]; *Tracy* [698 v. *People*, 97 Ill. 101; *Hill* v. *State*, 64 Miss. 481.

It is true that, in respect to other witnesses, a foundation must be laid for evidence of contradictory statements by asking the witness whether he has made such statements, and we have held that where the testimony of a deceased witness, given upon a former trial, was put in evidence, that proof of the death of such witness subsequent to his former examination will not dispense with this necessity. *Mattox* v. *United States*, 156 U. S. 237 [39:409]. That case, however, was put upon the ground that the witness had once been examined and cross-examined upon a former trial. We are not inclined to extend it to the case of a dying declaration, where the defendant has no opportunity by cross-examination to show that by reason of mental or physical weakness or actual hostility felt toward him the deceased may have been mistaken. Considering the friendly relations which had existed between the defendant and the deceased for a number of years, their apparent attachment for each other, and the alcoholic frenzy under which defendant was apparently laboring at the time, the shooting may possibly not have been with deliberate intent to take the life of the deceased, notwithstanding the threats made by the defendant earlier in the evening. In nearly all the cases in which the question has arisen evidence of other statements by the deceased inconsistent with his dying declarations has been received. *People* v. *Lawrence*, 21 Cal. 368 (an opinion by Chief Justice Field, now of this court); *State* v. *Blackburn*, 80 N. C. 474; *McPherson* v. *State*, 9 Yerg. 279; *Hurd* v. *People*, 25 Mich. 405; *Battle* v. *State*, 74 Ga. 101; *Felder* v. *State*, 23 Tex. App. 447 [59 Am. Rep. 777]; *Moore* v. *State*, 12 Ala. 764 [46 Am. Dec. 276].

Our attention has been called to but one case to the contrary, *viz.*, *Wroe* v. *State*, 20 Ohio St. 460, cited with apparent approval in the *Mattox Case*. But we think, as applied to dying declarations, it is contrary to the weight of authority.



Digitized by Google

As these declarations are necessarily *ex parte*, we think the defendant is entitled to the benefit of any advantage he may have lost by the want of an opportunity for cross-examination. *Rex* v. *Ashton*, 2 Lew. C. C. 147.

699] *The disposition we have made of these assignments renders it unnecessary to consider the others. *The judgment of the court must be reversed*, the conviction set aside, and a new trial ordered.

Mr. Justice **Brewer** and Mr. Justice **Peckham** concurred in reversing upon the sixth assignment only.



Digitized by Google

# CLXIV UNITED STATES.

**164 U. S. 1–26, 41 L. 327, BEAR LAKE, ETC., IRR. CO. v. GARLAND.**

**Statutes.**— Later statute, containing similar and identical provisions as earlier, will be construed as continuation, p. 11.

**Mechanic's liens.**— Law enlarging time for enforcement applies to one who has just entered on contract, p. 13.

**Constitutional law.**— Law enlarging time for enforcing mechanics' liens affects procedure only, p. 15.

**Mortgage** may subject after-acquired property to lien, p. 15.

Reaffirmed in Harris v. Youngstown Bridge Co., 90 Fed. 328, 62 U. S. App. 124.

**Mortgage** binding after-acquired property attaches as soon as property is acquired, p. 15.

**Supreme Court,** on appeal from territorial court, cannot review findings of fact, p. 18.

Approved in Harrison v. Perea, 168 U. S. 323, 42 L. 482, 18 S. Ct. 134, reaffirming rule; Cahill v. Benson, 19 Tex. Civ. App. 34, 46 S. W. 891, question of improvements in good faith is for jury.

**Public lands.**— No title to right of way for ditches and canals is acquired until completion, p. 19.

Approved in Harris v. Youngstown Bridge Co., 90 Fed. 332, 62 U. S. App. 130, bridge company obtained title to right of way by ordinance, prior to construction.

**Mechanic's lien** for labor in constructing ditches across public lands attaches to property at once, p. 19.

Approved in New York, etc., Trust Co. v. Capital Ry., 77 Fed. 531, and Harris v. Youngstown Bridge Co., 90 Fed. 329, 62 U. S. App. 125, where mortgagor's title is acquired through another's expenditure, under circumstances giving latter lien, prior mortgage, with after-acquired property clause, attaches only to interests of mortgagor subject to same lien.

Distinguished in Venner v. Farmers' Loan, etc., Co., 90 Fed. 355, 62 U. S. App. 155, refusing priority to vendor's lien as against grantee's mortgagees, vendor being practically identical with grantee.

**Public lands.**— Title to right of way cannot relate back if mechanics' liens will be defeated, p. 23.



Digitized by Google

**Mechanics' liens.**— Company engaged in constructing ditch over public lands is "owner" within lien law, p. 25.

Approved in Chicago Lumber Co. v. Dillon, 13 Colo. App. 204, 56 Pac. 992, grantee is owner of property while deed is in escrow.

164 U. S. 26–42, 41 L. 337, AMERICAN ROAD-MACHINE CO. v. PENNOCK, ETC., CO.

**Patent No. 331,920, to Geo. W. Taft, for road machine is void for want of novelty, p. 41.**

**Patents.**— Where means are old, enlargement by common method is not invention, p. 41.

Not cited.

164 U. S. 42–46, 41 L. 344, UNITED STATES v. GILLIAT.

**Supreme Court cannot review Court of Claims' determination of person to whom spoliation claim was payable, p. 44.**

**Court of Claims' certificate as to person to whom spoliation claim is payable is conclusive, p. 46.**

Not cited.

164 U. S. 46–49, 41 L. 345, UNITED STATES v. HEWECKER.

**Courts.**— Certificates of division cannot be granted in criminal cases upon request of government, p. 48.

Not cited.

164 U. S. 49–53, 41 L. 346, UNITED STATES v. KURTZ.

**Clerks of courts.**— Entire record in criminal case is deemed one instrument in estimating fees, p. 51.

Followed in Marsh v. United States, 88 Fed. 881.

**Clerk's right to fee is not affected by withdrawal of plea of not guilty, p. 51.**

**Clerk is entitled to fee in case which, after issue joined, is discontinued upon nol. pros., p. 52.**

**Clerk is entitled to larger fees where issue is joined in course of proceedings, p. 52.**

Reaffirmed in Butler v. United States, 87 Fed. 666.

**Clerk may charge for making list of jurors, with residence, when required by order or practice, p. 53.**

**Clerks may charge for entering order directing disposition of fines and for filing certificate of deposit. p. 53.**

Approved in Marsh v. United States, 88 Fed. 889, treasury rule, allowing no supplemental accounts after quarter's accounts have been passed on, does not bind courts, followed.

**Clerks.**— Commission allowed clerk for keeping money, pursuant to order or statute, does not exclude ordinary fees, p. 53.

Digitized by Google

**164 U. S. 54–75,** 41 L. 348, SALTONSTALL v. BIRTWELL.

**Customs.—"Payment under protest" means transaction where protest has been** made pursuant to § 2931, R. S., p. 70.

**Customs.—In** 1888 right of action accrued to importer if he made protest in form required within ten days, p. 70.

**Not cited.**

**164 U. S. 76–81,** 41 L. 355, McELROY v. UNITED STATES.

**Indictments** for assault to kill, and for arson against same persons, cannot be joined with indictments for arson on different date against some of them, p. 79.

**Approved in** Cohen v. United States, 164 U. S. 702, 41 L. 1181, 17 S. Ct. 993, affirmed on authority hereof.

**Distinguished in** Williams v. United States, 168 U. S. 390, 42 L. 512, 18 S. Ct. 95, indictments for same kind of offenses, provable by same kind of evidence, against same person, may be tried together.

**Criminal law.—** Substantive offenses, distinct and complete, cannot be consolidated for trial, p. 80.

**Criminal law.—** Improper consolidation of trials under § 1024, R. S., is reversible error, p. 80.

**164 U. S. 81–88,** 41 L. 357, UNITED STATES v. McMAHON.

**United States** marshals can charge but one fee for attending examinations before same commissioner on same day, p. 83.

**Followed in** Nixon v. United States, 82 Fed. 31, and Puleston v. United States, 88 Fed. 975.

**United States** marshal may charge for each attendance before different commissioners on same day, p. 83.

**United States** marshal's special deputy cannot, under § 2021, R. S., charge for attending examination of persons arrested for illegal voting, p. 85.

**United States** marshal is entitled to mileage for taking prisoner to penitentiary in State, but outside of district, p. 87.

**Reaffirmed in** Jacobus v. United States, 87 Fed. 107.

**United States** marshal cannot have fee of $2 for serving warrants of commitment, p. 87.

**Followed in** United States v. Dill, 86 Fed. 84, 57 U. S. App. 270.

**Miscellaneous.—** Cited in United States v. Saunders, 79 Fed. 407, 50 U. S. App. 25, United States may maintain set-off for payments unauthorized by law.

**164 U. S. 89–92,** 41 L. 360, PARSONS v. VENZKE.

**Public lands.—** Commissioner and secretary may cancel entry after final receipt issued, p. 91.

Digitized by Google

Approved in Michigan, etc., Lumber Co. v. Rust, 168 U. S. 593, 42 L. 592, 18 S. Ct. 209, land department has jurisdiction to determine whether or not title has passed; Diller v. Hawley, 81 Fed. 654, 48 U. S. App. 469, and Pfund v. Valley, etc., Trust Co., 52 Neb. 476, 72 N. W. 481, reaffirming rule.

Public lands.— Section 7, act of March 3, 1891, regarding confirmations, refers only to entries then existing, p. 92.

Reaffirmed in Pfund v. Valley, etc., Trust Co., 52 Neb. 477, 72 N. W. 481.

164 U. S. 93–100, 41 L. 362, CENTRAL PAC. R. R. v. UNITED STATES.

Post-office.— Railroad's acquiescence in inspector's demand for free transportation for several years waives claim therefor, p. 100.

Not cited.

164 U. S. 100–105, 41 L. 365, WHITE v. UNITED STATES.

Criminal law.— Where records showed indictment, arraignment, plea, trial, conviction and refusal to arrest judgment, sentence is sufficient judgment, p. 102.

Criminal law.— Entry by jailer in book kept for own convenience may show prisoner's presence at time, p. 103.

Approved in Goodrich v. Senate, 92 Me. 251, 42 Atl. 410, sheriff's register is merely prima facie evidence of presence in jail.

Criminal law.— Book kept by jailer by order of superior is kept in his official capacity, p. 103.

Distinguished in Rollins v. Board of Commrs., 90 Fed. 579, 32 U. S. App. 262, county clerk's "statements" of county expenditures are not receivable to show indebtedness at dates thereof.

Criminal law.— Defendant cannot object to charge as to good character given substantially as requested, p. 105.

164 U. S. 105–112, 41 L. 367, PRESS PUB. CO. v. MONROE.

Circuit Court's jurisdiction on ground of Federal question must be determined from plaintiff's claim, p. 110.

Reaffirmed in Muse v. Arlington Hotel Co., 168 U. S. 436, 42 L. 533, 18 S. Ct. 111.

Circuit Court of Appeals' decision in suit based on right in unpublished manuscript is final where citizenship diverse, p. 112.

Approved in Pope v. Louisville, etc., Ry., 173 U. S. 576, 19 S. Ct. 501, Circuit Court of Appeals' judgments in suits depending on diverse citizenship, are final; San Joaquin, etc., Irr. Co. v. Stanislaus Co., 90 Fed. 520, where record shows Federal question, diverse citizenship is not essential.

Digitized by Google

**164 U. S. 112–179, 41 L. 369, FALLBROOK IRR. DIST. v. BRADLEY.**

**Circuit Court** may decide constitutionality of State law in suit based on diverse citizenship, p. 154.

**Approved in San Joaquin, etc., Irr. Co. v.** Stanislaus Co., 90 Fed. **520, diversity of citizenship is not essential to jurisdiction where record discloses Federal question; dissenting opinion in Tregea v. Modesto Irr. Dist., 164 U. S. 189, 42 L.** 399, 17 S. Ct. 56, arguendo.

**Federal court's determination as to repugnancy of law to State Constitution, must be based on State court's construction, p. 154.**

**Approved in Miller v. Perris Irr. Dist.,** 85 Fed. 701, California **Superior Court decisions approving organization of irrigation district, bind Federal court.**

**Federal courts will not declare law repugnant to State Constitution in face of contrary State decisions, p. 155.**

**Taxation.— Constitutional guaranty of** due process **is preserved by tax law providing for hearing of protests, p. 158.**

**Approved in Yazoo, etc., R. R. v. Adams,** 77 Miss. 779, 25 So. 357, **upholding provision for assessment of railroad property for back taxes by commissioners without authority** to assess other property.

**Courts.—** Property **is taken without due** process when for other **than public use, giving Federal court jurisdiction, p. 159.**

**Approved in Missouri Pac. Ry. v. Nebraska,** 164 U. S. 417, 41 L. **495, 17 S. Ct. 135, act requiring railroads** allowing one party to **erect elevators on right of way, to extend** privilege to all, **is unconstitutional; Sears v. Street Commrs.,** 173 Mass. 355, 53 N. E. **878, sewer assessment, statute of 1897, is** unconstitutional, as **authorizing taking to pay charge not founded** on special benefit.

**Eminent domain.— Irrigation of arid lands is** public use, p. 161.

**Approved in Ellinghouse v. Taylor,** 19 Mont. 466, 48 Pac. 758, **upholding act of 1891, authorizing condemnation** of right of way for **ditch to irrigate particular mine; Cummings** v. Hyatt, 54 Neb. 42, **74 N. W. 414, reaffirming rule; Prescott** Irr. Co. v. Flathers, 20 **Wash. 459, 55 Pac. 636, upholding Washington** irrigation laws.

**Waters.— Fact that use of water is** limited to landowners **does not invalidate law creating irrigation district,** p. 161.

**Eminent domain.— Direct enjoyment by** considerable portion **of community is not necessary to public use,** p. 162.

**Approved in Rolph v. Fargo,** 7 N. Dak. 669, 76 N. W. 251, 42 L. **R. A. 657, rule of apportionment among** parcels of land benefited, **rests within legislative discretion.**

**Waters.— Owner must be heard on** question whether his land **would be benefited by irrigation district, p. 167.**

**Waters.— Decision of tribunal to determine** whether **lands would be benefited is conclusive in absence of fraud, p. 168.**



Digitized by Google

Approved in Yazoo, etc., R. R. v. Adams, 77 Miss. 779, 25
commissioners' valuation and assessment of railroad pro
collaterally conclusive except for fraud; Rolph v. Fargo, 7
664, 76 N. W. 249, 42 L. R. A. 655, legislature may direct
penses of street paving to be assessed against abutting p
proportionate to frontage.

Constitutional guaranty of due process does not require
appeal from special board's decision, p. 169.

Waters.— Act creating district for irrigating arid lands is
valid because not limited to arid lands, p. 170.

Reaffirmed in Herring v. Modesto Irr. Dist., 95 Fed. 723.

Waters.— Act providing for creating irrigation districts
hearing on question of benefit is valid, p. 171.

Approved in In re Central Irr. Dist., 117 Cal. 390, 49 Pac.
holding "Wright" irrigation act of 1887; Alessandro Irr.
Sav., etc., Co., 88 Fed. 939, arguendo.

Waters.— Irrigation district under California law is public
tion, and its officers public officers, p. 174.

Approved in Atlantic Trust Co. v. Woodbridge, etc., Irr.
Fed. 43, and Atlantic Trust Co. v. Woodbridge, etc., Irr.
Fed. 506, equitable rules governing priority of labor claims
road's foreclosure proceedings, apply to irrigation compani
Joaquin, etc., Irr. Co. v. Stanislaus Co., 90 Fed. 521, irrigati
pany is a quasi-public corporation whose rates are subject to
tion; Herring v. Modesto Irr. Dist., 95 Fed. 716, legality of o
tion of irrigation district formed under California Wright a
not be collaterally attacked, or pleaded by district.

Distinguished in San Diego Flume Co. v. Souther, 90 F
61 U. S. App. 145, irrigation companies are private corpo
and in absence of statutory rates may contract with commi
for furnishing water.

Waters.— Act creating irrigation district is not invalid
assessments are not proportioned to benefits, p. 176.

Approved in Rolph v. Fargo, 7 N. Dak. 666, 76 N. W. 2
R. A. 656, in exercising power of local assessment legislatu
limited to actual increase in value of property assessed r
from local improvement.

Waters.— Act authorizing supervisors to create irrigation
is not void as delegation of power, p. 178.

Approved in Bauman v. Ross, 167 U. S. 590, 42 L. 288,
982, and Rolph v. Fargo, 7 N. Dak. 668, 76 N. W. 251, 42
657, class of lands to be assessed for street improvement
determined by legislature or commissioners and confined
they decide to be benefited.

Digitized by Google

Miscellaneous.— Cited in Wisconsin v. Siebecker, 164 U. S. 702, 41 L. 1182, 17 S. Ct. 1000, decided on authority of principal case (point not stated).

164 U. S. 179–189, 41 L. 395, TREGEA v. MODESTO IRR. DIST.

**Courts.**— State court's decision upholding assessment against claim of unconstitutionality involves Federal question, p. 185.

**Courts.**— State court's ex parte judgment as to validity of irrigation bonds involves no Federal question, p. 186.

Approved in Miller v. Perris Irr. Dist., 85 Fed. 700, State decisions upholding validity of irrigation district organization, bind Federal courts; In re Central Irr. Dist., 117 Cal. 386, 49 Pac. 356, upholding "Wright" irrigation act of 1887.

**Courts.**— State court's decision as to proper organization of irrigation district binds Supreme Court, p. 186.

Approved in Miller v. Perris Irr. Dist., 85 Fed. 701, California Superior Court decisions approving organization of irrigation districts binds Federal courts.

164 U. S. 190–212, 41 L. 399, WISCONSIN CENT. R. R. v. UNITED STATES.

**Statutes.**— Construction rendering meaningless reference to former act will not be favored, p. 202.

**Post-office.**— Surrender of right to demand carriage over subsidized roads, at reasonable rate, will not be presumed, p. 204.

**Post-office.**— Railroad-aid acts of 1856 and 1864 construed with reference to mail-carriage, p. 204.

Statutes granting privileges or relinquishing public rights must be strictly construed against grantee, p. 202.

Approved in State v. Towers, 71 Conn. 666, 42 Atl. 1086, grant of right to lay wires must be strictly construed, mandamus to city refused.

Postmaster-general does not act judicially in directing payment for mail carriage, p. 205.

**Statutes.**— Executive construction neither contemporaneous nor continuous, cannot control where language is clear, p. 205.

Cited in Logan Co. v. United States, 169 U. S. 259, 42 L. 739, 18 S. Ct. 362, arguendo.

United States is not bound in suit by action of executive departments in matters of account, p. 205.

Approved in United States v. Utz, 80 Fed. 852, 39 U. S. App. 630, customs collector's audit is not conclusive; State v. Nelson, 105 Wis. 114, 80 N. W. 1106, as between public corporations and officers, title and ownership of fund cannot be gained or lost by mistaken transfer from one treasury to another.

Digitized by Google

Distinguished in Logan Co. v. United States, 169 U. S. 257, 42 L. 738, 18 S. Ct. 361, approval of internal revenue commissioner and secretary of treasury is prima facie evidence that claim was due.

Post-office.— Payment is "by mistake" within § 4057, R. S., when result of erroneous construction by department, p. 211.

United States is not bound by unauthorized payments by officers misconstruing law, p. 210.

See 55 Am. St. Rep. 517, note.

Payment.— Parties receiving illegal payments from public officers must refund, p. 212.

Approved in United States v. Saunders, 79 Fed. 408, 50 U. S. App. 26, government may recover money erroneously paid marshal, where error is of law or fact.

Court of Claims procedure does not require United States to set off claim for money illegally paid, p. 212.

164 U. S. 213–220, 41 L. 407, UNITED STATES v. VERDIER.

Postmaster whose accounts show him indebted to government at end of term is liable for interest, p. 215.

Post-office.— Application for readjustment of salary must be made before demand under act of 1883, p. 217.

United States.— Postmaster-general cannot bind government by neglect to act on claim for readjusted salary, p. 220.

United States is not liable for interest on claims delayed by officer's neglect, p. 220.

Reaffirmed in District of Columbia v. Johnson, 165 U. S. 338, 41 L. 737, 17 S. Ct. 365.

Approved in Dunlap v. United States, 173 U. S. 72, 19 S. Ct. 322, construing act of 1894, relative to use of alcohol in arts, etc.

164 U. S. 221–227, 41 L. 410, BROWN v. UNITED STATES.

Witnesses.— Charge that witness can be impeached only by testimony of honest and good men is erroneous, p. 224.

Criminal law.— Exception "to that part of charge in regard to evidence" of specified witness, is sufficient, p. 224.

Not cited.

164 U. S. 227–240, 41 L. 412, PRAIRIE STATE BANK v. UNITED STATES.

United States contract for public building cannot be affected by agreement between contractor and stranger, p. 231.

Subrogation.— Surety completing building after default by principal is entitled to be subrogated, p. 231.

Contracts.— Contractor's surety has equity in amount stipulated to be retained until completion of building, p. 233.

Digitized by Google

**Contracts.**— Surety is released by owner's disregard of stipulation for retention of part of price, p. 233.

Approved in dissenting opinion in Graves v. Merrill, 67 Minn. 476, 70 N. W. 567, majority holding payment in excess of 85 per cent. of price did not release surety without proof that payment exceeded 85 per cent. of total of labor and materials already furnished.

**Contracts.**— Surety's equity in money retained is superior to that of one advancing to original contractor, p. 240.

164 U. S. 240–247, 41 L. 419, DRAPER v. UNITED STATES.

**Courts.**— Enabling act did not deprive Montana courts of jurisdiction of offenses on Indian reservation, not by or against Indians, p. 242.

Approved in Nordstrom v. Washington, 164 U. S. 705, 41 L. 1188, 17 S. Ct. 997, approved on authority hereof; Stiff v. McLaughlin, 19 Mont. 302, 48 Pac. 233, entry on Indians' lands to levy execution on property of non-Indian is not interdicted by enabling act.

**Courts.**— Reservation in enabling act of control over Indian lands did not affect such jurisdiction, p. 247.

Approved in State v. Denoyer, 6 N. Dak. 596, 72 N. W. 1018, county commissioners should establish voting precinct within territory allotted in severalty to certain Indians.

164 U. S. 248–252, 41 L. 422, WILSON v. KIESEL.

**Appeal.**— Cross-bill involving jurisdictional amount cannot give jurisdiction where necessary parties absent, p. 251.

Appeal will be dismissed where record shows absence of persons directly and vitally interested in decree, p. 252.

Not cited.

164 U. S. 252–255, 41 L. 424, FOWLER v. LAMSON.

Supreme Court will dismiss writ of error to State court where record is vague and fragmentary, p. 253.

**Courts.**— Assignment of errors cannot show Federal question not disclosed by record, p. 255.

Supreme Court will not review State decision unless Federal question was raised before final judgment, p. 255.

Approved in Chappell Chemical Co. v. Sulphur Mines Co., 172 U. S. 471, 19 S. Ct. 268, motion to dismiss granted although Federal question was raised by petition, State court decisions resting on other grounds.

164 U. S. 255–261, 41 L. 425, LALONE v. UNITED STATES.

**Pensions.**— To warrant recovery of pension paid, evidence of fraud must be clear and satisfactory, p. 257.

Digitized by Google

**Pensions.**— Evidence of injury before entering army will rant recovery of pension paid where there was evidence th ant was healthy when he entered, p. 260.

Not cited.

164 U. S. 261–270, 41 L. 427, OLD JORDAN MIN., ETC SOCIETE ANONYME.

**Appeal.**— Failure to present and insist on errors assign operates as waiver thereof, p. 265.

**Contracts.**— Whether letter and answer make contract determined from all correspondence and actions, p. 270.

Not cited.

164 U. S. 271–280, 41 L. 431, WABASH WESTERN RY. v.

**Removal.**— Filing of petition amounts only to special app p. 279.

Reaffirmed in Du Pont v. Abel, 81 Fed. 534, and Monroe v. son, 81 Fed. 087, Spreen v. Delsignore. 94 Fed. 72.

Approved in Hawkins v. Peirce, 79 Fed. 453, filing removal is not appearance waiving defects in service; Purdy v. M Fed. 514, non-resident not personally served does not submit court jurisdiction by giving bond to release attachment; v. Calumet Fire-Clay Co., 94 Fed. 26, answering pending to quash summons is not voluntary appearance preventing

Distinguished in Gregory v. Boston Safe-Deposit, etc., Co., 4, under act of 1887, petition for removal cannot be fil expiration of time to answer in State court; Howard v. Ry., 122 N. C. 951, 29 S. E. 780, removal cannot be had on filed during extension by stipulation of time to answer.

**Removal.**— After removal defendant may object to orig vice of process, p. 278.

Approved in Nat. Accident Soc. v. Spiro, 164 U. S. 281, 4 17 S. Ct. 996, reaffirming rule; Frink v. Blackinton Co., 308, all matters in abatement remain open to be pleaded in Court in suits removed; Ashley v. Quintard, 90 Fed. 87, dent, served by publication, does not, by removal, waive move to vacate service; Collins v. American, etc., Mfg. Co., 133, objection to sufficiency of return of service may b after removal; Purdy v. Müller, 81 Fed. 515, arguendo.

Distinguished in Bragdon v. Perkins, etc., Co., 82 Fed. 3 court's decision on motion to set aside service precludes of motion after removal.

164 U. S. 281, 41 L. 435, NATIONAL ACCIDENT SOC. v.

**Removal.**— After removal defendant may object to orig vice of process, p. 281.

Digitized by Google

Approved in National Accident Soc. v. Spiro, 78 Fed. 776, 47 U. S. App. 293, reaffirming rule; Hawkins v. Peirce, 79 Fed. 453, filing removal petition is not appearance waiving defects in service.

164 U. S. 282-286, 41 L. 435, UNITED STATES v. DELANEY.

Public lands.— Register of new land office is entitled to compensation as soon as he commences duties, p. 285.

Not cited.

164 U. S. 287-294, 41 L. 437, McKEE v. UNITED STATES.

Internal revenue.— Section 4, act of March 2, 1891, directing payment of money collected under act of 1861, construed, p. 294.

Statute will be restricted within narrower limits than language imports where legislative intention so requires, p. 293.

Distinguished in United States v. Freight Assn., 166 U. S. 320, 41 L. 1020, 17 S. Ct. 551, debates in Congress are not appropriate sources of information from which to discover meaning of statute; United States v. Goldenberg, 168 U. S. 103, 42 L. 398, 18 S. Ct. 4, no mere omission or failure to provide for contingencies will justify judicial addition to statute.

Miscellaneous.— Cited in Glover v. United States, 164 U. S. 295, 41 L. 440, 17 S. Ct. 96, referring to principal case for text of act.

194 U. S. 294-301, 41 L. 440, GLOVER v. UNITED STATES.

Mortgage creditor is not legal owner in South Carolina, p. 296.

Internal revenue.— Mortgage creditor at time of sale to enforce direct tax of 1861 was not "legal owner" within act of 1891, p. 297.

Not cited.

164 U. S. 301-311, 41 L. 442, COUGHRAN v. BIGELOW.

Jury.— Right to jury trial is not infringed by granting non-suit for want of sufficient evidence, p. 308.

Distinguished in Patting v. Spring Valley Coal Co., 93 Fed. 99, involuntary non-suits not being allowed in Federal courts on failure to appear, proper procedure is to impanel jury and direct verdict.

Vendor's acceptance of payment after time limited is waiver of right to rescind, p. 310.

Vendor's surety is released by vendee's failure to pay at prescribed time, though vendor accepts later, p. 310.

Vendor's inability to make conveyance does not excuse tender by vendor seeking to charge surety, p. 311.

Approved in Duncan v. Geyser Mining Co., 17 Utah, 213, 53 Pac. 1045, upon failure to convey or tender, action accrues to recover payment made after failure. See 60 Am. St. Rep. 96, note.

Digitized by Google

164 U. S. 311–318, 41 L. 447, CAKE v. MOHUN.

**Receivers.**— Judgment for compensation and debt ass receiver passes to his personal representative, p. 315.

**Receiver** may carry on business where interests of par to require, in discretion of court, p. 316.

**Receivers.**— Purchaser under foreclosure agreeing to pay for expenditures and compensation cannot question allo 316.

**Receivers.**— Purchaser so agreeing to obtain immediate p without payment into court is personally liable, p. 316.

**Receivers.**— Concurring views of master and court bel compensation are of great weight, p. 318.

**Receivers.**— Allowance of $500 for attorney's fees held fa

Not cited.

164 U. S. 319–324, 41 L. 451, CITIZENS' BANK v. CANNO

**Circuit Court** cannot acquire jurisdiction to enjoin tax joinder of suits, p. 322.

**Circuit Court** cannot assume for jurisdictional purposes t for succeeding years were same as one appearing, p. 322.

**Appellate court may**, on review of dismissal for want diction, review allowance of costs as penalty, p. 323.

Approved in The City of Augusta, 80 Fed. 304, 50 U. S. court has entire control of costs as well as of merits whe possession of case on appeal from final decree.

**Costs.**— **Circuit Court** cannot, upon dismissal for want diction, decree payment of costs, p. 324.

Distinguished in The City of Augusta, 80 **Fed.** 303, 50 U. 49, there **may** be **appeal** from costs when **force of statu** volved.

164 U. S. 325–327, 41 L. 453, CAROTHERS v. MAYER.

**Courts.**— Holding that statute did not run against cla patent, involves no Federal question, p. 327.

Not cited.

164 U. S. 327–337, 41 L. 454, CENTRAL R. R., ETC., WRIGHT.

**Federal court is not bound** by construction of statute by ring judge of State court, p. 333.

Taxation.— Word "stock" in statute empowering city only property, does not include property represented b p. 334.

**Taxation.**— Exemption cannot be **presumed**, p. 336.

Digitized by Google

**Taxation.**— Municipalities created after act conferring taxing powers are included therein, p. 337.

Not cited.

164 U. S. 338-347, 41 L. 458, GONZALES v. FRENCH.

**Public lands.**— Department's decision of contest is conclusive, in absence of fraud or erroneous construction of law, p. 342.

Reaffirmed in Wiseman v. Eastman, 21 Wash. 172, 57 Pac. 401.

**Public lands.**— Settler on school sections before survey, failing to make entry, acquires no pre-emption rights, p. 344.

**Public lands.**— Decision of receiver and register is conclusive, unless appealed to commissioner, p. 345.

164 U. S. 347-361, 41 L. 461, McCLELLAN v. CHIPMAN.

**Banks.**— State law is unconstitutional as affecting State banks only when their duty to government is affected, p. 357.

Approved in Linton v. Childs, 105 Ga. 573, 32 S. E. 619, act imposing tax on each president of a bank within State is inoperative as to national banks.

National banks are subject to State laws except so far as they conflict with Federal laws, p. 357.

**Banks.**— There is no conflict between powers of national banks under §§ 5136, 5137, R. S., and State law, to prevent preferences, p. 361.

164 U. S. 361-367, 41 L. 467, EDGINGTON v. UNITED STATES.

**Pensions.**— Section 5438, R. S., was not repealed by § 4746, p. 368.

Reaffirmed in United States v. Hansee, 79 Fed. 304.

**Criminal law.**— Evidence of good character is admissible to raise doubt whether accused would commit crime, p. 364.

Approved in State v. Porter, 32 Or. 159, 49 Pac. 970, reaffirming rule.

**Criminal law.**— Error in admitting evidence is not cured by conjecture that it might be proper later, p. 364.

Miscellaneous.— Cited in Felton v. Newport, 92 Fed. 474, holding exception to part of charge sufficiently specific.

164 U. S. 367-373, 41 L. 472, NOBLE v. MITCHELL.

**Federal courts** will follow State court's construction rendering statute constitutional, p. 372.

Approved in Osborne v. Florida, 164 U. S. 654, 41 L. 587, 17 S. Ct. 215, Florida statute imposing license on express companies, as construed by Florida courts, is valid.

**Supreme Court** cannot review State decision as to sufficiency of evidence to go to jury, p. 373.

Digitized by Google

164 U. S. 373–380, 41 L. 474, UNITED STATES v. ELL

Internal revenue.— Remainderman may have benefit 1891, although property bought in by life tenant after r period, p. 380.

Approved in Fuller v. United States, 172 U. S. 643, 876, and United States v. Kidder, 172 U. S. 644, 19 S. C firmed on authority hereof.

164 U. S. 380–383, 41 L. 477, STONE v. UNITED STAT

Court of Claims' findings, in action at law, is of same verdict of jury, p. 382.

Reaffirmed in Collier v. United States, 173 U. S. 81, 19

Supreme Court will not refer to Court of Claims' opin tend or limit findings, p. 383.

Reaffirmed in Collier v. United States, 173 U. S. 80, 19 and United States v. New York Indians, 173 U. S. 470, 19

164 U. S. 383–388, 41 L. 479, NORTHERN PAC. R. R. v. C

Courts.— Decision of State court adverse to Fede claimed, raises Federal question, regardless of ground, p.

Public lands.— Homestead or pre-emption rights cann until entry in land office, p. 386.

Approved in Northern Pac. R. R. v. Smith, 171 U. S. Ct. 797, mere occupation and improvement do not conv right in public lands; Central Pac. R. R. v. McCann, 126 58 Pac. 1045, reaffirming rule; McHenry v. Nygaard, 72 74 N. W. 1108, mere occupation and cultivation is insu defeat right of railroad to select as indemnity lands; Ja etc., R. R. v. Jones, 7 N. Dak. 625, 76 N. W. 228, as agains grant of right of way to railroad attaches only after s approval of profile of road; United States v. Central P 84 Fed. 90, arguendo.

Distinguished in Northern Pac. Ry. v. McCormick, 94 settler on unsurveyed land at time of filing map of rail tion, has pre-emptor's right thereon.

Public lands.— Secretary's decision that occupation in excepts land from railway grant is reviewable, p. 387.

Approved in McHenry v. Nygaard, 72 Minn. 12, 74 N. when railroad selects indemnity lands and files list, its rig cannot be defeated by arbitrary refusal to approve selec

Public lands.— Patent is not always conclusive in acti p. 387.

Approved in Northern Pac. Ry. v. Miller, 20 Wash. 3 606, patent may be collaterally attacked as void because till after grant to others; Moore v. Cormode, 20 Wash. 3 219, arguendo.

Digitized by Google

**Miscellaneous.**— Cited in Northern Pac. Ry. v. De Lacey, 174 U. S. 634, 19 S. Ct. 796, not in point.

164 U. S. 388–393, 41 L. 481, ACERS v. UNITED STATES.

**Homicide.**— Stone large enough to fracture skull is deadly weapon, p. 391.

**Homicide.**— Deadly weapon may be defined as one "with which death may be easily and readily produced," p. 391.

**Homicide.**— Self-defense must be in face of present danger calculated to permanently maim or kill, p. 392.

**Homicide.**— It is not error to charge that intent to kill must be deduced from circumstances, p. 390.

**Homicide.**— Charge that "self-defense must be in face of deadly violence" is not error where "great violence" was clearly meant, p. 392.

**Not cited.**

164 U. S. 393–403, 41 L. 485, ATLANTIC, ETC., R. R. v. LAIRD.

**Carriers.**— In action against two railroads for tort, court cannot assume that they were single company, p. 396.

Distinguished in Doremus v. Root, 94 Fed. 761, court cannot assume one of two joint defendants to be real object of prosecution, other being joined to prevent removal.

**Torts.**— In suit against joint tortfeasors recovery may be had, if evidence warrants it, against one alone, p. 400.

**Limitations.**— Amendment dismissing one of two joint tortfeasors does not introduce new cause of action, p. 401.

**Limitations.**— Amendment stating that plaintiff was travelling on second-class ticket instead of first does not state new cause, p. 401.

**Limitations.**— Amendment alleging incorporation under Federal instead of State laws does not state new cause, p. 401.

Miscellaneous.— Cited in The John G. Stevens, 170 U. S. 125, 18 S. Ct. 549, Cockrill v. Butler, 78 Fed. 685, The Anaces, 93 Fed. 242, and Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 194, as to form of action for injuries.

164 U. S. 403–417, 41 L. 489, MISSOURI PAC. RY. v. NEBRASKA.

**Supreme Court** will look to State court's construction of act in determining constitutionality, p. 417.

**Constitution.**— Order to railroad to allow erection of elevator on its land takes property for private use, p. 417.

Approved in Iron Mountain R. R. v. Memphis, 96 Fed. 122, ordinance forfeiting franchise and declaring intention to take tracks is threatened deprivation of property; Chicago, etc., R. R. v. State, 50 Neb. 400, 69 N. W. 956, reaffirming rule; dissenting opinion in

Digitized by Google

Chicago, etc., R. R. v. Chicago, 166 U. S. 260, 41 L. 993, 17
majority upholding condemnation for crossing over rig

Constitution is violated by statutes taking private pr
private use, p. 417.

Distinguished in Hartford Ins. Co. v. Chicago, etc., Ry.
99, 20 S. Ct. 36, clause in lease of land for warehouse, prov
railroad be not liable for fires from locomotives, is valid
etc., R. R. v. Chicago, 166 U. S. 235, 41 L. 984, 17 S. C
pense of erecting gates and maintaining flagmen at cr
tablished by city must be borne by railroad.

164 U. S. 418–435, 41 L. 495, WARNER v. TEXAS, ETC

Frauds, statute of.— That agreement may not be
within year does not place it within statute, p. 423.

Approved in Buhl v. Stephens, 84 Fed. 926, State statutes
are applicable in Federal courts in actions at law; Hintze
benschmidt, — Tex. Civ. App. —, 44 S. W. 40, oral agreer
one may occupy land until owner demand possession is n
statute of frauds.

Distinguished in Willis v. Eastern Trust, etc., Co., 169
42 L. 758, 18 S. Ct. 352, arguendo; Buhl v. Stephens, 84
agreement giving licensee exclusive rights for one year, wi
to then surrender claim or continue for sixteen years,
statute.

Frauds, statute of.— Agreement by railroad to lay track
owner's benefit is not within statutes, p. 434.

Frauds, statute of, does not, in Texas, embrace grant
ment, p. 435.

164 U. S. 436–452, 41 L. 504, CHAPMAN v. UNITED S

Supreme Court cannot, under act of 1893, review District
Court's judgment in criminal case, p. 446.

Reaffirmed in Prather v. United States, 164 U. S. 452,
17 S. Ct. 997, and Perrine v. Slack, 164 U. S. 454, 41 L.
Ct. 80.

Distinguished in Gonzales v. Cunningham, 164 U. S. 6
574, 17 S. Ct. 184, appeal lies from final order of Supreme
New Mexico discharging habeas corpus.

Criminal law.— That punishment involves money fine
give appellate jurisdiction, p. 450.

Courts of District of Columbia are not included in judi
of 1891, p. 451.

164 U. S. 452, 41 L. 510, PRATHER v. UNITED STATES

Adjudged in conformity with preceding case, q. v.

Digitized by Google

164 U. S. 452–454, 41 L. 510, PERRINE v. SLACK.

Appeal.— Controversy between mother and testamentary guardian as to custody of children involves no certain value, p. 454.

Reaffirmed in Gonzales v. Cunningham, 164 U. S. 618, 41 L. 574, 17 S. Ct. 184, and Simms v. Simms, 175 U. S. 167, 20 S. Ct. 60.

164 U. S. 454–458, 41 L. 511, CHICAGO, ETC., RY. v. CHICAGO.

Supreme Court cannot review State decision unless Federal right claimed was specially set up, p. 457.

Reaffirmed in Pim v. St. Louis, 165 U. S. 273, 41 L. 715, 17 S. Ct. 322, Zadig v. Baldwin, 166 U. S. 488, 41 L. 1088, 17 S. Ct. 640, Oxley Stave Co. v. Butler Co., 166 U. S. 658, 41 L. 1153, 17 S. Ct. 712, and Goodsell v. Delta, etc., Land Co., 166 U. S. 718, 41 L. 1186, 17 S. Ct. 993. Approved in Ash v. Independence, 145 Mo. 126, 46 S. W. 751, State Supreme Court cannot decide on constitutionality of statute where question was not involved in issues.

164 U. S. 458–471, 41 L. 512, THE KATE.

Maritime lien cannot be asserted where one furnishing coal is charged with notice of charterer's liability, p. 465.

Approved in The Valencia, 165 U. S. 266, 267, 41 L. 712, 17 S. Ct. 324, a like case; The Glide, 167 U. S. 610, 42 L. 297, 17 S. Ct. 931, enforcement in rem of Massachusetts lien for home supplies is exclusively within Federal jurisdiction; Lowry v. United States Shipping Co., 84 Fed. 685, libellant was put on inquiry as to facts, and no lien for towage arose; The Burton, 84 Fed. 999, 1000, denying lien for wharfage; The H. C. Grady, 87 Fed. 237, possession under agreement of sale, does not give vendee apparent authority to create liens for supplies; The Del Norte, 90 Fed. 508, similarly construing 2 Ball An. Codes, § 5953 (Washington); The Mary A. Tryon, 93 Fed. 221, denying lien for towage.

Distinguished in A Scow Without A Name, 80 Fed. 736, allowing towage lien on houseboat; The Sappho, 94 Fed. 551 (reversing S. C., 89 Fed. 373), evidence herein disclosed that credit was to vessel.

164 U. S. 471–482, 41 L. 518, NEW ORLEANS W.-W. CO. v. NEW ORLEANS.

Equity cannot order city to repeal ordinance granting right to lay pipes in absence of parties affected, p. 480.

Municipalities.— Legislature may delegate to municipal assemblies power to enact ordinances relating to local matters, p. 481.

Municipal ordinances, legally enacted, have force of State laws, p. 481.

Approved in Walla Walla v. Walla Walla Water Co., 172 U. S. 9, 19 S. Ct. 81, municipal franchise is a State contract; Consolidated Water Co. v. San Diego, 93 Fed. 852, bill to annul ordinance fixing water rates, alleged so low as to be taking property with-

Digitized by Google

out due process, involves Federal question; Iron Mountain R. R. v. Memphis, 96 Fed. 129, ordinance declaring forfeiture and threatening seizure of tracks is contemplated violation of fourteenth amendment.

**Municipalities.**— Equity cannot interfere in advance with municipality's exercise of legislative powers, p. 481.

Distinguished in North Jersey St. Ry. v. South Orange, 58 N. J. Ch. 85, 43 Atl. 54, ordinance adjudging breach of duties and declaring forfeiture is judicial and may be modified by equity.

164 U. S. 483–492, 41 L. 524, GRIMES DRY-GOODS CO. v. MALCOLM.

**Chattel mortgages.**— Conveyance of personalty in trust for creditors is in nature of mortgage in Arkansas, p. 489.

**Trial.**— In Arkansas, court may submit special questions to jury, p. 490.

**Evidence.**— Statements by party to instrument subsequent to execution cannot control its effect, p. 490.

Trial court may refuse to allow jury to change verdict which it could have directed, p. 492.

Not cited.

164 U. S. 492–502, 41 L. 528, ALLEN v. UNITED STATES.

**Homicide.**— Where evidence warrants, court may instruct jury that they may infer willfulness and malice, p. 495.

**Homicide.**— Intent showing malice need not have existed for particular time; killing may raise inference, p. 495.

Approved in Ross v. State, — Wyo. —, 57 Pac. 932, approving charge embodying rule.

**Criminal law.**— It is proper to charge that one is presumed to intend natural consequences of act, p. 496.

Approved in dissenting opinion in Tucker v. State, 89 Md. 491, 44 Atl. 1005, arguendo.

**Homicide.**— Mere words, however aggravating, cannot reduce crime from murder to manslaughter, p. 497.

Homicide, to be justifiable, must be result of reasonable belief that life was in peril, p. 498.

Approved in Andersen v. United States, 170 U. S. 508, 42 L. 1125, 18 S. Ct. 696, plea of self-defense cannot avail where defendant brought on the difficulty.

**Criminal law.**— Flight is competent evidence as tending to show guilt, p. 499.

Distinguished in Starr v. United States, 164 U. S. 632, 41 L. 579, 17 S. Ct. 225, instruction that flight is silent admission of guilt is error.

Digitized by Google

**Criminal law.**— Jury may be instructed to disregard evidence inherently false, p. 500.

**Criminal law.**— Testimony knowingly and purposely invoked by accused may be used against him, p. 500.

**Criminal law.**— Fabrication of testimony raises presumption against person guilty of practice, p. 500.

**Criminal law.**— It is not error to refuse specific instruction as to reasonable doubt, if covered by charge, p. 500.

Approved in Buel v. State, 104 Wis. 154, 80 N. W. 86, refusal to instruct on subject of certainty of existence of facts requisite to conviction is not reversible error where general charge contained full instructions.

**Criminal law.**— Charge as to freedom of discussion of case and attitude dissenting juror should assume, upheld, p. 501.

164 U. S. 502–526, 41 L. 531, WILLARD v. WOOD.

**Mortgages.**— Agreement by mortgagor's grantee to pay, without mortgagee's consent, does not create relation of principal and surety, p. 520.

**Limitations** are determined by law of forum, p. 520.

Reaffirmed in Green v. Turner, 80 Fed. 43, Brunswick Terminal Co. v. National Bank, 88 Fed. 608, and Underwood v. Patrick, 94 Fed. 471.

**Limitations.**— Grantee of land subject to mortgage is bound by limitation applicable to simple contracts, p. 520.

**Dismissal** is effected by order intended as dismissal and supposed to so operate, although only one of two executors is referred to, p. 521.

Approved in Green v. Turner, 80 Fed. 42, grantee is not directly liable to grantor's mortgagee at law or in equity; mortgagee's remedy is by virtue of creditor's right to avail himself of security held by debtor from third party; Green v. Turner, 86 Fed. 838, 59 U. S. App. 255, mortgagee may maintain suit in equity against mortgagor's grantee agreeing to pay indebtedness.

**Covenant** is enforceable according to law of obligee's domicile, p. 523.

**Limitations, statute of,** may bar suit where plaintiff mistakes remedy, becomes non-suit or suit abates, p. 523.

**Equity.**— Doctrine of laches may be applied by court of its own motion, p. 324.

Approved in Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 697, 42 L. 631, 18 S. Ct. 228, reaffirming rule; Underwood v. Patrick, 94 Fed. 472, right of action of vendor taking notes of member of syndicate for deferred payment accrues against others on maturity of notes.

Digitized by Google

**Equity.**— Failure to prosecute suit diligently may have same consequence as delay in bringing it, p. 525.

164 U. S. 526–546, 41 L. 541, UNITED STATES v. OREGON, ETC., R. R.

**Public lands.**— Grant of May 4, 1870, to Oregon Central railroad, construed, p. 538.

**Public lands.**— Railroad grants must be construed in favor of government, p. 539.

**Public lands.**— Railroad grant will be construed, if possible, to effectuate legislative intention, p. 539.

Approved in Stephens v. Cherokee Nation, 174 U. S. 490, 19 S. Ct. 735, for purpose of arriving at true meaning of statute, courts read with such stops as are manifestly required.

**Statutes.**— Title is no part of act and cannot control words if unambiguous, p. 541.

Statute cannot be explained by title unless ambiguity is in context, p. 541.

Approved in Lackland v. Walker, 151 Mo. 264, 52 S. W. 430, preamble can be looked to to elucidate statute only where language of body is ambiguous.

164 U. S. 546–558, 41 L. 547, ROWE v. UNITED STATES.

**Homicide.**— Where deceased's offensive language provoked slight assault by accused, latter was entitled to defend himself from attack with knife by deceased, p. 555.

Approved in Stevenson v. United States, 86 Fed. 112, 52 U. S. App. 661, refusal to instruct as to effect of accused's withdrawal after provoking quarrel is error; State v. Rolla, 21 Mont. 585, 55 Pac. 524, instruction that it was accused's duty to "exhaust all other reasonable means" is error, accused being murderously attacked.

**Homicide.**— In such case it is error to instruct jury that accused should have avoided deceased, p. 558.

164 U. S. 559–577, 41 L. 552, ROGERS LOCOMOTIVE MACH. WORKS v. AMERICAN EMIGRANT CO.

**Public lands granted to Iowa,** under swamp land act of 1850, could not be certified to it under act of 1856, p. 570.

Approved in American Emigrant Co. v. Long, 105 Iowa, 195, 74 N. W. 940, arguendo.

**Public lands.**— Under swamp land act of 1850 title was inchoate until identification and patent, p. 570.

**Public lands.**— Whether lands were swamp, under act of 1850, was determinable primarily by secretary of interior, p. 574.

Digitized by Google

Approved in Northern Pac. Ry. v. Soderberg, 86 F'ed. 50, in suit to enjoin removal of stone from unsurveyed land, court will not determine mineral or non-mineral character thereof before decision by department.

Public lands.— Certification of lands under railroad grant is, in effect, decision that they are not swamp, p. 570.

Approved in Michigan Land, etc., Co. v. Rust, 168 U. S. 592, 42 L. 592, 18 S. Ct. 209, and Brown v. Hitchcock, 173 U. S. 476, 19 S. Ct. 486, State's title to swamp lands did not become perfect until issuance of patent; Rood v. Wallace, 109 Iowa, 11, 79 N. W. 451, departmental decision that certain lands are swamp cannot be collaterally assailed.

Public lands.— State, accepting land certified under railroad grant, cannot afterwards claim it was swamp land, p. 575.

Public lands.— County is bound by action of State in accepting lands under railroad act, p. 577.

164 U. S. 578–598, 41 L. 560. COVINGTON, ETC., TURNPIKE-ROAD CO. v. SANDFORD.

Supreme Court may review State decision that law regulating tolls does not violate Federal Constitution, p. 580.

Approved in Cotting v. Kansas City Stock-Yards Co., 79 Fed. 683, Federal court may enjoin State officers from enforcing unconstitutional law.

Corporation succeeding to "powers, rights and capacities" of another does not take exemption from legislation, p. 586.

Approved in Cotting v. Kansas City Stock-Yards Co., 82 Fed. 844, upholding statute limiting stock-yard charges to allow net income of 5.67 per cent. in actual value of plant; Adams v. Yazoo, etc., R. R., 77 Miss. 256, 24 So. 209, consolidated railroad is subject to constitutional prohibition of exemptions. See 62 Am. St. Rep. 295, note.

Corporations.— Relinquishment of legislative control will not be presumed, p. 587.

Approved in New Mexico v. United States Trust Co., 172 U. S. 186, 19 S. Ct. 133, exemption of right of way granted Atlantic and Pacific railroad operates on land itself.

Corporations.— Kentucky statute of 1856, providing for amendment of charters, was inapplicable to those previously existing, p. 585.

Turnpike company is deprived of property without due process by tariff of rates precluding profits, p. 592.



Digitized by Google

Approved in Gulf, etc., Ry. v. Ellis, 165 U. S. 154, 41 L. S. Ct. 256, annulling Texas law providing for attorney's fe tions against railroads; Milwaukee Elec. Ry., etc., Co. v. Mil 87 Fed. 579, stating limitations to which municipal powe rates are subject; San Joaquin, etc., Irr. Co. v. Stanislaus Fed. 521, ordinance fixing rates, chargeable by irrigation c must not amount to deprivation of property. See 62 Am. 298, note.

Distinguished in **Smyth v. Ames, 169 U. S. 525, 42 L. 84** Ct. 426, upholding statute fixing maximum railroad rate lands, etc., W. Co. v. Redlands, 121 Cal. 369, 53 Pac. 844, to require board to fix rates assuring company annual incor cient to pay interest on indebtedness, expenses, taxes an cent. dividends; Indianapolis v. Navin, 151 Ind. 144, 47 N. upholding act limiting street-car fares to three cents.

**Constitutional law.**— Corporations are persons within c tional guaranty of due process, p. 592.

Approved in Railroad v. Harris, 99 Tenn. 705, 43 S. W. affirming rule. See notes in 62 Am. St. Rep. 168, and 62 Rep. 302.

Distinguished in Harbison v. Knoxville Iron Co., 103 Te 76 Am. St. Rep. 687, 53 S. W. 957, and Dayton Coal, etc. Barton, 103 Tenn. 611, 53 S. W. 971, upholding law requir sons paying employees' in store orders to redeem same in Waters, etc., Oil Co. v. State, 19 Tex. Civ. App. 10, 44 S. permitting foreign corporation to do business in State d absolve it from responsibility to police power.

**Turnpike** company's answer in suit to enjoin excess showing that statutory rates precluded all profit, makes facie case against validity of statute, p. 595.

Approved in Nashville, etc., Ry. v. Taylor, 86 Fed. 1 against State equalizers to enjoin certification of discrimina sessment, is not against State; Dinsmore v. Southern Exp. Fed. 720, express company may sue railroad commission t enforcement of order requiring it to pay war tax.

**Supreme Court** determines whether Federal right was su set forth in State court, p. 595.

**Turnpikes.**— Public right to use turnpike on payment of able rates is element in determining reasonableness, p. 597

Approved in Interstate Commerce Commission v. Cincinn Ry., 167 U. S. 511, 42 L. 257, 17 S. Ct. 905, reaffirming rule v. Ames, 169 U. S. 545, 42 L. 848, 18 S. Ct. 433, corporatio entitled, as of right, to realize given per cent. on capital st Diego Land Co. v. National City, 174 U. S. 756, 19 S. Ct. diciary should not interfere unless rates are so palpably u

Digitized by Google

able as to render enforcement deprivation of property; Chicago, etc., Ry. v. Tompkins, 90 Fed. 367, State right to regulate infra-State rates cannot be defeated by charging indebtedness to running expenses; Redlands, etc., W. Co. v. Redlands, 121 Cal. 371, 53 Pac. 845, value of water company's property, not its liabilities, is basis for determining reasonableness of rates; Griffin v. Goldsboro Water Co., 122 N. C. 211, 30 S. E. 320, 41 L. R. A. 242, evidence of cost of construction and operation is not conclusive in determining reasonableness of rates. See 62 Am. St. Rep. 297, note.

Turnpike company is not denied equal protection of laws by act imposing different rate on other companies, p. 597.

Approved in Atchison, etc., R. R. v. Matthews, 174 U. S. 105, 19 S. Ct. 613, upholding Kansas provision, including attorney's fees, in sum recoverable from railroads for fires from locomotives; Cotting v. Kansas City Stock-Yards Co., 82 Fed. 850, State may regulate stock-yard charges, though yards are partly in another State; Chicago, etc., Ry. v. Tompkins, 90 Fed. 366, quasi-public corporation is only entitled to just and reasonable compensation; Railroad v. Harris, 99 Tenn. 706, 43 S. W. 120, act imposing privilege tax on all railroads "not paying ad valorem tax" is valid, although there are but two such companies.

Miscellaneous.— Cited in Indianapolis v. Navin, 151 Ind. 143, 47 N. E. 526, 41 L. R. A. 340, legislature may reasonably regulate street railway fares.

164 U. S. 599–611, 41 L. 567, MAISH v. ARIZONA.

Appellate court will not consider general objection that tax-list, admitted below without objection, was not true copy, p. 602.

Taxation.— That court takes time to determine amount of taxes due does not oust jurisdiction in Arizona, p. 604.

Approved in Gonzales v. Cunningham, 164 U. S. 627, 41 L. 577, 17 S. Ct. 188, in New Mexico trial judge may continue Special Term until close of pending case; Hooker v. Bond, 118 Mich. 258, 76 N. W. 405, provision that court make final decree in favor of State for taxes at least ten days before time for sale is directory merely.

Taxation.— Arizona statute, making tax-list prima facie evidence that taxes are due, includes past taxes, p. 606.

Taxation.— It will not be presumed in face of delinquent tax-list that assessment was arbitrarily raised, p. 607.

Taxation of unconfirmed Mexican grant cannot be objected to where want of possession and title is not shown, p. 609.

Taxation.— Court will not indirectly strike down levy for bond interest through action for delinquent taxes, p. 610.

Taxation.— More than error of judgment is necessary to set aside assessment, p. 611.

Digitized by Google

Approved in Lee v. Mehew, 8 Okl. 141, 56 Pac. 1048, t
tion that board had fraudulently contracted liabilities e
per cent. of limit will not justify enjoining tax collecto

164 U. S. 612-627, 41 L. 572, GONZALES v. CUNNING
Courts.— Appeal lies from territorial to Supreme Court
corpus, p. 621.

Distinguished in Simms v. Simms, 175 U. S. 166, 20
no appeal lies here from decree of territorial Supreme C
ing or refusing divorce.

Habeas corpus cannot perform office of writ of error,

Courts.— Territorial legislature may provide for holdi
by one justice in absent justice's district, p. 622.

Courts.— In New Mexico trial judge may continue Sp
until special proceeding concluded, p. 627.

164 U. S. 627-632, 41 L. 577, STARR v. UNITED STAT
Arrest.— Warrant signed "commissioner U. S. Cour
District of Arkansas," is sufficient, p. 680.

United States commissioner for District Court, acting
tion of Circuit Court, is de facto officer, p. 631.

Criminal law.— It is error to charge that flight is a
vant evidence tending to show guilt, p. 632.

Not cited.

164 U. S. 633-635, 41 L. 579, IN RE ATLANTIC CITY R
Supreme Court may issue mandamus to lower court
it to assume jurisdiction, p. 635.

Approved in State v. Kellogg, 95 Wis. 679, 70 N. W. 3
mandamus to compel board to revoke saloon license.

Supreme Court will not issue mandamus to compel Ci
to dismiss bill as against petitioner, p. 635.

Trial.— Objection to jurisdiction is not waived by ans
ter special demurrer is overruled, p. 635.

Approved in Donahue v. Calumet Fire-Clay Co., 94 Fe
resident's answer, after overruling motion to quash ser
on special appearance, does not debar it from removal.

164 U. S. 636-644, 41 L. 580, TEXAS, ETC., RY. v. BL
Railroad is liable to suit, after restoration of proper
jury caused during receivership, p. 640.

Approved in Texas, etc., Ry. v. Gay, 167 U. S. 745, 42
S. Ct. 1000, and Houston, etc., R. R. v. Bowles, 168 U.
L. 1213, 18 S. Ct. 943, both reaffirming rule; Archambea
173 Mass. 252, 53 N. E. 817, after receiver has handed

Digitized by Google

and been discharged he cannot be sued for injury occurring during receivership.

164 U. S. 644–649, 41 L. 584, MILLS v. UNITED STATES.

**Rape.**— Charge that all force that need be exercised is force incident to commission of act, is erroneous, p. 647.

**Rape.**— Mere non-consent does not constitute rape, unless resistance would be useless, p. 648.

Not cited.

164 U. S. 650–656, 41 L. 586, OSBORNE v. FLORIDA.

**Federal courts will follow State court's construction of act imposing license tax on express companies, p. 654.**

**Commerce power is not infringed by State law imposing license tax on interstate express company, p. 656.**

Approved in State v. Wagener, 77 Minn. 501, 77 Am. St. Rep. 690, 80 N. W. 637, upholding act defining and regulating business of selling agricultural products on commission; Railroad v. Harris, 99 Tenn. 712, 43 S. W. 122, upholding privilege tax on railroad's mileage in State; Ogden City v. Crossman, 17 Utah, 76, 53 Pac. 988, ordinance levying license fee of $5 for telephone used exclusively in city is valid; dissenting opinions in Adams Exp. Co. v. Ohio, 165 U. S. 251, 41 L. 706, 17 S. Ct. 321, arguendo; Lake Shore, etc., Ry. v. Ohio, 173 U. S. 337, 19 S. Ct. 485, majority upholding act requiring trains to stop at towns of certain size.

**Supreme Court cannot declare State tax law void on ground that it is not sufficiently definite, p. 656.**

164 U. S. 657–662, 41 L. 588, NOFIRE v. UNITED STATES.

**Marriage license carries with it presumption of compliance with statutory prerequisite, p. 660.**

Cited in Ford v. Delta, etc., Land Co., 164 U. S. 673, 41 L. 594, 17 S. Ct. 234, arguendo.

**Officers.**— One acting in office with consent of officer and deputy is de facto officer, p. 661.

**Indians.**— One taking what he believes to be all necessary steps to become citizen of nation is such within statute as to jurisdiction of Indian courts, p. 662.

Approved in Raymond v. Raymond, 83 Fed. 723, 55 U. S. App. 94, marriage and adoption into Indian tribe ousts Federal courts of jurisdiction over party.

164 U. S. 662–676, 41 L. 590, FORD v. DELTA, ETC., LAND CO.

**Taxation.**— Exemption will not be presumed, p. 666.

Approved in Railroad v. Harris, 99 Tenn. 696, 43 S. W. 117, imposition of privilege tax is not invalid as an attempt to deprive

Digitized by Google

company of benefit of exemption from ad valorem tax; Western Union Tel. Co. v. Harris, — Tenn. Ch. App. —, 52 S. W. 753, payment of statutory privilege tax does not create contract exempting company from imposition of additional privilege tax in same year.

Distinguished in McHenry v. Alford, 168 U. S. 662, 42 L. 618, 18 S. Ct. 247, Dakota laws of 1883, providing for taxation of Northern Pacific lands, exempted property owned by company and not leased.

**Taxation.**— General exemption of corporate property refers only to property necessary to business of corporation, p. 667.

**Taxation.**— Exemption does not release from liability to assessment for local improvements, p. 671.

Approved in Railroad v. Harris, 99 Tenn. 701, 43 S. W. 119, exemption from ad valorem does not bar imposition of privilege tax.

**Tax deed**, reciting sale for "all State and county taxes," is not evidence of payment of levee taxes, p. 674.

**Statutes.**— Punctuation is not decisive of meaning, p. 674.

**Federal courts** will follow State court's construction of legislative contract, p. 675.

164 U. S. 676–683, 41 L. 595, FRANCE v. UNITED STATES.

**Criminal law.**— Court must refuse to instruct to acquit where evidence, if believed, would sustain conviction, p. 681.

**Lotteries.**— Paper containing only figures relating to completed drawing is not within act of March 2, 1895, p. 682.

**Statute** highly penal will be strictly construed, p. 683.

Not cited.

164 U. S. 684–686, 41 L. 598, BUSHNELL v. LELAND.

**Banks.**— Comptroller may appoint receiver and call for assessment without judicial determination of necessity, p. 685.

Approved in McCormick v. Market Bank, 165 U. S. 548, 41 L. 821, 17 S. Ct. 436, In re Chetwood, 165 U. S. 458, 41 L. 787, 17 S. Ct. 391, and Church v. Ayer, 80 Fed. 543, all reaffirming rule; Columbia Nat. Bank v. Mathews, 85 Fed. 939, 940, 56 U. S. App. 649, 650, and Tillinghast v. Bailey, 86 Fed. 47, comptroller's certificate, approving increase of national bank's capital stock, is conclusive of existence of facts authorizing same; Wallace v. Hood, 89 Fed. 21, stockholder by purchase cannot defend against assessment on ground that original capital stock was never put in; Foster v. Row, 120 Mich. 7, 79 N. W. 898, under Michigan bank statutes court appointing receiver can determine ex parte necessity for enforcing individual liability.

Digitized by Google

**164 U. S. 686–691, 41 L. 599, UNITED STATES v. NORTHWESTERN, ETC., TRANSP. CO.**

**Indians.**— Corporation of State is embraced in designation "citizens" in act of 1891, concerning depredation claims, p. 687.

Approved in Cæsar v. Capell, 83 Fed. 426, and Ashley v. Quintard, 90 Fed. 87, corporation can have but one domicile as far as suits in Federal courts are concerned; Hammond Beef, etc., Co. v. Best, 91 Me. 438, 40 Atl. 341, 42 L. R. A. 531, corporations are "persons" within protection of fourteenth amendment.

**164 U. S. 691–694, 41 L. 601, EX PARTE JONES.**

**Circuit Court of Appeals'** decision in suit against national bank is final where Circuit Court's jurisdiction depends on citizenship, p. 693.

**Circuit Court of Appeals'** decision is final where diverse citizenship was basis, regardless of other ground, p. 693.

Approved in Third St., etc., Ry. v. Lewis, 173 U. S. 460, 19 S. Ct. 453, Federal courts have no jurisdiction of suits as involving Federal question unless same appears from plaintiff's statement; Pope v. Louisville, etc., Ry., 173 U. S. 578, 19 S. Ct. 502, reaffirming rule.

**164 U. S. 694–699, 41 L. 602, CARVER v. UNITED STATES.**

**Homicide.**— Evidence that deceased had received extreme unction is admissible with proof of dying declaration, p. 695.

**Evidence.**— Where one party has put conversation in evidence other may explain, vary or contradict it, p. 697.

Reaffirmed in Stevenson v. United States, 86 Fed. 111, 52 U. S. App. 659; State v. O'Shea, 60 Kan. 780, 57 Pac. 973, dying declarations may be discredited by proof that deceased at time was in reckless, irreverent state of mind.

**Homicide.**— It is error to exclude evidence of statements contradicting dying declaration already in evidence, p. 697.

**164 U. S. 701, 41 L. 1180, TUCKER v. McKAY.**

Cited in Blythe Co. v. Blythe, 172 U. S. 644, 19 S. Ct. 878.

**164 U. S. 701, 41 L. 1181, UNITED STATES v. LOCHREN.**

Cited in Warner Valley Stock Co. v. Smith, 165 U. S. 31, United States v. Butterworth, 169 U. S. 604, 42 L. 874, 18 S. Ct. 442, and Lansing v. Hesing, 81 Fed. 242, 53 U. S. App. 290.

**164 U. S. 703, 41 L. 1182, UNITED STATES v. KING.**

Cited in United States v. Harsha, 172 U. S. 570, 19 S. Ct. 295.

Digitized by Google

164 U. S. 704, 41 L. 1183, CRÆMER v. WASHINGTON.

Cited in Crœmer v. Washington, 168 U. S. 128, 42 L. 408, 18 S. Ct. 2.

164 U. S. 705, 41 L. 1183, NORDSTROM v. WASHINGTON.

Cited in Durrant v. Hale, 168 U. S. 705, 42 L. 1213, 18 S. Ct. 942, and Nordstrom v. Moyer, 170 U. S. 704, 42 L. 1218, 18 S. Ct. 944.

164 U. S. 706, 41 L. 1180, WALKER v. KEENAN.

Cited in Bosworth v. Chicago, etc., Ry., 87 Fed. 89, 56 U. S App. 304.

Digitized by Google

# CASES

ARGUED AND DECIDED

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

AT

OCTOBER TERM, 1896.

---

Vol. 165.

Digitized by Google

Digitized by Google

# REFERENCE TABLE

OF SUCH CASES

# DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1896,

AND REPORTED HEREIN,

VOL. 165,

AS ALSO APPEAR IN

## OFFICIAL REPORTER'S EDITION.

| Off. Rep. 165 U. S. | Title. | Herein. |
|---|---|---|
| 1–2 | St. Louis & S. F. R. Co. v. Mathews | 611 |
| 2–3 | " " " " | 612 |
| 5–6 | " " " " | 613 |
| 6–9 | " " " " | 614 |
| 9–12 | " " " " | 615 |
| 12–15 | " " " " | 616 |
| 15–17 | " " " " | 617 |
| 17–20 | " " " " | 618 |
| 20–23 | " " " " | 619 |
| 23–26 | " " " " | 620 |
| 26–27 | " " " " | 621 |
| 27 | Missouri P. R. Co. v. Simmons | 621 |
| 28 | Warner Valley Stock Co. v. Smith | 621 |
| 28–31 | " " " | 622 |
| 31–34 | " " " | 623 |
| 34–36 | " " " | 624 |
| 36 | Agnew v. United States | 624 |
| 37–39 | " " | 625 |
| 39–42 | " " | 626 |
| 42–45 | " " | 627 |
| 45–48 | " " | 628 |
| 48–51 | " " | 629 |
| 51–53 | " " | 630 |
| 53–56 | " " | 631 |
| 56–57 | " " | 632 |
| 58 | { Scott v. Donald (No. 1) / { Gardner v. Donald | 632 |
| 59–73 | " " | 633 |
| 73–82 | " " | 634 |
| 82–86 | " " | 635 |
| 86–87 | " " | 636 |
| 87–88 | " " | 637 |
| 88–89 | " " | 638 |
| 89–90 | " " | 639 |
| 90–91 | " " | 640 |
| 91 | " " | 641 |
| 91–93 | " " | 642 |
| 93–96 | " " | 643 |
| 96–98 | " " | 644 |
| 98–101 | " " | 645 |
| 101–104 | " " | 646 |
| 104–107 | " " | 647 |
| 107–110 | Scott v. Donald (No. 2) | 648 |
| 110–111 | " " " | 649 |
| 111–114 | " " " | 653 |
| 114–117 | " " " | 654 |
| 117 | " " " | 655 |
| 118–120 | Missouri v. Iowa | 655 |
| 120–123 | " " | 656 |
| 123–126 | Missouri v. Iowa | 657 |
| 126–128 | " " | 658 |
| 128–131 | " " | 659 |
| 131–134 | " " | 660 |
| 134–137 | " " | 661 |
| 137–140 | " " | 662 |
| 141–143 | " " | 663 |
| 143–144 | " " | 664 |
| 144–145 | Hussman v. Durham | 664 |
| 145–148 | " " | 665 |
| 148–150 | " " | 666 |
| 150 | Gulf, C. & S. F. R. Co. v. Ellis | 666 |
| 150–154 | " " " | 667 |
| 154–156 | " " " | 668 |
| 156–159 | " " " | 669 |
| 159–162 | " " " | 670 |
| 162–165 | " " " | 671 |
| 165–168 | " " " | 672 |
| 168 | " " " | 673 |
| 168 | { Clarke v. McDade / { Clarke v. Mott | 673 |
| 170–173 | " " | 674 |
| 173–174 | " " | 675 |
| 174–175 | United States v. Barnette | 675 |
| 175–178 | " " | 676 |
| 178–180 | " " | 677 |
| 180 | Jones v. Brim | 677 |
| 181–183 | " " | 678 |
| 183–184 | " " | 679 |
| 184–186 | Addington v. United States | 679 |
| 186–188 | " | 680 |
| 188–189 | Egan v. Hart | 680 |
| 189–191 | " " | 681 |
| 191–194 | " " | 682 |
| 194–196 | Adams Express Co. v. Ohio State Auditor | 683 |
| 196–199 | " " " | 684 |
| 199–202 | " " " | 685 |
| 202–203 | " " " | 686 |
| 218–219 | " " " | 694 |
| 219–222 | " " " | 695 |
| 222–225 | " " " | 696 |
| 225–228 | " " " | 697 |
| 228–231 | " " " | 698 |
| 231–233 | " " " | 699 |
| 233–236 | " " " | 700 |
| 236–239 | " " " | 701 |
| 239–242 | " " " | 702 |
| 242–245 | " " " | 703 |



Digitized by Google

| Off. Rep. 165 U. S. | Title. | Here in. |
|---|---|---|
| 245–248 | Adams Express Co. v. Ohio State Auditor | 704 |
| 248–251 | " " " | 705 |
| 251–253 | " " " | 706 |
| 253–255 | " " " | 707 |
| 255–256 | American Express Co. v. Indiana; Adams Express Co. v. Indiana; United States Express Co. v. Indiana | 707 |
| 256 | " " " | 708 |
| 257–258 | Rosencrans v. United States | 708 |
| 258–261 | " " | 709 |
| 261–264 | " " | 710 |
| 264 | The Valencia ("The Valencia v. Ziegler") | 710 |
| 264–265 | " " | 711 |
| 265–268 | " " | 712 |
| 268–271 | " " | 713 |
| 271–273 | " " | 714 |
| 273 | Pim v. St. Louis | 714 |
| 273–274 | " " | 715 |
| 275–276 | Robertson v. Baldwin | 715 |
| 276–279 | " " | 716 |
| 279–282 | " " | 717 |
| 282–285 | " " | 718 |
| 285–288 | " " | 719 |
| 288–291 | " " | 720 |
| 291–294 | " " | 721 |
| 294–297 | " " | 722 |
| 297–300 | " " | 723 |
| 300–302 | " " | 724 |
| 302–303 | " " | 725 |
| 304–305 | Western U. Teleg. Co. v. Indiana | 725 |
| 305–308 | " " " | 726 |
| 308–310 | " " " | 727 |
| 311 | Price v. United States | 727 |
| 311–314 | " " | 728 |
| 314–315 | " " | 729 |
| 316 | United States v. Gorham | 729 |
| 316–319 | " " | 730 |
| 319–322 | " " | 731 |
| 322 | " " | 732 |
| 323–325 | Graves v. United States | 732 |
| 325–328 | " " | 733 |
| 328–330 | " " | 734 |
| 330 | District of Columbia v. Johnson; District of Columbia v. Sheckels | 734 |
| 330–333 | " " " | 735 |
| 333–336 | " " " | 736 |
| 336–339 | " " " | 737 |
| 339 | " " " | 738 |
| 340–341 | District of Columbia v. Hall | 738 |
| 341–342 | District of Columbia v. Dickson | 738 |
| 342 | " " " | 738 |
| 342–343 | Hopkins v. Grimshaw | 739 |
| 343–346 | " " | 740 |
| 346–349 | " " | 741 |
| 349–352 | " " | 742 |
| 352–355 | " " | 743 |
| 355–358 | " " | 744 |
| 358 | " " | 745 |
| 359–360 | Robinson v. Caldwell | 745 |
| 360–362 | " " | 746 |
| 363 | Oakes v. Mase | 746 |
| 363–364 | " " | 747 |
| 365–366 | Lake Shore & M. S. R. Co. v. Ohio | 747 |
| 366–368 | " " " | 748 |
| 369 | " " " | 749 |
| 370–371 | Burlington Gaslight Co. v. Burlington, C. R. & N. R. Co. | 749 |
| 371–373 | Burlington Gaslight Co. v. Burlington, C. R. & N. R. Co. | 750 |
| 373 | Davis v. United States | 750 |
| 374 | " " | 751 |
| 374–375 | " " | 752 |
| 375–376 | " " | 753 |
| 376–379 | " " | 754 |
| 379 | Germania Iron Co. v. United States | 754 |
| 379–382 | " " " | 755 |
| 382–384 | " " " | 756 |
| 385 | " " " | 757 |
| 386–387 | Deweese v. Reinhard | 757 |
| 387–390 | " " | 758 |
| 390–393 | " " | 759 |
| 393–394 | " " | 760 |
| 394 | Glover v. Patten | 760 |
| 395–396 | " " | 761 |
| 396–397 | " " | 762 |
| 397–399 | " " | 763 |
| 399–400 | " " | 764 |
| 400–401 | " " | 765 |
| 401–404 | " " | 766 |
| 404–407 | " " | 767 |
| 407–410 | " " | 768 |
| 410–413 | " " | 769 |
| 413–415 | Atlantic & P. R. Co. v. Mingus | 770 |
| 415–418 | " " " | 771 |
| 418–419 | " " " | 772 |
| 426–428 | " " " | 776 |
| 428–431 | " " " | 777 |
| 431–434 | " " " | 778 |
| 434–437 | " " " | 779 |
| 437–440 | " " " | 780 |
| 440–442 | " " " | 781 |
| 443–445 | *Re* Chetwood | 782 |
| 445–448 | " | 783 |
| 448–451 | " | 784 |
| 451–453 | " | 785 |
| 453–456 | " | 786 |
| 456–459 | " | 787 |
| 459–462 | " | 788 |
| 463–465 | United States v. Winona & St. P. R. Co. | 789 |
| 465–468 | " " " | 790 |
| 468 | " " " | 791 |
| 472–474 | " " " | 794 |
| 474–477 | " " " | 795 |
| 477–480 | " " " | 796 |
| 480–482 | " " " | 797 |
| 482–483 | United States v. Union P. R. Co.; United States v. St. Paul & S. C. R. Co. | 797 |
| 483–485 | Winona & St. P. R. Co. v. United States | 798 |
| 485–486 | " " " | 799 |
| 486–488 | Dunlop v. United States | 799 |
| 488–491 | " " | 800 |
| 491–494 | " " | 801 |
| 494–497 | " " | 802 |
| 497–500 | " " | 803 |
| 500–503 | " " | 804 |
| 503–504 | " " | 805 |
| 504–506 | United States v. McMillan | 805 |
| 506–509 | " " | 806 |
| 509–511 | " " | 807 |
| 511–514 | " " | 808 |
| 514–517 | " " | 809 |
| 517 | " " | 810 |
| 518–519 | Smith v. Vulcan Iron Works; Norton v. Wheaton | 810 |




Digitized by Google

| Off. Rep. 165 U. S. | Title. | Here in. |
|---|---|---|
| 519–522 | Smith v. Vulcan Iron Works | |
| | Norton v. Wheaton | 811 |
| 522–525 | " " | 812 |
| 525–526 | " " | 813 |
| 526–528 | *Re* Kollock | 813 |
| 528–531 | " | 814 |
| 531–534 | " | 815 |
| 534–537 | " | 816 |
| 537 | " | 817 |
| 538 | *Re* McCaully | |
| | *Re* Lusby | 817 |
| 538 | McCormick v. Market Bank | 817 |
| 539–541 | " " " | 818 |
| 541–544 | " " " | 819 |
| 544–547 | " " " | 820 |
| 547–550 | " " " | 821 |
| 550–553 | " " " | 822 |
| 553 | " " " | 823 |
| 553–555 | Swaim v. United States | 823 |
| 555–558 | " " | 824 |
| 558–561 | " " | 825 |
| 561–564 | " " | 826 |
| 564–566 | " " | 827 |
| 566 | De Vaughn v. Hutchinson | 827 |
| 566–569 | " " | 828 |
| 569–572 | " " | 829 |
| 572–575 | " " | 830 |
| 575–578 | " " | 831 |
| 578 | " " | 832 |
| 578–580 | Allgeyer v. Louisiana | 832 |
| 580–583 | " " | 833 |
| 583–586 | " " | 834 |
| 586–589 | " " | 835 |
| 589–592 | " " | 836 |
| 592–593 | " " | 837 |
| 593–594 | Walker v. New Mexico & S. P. R. Co. | 837 |
| 594 | " " " | 838 |
| 594–595 | " " " | 840 |
| 595–598 | " " " | 841 |
| 598–601 | " " " | 842 |
| 601–604 | " " " | 843 |
| 604–606 | " " " | 844 |
| 606 | Pauly v. State Loan & T. Co. | 844 |
| 607–608 | " " " | 845 |
| 608–611 | " " " | 846 |
| 611–614 | " " " | 847 |
| 614–617 | Pauly v. State Loan & T. Co. | 848 |
| 617–620 | " " " | 849 |
| 620–623 | " " " | 850 |
| 623–624 | " " " | 851 |
| 624–625 | Wade v. Lawder | 851 |
| 625–628 | " " | 852 |
| 628–630 | New York, N. H. & H. R. Co. v. New York | 853 |
| 630–633 | " " " | 854 |
| 633–634 | " " " | 855 |
| 634 | Fourth Street Bank v. Yardley | 855 |
| 635–636 | " " " | 856 |
| 636–637 | " " " | 857 |
| 643–644 | " " " | 861 |
| 644–647 | " " " | 862 |
| 647–650 | " " " | 863 |
| 650–653 | " " " | 864 |
| 653–654 | " " " | 865 |
| 654 | Walker v. Brown | 865 |
| 655 | " " | 866 |
| 655–657 | " " | 867 |
| 657–658 | " " | 868 |
| 658–661 | " " | 869 |
| 661–664 | " " | 870 |
| 664–666 | " " | 871 |
| 666–669 | " " | 872 |
| 669–672 | " " | 873 |
| 672–675 | " " | 874 |
| 675 | United States v. Santa Fé | 874 |
| 675–678 | " " | 875 |
| 678–680 | " " | 876 |
| 680–683 | " " | 877 |
| 683–686 | " " | 878 |
| 686–689 | " " | 879 |
| 689–692 | " " | 880 |
| 692–695 | " " | 881 |
| 695–698 | " " | 882 |
| 698–701 | " " | 883 |
| 701–704 | " " | 884 |
| 704–707 | " " | 885 |
| 707–710 | " " | 886 |
| 710–713 | " " | 887 |
| 713–716 | " " | 888 |
| 716–717 | " " | 889 |
| 719 | Memorandum Cases | 1177 |
| 721 | " | 1188 |




Digitized by Google

ANN

Digitized by Google

THE DECISIONS

OF THE

# Supreme Court of the United States

AT

OCTOBER TERM, 1896.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

[1]ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, *Plff. in Err.*,
*v.*
LEONARD MATHEWS.

(See S. C. Reporter's ed. 1-27.)

*Statute making railroad liable for fires—when constitutional.*

1. The Missouri statute of March 31, 1887, making every railroad corporation liable for all property injured or destroyed by fire from its locomotives, and giving it an insurable interest in the property for its protection, is constitutional and valid.
2. Such statute neither violates any contract between the state and the railroad company, nor deprives the company of its property without due process of law, nor denies it the equal protection of the laws.

[No. 105.]

*Argued November 4, 1896. Decided January 4, 1897.*

IN ERROR to the Supreme Court of the State of Missouri to review a judgment of that court affirming the judgment of an inferior court of that state in favor of the plaintiff, Leonard Mathews, against the St. Louis & San Francisco Railway Company for damages for the destruction of plaintiff's buildings and personal property by fire communicated from one of the company's engines. *Affirmed.*

See same case below, 121 Mo. 298, 25 L. R. A. 161.

Statement by Mr. Justice **Gray:**

This was an action brought in an inferior court of the state of Missouri, by an owner of land in St. Louis county, against a railroad corporation organized under the laws of the state, and owning and operating with locomotive engines a line of railway adjoining the plaintiff's land, to recover damages for the destruction of the plaintiff's dwelling house, barn, *out-buildings, shrubbery, and [2] personal property upon that land, by fire communicated from one of those engines on August 9, 1887.

The petition contained two counts, the first of which alleged negligence on the part of the defendant, and the second did not, but was founded on the statute of Missouri of March 31, 1887, by which "each railroad corporation owning or operating a railroad in this state shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated, directly or indirectly, by locomotive engines in use upon the railroad owned or operated by such railroad corporation; and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf, for its protection against such damages." Mo. Laws 1887, p. 101; Mo. Rev. Stat. 1889, § 2615.

The answer, among other defenses, set up that the statute violated the Constitution of the United States, by depriving the defendant of its property without due process of law; and by denying to it the equal protection of the laws; and by impairing the obligation of the contract made between it and the state, "by the terms and provisions of which it was impliedly agreed that said defendant might and could use fire for the purpose of generating steam to propel said locomotive engines and cars attached thereto, and be responsible only for the negligent and careless use thereof."

The defendant was incorporated September 10, 1875, under the general laws of the state, which authorized railroad corporations to be formed by voluntary articles of association filed in the office of the Secretary of State; and to lay out and construct their railroad; to take lands for the purpose; and "to take and convey persons and property on their

NOTE.—*As to liability of railroad company for fires set by it along its line; what admissible to prove negligence by company.*—see note to Grand Trunk R. Co. v. Richardson, 23: 357.

*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.



Digitized by Google

railroad by the power or force of steam, or of animals, or by any mechanical power, and to receive compensation therefor." Mo. Gen. Stat. 1865, chap. 63, §§ 1, 2; Mo. Rev. Stat. 1889, §§ 2542, 2543.

At the trial, the plaintiff introduced evi-
3] dence tending to *support the allegations of the petition; and the court, at his request, instructed the jury that "if they believe from the evidence that during the month of August, 1887, plaintiff was the owner of the land in the petition described, and defendant was the owner or operating a railroad adjoining said land, having locomotive engines in use upon said road, and that on August 9, 1887, fire was communicated from a locomotive engine then in use upon the railroad owned or operated by defendant to plaintiff's property on his said land, and thereby the buildings and other property in the petition mentioned, or any of it, were destroyed, then the jury will find for the plaintiff."

The court refused to give to the jury the following instruction requested by the defendant: "Though the jury may believe from the evidence that fire was communicated from a locomotive engine in use on defendant's railroad to plaintiff's property, as charged in the second count of plaintiff's petition, yet that fact is only prima facie evidence of negligence on the part of defendant, and unless the jury believe from the whole evidence in the case that said fire was either negligently set out by defendant or was communicated to plaintiff's property by reason of defendant's negligence the plaintiff cannot recover."

The defendant excepted to the instruction given, as well as to the refusal to instruct as requested; and, after verdict and judgment for the plaintiff, appealed to the supreme court of the state which held the statute to be constitutional, and affirmed the judgment. 121 Mo. 298 [25 L. R. A. 161]. The defendant sued out this writ of error.

*Messrs.* **D. D. Duncan,** *L. F. Parker, John F. Dillon,* and *Winslow F. Pierce,* for plaintiff in error:

Section 2615 of the Missouri Revised Statutes of 1889 is unconstitutional, because:

(a) It impairs the obligation of the contract contained in defendant's charter.

Mo. Rev. Stat. 1889, § 2543; *Fletcher* v. *Peck,* 10 U. S. 6 Cranch, 87 (3: 162); *Dartmouth College* v. *Woodward,* 17 U. S. 4 Wheat. 518 (4: 629); *United States* v. *Quincy,* 71 U. S. 5 Wall. 535 (18: 403); *Green* v. *Biddle,* 21 U. S. 8 Wheat. 92 (5: 570); *Planters' Bank* v. *Sharp,* 47 U. S. 6 How. 327 (12: 458); *Com.* v. *Erie & W. Transp. Co.* 107 Pa. 112; *Pennsylvania R. Co.* v. *Baltimore & O. R. Co.* 60 Md. 263; *Bank of the Republic* v. *Hamilton County,* 21 Ill. 53; *Payne* v. *Baldwin,* 3 Smedes & M. 661; *Edwards* v. *Kearzey,* 96 U. S. 607 (24: 799); *Howard* v. *Bugbee,* 65 U. S. 24 How. 461 (16: 753); *Meriwether* v. *Garrett,* 102 U. S. 472 (26: 197); *Bronson* v. *Kinzie,* 42 U. S. 1 How. 311 (11: 143); *McCracken* v. *Hayward,* 43 U. S. 2 How. 608 (11: 397); *Louisiana* v. *New Orleans,* 102 U. S. 203 (26: 132); *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 668 (29: 525); *New Orleans Waterworks Co.* v. *Rivers,* 115 U. S. 682 (29: 528); *People* v. *Jackson & M. Pl. Road Co.* 9 Mich. 285; *Sloan* v. *Pacific R. Co.* 61 Mo. 24, 21 Am. Rep. 397; *Smith* v. *Hannibal & St. J. R. Co.* 37 Mo. 295; *Burroughs* v. *Housatonic R. Co.* 15 Conn. 128, 38 Am. Dec. 64; *Mosher* v. *Utica & S. R. Co.* 8 Barb. 427; *Rood* v. *New York & E. R. Co.* 18 Barb. 80; *Piqua Branch Bank* v. *Knoop,* 57 U. S. 16 How. 369 (14: 977); *Dodge* v. *Woolsey,* 59 U. S. 18 How. 331 (15: 401); *Thomas* v. *West Jersey R. Co.* 101 U. S. 71 (25: 950); *Ashbury R. Carriage & I. Co.* v. *Riche,* L. R. 7 H. L. 653; *Bailey* v. *Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 401, 64 Am. Dec. 593; *Lake View* v. *Rose Hill Cemetery Asso.* 70 Ill. 196, 22 Am. Rep. 71; *Ohio & M. R. Co.* v. *Lackey,* 78 Ill. 57, 20 Am. Rep. 259; *Thorpe* v. *Rutland & B. R. Co.* 27 Vt. 143, 62 Am. Dec. 625; *Benson* v. *New York,* 10 Barb. 223; *Small* v. *Chicago, R. I. & P. R. Co.* 50 Iowa, 346; *Vincennes University* v. *Indiana,* 55 U. S. 14 How. 268 (14: 416); *Scotland County* v. *Missouri, I. & N. R. Co.* 65 Mo. 135; *State, Haeussler,* v. *Greer,* 78 Mo. 188; Wharton, Negligence, § 668; Cooley, Const. Lim. 5th ed. 387.

(b) It denies defendant the equal protection of the laws.

*Pearson* v. *Portland,* 69 Me. 278; *State* v. *Hayes,* 81 Mo. 586; *Chicago, St. L. & N. O. R. Co.* v. *Moss,* 60 Miss. 641; *Butchers' Benev. Asso.* v. *Crescent City L. S. L. & S. H. Co.* ("*Slaughter House Cases*"), 83 U. S. 16 Wall. 36 (21: 394); *San Mateo County* v. *Southern P. R. Co.* ("*Railroad Tax Case*"), 13 Fed. Rep. 722; *Santa Clara County* v. *Southern P. R. Co.* 118 U. S. 394 (30: 118).

(c) It takes defendant's property without due process of law.

*Ohio & M. R. Co.* v. *Lackey,* 78 Ill. 57, 20 Am. Rep. 259; *Small* v. *Chicago, R. I. & P. R. Co.* 50 Iowa, 340; *Zeigler* v. *South & N. Ala. R. Co.* 58 Ala. 594; *Miller* v. *Martin,* 16 Mo. 503, 57 Am. Dec. 242; *Kahle* v. *Hobein,* 30 Mo. App. 476; *Catron* v. *Nichols,* 81 Mo. 82, 51 Am. Rep. 222; *Wally* v. *Kennedy,* 2 Yerg. 554, 24 Am. Dec. 511.

Said section, if valid, only makes the fact of the injury prima facie evidence of negligence.

*Tilley* v. *St. Louis & S. F. R. Co.* 49 Ark. 535, 32 Am. & Eng. R. Cas. 324.

Said section does not authorize damages for property upon which plaintiff could not have obtained insurance.

*Chapman* v. *Atlantic & St. L. R. Co.* 37 Me. 92.

Plaintiff was not entitled to damages for his personal property.

The question of plaintiff's contributory negligence should have been submitted to the jury.

*Ross* v. *Boston & W. R. Co.* 6 Allen, 92.

Plaintiff was compensated for his loss in the condemnation proceedings instituted by the defendant.

The defendant should have been allowed to prove the amount of insurance which plaintiff had upon his buildings at the time they were destroyed.

*Messrs.* **Percy Werner** and *Garland Pollard,* for defendant in error:

The statute in question does not deny defendant in error the equal protection of the law.

*Barbier* v. *Connolly,* 113 U. S. 27 (28: 923); *Soon Hing* v. *Crowley,* 113 U. S. 703 (28: 1145); *Missouri P. R. Co.* v. *Humes,* 115 U. S. 512 (29: 463); *Minneapolis & St. L. R. Co.* v. *Beck-*



Digitized by Google

*with*, 129 U. S. 26 (32: 585); *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 (35: 1051); *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205 (32: 107).

It does not deprive plaintiff in error of its property without due process of law.

*Missouri P. R. Co.* v. *Humes*, 115 U. S. 512 (29: 463); *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96 (32: 352, 2 Inters. Com. Rep. 238); *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659 (24: 1036); *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25 (24: 989); *Missouri P. R. Co.* v. *Mackey*, *supra*.

It does not impair obligations of a contract made between the state of Missouri and plaintiff in error.

*Pearsall* v. *Great Northern R. Co.* 161 U. S. 671 (40: 847); *Northwestern Fertilizing Co.* v. *Hyde Park*, *supra;* Cooley, Const. Lim. 6th ed. chap. 16, pp. 707–710; Mo. Const. art. 12, §§ 5, 14.

Statutes substantially the same as that of Missouri here drawn in question, imposing liability for damages caused by railroad locomotives, irrespective of negligence, have in no case been held unconstitutional, though passing under judicial review for a period of more than fifty years.

*Lyman* v. *Boston & W. R. Corp.* 4 Cush. 288; *Hart* v. *Western R. Co.* 13 Met. 105, 46 Am. Dec. 719; *Ross* v. *Boston & W. R. Co.* 6 Allen, 90; *Pierce* v. *Worcester & N. R. Co.* 105 Mass. 199; *Trask* v. *Hartford & N. H. R. Co.* 16 Gray, 71; *Chapman* v. *Atlantic & St. L. R. Co.* 37 Me. 92; *Pratt* v. *Atlantic & St. L. R. Co.* 42 Me. 579; *Hooksett* v. *Concord R. Co.* 38 N. H. 242; *Rowell* v. *Railroad*, 57 N. H. 132, 24 Am. Rep. 59; *Smith* v. *Boston & M. R. Co.* 63 N. H. 25; *Grissell* v. *Housatonic R. Co.* 54 Conn. 447; *Martin* v. *New York & N. E. R. Co.* 62 Conn. 881; *Rodemacher* v. *Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 592; *Small* v. *Chicago, R. I. & P. R. Co.* 50 Iowa, 340; *Union P. R. Co.* v. *De Busk*, 12 Colo. 294, 3 L. R. A. 350; *McCandless* v. *Richmond & D. R. Co.* 38 S. C. 108, 18 L. R. A. 440; *Mathews* v. *St. Louis & S. F. R. Co.* 121 Mo. 298, 25 L. R. A. 161; *Campbell* v. *Missouri P. R. Co.* 121 Mo. 340, 25 L. R. A. 175.

Mr. Justice **Gray** delivered the opinion of the court:

The only question presented by the record, of which this court has jurisdiction, is whether there is anything inconsistent with the Constitution of the United States in the statute of Missouri of March 31, 1887, by which every railroad corporation owning or operating a railroad in the state is made responsible in damages for property of any person injured or destroyed by fire communicated by its locomotive engines; and is declared to have an insurable interest in property along its route, and authorized to insure such property, for its protection against such damages.

It has been strenuously argued, in behalf of the plaintiff in error, that this statute is an arbitrary, unreasonable, and unconstitutional exercise of legislative power, imposing an absolute and onerous liability for the consequences of doing a lawful act, and of conducting a lawful business in a lawful and careful manner; and that the statute violates the Constitution of the United States, by depriving the railroad company of its property without due process of law, by denying to it the equal protection of the laws, and by impairing the obligation of the contract previously made between it and the state by its incorporation under general laws, authorizing it to convey passengers and freight over its railroad by the use of locomotive engines.

The argument that this statute is in excess of the power of the legislature may be the most satisfactorily met by first tracing the history of the law regarding the liability of persons for fire originating on their own premises and spreading to the property of others.

At common law, every man appears to have been obliged, by the custom of the realm, to keep his fire safe so that it should not injure his neighbor; and to have been liable to an action, if a fire, lighted in his own house, or upon his land, by the act of [6 himself or of his servants or guests, burned the house or property of his neighbor, unless its spreading to his neighbor's property was caused by a violent tempest or other inevitable accident which he could not have foreseen. Thirning, Ch. J., and Markham, J., in *Beaulieu* v. *Finglam*, Year Book 2 Hen. IV. 18; *Anonymous*, Cro. Eliz. 10; 1 Rolle, Abr. 1, *Action sur Case, B;* 1 D'Anvers, Abr., *Actions, B; Turberville* v. *Stamp* (1698) Comyns, 32, 1 Salk. 13, Holt, 9, 1 Ld. Raym. 264, 12 Mod. 152; Com. Dig. *Action upon the Case for Negligence, A, 6;* 1 Vin. Abr. 215, 216; 1 Bac. Abr. *Action on the Case, F* (Am. ed. 1852) p. 122; *Canterbury* v. *Attorney General*, 1 Phil. Ch. 306, 316–319; *Filliter* v. *Phippard*, 11 Q. B. 347, 354; *Furlong* v. *Carroll*, 7 Ont. App. 145, 159.

The common-law liability in case of ordinary accident, without proof of negligence, was impliedly recognized in the statute of Anne, passed within ten years after the decision in *Turberville* v. *Stamp*, above cited, and providing that "no action, suit, or process whatsoever shall be had, maintained, or prosecuted against any person in whose house or chamber any fire shall accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby, any law or usage or custom to the contrary notwithstanding." Stat. 6 Anne (1707) chap. 31 [58], § 7; 8 Statutes of the Realm, 795; 10 Anne (1711) chap. 14 [24], § 1; 9 Statutes of the Realm, 684. By the Statute of 14 Geo. III. (1774) chap. 78, § 86, the statute of Anne was extended to "any person in whose house, chamber, stable, barn, or other building, or on whose estate, any fire shall accidentally begin."

In modern times in England, the strict rule of the common law as to civil liability in damages for fire originating on one's own land and spreading to property of another, has been recognized as still existing, except so far as clearly altered by statute.

In *Rex* v. *Pease* (1832) 4 Barn. & Ad. 30, 1 Nev. & Macn. 690, a corporation expressly authorized by act of Parliament to establish a railway between certain points, and to use



Digitized by Google

locomotive engines thereon, was held not to 7]be liable to *an indictment for a nuisance by frightening horses traveling upon a highway parallel to the railroad.

In *Aldridge* v. *Great Western R. Co.* (1841) 3 Man. & G. 515, 4 Scott, N. R. 156, which was an action against a railway corporation created by similar acts of Parliament to recover damages for property destroyed by fire kindled by sparks from a locomotive engine, it was argued for the plaintiff that by the common law a civil action for damages could be sustained by proof of injury without evidence of negligence. See Broom, Legal Maxims (5th ed.) 366, 367; Holmes, Common Law, 85-88. But the court held that the corporation could not be held liable, unless negligent. In *Piggot* v. *Eastern Counties R. Co.* (1846) 3 C. B. 229, the same rule was recognized, although the fact of the property having been fired by sparks from the engine was held sufficient proof of negligence.

In the course of the argument in *Blyth* v. *Birmingham Waterworks Propre.* (1856) 11 Exch. 781, 783, Baron Martin said: "I held, in a case tried at Liverpool, in 1853, that, if locomotives are sent through the country emitting sparks, the persons doing so incur all the responsibilities of insurers; that they were liable for all the consequences."

In *Vaughan* v. *Taff Vale R. Co.* (1858) 3 Hurlst. & N. 743, the court of exchequer held that a railway company, expressly authorized by its charter to use locomotive engines on its railway, was responsible for damages caused to property by fire communicated from such engines, although it had taken every precaution in its power to prevent the injury. But the judgment was reversed in the exchequer chamber, and Lord Chief Justice Cockburn said: "Although it may be true, that if a person keeps an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the animal, or using the instrument, yet when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been used to prevent injury, the 8]sanction of the legislature *carries with it this consequence, that if damage results from the use of such thing independently of negligence the party using it is not responsible." (1860) 5 Hurlst. & N. 679, 685.

The final decision in that case has since been considered in England as establishing that a railway company which by act of Parliament has been expressly authorized to use locomotive engines upon its railway, without being declared to be responsible for fires communicated from those engines, is not, in the absence of negligence on its part, liable for damages caused by such fires. *Fremantle* v. *London & N. W. R. Co.* (1861) 10 C. B. N. S. 89; *Hammersmith & C. R. Co.* v. *Brand* (1868) L. R. 4 H. L. 171; *Smith* v. *London & S. W. R. Co.* (1870) L. R. 6 C. P. 14, 21, 22; *London, B. & S. C. R. Co.* v. *Truman* (1885) L. R. 11 App. Cas. 45.

On the other hand, a railway company chartered by act of Parliament in 1832 to make and maintain a "railway or tramroad for the passage of wagons, engines, and other carriages" for the purpose of conveying coals and other minerals, and neither expressly authorized nor prohibited to use locomotive engines, was held liable for damages by sparks from such an engine although proved to have taken all reasonable precautions to prevent the emission of sparks, Mr. Justice Blackburn saying that "the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engines from doing injury, and if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shown on their part;" and that, in order to bring them within the decision in *Vaughan* v. *Taff Vale R. Co.* above cited, "it is essential to show that their act authorized the use of locomotive engines, and it is not enough to show that it authorized the making and using of a railway, and that there are no words, either prohibiting the use of locomotives, or showing that the legislature meant to prohibit the use." *Jones* v. *Festiniog R. Co.* (1868) L. R. 3 Q. B. 733.

So, where acts of Parliament, authorizing and regulating *the use of locomotive en- 9] gines on turnpike and other roads, provided that nothing in the acts contained should be construed as authorizing any person to use upon the highway a locomotive engine so constructed or used as to cause a public or private nuisance; and that every person so using such an engine should be liable to an action for such use, when such an action could have been maintained before the passage of the acts,—the court of appeal held that a man who used upon a public highway a locomotive engine constructed in conformity with the provisions of the acts, and managed and conducted with all reasonable care and without negligence, was liable for a destruction of property on land adjoining the highway by sparks proceeding from his engine, Lord Justice Bramwell saying: "The passing of the engine along the road is confessedly dangerous, inasmuch as sparks cannot be prevented from flying from it. It is conceded that at common law an action may be maintained for the injury suffered by the plaintiffs. The locomotive acts are relied upon as affording a defense, but, instead of helping the defendant, they show not only that an action would have been maintainable at common law, but also that the right to sue for an injury is carefully preserved. It is just and reasonable that if a person uses a dangerous machine he should pay for the damage which it occasions; if the reward which he gains for the use of the machine will not pay for the damage, it is mischievous to the public and ought to be suppressed, for the loss ought not to be borne by the community or the injured person. If the use of the machine is profitable, the owner



Digitized by Google

ought to pay compensation for the damage." *Powell* v. *Fall* (1880) L. R. 5 Q. B. Div. 597.

In this country, the strict rule of the common law of England as to liability for accidental fires has not been generally adopted; but the matter has been regulated in many states by statute. *Clark* v. *Foot*, 8 Johns. 421; *Bachelder* v. *Heagan*, 18 Me. 32; *Tourtellot* v. *Rosebrook*, 11 Met. 460; *Finley* v. *Langston*, 12 Mo. 120; *Miller* v. *Martin*, 16 Mo. 508 [57 Am. Dec. 242]; *Catron* v. *Nichols*, 81 Mo. 80 [51 Am. Rep. 222]; Cooley, Torts, 14, 590-592; 1 Thomp. Neg. 148-150.

10] *In the colony of Massachusetts, from the first settlement, it was an object of legislation, "for the preservation of houses, hay, boards, timber, etc." 1 Mass. Colonial Records 1631, 90; Mass. Colonial Records 1639, 281; 3 Mass. Colonial Records 1646, 102. In 1660, or earlier, it was enacted that "whoever shall kindle any fires in the woods, or grounds lying in common, or inclosed, so as the same shall run into corn grounds or inclosures," at certain seasons, should "pay all damages, and half so much for a fine; . . . provided that any man may kindle fire in his own ground so as no damage come thereby either to the country or to any particular person." Mass. Colonial Laws 1660, p. 31; Mass. Colonial Laws 1672, p. 51.

Soon after the introduction of railroads into the United States, the legislature of the state of Massachusetts, by the statute of 1837, chap. 226, provided that a railroad corporation should be held responsible in damages for any injury done to buildings or other property of others by fire communicated from its locomotive engines, "unless the said corporation shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury;" and that any railroad corporation should have an insurable interest in property along its route for which it might be so held responsible in damages, and might procure insurance thereon in its own behalf.

Three years later, that statute was repealed, and was re-enacted with the omission of the clause above quoted, thus making the liability of the railroad corporation absolute, and not dependent upon negligence on its part. And the statute in this form, with merely verbal changes, has been continued in force by successive re-enactments. Mass. Stat. 1840, chap. 85; Mass. Gen. Stat. 1860, chap. 63, § 101; Mass. Stat. 1874, chap. 372, § 106; Mass. Pub. Stat. 1882, chap. 112, § 214.

In the first reported case under this statute, it was held by the supreme judicial court of Massachusetts that the liability of the railroad company was not restricted to a building by the side of its road, which the very particles of fire emanating from the engines fell upon and kindled a flame in, but extended to a building across a street, set on fire by sparks wafted by the wind from the first building while it was burning; 11] and *Chief Justice Shaw, in delivering judgment, said: "We consider this to be a statute purely remedial, and not penal. Railroad companies acquire large profits by their business. But their business is of such a nature as necessarily to expose the property of others to danger; and yet, on account of the great accommodation and advantage to the public, companies are authorized by law to maintain them, dangerous though they are, and so they cannot be regarded as a nuisance. The manifest intent and design of this statute, we think, and its legal effect, are, upon the consideration stated, to afford some indemnity against this risk to those who are exposed to it and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit from it." *Hart* v. *Western R. Co.* (1847) 13 Met. 99 [46 Am. Dec. 719].

Two years afterwards, the same court adjudged that the statute applied to railroad companies incorporated before its passage; and that it extended as well to estates, a part of which had been conveyed by the owner, as to those of which a part had been taken by law, for the purposes of a railroad; and Mr. Justice Dewey, in delivering judgment, said: "We can perceive no sound distinction between the cases supposed. Each of these modes for acquiring the necessary real estate for the purpose of a railroad is authorized, both by the general laws and by the acts creating railroad corporations. In each, the landowner is supposed to receive full satisfaction for all the injuries necessarily resulting from the use of the same for a railroad. But with the use of locomotive engines, greater hazard to contiguous buildings and property owned by the adjacent landowners may arise than was originally contemplated, or ought to be left to the ordinary common-law remedies. We consider this provision of the Statute of 1840, chap. 85, as one of those general remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the introduction of the locomotive engine. The right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations, and impose such liabilities for injuries suffered from the mode of using the road, as the occasion *and circum- [12 stances may reasonably justify." *Lyman* v. *Boston & W. R. Corp.* (1849) 4 Cush. 288.

The same statute was held to cover personal property in a building, and growing trees, destroyed by fire from a locomotive engine, Chief Justice Bigelow saying: "It is not a penal statute, but purely remedial in its nature; and it is to be interpreted fairly and liberally, so as to secure to parties injured an indemnity from those who reap the advantages and profits arising from the use of a dangerous mode of locomotion, by means of which buildings and other property are destroyed." *Ross* v. *Boston & W. R. Co.* (1863) 6 Allen, 87.

Again, in *Ingersoll* v. *Stockbridge & P. R. Co.* (1864) 8 Allen, 438, it was held, following *Hart* v. *Western R. Co.*, above cited, to be immaterial that a building was destroyed by the spreading of a fire from other buildings on which the sparks from the engine had fallen; and it was also held to be immaterial that the building stood partly within



Digitized by Google

the location of the railroad, Mr. Justice Hoar saying: "The fact that a building or other property stands near a railroad, or partly or wholly on it, if placed there with the consent of the company, does not diminish their responsibility, in case it is injured by fire communicated from their locomotives. The legislature have chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which the fire may cause."

Upon facts very like those of that case, this court, at October term, 1875, sustained an action under a statute of Vermont, copied from the Massachusetts statute of 1837, and, speaking by Mr. Justice Strong, said: "The statute was designed to be a remedial one. . . . In Massachusetts, there is a statute almost identical with that of Vermont;" and, referring to that case as directly in point, quoted the passage above cited from the opinion, ending with the words: "The legislature have chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which the fire may cause." *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454, 13] 456, 472 [23: 356, 362]. *The statute of Massachusetts, existing at the time of that decision and for thirty-five years before and enforced in the Massachusetts cases, imposed a liability upon the railroad company, wholly independent of negligence on its part; and the terms in which this court referred to that statute, and quoted from one of those cases, show that no doubt of its constitutionality was entertained.

In Maine and in New Hampshire, statutes substantially like the statute of Massachusetts of 1840, making railroad corporations absolutely liable, without regard to negligence, for injuries to property by fire communicated from their locomotive engines, were enacted in 1842, and have been since continued in force, and their validity upheld by the highest courts of those states, as applied to corporations created either before or after their passage. Me. Stat. 1842, chap. 9, § 5; Me. Rev. Stat. 1883, chap. 51, § 64; *Chapman* v. *Atlantic & St. L. R. Co.* 37 Me. 92; *Pratt* v. *Atlantic & St. L. R. Co.* 42 Me. 579; *Stevens* v. *Atlantic & St. L. R. Co.* 46 Me. 95; *Sherman* v. *Maine C. R. Co.* 86 Me. 422; N. H. Rev. Stat. 1842, chap. 142, §§ 8, 9; N. H. Gen. Stat. 1867, chap. 148, §§ 8, 9; N. H. Gen. Laws 1878, chap. 162, §§ 8, 9; *Hooksett* v. *Concord R. Co.* 38 N. H. 242; *Rowell* v. *Railroad*, 57 N. H. 132 [24 Am. Rep. 59]; *Smith* v. *Boston & M. R. Co.* 63 N. H. 25.

In Connecticut, before any legislation towards holding railroad corporations liable for property burned by sparks from their locomotive engines, they were held not to be so liable, if their use of such engines was with due care and skill, and in conformity with their charters. *Burroughs* v. *Housatonic R. Co.* 15 Conn. 124 [38 Am. Dec. 64]. The subsequent legislation upon the subject and the reasons for it as stated by the supreme court of the state were as follows: Experience demonstrated that in all cases of fire set by the operation of railroads it was extremely difficult, and in some cases impossible, to prove negligence even when it existed. This led to the passage in 1840, and to the re-enactment in 1875, of a statute providing that, in all actions for an injury occasioned by fire communicated by any railway locomotive engine in the state, proof that such fire *was so communicated should [14 be prima facie evidence of negligence. Conn. Stat. 1840, chap. 26; Conn. Gen. Stat. 1875, title 19, chap. 11, § 29. Even then, the difficulty was but partially removed, for in most cases the defendant could easily produce evidence of due care, and the plaintiff would be ill prepared to meet it. Therefore, in 1881, the legislature took the broad, equitable ground that upon proof of the fact that the locomotive engine communicated fire to and destroyed property the company should be liable, independently of the question of negligence; and accordingly enacted another statute, in the words of the Massachusetts statute of 1840, before mentioned, imposing an absolute liability, qualified only by the insertion of the words, "without contributory negligence on the part of the person or corporation entitled to the care and possession of the property injured." Conn. Stat. 1881, chap. 92. The statutes of 1875 and 1881 were both re-enacted in the Revised Statutes of 1888, §§ 1096, 3581. *Martin* v. *New York & N. E. R. Co.* 62 Conn. 331, 339. The provisions of the statute of 1881 have been repeatedly upheld and enforced. *Simmonds* v. *New York & N. E. R. Co.* 52 Conn. 264 [52 Am. Rep. 587]; *Grissell* v. *Housatonic R. Co.* 54 Conn. 447; *Regan* v. *New York & N. E. R. Co.* 60 Conn. 124; *Martin* v. *New York & N. E. R. Co. supra.*

In *Grissell* v. *Housatonic R. Co.* the validity of that statute was strongly assailed upon all the grounds taken by the plaintiff in error in the present case; and the court, in the course of a well-considered opinion, said: "It is a mistake to suppose that it necessarily transcends the limits of valid legislation, or violates the principle of a just equality before the law, if the one using extra hazardous materials or instrumentalities, which put in jeopardy a neighbor's property, is made to bear the risk and pay the loss thereby occasioned, if there is no fault on the part of the owner of the property, even though negligence in the other party cannot be proved." The court referred to early statutes of Connecticut, which required no proof of negligence in two classes of actions of tort; the one, making the owner of a dog, or, if the owner was a minor or an apprentice, his parent, guardian, or master, liable for all damage done by the dog (Conn. Stat. 1789, Acts and *Laws of [15 1796), p. 383; Conn. Gen. Stat. 1875, p. 267, § 3; Conn. Rev. Stat. 1888, § 3761; *Russell* v. *Tomlinson*, 2 Conn. 206; *Woolf* v. *Chalker*, 31 Conn. 121, 133 [81 Am. Dec. 175]; the other, making every person setting a fire on his own or any land that runs upon the land of any other person, liable for all damage done by the fire. Conn. Colonial Laws 1750, p. 247; 2 Swift's System, 81; Conn. Gen.



Digitized by Google

Stat. 1875, p. 489, § 6; Conn. Rev. Stat. 1888, § 1344; *Grannis* v. *Cummings*, 25 Conn. 165; *Ayer* v. *Starkey*, 30 Conn. 304. The court added: "We are not aware that the validity of any of these statutes has been called in question: The dangerous character of the thing used is always to be considered in determining the validity of statutory regulations fixing the liability of parties so using it. Fire has always been subject to arbitrary regulations, and the common law of England was more severe and arbitrary on the subject than any statute. In Rolle's Abridgment (Action on the Case, *B*, title, *Fire*) it is said: 'If my fire by misfortune burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods and also my neighbor's house, he shall have his action on the case against me. So, if the fire is caused by a servant or a guest or any person who entered the house with my consent. But otherwise if it is caused by a stranger who entered the house against my will.' . . . There is no force in the objection that the statute under consideration unjustly selects only railroad corporations to bear the burden of an extraordinary risk. It is confined to them, because they alone have the privilege of taking a narrow strip of land from each owner, without his consent, along the route selected for the track, and of traversing the same at all hours of the day and night, and at all seasons, whether wet or dry, with locomotive engines that scatter fire along the margin of the land not taken, thereby subjecting all combustible property to extraordinary hazard of loss, and that, too, for the sole profit of the corporation." 54 Conn. 461, 462.

In Iowa, before the passage of any statute making railroad corporations responsible for damage done by sparks from their locomotive engines, it was held that no action could 16]be *maintained for such damage without proof of negligence on their part. *Gandy* v. *Chicago & N. W. R. Co.* 30 Iowa, 420 [6 Am. Rep. 682]. The legislature then passed a statute providing that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway." Iowa Code 1873, § 1289. The supreme court of the state, assuming this statute to impose a liability independent of negligence, held it to be constitutional and applicable to companies incorporated under general laws before its passage, and said: "The statute simply recognizes the doctrine that the use of the locomotive engine is the employment of a dangerous force; that sometimes, notwithstanding the exercise of the highest care and diligence, it will emit sparks and cause destructive conflagrations; that when this occurs loss must fall upon one of two innocent parties; that heretofore that loss has been borne by the owner of the property injured; hereafter it shall be borne by the owner of the property causing the injury. . . . What the policy of this legislation may be experience alone can show. It may be that it will prove to be unreasonably severe and to stand in the way of material progress and the best interests of the country at large. It may, upon the other hand, promote a high degree of skill and care, and stimulate the invention and use of improved appliances, lessening the danger of fires, and greatly increasing the safety of property, without any detriment to public interests. With these questions we have nothing to do. For us it is enough to know that the statute contravenes no constitutional provision, state or national; and that it does not do so we entertain no doubt." *Rodemacher* v. *Milwaukee & St. P. R. Co.* 41 Iowa, 297, 309 [20 Am. Rep. 592]. The subsequent decision, by a majority of the same court, cited by the plaintiff in error, that this statute only made the fact of an injury so occurring prima facie evidence of negligence, was based wholly upon a peculiar construction of this section in connection with other provisions of the Code, and in no degree upon any suggestion that, regarded as imposing an absolute liability, it would be unconstitutional. *Small* v. *Chicago, R. I. & P. R. Co.* 50 Iowa, 338.

*In a recent case in the circuit court of [17 the United States for the northern district of Iowa, Judge Shiras said: "The right to use the agencies of fire and steam in the movement of railway trains in Iowa is derived from the legislation of the state; and it certainly cannot be denied that it is for the state to determine what safeguards must be used to prevent the escape of fire, and to define the extent of the liability for fires resulting from the operation of trains by means of steam locomotives. This is a matter within state control. The legislation of the state determines the width of the right of way used by the companies. The state may require the companies to keep the right of way free from combustible material. It may require the depot and other buildings used by the company to be of stone, brick, or other like material, when built in cities or in close proximity to other buildings. The state, by legislation, may establish the extent of the liability of railway companies for damages resulting from fires caused in the operation of the roads." *Hartford F. Ins. Co.* v. *Chicago, M. & St. P. R. Co.* 62 Fed. Rep. 904, 907.

In Missouri, a statute was enacted in 1853 requiring railroad corporations, whether already existing or thereafter formed under the laws of the state, to erect and maintain fences on the sides of their railroads, where they passed through inclosed fields, with openings or gates or bars at farm crossings, and also cattle guards at all road crossings, suitable and sufficient to prevent cattle, horses, or other animals from getting upon the rail roads; and, until such fences and cattle guards were duly made, making the corporation liable for all damages done by its agents or engines to animals on the railroad. Mo. Stat. February 24, 1853, §§ 51, 56 (Laws 1853, pp. 143, 144). The supreme court of the state, following the opinion of Chief Justice Redfield in the leading case of *Thorpe* v. *Rutland & B. R. Co.* 27 Vt. 140 [62 Am. Dec. 625], and referring to *Lyman* v. *Boston*



Digitized by Google

*& W. R. Corp.* 4 Cush. 288, above stated, held the statute constitutional as applied to companies incorporated under general laws before its passage, and Mr. Justice Scott, in 18] delivering *judgment, said: "Where such dangerous and powerful agents as steam engines are brought into use, there should be a power in the legislature to prescribe such reasonable regulations as will prevent injuries resulting from their employment. The foresight of man is not competent to the task of prescribing in a charter all the regulations which time may show to be necessary for the security of the interests of the people of the state against injuries caused by the introduction of new, powerful, and dangerous agents for carrying on her intercourse and commerce. The charter must be taken subject to the understanding that in its operation affecting the interests of society, it will be, like individuals, liable to be controlled by such reasonable enactments as may be dictated by a sense of what is required for the preservation of the persons, lives, and property of the people, such enactments not contravening the expressed or plainly implied provisions of the charter." *Gorman* v. *Pacific R. Co.* 26 Mo. 441, 450, 451 [72 Am. Dec. 220]. That statute was afterwards re-enacted, modified by including uninclosed lands as well as inclosed or cultivated fields and by making the corporation liable in double the amount of damages to cattle, horses, or other animals occasioned by failure to construct or maintain such fences or cattle guards. Mo. Gen. Stat. 1865, chap. 63, § 43; 1 Wagner's Mo. Stat. chap. 37, art. 2, § 43; Mo. Stat. February 18, 1875 (Laws 1875, p. 131); Mo. Rev. Stat. 1889, § 2611. And the statute, as so modified, and as applied to existing railroad corporations, was held to be valid by a decision of that court, affirmed by this court. *Humes* v. *Missouri P. R. Co.* 82 Mo. 221 [52 Am. Rep. 369], and 115 U. S. 512 [29: 463].

In Missouri, before the passage of any statute concerning the liability of railroad corporations for fire communicated from their engines, they were held not to be liable, unless negligent; but the fact of fire escaping from a passing engine and burning property of another was held to be prima facie evidence of negligence, and to throw upon the defendant the burden of proving that it supplied the best mechanical contrivances to prevent the fire from escaping, and that there was no negligence on the part of its servants. 19] *Fitch* v. *Pacific R. Co.* 45 Mo. 322; *Miller* v. *St. Louis, I. M. & S. R. Co.* 90 Mo. 389. The statute of March 31, 1887, now in question (re-enacted in Mo. Rev. Stat. 1889, § 2615), changed the rule, by making the railroad corporation absolutely responsible in damages to the owners of property "injured or destroyed by fire communicated, directly or indirectly, by locomotive engines" in use upon its railroad; and providing that it should have an insurable interest in property along its route, and might procure insurance thereon in its own behalf, for its protection against such damages. The constitutionality of this statute was upheld by the supreme court of the state in full and able opinions in the case at bar, and in a similar case decided at the same time, and now argued with it in this court. *Mathews* v. *St. Louis & S. F. R. Co.* 121 Mo. 298, [25 L. R. A. 161]; *Campbell* v. *Missouri P. R. Co.* 121 Mo. 340 [25 L. R. A. 175]. In discussing the subject the court said: "If the state is powerless to protect its citizens from the ravages of fires set out by agencies created by itself, then it fails to meet one of the essentials of a good government. Certainly it fails in the protection of property. The argument of the defendant, reduced to its last analysis, is this: The state authorized the railroad companies to propel cars by steam. To generate steam, they are compelled to use fire. Therefore, they can *lawfully use* fire, and as they are pursuing a lawful business they are only liable for negligence in its operation; and when, in a given case, they can demonstrate they are guilty of no negligence, then they cannot be made liable. To this the citizen answers: 'I also own my land lawfully. I have the right to grow my crops and erect buildings on it, at any place I choose. I did not set in motion any dangerous machinery. You say you are guiltless of negligence. It results, then, that the state, which owes me protection to my property from others, has chartered an agency which, be it ever so careful and cautious and prudent, inevitably destroys my property, and yet denies me all redress. The state has no right to take or damage my property without just compensation.' But what the state cannot do directly, it attempts to do indirectly, [20 through the charters granted to railroads, if defendant's contention be true. When it was demonstrated that, although the railroads exercised every precaution in the construction of their engines, the choice of their operatives, and clearing their rights of way of all combustibles, *still* fire was emitted from their engines, and the citizen's property burned, notwithstanding his efforts to extinguish it, and notwithstanding he had in no way contributed to setting it out, it is perfectly competent for the state to require the company who set out the fire to pay his damages. . . . The organic law of the state prescribed, before defendant obtained its charter, that 'the exercise of the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well being of the state.' Mo. Const. art. 12, § 5. Let it be conceded, for it is true, that, prior to the enactment of § 2615, by the decisions of this and other courts, defendant was only liable for negligence in setting out fire. Is it to be concluded that the legislature is powerless to enact laws which will give ample protection to citizens against fires? Most certainly not. Fire, as one of the most dangerous elements, has ever been the subject of legislative control. It ought not to excite surprise among a people, the great body of whose laws had their origin in England, that those who set out fires which destroy the property of others should be held absolutely responsible for



Digitized by Google

them. Such was the ancient common law, before any statutes were enacted"—quoting Rolle's Abridgment, before cited. "Under ordinary circumstances, this was thought to be a harsh rule, and it was not generally adopted by the courts of the several states; but the question we are discussing is not what the courts have generally regarded as the reasonable rule, but what is the power of the lawmaking power to adopt as a correct one." 121 Mo. 315-317 [25 L. R. A. 168].

Similar statutes have also been enacted and held to be constitutional in Colorado and in South Carolina. Colo. Terr. Stat. January 13, 1874, § 3 (Laws 1874, p. 225); Colo. Gen. Laws 1877, art. 2237, § 3; Colo. 21]Gen. Stat. 1883, §§ 1037, *2798; *Union P. R. Co.* v. *De Busk*, 12 Colo. 294 [8 L. R. A. 350]; S. C. Gen. Stat. 1882, § 1511; *McCandless* v. *Richmond & D. R. Co.* 38 S. C. 108 [18 L. R. A. 440].

In *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469 [24: 256], in *Northern P. R. Co.* v. *Lewis*, 162 U. S. 366 [40: 1002], and in *Eddy* v. *Lafayette*, 163 U. S. 456 [41 L. ed. 225], in which it was assumed that negligence on the part of the defendant must be proved, the action was at common law, unaffected by any statute. And the statutes of some states make negligence an essential element in the liability of a railroad company for injuries by fire from its engines. 1 Thomp. Neg. 171.

The statute of Alabama of February 8, 1877, chap. 39, which was held to be unconstitutional in *Zeigler* v. *South & N. Ala. R. Co.* 58 Ala. 594, cited by the plaintiff in error, was one providing that all corporations or persons "owning or controlling any railroad in this state shall be liable for all damages to live stock or cattle of any kind, caused by locomotives or railroad cars." Whatever may be thought of the correctness of that decision, no question of liability for fire was before the court, nor was any reference made to the statutes or decisions of other states upon this subject.

In each of the cases in Arkansas, cited by the plaintiff in error, the decision was that a statute of the state providing generally that "all railroads which are now or may be hereafter built and operated, in whole or in part, in this state, shall be responsible for all damages to persons and property done or caused by the running of trains in this state," was not intended by the legislature to make the railroad company responsible for all damages, without regard to negligence, but only to shift the burden of proof upon the defendant. Ark. Stat. February 3, 1875 (Mansfield's Dig.) § 5537; *Little Rock & Ft. S. R. Co.* v. *Payne*, 33 Ark. 816 [34 Am. Rep. 55]; *Tilley* v. *St. Louis & S. F. R. Co.* 49 Ark. 535. The court in the first of those cases, while expressing an opinion that "it was not within the province of the legislature to devest rights by prescribing to the courts what should be conclusive evidence," impliedly admitted, or at least cautiously abstained from denying, the 22]validity of statutes like that now *in question, by saying: "In Massachusetts, by statute, railroad companies are made absolutely liable for injuries by fire communicated from their engines; but, in compensation, are given an insurable interest in any buildings along the route. The courts have sustained this law, but the nature of it is peculiar and exceptional, and the language too clear to admit of doubt." 33 Ark. 820 [34 Am. Rep. 55].

The learning and diligence of counsel have failed to discover an instance in which a statute making railroad companies absolutely liable for damages by fire communicated from their locomotive engines to the property of others has been adjudged to be unconstitutional as to companies incorporated before or since its enactment.

This review of the authorities leads to the following conclusions:

First. The law of England, from the earliest times, held anyone lighting a fire upon his own premises to the strictest accountability for damages caused by its spreading to the property of others.

Second. The earliest statute which declared railroad corporations to be absolutely responsible, independently of negligence, for damages by fire communicated from their locomotive engines to property of others, was passed in Massachusetts in 1840, soon after such engines had become common.

Third. In England, at the time of the passage of that statute, it was undetermined whether a railroad corporation without negligence was liable to a civil action, as at common law, for damages to property of others by fire from its locomotive engines; and the result that it was not so liable was subsequently reached after some conflict of judicial opinion, and only when the acts of Parliament had expressly authorized the corporation to use locomotive engines upon its railroad, and had not declared it to be responsible for such damages.

Fourth. From the time of the passage of the Massachusetts statute of 1840 to the present time, a period of more than half a century, the validity of that and similar statutes has been constantly upheld in the courts of every state of the Union in which the question has arisen.

*In this court the constitutionality of [23 such a statute has never been directly drawn into judgment. But it appears to have been assumed in *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454, 472 [23: 356, 363], already cited, and it rests upon principles often affirmed here.

As was said by Chief Justice Shaw: "It is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." *Com.* v. *Alger*, 7 Cush. 53, 84, 85. This court has often recognized and affirmed the fundamental principle so declared, and has more than once said: "Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense as are all con-



Digitized by Google

tracts and all property, whether owned by natural persons or corporations." *Butchers Benev. Asso.* v. *Crescent City L. S. L. & S. H. Co.* ("*Slaughter-House Cases*"), 83 U. S. 16 Wall. 36, 62 [21 : 394, 404]; *Patterson* v. *Kentucky*, 97 U. S. 501, 505 [24 : 1115, 1117]; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 672 [29 : 516, 524]; *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674, 678 [29 : 525, 527]; *Mugler* v. *Kansas*, 123 U. S. 623, 665 [31 : 205, 212]; *Sweet* v. *Rechel*, 159 U. S. 380, 398 [40 : 188, 195].

In *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33 [24 : 989, 992], in which a statute of Massachusetts, prohibiting the manufacture and sale of intoxicating liquors, including malt liquors, was held to be constitutional and valid, as applied to a corporation chartered long before by the state for the purpose of manufacturing malt liquors, this court, speaking by Mr. Justice Bradley, said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the perservation of good order and the public morals. The legislature cannot by any contract devest itself of the power to provide for these objects. They belong emphatically to that class of ob- [24] jects *which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

In *Missouri P. R. Co.* v. *Humes*, 115 U. S. 512 [29 : 463], already mentioned, in which a statute of Missouri making railroad corporations not fencing their railroads liable in double damages for injuries thereby occasioned to cattle and other animals, was held constitutional as applied to corporations existing before its enactment, this court, speaking by Mr. Justice Field, said: "If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law. . . . The law of Missouri, in requiring railroad corporations to erect fences where their roads pass through, along, or adjoining inclosed or cultivated fields or uninclosed lands, with openings or gates at farm crossings, and to construct and maintain cattle guards, where fences are required, sufficient to keep horses, cattle, and other animals from going on the roads, imposes a duty in the performance of which the public is largely interested. Authority for exacting it is found in the general police power of the state to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations. . . . In few instances could the power be more wisely or beneficently exercised than in compelling railroad corporations to inclose their roads with fences having gates at crossings, and cattle guards. The speed and momentum of the locomotive render such protection against accident in thickly settled portions of the country absolutely essential." 115 U. S. 520, 522 [29 : 466].

"The objection that the statute of Missouri violates the clause of the 14th Amendment, which prohibits a state to deny to any person within its jurisdiction the equal *protec- [25] tion of the laws, is as untenable as that which we have considered. The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability, and from each the same security, by the erection of fences, gates, and cattle guards, is exacted, when its road passes though, along, or adjoining inclosed or cultivated fields or uninclosed lands. There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances." 115 U. S. 523 [29 : 467].

Like decisions, for like reasons, were made in the similar cases of *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26 [32 : 585], and *Minneapolis & St. L. R. Co.* v. *Emmons*, 149 U. S. 364 [37 : 769], in which last case this court, again speaking by Mr. Justice Field, said: "The extent of the obligations and duties required of railway corporations or companies by their charters does not create any limitation upon the state against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employees, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably within the police powers of the states. No contract with any person, individual or corporate, can impose restrictions upon the power of the states in this respect." 149 U. S. 367, 368 [37 : 772].

In *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205 [32 : 107], the judgment of the supreme court of Kansas in 33 Kan. 298, maintaining the constitutionality of a statute of the state imposing for the future upon every railroad corporation organized or doing business in the state a liability to which no person or corporation was before subject, for all damages done to any of its employees by negligence or mismanagement of their fellow servants, was affirmed by this court saying: "The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees, as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objec- [26] tions, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied



Digitized by Google

to carriers by canal and stage coaches, and to persons and corporations using steam in manufactories." 127 U. S. 210 [32: 109]. The motives which have induced, and the reasons which justify, the legislation now in question, may be summed up thus: Fire, while necessary for many uses of civilized man, is a dangerous, volatile, and destructive element, which often escapes in the form of sparks, capable of being wafted afar through the air, and of destroying any combustible property on which they fall; and which, when it has once gained headway, can hardly be arrested or controlled. Railroad corporations, in order the better to carry out the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to use locomotive engines propelled by steam generated by fires lighted upon those engines. It is within the authority of the legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company which employs the instruments and creates the peril for its own profit rather than upon the owner of the property, who has no control over or interest in those instruments. The very statute now in question, 27] *which makes the railroad company liable in damages for property so destroyed, gives it, for its protection against such damages, an insurable interest in the property in danger of destruction and the right to obtain insurance thereon in its own behalf; and it may obtain insurance upon all such property generally, without specifying any particular property. *Eastern R. Co.* v. *Relief F. Ins. Co.* 98 Mass. 420. The statute is not a penal one, imposing punishment for a violation of law; but it is purely remedial, making the party doing a lawful act for its own profit liable in damages to the innocent party injured thereby, and giving to that party the whole damages measured by the injury suffered. *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454, 472 [23: 356, 363]; *Huntington* v. *Attrill*, 146 U. S. 657 [36: 1123].

The statute is a constitutional and valid exercise of the legislative power of the state, and applies to all railroad corporations alike. Consequently, it neither violates any contract between the state and the railroad company, nor deprives the company of its property without due process of law, nor yet denies to it the equal protection of the laws.

*Judgment affirmed.*

No. 118. MISSOURI PACIFIC RAILWAY COMPANY *v.* SIMMONS, Administrator of Campbell, argued and decided with this case, and reported below in 121 Mo. 340 [25 L. R. A. 175], was substantially similar, and in that case also *the judgment is affirmed.*

*Messrs.* **David D. Duncan**, *John F. Dillon*, and *Winslow F. Pierce*, for plaintiff in error.

*Mr.* **W. M. Williams** for defendant in error.

---

## WARNER VALLEY STOCK COMPANY, *Appt.*, [28

*v.*

HOKE SMITH, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office.

(See S. C. Reporter's ed. 28-36.)

*Abatement of suit—Commissioner of Land Office—substitution of defendant.*

1. A suit against the Secretary of the Interior seeking a mandatory injunction abates by his resignation of the office.
2. A suit against the Secretary of the Interior and Commissioner of the General Land Office, which aims to control the action of the Secretary and asks merely incidental relief against the Commissioner, cannot be maintained against the latter after the Secretary's resignation.
3. The successor in office cannot be substituted as defendant for a Secretary of the Interior who resigns his office while a suit is pending against him for a mandatory injunction against exercising further jurisdiction over certain lands and to compel him to issue a patent therefor.

[No. 550.]

*Argued December 17, 18, 1896. Decided January 11, 1897.*

APPEAL from a decree of the Court of Appeals of the District of Columbia affirming the decree of the Supreme Court of that District dismissing a suit in equity brought by the Warner Valley Stock Company, plaintiff, against Hoke Smith, Secretary of the Interior, *et al.*, to restrain defendants from exercising further jurisdiction in regard to certain lands and for a mandatory injunction to the defendant Smith to prepare for issuance to the plaintiff of patents for the land, etc. *Reversed*, with directions to dismiss the suit.

See same case below, 24 Wash. L. Rep. 392.

The facts are stated in the opinion.

*Messrs.* **Frederic D. McKenney**, *Samuel F. Phillips*, *Charles A. Cogswell*, and *James B. McCrellis* for appellant.

*Messrs.* **Holmes Conrad**, Solicitor General, **Edward B. Whitney**, Assistant Attorney General, *Jos. K. McCammon*, *John Mullan*, and *James H. Hayden* for appellees.

---

NOTE.—*As to when injunction to restrain acts of public officers will be granted*, see note to Mississippi v. Johnson, 18: 437.

*That patents for land may be set aside for fraud*, see note to Miller v. Kerr, 5: 381.

*As to errors in surveys and descriptions in patents for lands, how construed*, see note to Watts v. Lindsey, 5: 423.

*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.



Digitized by Google

Mr. Justice **Gray** delivered the opinion of the court:

This was a bill in equity, filed January 15, 1896, in the supreme court for the District of Columbia, by a corporation of the state of Oregon, against Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, both alleged in the bill to be citizens and residents of the District of Columbia, and to be "sued for acts done and threatened by them in their official capacity respectively."

29] *The prayer of the bill was "that the said Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, their subordinates and agents, may be restrained and enjoined from assuming to exercise further jurisdiction with respect to the disposition of lands described in Oregon swamp land lists No. 30 and No. 31, and from further trespassing upon your orator's right of quiet possession thereof; and that said defendant Hoke Smith may be commanded and enjoined to prepare for issuance unto your orator, in accordance with law, patents for said lands, and to the end that your orator's title to said lands may be quieted and freed from cloud; and that such other and further relief may be administered unto your orator as the peculiar necessities and circumstances of the case may require and merit."

By the act of Congress of September 28, 1850, chap. 84, entitled "An Act to Enable the State of Arkansas and Other States to Reclaim the 'Swamp Lands' within Their Limits," it was enacted that in each state the whole of the "swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be and the same are hereby granted to said state;" and that it should be the duty of the Secretary of the Interior, as soon as might be practicable, "to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the state," and at his request, "cause a patent to be issued to the state therefor; and on that patent the fee simple to said lands shall vest in said state, subject to the disposal of the legislature thereof." 9 Stat. at L. 519. And by the act of March 12, 1860, chap. 5, the provisions of the act of 1850 were extended to the state of Oregon, "provided that the grant hereby made shall not include any lands which the government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act." 12 Stat. at L. 3.

The leading facts alleged in the bill were as follows: The lands in question were sold and conveyed by the state of Oregon in 1883 and

30] 1884, and passed by mesne conveyances *to the plaintiff on January 15, 1892, in consideration of the payment by it of the sum of $19,000. In 1888, these lands, having previously been selected by the state as swamp and overflowed lands under the act of 1860, were certified by the surveyor general of the United States for Oregon to the Commissioner of the General Land Office. The Commissioner, in March and April, 1892, prepared lists, numbered 30 and 31, of these lands as swamp and overflowed lands, and submitted them to John W. Noble, then Secretary of the Interior, for his approval. He approved both lists on April 9 and December 3, 1892, respectively, "subject to any valid adverse rights that may exist to the tracts of land therein described;" and his approvals were noted upon the records of the General Land Office, and a certified copy of the first list was forwarded to the governor of Oregon, who by letter dated May 12, 1892, requested that a patent of the lands in that list be issued to the state. Upon a petition filed December 29, 1892, by settlers upon the lands, claiming that they were not swamp and overflowed lands at the date of the act of 1860, Secretary Noble, on March 2, 1893, notwithstanding the plaintiff's protest against his jurisdiction to do so, made an order revoking and canceling his approvals of the lists, and directing the Commissioner to take proper steps to make the revocation and cancelation formally effective. On December 19, 1893, his successor, the defendant Hoke Smith, decided that these lands were not swamp and overflowed lands, and that the state had no claim to them as such, and therefore directed the Commissioner to "cause all decisions recommending or holding for cancelation entries or declaratory statements, upon the ground that the lands in contest were granted to the state of Oregon as swamp and overflowed lands by the act of March 12, 1860, to be set aside and annulled, and the cases reinstated; and all contests based upon said ground alone to be dismissed." 17 U. S. Land Dec. 571. On October 10, 1894, a motion of the plaintiff for a review of that decision was overruled by the Secretary; and on January 5, 1895, his decision was promulgated by a letter from the Commissioner to the local land officers in Oregon.

*The principal contention in support of [31 the bill was that by the acts of Congress of 1850 and 1860 the title to all the swamp and overflowed lands within the state of Oregon, not reserved, sold, or disposed of prior to the confirmation of title under those acts, passed to and became vested in the state, subject only to the identification by the Secretary of the Interior of the specific lands as "swamp and overflowed lands, made unfit thereby for cultivation," within the meaning of those acts; that upon such identification, evidenced by the making out of accurate lists and plats of such lands, and the transmission thereof to the governor of Oregon, the title became absolute in the state by relation as of March 12, 1860, and could not be devested by any subsequent action of the Secretary; and that the duty imposed upon him to cause patents of lands so identified and listed to be issued to the state upon the request of the governor was but ministerial.

A general demurrer to the bill was sustained, and a decree rendered thereon for the defendants by the supreme court of the District of Columbia; and that decree was affirmed by the court of appeals of the District of Columbia on June 11, 1896, upon the ground that the whole subject remained under the control of the Secretary of the Interior until the execution of the patent. 24 Wash. L. Rep. 392.

The plaintiff took an appeal to this court; and pending this appeal the defendant, Hoke



Digitized by Google

Smith, on September 1, 1896, resigned the office of Secretary of the Interior.

That a petition for a writ of mandamus to a public officer of the United States abates by his resignation of his office has been determined by a series of uniform decisions of this court, and has for years been considered as so well settled that in many of the cases no opinion has been filed and no official report published. *Cox* v. *United States*, 76 U. S. 9 Wall. 298, 313 [19: 579, 584]; *United States* v. *Boutwell*, 84 U. S. 17 Wall. 604, 609 [21: 721, 723]; *Leavenworth County Comrs.* v. *Sellew*, 99 U. S. 624, 626 [25: 332, 335]; *United States* v. *Schurz*, 102 U. S. 378, 408 [26: 167, 220]; *Thompson* v. *United States*, 103 U. S. 480, 484 [26: 521, 523]; *United States, Warden*, v. *Chandler*, 122 U. S. 643 [30: 1244]; *United States International Contracting Co.* v. *Lamont*, 155 U. S. 303, 306 [39: 160, 163].

The reasons for this conclusion, as stated by 32] Mr. Justice *Strong, delivering the unanimous judgment of the court in the leading case of *United States* v. *Boutwell*, which was a petition by the owner of an order upon the Treasury of the United States for a writ of mandamus to the Secretary of the Treasury to pay it, were as follows: "The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. . . . If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he can only be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is therefore in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. Hence it is an imperative rule that, previous to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant; and it must appear that he refused to comply with such demand, either in direct terms, or by conduct from which a refusal can be conclusively inferred. Thus it is the personal default of the defendant that warrants impetration of the writ; and if a peremptory mandamus be awarded the costs must fall upon the defendant. It necessarily follows from this, that on the death or retirement from office of the original defendant, the writ must abate, in the absence of any statutory provision to the contrary. When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And if a successor in office may be substituted, he may be mulcted in costs for the fault of his predecessor, without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty, and render the interposition of the court unnecessary. At all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative." 84 U. S. 17 Wall. 607, 608 [21: 722].

The case of a public officer of the United States 33] differs in *this respect from that of a municipal board, which is a continuing corporation (although its individual members may be changed) and to which in its corporate capacity a writ of mandamus may be directed. As was said, in *Leavenworth County Comrs.* v. *Sellew*, by Chief Justice Waite: "One of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifested itself in *United States* v. *Boutwell* 84 U. S. 17 Wall. 604 [21: 721], may be avoided." 99 U. S. 627 [25: 335]. And in *Thompson* v. *United States*, Mr. Justice Bradley said: "The cases in which it has been held by this court that an abatement takes place by the expiration of the term of office have been those of officers of the government, whose alleged delinquency was personal, and did not involve any charge against the government whose officers they were. A proceeding against the government would not lie." 103 U. S. 484, 485 [26: 523].

The main object of the present bill was to compel the defendant Hoke Smith, as Secretary of the Interior, to prepare patents to be issued to plaintiff for the lands in question. The mandatory injunction prayed for was in effect equivalent to a writ of mandamus to him. The reasons for holding a suit, which has this object, to have abated, as to him, by his resignation, are as applicable to this bill in equity, as to a petition for a writ of mandamus at common law. Consequently, as against the defendant Hoke Smith, this suit must be held to have abated by his resignation of the office of Secretary of the Interior.

It appears to us to be equally clear that the suit cannot be maintained against the Commissioner of the General Land Office alone.

By the Revised Statutes of the United States, the Secretary of the Interior "is charged with the supervision of public business relating to," among other things, "the public lands, including mines." The Commissioner of the General Land Office is to "perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate *to private [34 claims of land, and the issuing of patents for all grants of land under the authority of the government;" and likewise, "under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations," every part of the provisions of title 32 of the Revised Statutes, relating to public lands, not otherwise specially provided for. U. S. Rev. Stat. §§ 441, 453, 2478. The phrase "under the direction of the Secretary of the Interior," thus used in these statutes, as was said by Mr. Justice Lamar, speaking for this court, "is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department, of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government by reason of the laws of Congress or under treaty stipulations, respecting the pub-



Digitized by Google

lic domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States." *Knight* v. *United Land Asso.* 142 U. S. 161, 177, 178 [35: 974, 979, 980]; *Orchard* v. *Alexander*, 157 U. S. 372 [39: 738].

The present suit was avowedly brought against Smith as Secretary and Lamoreux as Commissioner for acts done and threatened by them in their official characters respectively. The prayer of the bill was for an injunction against both of them from assuming to exercise further jurisdiction with respect to the disposition of the lands in question, and from further trespassing upon the plaintiff's right of quiet possession thereof; and that the defendant Smith be commanded to prepare patents therefor to be issued to the plaintiff, in accordance with law, and to the end that the plaintiff's title might be quieted and freed from cloud; and for further relief.

The purpose of the bill was to control the action of the Secretary of the Interior; the principal relief sought was against him; and the relief asked against the Commissioner of the General Land Office was only incidental, and 35] by way *of restraining him from executing the orders of his official head. To maintain such a bill against the subordinate officer alone, without joining his superior whose acts are alleged to have been unlawful, would be contrary to settled rules of equity pleading. 3 Calvert, Parties (2d ed.) chap. 18.

This is well exemplified by a decision of Lord Chancellor Hardwicke. Under acts of Parliament appointing commissioners to build fifty new churches, appropriating money to support the ministers, and providing that the moneys appropriated should be paid to a treasurer, not one of the commissioners, but appointed by the Crown, and should be by him disbursed and applied according to orders of the commissioners, Lord Hardwicke held that a bill by a minister of one of the churches to recover his stipend, and to have a fund in the treasurer's hands invested as required by the acts, could not be maintained against the treasurer alone, without joining any of the commissioners; and said: "This is one of the most extraordinary bills I ever remember; and there is no foundation for relief either in law or equity. It is brought against Mr. Blackerby, who is nothing but an officer under the commissioners for building the fifty new churches. It would be absurd if a bill should lie against a person who is only an officer and subordinate to others, and has no directory power. . . . I should think the commissioners only, and not the treasurer, ought to have been parties, for it is absurd to make a person who acts ministerially the sole party." *Vernon* v. *Blackerby*, 2 Atk. 144, 146, Barn. Ch. 377.

This bill cannot be amended by making the present Secretary of the Interior a defendant, because he was not in office before the bill was filed, and had no part in the doings complained of.

As against the Commissioner of the General Land Office, the bill does not strictly abate, as upon the disappearance, by death or resignation, of the sole defendant in an action the cause of which does not survive against representatives or successors. But the bill cannot be maintained against the Commissioner, because it shows no ground for relief against him alone, and the Secretary of the Interior is not and cannot now be made a party.

*The objection that the bill cannot be [36 maintained against the Commissioner alone being decisive of the case, it would be inappropriate to express an opinion upon any of the graver questions, fully argued at the bar, touching the jurisdiction of the court, and the merits of the bill; or to leave the record in such a shape as to appear to foreclose any of those questions. It is therefore ordered that *the decree be reversed*, and the case remanded, with directions to dismiss the bill, with costs, for want of proper parties.

Mr. Justice **Brewer** and Mr. Justice **Brown** concurred in the result.

---

## ENOCH W. AGNEW, *Plff. in Err.*,
*v.*
## UNITED STATES.

(See S. C. Reporter's ed. 36-57.)

*Plea in abatement—assigning grounds—invalid exception—commercial rating—testimony of cashier—opinion of witness—proper instruction—refusal to instruct—false entry on books of a bank—presumption—exculpatory instruction—defrauding a bank.*

1. A plea in abatement alleging irregularities in drawing grand jurors, filed two weeks after the court opened and five days after the indictment was returned, is too late where it does not allege any reason for the delay.
2. Such plea is fatally defective when, although it states that the drawing tended to defendant's injury and prejudice, no grounds are assigned for such conclusion, and the record does not show any.
3. An exception to the permission to a juryman to take notes of the evidence has nothing to rest on where the record does not show that any notes were taken.
4. The commercial rating of defendant is not evidence of his actual financial condition, nor of what he knew or believed it to be.
5. On the trial of the president of a bank for criminal misapplication of its funds, the testimony of its cashier—a witness for defendant—as to why he resigned such position, is admissible on his cross-examination.
6. The opinion of a witness as to the responsibility of the president of a bank is not admissible on the question of the latter's fraud in obtaining credit upon a guarantee and knowledge of his own responsibility.
7. An instruction that if defendant placed on the books of the bank to his own credit and at an exaggerated value that which was worthless or of little value, the intent to defraud is to be inferred, and evidence to do away with that presumption must satisfy the jury beyond a reasonable

NOTE.—*As to objections to grand jurors, when and how taken*, see note to United States v. Gale, 27: 857.
*Evidence of contradictory statements made by witnesses to impeach; in regard to what facts inquired of on cross-examination the witness may be contradicted*,—see note to Ellicott v. Pearl, 9: 475.



Digitized by Google

doubt, is not prejudicial error, where the jury are further instructed that the presumption of innocence remains until they are satisfied beyond a reasonable doubt of his guilt and intent to defraud.

8. It is not error to refuse to give an instruction which has been covered by a correct instruction already given.

9. An instruction that a false entry mentioned in U. S. Rev. Stat. § 5209, includes an entry intentionally made to represent what is not true, and that the entry in the books of a bank of a deposit slip containing a false statement is a false entry, is not erroneous.

10. An instruction that the intent is to be presumed from the act, and that if defendant embezzled funds of the bank so as to reduce its capital or lessen or destroy its ability to meet its engagements the intent to injure and defraud it may be presumed, is unexceptionable.

11. A refusal to give an exculpatory instruction is not error, where the attempted explanation on which it is based is entirely unsatisfactory.

12. Where the president of a bank placed on its books to his own credit at their face value bonds known to him to be worthless or of small value, without authority of the directors or stockholders, the fact that he gave a guarantee of payment of the bonds on demand does not relieve him from liability for an intent to defraud the bank by misapplying its moneys, although at the time he was solvent and intended to pay his guarantee on demand.

[No. 447.]

*Submitted November 13, 1896. Decided January 11, 1897.*

IN ERROR to the Circuit Court of the United States for the Southern District of Florida to review a judgment convicting Enoch W. Agnew of a violation of U. S. Rev. Stat. § 5209, for wilfully misapplying moneys, etc., of the First National Bank of Ocala, Florida, while president of that bank. *Affirmed.*

Statement by Mr. Chief Justice **Fuller:**

Plaintiff in error was indicted in the United States circuit court for the southern district of Florida for violation of U. S. Rev. Stat. § 5209, which is as follows:

38] "Sec. 5209. Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The indictment contained eight counts, charging that Agnew, being president of the First National Bank of Ocala, Florida, unlawfully misapplied the moneys, funds, and credits of the bank, with intent to convert them to his own use, and to injure and defraud the bank, by causing a check for $3,400 belonging to the bank to be entered as a credit on his personal account with the bank, his account at the time being largely overdrawn, and he being largely indebted to it; that he caused a false entry of $3,400 to be made to his credit on the books of the bank by means of a false deposit slip which he caused to be made in his own favor, with the intent on his part to injure and defraud the association; that he embezzled and converted to his own use, with the intent to injure and defraud the associations, moneys, and assets thereof to the amount of $2,500; that he unlawfully misapplied the moneys, funds, and credits of the association, with intent to convert them to his own use, and with intent to injure and defraud the association, in this, that he purchased for the bank certain bonds of the par value of $5,000, of the Globe Phosphate Mining & Manufacturing Company, paying for them the *sum of $2,500, and, [39 without the knowledge and consent of the banking association, placed the bonds among its assets, and caused them to be credited to his personal account on the books of the bank at the sum of $5,000, knowing the bonds to be entirely worthless and of no commercial value, and thus wilfully misapplied the moneys, funds, and credits of the bank to the amount of $2,500, and converted the same to his own use; that he feloniously embezzled and converted to his own use $7,500 of the moneys, funds, and credits of the bank with intent to injure and defraud it; that he unlawfully and wilfully misapplied the moneys, funds, and credits of the bank, with intent to convert the same to his own use and to injure and defraud the bank by purchasing, acting ostensibly for it, certain bonds of the Globe Phosphate Mining & Manufacturing Company of the par value of $10,000, for $2,500, and, without the knowledge and consent of the bank, placing said bonds among the assets of the bank as a part thereof, and causing the sum of $10,000 to be credited to his own personal account on the books of the bank, he then and there well knowing that the bonds were worthless and of no commercial value, and thus wilfully misapplying and converting to his own use $7,500 of the moneys, funds, and credits of the association; that he embezzled and converted to his own use, with intent to injure and defraud the association, $7,500 of the bank's moneys and assets; that he unlawfully and wilfully misapplied the moneys, funds, and credits of the bank, with intent to convert the same to his own use and to injure and defraud the bank, by purchasing $10,000 of the Globe Phosphate Mining & Manufacturing Company's bonds for $2,500, placing them, without the knowledge and consent of the association, among the assets of the association at $10,000, and causing the sum of $10,000 to be placed to his personal credit on the books of the association, knowing said bonds to be worthless and



Digitized by Google

of no commercial value, thus wilfully misapplying and converting to his own use $7,500 of the moneys, funds, and credits of the bank with the aforesaid intent.

The indictment was returned December 12, 40] and plaintiff in *error was arraigned December 17, 1895, and filed a plea in abatement as follows:

"And the said Enoch W. Agnew in his own proper person comes into court here, and, having heard the said indictment read, says that the grand jury which found said indictment was an illegal grand jury in this, that after sixteen had failed to attend upon the regular venire the court ordered that a special venire issue for ten grand jurors to be drawn according to law; said grand jurors so ordered by the court were directed to be taken from the county of Duval; that the clerk and marshal in drawing said venire, whenever a name was legally drawn from the box, if said party so drawn was not from the county of Duval, laid aside said name and continued drawing until ten names from the county of Duval were obtained, and which illegal drawing of said venire tended to the prejudice of this defendant, and the court, on excusing three returned on the second venire, ordered that four names be drawn for jurors to complete the panel; that said jurors were ordered to be drawn from the box, and the clerk and marshal drawing the same were ordered to take those that were from Duval county as they came from the box, and the said clerk and marshal, as the names were drawn, rejected and did not place on the venire said names so drawn, but rejected and laid them aside until names came out of the box of parties resident of Duval county, which drawing was illegal and tended to the prejudice of the defendant; and, upon said venire being returned showing A. K. Leon and Julius Kaufman summoned and Alex. Sabel and Frank Robinson not found, the court ordered that four names be drawn from the box and in said order directed that said four names should be taken from the county of Duval; that the said United States marshal and clerk, in obedience to said order, drew from the box more than four names, and where the names were of persons not resident of Duval county rejected and laid them aside and continued drawing until Dennis A. Andreu, Benjamin F. Manier, John L. Marvin, and Samuel Morris were drawn, and so John L. Marvin, John E. Onley, Z. L. Anderson, Charles E. Bell, 41] W. G. Candlish, A. R. Paxon, *and Dennis A. Andreu were drawn illegally by said marshal and clerk and not in accordance with the statute of the United States in such case made and provided, which requires that where less than sixteen attend the court shall order the marshal to summon from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And so the names of many persons who were duly drawn from the jury box were not placed upon the venire, but were, in the pursuance of the aforesaid orders, after being drawn from the box, rejected and laid aside by the clerk and marshal drawing the same for the purpose of completing the grand jury from the residents of the county of Duval; and the defendant says that he was entitled to have the said grand jury completed according to law; and the said grand jury so impaneled and sworn as aforesaid was not drawn and impaneled in accordance with the statutes of the United States providing for the drawing and impaneling of grand juries, but was illegal; and this defendant says that such drawing tended to his injury and prejudice.

"Wherefore he prays judgment of the said indictment, and that the same may be quashed."

To this plea the United States filed a demurrer, and issue being joined thereon the court, after argument, held the plea insufficient, to which plaintiff in error excepted and pleaded not guilty. The cause was set for trial on January 8, on which day a jury was impaneled, the trial proceeded with, and a verdict of guilty returned January 7. Motions for new trial and in arrest of judgment were submitted and denied, and sentence thereupon pronounced and the cause brought here on writ of error.

*Mr.* **Eleazer K. Foster** for plaintiff in error.

*Mr.* **Holmes Conrad,** Solicitor General, for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

*Nineteen errors were assigned, of which[42 the 3d, 5th, 9th, and 14th were abandoned, and the 6th and 7th, the 12th, 16th, and 17th, and the 11th and 15th were argued by counsel for plaintiff in error together. We will examine these alleged errors in their order.

1. That the court erred in sustaining the demurrer to defendant's plea in abatement.

U. S. Rev. Stat. § 802, is as follows: "Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services."

Under § 803, writs of *venire facias*, when directed by the court, were to issue from the clerk's office and be served and returned by the marshal in person or by his deputy, or, in case the marshal or his deputy were incapacitated, by some fit person specially appointed by the court.

By § 804, when, from challenges or otherwise, there was not a petit jury, it was provided that the marshal or his deputy should, by order of the court, return jurymen from the bystanders sufficient to complete the panel.

Section 808 reads thus: "Every grand jury impaneled before any district or circuit court shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And



Digitized by Google

whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose."

By the act of June 30, 1879 (21 Stat. at L. 43, chap. 52), it was provided that all jurors, grand and petit, "including those summoned during the session of the court, shall be 43] publicly drawn *from a box containing, at the time of each drawing, the names of not less than 300 persons possessing the qualifications prescribed in § 809 of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner to be appointed by the judge thereof. . . . The clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein. But nothing herein contained shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the state authorities in selecting jurors in the highest courts of the state."

The plea sets up as ground for abatement of the indictment that after the original venire had been exhausted without obtaining sixteen grand jurors, the court ordered a special venire to issue for ten grand jurors to be drawn according to law, "to be taken from the county of Duval; that the clerk and marshal in drawing said venire, whenever a name was legally drawn from the box, if said party so drawn was not from the county of Duval, laid aside said name and continued drawing until ten names from the county of Duval were obtained," and that some of the ten returned on the second venire being excused, other names were drawn in the same way, and a third venire was issued, and still another, until the grand jury was completed with grand jurors from Duval county. The original venire showed that twenty-three persons were summoned from ten counties, not including the county of Duval, one or more from each, and the plea stated that when a deficiency appeared from the failure of some of those summoned to attend the court directed the deficiency to be made up by obtaining jurors from Duval county in the manner pointed out. There are certain orders of court certified as part of the record, which directed the drawing according to law from the various counties exclusive of Duval county, and then from that county. It will be perceived, then, that the jurors were all drawn from the body of the district, and so distributed as not to incur unnecessary expense, or unduly burden the citizens of any part of the district with jury service.

44] *U. S. Rev. Stat. § 802, was brought forward from a clause of § 29 of the judiciary act of September 24, 1789, which was regarded by Mr. Justice Curtis as applicable to grand as well as petit juries. *United States* v. *Stowell*, 2 Curt. C. C. 153. In that view we are inclined to concur, but apart from this, and without considering how far, if at all, the section may have been modified by the act of June 30, 1879, we think the plea was properly adjudged insufficient.

Such a plea must be pleaded with strict exactness. *United States* v. *Hammond*, 2 Woods, 197; *O'Connell* v. *Reg.* 11 Clark & F. 155; *Dolan* v. *People*, 64 N. Y. 485; *Jenkins* v. *State*, 35 Fla. 737; *McClary* v. *State*, 75 Ind. 260; Whart. Crim. Pl. & Pr. § 427; Bishop, New Crim. Proc. §§ 827, 745.

Dr. Wharton lays it down (Whart. Crim. Pl. & Pr. §§ 344, 350) that "material irregularities in selecting and impaneling the grand jury, which do not relate to the competency of individual jurors, may usually be objected to by challenge to the array, or by motion to quash," or by plea in abatement; that the question of the mode in which such objections are to be taken largely depends upon local statutes, but that certain rules may be regarded as generally applicable. One of these rules is that the defendant must take the first opportunity in his power to make the objection. Where he is notified that his case is to be brought before the grand jury, he should proceed at once to take exception to its competency, for if he lies by until a bill is found, the exception may be too late; but where he has had no opportunity of objecting before bill found, then he may take advantage of the objection by motion to quash or by plea in abatement, the latter in all cases of contested fact being the proper remedy. *United States* v. *Gale*, 109 U. S. 65 [27: 857]. Another general rule is that for such irregularities as do not prejudice the defendant he has no cause of complaint, and can take no exception. *United States* v. *Richardson*, 28 Fed. Rep. 65; *United States* v. *Reed*, 2 Blatchf. 456; *United States* v. *Tallman*, 10 Blatchf. 51; *State* v. *Mellor*, 13 R. I. 666; *Cox* v. *People*, 80 N. Y. 500; *People* v. *Petrea*, 92 N. Y. 128.

The original venire was issued November 18, the second *venire issued December 2, [45 1895. The court opened December 3, 1895, and the indictment was returned December 12, yet defendant did not file his plea in abatement until December 17. The plea does not allege want of knowledge of threatened prosecution on the part of defendant, nor want of opportunity to present his objection earlier, nor assign any ground why exception was not taken or objection made before; and, moreover, the plea is fatally defective in that, although it is stated that the drawing "tended to his injury and prejudice," no grounds whatever are assigned for such a conclusion, nor does the record exhibit any such.

2. That the court erred in allowing the jurors to take notes.

It appears from the bill of exceptions that one of the jurymen asked the court if he "could take notes and jot down any items on paper," and that the court responded: "Certainly, you have a right to assist your memory in any way that is consistent with your conscience." To which defendant excepted. The court subsequently admonished the jury that this was simply for the personal convenience of the juror; that he wished them to undertand that their memory and recollection of the testimony were to control



Digitized by Google

in arriving at a verdict; and that they should not be influenced in the least by the juror's notes.

The exception saved was to the permission to take notes and not to the use of them in the jury room. But the record does not show that any notes were taken, and there is nothing for the exception to rest on.

3. That the court erred in refusing to allow the witness McIntyre to answer this question propounded by defendant's counsel: "Do you know what his [Agnew's] commercial rating was at that time?"

McIntyre was cashier of the First National Bank of Ocala at the time of the alleged criminal misapplication of its funds, and had testified fully, on behalf of plaintiff in error, as to his financial condition and standing, when he was asked this question. We hold the ruling of the court correct. The point of inquiry was Agnew's actual financial condition or what he knew or must be held to have known, or actually and with [46] *reason believed, that it was, and his commercial rating was not relevant.

4. That the court erred in allowing the witness McIntyre to be asked on cross-examination why he resigned as cashier of the bank in June, 1894, and in permitting him to answer the question.

The criminal acts charged in the indictment were alleged to have been committed in January, February, and May, 1894. McIntyre was cashier of the bank during that period and his resignation of that office was not accepted until June, 1894. The ground assigned for the objection was that the testimony was immaterial, and the court said: "That might be relevant and might not. If he resigned because he knew that Mr. Agnew's guarantee was not good for anything, that might be relevant."

The record thus continues:

"Q. Didn't you attempt to resign as cashier of that bank previous to the time when you did actually resign? A. Yes, sir. I offered my resignation at the regular annual meeting of the stockholders in January, 1894. Q. I will ask you why you tendered your resignation at that time as cashier of that bank? The defendant renewed his objection to this question as immaterial; but the court overruled the objection and allowed the question to be answered; to which decision of the court the defendant excepted. A. I cannot state any one particular or special reason for tendering it. In 1893, during the time when all banks were having hard times, of course the banks here had hard times, and I just simply made up my mind then that until things got back to their normal condition again I was going to get out of that business right there. Q. So that your reason was just because you wanted to quit the banking business. A. I would not say that that was the reason. Q. What we want is the reason. A. I would state that, of course, it is very apparent I was not altogether satisfied with the business, that is my reason for giving it up; I was not satisfied. I cannot state any particular. Q. You were not satisfied with the business or the manner in which the business was conducted, which? Defendant excepted *to this question. By the court: [47] To pursue that line of questioning would be bringing rather irrelevant and general matters which might possibly influence the jury and which might not be relevant in this issue unless he can state some definite thing. Mr. Clark (district attorney): I will ask a straight question. Q. I will ask you if it is not true that you tendered your resignation and made up your mind to quit the service of the bank on account of the acts and doings of Mr. Agnew, president of the bank, similar to this bond transaction. The defendant objected to this question as immaterial and leading, but the court overruled the objection and allowed the question to be answered; to which decision of the court the defendant excepted. A. As I said, there was no one special reason that I could mention that caused my resignation. By the court: If you cannot state anything definite, the court does not want any general information or implication."

We think there was no error committed in this regard. This witness was the officer next in rank to the president. He had testified on defendant's behalf and his personal action was relevant on cross-examination as testing his testimony in chief. If his voluntary resignation had no connection with the conduct of his superior officer, his answer could not be injurious. If it had, then that fact tended to weaken any evidence he might have given in extenuation of the action of that officer. Besides, these answers of the witness were practically immaterial.

5. That the court erred in refusing to allow the witness Barnett to testify as to whether he considered Agnew's guarantee of $20,000 Globe Phosphate bonds, at the time he made it, good, and in striking out the testimony of the witness; and in not allowing the witness Stewart to testify as to the rating, by Dun's Commercial Agency, of Agnew at the time he gave the guarantee of $20,000.

McIntyre had testified that he had made out two deposit tickets in favor of Agnew and at his request, one dated February 12, and the other May 12, 1894, crediting him with depositing $10,000 in bonds in each instance; that the bonds referred to were Globe Phosphate bonds; that he had the *bonds in his pos- [48] session when he made out the deposit slips; that the bonds were for $10,000 each; that Mr. Agnew asked him to give him credit for the bonds, $10,000 each time; that in each instance Mr. Agnew stated that "he would be personally responsible to the bank that these bonds would be all right. He would guarantee the bank both principal and interest; that he would make a written guarantee at any time I would write it out." Witness further identified a guarantee dated February 12, 1894, as written by him, and signed by Agnew in his presence, which was read in evidence.

The witness Barnett was president of the National Bank of Jacksonville, Florida, and was called as a witness on behalf of defendant. The question put to him was: "Are you sufficiently acquainted with Mr. Agnew's standing in the spring of 1894 to testify as to whether or not you considered his obligation, guarantee, or indorsement at that



Digitized by Google

time good for $20,000? Mr. Clark. Wait a moment. A. Yes sir; I considered him good." The government asked that this answer be stricken out. The court said: "Any testimony that would show positively the financial condition of Mr. Agnew at that time, not in the commercial world—the opinion of what his guarantee would be taken for by others—is not a true test of what he knew himself. The opinion of others as to his standing at that time I do not think should be introduced to determine the value of that guarantee;" and sustained the motion. The court was right in this ruling. On the question of value to Agnew's knowledge, Barnett's opinion of Agnew's responsibility was irrelevant.

The witness Stewart was the agent of R. G. Dun & Co., a commercial agency, in charge at Jacksonville, Florida. Defendant offered to show that Dun's Commercial Agency rated him at that time at a certain amount of money. The court declined to admit the evidence, and correctly ruled:

"The question in this case is what was his intent, and he knew himself what that guarantee was worth, and that guarantee was worth just as much as he would be able to make it worth in a case of emergency. The question here is not how much Mr. Agnew was worth, but the question is how [49] much *he knew himself to be worth at that time and how good he knew his guarantee was. I consider in that case that if he had good grounds to believe that he was perfectly able to comply with that guarantee in every way and according to his own financial condition at that time—had no doubt in his own mind—I will admit that such positive evidence as that might be relevant to go to the jury to show he had no intent to injure or defraud the bank, but what the opinions of the financial world were in regard to his condition is not the best evidence."

6. The tenth assignment alleged error in several distinct parts of the charge of the court, but in argument only one out of six exceptions saved thereto was relied on, namely, to the following:

The court advised the jury that in determining defendant's intent they might consider testimony tending to show that defendant, without notice to the board of directors, and without their knowledge or consent, had invested one half the bank's capital in the bonds in question, and then said:

"The rule of law in regard to intent is that intent to defraud is to be inferred from wilfully and knowingly doing that which is illegal, and which, in its necessary consequences and results, must injure another. The intent may be presumed from the doing of the wrongful or fraudulent or illegal act, and in this case, if you find that the defendant placed that which was worthless or of little value among the assets of the bank at a greatly exaggerated value, and had that exaggerated value placed to his own personal account upon the books of the bank, from such finding of fact you must necessarily infer that the intent with which he did that act was to injure or defraud the bank, but this inference or presumption is not necessarily conclusive. There may be other evidence which may satisfy the jury that there was no such intent, but such an inference or presumption throws the burden of proof upon the defendant, and the evidence upon him in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy you beyond a reasonable doubt that there was no such guilty intent in such transaction."

*Undoubtedly in criminal cases the [50 burden of establishing guilt rests on the prosecution from the beginning to the end of the trial.

But when a prima facie case has been made out, as conviction follows unless it be rebutted, the necessity of adducing evidence then devolves on the accused.

The circuit court, in this part of the charge, was dealing with the intent to injure and defraud the bank, and rightly instructed the jury that if they found certain facts such intent was necessarily to be inferred therefrom.

This was in application of the presumption that a person intends the natural and probable consequences of acts intentionally done, and that an unlawful act implies an unlawful intent. 1 Greenl. Ev. § 18; 3 Greenl. Ev. §§ 13, 14; Jones, Ev. § 23; Bishop, Crim. Proc. §§ 1100, 1101, and cases cited.

The circuit court, however, told the jury that the presumption of the intent to injure and defraud, if the facts were found as stated, was not conclusive, but, in substance, that its strength was such that it could only be overcome by evidence that created a reasonable doubt of its correctness; in other words, that as the presumption put the intent beyond reasonable doubt, it must prevail, unless evidence of at least equivalent weight were adduced to the contrary.

The question of the particular intent was not treated as a question of law, but as a question to be submitted to the jury, and conceding that the statement of the court that the evidence to overcome the presumption must be sufficiently strong to satisfy the jury "beyond a reasonable doubt" was open to objection for want of accuracy, we are unable to perceive that this could have tended to prejudice the defendant when the charge is considered as a whole.

For the jury were further advised that if they found the facts in question, which were again rehearsed, then the necessary inference was that the transaction was effected "with intent to injure and defraud said bank, and such inference can only be overcome by evidence satisfactory to you that there was no such intent;" that "the question of the intent is to be determined by the facts and circumstances and the surroundings at the time of the transaction;" that "the intent of the *defendant at the time he committed the [51 transaction is the question for you to determine, and in arriving at a conclusion on that intent you will carefully weigh all of the testimony in the case;" that the presumption of innocence remains with the defendant until the jury are "satisfied of the guilt beyond a reasonable doubt;" and that "if you



Digitized by Google

are satisfied beyond a reasonable doubt that the transactions as charged were committed, and at the time he committed those transactions he had an intent to defraud the bank, your verdict will be one of guilty. Unless you are satisfied beyond a reasonable doubt that he had such intent, your verdict will be not guilty." And again: "The jury must be satisfied beyond a reasonable doubt as regards the guilt of the accused before they can find a verdict of guilty. By a reasonable doubt is not meant a possible doubt, but such a doubt arising from the evidence that leaves the minds of the jury in such a state that they cannot say, after having reviewed all the evidence, that they have an abiding conviction, to a moral certainty, of the guilt of the accused."

7. That the court erred in giving to the jury the following instruction: "The defendant is presumed to be innocent of all the charges against him until he is proved guilty by the evidence submitted to you. This presumption remains with the defendant until such time in the progress of the case that you are satisfied of the guilt beyond a reasonable doubt;" and in not giving the following instruction asked by defendant: "Every man is presumed to be innocent until he is proved guilty, and this legal presumption of innocence is to be regarded by the jury in this case as matter of evidence to the benefit of which the party is entitled. This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy."

The court is not bound to accept the language which counsel employ in framing instructions, nor is it bound to repeat instructions already given in different language. *Ayers* v. *Watson*, 137 U. S. 584 [34: 803]; *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408 [36: 485]; *Coffin* v. *United States*, 162 U. S. 672 [40: 1118]. The instruction given was quite 52] correct and substantially covered *the instruction refused, and as to the latter the court might well have declined to give it on the ground of the tendency of its closing sentence to mislead.

In *Coffin* v. *United States*, 156 U. S. 432, 460 [39: 481, 493], this court, in discussing the distinction between the presumption of innocence and reasonable doubt, said: "The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumptio juris* demonstrates that it is evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy." But in that case the charge of the court was thought not to have given due effect to the presumption of innocence, which there was no failure in this case to state, and the giving of the instruction asked would have tended to obscure what had already been made plain.

8. That the court erred in giving the following instruction on behalf of the government:

"The crime of making false entries by an officer of a national bank, with the intent to defraud, defined in U. S. Rev. Stat. § 5209, includes any entry on the books of the bank which is intentionally made to represent what is not true or does not exist, with the intent either to deceive its officers or to defraud the association. The crime may be committed personally or by direction."

The exception was confined to the foregoing, but the instruction thus continued:

"Therefore the entry of a slip upon the books of the bank, if the matter contained in that deposit slip is not true, is a false entry. If the statement made upon the deposit slips is false, the entry of it in the bank and the books of the bank is false."

And in refusing to give the following instructions asked by defendant:

"The making of a false entry is a concrete offense which is not committed where the transaction entered actually took place and is entered exactly as it occurred.

"The truthful entry of a transaction charged as fraudulent *does not constitute a false [53 entry within the meaning of the statute."

The instruction as given was correct, and in accordance with the rule indicated in *Coffin* v. *United States*, 162 U. S. 684 [40: 1117]. This being so no error was committed in declining to give the others.

9. That the court erred in giving the following instruction:

"The law presumes that every man intends the legitimate consequence of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. It is a well-settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the result of the action. If, therefore, the funds, moneys, or credits of the First National Bank of Ocala are shown to have been either embezzled or wilfully misapplied by the accused and converted to his own use, whereby, as a necessary, natural, or legitimate consequence, the association's capital was reduced or placed beyond the control of the directors, or its ability to meet its engagements or obligations or to continue its business was lessened or destroyed, the intent to injure or defraud the bank may be presumed."

In our opinion there was evidence tending to establish a state of case justifying the giving of this instruction, which was unexceptionable as matter of law.

10. That the court erred in refusing to give the following instruction requested by defendant:

"If the jury shall find from the evidence that on the 15th day of April, A. D. 1895, E. W. Agnew, upon receipt of the check of the Merchants' National Bank of Savannah for $3,400, used that check and the proceeds of it for the payment of a debt of the First National Bank of Ocala, then they must find upon that count in the indictment that he did not fraudulently embezzle or misapply the check or the proceeds of it."



Digitized by Google

The first count of the indictment charged
54] that Agnew, "knowing his personal account with the bank to be largely overdrawn and that he was largely indebted to the bank, caused this check for $3,400, which was the property of the bank, to be entered to his personal credit on the books of the bank and thereby made it subject to his disposal, and technically the offense would not have been, in itself, condoned by any rightful application which he may have made of that particular amount of money. And while the evidence showed that the $3,400 was received from the sale of stocks belonging to the bank, it also showed that Agnew never charged himself with the $3,400 and credited stock account, nor paid in that sum and made that credit, but that when the bank failed the $3,400 still stood as applied on Agnew's credit and still remained an asset in the stock account. Such explanation as was attempted was so unsatisfactory that we do not think the refusal of the instruction constitutes reversible error.

11. That the court erred in not giving the following instruction asked for by defendant:

"That the written guarantee introduced and filed in evidence, signed by E. W. Agnew and conditioned for the payment of the interest and principal of the bonds of the Globe Phosphate Mining Company, was upon its face a good, legal, and sufficient guarantee, and that if the jury shall find from the evidence that at the time of the delivery by E. W. Agnew to the cashier of the First National Bank of Ocala of the bonds of the Globe Phosphate Mining Company in controversy he also delivered the guarantee which has been introduced in evidence, and they shall further find from the evidence that at the time said guarantee was signed and delivered that E. W. Agnew, the defendant, was solvent and thoroughly able to respond to the obligation, and that he signed and delivered the guarantee with the knowledge of his solvency and with intent to pay the same when demand was made upon him for payment, then the jury may find from the evidence that the defendant did not invest or misapply the money arising from the sale of the said bonds with intent to defraud the association or anyone else."

The phosphate bonds were put in evidence
55]and the record *should have contained a copy of at least one of them, but it does not, and instead there is a brief statement that they were bonds of "The Globe Phosphate Mining & Manufacturing Company, Citrus county, Florida, each of the value of $1,000, payable in gold coin of the United States, in ten years from date or on call, at or after the expiration of two years from date, drawing interest at 8 per cent, semiannually in gold coin, payable on the 15th day of December and June in each year, according to tenor of coupons attached, upon presentation and surrender of said coupons respectively; default in payment of coupons and continuing default for two months, the whole becomes due; all bearing even date and of the same tenor and same term, ten years; executed in pursuance of vote of the stockholders and board of directors; secured by first-mortgage bond upon all property of even date, present and future, acquired by the company, the right to redeem after two years being optional with the company; said bonds dated 11th December, 1893; signed by John A. Bishop and Herbert A. Bishop, the original having been withdrawn by order of the court, to be returned to the receiver of the First National Bank of Ocala."

Agnew's guarantee was in these words:

"Know all men by these presents that for and in consideration of the sum of five ($5) dollars cash in hand paid by the First National Bank of Ocala, and for other good and valuable consideration, I hereby guarantee to the said bank the payment on demand of both principal and interest of fifteen (15) bonds of the Globe Phosphate Mining & Manufacturing Company, numbered from one (1) to five (5), both inclusive, eleven (11) to fifteen (15), both inclusive, and twenty-one (21) to twenty-five (25), both inclusive, for one thousand ($1,000) dollars each, total fifteen thousand ($15,000) dollars, and bearing interest at the rate of eight (8) per cent per annum. It is agreed and understood that I hereby guarantee the payment of the principal of these bonds, payable on demand, with accrued interest.

"This agreement and contract is to be binding on me, my heirs, executors, administrators, or assigns.

*"Bonds of the Globe Phosphate Mining[56 and Manufacturing Co. Nos. 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, 73, 75, 77, and 79 are to be included in the above guarantee, and I hereby guarantee principal and interest on all of the above-described bonds."

The evidence was to the effect that five Globe Phosphate bonds, numbered from 1 to 5, were purchased by Agnew for the bank at 50 cents on the dollar and credited at par. But Agnew testified that he purchased them for himself. It also appeared that two lots of Globe Phosphate bonds of $10,000 each were purchased at 25 cents on the dollar, and that Agnew was credited on his personal account with $10,000, in each instance, and the bonds placed in the assets of the bank; and that the bonds were subsequently sent away to be used as collateral security, and the guarantee forwarded to be put with them. The evidence further tended to show that the bonds were of little, if any, value, and that Mr. Agnew's financial condition was such as to place his guarantee in the same category. And although Agnew testified on his own behalf he did not refer to the subject of the guarantee, or his intentions and ability in regard to it, while it appeared that the credits of these bonds were never consented to nor authorized at any meeting of the directors or stockholders.

The bonds were payable in ten years with an option to the company to pay after two years, it being also provided that for default in payment of interest, which was payable semiannually, continuing two months, the whole might become due. If the president of the bank received a personal credit of $20,000 for these bonds, under the circumstances



Digitized by Google

disclosed, the court was not required to instruct as requested that from his guarantee that the bonds and interest should be paid, the jury might find that there was no intent to injure and defraud the bank in the transaction.

The true view of this branch of the case was fairly covered by the charge of the court as follows: "There is testimony tending to show that the defendant at the time he was thus depositing the bonds, gave a guarantee that the bonds were good, and that he would 57]guarantee the payment of principal *and interest. You can take that into consideration, and such guarantee can only be considered as determining the value of those bonds at that time and the intent of the party in such transaction. . . . As I say again, gentlemen, the only difficult question for you to determine is the intent of the accused. The question of the intent is to be determined by the facts and circumstances and the surroundings at the time of the transaction; but, gentlemen, the law presumes that every party who in any way attempts anything by any guarantee or anything of that kind which is dependent upon future successful operations takes the risk of the success, and that if a person commits an offense with the intent of temporarily injuring or defrauding another party or a banking institution, although it may be his intent at the time to finally recompense or prevent any injury resulting from such act, he is not protected by such intent to finally correct the temporary wrong deed; or, in this case, if you are satisfied that at the time he placed those bonds there he knew that they were worthless or of a very small value and had a large value charged to the bank and placed to his account, if he did that with the intent, for the time being, to injure the bank and take a wrongful advantage of the credit of the bank, no matter if at that time he had an intent to in the future remedy any injury that might come to the bank, it would not protect him in your finding, or from your finding, what the intent was at that time."

We have carefully explored the evidence and considered the errors assigned, whether pressed in argument or not, and have been unable to discover any adequate ground for the reversal of the judgment.

*Judgment affirmed.*

J. M. SCOTT, *Piff. in Err.*, [58
*v.*
JAMES DONALD. (No. 1.)

J. M. SCOTT, *Piff. in Err.*,
*v.*
JAMES DONALD.

R. M. GARDNER *et al.*, *Piffs. in Err.*,
*v.*
JAMES DONALD.

(See S. C. Reporter's ed. 58-107.)

*When action is not against the state—jurisdiction—exemplary damages—jurisdictional amount—unlawful discrimination—South Carolina dispensary law unconstitutional—police power.*

1. A suit against persons claiming to act as officers of a state, who, under color of an unconstitutional statute, commit injury to plaintiff's property, to recover money on property in their hands unlawfully taken by them in behalf of the state, or for compensation for damages, is not, within the 11th Amendment, an action against the state.
2. In a case before this court in which a state law is claimed to be in contravention of the United States Constitution, it has jurisdiction of the entire case and of all questions involved in it.
3. Exemplary damages may be allowed for malicious injury to plaintiff's constitutional rights.
4. Allegations of damages to an amount sufficient to give the circuit court jurisdiction will give that court jurisdiction, which, having attached, will not be defeated by the fact that the recovery is for less than the jurisdictional amount.
5. Where a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against bringing such articles in and importing them from other states.
6. The South Carolina dispensary law of January 2, 1895, is unconstitutional and void as a hindrance to interstate commerce, and an unjust preference of the products of that state as against similar products of other states.
7. Such law is not within the scope and operation of the act of August, 1890, subjecting intoxicating liquors brought into any state or territory to its police laws.

[Nos. 411-413.]

*Argued October 21, 22, 1896. Decided January 18, 1897.*

IN ERROR to the Circuit Court of the United States for the District of South Carolina to review a judgment in each of the above-entitled cases, in favor of the several plaintiffs therein for damages for seizing and carrying away wines and liquors belonging to the

NOTE.—*As to power of Congress to regulate commerce*, see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

*As to interstate commerce; regulation of; power of Congress; how far exclusive*,—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

*As to amount necessary to give jurisdiction in circuit court cases prior to act of 1875; amount necessary since act of 1875; amount in dispute*,—see note to Schunk v. Moline, M. & S. Co. 37: 255.

*As to constitutionality of laws regulating sale of liquors*, see note to Foster v. Kansas, 28: 996.



Digitized by Google

plaintiffs; the two first above suits being brought by James Donald against J. M. Scott, and the third one brought by the same plaintiff against R. M. Gardner *et al.* *Affirmed.*

Statement by Mr. Justice Shiras:

In the circuit court of the United States for the district of South Carolina in February, 1895, two suits at law were brought by James Donald against J. M. Scott, and one by Donald against Gardner and others, wherein the plaintiff sought to recover damages caused by the action of the defendants, who were state constables of the state of South Carolina, in seizing and carrying away several packages of wines and liquors belonging to the plaintiffs, and, at the time of the seizure, in the possession of railroad companies, which as common carriers had brought the packages within the state.

It appeared that one of the packages, consisting of a case of domestic California wine, came by rail from Savannah, Georgia, whither it had been imported by the plaintiff; another, consisting of a case of whiskey, in bottles, made in Maryland, and imported by the plaintiff by way of the Baltimore Steam Packet line; and another, consisting of one barrel of bottled beer, made at Rochester, New York, and imported by the plaintiff into the state of South Carolina by way of the Old Dominion Steamship line.

Demurrers to the several declarations or complaints were interposed and overruled. Thereupon issues of fact were joined, and, trial by jury having been duly waived, the causes were tried and determined by the court, and resulted in findings and judgments in favor of the plaintiff for the sum of $300 and 60] costs in each case, *respectively. Writs of error from this court were then sued out and allowed.

*Mr.* **William A. Barber,** Attorney General of South Carolina, for plaintiffs in error:

The plaintiffs in error, as state constables, were authorized by the act generally known as the dispensary law to seize the wine, beer, and whiskey of James Donald.

Sections 1, 25, 29, 32, 33, 43, of said act.

The dispensary act of South Carolina is the lawful exercise of the police power of the state and is not in conflict with article 9 of the Constitution of the United States in so far as it prohibits citizens of the state from importing within the state alcoholic liquors for their own use and consumption.

For the authorities on this proposition, see the brief in the case of *Scott* v. *Donald*, 165 U. S. 107 (*post*, 648).

*Mr.* **J. P. Kennedy Bryan,** for defendant in error:

These three cases at law all involve alike one question made in the bill of exceptions in each case, to wit: the constitutionality of the act of the general assembly of the state of South Carolina approved January 2, 1895 (21 S. C. Stat. at L. p. 721), generally known as the state liquor dispensary law, in prohibiting the importation by the plaintiff into the state of South Carolina of all intoxicating liquors, products of other states and foreign countries, for his own use and consumption, and authorizing a seizure of the same.

This question is discussed in the case of *Scott* v. *Donald*, at this term, 165 U. S. 107 (*post*, 648), and in these cases the argument filed in that case is submitted on behalf of the appellee.

**Mr. Justice Shiras** delivered the opinion of the court:

The records in these cases present the question of the validity, under the Constitution of the United States, of the act of the general assembly of the state of South Carolina, approved January 2, 1895, generally known as the state dispensary law, and a copy of which is in the margin.†

*A preliminary question is raised by the [67 proposition that these are in fact suits against the state of South Carolina, and forbidden by the 11th Amendment. This question is *suffi- [68 ciently disposed of by referring to the late case of *Re Tyler*, 149 U. S. 164 [37: 689], where the conclusion of numerous previous cases was stated to be that where a suit is brought against *defendants who claim to act as officers [69 of a state, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover *money or property in their hands unlaw- [70 fully taken by them in behalf of the state, or for compensation for damages, such suit is not, within the meaning of the amendment, an action against the state.

*It is also argued that the amounts in- [71 volved in the respective suits were not sufficient to give jurisdiction to the circuit court. Although the question of the jurisdiction of the court below has not been certified to us in the manner provided by the *5th section of the [72 judiciary act of March 3, 1891, yet, as the case is before us, in a case in which the law of a state is claimed to be in contravention of the Constitution of the *United States, under [73 another clause of that statute, we have jurisdic-

†An Act to Further Declare the Law in Reference to, and Further Regulate the Use, Sale, Consumption, Transportation, and Disposition of, Alcoholic Liquids or Liquors within the State of South Carolina, and to Police the Same.

Sec. 1. *Be it enacted by the senate and house of representatives of the state of South Carolina, now met and sitting in general assembly, and by the authority of the same*, That the manufacture, sale, barter, or exchange, receipt, acceptance, delivery, storing, and keeping in possession, within this state, of any spirituous, malt, vinous, fermented, brewed (whether lager or rice beer), or other liquors, or any compound or mixture thereof, by whatever name called or known, which contains alcohol and is used as a beverage by any person, firm, or corporation; the transportation, removal, the taking from the depot or other place by consignee or other person, or the payment of freight or express or other charges, by any person, firm, association, or corporation, upon any spirituous, malt, vinous, fermented, brewed (whether lager, rice, or other beer), or other liquor, or any compound or mixture thereof by whatever name called or known, which contains alcohol and is used as a beverage, except as is hereinafter provided, is hereby prohibited, under a penalty of not less than three (3) nor more than twelve (12) months at hard labor in the state penitentiary, or pay a fine of not less than $100 nor more than $500, or both fine and imprisonment, in the discretion of the court, for each offense. All such liquors, except when bought from a state officer authorized to sell the same, or in possession of one, are declared to be contraband and against the morals, good health, and safety of the state, and may be seized wherever found, without warrant, and turned over to the state commissioner.



Digitized by Google

tion of the entire case and of all questions involved in it. *Horner* v. *United States*, 143 U. S. 570 [36: 266]; *Carey* v. *Houston & T. C. R. Co.* 150 U. S. 181 [37: 1044]; *Chappell* v. *United States*, 160 U. S. 499 [40: 510].

Our inspection of these records does not satisfy us that this objection is well founded. The [75] declaration or complaint *alleges in each case that the plaintiff has been injured and damaged in the sum of $6,000 and demands judgment for that amount. It is urged that, as the value of the goods and chattels taken was alleged and shown to be but comparative-[76]ly *a few dollars, and as the recovery in each case was only in the sum of $300, we are obliged to infer that the damages alleged and [77] demanded were without *just foundation, and in the nature of a fraud upon the jurisdiction of the court.

The declarations contain allegations which, if true, bring *the cases within the well-set-[78] tled doctrine that exemplary damages may in certain cases be assessed. After alleging that the plaintiffs, in importing for his own use the articles *mentioned, was in the exercise of [79] his legal rights guaranteed by the Constitution of the United States, it is averred, in the several declarations, that the defendants were notified that *any seizure of said goods, un-[80] der any pretense of authority, would be a grievous trespass and in disregard of constitutional rights, for which they would be held responsible; that the *defendants notwithstanding [81] such notice, and claiming to act as constables of the state of South Carolina, forcibly seized and carried away the said packages; and that, in committing *the said unlawful acts, the [82] said defendants acted knowingly, wilfully, and maliciously, and with intent to oppress and humiliate and intimidate the plaintiff, and

---

Sec. 2. The governor, the secretary of state, and the comptroller general shall *ex officio* constitute the state board of control to carry out the provisions of this act. The state board of control shall elect a clerk, who shall hold his office during the pleasure of the board, and shall receive as compensation for his services a salary of $800 per annum.

Sec. 3. That the state board of control shall, at the expiration of the term of the present commissioner, and at the expiration of every two years thereafter, appoint a commissioner, which appointment shall be submitted to the senate at its next session for its approval; said commissioner shall be believed by the state board of control to be an abstainer from intoxicants, and shall, under such rules and regulations as may be made by the state board of control, purchase all intoxicating liquors for lawful sale in this state, and furnish the same to such persons as may be designated as dispensers thereof, to be sold as hereafter prescribed in this act. Said commissioner shall reside, and have his place of business, in the city of Columbia, in this state, and hold his office two years from his appointment and until another be appointed in his stead. He shall be subject to removal for cause by the state board of control. He shall qualify and be commissioned the same as other state officers, and shall receive an annual salary of $2,500, payable at the same time and in the same manner as is provided for the payment of the salaries of state officers. He shall be allowed a bookkeeper, who shall be paid in the same manner a salary of $1,200, and such other assistants as in the opinion of the board of control may be deemed necessary. He shall not sell to the county dispensers any intoxicating or fermented liquors except such as have been tested by the chemist of the South Carolina college and declared to be pure: *Provided*, That said board of control shall have authority to appoint such assistants as they may find necessary to assist the chemist of the South Carolina college in making the analysis required by this act; and the said board of control may fix such reasonable compensation, if any, as they may deem proper for the services rendered by such chemist or such assistants. The state commissioner shall deposit all amounts received by him from sales to county dispensers or others with the treasurer of the state under such rules as may be made by the state board of control to insure the faithful return of the same, and the state treasurer shall keep a separate account with said fund, from which the commissioner shall draw from time to time, upon warrants duly approved by the chairman of said board, the amount necessary to pay the expenses incurred in conducting the business. All rules and regulations governing the said commissioner in the purchase of intoxicating liquors or in the performance of any of the duties of his office, where the same are not provided for by law, shall be prescribed by the state board of control. He shall, before entering upon the duties of his office, execute a bond to the state treasurer, with sufficient sureties, to be approved by the attorney general, in the penal sum of $25,000, for the faithful performance of the duties of his office. In all purchases or sales of intoxicating liquors made by said commissioner, as contemplated in this act, the commissioner shall cause a certificate to be attached to each and every package containing said liquors when the same is shipped to him from the place of purchase or by him to the county dispensaries, certified by his official signature and seal, which certificate shall state that liquors contained in said packages have been purchased by him for sale within the state of South Carolina, or to be shipped out of the state, under the laws of said state; and without such certificate any package containing liquors which shall be shipped out of the state, or shipped from place to place within the state, or delivered to the consignee by any railroad, express company, or other common carriers, or be found in the possession of any common carrier, shall be regarded as contraband and may be seized without warrant for confiscation, and such common carrier shall be liable to a penalty of $500 for each offense, to be recovered against said common carrier in any court of competent jurisdiction by summons and complaint, proceedings to be instituted by the solicitor of any circuit with whom evidence may be lodged by any officer or citizen having knowledge or information of the violation; and any person attaching or using such certificate without the authority of the commissioner, or any counterfeit certificate for the purpose of securing the transportation of any intoxicating liquors out of or within this state, in violation of law, shall, upon conviction thereof, be punished by a fine of not less than $500 and imprisonment in the penitentiary for not less than one year for each offense.

Sec. 4. Said commissioner shall make a printed monthly statement, under oath, of all liquors sold by him, enumerating the different kinds and quality of each kind, the price paid, and the terms of payment and to whom sold; also the names of the parties from whom the liquor was purchased and their places of business and dates of purchase, which statement shall be filed with the state board of control.

Sec. 5. The state commissioner shall, before shipping any liquors to dispensers, except lager beer, cause the same to be put into packages of not less than ½ pint nor more than 5 gallons, and securely seal the same, and it shall be unlawful for the dispenser to break any of such packages or open the same for any reason whatsoever. He shall sell by the package only, and no person shall open the same on the premises: *Provided*, This section shall not apply to malt liquors shipped in cases or bottles thereof shipped in barrels; and such malt liquors may be sold by the county dispenser in such quantities, of not less than 1 pint, as he may see proper: *Provided*, the same shall not be drank on the premises. Dispensers shall open their places of business and sell only in the daytime, under such rules as may be made by the state board of control or by the county board of control with approval of the state board of control.

Sec. 6. It shall be the duty of the state board of control to appoint a county board of control, composed of the county supervisor *ex officio* and two other persons believed by the said board not to be addicted to the use of intoxicating liquors. The two persons so appointed shall hold their office for a term of two years, and until their successors are appointed, and shall be subject to removal for



Digitized by Google

83]make him afraid *to rely upon the Constitution and laws of the United States and the judicial power thereof for his protection in the rights, privileges, and immunities secured to 84] him by the *Constitution and laws of the United States; and that the defendants well knew when they made said seizures and committed said trespasses that said acts were unlaw-85] ful and forbidden by *the laws and Constitution of the United States, but that they so acted, trusting and believing that they would be shielded and protected from all harm by their 86] official superiors in the *state of South Carolina; and that they made such seizures and committed such trespasses wilfully and maliciously, with the purpose and intent to trample on the plaintiff's rights under the law and to do him all the injury in the power of the defendants.

These allegations must, for the purpose of disposing of the present question, be accepted by us as true, or, at least, as susceptible of proof.

Damages have been defined to be the compensation which the law will award for an injury done, and are said to be exemplary and allowable in excess of the actual loss, where a tort is aggravated by evil motive, actual malice, deliberate violence, or oppression. While some courts and text-writers have questioned the soundness of this doctrine, it has been accepted in England, in most of the states of this Union, and has received the sanction of this court.

In the case of *Wilkes* v. *Wood*, Lofft. 19, which was an action of trespass for breaking into the plaintiff's house and seizing his papers, under color of a general warrant by a secretary of state, Chief Justice Pratt, in charging the jury, and in replying to the contention of the solicitor general that damages

---

cause by the state board of control. Said county board of control shall make such rules as will be conducive to the best management of the sale of intoxicating liquors in their respective counties: *Provided*, All such rules shall be submitted to the state and approved by them before adoption. The board members of the county board of control shall qualify and be commissioned as are other county officers, without fees therefor.

Sec. 7. Applications for positions of county dispenser shall be by petition, signed and sworn to by the applicant and filed with the county board of control at least ten days before the meeting at which the application is to be considered, which petition shall state the applicant's name, place of residence, in what business engaged, and in what business he has been engaged two years previous to filing petition: that he is a citizen of the United States and of South Carolina; that he has never been adjudged guilty of violating the law relating to intoxicating liquors, and is not a keeper of a restaurant or place of public amusement, and that he is not addicted to the use of intoxicating liquors as a beverage. This permit or renewal thereof shall issue only on condition that the applicant shall execute to the county treasurer a bond in the penal sum of $3,000 with good and sufficient sureties, conditioned that he will well and truly obey the laws of the state of South Carolina, now or hereafter in force, in relation to the sale of intoxicating liquors, that he will pay all fines, penalties, damages and costs that he may be assessed, or recorded against him, for violations of such laws during the term for which said permit or renewal is granted, and will not sell intoxicating liquors under his permit at a price other than that fixed by the state board of control. Said bond shall be for the use of the county or any person or persons who may be damaged or injured by reason of any violation on the part of the obligor of the law relating to intoxicating liquors purchased or sold during the term for which said permit, or the renewal thereof, is granted. The said bond shall be deposited with the county treasurer, and suit thereon shall be brought at any time by the solicitor or any person for whose benefit the same is given; and in case the conditions thereof, or any of them, shall be violated, the principal and sureties thereon shall also be jointly and severally liable for all civil damages, costs, and judgments that may be obtained against the principal in any civil action brought by wife, child, parent, guardian, employer, or other person under the provision of the law. All other moneys collected for breaches of such bond shall go into the county treasury. Said bond shall be approved by the county board of control under the rules and laws applicable to the approval of the official bonds.

Sec. 8. There may be one or more county dispensers appointed for each county, the place of business of each of whom shall be designated by the county board, but the state board must give consent before more than one dispenser can be appointed in any county; and when the county board designates a locality for a dispensary, ten days' public notice of which shall be given, it shall be competent for a majority of the voters of the township in which such dispensary is to be located to prevent its location in such township by signing a petition or petitions addressed to the county board requesting that no dispensary be established in that township, whereupon some other place may be designated. The county board may in its discretion locate a dispensary elsewhere than in an incorporated town in the counties of Beaufort and Horry, and no others, except such as are authorized by special act of the general assembly: *Provided, however*, That any county, town, or city wherein the sale of alcoholic liquors was prohibited by law prior to July 1, 1894, may secure the establishment of a dispensary within its borders in the following manner: Upon petition signed by one fourth of the qualified voters of such county, town, or city wishing a dispensary therein being filed with the county supervisor or town or city council, respectively, they shall order an election submitting the question of dispensary or no dispensary to the qualified voters of such county, town, or city, and shall prescribe the rules, regulations, returns, ballots, and notice of such election and shall declare the result; and if a majority of the ballots cast be found and declared to be for a dispensary, then a dispensary may be established in said county, town, or city: *Provided*, That dispensaries may be established in the counties of Williamsburg, Pickens, and Marion and at Seneca and other towns now incorporated in Oconee county without such election, on compliance with the other requirements of this act: *Provided*, That nothing in this act contained shall be so construed as to prohibit persons resident in counties which shall elect to have no dispensary from procuring liquors from dispensaries in other counties, or county dispensers from shipping same to their places of residence under proper labels or certificates: *Provided, further*, That nothing in this act shall be construed to repeal an act entitled "An Act to Allow the Opening of Dispensaries in Pickens and Oconee Counties," approved December 18, 1894.

Sec. 9. If the application for the position of dispenser be granted, it shall not issue until the applicant shall make and subscribe on oath before some officer authorized by law to administer oaths which shall be indorsed upon the bond to the effect and tenor following: "I, —— ——, do solemnly swear (or affirm) that I will well and truly perform all and singular the condition of the within bond, and keep and perform the trusts confided in me to purchase, keep, and sell intoxicating liquors. I will not sell, give, or furnish to any person any intoxicating liquors otherwise than is provided by law, and especially I will not sell or furnish intoxicating liquors to any minor, intoxicated person, or persons who are in the habit of becoming intoxicated, and I will make true, full, and accurate returns to the county board of control on the 1st Monday of each month of all certificates and requests made to or received by me, as required by law, during the preceding month; and such returns shall show every sale and delivery of such liquors made by me or for me during the month embraced therein, and the true signature to every request received and granted; and such returns shall show all the liquors sold or delivered to any and every person as returned." Upon taking said oath and filing bond as hereinbefore provided, the county



Digitized by Google

nominal or merely compensatory were all that could be allowed, said: "Notwithstanding 87] what the solicitor *general has said, I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." The jury found a verdict with £1,000 damages.

In the case of *Huckle* v. *Money*, 2 Wils. 205, there was a motion for a new trial on the ground that the jury had allowed excessive damages. It was proved on the trial that the plaintiff was a journeyman printer, and was taken in custody by the defendant, under the general warrant of a secretary of state, upon suspicion of having printed a certain libelous paper; that the defendant kept him in custody about six hours, but used him very civilly by treating him with beefsteaks and beer, so that he suffered very little or no damages. The jury gave him a verdict in £300 damages. In disposing of the motion, the Lord Chief Justice Pratt said "that if the jury had been confined by their oath to consider the mere personal injury only, perhaps £20 damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial. . . . I cannot say what damages I should have given if I had been upon the jury, but I directed and told them they were not bound to any certain damages. . . . Upon the whole, I am of opinion the

---

board of control shall issue to him a permit authorizing him to keep and sell intoxicating liquors as in this act provided, and every permit so granted shall specify the building, giving the street and number or location, in which intoxicating liquors may be sold by virtue of the same, and the length of time in which the same shall be in force, which in no case shall exceed twelve months. Permits granted under this act shall be deemed trusts reposed in the recipients thereof, not as a matter of right, but of confidence, and may be revoked upon sufficient showing by order of the county board of control; and upon the removal of any county dispenser, or upon demand of the county board of control, he shall immediately turn over to the county board of control all liquors and other property in his possession belonging to the state or county. Said county board of control shall be charged with the duty of prosecuting the county dispenser or any of his employees who may violate any of the provisions of this act. On the death, resignation, or removal of a county dispenser, or expiration of his term of office, the county board shall appoint his successor.

Sec. 10. The county board of control shall use as their office the office of the county supervisor of their county, and shall elect one of their number as chairman and another as clerk of the said county board of control. The county board shall preserve as a part of the records and files of their office all petitions, bonds, and other papers pertaining to the granting or revocation of permits, and keep suitable books in which bonds and permits shall be recorded. The books shall be furnished by the county like other public records. The county board of control shall designate or provide a suitable place in which to sell the liquors. The members of the county board of control shall meet once a month or oftener, on the call of the chairman, and each member of the board shall receive a per diem of $2.05 mileage each way, but they shall not receive compensation for more than thirty days in any one year except in the county of Charleston, where they shall not receive compensation for more than sixty days in any one year, and in Barnwell county not more than fifty days in any one year. They shall, upon the approval of the state board of control, employ such assistants for the county dispenser as may be necessary. The dispenser and his assistants shall receive such compensation as the state board of control may determine. All profits, after paying all expenses of the county dispensary, shall be paid, one half to the county treasury and one half to the municipal corporation in which it may be located, such settlements to be made quarterly: *Provided*, That if the authorities of any town or city, in the judgment of the state board of control, do not enforce this law, the state board may withhold the part going to the said town or city and use it to pay state constables or else turn it into the county treasury. All moneys received by the county dispenser belonging to the state shall be forwarded on Monday of each week to the state commissioner, and at the same time the county dispenser shall forward to the state board of control a duplicate statement of the remittance so made to the state commissioner. On the same day of each week the county dispenser shall deposit with the county treasurer the portion of all the moneys received by him belonging to the county and to the municipal authorities in which the dispensary is located. The county treasurer shall give his receipt therefor and hold the same until the quarterly settlement hereinbefore provided for is had. The quarterly settlement herein provided for shall be made on the 4th Monday in the months of December, March, June, and September in each year. Such settlement shall be made in the presence of the county auditor, who shall make a memorandum of the items thereof, and forward the same to the state board of control. The mayor or intendant of the city or town in which the dispensary is located shall also attend such settlement: *Provided*, That in counties where dispensaries other than incorporated cities or towns the county shall get all profits that would otherwise go to such cities and towns.

Sec. 11. Before selling or delivering any intoxicating liquors to any person, a request must be presented to the county dispenser, printed or written in ink, dated of the true date, stating that he or she is of age, and the residence of the signer, for whom or whose use it is required, the quantity and kind required, and his or her true name, and the request shall be signed by the applicant in his own true name and signature, attested by the county dispenser or clerk who receives and files the request. But the request shall be refused if the county dispenser filing it personally knows the person applying is a minor, that he is intoxicated, or that he is in the habit of using intoxicating liquors to an excess, or if the applicant is not so personally known to said county dispenser before filing said order or delivering said liquor he shall require the statement of a reliable and trustworthy person of good character and habits, known personally to him, that the applicant is not a minor and is not in the habit of using intoxicating liquors to excess.

Sec. 12. Requests for purchase of liquor shall be made upon blanks furnished by the county auditor, in packages of one hundred each, to the county dispensers, from time to time as the same shall be needed, and shall be numbered consecutively by the auditor. The blanks aforesaid shall be furnished to the county auditor by the state board of control, in uniform books, like bank checks, and the date of delivery shall be indorsed by the county auditor on each book and receipt taken therefor and preserved in his office. The dispenser shall preserve the application in the original form consecutively by the auditor. The blanks aforesaid shall be — and book, except the filing of the blanks therein, until returned to the county auditor. When return thereof is made the county auditor shall indorse thereon the date of return, and file and preserve the same, to be used in the quarterly settlements between such dispenser and the county treasurer. All unused or mutilated blanks shall be returned or accounted for before other blanks are issued to such county dispenser.

Sec. 13. On or before the 10th day of each month each dispenser shall make full returns to the county auditors of all requests filed by him and his clerks during the preceding month upon blanks to be fur-



Digitized by Google

damages are not excessive, and that it is very dangerous for the judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages."

In *Day* v. *Woodworth*, 54 U. S. 13 How. 371 [14: 185], which was an action of trespass charging the defendants with tearing down and destroying the plaintiff's mill dam, this court, through Mr. Justice Grier, said:

88] *"It is a well-established principle of the common law that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers, but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by the statute law men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages inflicted by way of penalty or punishment given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have

---

nished by the state board of control for that purpose, and accompany the same with an oath, duly taken and subscribed before the county auditor or notary public, which shall be in the following form, to wit: "I, ——— ———, being duly sworn, state on oath that the requests for liquors herewith returned are all that were received and filed at my place of business under my permit during the month of ———, 189–; that I have carefully preserved the same, and that they were filled up, signed, and attested at the date shown thereon, as provided by law; that said requests were filled by delivering the quantity and kind of liquors required, and that no liquors have been sold or dispensed under my permit during said month except as shown by the requests herewith returned; and that I have faithfully observed and complied with the provisions of my bond and oath taken by me, thereon indorsed, and with all the laws relating to my duties in the premises."

Sec. 14. Upon failure of any dispenser to make returns to the auditor as herein required, it shall be the duty of said auditor to report such failure to the state board of control, and the said state board of control shall immediately order the county board to summon said delinquent dispenser to appear before them and show cause why his permit should not be revoked; and if the cause shall not be shown to the satisfaction of the county board of control, they shall immediately annul said permit and give public notice thereof; and the circuit solicitor shall proceed to enforce the penalties prescribed in this act for such violation against said county dispenser at the next succeeding term of court in the county in which such permit is held; and any dispenser who shall sell or dispose of any intoxicating liquors after his permit shall have been revoked shall, upon conviction thereof, be fined not less than five hundred (500) dollars and be imprisoned for six months. If any dispenser or his clerk shall purchase any intoxicating liquors from any other person except the state commissioner, or if he, or they, or any person or persons in his or their employ, or by his or their direction, shall sell or offer for sale any liquors other than such as have been purchased from the state commissioner, or shall adulterate, or cause to be adulterated, any intoxicating, spirituous, or malt liquors which he or they may keep for sale under this act, by mixing with same coloring matter or any drug or ingredient whatever, or shall mix the same with other liquors of different kind or quality, or with water, or shall sell or expose for sale such liquors so adulterated, knowing it to be such, or shall change the label upon any box, bottle, or package, he or they shall be guilty of a misdemeanor and be fined in a sum of not less than $200 or imprisonment for not less than six months. If any county dispenser shall misappropriate, misuse, or otherwise wrongfully dispose of any moneys or other property belonging to the state, county, or municipality, he shall, upon conviction, be punished as in case of breach of trust with fraudulent intent.

Sec. 15. No person, firm, association, or corporation shall manufacture for sale, or keep for sale, exchange, barter, or dispense any liquors containing alcohol, for any purpose whatsoever, otherwise than is provided in this act. Any person, firm, association, or corporation desiring or intending to manufacture or distill any liquors containing alcohol within this state shall first obtain from the state board of control a permit or license so to do, and it shall be unlawful for any such person, firm, association, or corporation to manufacture or distill any liquors containing alcohol within this state without having such permit or license. Any violations of the terms of the permit or license shall authorize and warrant the seizure of the product on hand at any distillery or place where liquors containing alcohol are manufactured: *Provided*, The United States has no lien or claim upon the same. And in the application for a permit or license to manufacture liquors containing alcohol, the applicant shall give the state full power, upon any violation of this act, to seize and take possession of any product on hand at the distillery or place where such applicant shall manufacture such liquors, and shall authorize the state to pay the United States government tax upon the same if unpaid, and to dispose thereof as provided herein for contraband goods. Dispensers as herein provided shall alone be authorized to sell and dispense liquors containing alcohol, and all permits must be procured by such dispensers as herein provided from the county board of control: *Provided*, That the manufacturers of distilled, malt, or vinous liquors who are doing business in the state shall be allowed to sell to no person in this state except the state commissioner and to parties outside the state, and the state commissioner shall purchase his supplies from the brewers and distillers in this state when their product reaches the standard required by this act: *Provided*, Such supplies can be purchased as cheaply from such brewers and distillers in this state as elsewhere: *And provided, further*, That the state commissioner shall have the right, and he is hereby empowered, to purchase malt liquors from breweries of this state, and also from breweries outside of this state who may have agents representing them in this state. Every package, barrel, or bottle of such liquor shipped beyond the limits of this state shall have thereon the certificate of the state commissioner allowing same, otherwise it shall be liable to confiscation and the railroad carrying it shall be punished as in § 3: *And provided*, That any person shall have the right to make wine for his or her own use from grapes or other fruits. The inspector appointed by the state board of control, as herein provided, shall have the right to enter and examine, at any and all times not forbidden by the United States laws, any distillery, brewery, or place where liquors containing alcohol is manufactured, within this state. Any manufacturer, distiller, or brewer who may refuse to allow the inspector to enter and examine his place of business and its appurtenances at such times as the inspector may deem proper shall forfeit his permit or license.

Sec. 16. Every dispenser shall keep a strict account of all liquors received by him from the state commissioner in a book kept for that purpose, which shall be subject at all times to the inspection of the circuit solicitor, any peace officer or grand



Digitized by Google

been entitled to recover had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money.' This has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."

*Philadelphia, W. & B. R. Co.* v. *Quigley*, 62 U. S. 21 How. 213 [16: 77], was a case wherein a railroad company was responsible in an action for the publication of a libel; and although this court reversed the circuit court for allowing the jury to give exemplary damages, because there was no evidence that the injury was inflicted maliciously or wantonly, yet the case of *Day* v. *Woodworth*, 54 U. S. 13 How. 363 [14: 181], was cited with approval as recognizing 89] the power of a jury in certain *actions of tort to assess against the tortfeasor punitive or exemplary damages, and as laying down the law that whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person.

This was likewise recognized as well-settled doctrine in the case of *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 107 [37: 99].

The intentional, malicious, and repeated interference by the defendants with the exercise of personal rights and privileges secured to the plaintiff by the Constitution of the United States, as alleged in the complaint, constitutes, as we think, a wrong and injury not the subject of compensation by a mere money standard, but fairly within the doctrine of the cases wherein exemplary damages have been allowed. Those allegations of the complaints, though denied in the answers, have been sustained by the tribunal—in these cases, the court, a jury having been waived—which had to pass upon the issues of fact.

---

juror of the county, or of any other citizen, and such book shall show the amount and kind of liquors procured, the date of receipt and amount sold, and the amount on hand of each kind for each month. Such books shall be produced by the party keeping the same, to be used as evidence on trial of any prosecution against him on notice duly served that the same will be required as evidence.

Sec. 17. The payment of the United States special tax as a liquor seller, or notice of any kind in any place of resort, or in any store or shop indicating that alcoholic liquors are there sold, kept, or given away, shall be prima facie evidence that the person or persons paying said tax and the parties displaying such notices are acting in violation of this act; and unless said person or parties are selling under permit as prescribed by this act they shall be punished by a fine of not less than $100 nor more than $500, or by imprisonment for a term of not less than three months nor more than twelve months. Conviction in the United States courts of illicit sales of liquor shall be taken as prima facie evidence of violation of the provisions of this act, and any distiller or manufacturer of liquors containing alcohol so convicted in the United States courts shall, by reason of such conviction, forfeit the permit or license granted him by the state board of control in addition to the other penalties herein provided.

Sec. 18. Licensed druggists conducting drug stores and manufacturers of proprietary medicines are hereby authorized to purchase of dispensers of the counties of their residence intoxicating liquors (not including malt) for the purpose of compounding medicines, tinctures, and extracts that cannot be used as a beverage. The dispenser shall not charge such licensed druggists more than 10 per cent net profits for liquors so sold. Such purchaser shall keep a record of the uses to which the same are devoted, giving the kind and quantity so used, and quarterly they shall make and file with the county auditor and with the county board of control sworn reports, giving a full and true statement of the quantity and kinds of such liquors purchased and used, the uses to which the same have been devoted, and giving the name of the dispenser from whom the same was purchased, and the dates and quantities so purchased, together with an invoice of each kind still in stock and kept for such compoundings. If said licensed druggist shall sell, barter, give away, or exchange or in any manner dispose of said liquors for any purpose other than authorized by this section, he shall upon conviction forfeit his license and be liable to all penalties, prosecutions, and proceedings at law and in equity provided against persons selling without permit, and upon such conviction the clerk of the court shall, within ten days after such judgment or order, transmit to the board of pharmaceutical examiners the certified record thereof, upon receipt of which the said board shall strike the name of the said druggist from the list of pharmacists and revoke his certificate: *Provided*, That nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound, under any name, form, or device, which may be used as a beverage which is intoxicating in its character: *And provided, further*, That the state commissioner shall be authorized to sell to manufacturing chemists and wholesale druggists alcohol by the barrel at cost.

Sec. 19. If any person shall make any false or fictitious signature or sign any name other than his or her own to any paper required to be signed by this act, without being authorized so to do, or make any false statement in any paper, request, or application signed to procure liquors under this act, the person so offending shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than $25 or be imprisoned not more than thirty days.

Sec. 20. If any dispenser or his clerk shall make false oath touching any matter required to be sworn to under the provisions of this act, the person so offending shall upon conviction be punished as provided by law for perjury. If any county dispenser shall purchase or procure any intoxicating liquors from other person than the state commissioner, or make any false return to the county auditor, or use any request for liquors for more than one sale, in any such case he shall be deemed guilty of a misdemeanor, and, upon conviction, be punished by a fine of $500 or six months' imprisonment.

Sec. 21. Every person who shall directly or indirectly keep or maintain by himself or by associating or combining with others, who shall in any manner aid, assist, or abet in keeping or maintaining, any club room or other place in which any intoxicating liquors are received or kept for use, barter, or sale as a beverage, or for distribution or division among the members of any club or association by any means whatever, and every person who shall receive, barter, sell, assist, or abet another in receiving, bartering, or selling, any alcoholic liquors so received or kept, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than $100 nor more than $500, or by imprisonment for a term of not less than three months nor more than twelve months: *Provided*, That the state board of control shall have the power, upon a proper showing and under such rules as they may adopt, to exempt hotels where tourists or health seekers resort from being considered nuisances or as violating this act by reason of any manager of such hotels dispensing liquors bought from the dispensary, by the bottle, either night or day, but before any such exemption shall be granted the state board of control shall require the manager of such hotel to give a good and sufficient bond, in the penal sum of $3,000, conditioned for the observance of all the rules, regulations, and restrictions prescribed and imposed by the said board and with all the requirements of this act, and it shall be lawful for any constable or officer thus employed under this act to enter such hotel and search it at any time, day or night, without a warrant, for contraband liquors.

Sec. 22. All places where alcoholic liquors are



Digitized by Google

That the amount of the recovery in each case fell short of the sum of $2,000 did not withdraw the cases from the jurisdiction of the court. As the declarations alleged damages in the sum of $6,000, and as a jury would be at liberty to find any amount not in excess of that sum, the jurisdiction, having once validity attached would not be defeated by the fact that the recoveries were for sums less than $2,000. As said in the case of *Day* v. *Woodworth*, above cited, the amount "has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."

*Barry* v. *Edmunds*, 116 U. S. 550 [29: 729,] was a fully considered case, and it was there held that a suit cannot properly be dismissed by a circuit court of the United States as not substantially involving a controversy within the jurisdiction of the court, unless the facts, where made to appear on the record, create a legal certainty of that conclusion; that where exemplary *damages beyond the sum neces- [90
sary to give a circuit court of the United States jurisdiction are claimed in an action for malicious trespass, the court should not dismiss the case for want of jurisdiction simply because the record shows that the actual injury caused to the plaintiff by the trespass was less than the jurisdictional amount, and that it is settled in this court that in an action for a trespass accompanied with malice the plaintiff may recover exemplary damages in excess of the amount of his injuries, if the *ad damnum* is properly laid.

Our inquiries thus far have proceeded on the assumption that the injuries complained of were inflicted in the enforcement of an unconstitutional law of the state. Sustaining the jurisdiction of the circuit court on that assumption, we are now brought to the more important and difficult question whether the so-called dispensary law of the state of South Carolina

---

sold, bartered, or given away in violation of this act, or where persons are permitted to resort for the purpose of drinking alcoholic liquors as a beverage, or where alcoholic liquors are kept for sale, barter, or delivery in violation of this act, are hereby declared to be common nuisances, and any person may go before any trial justice in the county and swear out an arrest warrant on personal knowledge or on information and belief charging said nuisance, giving the names of witnesses against the keeper or manager of such place and his aids and assistants, if any, and such trial justice shall direct such arrest warrant either to the sheriff of the county or to any special constable, commanding said defendant to be arrested and brought before him to be dealt with according to law, and at the same time shall issue a search warrant in which the premises in question shall be particularly described, commanding such sheriff or constable to thoroughly search the premises in question and to seize all alcoholic liquors found thereon and dispose of them as provided in § 33, and to seize all vessels, bar fixtures, screens, bottles, glasses, and appurtenances apparently used or suitable for use in retailing liquors, to make a complete inventory thereof, and deposit the same with the sheriff. That under the arrest warrant the defendant shall be arrested and brought before such trial justice, and the case shall be disposed of as in case of other crimes beyond his jurisdiction, except that when he commits or binds over the parties for trial to the next term of court of general sessions for the county, he shall make out every paper in the case in duplicate and file one with the clerk of the court for the county, and immediately transmit the other to the solicitor of the circuit, whereupon said solicitor shall at once apply to the circuit judge at chambers within that circuit for an order restraining the defendants, their servants or agents, from keeping, receiving, bartering, selling, or giving away any alcoholic liquors until the further order of the court. Such circuit judge is hereby authorized, empowered, and required to grant the said restraining order without requiring a bond or undertaking upon the hearing or receipt by him of said papers from the court of the said trial justice by the hands of the solicitor; and any violation of said restraining order before the trial of the case shall be deemed a contempt of court and punished as such by said judge or court, or any other circuit judge, as for the violation of an order of injunction. Upon conviction of said defendants of maintaining said nuisance at the trial, they or any of them shall be deemed guilty of a misdemeanor, punishable by imprisonment in the state penitentiary for a term of not less than three months, or a fine of not less than $200 or by both, in the discretion of the court, and the restraining order shall be made perpetual. The articles covered by the inventory, which were retained by the sheriff, shall be forfeited to the state and sold and the net proceeds sent to the state commissioner, and the sheriff shall forthwith proceed to dispose of the alcoholic liquors covered by said inventory as provided for in this act as when other liquors are seized. The finding of such alcoholic liquors on such premises, with satisfactory evidence that the same was being disposed of contrary to this act, shall be prima facie evidence of the nuisance complained of. Liquors seized as hereinbefore provided, and the vessels containing them, shall not be taken from the custody of the officers in possession of the same by any writ of replevin or other process while the proceedings herein provided are pending. No suit shall lie for damages alleged to arise by seizure and detention of liquors under this act. Any person violating the terms of any restraining order granted in such proceedings shall be punished for contempt by a fine of not less than $200 nor more than $1,000, and by imprisonment in the state penitentiary not less than ninety days nor more than one year. In contempt proceedings arising out of the violation of any injunction granted under the provisions of this act, the court, or, in vacation, the judge thereof, shall have power to try summarily and punish the party or parties guilty, as required by law. The affidavits upon which the attachment for contempt issues shall make a prima facie case for the state. The accused may plead in the same manner as to an indictment in so far as the same is applicable. Evidence may be oral or in the form of affidavits or both. The defendant shall not necessarily be discharged upon his denial of the fact stated in the moving papers. The clerk of the court shall, upon the application of either party, issue subpœnas for witnesses, and, except as above set forth, the practice in such contempt proceeding shall conform as nearly as may be to the practice in the court of common pleas. That when any solicitor neglects or refuses to perform any duty or to take any steps required of him by any of the provisions of the preceding section or by any of the provisions of this act, the attorney general, on his own motion, or by the request of the governor, shall, in person or by his assistant, proceed to the locality and perform such neglected duty and take such steps as are necessary in the place instead of such solicitor, and at his discretion to cause a prosecution to be instituted, not only in the matter so neglected, but also a prosecution against the solicitor for malfeasance or misfeasance in office or for official misconduct or for other charges justified by facts, and to pursue the prosecution to the extent of a conviction and dismissal from office of any such solicitor. And in such event the attorney general shall be and is hereby authorized and empowered to appoint one or more additional assistants, who shall each have, while actually employed, the same compensation, to be paid from the litigation fund of the attorney general.

Sec. 23. The state commissioner, under rules and regulations provided by the state board of control, may enter into contracts with responsible grape growers in this state for the sale of domestic wines through the dispensary, so as to encourage grape growing in this state, and in furtherance of this object not more than 10 per cent profit to the dispensary over the expenses of bottling, labeling, freighting, etc., shall be charged for the handling of such wines. The manager of every registered distillery



Digitized by Google

is, indeed, as to some or all of its parts, invalid, as being in conflict with the Constitution of the United States and acts of Congress made thereunder? Is that statute a lawful exercise of the police power of the state?

In the present discussion we do not deem it necessary or desirable to review the numerous cases in which this court has had occasion to consider similar questions. We shall find it sufficient to apply to the case before us the conclusions announced in several very recent cases.

The difficulty of the subject is shown in the frequent and elaborate dissents in many of the cases. Still, it can be safely said that the differences of opinion thus manifested have not been so much upon fundamental principles as upon questions of the construction and meaning of the various state statutes that have been under consideration. Those statutes have covered almost innumerable subjects; such as the exclusion from the state of contagious or infectious diseases, or of criminals, paupers, and others likely to become a burden or public charge; regulations requiring railroad companies to fence their roads; forbidding the manufacture and sale of oleomargarine; the prohibition of Sunday labor, even by railroad companies partly engaged in interstate commerce, etc.

*But the particular state laws that have[91 been most frequently considered and have occasioned the most discussion have been those that have sought to regulate or forbid the importation, manufacture, and sale of intoxicating liquors. And the law, whose validity we are now to consider, is one of that class.

The evils attending the vice of intemperance in the use of spirituous liquors are so great that a natural reluctance is felt in appearing

---

of liquor in this state shall report quarterly to the state commissioner, showing the number of gallons of each kind of liquor on hand, manufactured, or disposed of during the quarter; and if the said report fail to correspond with the return of said distiller to the United States internal revenue collector of this state, or it is shown that said manager has disposed of liquor contrary to this act, said distillery shall be deemed to be a common nuisance and the said manager and his aids and assistants and the premises shall be proceeded against as in this act provided as to places where liquors are sold contrary to this act.

Sec. 24. In all places where liquors are unlawfully kept or stored, the same not being in an open house or exposed to view, and a search being necessary, upon affidavit to that effect, or on information and belief that contraband liquor is in such place, a search warrant may be issued by a justice, judge, or trial justice, or mayor or intendant of a city or town, to whom application is made, empowering a constable or any person who may be deputized to enter the said place by daytime or in the night-time and to search and examine the said premises for the purpose of seizing the said contraband liquors therein concealed, kept, or stored, which said liquor when so seized shall be disposed of as hereinafter provided.

Sec. 25. That any of the liquors set forth in § 1 of this act, which are contraband, may be seized and taken without warrant by any state constable, sheriff, or policeman, while in transit or after arrival, whether in possession of a common carrier, depot agent, express agent, private person, firm, corporation, or association, and reported to the state commissioner at once, who shall dispose of the same as hereinafter provided: *Provided*, That liquors purchased outside the state, owned and conveyed as personal baggage, shall be exempt from seizure when the quantity does not exceed 1 gallon.

Sec. 26. That the possession of said illicit liquors is hereby prohibited and declared unlawful, and any obligation, note of indebtedness, contracted in their sale or transportation is declared to be absolutely null and void, nor shall any action or suit for the recovery of the same be entertained in any court in this state.

Sec. 27. That the proceeding against liquor so illegally kept, stored, sold, delivered, transported, or being transported shall be considered a proceeding *in rem*, unless otherwise herein provided, elsewhere than at his or her residence.

Sec. 28. That the carriage, transportation, possession, removal, sale, delivery, or acceptance of any of the said liquors or liquids in any package, cask, jug, box, or other package, under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks, packages, or boxes containing the same, or the causing of such carriage, transportation, possession, removal, sale, delivery, or acceptance, shall work the forfeiture of said liquors or liquids and casks or packages, and the person or persons so offending, knowingly, be subject to pay a fine of not less than $100 nor more than $500, or imprisonment for the term of not less than six months nor more than one year, and the wrongful name, address, mark, stamp, or style on such liquor when seized shall be considered evidence prima facie of guilt. The books and waybills of the common carrier may be examined to trace said liquor to the shipper, who shall be liable, upon conviction, in a like penalty.

Sec. 29. That all constables, deputy constables, sheriffs, trial justices, or municipal policemen shall have the right, power, and authority and it shall be their duty, whenever they are informed or suspect that any such suspicious package in possession of a common carrier contains alcoholic liquors or liquids, to detain the same for examination for the term of twenty-four hours without any warrant or process whatever. Any constable, deputy constable, sheriff, or trial justice who shall neglect or refuse to perform the duties required by this act shall be subject to suspension by the governor. Any sheriff or trial justice seizing any alcoholic liquors or liquids, as required by this section, shall be paid one half the value of such liquor or liquids so soon as the same shall have been received at the state dispensary, approved and disposed of according to law.

Sec. 30. That any interference by any person with, obstruction or resistance of, or abusive language to, any officer or person in the discharge of the duties herein enjoined, or the use of abusive language by any such officer or person to any other person or persons, shall be deemed a misdemeanor, and the person or persons so offending shall, upon conviction, be punished by a fine of not less than $100 nor more than $500, or imprisoned for a term of not less than three months nor more than twelve months.

Sec. 31. In all cases of seizure of any goods, wares, or merchandise hereafter or heretofore made as being subject to forfeiture under any provision of this act or the former act, which, in the opinion of the officer or person making the seizure, are of the appraised value of $50 or more, the said officer or person shall proceed as follows: First. He shall cause a list containing a particular description of the goods, wares, or merchandise seized to be prepared in duplicate and an appraisement thereof to be made by three sworn appraisers to be selected by him, who shall be respectable and disinterested citizens of the state of South Carolina residing within the county wherein the seizure was made. Said list and appraisement shall be properly attested by the said officer or person and the said appraisers, for which service each of the said appraisers shall be allowed the sum of $1 per day, not exceeding five days, to be paid by the state commissioner. Second. If the said goods are believed by the officer making the seizure to be of less value than $50, no appraisement shall be made. The said officer or person shall proceed to publish a notice for three weeks, in writing, at three places in the county where the seizure was made, describing the articles and stating the time and place and cause of their seizure, and requiring any person claiming them to appear and make such claim within thirty days from the date of the first publication of such notice. Third. Any person claiming the liquors so seized as contraband and the vessels containing the same, within the time specified in the notice, may file with the state commissioner a claim stating his interest in the articles seized,



Digitized by Google

to interfere, even on constitutional grounds, with any law whose avowed purpose is to restrict or prevent the mischief. So long, however, as state legislation continues to recognize wines, beer, and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles.

We cheerfully concede that the law in question was passed in the bona fide exercise of the police power. We disclaim any imputation to the lawmakers of South Carolina of a design, under the guise of a domestic regulation, to interfere with the rights and privileges of either her own citizens or those of her sister states, which are secured to them by the Constitution and laws of the United States.

But, as we have had more than one occasion to observe, our willingness to believe that this statute was enacted in good faith, and to protect the people of the state from the evils of unrestricted importation, manufacture, and sale of ardent spirits, cannot control the final determination whether the statute, in some of its provisions, is not repugnant to the Constitution of the United States. As was said in *Mugler* v. *Kansas*, 123 U. S. 661 [31: 210]: "If a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

It is important to observe that the statute before us does not purport to prohibit either

---

and may execute a bond to the state commissioner in the penal sum of $500, with sureties, to be approved by the said state commissioner, conditioned that in the case of condemnation of the articles so seized the obligors shall pay all the costs and expenses of the proceedings to obtain such condemnation; and upon the delivery of such bonds to the state commissioner he shall transmit the same with the duplicate list or description of the goods seized to the solicitor of the circuit in which such seizure was made, and the said solicitor shall prosecute the case to secure the forfeiture of said contraband liquors or liquids in the court having jurisdiction. Fourth. If no claim is interposed and no bond given within the time above specified, such liquors shall be forfeited without further proceedings, and the state commissioner shall have the said liquors tested by the state chemist, and if pure shall sell the same through the state dispensary as though purchased by him. If not pure, he shall sell the same beyond the state and deposit the proceeds to the credit of the state commissioner: *Provided*, That in seizures in quantities less in value than $50, of such illicit liquor or liquors, the same may be advertised with other quantities at Columbia by the state commissioner and disposed of as hereinbefore provided: *Provided further*, That the claimants of such liquors may give bond in $100, as when the value is $50 or over, and shall bear the burden of showing before a trial justice that he has complied with the law and that the liquor is not liable to seizure.

Sec. 32. That all fermented, distilled, or other liquors or liquids containing alcohol, transported into this state or remaining herein for use, sale, consumption, storage, or other disposition, shall, upon introduction and arrival in this state, be subject to the operation and effect of this law to the same extent and in the same manner as though such liquors or liquids had been produced in this state.

Sec. 33. That no person, except as provided in this act, shall bring into this state or transport from place to place within this state, by wagon, cart, or other vehicle, or by any other means or mode of carriage, any liquor or liquids containing alcohol, under a penalty of $100 or imprisonment for thirty days for each offense, upon conviction thereof, as for a misdemeanor. Any servant, agent, or employee of any persons, corporations, or associations, doing business in this state as common carrier, or any person whatever (except an officer seizing or examining the same) who shall remove any intoxicating liquors from any railroad car, vessel, or other vehicle of transportation at any place other than the usual and established stations, wharves, depots, or places of business of such common carriers within some incorporated city or town where there is a dispensary, or who shall aid in or consent to such removal or attempt to remove, shall, upon conviction, be sentenced to pay a fine of not less than $100 nor more than $500, or imprisonment for a term of not less than three months nor more than twelve months: *Provided*, That said penalty shall not apply to any liquor in transit when changed from car to car to facilitate transportation across the state: *Provided*, That this section does not apply to liquors purchased from a dispensary and bearing the proper label or certificate. All liquors in this state, except dispensary liquors and those passing through this state consigned to points beyond this state, shall be deemed contraband, and may be seized in transit without warrant. And any steamboat, sailing vessel, railroad, express company, or other common carrier transporting or bringing into this state for sale or use therein, except by the dispensary, shall suffer a penalty of $500 and costs for each offense, to be recovered by the solicitor of the circuit or the attorney general, by an action brought therefor in any court of competent jurisdiction. The state constable, sheriff, municipal police, or any lawful constable may enter any railroad car, or express car, or depot, or steamboat, or other vessel, without warrant, and make search for such contraband liquors, and may examine the waybills and freight books of said common carriers, and anyone interfering with or resisting such officer shall be punished by a fine of not less than $100 nor more than $500, or imprisonment for a term of not less than three months nor more than twelve months.

Sec. 34. That any person detected openly or in the act of violating any of the provisions of this act shall be liable to arrest without warrant: *Provided*, A warrant shall be procured within a reasonable time thereafter.

Sec. 35. That violations of any of the sections of this act where punishment upon conviction is not especially provided for, the person or persons or corporations so convicted shall be punished in the discretion of the court trying the same. All alcoholic liquors other than domestic wine, and in quantity more than 5 gallons, which do not have on the packages in which they are contained the label and certificates going to show that they have been purchased from a state officer authorized to sell them are hereby declared contraband, and on seizure will be forfeited to the state as provided in § 31: *Provided*, That this section shall not apply to liquor held by the owners of registered stills. Persons having more than 5 gallons of liquor which they wish to keep for their own use may throw the protection of the law around the same by furnishing an inventory of the quantity and kinds to the state commissioner and applying for certificates to affix thereto. After sixty days from the approval of this act any liquor found in the state not having such certificates may be seized and confiscated. Persons having more than they wish to use may obtain certificates to ship beyond the limits of the state. Any persons affixing or causing to be affixed to any package containing alcoholic liquor any imitation stamp or other printed or engraved label or device than those furnished by the state commissioner shall, for each offense, be liable to a penalty of ten days' imprisonment or $25 fine.

Sec. 36. Every person who dispossesses or rescues from a constable or other officer, or attempts so to do, any alcoholic liquor taken or detained by such officer charged with the enforcement of this law, shall, upon conviction, be imprisoned not less than three months nor more than twelve months, or pay a fine of not less than $100 nor more than $500.

Sec. 37. Any person handling contraband liquor in the night-time, or delivering the same, shall be



Digitized by Google

92] the importation, the manufacture, the sale, or the use of intoxicating liquors. The 1st section does, indeed, make it penal to manufacture, sell, barter, deliver, store, or keep in possession any spirituous, malt, vinous, fermented, brewed, or other liquors which contain alcohol and are used as a beverage, and declares all such liquors to be contraband and against the morals, good health, and safety of the state, and authorizes them to be seized wherever found, without warrant, and turned over to the state commissioner; yet those enactments are not absolute, but are made subject to the subsequent provisions of the act. When those subsequent provisions are examined, we find that, so far from the importation, manufacture, and sale of such liquors being prohibited, those operations are turned over to state functionaries, by whom alone, or under whose direction, they are to be carried on.

Thus, § 8 provides for the appointment of a state commissioner who is required to purchase all intoxicating liquors for lawful sale in the state, and to furnish the same to such persons as may be designated as dispensers thereof, to be sold as thereafter provided in the act. Such commissioner is directed, before shipping the liquor to county dispensaries, to cause the same to be put up in sealed packages of not less than ½ pint nor more than 5 gallons, in which packages they shall be sold by county dispensers.

The 15th section enacts that "any person, firm, association, or corporation desiring or intending to manufacture or distill any liquors containing alcohol within the state, shall first obtain from the state board a permit or license to do so," and said section further provides "that manufacturers of distilled, malt, or vinous liquors who are doing business within this state shall be allowed to sell to no person in this state except the state commissioners and to parties outside the state, and the state commissioner shall purchase his supplies from the brewers and distillers in this state when their product reaches the standard required by this act: *Provided*, Such supplies can be purchased as cheaply from such brewers and distillers in this state as elsewhere." So, too, the 23d section provides that "the state commissioner may enter into contracts with re- [93 sponsible grape growers in this state for the sale of domestic wines through the dispensary, so as to encourage grape growing in this state, and in furtherance of this subject not more than 10 per cent profit to the dispensary over the expense of bottling, labeling, freighting, etc., shall be charged for the handling of such wines." But there is no such limitation of charge in the case of imported wines. And in case of seizure of contraband liquors, the 31st

---

guilty of a misdemeanor, and on conviction shall be punished by imprisonment for not less than three months, nor more than twelve months, or by a fine of not less than $100 nor more than $500.

Sec. 38. Any wagon, cart, boat, or other conveyance transporting liquors at night, other than regular passenger or freight steamers and railway cars, shall be liable to seizure and confiscation, and to that end the officer shall cause the same to be duly advertised and sold and the proceeds sent to the state commissioner.

Sec. 39. Every dispenser when he sells a package containing liquor shall put a cross-mark in ink on the label or certificate thereon, extending from the top to the bottom and from side to side. When any liquor is seized because it has not the necessary certificates and labels required by this act, the burden of proof shall be upon the claimant of said spirits to show that no fraud has been committed and that the whiskey is not contraband.

Sec. 40. That any railroad, steamboat, express company, or other common carrier, shall incur a penalty of treble the invoice price of any alcoholic liquors lost or stolen in transit to or from the dispensary, whether shipped as released or not, such penalty to be recovered by action in any court of competent jurisdiction.

Sec. 41. That it shall be unlawful for any person to take or to solicit orders or to receive money from other persons for the purchase or shipment of any alcoholic liquors for or to such other persons in this state, except for liquors to be purchased and shipped from the dispensary, and any person violating this section, upon conviction, shall be deemed guilty of a misdemeanor, and shall be punished by imprisonment for a term of not less than three months nor more than twelve months, or by a fine of not less than $100 nor more than $500.

Sec. 42. It shall be the duty of sheriffs, deputy sheriffs, and constables having notice of the violation of any of the provisions of this act to notify the circuit solicitor of the fact of such violation, and to furnish him the names of any witness within their knowledge by whom such violation can be proved. If any such officer or solicitor shall willfully fail to comply with the provisions of this section, he shall, upon conviction, be fined in a sum not less than $100 nor more than $500, and such conviction shall work a forfeiture of the office held by such person, and the court before whom such conviction is had shall, in addition to the imposition of the fine aforesaid, order and adjudge the forfeiture of his said office.

Sec. 43. The governor shall have authority to appoint one or more state constables, at a salary of $2 per day when on duty, and two chief constables, at $3 each per day and expenses, to see that this act is enforced, the same to be charged to the expense account of the state commissioner, except as otherwise provided in this act.

Sec. 44. That chapter 1, title 7, of the Code of Civil Procedure of this state, entitled "Of Provisional Remedies in Civil Actions," shall not apply to any officer or person having duties to perform under this act, and in no case shall an action lie against any such officer or person for damages to person or property as provided in said chapter.

Sec. 45. That when any bill of indictment shall have been given out by any solicitor or by the attorney general or an assistant attorney general to any grand jury in any county of this state at any term of the court of general sessions therein charging any person or persons with any violation of any of the provisions of the statutes of this state relating to spirituous, alcoholic, malt, or intoxicating liquors, such grand jury shall, in the opinion of such prosecuting officer, from prejudice, caprice, undue influence, or improper cause, refuse to find a true bill thereon, it shall be then and there competent for such prosecuting officer to move for, and for the presiding judge to grant at his discretion, a change of venue and place of hearing and trial at such stage of the proceedings when such judge is satisfied with the showing of such prosecuting officer, to be made on the minutes of the court or upon affidavit, that a fair and impartial consideration cannot be had before such grand jury.

Sec. 46. That whenever in this act it is provided that process shall issue upon an affidavit based on information and belief, the affidavit shall contain a statement setting forth the sources of information, the facts and grounds of belief upon which the affiant bases his belief: *Provided*, That it shall not be necessary to set forth the sources of information, the facts and grounds of belief in the affidavit upon which a warrant of arrest shall issue, but it shall only be necessary in cases of search warrants.

Sec. 47. That this act shall be a public act, and shall go into effect immediately upon its approval by the governor, and that all acts or parts of acts inconsistent with this act be and are hereby repealed.

Approved January 2, A. D. 1895.



Digitized by Google

ection provides that "the state commissioner hall have the same tested by the state chemist, nd if pure shall sell the same through the tate dispensary as though purchased by him; nd if not pure he shall sell the same beyond he state; and deposit the proceeds to the redit of the state commissioner."

In view of these and similar provisions, it is ndisputable that whatever else may be said of his act, it was not intended to prohibit the nanufacture, sale, and use of intoxicating iquors. On the contrary, liquors and wines re recognized as commodities which may be awfully made, bought, and sold, and must therefore be deemed to be the subject of foreign and interstate commerce.

It is sought to defend the act, as an inspection act, within the meaning of that provision of the Constitution of the United States which permits the states to impose excise duties as far as they may be absolutely necessary for executing their inspection laws.

The act does, indeed, contain provisions looking to the ascertainment of the purity of liquors, and to that extent may be said to be in the nature of an inspection law. But those provisions, such as they are, do not redeem the act from the charge of being an obstruction and interference with foreign and interstate commerce. This aspect of the question has been several times considered by this court in cases where similar attempts were made to sustain state statutes as legitimate inspection laws.

In *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 [24: 527], the validity of an act of the state of Missouri, which forbade the introduction into the state of any Texan or Mexican 94]cattle between the *months of March and December of each and every year, was considered.

It was contended on behalf of the law that it was valid as a quarantine or inspection law, as its purpose was to prevent the introduction of cattle afflicted with contagious diseases. But the court pointed out that no provision was made for the actual inspection of the cattle, so as to secure the rejection of those that were diseased, but that all importation of cattle, whether sound or diseased, was forbidden for long periods; and it was held that the statute was void as a plain intrusion upon the exclusive domain of Congress.

*Walling* v. *Michigan*, 116 U. S. 446 [29: 691], was a case wherein was brought into question the validity of a statute of the state of Michigan, which imposed a tax or duty on persons who, not having their principal place of business within the state, engage in the business of selling liquors to be shipped into the state; and it was held that a discriminating tax imposed by a state, operating to the disadvantage of the products of other states when introduced into the first mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the power confirmed by the Constitution upon the Congress of the United States. Answering the argument upon which the law had been sustained by the supreme court of the state, this court, through Mr. Justice Bradley, said: "It is suggested by the learned judge who delivered the opinion of the supreme court of Michigan in this case, that the tax imposed by the act of 1875 is an exercise of the legislature of Michigan of the police power of the state for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people. This would be a perfect justification of the act if it did not discriminate against the citizens and products of other states in a matter of commerce between the states, and thus usurp one of the prerogatives of the national legislature. The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States government created thereby."

*In 1886 the legislature of the state of [95 Iowa passed an act forbidding any common carrier from bringing within that state for any person or corporation, any intoxicating liquors from any other state or territory of the United States, without first having been furnished with a certificate, under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered is authorized to sell intoxicating liquor in said county. This statute was declared invalid in the case of *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465 [31: 700], this court saying, through Mr. Justice Matthews: "The statute of Iowa under consideration falls within this prohibition. It is not an inspection law; it is not a quarantine or sanitary law. It is essentially a regulation of commerce among the states within any definition heretofore given to that term, or which can be given; and although its motive and purpose are to perfect the policy of the state of Iowa in protecting its citizens against the evils of intemperance, it is none the less on that account a regulation of commerce. If it had extended its provisions so as to prohibit the introduction into the state from foreign countries of all importations of intoxicating liquors produced abroad, no one would doubt the nature of the provision as a regulation of foreign commerce. Its nature is not changed by its application to commerce among the states. . . . And here is the limit between the sovereign power of the state and the Federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States. . . . The same process of legislation and reasoning adopted by the state and its courts would bring within the police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drank or to food and clothing."

In *Leisy* v. *Hardin*, 135 U. S. 100 [84: 128, 8 Inters. Com. Rep. 36], it was recognized that ardent spirits, distilled liquors, ale, and beer are subjects of exchange, barter, and traffic like any other commodity in *which[96 a right of traffic exists, and that being thus articles of commerce, a state cannot, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister state, nor when imported prohibit



Digitized by Google

their sale by the importer; and, accordingly, it was held that a statute of the state of Iowa, prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical, or sacramental purposes, and under a license from a county court of the state, was, as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured and brought from another state, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several states.

In *Minnesota* v. *Barber*, 136 U. S. 313 [34: 455], the facts so closely resemble those shown by the record now under consideration, and the principles stated in the opinion are so applicable, that we shall state them with some particularity.

A statute of the state of Minnesota, entitled "An Act for the Protection of the Public Health by Providing for Inspection, before Slaughter, of Cattle, Sheep, and Swine Designed for Slaughter for Human Food," in its 1st section prohibited the sale of any fresh beef, veal, mutton, lamb, or pork for human food in the state, except as subsequently provided in the act. Boards of inspectors were there provided for, whose duty it should be to inspect all cattle, sheep, and swine slaughtered for human food. It was made a matter of fine or imprisonment for anyone to sell or expose for sale for human food any fresh beef, mutton, lamb, or pork which had not been so inspected.

This court, in an opinion delivered by Mr. Justice Harlan, while conceding that the statute was enacted in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, held that, as the necessary effect of the act was to deny altogether to the citizens of other states the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, mutton, veal, or pork, from animals slaughtered outside 97] of the state, and to compel the *people of Minnesota, wishing to buy such meats, either to purchase those taken from animals inspected and slaughtered in the state, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the state, such legislation was void as constituting a discrimination against the products and business of other states in favor of the products and business of Minnesota, and as depriving the people of Minnesota of the right to bring into that state, for the purposes of sale and use, sound and healthy meat, wherever such meat may have come into existence. It was said:

"A law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the state, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the state of sound meats, the products of animals slaughtered in other states. It is one thing for a state to exclude from its limits cattle, sheep, or swine actually diseased, or meats that, by reason of their condition, or the condition of the animals from which they are taken, are unfit for human food, and punish all sales of such animals or of such meats within its limits. It is quite a different thing for a state to declare, as does Minnesota by the necessary operation of its statute, that fresh beef, veal, mutton, lamb, or pork—articles that are used in every part of this country to support human life—shall not be sold at all for human food within its limits, unless the animal from which such meat is taken is inspected in that state, or, as is practically said unless the animal is slaughtered in that state. . . . It is, however, contended, in behalf of the state, that there is in fact no interference by this statute with the bringing of cattle, sheep, and swine into Minnesota from other states, nor any discrimination against the products and business of other states for the reason—such is the argument—that the statute requiring an inspection of animals on the hoof, as a condition of the privilege of selling or offering for sale in the state, the meats taken from them, is applicable alike to all owners of such animals, whether citizens of Minnesota or citizens of other states. To this we answer that *a [98 statute may, upon its face, apply equally to the people of all the states, and yet be a regulation of interstate commerce which a state may not establish. A burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 497 [30: 697]; *Philadelphia & R. R. Co.* v *Pennsylvania* (*"State Freight Tax Case"*) 82 U. S. 15 Wall. 232 [21: 146]. The people of Minnesota have as much right to protection against the enactments of that state interfering with the freedom of commerce among the states as have the people of other states. Although this statute is not avowedly, or in terms, directed against the bringing into Minnesota of the products of other states, its necessary effect is to burden or affect commerce with other states, as involved in the transportation into that state, for the purposes of sale there, of all fresh beef, veal, mutton, lamb, or pork however free from disease may have been the animals from which it was taken."

The same reasoning prevailed in *Brimmer* v. *Rebman*, 138 U. S. 78 [34: 862], wherein an act of the state of Virginia, which declared it to be unlawful to offer for sale, within the limits of that state, any beef, veal, or mutton from animals slaughtered 100 miles or more from the place at which it is offered for sale, unless it has been previously inspected and approved by local inspectors, was held void, as being in restraint of commerce between the states, and as imposing a discriminating tax upon the products and industries of some states in favor of the products and industries of Virginia; and wherein it was said that "the statute of Virginia, although avowedly enacted to protect its people against the sale of unwholesome meats, has no real or substantial relation to such an object, but, by its necessary operation, is a regulation of commerce beyond the power of the state to establish."

After the decision in *Leisy* v. *Hardin*, and perhaps, in pursuance of some observations contained therein, Congress passed the act of



Digitized by Google

August 8, 1890 (26 Stat. at L. 313, chap. 728), enacting "that all fermented distilled, or other intoxicating liquors, or liquors transported into [99] any state or territory, or *remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." This law was approved as valid, in the case of *Wilkerson* v. *Rahrer* (*Re Rahrer*), 140 U. S. 545 [35: 572], and a provision of the Constitution of Kansas, which provided that the manufacture and sale of intoxicating liquors shall be forever prohibited in that state, except for medicinal, scientific, and mechanical purposes, and an act passed in enforcement thereof, making penal the manufacture, sale, or barter of any spirituous, malt, vinous, fermented, or other intoxicating liquors, were held to be efficacious, and that imported liquors or liquids shall, upon arrival in a state, fall within the category of domestic articles of a similar nature.

In *Plumley* v. *Massachusetts*, 155 U. S. 471 [39: 227], and in *Emert* v. *Missouri*, 156 U. S. 296 [39: 430], in the first of which the validity of a state law forbidding the manufacture and sale of imitation butter, and in the second the validity of an act compelling itinerant peddlers to take out licenses, were sustained, the scope and effect of the case of *Leisy* v. *Hardin* and of the act of Congress of August 8, 1890, were considered and a full review of the cases heretofore cited was gone into and their principles elaborately discussed.

In the light of these cases the act of South Carolina of January 2, 1895, must, as to those of its provisions which affect the plaintiff in the present suits, stand condemned.

It is not an inspection law. The prohibition of the importation of the wines and liquors of other states by citizens of South Carolina for their own use is made absolute, and does not depend on the purity or impurity of the articles. Only the state functionaries are permitted to import into the state, and thus those citizens who wish to use foreign wines and liquors are deprived of the exercise of their own judgment and taste in the selection [100] of commodities. To empower a *state chemist to pass upon what the law calls the "alcoholic purity" of such importations by chemical analysis can scarcely come within any definition of a reasonable inspection law.

It is not a law purporting to forbid the importation, manufacture, sale, and use of intoxicating liquors, as articles detrimental to the welfare of the state and to the health of the inhabitants, and hence it is not within the scope and operation of the act of Congress of August, 1890. That law was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. When that law provided that "all fermented, distilled, or intoxicating liquors transported into any state or territory, remaining therein for use, consumption, sale, or storage therein, should, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise," evidently equality or unformity of treatment under state laws was intended. The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the state cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful.

Whether those provisions of the act which direct that so-called contraband liquors may be seized without warrant by any state constable, sheriff, or policeman, while in transit or after arrival, whether in possession of a common carrier, *depot agent, express agent, or [101] private person, and which subject common carriers to fine and imprisonment for carrying liquors in any package, cask, jug, box, or other package, under any other than the proper name or brand known to the trade, and which forbid the bringing of any suit for damages alleged to arise by seizing and detention of liquors under the act, would be lawful in an inspection law otherwise valid, we do not find it necessary to now consider. It was pressed on us, in the argument, that it is not competent for a state, in the exercise of its police power, to monopolize the traffic in intoxicating liquors, and thus put itself in competition with the citizens of the other states.

This phase of the subject is novel and interesting, but we do not think it necessary for us now to consider it. It is sufficient for the present cases to hold, as we do, that when a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other states; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting state as against similar products of the other states.

There has been filed in the record a suggestion by the attorney general of the state of South Carolina that, since the trials of these cases in the court below, there has been passed by the general assembly of that state a further act approved by the governor on March 6, 1896, which act, it is submitted, supersedes and repeals parts of the act which has been under consideration in these cases; and we are asked to consider the provisions of the more recent act.

So far as these actions at law are concerned, it is, of course, obvious that the damages recovered were for acts committed under the alleged authority of the act of 1895, and can-



Digitized by Google

not be affected by the provisions of the act of 1896, even if the invalidities of the former act were thereby remedied—a matter on which we express no opinion.

*The judgments of the Circuit Court are affirmed.*

Mr. Justice **Brewer** did not hear the argument and took no part in the decision of this case.

Mr. Justice **Brown** dissenting:

**102]** *I am unable to concur in the opinion of the court holding the South Carolina dispensary law to be unconstitutional as applied to the facts of this case. While I see no reason to question the propriety of our rulings in the cases analyzed in the opinion, of *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 [24: 527], *Minnesota* v. *Barber*, 136 U. S. 313 [34: 455, 3 Inters. Com. Rep. 185], and *Brimmer* v. *Rebman*, 138 U. S. 78 [34: 862, 3 Inters. Com. Rep. 485], they do not seem to me to have any considerable bearing upon the question in controversy, in view of the recent legislation by Congress upon the subject of intoxicating liquors.

In *Leisy* v. *Hardin*, 135 U. S. 100 [34: 128, 3 Inters. Com. Rep. 36], this court, in April, 1890, overruling the prior case of *Thurlow* v. *Massachusetts*, 46 U. S. 5 How. 504 [12: 256], held that a state statute prohibiting the sale of intoxicating liquors, except for certain purposes, and under license from a county court, was, when applied to a sale by an importer of liquors brought from another state in the original packages, unconstitutional and void, as repugnant to the power of Congress to regulate commerce. Following closely upon this decision, and probably in consequence of it, Congress, upon August 8 of the same year, enacted what is popularly known as the "Wilson Bill," and declared that all such liquors transported into any state, or remaining there for use, consumption, sale, or storage, should, upon arrival, be "subject to the operation and effect of the laws of such state, enacted in the exercise of its police powers," to the same extent as if they had been produced in such state.

The effect of this enactment seems to me to withdraw intoxicating liquors from the operation of the commerce clause of the Constitution, and to permit the traffic in them to be regulated in such manner as the several states, in the exercise of their police powers, shall deem best for the general interests of the public. The act is not limited in its operation, as the majority of opinion seems to assume, to state laws forbidding the importation, manufacture, and sale of such liquors; but declares that they shall be subject, upon their arrival within the state, to the operation of *all* its laws **103]** enacted in the exercise *of its police powers. Adopting the very language of the act of Congress, § 32 of the dispensary law provides: "That all fermented, distilled, or other liquors or liquids containing alcohol, transported into this state or remaining herein for use, sale, consumption, storage, or other disposition, shall, upon introduction and arrival in this state, be subject to the operation and effect of this law, to the same extent and in the same manner as though such liquors or liquids had been produced in the state."

We cannot fail to recognize the growing sentiment in this country in favor of some restrictions upon the sale of ardent spirits, and whether such restrictions shall take the form of a license tax upon dealers, a total prohibition of all manufacture or sale whatever, or the assumption by the state government of the power to supply all liquors to its inhabitants, is a matter exclusively for the states to decide.

The 1st section of the dispensary law of South Carolina declares that the manufacture, sale, receipt, acceptance, or keeping in possession of alcoholic liquors, except when bought from a state officer authorized to sell the same, are declared to be contraband, and against the morals, good health, and safety of the state, and may be seized wherever found, without warrant. Now, as Congress has expressly declared that such articles shall, upon their arrival in the state, become subject to its laws to the same extent as if they had been originally produced there, and, as the dispensary act does not declare them contraband as imported liquors, or because they were imported, but because they were not bought from a state officer authorized to sell the same, and as the law makes no discrimination in that particular between imported and domestic liquors, it is impossible for me to see why Congress has not directly authorized the action that was taken by the state officers in seizing these liquors. The power to declare intoxicating liquors to be contraband and to prohibit their manufacture and sale *in toto* was affirmed by this court in *Mugler* v. *Kansas*, 123 U. S. 623 [31: 205], and if the provision requiring them to be bought of the state dispensary be valid, it applies as well to imported as to domestic liquors.

*But, as I understand, the court bases **104]** to a certain extent its opinion of the unconstitutionality of this act upon the fact that the traffic in intoxicating liquors is not absolutely prohibited, but is monopolized by the state itself through the agency of a state commissioner, who is required (§ 3) to "purchase all intoxicating liquors for lawful sale" in the state, and to "furnish the same to such persons as may be designated as dispensers thereof," to be sold as thereafter provided in the act. Conceding this to be so, I am unable to see that any provision of the Federal Constitution is thereby infringed. The Constitution does, indeed, require of each state a republican form of government, and, in the 10th section of the 1st article, imposes certain limitations upon state action, none of which have any relevancy to the subject under consideration. Except as restricted by the provisions of this section, the several state legislatures possess, so far as any interference by the Federal government is concerned, full legislative powers, and, with respect to the subject of intoxicating liquors, are, since the passage of the "Wilson bill," untrammeled by the Federal Constitution.

Granting that the act gives the state itself a monopoly of all traffic in such liquors, it is not a monopoly in the ordinary or odious sense of the term, where one individual or corporation is given the right to manufacture or trade which is not open to others, but a monopoly



Digitized by Google

for the benefit of the whole people of the state, the profits of which, if any, are enjoyed by the whole people; in short, a monopoly in the same sense in which the Postoffice Department, and the right to carry the mails, is a monopoly of the Federal government. *Lowenstein* v. *Evans*, 69 Fed. Rep. 908.

The only objections to the dispensary law which strike me as being of any force are the provisions of the 15th and 23d sections, requiring the state commissioner to purchase his supplies from the brewers and distillers in the state; but even this provision, though perhaps unwise, is subject to two conditions: first, that their product shall reach the standard required by the act; and, second, that such supplies can be purchased as cheaply from such brew-
105] ers and *distillers in this state as elsewhere. As this restriction is practically no restriction at all, and only incorporates in the statute exactly what the law would imply without it, I see no valid objection to it.

But even if it were conceded that this particular provision of the law were inoperative, and might be so declared in a case properly raising that question, it is not of the essence of the law, but a mere incident to the power of the commissioner, and surely should not have the sweeping effect of rendering the whole law unconstitutional and void. The main object of the act is to preserve the health and morals of the people by securing to them pure liquors, prohibiting individual dealings in such liquors, and requiring all such traffic to be carried on through the agencies of the state. Such methods of dealing with this traffic are by no means unknown abroad. Indeed, I understand the act to be but the reproduction in this country of what is know as the Gothenberg system.

It is entirely well settled that the unconstitutionality of a particular provision will not invalidate an entire statute, unless such provision embodies the main purpose of the statute, or is so connected with such purpose that it is inseparable from it, or unless the court can see that the legislature would not have passed the act without such provision. This doctrine has been repeatedly affirmed by this court. *Bank of Hamilton* v. *Dudley*, 27 U. S. 2 Pet. 492 [7: 496]; *Austin* v. *Boston*, 74 U. S. 7 Wall. 694 [19: 224]; *Keokuk N. L. Packet Co.* v. *Keokuk*, 95 U. S. 80 [24: 377]. Indeed, in *Tiernan* v. *Rinker*, 102 U. S. 123 [26: 103], this court held an act of the legislature of Texas, taxing intoxicating liquors, to be inoperative only so far as it discriminated against imported wines or beers; and that, as defendant was also engaged in selling other liquors, an injunction was properly refused. That the provision that the commissioner in purchasing the liquors shall give preference to those of domestic manufacture is separable from the main purpose of the act seems to me too clear for argument. That the legislature would have passed the act without this provision is conclusively shown by the fact that, in a general amendment and re-enactment of this law, made in 1896, this provision was omitted.

106] *While the power of courts to declare an act of legislature to be unconstitutional undoubtedly exists, it is one of great delicacy, particularly when brought to bear upon the legislative acts of another sovereignty. In one of the early cases decided by this court (*Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87, 128 [3: 162, 175]), it was said by Chief Justice Marshall: "But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Still more explicit is the language of Chief Justice Waite in *Union P. R. Co.* v. *United States* ("*Sinking Fund Cases*"), 99 U. S. 700, 718 [25: 496, 501]: "It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

I regard these words as particularly applicable to the dealings by this court with the proceedings of a state legislature, and that their right to determine what is for the best interests of their people should be carefully respected, except where it comes in manifest conflict with the dominant law. Especially should everything be avoided which carries the suggestion of a vexatious interference with state action. The manifest dangers to the future of the country, which lurk in the inflexibility of the Federal Constitution, can only be averted by carefully distinguishing between such laws as practically concern the inhabitants of a particular state only, and are intended bona fide for their welfare, and such as are a mere subterfuge for an unlawful discrimination, and cannot be carried into effect without doing palpable injustice to citizens of other states. It should not be overlooked in this *connection that the complaints in [107 this case emanate from a citizen of South Carolina, who seeks to defy the law of his own state, and puts forward as his excuse the injustice done the citizens of other states who make no complaint of her action in this particular. If a state cannot prohibit her own citizens from importing liquors, as well as buying them at home, the "Wilson bill" is set at nought, and the prohibitory laws of the several states rendered inoperative in a vital particular. The fact that these liquors were imported for complainant's own use and consumption, instead of for sale, raises no question under the Federal Constitution. Both are under the ban of the statute.

I am unable to see wherein that section of the dispensary act of South Carolina, which authorized the seizure made in this case, conflicts in any particular with the Federal Constitution.



Digitized by Google

J. M. SCOTT *et al., Appts.,*
*v.*
JAMES DONALD (No. 2).

(See S. C. Reporter's ed. 107-117.)

*Injunction to restrain trespass—constitutional amount—including other persons—persons not parties.*

1. An injunction to restrain executive officers of a state from continued and repeated acts of trespass in seizing and carrying away and confiscating for the use of the state the imported property of the complainant, under alleged authority of an unconstitutional statute, is not invalid on the ground that it is a proceeding against the state, or that it interferes with official discretion.
2. A controversy exceeding the value of $2,000 is presented in a suit for an injunction, where complainant intends to import certain liquors exceeding $2,000 in value, and defendants have seized some thus imported, and threatened to seize all that he shall import, under an unconstitutional statute.
3. A citizen whose property imported is seized by officials under an unconstitutional statute cannot proceed for an injunction on behalf of other persons who may make similar importations.
4. Officials who are not parties to or represented in a suit for an injunction against enforcing an unconstitutional statute cannot be included in the injunction.

[No. 410.]

*Argued October 21, 22, 1896. Decided January 18, 1897.*

APPEAL from a decree of the Circuit Court of the United States for the District of South Carolina decreeing a perpetual injunction restraining defendants and others from seizing and carrying away wines or spirituous liquors brought into South Carolina, etc., in an action brought by James Donald, plaintiff, against J. M. Scott *et al.* *Decree amended* by restricting it to the parties named as plaintiff and defendants, *and otherwise affirmed.*

See same case below, 67 Fed. Rep. 854.

Statement by Mr. Justice **Shiras:**

In the circuit court of the United States for the district of South Carolina, on April 25, 1895, James Donald, a citizen of the United States and of the state of South Carolina, in his own behalf and on behalf of all other persons in the state of South Carolina, as importers for their own use and consumers of the wines, ales, and spirituous liquors, the products of other states and foreign countries, filed 109]a bill in equity against J. M. Scott, *M. T. Holley, E. C. Beach, and R. M. Gardner, claiming to act as constables of the state of South Carolina, and all other persons whomsoever claiming to act as such constables or as county sheriffs, municipal policemen, or executive officers, or in any capacity whatever, under or by virtue of an act of the general assembly of the state of South Carolina, approved January 2, 1895, and generally known as the "dispensary law."

The bill alleged that the defendants named had on several occasions seized and carried away packages of wines and liquors belonging to the plaintiff, being products of the states of New York, Maryland, and California respectively, and imported by the plaintiff for his own use and consumption, and not intended for sale, barter, or exchange by the plaintiff within the state of South Carolina; and that the defendants claimed, in so doing, to act by virtue of the said act of January 2, 1895, which act was alleged by the plaintiff to be void and unconstitutional, and to furnish no protection to the said defendants in their said acts of trespass and seizure. The bill further alleged that the plaintiff had brought several actions at law against the said defendants in the circuit court of the United States for damages caused by the said unlawful acts, which said suits were still pending; that notwithstanding the bringing of said suits the said defendants, and others, constables of the state of South Carolina, have continued to seize and carry away ales, wines, and spirituous liquors of the plaintiff and of other persons in the state of South Carolina, imported from other states and foreign countries, and threaten to continue so to do. The bill further alleges that protection of the plaintiff's rights by actions at law involved a multiplicity of suits against said constables, and that by said dispensary act the remedy of replevin was denied to the plaintiff in the courts of South Carolina; and that all said constables were wholly irresponsible financially and unable to respond in damages, and that the plaintiff's constitutional rights, privileges, and immunities were now being and are threatened to be, continually invaded and grossly violated without redress, and to his irreparable injury. The bill avers that the said *right to import wines and spirituous li- [110 quors for his own use and consumption is of the money value of upwards of $2,000 and also that the value of said articles intended to be imported from other states and foreign countries by this plaintiff for his own use and consumption, from time to time, and which are threatened to be seized by said constables, exceeds the sum of $2,000.

The plaintiff prayed for a preliminary and a final injunction, restraining the defendants named, and all other persons claiming to act as constables, and all sheriffs, policemen, and other officers, acting or claiming to act under said dispensary act, from seizing and carrying away wines or spirituous liquors imported or brought into the state of South Carolina for his own use or consumption, and from forcibly entering or attempting to search the dwelling house of the plaintiff for any such articles, and from hindering and preventing the plaintiff or any other person from importing, holding, possessing, and using the said liquors so imported.

After argument a preliminary injunction was issued on May 9, 1895. The plaintiff had leave to amend his bill by adding the averment

NOTE.—*As to when injunction to restrain acts of public officers will be granted,* see note to Mississippi v. Johnson, 18: 437.

*As to amount necessary to give jurisdiction in circuit court cases prior to act of 1875; amount necessary since act of 1875; amount in dispute,*—see note to Schunk v. Moline, M. & S. Co. 37: 255.



Digitized by Google

that the other said persons on behalf of whom he sues, to wit, importers for their own use and consumers in the state of South Carolina of such ales, wines, and spirituous liquors as aforesaid, are too numerous to make parties complainant to the bill, and that some of them are unknown.

Subsequently the defendants pleaded to the jurisdiction of the court, 1st, because the suit is in effect a suit against the state; 2d, because the bill presents no question arising under the Constitution or laws of the United States; 3d, because the bill presents no case upon which the jurisdiction of a court of equity can be founded, there being plain and adequate remedies at law for the injuries complained of; and, 4th, because plaintiff hath not made or stated in his bill a case to entitle him to the relief prayed for. They also answered admitting some and denying others of the allegations of the bill. A replication was filed. Afterwards an agreed statement of facts was filed. Among the facts 111 so stated was the fact that, "in the several actions at law mentioned in the bill, final judgments against the defendants had, upon trial, been obtained; that notwithstanding said recoveries and notwithstanding the pendency of this bill, other seizures of wines and liquors imported by the plaintiff and by other persons named had been made; that the plaintiff testified that he intends to import for his own use, from time to time as he may need the same, ales, wines, and liquors, the products of other states, of the value exceeding $2,000, which are threatened to be seized by the state constables, claiming to act under the dispensary law; that the value of the right of importation of ales, wines, and other liquors, products of other states and countries, is of the value of $2,000 and upwards; that the difference in the price to the consumer, like the plaintiff, of such liquor bought at the state dispensary of South Carolina, and that bought out of the state, is about 50 to 75 per cent in favor of imported liquors; that the defendants, state constables who have made the seizures, are all insolvent and financially irresponsible, except Chief Constable Holley, who had not personally made any seizure of plaintiff's liquors, except the first seizure.

The case came on to be heard on the pleadings and the agreed statement of facts, and thereupon the injunction theretofore granted was made perpetual. An assignment of errors was filed and an appeal was allowed to this court.

*Mr.* **William A. Barber,** Attorney General of South Carolina, for appellants:

This is in effect a suit against the state of South Carolina.

*Poindexter* v. *Greenhow* ("*Virginia Coupon Cases*") 114 U. S. 270 (29: 185); *Louisiana* v. *Jumel*, 107 U. S. 711 (27: 448); *Cunningham* v. *Macon & B. R. Co.* 109 U. S. 446 (27: 992); *Ex parte Tyler*, 149 U. S. 191 (37: 698); *Pennoyer* v. *McConnaughy*, 140 U. S. 1 (35: 363).

The complainant seeks a single injunction that will serve to restrain the whole executive branch of the state government.

It amounts to a mandate to the state to desist from the seizure of liquors declared contraband by a statute which has been held valid by her own supreme court.

This injunction does not operate upon the defendants as individuals, but through them and other officers upon the state, controlling her action, and directly affecting her interest alone.

The complainant had a plain and adequate remedy at law, and the court was without authority to grant the order of injunction.

*Barber* v. *Barber*, 62 U. S. 21 How. 582 (16: 226); *Watson* v. *Sutherland*, 72 U. S. 5 Wall. 74 (18: 580); *Mississippi Mills* v. *Cohn*, 150 U. S. 202 (37: 1052); *Scott* v. *Neely*, 140 U. S. 106 (35: 358); *Wolfe* v. *Burke*, 56 N. Y. 118; *Springer* v. *Walters*, 139 Ill. 419; *Jones* v. *Black*, 48 Ala. 540.

The bill of complaint in this case does not show affirmatively upon its face that the United States circuit court has jurisdiction.

*United States* v. *Southern P. R. Co.* 49 Fed. Rep. 297; *United States, McIntosh*, v. *Crawford*, 47 Fed. Rep. 561; *Tennessee* v. *Union & P. Bank*, 152 U. S. 454 (38: 511); *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138 (37: 1030).

The bill does not show a Federal question so as to give jurisdiction to the United States circuit court, and the order of injunction was granted without authority, or exceeded the authority of the court.

The sole question is whether so much of the dispensary law of South Carolina as prohibits the importation of alcholic liquors from other states for personal use was enacted in the legitimate exercise of the police power of the state; and, if so, it is above the Constitution and acts of Congress, and no Federal question is presented.

The police power of a state is that great attribute of sovereignty by which a state is justified in its self-protection and self-preservation; and it implies the use of the necessary means for the protection of rights of the sovereign and the citizen.

The state gave up to the Union the right to regulate commerce, tax imports, declare war, proclaim peace, emit bills of credit, coin money, and operate the postoffice. But it gave up no right based upon those fundamental principles not laid down in the Federal Constitution, and which are necessary to the protection of itself, necessary to the safety, comfort, and well-being of society, and necessary to the protection of its citizens against the evils of intemperance, pauperism, and crime. The police power is among the reserved powers of the state.

*New York* v. *Miln*, 36 U. S. 11 Pet. 102 (9: 648).

The police power is described as the power to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase industries of the state, develop its resources, and add to its wealth and property.

*Barbier* v. *Connolly*, 113 U. S. 31 (28: 925).

The nature and authority of the police power are best described by the maxim *Salus populi suprema lex*, while the principle *Sic utere tuo ut alienum non laedas* furnishes in most cases a convenient rule for its application.

*Stone* v. *Mississippi*, 101 U. S. 814 (25: 1079).



Digitized by Google

Neither the 14th Amendment—broad and comprehensive as it is—nor any other Amendment to the Federal Constitution was designed to interfere with the police power of the states.

*Wilkerson* v. *Rahrer* ("*Re Rahrer*") 140 U. S. 545 (35: 572); *Trageser* v. *Gray*, 73 Md. 250, 9 L. R. A. 780.

It is under this reserved and inalienable power of the state that we seek to uphold the dispensary act as a valid police measure. The state may restrain, regulate, or prohibit the exercise of any calling, business, or pursuit that militates against the morals, health, peace, good order, and safety of society.

The state may even take immediate control of such hurtful calling, and, for the purpose of restricting its baneful effects, may conduct it herself, to the exclusion of her citizens.

*Crowley* v. *Christensen*, 137 U. S. 90–92 (34: 623, 624).

An exercise by the state of the exclusive right to engage in such a calling for the benefit of all her citizens has none of the elements of a monopoly. It is the state holding the right for the benefit of all instead of granting the right to one or a few to the exclusion of others.

*Butchers' Benev. Asso.* v. *Crescent City L. S. L. & S. H. Co.* ("*Slaughter House Cases*") 83 U. S. 16 Wall. 66 (21: 405); *State* v. *Brennan's Liquors*, 25 Conn. 278; *Lincoln* v. *Smith*, 27 Vt. 328; *Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall. 129 (21: 929); *Lowenstein* v. *Evans*, 69 Fed. Rep. 908.

It is not for the judiciary or the executive departments to inquire whether the legislature has violated the genius of the government or the general principles of liberty, or the rights of man, or whether these acts are wise or expedient, but only whether the legislature has transcended the limits prescribed by the fundamental law.

Potter's Dwarr. Stat. 362, 363; Cooley, Const. Lim. 6th ed. 197; 3 Am. & Eng. Enc. Law, 673; Endlich, Interpretation of Statutes, p. 8, § 5; Sedgw. Stat. & Const. Law, 80; *Sharpless* v. *Philadelphia*, 21 Pa. 160, 59 Am. Dec. 759; *Reeves* v. *Corning*, 51 Fed. Rep. 774; *Morrison* v. *Springer*, 15 Iowa, 304.

The court will declare a law unconstitutional only when it is clearly, palpably, and plainly inconsistent with the provisions of that instrument.

*Bennett* v. *Boggs*, 1 Baldw. 74; *Union P. R. Co.* v. *United States* ("*Sinking Fund Cases*"), 99 U. S. 700 (25: 496).

The dispensary law is a police measure.

*State, George*, v. *Aiken*, 42 S. C. 222, 26 L. R. A. 345.

The act shows that the legislature had in view the protection of the "morals, good health, and safety of the state" in dealing with this question.

*Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall. 129 (21: 929).

A state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to the Constitution of the United States.

*Foster* v. *Kansas*, 112 U. S. 201 (28: 629); *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25 (24: 989).

Legislation by a state permitting the manufacture within her limits of intoxicating liquors, to be there sold and bartered for general use as a beverage, does not necessarily infringe any rights, privileges, or immunities secured by the Constitution of the United States; and under the police power of the state it is competent for the legislature to determine primarily what measures were appropriate or needful for the protection of the public morals, the public health, or the public safety.

*Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465 (31: 700, 1 Inters. Com. Rep. 823), held that a law of Iowa forbidding the bringing into the state from other states of intoxicating liquors without a certificate, as therein required, was a regulation of commerce among the states, and was void as being repugnant to the Constitution.

*Leisy* v. *Hardin*, 135 U. S. 100 (34: 128, 3 Inters. Com. Rep. 36), held that a party had the right under the interstate commerce acts to import intoxicating liquor into the state, and the importer had the right to sell the imported liquor in the state so long as it remained in the original package. This case induced the passage of the Wilson act.

In *Wilkerson* v. *Rahrer* ("*Re Rahrer*"), 140 U. S. 545 (35: 572), the constitutionality of this act was assailed, but it was sustained by the court.

The Wilson act is the controlling act now and by it Congress has provided that upon the arrival of liquors within the state, they become subject to the police power of the state, to the same extent and in the same manner as though such liquors had been produced in the state.

This act did not add to the police power of the state, but did give expression to the will of Congress that a state could control intoxicating liquors, as articles of commerce, upon their arrival in the state, no matter where manufactured or from where imported.

*Re Langford*, 57 Fed. Rep. 570, 4 Inters. Com. Rep. 487.

But it is contended by the complainant that while he had no right as a citizen to bring intoxicating liquors into the state for sale, he had the right to bring them in for his own use.

The dispensary law prohibits this.

*Cantini* v. *Tillman*, 54 Fed. Rep. 974.

The Wilson act makes all liquors, upon their arrival in the state for sale, use, and consumption, subject to the laws of the state passed in the exercise of the police power.

But it is contended in this case that the dispensary law is in contravention of the inter state commerce acts, because it discriminates against products of other states and against citizens of other states:

1st. In that it allows dispensaries to sell intoxicating liquor, while citizens from other states are not allowed to send it into the state for sale.

2d. In that it discriminates against intoxicating liquors, the product of other states, by prohibiting their introduction into the state for sale or use.

The act does authorize the sale of ales, wines, and liquors by the state, and does prohibit all citizens of this state, as well as citizens of other states, from bringing them into the state for sale or use.

The act does allow the commissioner for the state to buy liquors outside the state, and does



Digitized by Google

prohibit other persons from buying and bringing them into the state.

But this is a legitimate exercise of the police power, and does not in any way regulate commerce between the states, and is not a discrimination against products or citizens of other states. It places citizens and products of this state on an equal footing with those of other states. Domestic liquors and foreign liquors are alike subject to the provision of the law. While citizens of other states are forbidden to sell liquors within this state, the prohibition extends to citizens of this state as well; and while a citizen is prohibited from importing liquors, he is likewise prohibited from purchasing within the state any liquors not previously analyzed by the chemist, and sold by the proper officers of the state.

The act may remotely affect commerce, but it does not interfere with or regulate it by discrimination or otherwise.

*Welton* v. *Missouri*, 91 U. S. 275 (23: 347); *Brown* v. *Houston*, 114 U. S. 622 (29: 257); *Walling* v. *Michigan*, 116 U. S. 455 (29: 694); *Mobile County* v. *Kimball*, 102 U. S. 691 (26: 238).

The commercial power of Congress continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character.

After the goods have been sent from one state to another for sale, or in consequence of a sale, and have reached their destination, they become part of the general property of the state, and are subject to its regulations and taxes just as all other property is, provided only that there be no discrimination against them by reason of their extra state origin.

*Woodruff* v. *Parham*, 75 U. S. 8 Wall. 123 (19: 382); *Howe Mach. Co.* v. *Gage*, 100 U. S. 676 (25: 754); *Hinson* v. *Lott*, 75 U. S. 8 Wall. 148 (19: 378); *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25 (24: 989); *Walling* v. *Michigan*, 116 U. S. 446 (29: 691); *Plumley* v. *Massachusetts*, 155 U. S. 461 (39: 223); *Sherlock* v. *Alling*, 93 U. S. 103 (23: 820); *Pittsburg & S. Coal Co.* v. *Louisiana*, 156 U. S. 590 (39: 544); *Pittsburg & S. Coal Co.* v. *Bates*, 156 U. S. 577 (39: 538); *Western U. Teleg. Co.* v. *James*, 162 U. S. 662 (40: 1109).

The dispensary law is a legitimate exercise of the police power.

The law does not discriminate against liquors, the products of other states, but makes the liquors produced in this state, as well as those imported, subject to it.

The law does not discriminate against the citizens of other states. Citizens of this state are put on an equality with them. None of them can sell intoxicating liquors. It is true the state sells, but none of her citizens can do so.

The law does require her citizens to buy from dispensaries, but no citizen from other states is inhibited from doing so.

There is no discrimination in the law against citizens or products of other states, as such, and because they are citizens and products of other states, but the object is to protect the public morals, public health, and public safety. It is not the intention of the law to regulate interstate commerce, but to protect the people of the state.

But it may be said that while the state sells liquors to her own citizens she cannot prohibit the introduction of liquors from other states upon the ground that they are deleterious.

The provision in the act requiring all liquors sold by the dispensaries to undergo an analysis and their purity to be certified sufficiently answers this objection.

The complainant is denied no right, privilege, or immunity secured by the Constitution or laws of the United States, and no Federal question arises in this action. The simple averment in the bill that a Federal question is presented is not sufficient.

*New Orleans* v. *New Orleans Water Works Co.* 142 U. S. 79 (35: 948); *Hamblin* v. *Western Land Co.* 147 U. S. 532 (37: 268).

As there is no Federal question involved in the proceeding, the circuit court exceeded its jurisdiction in making the order of injunction.

*Emert* v. *Missouri*, 156 U. S. 296 (39: 430); *Plumley* v. *Massachusetts*, 155 U. S. 471 (39: 227).

The circuit court, if warranted in making an order of injunction at all, was not authorized to grant a perpetual injunction to restrain other officers than those named in the bill, nor was it authorized to restrain them from seizing ales, wines, and liquors imported into the state by others than the complainant in the bill.

*Iveson* v. *Harris*, 7 Ves. Jr. 256; *Fellows* v. *Fellows*, 4 Johns. Ch. 25; *Schalk* v. *Schmidt*, 14 N. J. Eq. 268; *Ex parte Lennon*, 64 Fed. Rep. 320; *United States* v. *Agler*, 62 Fed. Rep. 824; *Société Anonyme de la Distillerie* v. *Western Distilling Co.* 42 Fed. Rep. 96; *United States* v. *Debs*, 64 Fed. Rep. 741, 5 Inters. Com. Rep. 168; *United States* v. *Elliott*, 64 Fed. Rep. 85, 5 Inters. Com. Rep. 148.

In all of the above cases in which orders of injunction were granted charges of aiding and abetting and conspiring with parties were made in the bills. None of those cases apply to the case at bar.

*Ayres* v. *Carrer*, 58 U. S. 17 How. 591 (15: 179); *McArthur* v. *Scott*, 113 U. S. 392 (28: 1031); *Hovey* v. *Wilson*, 76 U. S. 9 Wall. 501 (19: 762); *Ex parte Jordan*, 94 U. S. 248 (24: 123); *Green* v. *Mills*, 16 C. C. A. 529, 25 U. S. App. 383, 69 Fed. Rep. 852, 30 L. R. A. 90.

The dispensary system, as a solution of the liquor question, is yet in its infancy, and the state legislature in passing the act of 1896 endeavored to perfect the business details of the institution. At the same time the inspection feature of the law was materially changed. It is to this alteration particularly that we invite attention, and respectfully ask that the court, if it deem proper, consider its provisions in this respect as affecting the act approved January 2, 1895, and the order of injunction in this case.

The states, in the exercise of the police power, may pass inspection laws which are not in their express words or operation a burden upon interstate commerce, by discriminating against the products or citizens of other states, and which operate equally upon products and citizens of the states themselves and citizens and products of other states.

*Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 492 (30: 696), 1 Inters. Com. Rep. 45; *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 208 (6: 71); *Brown* v. *Maryland*, 25 U. S. 12 Wheat.



Digitized by Google

419 (6: 678); *Voight* v. *Wright*, 141 U. S. 65 (35: 639); *Crutcher* v. *Kentucky*, 141 U. S. 59 (35: 653); *Brimmer* v. *Rebman*, 138 U. S. 78 (34: 862), 3 Inters. Com. Rep. 485; *Smith* v. *Alabama*, 124 U. S. 475 (31: 511), 1 Inters. Com. Rep. 804; *Dent* v. *West Virginia*, 129 U. S. 114 (32: 623); *Plumley* v. *Massachusetts*, 155 U. S. 472 (39: 227).

The legislature is the judge of what is against the public health, morals, and safety of the state, and when in the exercise of the police power it enacts a law declaring the use of any article to be against them, it will not conflict with the 9th article of the Constitution of the United States when it discriminates against the citizens and products of other states.

*Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 (24: 527); *Crowley* v. *Christensen*, 137 U. S. 91 (34: 624); *Plumley* v. *Massachusetts*, 155 U. S. 472 (39: 227).

The state, in the exercise of the police power, cannot enact laws protecting the people from the consequences of ignorance, incapacity, fraud, disease, poverty, and crime.

*Dent* v. *West Virginia*, 129 U. S. 114 (32: 623); *Plumley* v. *Massachusetts*, 155 U. S. 472 (39: 227); *Minnesota* v. *Barber*, 136 U. S. 313 (34: 455), 3 Inters. Com. Rep. 185; *Brimmer* v. *Rebman*, 138 U. S. 78 (34: 862), 3 Inters. Com. Rep. 485.

*Mr.* **J. P. Kennedy Bryan,** for appellee:

This is not a suit against the state. Suits against persons who hold office under the state, for illegal acts done by them under color of an unconstitutional law of the state are not suits against the state.

*Pennoyer* v. *McConnaughy*, 140 U. S. 1 (35: 363).

A suit against the state is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts.

*Re Ayers*, 123 U. S. 443 (31: 216); *Louisiana* v. *Jumel*, 107 U. S. 711 (27: 448); *Antoni* v. *Greenhow*, 107 U. S. 769 (27: 468); *Cunningham* v. *Macon & B. R. Co.* 109 U. S. 446 (27: 992); *Hagood* v. *Southern*, 117 U. S. 52 (29: 805).

The other class is where a suit is brought against defendants who, claiming to act as officers, commit acts of wrong and injury to the right and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state—or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial—is not, within the meaning of the 11th Amendment, an action against the state.

*Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738 (6: 204); *Davis* v. *Gray*, 83 U. S. 16 Wall. 203 (21: 447); *Tomlinson* v. *Branch*, 82 U. S. 15 Wall. 460 (21: 189); *Litchfield* v. *Webster County*, 101 U. S. 773 (25: 925); *Allen* v. *Baltimore & O. R. Co.* 114 U. S. 311 (29: 200); *Louisiana Board of Liquidation* v. *McComb*, 92 U. S. 531 (23: 623); *Poindexter* v. *Greenhow* ("*Virginia Coupon Cases*") 114 U. S. 270 (29: 185).

The complainant has made and stated a case to entitle him in a court of equity to relief.

The case stated and made is one of continuous, repeated, and threatened invasion, violation, and denial of constitutional commercial right, and further threatened seizures of property and invasions of the complainant's dwellings, and the threatened continued prevention in future of the complainant's importation and use of intoxicating liquors, the products of other states and foreign countries, done by persons against whom successive suits had been instituted on the law side of the same court, the United States circuit court, and who are alleged in the bill and admitted to be wholly irresponsible and unable financially to respond to any judgment for damages.

No stronger case could be stated for the interposition of a court of equity.

*Shelton* v. *Platt*, 139 U. S. 596 (35: 276); *Barthet* v. *New Orleans*, 24 Fed. Rep. 563; *Kilbourn* v. *Sunderland*, 130 U. S. 505 (32: 1005); *Watson* v. *Sutherland*, 72 U. S. 5 Wall. 75 (18: 580); *Barber* v. *Barber*, 62 U. S. 21 How. 582 (16: 226); *McConihay* v. *Wright*, 121 U. S. 201 (30: 932); *Carroll* v. *Safford*, 44 U. S. 3 How. 441 (11: 671).

The objection of multifariousness can be taken by a party to the bill only by demurrer or plea or answer, and cannot be taken at the hearing of the cause. The objection cannot be taken by a party in the appellate court.

*Oliver* v. *Platt*, 44 U. S. 3 How. 333 (11: 622); *Barney* v. *Latham*, 103 U. S. 215 (26: 518).

The bill, both as to the parties complainants and defendants, is properly brought, and the injunction is properly awarded as to parties.

*Smith* v. *Swormstedt*, 57 U. S. 16 How. 302 (14: 948); *West* v. *Randall*, 2 Mason, 193; *Bromley* v. *Smith*, 1 Sim. 8.

The provisions of the dispensary law, forbidding citizens from importing into the state ales, wines, and liquors from other states for their own use and consumption are not the lawful exercise of the police power of the state, but are in contravention of the Constitution of the United States or of the interstate commerce acts of Congress, but are authorized by the same.

*Woodruff* v. *Parham*, 75 U. S. 8 Wall. 140 (19: 387); *Hinson* v. *Lott*, 75 U. S. 8 Wall. 150 (19: 390); *Welton* v. *Missouri*, 91 U. S. 280 (23: 349); *Cook* v. *Pennsylvania*, 97 U. S. 573 (24: 1018); *Howe Mach. Co.* v. *Gage*, 100 U. S. 676 (25: 754); *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 490 (31: 709), 1 Inters. Com. Rep. 823; *Lyng* v. *Michigan*, 135 U. S. 167 (34: 153), 1 Inters. Com. Rep. 143; *Minnesota* v. *Barber*, 136 U. S. 320 (34: 458), 3 Inters. Com. Rep. 185; *Brimmer* v. *Rebman*, 138 U. S. 81 (34: 863), 3 Inters. Com. Rep. 485; *Voight* v. *Wright*, 141 U. S. 66 (35: 640); *Walling* v. *Michigan*, 116 U. S. 459 (29: 695); *Brennan* v. *Titusville*, 153 U. S. 299 (38: 722), 4 Inters. Com Rep. 658; *Plumley* v. *Massachusetts*, 155 U. S. 471 (39: 227).



Digitized by Google

Mr. Justice Shiras delivered the opinion of the court:

Having, in the cases at law in which the opinion has just been delivered, and for reasons therein given, reached the conclusion that the dispensary law of South Carolina, approved January 2, 1895, is so far unconstitutional 112]and void that this *plaintiff can maintain an action at law against these defendants for seizing his liquors, we are called upon now to consider whether there is a valid remedy by way of injunction to restrain executive officers from continued and repeated acts of trespass in seizing and carrying away and confiscating for the use of the state the property of the complainant so imported.

The bill prays for an injunction on the several grounds of irreparable damage; that the acts complained of prevent the exercise by the complainant of his right to import without molestation lawful commodities, the products of other states; to avoid multiplicity of suits; the want of adequate remedies at law.

The objections to proceedings against state officers by injunction are that it is, in effect, proceeding against the state itself, and that it interferes with the official discretion vested in the officers. The answer to such objections is found in a long line of decisions of this court: *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738 [6: 204]; *Dodge* v. *Woolsey*, 59 U. S. 18 How. 331 [15: 401]; *Louisiana Board of Liquidation* v. *McComb*, 92 U. S. 531 [23: 623]; *Cummings* v. *Merchants' Nat. Bank*, 101 U. S. 153 [25: 903]; *Memphis & L. R. R. Co.* v. *Berry*, 112 U. S. 609 [28: 837]; *Poindexter* v. *Greenhow* ("*Virginia Coupon Cases*") 114 U. S. 295 [29: 194]; *Allen* v. *Baltimore & O. R. Co.* 114 U. S. 315 [29: 201]; *Pennoyer* v. *McConnaughy*, 140 U. S. 1 [35: 363]; *Belknap* v. *Schild*, 161 U. S. 10, 18 [40: 599, 602].

*Ex parte Tyler*, 149 U. S. 164 [37: 689], was a case where the receiver of the South Carolina Railway Company filed a bill in equity in the circuit court of the United States against the treasurers and sheriffs, eighteen in number, in the counties through which the railroads in his possession passed, alleging that the treasurers were about to issue tax executions and the sheriffs about to levy and seize thereunder property of the railway company for the taxes for the fiscal year beginning November 1, 1890. The bill alleged that the taxes for that fiscal year were unconstitutional and illegal in part upon various grounds; that the levy and sale of the road would cause irreparable injury; that there was no adequate remedy at law; that a multiplicity of suits would be necessary to protect his rights if he sued at law; and prayed for an injunction against the issue and levy of the tax warrants in question. 113]After *answer and full hearing, the court issued an injunction restraining M. V. Tyler, sheriff of Aiken county, his deputies and agents, from further intermeddling, interfering with, keeping, and holding the personal property destrained upon by him belonging to the petitioner, as receiver, and ordering that the said property should be restored to the custody of the receiver. It being shown subsequently by affidavits that Tyler refused to comply with the injunction and continued to hold and detain said property, the court adjudged him guilty of contempt, imposed a fine upon him, and committed him to the custody of the marshal of the court until he should pay said fine or purge himself of his contempt. A petition for a writ of habeas corpus was filed in this court, and, upon the hearing of the cause, it was mainly argued, on behalf of the petitioner, that the proceedings in the circuit court were substantially a suit against the state of South Carolina, and that by its mandatory injunction upon its officers the court devested the state of its possession.

This court denied the writ, and, speaking through the Chief Justice, thus expressed the conclusion reached in the previous cases, many of which were cited in the argument:

"The object of this petition was . . . to protect the property, but even if it were to be regarded as a plenary bill in equity properly brought for the purpose of testing the legality of the tax, we ought to add that, in our judgment, it would not be obnoxious to the objection of being a suit against the state. It is unnecessary to retravel the ground so often traversed by this court in exposition and application of the 11th Amendment. The subject was but recently considered in *Pennoyer* v. *McConnaughy*, 140 U. S. 1 [35: 363], in which Mr. Justice Lamar, delivering the opinion of the court, cites and reviews a large number of cases. The result was correctly stated to be that where a suit is brought against defendants who claim to act as officers of a state, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state; or for compensation for damages; or, in a proper case, for *an in-[114 junction to prevent such wrong and injury; or for a mandamus in a like case to enforce the performance of a plain legal duty, purely ministerial,—such suit is not, within the meaning of the amendment, an action against the state. And while it is conceded that the principle stated by Chief Justice Marshall in the leading case of *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738 [6: 204], that 'in all cases where jurisdiction depends on the party, it is the party named in the record,' and that 'the 11th Amendment is limited to those suits in which a state is a party to the record,' had been qualified to a certain degree in some of the subsequent decisions of this court; yet it was also rightly declared that the general doctrine there announced, that the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state when to execute it would be to violate rights and privileges of the complainant that had been guaranteed by the Constitution and would do irreparable damage and injury to him, has never been departed from."

Suppose it established that the objections just mentioned fail, it is suggested that jurisdiction did not exist in the circuit court because the value in controversy did not exceed the sum of $2,000. It is alleged in the bill, and there was evidence to show, that the complainant intends to import for his own use, from time to time as he may need the same, ales, wines, and liquors, the products of other states, of the value exceeding $2,000, which



Digitized by Google

are threatened to be seized by the state constables, claiming to act under the dispensary law. And the agreed statement of facts contains the following statements: "Previous to filing of bill and temporary injunction granted in this case the state constable seized, intended and threatened to seize in future, all intoxicating liquors whatsoever coming into the state from other states and foreign countries, and to carry out in full all the provisions of the dispensary law of January 2, 1895; and the value of the right of importation of ales, wines, and other liquors, products of other states and countries, is of the value of $2,000 and upwards; and the difference in the price to the consumer, like the plaintiff, of such liquor [115] *bought at the state dispensary of South Carolina and bought out of the state is about 50 to 75 per cent in favor of imported liquors."

Such statements sufficiently concede that the pecuniary value of plaintiff's rights in controversy exceed the value of $2,000. Nor can it be reasonably claimed that the plaintiff must postpone his application to the circuit court, as a court of equity, until his property to an amount exceeding in value $2,000 has been actually seized and confiscated, and when the preventive remedy by injunction would be of no avail.

But while we think the complainant was entitled to an injunction against those defendants who had despoiled him of his property, and who were threatening to continue so to do, we are unable to wholly approve the decree entered in this case.

The theory of the decree is that the plaintiff is one of a class of persons whose rights are infringed and threatened, and that he so represents such class that he may pray an injunction on behalf of all persons that constitute it. It is, indeed, possible that there may be others in like case with the plaintiff, and that such persons may be numerous, but such a state of facts is too conjectural to furnish a safe basis upon which a court of equity ought to grant an injunction. We prefer to accept, in this respect, the views expressed by Mr. Justice Nelson in the case of *Cutting* v. *Gilbert*, 5 Blatchf. 259. There a bill had been filed by several bankers, as well for themselves as all others in the same interest, against the assessor and collector of a certain tax under the 99th section of the internal revenue act of June 30, 1884, seeking to restrain the collection of such tax as illegal, and the learned justice disposed of the question in the following language:

"This is a bill of peace to quiet the rights of parties, and to put an end to further litigation. The bill is founded on the idea that all persons in business as brokers, who are bankers doing business as brokers, charged with the tax in question, have such a unity or joinder of interest in contesting it that all may join in the bill for that purpose; and that as [116] *the parties are so numerous to make it inconvenient to join all of them, a determinate number may appear in the name of themselves and for the rest. I have not been able to concur in this view. The interest that will allow parties to join in a bill of complaint, or that will enable the court to dispense with the presence of all the parties, when numerous, except a determinate number, is not only an interest in the question, but one in common in the subject-matter of the suit; such as the case of disputes between the lord of a manor and his tenants; or between the tenants of one manor and those of another; or where several tenants of a manor claim the profits of a fair; or in a suit to settle a general fine to be paid by all the copyhold tenants of a manor, in order to prevent a multiplicity of suits. In all of these and the like instances given in the books, there is a community of interest growing out of the nature and condition of the right in dispute; for although there may not be any privity between the numerous parties, there is a common title out of which the question arises, and which lies at the foundation of the proceedings. . . . In the case before me, the only matter in common among the plaintiffs, or between them and the defendants, is an interest in the question involved, which alone cannot lay a foundation for the joinder of parties. There is scarcely a suit at law or in equity which settles a principle or applies a principle to a given state of facts, or in which a general statute is interpreted, that does not involve a question in which other parties are interested, as for instance, the doctrine of trusts, and the statutes of descents, of frauds, of wills, and the like. Yet no lawyer would contend that such an interest would justify a joinder of parties as plaintiffs, in a case arising under the law of trusts, or under any of the statutes mentioned. The same may be said of questions arising under the revenue laws, such as the tariff and the excise laws, and which are the subject of litigation in the courts almost daily. Large classes of persons, other than the parties to the suit, are interested in the questions involved and determined. To allow them to be made parties to the suit would confound the established order of judicial proceedings, and lead to endless perplexity and confusion."

*Similar views prevailed in the case of [117] *Baker* v. *Portland*, 5 Sawy. 566, where it was held by District Judge Deady, Mr. Justice Field concurring, that any number of persons who may from time to time be engaged in making street improvements under several and distinct contracts with a city are not therefore a class of persons having a common interest in the subject of street improvements, concerning which any one or more may sue for the whole.

The decree is also objectionable because it enjoins persons not parties to the suit. This is not a case where the defendants named represent those not named. Nor is there alleged any conspiracy between the parties defendant and other unknown parties. The acts complained of are tortious, and do not grow out of any common action or agreement between constables and sheriffs of the state of South Carolina. We have, indeed, a right to presume that such officers, though not named in this suit, will, when advised that certain provisions of the act in question have been pronounced unconstitutional by the court to which the Constitution of the United States refers such questions, voluntarily refrain from enforcing such provisions; but we do not think



Digitized by Google

it comports with well-settled principles of equity procedure to include them in an injunction in a suit in which they were not heard or represented, or to subject them to penalties for contempt in disregarding such an injunction. *Fellows* v. *Fellows*, 4 Johns. Ch. 25, citing *Iveson* v. *Harris*, 7 Ves. Jr. 257.

The decree of the court below should therefore be amended by being restricted to the parties named as plaintiff and defendants in the bill, and this is directed to be done, and it is otherwise affirmed.

Mr. Justice **Brewer** did not hear the argument and took no part in the decision of this case.

See dissenting opinion of Mr. Justice **Brown** in preceding case, p. 646.

---

**118]STATE OF MISSOURI**, *Complainant*,
*v.*
**STATE OF IOWA.**

(See S. C. Reporter's ed. 118-144.)

*Boundary line between the states.*

Order and decree made establishing the boundary line between Missouri and Iowa, and allowing compensation and expenses of remarking the same.

[No. 6, Original.]

*Submitted December 14, 1896. Decided January 18, 1897.*

ON APPLICATION of the state of Missouri, the state of Iowa consenting thereto, for decree on the report of commissioners appointed to remark the boundary line between Missouri and Iowa, etc. *Boundary line established.*

The facts are stated below.

*Mr.* **R. F. Walker**, Attorney General of Missouri, for complainant.

*Mr.* **Milton Remley**, Attorney General of Iowa, for defendant.

Mr. Chief Justice **Fuller** announced the decree of the court as follows:

This cause coming on to be heard on the application of the state of Missouri, the state of Iowa consenting thereto, for decree on the report of James Harding, Peter A. Dey, and Dwight C. Morgan, commissioners appointed by decretal order herein on February 3, 1896, to find and remark with proper and durable monuments such portions of the proper boundary line between the states of Missouri and Iowa, as run, marked and located by Hendershott and Minor, commissioners of this court, under the orders and decrees of this court of February 18, 1849, and January 3, 1851, as have become obliterated, especially between the 50th and 55th mile posts on the same; and it appearing that a difference of opinion has arisen in respect of certain allowances to be included in the expenses incurred in remarking said boundary line, it is ordered by the court that Commissioner Morgan be allowed his per diem for forty-six days' services, and that the account of expenses attached to said report be completed by the addition of that per diem in favor of said commissioner, and that said report as so completed in that particular be and the same is hereby in all things confirmed, as follows:

"To the Honorable the Supreme Court [119 of the United States:

The undersigned commissioners, appointed by the decree of your honorable court dated February 3, 1896, to find and remark with proper and durable monuments such portions of the boundary line between the states of Missouri and Iowa, run, marked, and located by Hendershott and Minor in accordance with decree of your honorable court dated Jan. 3, 1851, as have become obliterated, especially between the 50th and 55th mile posts on said line, etc., respectfully submit the following report:

On the 27th day of February last the commissioners met in the city of Chicago and fully discussed matters pertinent to the proper performance of the duties imposed upon them. Construing the decree as applying to all portions of the boundary line in question, the commissioners decided to advertise in newspapers published in counties in Missouri and Iowa adjacent to the boundary for information regarding such parts of said line as were in dispute or had become obliterated. This was done and considerable information elicited, but as the officials of one of the states interested declined to authorize the work necessary in retracing the line, excepting where directed in the decree, nothing was done beyond the finding and remarking "with proper and durable monuments" such portions of the line as were necessary for its proper relocation between the 40th and 60th mile points; as shown hereinafter.

After careful consideration it was decided to apply to Gen. W. W. Duffield, superintendent United States Coast and Geodetic Survey, for a detail from his corps of assistants to perform all field work necessary in carrying out the instructions of the court. It was decided that the employment of expert officers of the geodetic survey corps for the services required would result more satisfactorily to the states concerned than would the selection of any private parties, as the high professional attainments of these officers and their freedom from any possible bias regarding the boundary line to be established were ample guaranties for the entire reliability and impartiality of any work done by them.

Correspondence was accordingly had with Gen. Duffield, "who consented to detail [120 two of his assistants, and also to supply them with a complete outfit of all instruments and appliances necessary in the prosecution of the proposed work. This offer was at once accepted. A meeting was afterwards had in St. Louis March 11th, ult., when it was decided to meet at Lineville, Iowa, a point immediately upon the boundary line between Missouri and Iowa, for the purpose of personal investigation as to the proper point or points at which to commence operations. Two of the commissioners

NOTE.—*As to judicial settlement of state boundaries*, see note to Nebraska v. Iowa, 36: 798.



Digitized by Google

accordingly met at Lineville on March 18th, ult., and spent three days in the examination of the boundary line and of points on said line claimed to have been established by Hendershott and Minor in 1850. The first step taken was to decide regarding the proper points between which our work of relocation of that part of the line designated in the decree of your honorable court, namely, from the 50th to the 55th mile points on the Hendershott and Minor line, should be commenced. It appeared to us that the cast-iron monuments placed by Hendershott and Minor at intervals of 10 miles would naturally be more reliable than any traditional points, and the first investigations were made as regarding the 40th, 50th, and 60th mile points, these being originally marked by Hendershott and Minor with iron monuments as stated. After careful examination and much inquiry the commissioners were satisfied that the monuments marking the 40th and 60th mile points were in their original positions. As regarded the monument at the 50th-mile point, whilst no positive evidence could be had as to its removal from its original position, the rumors and statements were such as to render its reliability a matter of doubt, and it was therefore determined to use the monuments at the 40th and 60th mile points as fixed points between which to relocate the boundary line.

It was subsequently arranged for the commissioners to meet at Davis City, Iowa, a point on the Chicago, Burlington, & Quincy railroad adjacent to the 40th-mile point, where it was proposed to commence work. Gen. Duffield was accordingly notified, and on Wednesday, April 8th, ult., the commissioners reached Davis City and met Messrs. W. C. Hodgkins [121]*(in charge of work) and A. L. Baldwin, of the United States geodetic survey corps, detailed as per arrangements made with Gen. Duffield. These gentlemen brought with them a very complete outfit of instruments of the best description used in geodetic work, including all necessary equipment for astronomical observations as well as field work. We proceeded to the 40th-mile point on the afternoon of April 8th, ult., and arranged for the commencement of work the following day. On April 9th, ult., a party for field work having been organized and the necessary teams and wagons hired, the entire party proceeded to Pleasanton, Iowa, a point situated immediately on the boundary line just east of the 45th-mile point. Pleasanton and Lineville subsequently became the bases of operation, our parties changing from one of these points to the other as the necessities of the work required.

Work was commenced at the 40th-mile point, as arranged. It soon became quite evident that the actual boundary line as indicated by points shown and satisfactorily identified differed from the line as would be established by the field notes of the Hendershott and Minor survey. In order that the relative positions of the actual mile points between the 40th and 60th mile points could be properly determined, and also their true relation to the theoretical points as found in accordance with the courses and distances shown in Hendershott's report, it was deemed necessary to establish a chord or base line 20 miles in length between the 40th and 60th iron monuments to which all points actually found and definitely located or shown and claimed as being upon the boundary line could be referred and from which all points finally determined could be accurately located. For the details of the actual field work and its results we respectfully refer to the accompanying report of Mr. W. C. Hodgkins, in charge of party. (Appendix A.) It is proper here to state that the field work, done as it was in accordance with the precise methods of the United States geodetic surveys, was necessarily very slow and tedious, but its accuracy, in our opinion, cannot be questioned. The measurement of the 20-mile base line involved a very great amount of labor, whilst the computations necessary in the *exact re- [122] duction of the measurements were also very laborious. Complete topographical notes were also taken for the entire work, but the commissioners have deemed it unnecessary to have maps prepared, as their preparation would involve a considerable expense without any corresponding benefit. The very unfavorable weather during a great portion of May and a part of June interfered seriously with the prosecution of the field work, causing a delay of from two to three weeks.

Careful examination was made in every instance for the precise location of the original Hendershott and Minor mile points, but out of twenty-one of these points included in the survey only nine, including three iron monuments, could be satisfactorily identified. The 42d, 43d, 44th, 49th, 54th, and 58th mile points were identified and located by evidence entirely satisfactory to the commissioners. As regards the 50th-mile point (iron monument), concerning the reliability of which doubt had existed, the commissioners are satisfied that it is very little, if at all, out of its original position—its relation to the 49th-mile point (which was clearly identified as Hendershott's original point) as determined by the base line confirming our judgment. After the work of relocation had commenced and preliminary work on the 20-mile base well advanced, statements were made to the commissioners to the effect that the iron monument at the 60th-mile point had at one time been moved from its original position. This being a matter of importance—the monument in question being considered as a fixed point in establishing the base line—an inquiry was had regarding it and a considerable amount of testimony heard. This testimony was very conflicting, but after its careful consideration and the prolongation of the base line some 4 miles eastward of the 60th-mile point the commissioners were satisfied that the monument was occupying its original position.

The location of the 52d-mile point was more difficult and involved a much more extended investigation than for any point established by the commissioners. It was claimed and strongly urged that the original 52d-mile point as established by Hendershott and Minor was at a point witnessed by two *trees,—an elm [123] and an oak,—which trees, as well as a point established from them in accordance with the Hendershott and Minor field notes, were shown.



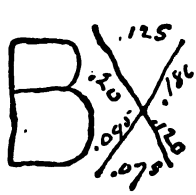
Digitized by Google

The field notes regarding this point and also the 53d-mile point are as follows:

(Chains.)
"80.00 Set 52d-mile post.
Bearings, elm 18 inches diameter, N. 87½° E. 10½ links; burr oak 12 inches diameter, S. 22° W. 28 links."
(Continuing:)
"N. 88° 47 E."

(Chains.)
" 0.80 A pond 250 links wide; direction of its length, N. & S.
5.00 Prairie.
15.00 Timber.
30.00 Field (Stokes') fence, nearly N. & S.
57.50 Left field.
80.00 Set 53d-mile post. Bearings, black oak 8" diameter, S. 53° E. 15 links; black oak 6" diameter, N. 53° E. 64 links."

The trees shown and claimed as being the original witness trees for Hendershott and Minor's 52d-mile point agree very well with the field notes as regards their distance from the 51st-mile point, and also as to their relative positions to each other. The distances and bearings of these trees from the point shown and claimed as the original Hendershott mile point also agree with the field notes closely. Beyond these coincidences, however, there is, in our judgment, nothing whatsoever to warrant a conclusion that they were ever marked as witness trees by Hendershott and Minor. In their report (*Missouri* v. *Iowa*, 51 U. S. 10 How. 15, 16 [13: 810]), they state: "In timber the number of the mile is marked on the witness trees with the letter appropriate to each state, there being one tree marked on each side of the line whenever possible. The foot of each witness tree is marked with the letters 'B L.'" The oak tree shown and claimed to be a witness 124] tree for the *52d-mile point had a large "blaze" on its trunk about 5 feet from the ground. Nothing whatever could be ascertained by the commissioners to in any manner indicate what, if any, marking had been inscribed on the blaze, nor could any information be had concerning such marking. At the foot of this tree, facing N. 45° E., is to be seen a blaze on which is plainly discernible the letters "B X." The blaze on the trunk of the tree faced directly east, whilst the point to which it is claimed to refer is but 22° east of north from the tree. It is the universal custom of surveyors in marking witness trees, so far as the experience of the commissioner goes, to make such marks so as to face as nearly as possible the point witnessed. The "B X" mark faces certainly 25° east, and the blaze on the trunk of tree 68° east of the point claimed to be witnessed. Measurements of the "X" mark at base of tree are as follows, in tenths of 1 foot:




The mark inclining to the left extends above the letter "B" and is quite close to the upper curved line. The mark inclining to the right runs closely to the lower part of the "B." It would have been quite as practicable to have cut a letter "L" as an "X" on the blaze found at foot of this tree, and the commissioners were not prepared to accept this letter "X" as an "L" without stronger corroborative evidence than they could obtain. This tree, if marked by Hendershott and Minor, must have been so marked forty-six years ago. A section of the tree at a point 8 feet above the ground, the tree being very uniform in size from 8 feet above the ground for 8 to 9 feet above, was cut and sent to Prof. McBride, botanical expert at the University of Iowa, for his opinion (as expert) as to its age, etc.

In a letter from him to Commissioner Dey, May 19, 1896, he states:

*"I judge that the tree when felled was [125 seventy years old. Its history runs about as follows: Fifty-nine years ago it received an injury (blaze?) of which a scar persists. The tree at the time was about eleven years (11-16) old, and not to exceed, bark included, 3½ inches thick. I say about eleven years, for it takes some years not recorded on the section for a tree to attain 6 feet in height. Twenty-five years later the tree had added about 2½ inches to its radius. The next seventeen years a little more than 1 inch to the radius, making the diameter of the wood (bark not counted) about 8½ to 8¾ inches. Since this another inch of wood has been added to the radius. Calling this seventeen years (it is more rather than less, as the annual increment is constantly smaller), we have the total since the scar, fifty-nine years."

This oak tree, as shown by Prof. McBride, at a point where section examined by him was cut, was 8½ to 8¾ inches in diameter when fifty-three to fifty-eight years old. Being seventy to seventy five years old, it would have been twenty-four to twenty-nine years old in 1850, and its diameter where blaze was found could not have exceeded 5 inches. As the blaze shows a face of fully 8 inches, it is evident it could not have been cut on a tree with a diameter of only 5 inches. The diameter of this tree at base, where "B X" mark was found, is now 15 inches. Applying the proportionate growth of tree as shown by Prof. McBride, and its diameter at base could not have exceeded 8.5 inches forty-six years ago, and its size was not sufficient to have received the blaze now shown.

Regarding the elm tree, also claimed to be a witness tree for the original Hendershott 52d-mile point. This tree also has a large blaze about 4 feet from the ground. Nothing whatever was shown to prove that it ever had any mark upon it (prior to the time of a private survey made in 1893) other than the characters "S 28." The letter "S," if it ever existed, is now totally obliterated. The figure "2" is still plainly discernible, and a part of the upper portion of a figure "8" to the right of the "2" can also be traced. Nothing was shown to prove that it was ever marked at its base with the letters "B L," as it should have been were it a Hendershott witness tree. *Dil-[126 igent search had evidently been made at some



Digitized by Google

time for this mark, as is plainly evidenced by the chopping at its base, and had the proper marks ever been found it is quite certain the facts would have been in evidence before the commissioners.

The Hendershott notes show that at 30 links eastward of the 52d-mile point the bank of a pond was reached, and that the pond itself was 250 links in width, making a distance of 280 links from the 52d-mile point to the east bank of pond. The bank of this pond directly east of the 52d-mile point, claimed to be witnessed by the "elm and oak," has evidently moved eastward to some extent since 1850, as shown by the present conditions. Measurements made by the commissioners show that 280 links eastward from the point claimed as the Hendershott 52d-mile point reach a point 59 links east of the present bank of the pond. Thirty chains east of their 52d-mile point, as seen by their notes, the Hendershott line crossed the "Stokes" field fence. The line of this fence is still plainly visible. A line straight from the 52d-mile point, claimed to be witnessed by the "elm and oak," to the 54th-mile point will pass at least 70 feet south of the "Stokes" fence line, as noted by Hendershott. For more than thirty years, and after the establishing of the boundary line by Hendershott and Minor, it is claimed a road was maintained and worked as a Missouri road between the 52d and 54th mile points, and that until within the past five years this fact was never questioned. It is claimed that the line recognized by parties living on both sides of the boundary as being the Hendershott line since his survey and until within the past few years is now plainly shown for a very considerable distance between the 52d and 53d mile points by the line of what is known as the "Fugate" fence line. It is claimed this fence was put up by one Fugate, the owner of land in and a resident of Iowa (and who was also a surveyor), and who, living as he did close to the line and present when the Hendershott survey was made, probably knew where the true line was and placed his fence on that line. This line very closely agrees with a line running directly from Sullivan's 52d-mile point to [127] the 54th-mile point, *the last named having been satisfactorily identified and located by the commissioners. It is claimed to be improbable that Fugate placed his fence north of the proper line.

The commissioners most carefully considered all the conditions relating to the point claimed to be the Hendershott 52d-mile point and witnessed by the "elm and oak," but the more the matter was weighed the stronger became their conclusion that the trees mentioned could not have been the witness trees as claimed. Coincidences of position constitute their claim. It is proper here to state that within a short distance to the north of the 52d-mile point as established by the commissioners are the stumps of an elm and burr oak which agree as well as do the other elm and oak as to distance from the 51st-mile point, better as to topographical conditions, and are very similar as to the relative position required by the field notes for the witnesses to the 52d-mile point. The commissioners have no idea that these stumps referred to were those of Hendershott's witness trees, but make this statement to show that coincidences such as shown by the "elm and oak" are not impossible. To have crossed the "Stokes" fence, in a distance of 30 chains, starting from the suppositious 52d-mile point claimed to be witnessed by the elm and oak, an angle of at least 2° to the left would have been necessary, and also another angle to the right equally great in order to run directly to the 54th-mile point. Hendershott's notes make no mention of any such angles. The angle recorded as having been made at the 52d-mile point was 29′ to the north, the course having been changed according to the Hendershott notes, from N. 89° 16′ E. to N. 88° 47′ E. We are satisfied, from personal investigation and from points found and referred to our base line, that the original Sullivan line can be readily traced from this 51st-mile point to his 52d-mile point, and we believe it very probable that the Hendershott line between the 52d and 54th mile points is nearly identical with the Sullivan line. Whilst we did not adopt the Sullivan line between the points named, very good reasons could have been given for doing so. The Hendershott notes make no mention of Sullivan's line after leaving his 49th-mile *point until his 54th-mile [128] point was reached. They make no mention of finding Sullivan's 52d-mile point or of any trees on his line; but they say in their report (*Missouri* v. *Iowa*, 51 U. S. 10 How. 4 [13: 304]) that they "discovered abundant blazes and many witness trees which enabled us to find and remark the said (Sullivan) line, as directed by this honorable court." Also on page 7 [305], same report, it is stated: "*But in heavy bodies of timber no difficulty was experienced in discovering evidences of the precise location of the* (Sullivan) *line, not only by blazes, but by line and witness trees.*" (Italics are ours.) And on the same page, "The general topography of the country, and especially the crossing of the streams, greatly facilitated us in following the line, and and in some instances, when confirmed by the old blazes, enabled us to establish it with sufficient certainty." Commencing some 10 chains east of the 51st-mile point, the country through which the boundary line passes was and is heavily timbered, and, as before stated, the Sullivan line in the timber is at this time readily to be found. The inference that the Hendershott line eastward from the 51st mile was nearly identical with the Sullivan line is quite as strong as the contrary, notwithstanding no mention is made by Hendershott of the Sullivan line after leaving a point 6.20 chains east of the 49th-mile point until reaching the 54th-mile point.

The Sullivan line, between the 51st and 52d mile points, as shown by his field notes, crossed the east fork of Grand river (now called Weldon) three times. This line now, by reason of changes in the bed of the stream, will cross the Weldon five times. With the exception of the "elm and oak," there were no traditional or apparent evidences claimed as indicating the original location of the Hendershott and Minor 52d-mile point. A line run eastward with the bearings given by the Hendershott notes from their 51st mile point would pass at least 40 feet south of the point indicated by the "elm and oak." A line run eastward, as per the Hender-



Digitized by Google

shott notes, from the point claimed as the Hendershott and Minor 52d-mile point would pass at least 90 feet south of their 54th-mile point. The commissioners carefully considered all the comparatively authentic traces of the Hender-
129]shott line, together *with the topographical conditions given in the notes of the survey. Between the 53d and 54th mile points were found evidences of the Hendershott line, which were satisfactory, and the line established by us was run from the 54th-mile point, which, as before stated, was identified, directly to the 52d-mile point and passing through the points found between the 53d and 54th mile points. The Hendershott notes show a line direct from the 52d to the 54th mile point.

The line as finally established and marked by us between the 52d and 53d mile points is north of the boundary line, as claimed for Iowa and south of that line as claimed by Missouri, and, as it happens, very nearly equally divides the narrow territory in dispute, although there was no intention to compromise the difference. We are satisfied that the line, as established by us between the 53d and 54th mile points, is very nearly, if not identical with, the original Hendershott line and in accordance with the marks of that survey. The same line was produced to the 52d-mile point, notwithstanding it passes considerably south of the plainly indicated Sullivan line. The 52d-mile point, as established and marked by us, was placed as nearly as possible in accordance with the notes of the Hendershott survey, evidenced by the width of the pond and also its distance from the "Stokes" fence line.

The field notes of the Hendershott and Minor survey show as follows:

"At 6.30 chains eastward from the Hendershott 42d-mile point Sullivan's 42d-mile point was found and course changed at that point from N. 88° 53′ E. to N. 89° 06′ E.

"6.37 chains eastward of Hendershott's 43d-mile point Sullivan's 43d-mile point was found and course changed at that point from N. 89° 16′ E. to N. 89° 47′ E.

"7.00 chains eastward of Hendershott's 44th mile point Sullivan's 44th-mile point was found and course changed at that point from N. 89° 47′ E. to N. 89° 9′ E.

"6.20 chains eastward from Hendershott's 49th-mile point Sullivan's 49th-mile point was found and course changed at that point from N. 89° 9′ E. to N. 89° 16′ E.

"4.07 chains eastward of Hendershott's 54th-
130] mile point Sullivan's 54th-mile *point was found and course changed at that point from N. 89° 16′ E. to N. 89° 2′ E.

"2.53 chains eastward of Hendershott's 58th-mile point Sullivan's 58th-mile point was found and course changed at that point from N. 89° 2′ E. to N. 89° 27′ E."

In each instance it will be seen that the Hendershott courses are changed at the Sullivan mile points. The decree of your honorable court made January 3, 1851, declared that the line should be direct between each Hendershott mile point, and it is evident that the actual courses between the points referred to above are not in accordance with the recorded courses. It was found by reference to our base line in all cases where the field notes show a straight line between such points that when the distance recorded as a straight line was 2 or more miles the line is actually a curve. The ordinates measured from the base line do not show any regular rate of curvature, and the curves themselves swing to the south and then to the north, the base line crossing the boundary line three times in 20 miles. The greatest distance of base line from boundary line is at the 55th-mile point, which is about 247 feet north of base. The 46th-mile point is 160 feet south and the 60th-mile point 153 feet south of base.

It is difficult to account for the discrepancies found between the recorded line as shown in Hendershott's notes and the line actually found. It is quite possible that the irregularities either grew out of the inaccuracy of the solar compass used on the survey, or an inaccurate use of the instrument itself.

We were surprised at the facility with which the Sullivan line could at the time of our survey be traced for considerable distances along the 20 miles of line included in our operations. Of 21 mile points from the 40th to the 60th, inclusive, Sullivan had witness trees for 15. Some of these witness trees can now be found, and also well-defined line trees mentioned by him. On Hendershott's line only 8 mile points out of the 21 referred to were witnessed by trees. Had the care shown by Sullivan in marking his line been exercised by Hendershott and Minor the line of the latter would have been much more fully *and satisfactorily[131 defined. The hurried manner in which the work of the Hendershott survey was performed (151 miles of relocation, in addition to random lines having been accomplished in thirty days) may in some measure account for the great lack of witness trees and other evidences necessary for an actual location of the boundary line of 1850. We are inclined to the opinion that, so far as regards the 30 miles mentioned, the Sullivan line can be as readily relocated as can the Hendershott line.

The decree of your honorable court requires that the line relocated by us shall be marked with durable monuments. Twenty-one mile points included in the line relocated, being from the 40th to the 60th mile inclusive, are now marked as required. The 40th, 50th, and 60th miles are marked with the cast-iron monuments originally placed by Hendershott and Minor, in 1850. Mile points intermediate are marked with stone monuments. These are of the best quality of Missouri red granite, are 12 inches square, and from 6′ 2″ to 6′ 6″ in length. The stones stand 2′ above ground (this portion being hammer-dressed) and are well finished in every particular. On the north side of each stone is plainly cut the word "Iowa," on the south side the word "Missouri," on the east side the words "State line," and on the west side the figures denoting the number of the mile point.

The iron monuments were reset so as to show about 18 inches above ground. The granite monuments were set with great care, their apices being exactly on the line. They were well rammed when placed in the ground and will need no witness trees. Their weight averages 1,050 pounds each, and we think they can safely be pronounced both durable and permanent. The amount paid for them in-



Digitized by Google

cludes all freight charges and expenses of delivery and setting.

Attached hereto (Appendix B) is a statement of the expenses consequent upon the relocation and marking that portion of the boundary line between the 40th and 60th mile points, which statement is respectfully submitted for the action of your honorable body.

Attached hereto (Appendix C) is a photo-
132]graph of *the section of the oak tree examined and reported on by Prof. McBride.

James Harding, Comm'r for Missouri,
Peter A. Dey, Comm'r for Iowa,
Dwight C. Morgan, of Illinois.

Chicago, Ill. Sep. 18, 1896.

APPENDIX A.

U. S. Coast and Geodetic Survey.
Salina, Kansas, June 20, 1896.

Gen. James Harding, Hon. Peter A. Dey, Dwight C. Morgan, Esq., Commissioners in the matter of the boundary line between the states of Missouri and Iowa.

Dear Sirs: I have the honor to submit the following report upon the operations conducted under my direction for the purpose of enabling you to locate and mark by "durable monuments," as required by the decree of the Supreme Court of the United States dated February 3, 1896, that portion of the boundary line between the states of Missouri and Iowa which lies between the 40th and 60th mile posts east of the old northwest corner of Missouri, as marked in 1850 by H. B. Hendershott and W. G. Minor, commissioners.

It appears unnecessary for me to make any mention in this report of the antecedent circumstances leading up to this survey, as you are well acquainted with them, and will, no doubt, take occasion to allude to them in your own report to the Supreme Court.

I therefore pass at once to my own work.

Your board having applied to General W. W. Duffield, superintendent of the United States Coast and Geodetic Survey, for the detail of an officer to make the necessary surveys, I was selected for that duty, and Mr. A. L. Baldwin, also of the Coast and Geodetic Survey, was assigned to the party as assistant observer.

In compliance with the request of your board, received through Mr. Morgan, we met
133] you on April 8, 1896, at Davis *City, Iowa. A preliminary inspection of the western portion of the field of work was made on that day and the organization of the party was completed by engaging laborers and teams.

On the following day the whole party was transferred to the village of Pleasanton, Iowa, that place being centrally located for the western half of the work, as it is directly on the boundary and just east of the 45th-mile post.

A partial examination of the line, as identified by more or less reliable traditions current in its neighborhood, made it evident that its course in many places deviated widely from the description given in the field notes attached to the report of the former commission. *Missouri* v. *Iowa*, 51 U. S. 10 How. 1 [13: 303].

Not only do the bearings differ from those recorded in that report, but portions of the line which are there called straight were found to be curved or composed of broken lines.

Under these conditions it seemed inexpedient to attempt to reproduce upon the ground the courses and distances of the former survey.

Such an attempt would undoubtedly have led to serious confusion, and would have furnished little information of real value, while the labor of making the necessary corrections would have been excessive.

In place of that undesirable plan I adopted, with your approval, the method of measuring a base line straight across the country for the 20 miles to be surveyed.

All of the old points which were recovered and all new points which it became necessary to locate upon the ground were directly referred to the base line, which, from a mathematical point of view, is the axis of abscissæ in a system of rectangular co-ordinates.

It seems scarcely necessary to mention the advantages which this method affords in point of simplicity and accuracy of work, but it may do no harm to allude very briefly to a few of them.

Thus the relative positions and bearings of different portions of the boundary can be readily found with far greater precision than would otherwise be easily practicable.

Moreover, in this system of work each point of the *boundary is fixed independently [134
of every other point, all being directly referred to the base line. This characteristic permits any desired local correction to be made at any point without necessarily affecting points on either side, a feature which I consider very essential in work of this character. The base line was so selected as to lie along the general direction of the boundary, which in fact crosses it three times, 11 of the 21 monuments being north of the base and the other 10 south of it.

This statement well illustrates both the irregularity of the boundary and the fact that the base line is very close to the general direction of the line.

Another important consideration in the selection of the base line was to make it pass through the towns of Pleasanton and Lineville without meeting obstructions and without damaging private property.

This was successfully accomplished, and in the whole course of the line remarkably little tree cutting was needful. The base line was ranged out with an 8-inch theodolite, the standards of which were high enough to permit the telescope to transit. The telescope was of excellent quality and was provided with an eyepiece micrometer, by means of which slight deviations from the straight line could be measured and corrected.

As the work of locating the base line advanced eastward the party was moved to Lineville, Iowa, which town is situated just north of the boundary line and between the 56th and 57th mile posts, and thenceforward operations were conducted from either Lineville or Pleasanton, as was found more convenient from time to time.

As soon as the line was opened, and even before the final adjustment of its eastern terminus, the linear measurement was begun by Mr. Baldwin, with the assistance of the commissioners, working westward from the east end of the base, near the 60-mile monument.

When about 5¼ miles had been so measured I was ready to take personal charge of the



Digitized by Google

measurement, and began at the west end of the base, near the 40-mile monument, working thence eastward to a junction with the line above mentioned.

135] *The system of measurement employed was that ordinarily used in the coast and geodetic survey for direct measures not requiring the base apparatus.

A narrow steel tape, 25 meters in length between end marks, was stretched under a tension of 10 kilogrammes, as indicated by a spring balance attached to one end of the tape. The successive tape-lengths were marked on stakes driven into the ground.

As the tape necessarily follows very closely the inclination of the ground, the horizontal distance will be less than the measured distance, and the correction for slope must be computed for each tape-length, the difference of height between the ends being determined by spirit-level. The very irregular profile of this line made these differences of height unusually great, and correspondingly increased the amount of correction.

A small correction for catenary is also necessary when the tape swings clear of the ground, the "sag" of the tape slightly decreasing the distance between its ends. Further, as all metallic measures vary in length with changes of temperature, it is necessary to apply a correction for such variations, the length of the tape being known at the temperature of zero, centigrade.

Temperatures were accordingly noted at frequent intervals, usually at every fourth tape.

The direct measurement was completed on May 8th, although the eastern part of the line had still to be levelled.

The computations were at once taken in hand and the resulting distances were furnished you as rapidly as possible.

These results, for present purposes and as compared with ordinary measures, may be considered practically exact, and they show that the chain used by the surveyors of 1850 was too long, probably from the combined effects of abrasion and of high temperature.

The distances between such of the old points as were recovered are nearly always too great. The ratio of excess is not constant, as, indeed, would hardly be expected, but shows a tendency to increase in going from west to east.

A marked exception to this rule of excess in distance is found in the 52d mile. The eastern

136] end of this mile *was not recovered, but was found with reasonable certainty from various considerations, while the reputed point at the western end was recovered. The mile so determined is noticeably less than a statute mile. The western part of this mile traverses a very steep, rough, and wooded country, while its eastern part crossed the Weldon river three times in 1850.

These natural difficulties in the way of accurate measurement probably caused the shortage in this particular mile.

In my own work I found it desirable to avoid the direct measurement of this mile, which is even more unfavorable now than in 1850, the Weldon having changed its course sufficiently to cross the base line five times at present.

For this purpose a branch base about ½ of 1 mile in length was measured on the flat ground east of the Weldon, and the distance across the broken section was then obtained with great precision by triangulation. The distances across the Grand river and Little river were also obtained by triangulation.

Whenever in the course of the measurement we passed a point which it was desirable to refer to the base line, the point at which its rectangular ordinate met the base line was noted and the length of the ordinate itself was measured. The relative positions of these various points thus became known, including not only such of the mile points as could be identified, but also numerous objects commonly reputed to mark the boundary, as fences, trees, stones, etc.

As far as possible in connection with the measurement, notes were made to provide material for a topographic sketch of the strip of country traversed by the boundary.

As stated above, the measurement was completed on May 8th. As rapidly as the reductions were computed the places for the mile stones were marked on the ground from the 40th to the 49th.

The weather, which up to that time had been generally favorable, now became very wet. The frequent and heavy rains seriously interfered with the work, and rendered progress across the country very slow, the roads being nearly impassable and the fords quite so. On May 18th the exigencies of the regular work of coast and geodetic survey *compelled[137 the detachment of Mr. A. L. Baldwin, who had rendered energetic and efficient assistance in the work.

On the same day I moved from Pleasanton to Lineville to resume work on the eastern part of the line. In the intervals between rains I completed the levels, and, after computing the distances, marked the places for the mile posts, a work in regard to which further details will be given. The topographic notes were also completed.

In order to furnish as much information as possible in regard to this portion of the boundary line, observations for the approximate determination of the latitude and longitude and the astronomical azimuth or bearing of the base line were made at Pleasanton and at Lineville.

Bad weather interfered with the observations at Pleasanton, and at Lineville the lack of time and unfavorable local conditions somewhat affected the precision of the results, which answer, however, the purpose desired. Latitude and azimuth were obtained by observations on Polaris (*a* Ursæ Minoris) with the theodolite. Time was obtained by sextant observations of the sun, using a mercurial horizon and the method of equal altitudes. For longitude the local time was compared with the railroad telegraphic time signals. It remains for me only to state briefly the old points which were recovered and the conditions which, under your decisions, governed the location of those points which were not identified by local marks.

The 40th, the 50th, and the 60th mile points were found marked by the iron monuments placed there by commissioners Hendershott and Minor in 1850. There was some dispute as to whether No. 60 was in its original posi-



Digitized by Google

tion or not, but the weight of evidence and the continuity of the traditional line on either side of it indicated pretty conclusively that it had never been disturbed.

The remaining points were originally marked by stakes, sometimes witnessed.

No. 42, while not directly identified by marks, was satisfactorily recovered by means of a "line tree" 4 chains W. and by topographical notes at crossing of Grand river, as shown in original record.

138] *No. 44 was restored by measurement from the two witness trees, the decaying stumps of both of which were found.

No. 49 was also identified by the stumps of both witness trees.

No. 51 was marked by a "mound and pit," which have been accepted for years as the true marks.

No. 54 was marked by a stone, and was further identified by one witness tree.

No. 58 was recovered by traces of the stakes in addition to the remains of the witness tree, and the point established by J. C. Sullivan in 1816 was also found a little further east, and also the stump of an elm tree, noted as a "line tree" in both Sullivan and Hendershott notes, being 4.10 chains W. of Hendershott's 58th-mile point. The remaining points were located in the following manner:

No. 41 was placed midway on line between 40 and 42.

No. 43 was so placed as to preserve the relations with 42 and 44 required by the field notes of 1850, and after being so located was found to agree with the stump of the witness tree on the Iowa side of the line.

No. 45 was placed in the middle of the street bounding Pleasanton on the south, which middle line is shown as the boundary on the official plat of the town on file at the county seat, and at the proper distance along the line averaging to the 49th mile.

No. 46 was similarly located on the line passing from 45 through a stone pointed out by tradition as marking the line.

No. 47 was placed at the proper distance on a line drawn straight from 49 westward through a witnessed section corner between 47 and 48.

No. 48 was placed on the same line midway between 47 and 49.

No. 52 was located at a point west of the pond or lake in the Weldon bottom agreeing with the topographic description given by the former commissioners and on a line agreeing as closely as possible with all of the apparently authentic traces of the line surveyed in 1850.

No. 53 was placed a mile west of 54 on the straight line between 52 and 54.

139] *No. 55 was placed a mile east of 54 on the extension of the line drawn from 54 through a witnessed stone at the corner common to Wayne and Decatur counties, Iowa.

Nos. 56 and 57 were placed at mile distances on the straight line drawn from 55 through an iron pin at the southwest corner of the streets surrounding the public square at Lineville, which pin was universally accepted as a point marking the boundary. Unsuccessful search was also made for the remains of a wooden post which formerly stood a little further east.

No. 59 was placed midway between 58 and 60, in the manner required by the field notes of 1850.

While this work was in progress many of the inhabitants along the line asked that additional points, intermediate between the mile points, might be furnished them, and with your approval this was done.

In accordance with the decree of the Supreme Court dated January 8, 1851, such points were always placed on the straight line between the adjacent mile posts. The final observations were made on the afternoon of June 13th, and the instruments were then packed, and on the 15th were shipped to Washington.

I left Lineville on June 15th, also, to resume my regular duties in the coast and geodetic survey.

In closing this report permit me to express my appreciation of the uniform courtesy and consideration shown my assistant and myself by all the members of the commission, and my hope that our earnest labors in this interesting work have proved satisfactory in methods and results, and that they may be instrumental in permanently settling this controversy.

The appended pages give in summarized form the results of the observations and measurements, as well as the mathematical formulæ employed.

Respectfully submitted.

W. C. HODGKINS,
Assistant, Coast and Geodetic Survey, Chief of Party.

## APPENDIX A.

The following table gives the bearings and distances between the successive mile posts of the Missouri-Iowa boundary *from the [140 40th to the 60th mile east of the initial point as the said mile posts were relocated and marked by James Harding, Peter A. Dey, and Dwight C. Morgan, commissioners, in 1896.

The distances are given to the nearest tenth of a metre and to the nearest half foot, and the bearings or azimuths to the nearest quarter-minute.

The azimuth is reckoned from the south point as zero in the direction of the west, north, and east successively—*i. e.*, 90° means due west, 270° due east, etc.

The convergence of the meridians is 44 seconds for each mile. The bearings going west, or back azimuths, are therefore in each case three fourths of a minute greater than the eastern or direct azimuths.

| Mile. | Azimuth | Back azimuth. | Distance. | |
|---|---|---|---|---|
| | | | *Metres.* | *Feet.* |
| 40 to 41 | 268° 57¾′ | 88° 58¼′ | 1,610.1 | 5,282½ |
| 41 to 42 | 268 58½ | 88 59¼ | 1,610.1 | 5,282½ |
| 42 to 43 | 269 20½ | 89 21¼ | 1,610.1 | 5,282½ |
| 43 to 44 | 269 58¾ | 89 59½ | 1,608.8 | 5,281¼ |
| 44 to 45 | 269 53¾ | 89 53½ | 1,616.7 | 5,304 |
| 45 to 46 | 269 51 | 89 51¾ | 1,610.2 | 5,283 |
| 46 to 47 | 269 11 | 89 11¾ | 1,610.1 | 5,282½ |
| 47 to 48 | 268 56¼ | 88 56¾ | 1,610.1 | 5,282½ |
| 48 to 49 | 268 56¼ | 88 57 | 1,612.7 | 5,291 |
| 49 to 50 | 269 16¾ | 89 17¼ | 1,608.3 | 5,276½ |
| 50 to 51 | 269 04¾ | 89 05¼ | 1,613.3 | 5,293 |
| 51 to 52 | 268 10¾ | 88 11 | 1,595.8 | 5,236½ |
| 52 to 53 | 268 17¾ | 88 18¼ | 1,626.1 | 5,335 |
| 53 to 54 | 268 18¾ | 88 19¼ | 1,613.2 | 5,292½ |
| 54 to 55 | 268 57¼ | 88 58¼ | 1,611.5 | 5,287 |
| 55 to 56 | 269 33 | 89 33¾ | 1,611.5 | 5,287 |
| 56 to 57 | 269 33¾ | 89 34½ | 1,611.5 | 5,287 |
| 57 to 58 | 270 45 | 90 45¾ | 1,612.0 | 5,289 |
| 58 to 59 | 270 36¾ | 90 37½ | 1,613.8 | 5,294½ |
| 59 to 60 | 270 39 | 90 39¾ | 1,613.8 | 5,294½ |



Digitized by Google

141] *Offsets from Base Line.

| Mon't | No. | M. | | ft. | |
|---|---|---|---|---|---|
| " | " | 40, | 8.3— | 11 | ft. N. |
| " | " | 41, | 8.8— | 29 | " " |
| " | " | 42, | 14.3— | 47 | " " |
| " | " | 43, | 9.8— | 32 | " " |
| " | " | 44, | 12.1— | 40 | " S. |
| " | " | 45, | 31.0— | 102 | " " |
| " | " | 46, | 48.7— | 160 | " " |
| " | " | 47, | 47.3— | 155 | " " |
| " | " | 48, | 38.3— | 125½ | " " |
| " | " | 49, | 29.4— | 96⅞ | " " |
| " | " | 50, | 29.6— | 97 | " " |
| " | " | 51, | 23.7— | 78 | " " |
| " | " | 52, | 7.6— | 25 | " N. |
| | | 53, | 36.2— | 119 | " " |
| " | " | 54, | 64.8— | 212½ | " " |
| " | " | 55, | 75.4— | 247 | " " |
| " | " | 56, | 69.5— | 228 | " " |
| " | " | 57, | 63.7— | 209 | " " |
| " | " | 58, | 23.4— | 77 | " " |
| " | " | 59, | 11.3— | 37 | " S. |
| " | " | 60, | 46.6— | 153 | " " |

*Note on the Reduction and Results of the Astronomical Observations at Lineville, Iowa.*

For latitude the observed altitudes of Polaris were reduced by the method and table given on page 534 of the American Ephemeris, with the result:

Approximate latitude=40° 34'.6.

Comparisons of local mean time, obtained by sextant observations of the sun, with railroad time signals, gave the following result:

Approximate longitude (W. of Greenwich)=93° 32'.

For azimuth the observations of Polaris were reduced by the formula

$$\tan A = \frac{\sin t}{\cos \Phi \tan \grave{o} - \sin \Phi \cos t}$$

in which the letters have the following significations:

$A$= the azimuth of the star at the instant of observation
$t$= the hour angle " " "
$\grave{o}$= the declination " " "
$\Phi$= the latitude of the place.

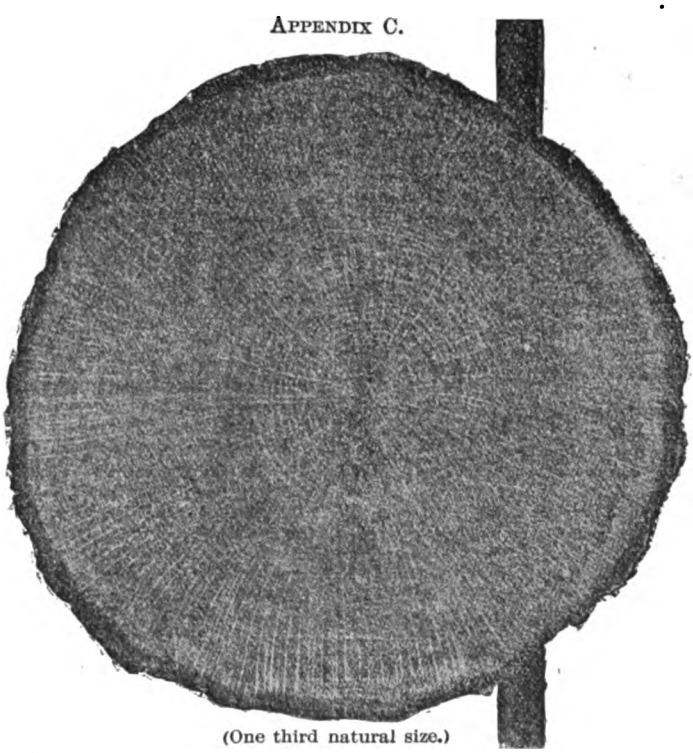
Resulting azimuth of base line = 89° 21' 49" east of north.

These results transferred to the monuments at each end of this 20-mile section give the following:

| | Lat. | Long. | Azimuth. |
|---|---|---|---|
| *40-mile mon't | 40° 34'.4 | 93° 51' 269° 14' | 49° [142 |
| 60-mile mon't | 40 34 .6 | 93 28 | 89 29 40 |

the azimuth at each point being the bearing of the straight line joining the two points.

APPENDIX C.



(One third natural size.)

Photograph of a section of the oak tree at the 52d-mile point, supposed to be witness tree in the Iowa-Missouri boundary. The dark line indicates the size of the stem fifty years ago.

143] *APPENDIX B.

Account of expenses incident to the relocation and remarking the boundary line between the states of Missouri and Iowa from the 40th to the 60th mile point, under decree of the Supreme Court of the United States, February 5, 1896.



Digitized by Google

| | | |
|---|---|---|
| Pay of engineers: | | |
| W. C. Hodgkins (U. S. Geodetic Survey Corps) 74 days @ $5.00 | $370 00 | |
| A. L. Baldwin (U. S. Geodetic Survey Corps) 41 days @ $5.00 | 205 00 | |
| Transportation from Washington, D. C. | 77 75 | |
| " to Salina, Kansas | 41 14 | |
| Freight on instruments returned to Washington | 8 32 | |
| | | 702 21 |
| Pay of one assistant (14 days @ $2.50) and laborers | | 190 50 |
| Subsistence of parties in field | | 421 75 |
| Hire of teams and drivers and feed for teams | | 342 25 |
| Paid for eighteen granite monuments in place | | 922 00 |
| Miscellaneous expenses paid (telegrams, township plats, signal materials, clerical work and typewriting, repairs of instruments, storage, etc., etc.) | | 171 60 |
| Advertising, Missouri and Iowa | | 133 80 |
| Commissioners: | | |
| James Harding comm. for Missouri, 78 days @ $10.00 | 780 00 | |
| James Harding, traveling expenses | 161 85 | |
| | | 941 85 |
| Peter A. Dey, comm. for Iowa, 60 days @ $10.00 | 600 00 | |
| Peter A. Dey, traveling expenses | 189 47 | |
| | | 789 47 |
| Dwight C. Morgan, comm. 46 days @ $10.00 | 460 00 | |
| " " traveling expenses | 198 63 | |
| | | 658 63 |
| Total | | $5,273 56 |

144] *And it is ordered, adjudged, and decreed that the boundary line between said states of Missouri and Iowa in controversy herein be, and it is hereby, established and declared to be as delineated and set forth in said report.

It is further ordered, adjudged, and decreed that the compensation and expenses of the commissioners and expenditures attendant upon the discharge of their duties be, and they are hereby, allowed at the sum of five thousand, two hundred and seventy-three dollars and fifty-six cents ($5,273.56), in accordance with their report as confirmed as aforesaid, and that said charges and expenses with the costs of this suit to be taxed be equally divided between the parties hereto.

And it is further ordered, adjudged, and decreed that the clerk of this court forthwith transmit to the chief magistrates of the states of Missouri and Iowa copies of this decree, duly authenticated under the seal of this court.

---

## BERNHARD HUSSMAN, *Plff. in Err.*,

*v.*

## WILLIAM H. DURHAM.

(See S. C. Reporter's ed. 144-150.)

*Federal question—privity between claimants of land—title under patent—privity—tax sales.*

1. A state decision that an equitable title apparently conveyed by proceedings in the United States Land Office was of no effect, and tax titles based thereon of no validity, denies a right claimed under authority of the United States, and presents a Federal question.
2. Under the tax law of Iowa there is no privity between the holder of the fee and one who claims a tax title upon the land.
3. The legal title created by the issue of a patent for public lands relates back only to the payment of the money therefor, and not to the time when the certificate of location was issued.
4. Where one has dealt with the government on the assumption that a departmental adjudication was binding, another not in privity with the former cannot challenge his acceptance of that adjudication.
5. While the title remains in the government, public lands are not subject to state taxation, and tax sales and tax deeds thereof are void; and one subsequently acquiring title thereto can contest their validity.

[No. 66.]

*Argued and Submitted January 5, 1897. Decided January 18, 1897.*

IN ERROR to the Supreme Court of the State of Iowa to review a judgment of that Court affirming a decree of the District Court of Carroll County, Iowa, in favor of William H. Durham, plaintiff, against Bernhard Hussman, defendant, quieting the title of the plaintiff as against the defendant to certain land. There was also a motion to dismiss. *Affirmed.*

See same case below, 88 Iowa, 29.

Statement by Mr. Justice **Brewer:**

This case comes up on error to the supreme court of the state of Iowa. The facts are these: On May 19, 1858, Robert Craig located bounty land warrant No. 27,911, issued to William Long under the act of Congress of March 8, 1855 (10 Stat. at L. 701), upon the land in controversy, and obtained from the proper land officer a certificate of location. This certificate was recorded in the office of the recorder of Carroll county, the county in which the land is situated. No patent was issued thereon. On February 1, 1864, the Secretary of the Interior canceled the land warrant under authority of an act of Congress, of date June 23, 1860 (12 Stat. at L. 90). This act provided that whenever it should appear that any land warrant was lost or destroyed, whether the same had been sold or assigned by the warrantee or not, the Secretary of the Interior should cause a new warrant to be issued, which new warrant should have all the force and effect of the original, and upon such action the original warrant was to be deemed and held to be null and void, and any assignment thereof fraudulent; and further, that "no patent shall ever issue for any land located therewith, unless such presumption of fraud in the as-

---

NOTE.—*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,*—see note to Hamblin v. Western Land Co. 37: 267.

*As to pre-emption rights,* see note to United States v. Fitzgerald, 10: 785.

*That patents for land may be set aside for fraud,* see note to Miller v. Kerr, 5: 331.

*As to errors in surveys and descriptions in patents for lands, how construed,* see note to Watts v. Lindsey, 5: 423.

*As to sale of lands for taxes; strict compliance with statute necessary,*—see note to Williams v. Peyton, 4: 518.

*As to when taxes illegally assessed can be recovered back,* see note to Erskine v. Van Arsdale, 21: 63.

*As to direct taxes,* see note to Scholey v. Rew, 23: 99.



Digitized by Google

signment be removed by due proof that the same was executed by the warrantee in good faith and for a valuable consideration." The 2d section authorized the Secretary to prescribe 146] *such rules and regulations as might be appropriate for carrying the act into effect. It was alleged in the petition filed in this case that the assignment on the warrant purporting to be that of Long, the warrantee, was a forgery, and this allegation was admitted by the defendant. The action of the Secretary was taken without, so far as appears, any notice to Robert Craig. Nothing was done either in the local land office or in the Land Department at Washington to formally cancel the certificate of location. Up to the year 1886 the records of the Land Department showed on their face a full equitable title passing to Robert Craig by virtue of his certificate of location and payment therefor in a land warrant. During these years the land was subjected to taxation by the officers of Carroll county, Iowa, and was sold for nonpayment of taxes; and the titles under such tax sales passed to Bernhard Hussman, defendant below.

In 1886 William H. Durham, plaintiff below, having obtained conveyances from Craig, applied to the land department for leave to purchase the land upon payment of the regular price. This application was granted under authority of rule 41 of the Department of the Interior, published on July 20, 1875, which reads as follows:

When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon, the parties in interest may procure the issuance of a patent by filing in the office for the district in which the land is situated an acceptable substitute for the said warrant. The substitution must be made in the name of the original locator, and may consist of a warrant, cash, or any kind of scrip legally applicable to the class of lands embraced in the entry.

The money, $150, was paid by Durham in 1888, and a patent issued, of date October 8, 1889, to Robert Craig, his heirs and assigns. It recited a payment by "F. M. Hunter, trustee for Robert Craig," and was delivered to said trustee, to be held until the rights of these parties could be judicially determined. Thereupon Durham commenced this suit in the district court of Carroll county, Iowa, to quiet his title as against the defendant, holding the tax titles. The district 147] court entered *a decree in his favor, which was affirmed by the supreme court. 88 Iowa, 29.

*Mr.* **C. C. Cole** for plaintiff in error.

*Messrs.* **C. C. Nourse** and *Barcroft & McCaughan* for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

A motion to dismiss was submitted by the defendant in error, but as the supreme court of the state held that the equitable title apparently conveyed by the proceedings in the United States Land Office in 1858 was of no effect, and the tax titles based thereon of no validity, it is apparent that a right claimed under the authority of the United States was denied, and therefore this court has jurisdiction.

On the merits of the case we remark that while it is undoubtedly true that when the full equitable title has passed from the government, even prior to the issue of a patent conveying the legal title, the land is subject to state taxation (*Carroll* v. *Safford*, 44 U. S. 3 How. 441 [11: 671]; *Witherspoon* v. *Duncan*, 71 U. S. 4 Wall. 210 [18: 339]), yet, until such equitable title has passed and while the land is still subject to the control of the government, it is beyond the reach of the state's power to tax. *Kansas P. R. Co.* v. *Prescott*, 83 U. S. 16 Wall. 603 [21: 373]; *Union P. R. Co.* v. *McShane*, 89 U. S. 22 Wall. 444 [22: 747]; *Tucker* v. *Ferguson*, 89 U. S. 22 Wall. 527, 572 [22: 805, 815]; *Central Colorado Improv. Co.* v. *Pueblo County Comrs.* 95 U. S. 259 [24: 495]. Therefore the validity of the tax titles held by plaintiff in error depends upon the question whether the equitable title to the land had passed from the government to Craig.

We remark, in the second place, that under such a tax law as exists in Iowa there is no privity between the holder of the fee and one who claims a tax title upon the land. The latter title is not derived from but in antagonism to the former. The holder of the latter is not a privy in estate with the holder of the former. Neither owes any duty to the other, nor is *estopped from mak 148] ing any claim as against the other. *Hefner* v. *Northwestern Mut. L. Ins. Co.* 123 U. S. 747, 751 [31: 309, 311]; *Turner* v. *Smith*, 81 U. S. 14 Wall. 553 [20: 724]; *Crum* v. *Cotting*, 22 Iowa, 411; Burroughs, Taxn. 346.

Neither can it be said that on the issue of a patent the title by relation always dates of the time when the certificate of location was issued. A title by relation extends no further backwards than to the inception of the equitable right. If no equitable right passed by the surrender of the land warrant and the certificate of location in 1858, but only by the payment of the money in 1888, the legal title created by the issue of the patent has no relation back of this later day. In other words, the United States does not part with its rights until it has actually received payment, and if by mistake, inadvertence, or fraud a certificate of location (which is equivalent to a receipt) is issued when in fact no consideration has been received, no equitable title is passed thereby; and a conveyance of the legal title does not operate by relation back of the time when the actual consideration is paid. These views have been recognized in Iowa, as elsewhere. Thus, in *Reynolds* v. *Plymouth County*, 55 Iowa, 90, it appeared that certain forged and counterfeit agricultural college scrip was located upon a tract of land, and that, after the issue of the certificate of location and before any patent, state taxes were assessed and levied thereon. Thereafter the forgery was discovered, the locator substituted genuine scrip or money, and a patent was issued. The court held that the taxes thus assessed and levied during the interval between the



Digitized by Google

original illegal entry and location and the subsequent substitution of genuine scrip or money were invalid, saying: "In order to protect a title, or to attain the ends of justice, the courts will, under the doctrine of relation, which is a fiction of law, hold that a title began at the date of an entry or location upon the public lands. But this doctrine cannot be invoked to burden the holder of a title, and require him, in violation of justice, to pay taxes when he held neither the equity nor title of the lands." A similar doctrine was announced in *Calder* v. *Keegan*, 30 Wis. 126. See also *Gibson* v. *Chouteau*, 80 149]U. S. 13 Wall. 92 [20:534], *in which this court, on page 101 [537], said: "The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land and acquired the equitable claim or right to the title. The defendants in this case were strangers to that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder."

It is, however, said by counsel for plaintiff in error that, as it does not appear that any notice was given to Craig, the finding of the Secretary of the Interior that the assignment was a forgery, and the order directing the cancelation, cannot be regarded as binding upon Craig or affecting the rights vested in him by the surrender of the land warrant and the issue of the location certificate. In other words, as in this respect the Secretary of the Interior is a tribunal with limited and special jurisdiction, proof of notice to the parties interested is essential to sustain the validity of any adjudication. Not questioning the proposition of law, as thus stated, there are two sufficient answers to its applicability to the present case: First, as Craig and those claiming under him thereafter dealt with the government upon the assumption that the adjudication was binding, one who is not in privity with them cannot challenge their acceptance of that adjudication; and, secondly, on the record the parties hereto have admitted that the assignment of the warrant by Long to Craig was a forgery. Craig therefore had no title to the warrant, and this formal surrender by him of the instrument was an invalid act, neither defeating the title of Long, nor releasing the government from its promise to convey to Long, or his genuine assignee, the specified number of acres.

The case therefore stands in this way: Confessedly, though a formal certificate of location was issued in 1858, there was then in fact no payment for the land, and the government received nothing until 1888. Dur 150]ing these intervening years, *whatever might have appeared upon the face of the record, the legal and the equitable title both remained in the government. The land was therefore not subject to state taxation. Tax sales and tax deeds issued during that time were void. The defendant took nothing by such deeds. No estoppel can be invoked against the plaintiff. His title dates from the time of payment in 1888. The defendant does not hold under him and has no tax title arising subsequently thereto.

With respect to the suggestion of counsel that it is a hardship that one who has changed wild land into a farm and greatly improved it should, after the lapse of many years, be deprived of the benefit of those improvements by reason of an undisclosed defect in the record title, it is sufficient to say that there is nothing in this record to indicate that the defendant ever made any improvements or expended a dollar otherwise than in paying for the tax title. We cannot, of course, take the intimation of counsel in the brief as evidence of a fact not appearing on the record. Further, so far as the money paid for taxes is concerned, it is familiar law that a purchaser of a tax title takes all the chances. There is no warranty on the part of the state. Beyond this, the statutes of Iowa contemplate a return of taxes when it is disclosed that the land was not subject to taxation. 1 McClain's Rev. Stat. 1888, p. 353, § 1387. We see no error in the decision of the supreme court of Iowa, and *it is therefore affirmed.*

---

## GULF, COLORADO, & SANTA FÉ RAILWAY COMPANY, *Plff. in Err.*,

v.

## W. H. ELLIS, by His Next Friend, H. W. Ellis.

(See S. C. Reporter's ed. 150-168.)

*Unconstitutional state statute—corporations are persons—classification.*

1. A state statute imposing an attorney's fee not to exceed $10, in addition to costs, upon railway corporations omitting to pay certain claims within a certain time after presentation, which applies to no other corporations or individuals, is unconstitutional as denying to them the equal protection of the laws.
2. Corporations are persons within the provisions of the 14th Amendment; and a state has no more power to deny to them the equal protection of the law than it has to individual citizens.
3. Classification to relieve a law from the charge of a denial of equal protection cannot be made arbitrarily, but must be based upon some differ-

NOTE.—*As to retrospective statutes, when valid*, see note to Otoe County v. Baldwin, 29: 331.

*Vested rights defined; how affected by subsequent repeal of statute*,—see note to Fletcher v. Peck, 3: 162.

*As to corporations, when deemed citizens or persons*, see note to United States v. Amedy, 6: 502.

*As to citizenship of corporations, with reference to jurisdiction of courts over them*, see note to National S. S. Co. v. Tugman, 27: 37, and Hope Ins. Co. v. Boardman, 3: 36.

*As to attorney's compensation contingent on success or from proceeds of suit; a fixed sum or a percentage; purchase of interest in the suit or subject of litigation by attorney*,—see note to McMicken v. Perin, 15: 504.



Digitized by Google

ence which bears a just and proper relation to the attempted classification.

[No. 133.]

*Submitted November 3, 1896. Decided January 18, 1897.*

IN ERROR to the Supreme Court of the state of Texas to review the judgment of that court affirming the judgment of the State Court of of Civil Appeals, which affirmed the judgment of the state District Court in favor of the plaintiff, W. H. Ellis, against the Gulf, Colorado, & Santa Fé Railway Company for damages for a colt killed by that company, and for an attorney's fee of $10, under the law of Texas of April 5, 1889. *Reversed*, and case remanded for further proceedings.

See same case below, 87 Tex. 19.

Statement by Mr. Justice **Brewer**:

On April 5, 1889, the legislature of the state of Texas passed this act:

"Sec. 1. *Be it enacted by the legislature of the state of Texas*, That after the time that this act shall take effect any person in this state having a valid bona fide claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this state, and the amount of such claim does not exceed $50, may present the same, verified by his affidavit, for payment to [151] such corporation by filing *it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue." Sayles's Tex. Civ. Stat. Supp. p. 768, art. 4266*a*.

On October 9, 1890, defendant in error commenced this action before a justice of the peace to recover $50 for a colt killed by the railway company. The complaint alleged presentation and nonpayment, as required by the act, and demanded $10 attorney fee. The company answered admitting everything except the claim for the attorney fee. The case passed, after judgment in favor of the plaintiff for the amount claimed and an attorney fee of $10, through the district court and the court of civil appeals, to the supreme court of the state, by which, on May 10, 1894, the judgment against the company was affirmed. 87 Tex. 19. To reverse such judgment the company sued out this writ of error.

*Messrs.* **E. D. Kenna** and **J. W. Terry** for plaintiff in error.

No counsel for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The single question in this case is the constitutionality of the act allowing attorney fees. The contention is that it operates to deprive the railroad companies of property without *due process of law, and denies to [153] them the equal protection of the law, in that it singles them out of all citizens and corporations, and requires them to pay in certain cases attorney fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. Only against railroad companies is such exaction made, and only in certain cases.

We have not been favored with any argument or brief from the defendant in error. Doubtless he believed, and justly, that nothing could be added to the arguments so fully and strongly made in support of the constitutionality of this law in the respective opinions of the two highest courts of the state.

The supreme court of the state considered this statute as a whole and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute.

It is true the amount of the attorney's fee which may be charged is small, but if the state has the power to thus mulct them in a small amount it has equal power to do so in a larger sum. The matter of amount does not determine the question *of right, and the [154] party who has a legal right may insist upon it, if only a shilling be involved. As well said by Mr. Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616, 635 [29: 746, 752]: "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of



Digitized by Google

person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the 14th Amendment a mere rope of sand, in no manner restraining state action.

It is well settled that corporations are persons within the provisions of the 14th Amendment of the Constitution of the United States. *Santa Clara County* v. *Southern P. R. Co.* 118 U. S. 394 [30: 118]; *Pembina Consol. Silver Min. & M. Co.* v. *Pennsylvania*, 125 U. S. 181, 189 [31: 650, 654, 2 Inters. Com. Rep. 24]; *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205 [32: 107]; *Minneapolis & St. L. R. Co.* v. *Herrick*, 127 U. S. 210 [32: 109]; *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26 [32: 585]; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 [35: 1051]; *Covington & L. Turnp. Road Co.* v. *Sandford*, 164 U. S. 578 [*ante*, 560]. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

155] *But it is said that it is not within the scope of the 14th Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (*Hayes* v. *Missouri*, 120 U. S. 68 [30: 578]; *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205 [32: 107]; *Walston* v. *Nevin*, 128 U. S. 578 [32: 544]; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232 [33: 892]; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339 [35: 1035, 3 Inters. Com. Rep. 810]; *Giozza* v. *Tiernan*, 148 U. S. 657 [37: 599]; *Columbus S. R. Co.* v. *Wright*, 151 U. S. 470 [38: 238]; *Marchant* v. *Pennsylvania R. Co.* 153 U. S. 380 [38: 751]; *St. Louis & S. F. R. Co.* v. *Mathews*, 165 U. S. 1 [*ante*, p. 251]), yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

As well said by Black, J., in *State* v. *Loomis*, 115 Mo. 307, 314 [21 L. R. A. 789], in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employees any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void: "Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and *regulations. Thus, the[156 legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

In *Vanzant* v. *Waddel*, 2 Yerg. 260, 270, Catron, J. (afterwards Mr. Justice Catron of this court), speaking for the supreme court of Tennessee, declared: "Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law, by another."

In *Stratton* v. *Morris* [89 Tenn. 497, 13 L. R. A. 70], Baxter, Special Judge, reviewing at some length cases of classification, closes the review with these words: "We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special in form, if it attempts to create distinctions and classifications between the citizens of this state, the basis of such classification must be natural and not arbitrary."

In *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232 [33: 892], the question was presented as to the power of the state to classify for purposes of taxation, and while it was conceded that a large discretion in these respects was vested in the various legislatures, the fact of a limit to such discretion was recognized, the court, by Mr. Justice Bradley, saying on page 237 [895]: "All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such



Digitized by Google

as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

It is, of course, proper that every debtor 157] should pay his *debts, and there might be no impropriety in giving to every successful suitor attorneys' fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other.

If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroad of all corporations are selected to bear this penalty. The rule of equality is ignored.

It may be said that certain corporations are chartered for charitable, educational, or religious purposes, and abundant reason for not visiting them with a penalty for the nonpayment of debts is found in the fact that their chartered privileges are not given for pecuniary profit. But the penalty is not imposed upon all business corporations, all chartered for the purpose of private gain. The banking corporations, the manufacturing corporations, and others like them, are exempt. Further, the penalty is imposed, not upon all corporations charged with the quasi-public duty of transportation, but only upon those charged with a particular form of that duty. So, the classification is not based on any idea of special privileges by way of incorporation, nor for special privileges given thereby for purposes of private gain, nor even of such privileges granted for the discharge of one general class of public duties.

But if the classification is not based upon the idea of special privileges, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The busi- 158]ness in which they are *engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the peculiar business in which they are engaged—is a just classification, and not one within the prohibition of the 14th Amendment. Thus, it is frequently required that they fence their tracks, and as a penalty for a failure to fence double damages in case of loss are inflicted. *Missouri P. R. Co.* v. *Humes*, 115 U. S. 512 [29: 463]. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the state, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the state and with a view to enforce just and reasonable police regulations.

While this action is for stock killed, the recovery of attorneys' fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The legislature of the state has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and as no duty is imposed, there can be no penalty for nonperformance. Indeed, the statute does not proceed upon any such theory; it is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the supreme court of the state.

But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of *railroad trans- [159 portation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the state, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency.

Neither can it be sustained as a proper means of enforcing the payment of small debts and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the state. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained.

But arbitrary selection can never be justified by calling it classification. The equal



Digitized by Google

protection demanded by the 14th Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369 [30: 220, 226]: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." The first official action of this nation declared the foundation of government in these words: "We hold [160] these truths to be self-evident, *that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.

Questions of this character have been frequently presented to the courts, and it is well to notice a few of the decisions. In Alabama a statute provided that a railroad corporation, or any complainant against it, taking an appeal from a judgment of a justice of the peace in a suit for damages to live stock, and failing to sustain such appeal, should be liable for a reasonable attorney's fee, incurred by reason thereof. Ala. Code, § 1715. This statute was less obnoxious to the charge of discrimination than the one before us, in that it gave the same right to the corporation as to its adversary, and it was limited to cases in which an appeal was taken from a judgment already rendered by a competent judicial officer; yet the supreme court of that state (*North & South Ala. R. Co.* v. *Morris*, 65 Ala. 193) held it in conflict with both the state and the 14th Amendment to the United States Constitution, saying: "Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to another, without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial, and discriminatory legisla- [161] tion, which secures this right to *some favored class or classes and denies it to others, who are thus excluded from that equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions." And again: "The section of the Code under consideration (1715) prescribes a regulation of a peculiar and discriminative character in reference to certain appeals from justices of the peace. It is not general in its provisions or applicable to all persons, but is confined to such as own or control railroads only; and it varies from the general law of the land by requiring the unsuccessful appellant, in this particular class of cases, to pay an attorney's tax fee not to exceed $20. A law which would require all farmers who raise cotton to pay such a fee in cases where cotton was the subject-matter of litigation and the owners of this staple were parties to the suit, would be so discriminating in its nature as to appear manifestly unconstitutional; and one which should confine the tax alone to physicians or merchants or ministers of the gospel would be glaring in its obnoxious repugnancy to those cardinal principles of free government which are found incorporated, perhaps, in the Bill of Rights of every state Constitution of the various commonwealths of the American government."

In Mississippi an act somewhat similar in its nature (Miss. Laws 1882, p. 110) was adjudged unconstitutional (*Chicago, St. L. & N. O. R. Co.* v. *Moss*, 60 Miss. 641), the court saying, on page 646: "The right of appeal cannot be fettered and clogged with reference to the parties litigant or the attitude they occupy as plaintiff or defendant. All litigants, whether plaintiff or defendant, should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law, and its instrumentalities. The same rule must exist for all in the same circumstances."

In Michigan a statute was passed (Mich. Laws 1885, chap. 234) authorizing the taxing of an attorney's fee of $25 in actions against a railroad company for damages *for [162] cattle killed, and the supreme court of that state held it unconstitutional (*Wilder* v. *Chicago & W. M. R. Co.* 70 Mich. 382), saying, on page 384: "Corporations have equal rights with natural persons as far as their privileges in the courts are concerned. They can sue, and defend in all courts the same as natural persons, and the law must be administered as to them with the same equality and justice which it bestows upon every suitor, and without which the machinery of the law becomes the engine of tyranny. This statute proposes to punish a railroad company for defending a suit brought against it with a penalty of $25, if it fails to successfully maintain its defense. The individual sues for the loss of his cow, and if it is shown that such loss was occasioned by his own neglect, and through no fault of the company, and he thereby loses his suit, the railroad company can recover only the ordinary statutory costs of $10 in justice's court, but if he succeeds because of the negligence of the company, the plaintiff is permitted to tax the $10 and an additional penalty of $25; for it is nothing more nor less than a penalty. Calling it an 'attorney fee' does not change its real na-



Digitized by Google

ture or effect. It is a punishment to the company, and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist." *Lafferty* v. *Chicago & W. M. R. Co.* 71 Mich. 35.

So, in Arkansas, an act was passed providing that when stock was killed by a railroad company the owner might demand an appraisement, and that, if the appraised value was not paid within a certain time, and an action was brought, an attorney fee for the plaintiff might be taxed and collected; but it was held by the supreme court (*St. Louis, I. M. & S. R. Co.* v. *Williams*, 49 Ark. 492) that such legislation could not be sustained. It was construed to be an act imposing a penal-
163] ty *for a failure to abide by an award of appraisers and contesting its validity in the courts. It is worthy of note that in the same volume is found a decision by the same court, sustaining a statute allowing an attorney fee in actions for the recovery of overcharges by railroads (*Dow* v. *Beidelman*, 49 Ark. 455), but the statute had prescribed the rates of charge for the carriage of passengers by railroads, had forbidden an overcharge, and it was as a penalty for failure to comply with such police regulations that the allowance of an attorney fee was sustained. See also *Jolliffe* v. *Brown*, 14 Wash. 155, in which, it appearing that there was no statutory obligation on railroad companies to fence their right of way, a statute allowing attorney fees in actions to recover damages for stock killed was declared to be unconstitutional; and *Grand Rapids Chair Co.* v. *Runnels*, 77 Mich. 104, in which an act authorizing an attorney fee to be taxed in entering judgments for personal services was set aside.

Besides these cases involving attorney's fees are others in which legislation imposing special burdens on an individual or a class has been declared beyond the power of the legislature as against equality of right. In *San Antonio & A. P. R. Co.* v. *Wilson* (Tex. App.) 19 S. W. 910, the court of appeals of Texas held that a statute providing that in the event of a railroad company's refusing to pay its indebtedness to an employee within twenty days after demand, he could recover as damages 20 per cent in addition to the amount due, was class legislation and unconstitutional. In the course of the opinion, after referring to those statutes allowing double damages for stock killed, the court observed: "But when we consider the relations of railway companies to their own servants, both as to contracts of employment and payment, we find a field in which special legislation has no right ordinarily to enter, and in which railways stand on the same footing with all other corporations or persons." In *Atchison & N. R. Co.* v. *Baty*, 6 Neb. 37 [29 Am. Rep. 356], there was presented for consideration a statute which gave to the owner of live stock accidentally killed or destroyed on a railroad track *double its value, [164 and it was held that the statute was void. *Millett* v. *People*, 117 Ill. 294 [57 Am. Rep. 869], in which an act of the legislature requiring owners and operators of coal mines to weigh coal in a certain specified manner was held invalid as beyond the power of the legislature to single out certain individuals and impose upon them burdens not imposed upon all. *Frorer* v. *People*, 141 Ill. 171 [16 L. R. A. 492], where an act which prohibited persons engaged in mining or manufacturing from keeping a store for furnishing supplies to their employees was held in conflict with the Constitution. *Braceville Coal Co.* v. *People*, 147 Ill. 66 [22 L. R. A. 340], where a like ruling was made in respect to a statute requiring certain specified corporations to pay the wages of their employees weekly. *Eden* v. *People*, 161 Ill. 296 [32 L. R. A. 659], which set aside a statute forbidding barbers, and barbers only, to keep open their shops or work their trade on Sundays. *Durkee* v. *Janesville*, 28 Wis. 464 [9 Am. Rep. 500], in which an act providing that no costs should be recovered against the city in an action commenced to set aside any assessment or tax deed, or to prevent the collection of taxes in said city, was held to conflict with the rule of equality in that suitors in all other cases were entitled to recover their costs, the court saying, on page 471 [505], that "it is obvious there can be no certain remedy in the laws, where the legislature may prescribe one rule for one suitor or class of suitors in the courts, and another for all others under like circumstances, or may discriminate between parties to the same suit, giving one most unjust pecuniary advantage over the other. Parties thus discriminated against would not obtain justice freely, and without being obliged to purchase it. To the extent of such discrimination they would be obliged to buy justice and pay for it, thus making it a matter of purchase to those who could afford to pay, contrary to the letter and spirit of this provision." *Janesville* v. *Carpenter*, 77 Wis. 288 [8 L. R. A. 808], in which a statute authorizing suits for injunction to be maintained in favor of certain parties under circumstances differing from those which obtained in respect to all other suits of a similar nature, was likewise held to be void, as discriminating and class legislation, *in [165 violation of the spirit of the Constitution, and contrary to public justice.

In *State* v. *Goodwill*, 33 W. Va. 179 [6 L. R. A. 621], the supreme court of appeals of West Virginia held unconstitutional a statute which prohibited persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper except such as was specified in the act; and on the same day in *State* v. *Fire Creek Coal & C. Co.* 33 W. Va. 188 [6 L. R. A. 359], the same court also set aside another statute which prohibited persons and corporations engaged in mining and manufacturing, and interested in selling merchandise and supplies, from selling any merchandise or supplies to their employees at a greater per



Digitized by Google

cent of profit than they sell to others not employed by them. In *Park* v. *Detroit Free Press Co.* 72 Mich. 560 [1 L. R. A. 599], it was held that an act limiting the recovery in suits brought for libel in certain cases to actual damages, as defined in the act, was not within the scope of constitutional legislation. In *Pearson* v. *Portland*, 69 Me. 278 [31 Am. Rep. 276], a statute, which provided that no damages for injury to person or property caused by a defect in the highway could be recovered of any city or town by any person who, at the time the damage was done, was a resident of any country where damage done under similar circumstances was not by the laws of that country recoverable, was held to conflict with the equality clause of the 14th Amendment of the United States Constitution.

It must not be understood that by citing we indorse all these decisions. Our purpose is rather to show the extent to which the courts of the various states have gone in enforcing the constitutional obligation of equal protection. Other cases of a similar character may be found in the reports, but a mere accumulation of authorities is of little value. It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation **166** to the attempted classification—*and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained. *The judgment* of the supreme court of Texas *is therefore reversed*, and the case is remanded for further proceedings not inconsistent with this opinion.

Mr. Justice **Gray**, with whom concurred Mr. Chief Justice **Fuller** and Mr. Justice **White**, dissenting:

The Chief Justice, Mr. Justice White, and myself are unable to concur in this judgment. The grounds of our dissent may be briefly stated.

Costs in civil actions at law are the creature of statute. From early times there have been statutes making different rules as to costs, according to the nature of the issue, and the amount involved; and sometimes allowing costs to the prevailing party when plaintiff, and not when defendant. The whole matter of costs, including the party to or against whom they may be given, the items or sums to be allowed, and the right to costs as depending upon the nature of the suit, upon the amount or value of the thing sued for or recovered, or upon other circumstances, is and always has been within the regulation and control of the legislature, exercising its discretionary power, not oppressively to either party, but as the best interest of the litigants and of the public may appear to it to demand. Bac. Abr. *Costs, passim; Postan* v. *Stanway*, 5 East, 261; *Green* v. *Liter*, 12 U. S. 8 Cranch, 229, 242 [3: 545, 549]; *Kneass* v. *Schuylkill Bank*, 4 Wash. C. C. 106; *Lowe* v. *Kansas*, 163 U. S. 81, 41 L. ed. 78.

The statute of the state of Texas, now in question, does but enact that any person having a valid bona fide claim, not exceeding $50, against a railroad corporation, for personal services or damages, or for overcharges on freight, or for destruction or injury of stock by its trains, and presenting the claim, verified by his affidavit, to the corporation, and, if it is not paid within thirty days, suing thereon in the proper court, and finally obtaining judgment for the full amount thereof in that court, or in any court to which the suit may be appealed,—shall be entitled to recover, in addition to *other costs, a reasonable attorney's fee [**167** (if he has employed an attorney) not exceeding $10, to be assessed and awarded by the court or jury trying the issue. Tex. Gen. Laws 1889, chap. 107, p. 131; Sayles's Tex. Civ. Stat. Supp. art. 4266*a*, p. 768. In other words, if an honest claim of not more than $50, and coming within one of those classes of small claims which most commonly arise between individuals and railroad corporations, is not promptly paid when presented under oath, and the claimant is thereby compelled to resort to a suit, the corporation, if ultimately cast in the suit, must pay to the successful plaintiff a very moderate attorney's fee, as a part of the costs of the litigation.

The legislature of a state must be presumed to have acted from lawful motives, unless the contrary appears upon the face of the statute. If, for instance, the legislature of Texas was satisfied, from observation and experience, that railroad corporations within the state were accustomed, beyond other corporations or persons, to unconscionably resist the payment of such petty claims, with the object of exhausting the patience and the means of the claimants by prolonged litigation and perhaps repeated appeals, railroad corporations alone might well be required, when ultimately defeated in a suit upon such a claim, to pay a moderate attorney's fee, as a just, though often inadequate, contribution to the expenses to which they had put the plaintiff in establishing a rightful demand. Whether such a state of things as above supposed did in fact exist, and whether, for that or other reasons, sound policy required the allowance of such a fee to either party or to the plaintiff only, were questions to be determined by the legislature, when dealing with the subject of costs, except in so far as it saw fit to commit the matter to the decision of the courts.

The constitutionality of statutes allowing plaintiffs only to recover an attorney's fee, as part of the judgment, in particular classes of actions selected by the legislature, appears to have been upheld by the courts of most of the states in which it has been challenged. *Kansas P. R. Co.* v. *Mower*, 16 Kan. 573, 582; *Kansas P. R. Co.* v. *Yans*, 16 Kan. 583; *Peoria, D. & *E. R. Co.* v. *Duggan*, 109 Ill. 537 [50 Am [**168** Rep. 619]; *Vogel* v. *Pekoc*, 157 Ill. 339; *Dow* v. *Beidelman*, 49 Ark. 455; *Perkins* v. *St. Louis, I. M. & S. R. Co.* 103 Mo. 52 [11 L. R. A. 426]; *Burlington, C. R. & N. R. Co.* v. *Dey*, 82 Iowa, 312, 340 [12 L. R. A. 436, 8 Inters. Com. Rep. 584]; *Wortman* v. *Kleinschmidt*, 12 Mont. 316; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 87 Tex. 19; *Cameron* v. *Chicago, M. & St. P. R. Co.* 63 Minn. 384.

It is to be regretted that so important a pre-



Digitized by Google

cedent as this case may afford for interference by the national judiciary with the legislation of the several states on little questions of costs, should be established upon argument *ex parte* in behalf of the railroad corporation, without any argument for the original plaintiff. But it is hardly surprising that the owner of a claim for $50 only, having been compelled to follow up, through all the courts of the state, the contest over this $10 fee, should at last have become discouraged and unwilling to undergo the expense of employing counsel to maintain his rights before this court.

---

ALFRED CLARKE, *Plff. in Err.*,
*v.*
J. J. McDADE.

Three Cases, Nos. 158, 159, 165.

---

ALFRED CLARKE, *Plff. in Err.*,
*v.*
C. W. MOTT *et al.*

Two Cases, Nos. 160, 161.

(See S. C. Reporter's ed. 168-174.)

*Final judgment or decree—Federal question—review of state decision.*

1. A so-called order made upon a return to a writ of habeas corpus granted by a judge and returnable before him does not constitute a final judgment or decree of a state court which may be reviewed on writ of error from this court under U. S. Rev. Stat. § 709.
2. A general statement that a decision is against the constitutional rights of a party or against the 14th Amendment, or that it is without due process of law, appearing only in specifications of error, will not raise a Federal question.
3. Where the record contains no final judgment of the state court a mere allegation in a bill of exceptions of an adjudication in insolvency and the exceptions taken, is not sufficient to show any final judgment which will sustain a writ of error from this court to a state court.

[Nos. 158, 159, 165, 160, 161.]

*Submitted January 13, 1897. Decided January 25, 1897.*

WRIT OF ERROR in each case to the Superior Court of the City and County of San Francisco, State of California, to review orders and proceedings in habeas corpus in Nos. 158, 159, 161, 165, and an adjudication in insolvency in No. 160. *Dismissed for want of jurisdiction.*

The facts are stated in the opinion.

*Miss* **Clara Shortridge Foltz** and *Messrs.* **A. C. Searle** and *Alfred Clarke*, in person, for plaintiff in error.

No counsel for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

The records in the above numbers, 158 and 159, relate to proceedings in habeas corpus. Those records are printed. Numbers 161 and 165 also relate to proceedings in habeas corpus. The records in those cases are not printed. Number 160 relates to a writ of error in what is termed in the record "an action."

All the records now before us, both printed and unprinted, are such a mass of confusion as to render it difficult to determine what has been done in the court below. The records relating to the proceedings taken upon habeas corpus show applications for that writ to various judges of the superior court of the city and county of San Francisco, state of California. From a perusal of the series of papers variously denominated orders, objections, demurrers, motions to vacate, answers, specifications of errors, and petitions for reversal, which are mixed up in inextricable confusion, we are able to gather that the plaintiff in error, Clarke, was proceeded against in the superior court of San Francisco as an alleged insolvent, and that such court, after a hearing, adjudged that he was insolvent; that he appealed from the adjudication and his appeal was heard in the supreme court of California, which court affirmed the adjudication and remitted the record to the superior court of San Francisco. These facts are discovered from the perusal of a paper appearing to be an order signed by one of the judges of the superior court, which shows that there had been an appeal, and that the remittitur had come down to that court affirming its judgment adjudging Clarke an insolvent.

[170] The order containing such recitals then directs the insolvent to file an inventory of his property, and it is signed by one of the judges of the court. An appeal was taken from the order, but no disposition of it appears to have been made, so far as the record shows. He failed to obey the order by filing the inventory as directed, and an order to show cause why he should not be punished for contempt having been made he appeared and offered various objections to such adjudication. He was finally adjudged guilty of the contempt charged, and was committed to the jail in San Francisco until he should obey the order of the court and file an inventory as directed. After his commitment to the jail he commenced a series of proceedings by habeas corpus to obtain his release. It is the decision of the judge rendered in each proceeding of

---

NOTE.—*As to what is final decree or judgment of state or other court, from which appeal lies*, see note to Gibbons v. Ogden, 5: 392.

*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

*As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws*,—see notes to Hart v. Lamphire, 7: 679, and Commercial Bank v. Buckingham, 12: 169.

*As to jurisdiction of Federal over state courts; necessity of Federal question*—see note to Hamblin v. Western Land Co. 37: 267.



Digitized by Google

which he complains. He applied to one judge of the superior court after another for the writ which was granted him, and when the writ was served and the petitioner produced in obedience to the writ, after a hearing the writ was discharged and the petitioner was remanded by the judge who granted the writ. This was repeated three or four times before different judges with the same result. He also applied to Judge Morrow, United States district judge, for a writ of habeas corpus, and that writ was applied for after he had applied to the state judge for the same kind of a writ which had been allowed, but before a decision was given by the state judge in that particular proceeding, and upon a hearing before the state judge upon the return of the writ sued out by himself, he objected that the judge had no right to hear the case, as he had applied to a United States district judge for a writ of habeas corpus, and that under the provisions of U. S. Rev. Stat. §§ 763, 766, there was no power in the state judge to proceed with the hearing upon a return of the writ.

It does not appear what (if any) action was taken by the Federal judge on the application for the habeas corpus, and it is upon the decisions made by the state judges on these various applications for writs of habeas corpus that the questions arise which plaintiff in error claims that this court has the jurisdiction to decide.

171] *All his objections to the proceedings are to be found in documents set forth in the records signed by himself and which he describes as specifications of error and prayers for reversal. In these specifications he sets up numerous objections to the order adjudging him an insolvent and to the order adjudging him in contempt, and to the alleged refusal of the various judges to admit him to bail pending an examination of his case under the writs issued. What these various decisions were can only be determined from these specifications of error and other descriptions and allegations contained in affidavits and alleged answers to petitions signed by the plaintiff in error.

He objects that the order adjudging him an insolvent, as well as various of the other orders made by the court, were not signed by the clerk and sealed with the seal of the court assuming to grant them; that they were not served by the sheriff; that he was denied a trial by jury upon the question of insolvency and upon the question of contempt; that he was denied bail; and, generally, that the 14th Amendment was violated in his person, and that all of the various orders were made in violation of the sections of the Revised Statutes (1977, 763-766).

There is not one judgment of any court to be found in the record. There is a statement in each of the records relating to the habeas corpus proceeding following the writ and return thereto, as follows: "Court order, October 26, 1893. Writ dismissed; prisoner remanded. Register 2 of Departments 1 to 10, page 249."

In one of the records four petitions for writs of habeas corpus are contained, one after the other, and no action shown in regard to any petition excepting at the end of the fourth there is a statement similar to that which is above set forth as to the dismissal of the writ.

There is no record of any appeal being taken to any state appellate tribunal or of any review being had or attempted of the various so-called court orders remanding the prisoner after a hearing upon the returns to the various writs, but the writs of error from this court are directed to the judges of the *superior[172 court of the city and county of San Francisco, and they have been allowed by one of the judges of that court.

The fatal objection appears in each case that the so-called court orders made upon the returns to the several writs of habeas corpus, which were granted by a judge and returnable before him, do not constitute that final judgment or decree in a suit in the highest court of a state in which a decision in the suit could be had which may be reviewed on writ of error from this court under U. S. Rev. Stat. § 709. If these various orders did constitute such a final judgment, it does not appear in the record that any question arose in such a manner as would give this court jurisdiction to review the same under the above-named section.

A general statement that the decision of a court is against the constitutional rights of the objecting party or against the 14th Amendment, or that it is without due process of law, particularly when these objections appear only in specifications of error, so called, will not raise a Federal question even where the judgment is a final one within the section of the Revised Statutes above mentioned. There must be at least some color of a Federal question. *Hamblin* v. *Western Land Co.* 147 U. S. 531 [37: 267].

In No. 160 of the above records, entitled *Mott* v. *Clarke*, in the superior court of the city and county of San Francisco, department 10, the record opens with what is termed "specifications of error and prayer for reversal" in which it is stated that the action was commenced on the 2d of October, 1891, by filing a petition in the court, and that on the same day a mutilated portion of an attachment bond was filed in the same case, but that the bond was never approved by the judge, and that on the 6th of October, 1891, the respondent, Alfred Clarke, filed and served an objection to the bond, which objection is set forth. Then it is stated that no other bond was ever filed. An order to show cause then follows, ordering Clarke to show cause why he should not be adjudged an insolvent debtor, and restraining his transfer of any property in the meantime. This order is signed by one of the judges of the superior court. It would *appear that the order[173 was served on the respondent personally and after such service it was filed, and was not served upon him after filing. The respondent thereafter objected to the jurisdiction of the court on the ground of absence of summons. The objection was overruled, subsequent proceedings were had, and on May 18, 1892, the respondent was adjudged an insolvent. The respondent claims that in the above proceedings he has been deprived of liberty and property without due process of law, and denied by the state the equal protection of the laws. He specifies the errors on which he will rely:



Digitized by Google

(1) That the judgment complained of is null and void for want of jurisdiction, and the court never obtained jurisdiction of his person, and therefore he has not been accorded due process of law.

(2) That said judgment is made in violation of the 14th article, United States Constitution, and § 1979 of Revised Statutes of United States.

Wherefore respondent prays that the said judgment may be reversed.

This paper is made and filed *nunc pro tunc* as of May 10, 1894, by leave of court for good cause shown.

(Signed) Alfred Clarke,
Respondent and Plaintiff in Error.

It is then stated that the foregoing bill of exceptions is allowed and authenticated as and for the transcript on writ of error from the United States Supreme Court to the superior court as provided by law. It is signed by a judge of the superior court. Upon such a record a writ of error is allowed, and the citation and return of the judges of the foregoing matters follows.

This is everything that is in the record. No pleadings, no judgment other than an allegation in what is called a bill of exceptions of an adjudication in insolvency, and the recital in such bill of objections taken of the character above set forth, and from this proceeding in insolvency before one of the judges of the superior court of San Francisco the plaintiff in error sues out a writ of error from this court 174] and claims the *right to review the proceedings (whatever they were) of the superior court of San Francisco county. The same objection (among others) applies to this that we have stated in regard to the other records.

There is no final judgment, such as is provided for in U. S. Rev. Stat. § 709, and there does not appear to have arisen any Federal question whatever.

We have carefully looked through these entire records, notwithstanding the mass of confusion which appears in all of them. We find nothing which shows that we have jurisdiction in the cases, and for these reasons *the various writs of error must be dismissed.*

---

## UNITED STATES, *Appt.*,
*v.*
## WILLIAM J. BARNETTE.

*Pay of lieutenant in the navy.*

(See S. C. Reporter's ed. 174-180.)

A lieutenant in the navy is entitled to pay for sea service while on board a vessel of the United States anchored at and tied to a wharf in New York harbor on which a nautical school is maintained in which he acts as an instructor, when the vessel is furnished by the Secretary of the Navy, who assigns the lieutenant to such duty, and he receives no orders except from the commander of the vessel, although the service is called by the Secretary "employment on shore duty," and the lieutenant receives pay also as instructor from the state of New York.

[No. 325.]

*Submitted December 21, 1896. Decided January 25, 1897.*

APPEAL from a judgment of the Court of Claims in favor of William J. Barnette against the United States, for sea pay as lieutenant in the navy. *Affirmed.*

See same case below, 30 Ct. Cl. 197.

Statement by Mr. Justice **Gray**:

This was a claim by a lieutenant in the navy of the United States for sea pay while on board the St. Mary's in the harbor of New York. The facts found by the court of claims were in substance as follows:

The St. Mary's was a sailing vessel owned and employed by the United States; and had been furnished for educational purposes by the Secretary of the Navy, upon the application of the governor of the state of New York, under the act of Congress of June 20, 1874, chap. 339, which is copied in the *margin.† The com-[175 mand of the vessel was always retained in an officer of the United States navy. The nautical school upon this vessel was established by the board of education of the city of New York, under the statute of the state of New York of July 1, 1882, chap. 410, the material provisions of which are likewise copied in the margin.‡

†An Act to Encourage the Establishment of Public Marine Schools.

The Secretary of the Navy, to promote nautical education, is hereby authorized and empowered to furnish, upon the application in writing of the governor of the state, a suitable vessel of the navy with all her apparel, charts, books, and instruments of navigation, provided the same can be spared without detriment to the naval service, to be used for the benefit of any nautical school, or school or college having a nautical branch, established at each or any of the ports of New York, Boston, Philadelphia, Baltimore, Norfolk, and San Francisco, upon the condition that there shall be maintained at such port a school, or branch of a school, for the instruction of youths in navigation, seamanship, marine enginery, and all matters pertaining to the proper construction, equipment, and sailing of vessels, or any particular branch thereof. And the President of the United States is hereby authorized, when in his opinion the same can be done without detriment to the public service, to detail proper officers of the navy as superintendents of, or instructors in, such schools: *Provided*, that if any such school shall be discontinued, or the good of the naval service shall require, such vessel shall be immediately restored to the Secretary of the Navy, and the officers so detailed recalled: *And provided further*, that no person shall be sentenced to or received at such schools as a punishment or commutation of punishment for crime. 18 Stat. at L. 121.

‡Sec. 1068. The board of education are authorized and directed to provide and maintain a nautical school in said city for the education and training of pupils in the science and practice of navigation; to furnish accommodations for said school, and make all needful rules and regulations therefor, and for the number and compensation of instructors and others employed therein; to prescribe the government and discipline thereof, and the terms and conditions upon which pupils shall be received and instructed therein and discharged therefrom, and provide in all things for the good management of said nautical school. And the said board shall have power to purchase the books, apparatus, stationery, and other things necessary or expedient to enable said school to be properly and successfully conducted; and may cause the said school, or the

NOTE.—*As to extra pay or compensation to officers*, see note to United States v. Macdaniel, 8: 587.



Digitized by Google

176] The object of the nautical school is to instruct young men in maritime matters, so as to fit them for any service connected with maritime life, leaving them free to go into the navy, or into the merchant marine. The instruction is in seamanship, navigation, sailmaking, and everything pertaining to a seaman's life.

The claimant, on January 1, 1891, reported to the commander of the St. Mary's for duty as executive officer on board of her, and there served as such until October 24, 1893 (the date of filing this petition), in obedience to an order signed by the Secretary of the Navy, dated December 30, 1890, and in the usual form of orders assigning officers to duty on school ships, as follows:

Navy Department, Washington,
December 30, 1890.

Sir:

You are detached from the Minnesota on the 31st instant, and will report to Commander A. S. Crowninshield on the same day for duty as executive on board the nautical school ship St. Mary's as the relief of Lieut. C. C. Cornwell. This employment on shore duty is required by the public interests, and such service will continue until the 31st of December, 1893, unless it is otherwise ordered.

Throughout the claimant's service on the St. Mary's he received no orders, except from her commander, an officer of the navy; and through him his junior officers received the orders of the commander. Her complement of officers was the commander, the executive officer, a lieutenant, an ensign, and a surgeon. Her 177] crew consisted of twenty-two men of different grades and ranks, all employed by the city of New York. Her commander was required by the regulations of the navy to report semiannually to the Secretary of the Navy upon the conduct and professional ability of his subordinate officers, and upon the efficiency of the men.

The St. Mary's each year went upon a cruise lasting from about the middle of May to some time in October; and during the rest of the year was attached to a dock in the harbor of New York. While she was not cruising, the claimant lived on board and was on duty on board every day, wearing his uniform and doing the same duty and subject to the same regulations as while the ship was on the high seas; and in the matter of quarters, mess, and uniform there was no difference whether the vessel was under sail, or lying at anchor, or tied to a wharf. The claimant's duties as executive officer were the care and preservation of the ship, looking after the crew, and attending to the details of the organization and police of the ship.

The claimant also acted as instructor of the pupils of the nautical school on board the St Mary's; and was paid for his services in that capacity by the board of education of the city of New York.

In the routine of the Navy Department, officers are usually assigned alternately to sea and shore duty for periods of about three years each. For two and a half years prior to December 31, 1890, the claimant had been attached to the United States steamship Galena on a cruise, performing sea duty and receiving sea pay.

The claimant had been in the navy since 1872; and during his service on the St. Mary's was entitled to $2,600 a year while on sea duty, and $2,200 while on shore duty. The accounting officers of the United States allowed him sea pay while the St. Mary's was on a cruise, but only shore pay while she was lying at a wharf in the harbor of New York.

The court of claims held that he was entitled to sea pay during the whole time of his service on the St. Mary's, and gave judgment accordingly in his favor for $780.25. 30 Ct. Cl. 197. The United States appealed to this court.

*Messrs.* **Joshua Eric Dodge**, Assistant Attorney General, and **George H. Gorman**, assistant attorney, for appellant.

*Messrs.* **John S. Blair** and **Charles Abert** for appellee.

Mr. Justice **Gray** delivered the opinion of the court:

By the statutes of the United States, the officers of the navy receive higher pay "when at sea," than when "on shore duty," or "on leave or awaiting orders;" and the pay of the claimant, being in the second five years of his service as lieutenant, was "when at sea, $2,600; on shore duty, $2,200; on leave or awaiting orders, $1,800." U. S. Rev. Stat. § 1556. And by § 1571, "no service shall be regarded as sea service, except such as shall be performed at sea, under the orders of a department, and in vessels employed by authority of law."

To constitute sea service, then, three things and three only are necessary. The service must be performed "at sea;" "under the orders of a department;" and "in vessels employed by authority of law."

In order to come within the phrase "at sea," as used in this statute, it is not necessary that the vessel upon which the service is performed should be upon the high seas. It is enough that she is waterborne, even if at anchor, in a bay or port or harbor, and not in condition presently to go to sea. It has accordingly been adjudged by this court that a vessel is "at sea," within the meaning of the statute,

pupils, or part of the pupils thereof, to go on board vessels in the harbor of New York, and take cruises in or from said harbor, for the purpose of obtaining a practical knowledge in navigation and of the duties of mariners. And the said board are hereby authorized to apply to the United States government for the requisite use of vessels and supplies for the purpose above mentioned.

Sec. 1070. The board of education shall appoint annually at least three of their number, who shall, subject to the control, supervision, and approbation of the board, constitute an executive committee for the care, government, and management of such nautical school, under rules and regulations so prescribed, and whose duty it shall be, among other things, to recommend the rules and regulations which they deem necessary and proper for such school.

Sec. 1071. After the establishment and organization of the said school, the expenses thereof and of carrying out the provisions of this chapter shall be defrayed from the moneys raised by law for the support of common schools in the city and county of New York. 2 N. Y. Laws 1882, p. 800.



Digitized by Google

although she is used as a training ship, anchored in a bay, and not in a condition to be taken out to sea beyond the main land; or is used as a receiving ship at anchor in port at a navy yard, communicating with the shore by a rope, and having a roof built over her deck and not technically in commission for sea service. *United States* v. *Symonds*, 120 U. S. 46 [30: 557]; *United States* v. *Bishop*, 120 U. S. 51 [30: 558]; *United States* v. *Strong*, 125 U. S. 656 [31: 823]. The claimant, while the St. Mary's was not on a cruise, but anchored at and tied to a wharf in the harbor of New York, lived on board of her, wore his uniform, 179]and was subject to *the same regulations as while she was upon the high seas; and was therefore "at sea," so far as affected his rate of pay, during the whole period of his service as her executive officer. The fact that this service was called, in the order of the Secretary of the Navy assigning him to duty upon this vessel, "employment on shore duty," is immaterial. The material question is whether the service was, in fact, performed at sea and not on shore; and not upon the name by which the Secretary of the Navy was pleased to designate it. As was said by this court in *United States* v. *Symonds*, above cited, "Congress certainly did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation, as established by law, by declaring that to be shore service which was in fact sea service, or to increase his compensation by declaring that to be sea service which was in fact shore service." 120 U. S. 49 [30: 558].

The service of the claimant was clearly performed "under the orders of a department." It was in obedience to an order of the Department of the Navy that he reported to the commander of the St. Mary's and served as her executive officer; and, throughout his service upon her, he received no orders except from her commander, himself an officer in the navy. As was well said by Judge Nott, now chief justice of the court of claims, in delivering the opinion of that court in the case at bar: "The order which placed the St. Mary's on duty as a school ship, and, to a certain extent, at the disposal of the board of education, did not transfer the vessel to any other authority than that of the United States. Possession, control, discipline, and authority were all retained by the government. The officers doubtless carried out the directions of the board of education; but they did not do so because they were the orders of the board of education, but because they were sent by the Secretary of the Navy to New York to do so." 30 Ct. Cl. 207.

It is no less clear that the St. Mary's was one of the "vessels employed by authority of law" by the United States. The court of claims has distinctly found, as a fact, that she was "a sailing vessel owned and employed by the 180]United States." *Both the furnishing of the St. Mary's by the Secretary of the Navy to the state of New York for a ship to maintain a nautical school upon, and the detail of the claimant as executive officer of the vessel while she was used for that purpose, were pursuant to the powers expressly conferred upon the President of the United States and the Secretary of the Navy by the act of Congress, entitled "An Act to Encourage the Establishment of Public Marine Schools." Act of June 20, 1874, chap. 339 (18 Stat. at L. 121).

The duties of executive officer of the St. Mary's having been performed by the claimant as a lieutenant in the navy of the United States, at sea, under the orders of the Department of the Navy, and in a vessel employed by the United States by authority of law, he was entitled, during the whole period of his service, whether the vessel was attached to a wharf or was sailing on a cruise, to the rate of pay which the statute allowed to him "when at sea," notwithstanding that during the same period he also received pay from the state of New York for the performance of the distinct, but quite consistent, duties of instructor in its nautical school upon this vessel, the performance of which, indeed, by naval officers, was manifestly contemplated and intended by the act of Congress, and by the orders of the Secretary of the Navy.

*Judgment affirmed.*

Mr. Justice **Field** and Mr. Justice **Brewer** took no part in the consideration and decision of this case.

---

THOMAS W. JONES, *Plff. in Err.*,
*v.*
ALFRED G. BRIM, Road Supervisor of District No. 2, Summit County, Utah.

(See S. C. Reporter's ed. 180-184.)

*Utah statute as to damages by cattle—presumption—due process of law.*

1. The Utah statute which makes any person who drives a herd of horses, asses, cattle, sheep, goats, or swine over a public highway constructed on a hillside, liable for all damages done by such animals in destroying the banks or rolling rocks into or upon such highway, does not deny the equal protection of the laws nor deprive of property without due process of law.
2. Such statute simply creates a conclusive presumption of negligence from a particular state of facts, which is within the province of the legislature.
3. A statute general in its application to all persons under like circumstances, and not an arbitrary exercise of power, does not deny to the defendant the equal protection of the laws; nor, if it provides for the ascertainment of liability by judicial proceedings, does it deprive him of property without due process of law.

[No. 621.]

*Submitted January 11, 1897. Decided February 1, 1897.*

IN ERROR to the Supreme Court of the State of Utah to review a judgment of that court affirming a judgment of the District Court of the Territory of Utah in favor of Alfred G. Brim, road supervisor, against Thomas W. Jones, for damages by destroying the banks of and rolling rocks into a highway, caused by a band of sheep while being driven upon the highway. *Affirmed.*

See same case below, 11 Utah, 200, 29 L. R. A. 97.

---

NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.



Digitized by Google

Statement by Mr. Justice **White**:

**181**] *This action was originally instituted in June, 1893, before a justice of the peace in the then territory of Utah, to recover the sum of $10 for damages alleged to have resulted from destroying the banks on the side of and from rolling rocks into and upon a public highway situated on a hillside, caused by a band of sheep owned by the defendant while being driven upon such highway.

The supreme court of the territory, on review of the judgment of a district court in favor of the defendant, held that the statute upon which the cause of action was founded was valid, adjudged that the petition stated a cause of action, and remanded the cause to the district court. 11 Utah, 200 [29 L. R. A. 97]. Subsequently, the supreme court of the state affirmed a judgment of the district court, which had been entered for the amount claimed. 45 Pac. 46. The defendant sued out this writ of error.

*Messrs.* **Franklin S. Richards** and *Joseph T. Richards* for plaintiff in error.

*Mr.* **Parley L. Williams** for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

The sole question presented for our consideration is whether 1 Utah Comp. Laws, p. 743, § 2087, is in conflict with the Constitution of the United States. The section reads as follows:

"Sec. 2087. Any person who drives a herd of horses, mules, asses, cattle, sheep, goats, or swine over a public highway, where such highway is constructed on a hillside, shall be liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway."

Plaintiff in error claims that the law in question deprives the class of persons mentioned in it of their property without due process of law, and denies to them the equal protection of the laws; and that consequently its provisions contravene that portion of the 1st section **182**] of the 14th Amendment *to the Constitution of the United States which provides that "no state shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The denial of the equal protection of the laws is asserted to consist in an unjust and illegal discrimination against persons who "drive herds of horses, mules, asses, cattle, sheep, goats, or swine over a public highway, where such highway is constructed on a hillside," by making them liable for damage done by them in using the highway, while all other persons are permitted to use it without liability.

We premise that the clause of the 14th Amendment of the Constitution referred to was undoubtedly intended to prohibit an arbitrary deprivation of life or liberty or arbitrary spoliation of property. *Barbier* v. *Connolly*, 113 U. S. 28 [28: 923]. But it does not limit, nor was it designed to limit, the subjects upon which the police power of a state may be lawfully exerted. *Minneapolis & St. L. R Co.* v. *Beckwith*, 129 U. S. 29 [32: 586]. Embraced within the police powers of a state are the establishment, maintenance, and control of public highways. *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 661 [29: 521]. The legislation in question would clearly seem, therefore, to come within the narrowest definition of the police power, and be properly classed as a reasonable regulation incident to the right to establish and maintain such highways. The statute is analogous in principle to the one considered in the case of *St. Louis & S. F. R. Co.* v. *Mathews*, decided at this term (165 U. S. 1 [*ante*, 251]), wherein it was held that a law of Missouri was valid which made every railroad corporation owning or operating a railroad in the state absolutely responsible in damages for the property of any person injured or destroyed by fire communicated by its locomotive engines. That decision was based upon the right of a state, in the exercise of its police power, to classify occupations with relation to their peculiar liability to cause injury to property, from the dangerous nature of the implements employed in the business. The legislation here in question undoubtedly proceeds upon this theory. The statute *was manifestly not designed to impose [**183** a liability upon the owners of herds for damage occasioned by the mere passage of a drove of animals over a hillside road. If these herds were kept in the road, the banks would not be caved or rocks rolled into the traveled way. The damage contemplated must therefore be occasioned by animals going outside the beaten roadway. In effect, the legislature declared that the passage of droves or herds of animals over a hillside highway was so likely, if great precautions were not observed, to result in damage to the road, that where this damage followed such driving, there ought to be no controversy over the existence or nonexistence of negligence, but that there should be an absolute legal presumption to that effect resulting from the fact of having driven the herd. The confusion of thought involved in the reasoning of the plaintiff in error not only results from failing to consider that the statute simply creates a conclusive presumption of negligence from a particular state of facts, but also is caused by treating the law as one imposing a liability on the owners of herds when liability does not also exist as to others. It is reasonable to infer that the lawmaker contemplated that, if only a few animals were driven over a road, and damage resulted from their being allowed to leave the road and go upon the sides, so as to cause injury, there would be no practical difficulty in establishing the want of due care on the part of those in charge of the animals driven, and therefore there was no necessity in such case of creating a conclusive presumption of negligence, whilst, on the other hand, the driving of a herd might require such a degree of care and leave room to so much question as to whether due care had been taken that where damage resulted the conclusive presumption of neglect should be entailed.

It was obviously the province of the state legislature to provide the nature and extent of the legal presumption to be deduced from a given state of facts, and the creation by law of such presumptions is after all but an illustration of the power to classify. When the stat-



Digitized by Google

ute is properly understood, therefore, the argument of the plaintiff in error amounts to an assertion that the whole subject of the probative 184]force *to arise by operation of law, from any specified state of fact, is, in every sense, by the effect of the 14th Amendment, removed from the jurisdiction of the local authorities.

The statute being general in its application, embracing all persons under substantially like circumstances, and not being an arbitrary exercise of power, does not deny to the defendant the equal protection of the laws. *Lowe* v. *Kansas*, 163 U. S. 81, 88 [41: 78, 80]; *Duncan* v. *Missouri*, 152 U. S. 377 [38: 485]. So, also, as the statute clearly specifies the condition under which the presumption of neglect arises, and provides for the ascertainment of liability by judicial proceedings, there is no foundation for the assertion that the enforcement of such ascertained liability constitutes a taking of property without due process of law.

*Judgment affirmed.*

---

C. L. ADDINGTON, *Plf. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 164-168.)

*Refusing a new trial—manslaughter—instruction.*

1. The refusal of the court below to grant a new trial cannot be assigned for error in this court.
2. Failure to say that manslaughter must be done unlawfully and wilfully does not render erroneous an instruction distinguishing between murder and manslaughter, which says that the accused cannot be found guilty of murder if the killing, though intentional, was without malice.
3. The right of self-defense is sufficiently stated in an instruction that a man may kill his assailant if the circumstances are such as to produce upon his mind, or that of a reasonably prudent man, the impression that by so doing only could he save his own life or protect himself from serious bodily harm.

[No. 579.]

*Submitted December 15, 1896. Decided February 1, 1897.*

IN ERROR to the Circuit Court of the United States for the Eastern District of Texas to review a judgment of that court, convicting C. L. Addington of murder of one Oscar Hodges. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **C. L. Addington,** in proper person, for plaintiff in error.

*Mr.* **Holmes Conrad,** Solicitor General, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff in error, C. L. Addington, and one T. D. Buchannon, "late of the Choctaw Nation, Red River county, Indian territory," were charged by indictment in the circuit court of the United States for the eastern district of Texas with the crime of having, on the 28th day of June, 1895, in said county, killed and murdered one Oscar Hodges, "a white person, and not an Indian, nor a citizen of the Indian territory, nor a citizen of any Indian nation or tribe."

The defendants pleaded separately not guilty. Buchannon was found not guilty, and Addington was found guilty of murder as charged in the indictment. A motion by Addington for a new trial having been made and overruled, the accused was sentenced to suffer death by hanging.

Addington subsequently moved in arrest of judgment upon various grounds, and that motion was overruled.

1. The first ten assignments of error are based upon a bill of exceptions setting out simply the grounds upon which the accused asked that a new trial be granted to him. It is only necessary to say that the refusal of the court to grant a new trial cannot be assigned for error in this court. *Blitz* v. *United States*, 153 U. S. 312 [38: 727].

2. The 11th assignment of error relates to the instruction given upon the subject of manslaughter. That instruction was in these words: "Manslaughter, as applied to a case of this character, is the intentional taking of human life, but the distinguishing trait between manslaughter and murder is the absence of malice; it must spring from a gross provocation, and of such character as to temporarily render the party incapable of that cool reflection that otherwise makes it murder. Of course, the defendant intends to do what he does, but he *must be laboring at the time[186 he performs the act under intense mental excitement such as would render any ordinarily prudent person for the time being incapable of that cool reflection that otherwise makes it murder. In that state of case the law does not wholly excuse the offense; but the law, in its charity for the imperfections and weakness of human nature, reduces it from murder to manslaughter."

The statutes of the United States provide that any person who, within any of the places or upon any of the waters described in § 5339, "unlawfully and wilfully, but without malice, strikes, stabs, wounds, or shoots at, or otherwise injures another, of which striking, stabbing, wounding, or shooting or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter." U. S. Rev. Stat. § 5341.

The accused contends that, under this statute, the taking of human life without malice, even though it be intentional, is not manslaughter unless the act be done "unlawfully and wilfully;" and that the instruction given was erroneous in that it did not instruct the jury that before they could convict of manslaughter it must appear from the evidence that the killing was not only intentional, but was unlawful and wilful.

The only purpose of the court in this part of its charge was to bring out the distinction between murder and manslaughter, and to inform the jury that they could not find the ac-

NOTE.—*As to criminal law; effect of general verdict,*—see note to Snyder v. United States, 28: 607.

*As to criminal law; correction of sentence of one convicted; resentence,*—see note to *Ex parte* Cross, 36: 969.



Digitized by Google

cused guilty of murder if the killing, although intentional, was without malice. This was for the benefit and not to the prejudice of the accused.

But it is said that the accused may have killed his adversary in self-defense. The court did not overlook this part of the case. It further instructed the jury: "The homicide becomes justifiable when the party that is charged with taking human life has been unlawfully assaulted himself by his adversary, and is placed in a position of peril where his life is about to be taken, or serious bodily harm is about to be done him, or, from the acts of his adversary, it reasonably indicates to the defendant, or would reasonably indicate 187] *to the mind of any other person situated as the defendant was, an intention, coupled with the ability, upon the part of his adversary, to take his life or do him serious bodily harm; in that state of the case it is his duty to avoid the threatened danger if he can, but he is authorized to use all reasonable means at his command to avert the threatened danger, and, if necessary, he is authorized to go to the extent of taking human life in his own proper self-defense."

If this instruction stood alone, there might be some ground to contend that it was inconsistent with the right of self-defense, as defined in *Beard* v. *United States*, 158 U. S. 550 [39: 1086]. But the court further said: "If you believe from the testimony that the said Addington was attacked by said Hodges without having produced the occasion for the assault, and that the acts of Hodges then showed to the mind of Mr. Addington, situated as he was, a present intention upon the part of Hodges either to take his life or do him serious bodily harm, or that it would have produced that impression upon the mind of any reasonably prudent person situated as Addington was that Hodges was then about to kill him or do him serious bodily harm, and you further believe that the means he used were the only reasonable means at his command to avert the threatened danger, and that he only fired in his own actual self-defense, not actuated by malice, and did not go there for the purpose of provoking this difficulty for the purpose of killing Hodges, you will find the defendant not guilty as charged in this indictment." This instruction is not liable to the objection that it recognized Addington's right to take the life of his adversary only upon its appearing that he was in fact in actual danger of losing his own life or of receiving serious bodily harm. On the contrary, the court said, in substance, that if the circumstances were such as to produce upon the mind of Addington, as a reasonably prudent man, the impression that he could save his own life, or protect himself from serious bodily harm, only by taking the life of his assailant, he was justified by the law in resorting to such means, unless he went to where the deceased was for the pur- 188] pose of provoking a difficulty in *order that he might slay his adversary. In so instructing the jury no error was committed.

We find no error of law in the record to the prejudice of the accused, and *the judgment must therefore be affirmed.*

Mrs. LILLIAN W. EGAN and Husband, *Plffs. in Err.*,
*v.*
A. HART, H. B. Richardson, and F. M. Kerr.

(See S. C. Reporter's ed. 188-194.)

*Review of state judgment—opinion of the court—Federal question.*

1. On error to a state court, this court cannot re-examine the evidence, and when the facts are found below is concluded by such finding.
2. On error to the supreme court of Louisiana the opinion of that court is to be treated as part of the record, and may be examined in order to ascertain the questions presented; and this court may for the purpose, not of deciding the facts, but by way of throwing light on the findings, look into the entire record.
3. If the questions of fact found and decided in the state court are adequate to determine the controversy between the parties, and broad enough to maintain a judgment independent of any Federal question, this court is without jurisdiction, although the state court may have also decided such a question.

[No. 63.]

*Submitted October 27, 1896. Decided February 1, 1897.*

IN ERROR to the Supreme Court of the State of Louisiana to review the decree of that court affirming the decree of the First District Court of the Parish of Caddo, Louisiana, in favor of the defendants, A. H. Hart *et al.*, in an action brought by Lillian W. Egan *et al.*, plaintiffs, to perpetually enjoin the building of a dam across a stream designated as Bayou Pierre. *Dismissed for want of jurisdiction.*

See same case below, 45 La. Ann. 1358.

The facts are stated in the opinion.

*Messrs.* **C. J. Boatner,** *Fred Thatcher*, and *J. C. Egan* for plaintiffs in error.

*Mr.* **A. H. Leonard** for defendants in error.

Mr. Justice **White** delivered the opinion of the court:

The plaintiffs in error, by original and supplemental petitions, sued in order to perpetually enjoin the building, by the board of state engineers of the state of Louisiana, of a dam across an alleged stream designated as Bayou Pierre. It was averred that the construction would permanently impair the *value of [189 certain real property to the plaintiff belonging,

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

*As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws*,—see notes to Hart v. Lamphire, 7: 679, and Commercial Bank v. Buckingham, 12: 169.

*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question*,—see note to Hamblin v. Western Land Co. 37: 267.



Digitized by Google

ated in the vicinage of the proposed work; that it was a purely private undertaking which the board of state engineers was not authorized to do at public expense, and that the dike, if carried out, would obstruct the navigation of Bayou Pierre, and would therefore violate the laws of the United States. The state of Louisiana, by intervention, and the defendants, by answers, traversed the averments of the petitions. There was judgment in the trial court rejecting the plaintiffs' demand, which was, on appeal, affirmed by the supreme court of the state of Louisiana. To the decree of affirmance this writ of error is prosecuted.

The record before us contains all the testimony introduced and evidence offered in the trial court, all of which was open for consideration and passed upon by the supreme court of the state of Louisiana. On error, however, to a state court, this court cannot re-examine the evidence, and, when the facts are found below, is concluded by such finding. *Dower* v. *Richards*, 151 U. S. 658 [38: 305]; *Bartlett* v. *Lockwood*, 160 U. S. 368 [40: 460]; *Stanley* v. *Schwalby*, 162 U. S. 278 [40: 968]. True it is that in *Dower* v. *Richards* the court, referring to the *dictum* in *Republican River Bridge Co.* v. *Kansas P. R. Co.* 92 U. S. 315, 317 [23: 515, 516], treated as open for further consideration the question whether in chancery cases the power existed in this court to review the decision of state courts on both the law and the fact. We, however, conclude that not only the very nature of the writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such findings. The adjudications are collected very fully in *Dower* v. *Richards*, and in the subsequent cases above referred to.

It is likewise settled that on error to the supreme court of Louisiana the opinion of that court is to be treated as part of the record, and that it may be examined in order to ascertain the questions presented, and this court may for the purpose, not of deciding the facts, but by way of throwing light on the findings, look into the entire record. *Crossley* v. *New Orleans*, 190]*108 U. S. 105 [27: 667]; *Gross* v. *United States Mortg. Co.* 108 U. S. 477 [27: 795].

Turning to the opinion of the supreme court of Louisiana, it is obvious that it held, not only that under the law of Louisiana the board of state engineers was competent to undertake the work in question, and any damage resulting to the plaintiff thereby was *absque injuria*, but that it also rested its decree upon three propositions, two of fact and one of law, *viz.*: First, that the construction of the dam was a public work jointly undertaken by the government of the United States and the board of state engineers of the state of Louisiana. Second, that the stream across which the dam was to be erected was not navigable, and was hence subject to state control. Third, that even if navigable, as the stream was wholly within the state of Louisiana, it was hence exclusively under the dominion of the state law. The findings of the court on these subjects were thus expressed:

"Speaking of the nature of the work, the district judge says: 'It is a public work, planned and located by state authority, and is a part of a system of levees ordered by the state for the prevention of overflows. It is the initial point of a line of levees the propriety, location, and construction of which have been determined by the state, acting through the state board of engineers, its accredited and duly authorized agents. It begins on the highlands on the west bank of the bayou and extends thence across the bayou to Hart's island, and from there to Dixie plantation, on Red river.' The United States government has contributed $4,000—a sum equal to the price of Hart's contract with the state—towards the cost of construction of the line of levees of which the dam in question is a part. Manifestly the claim that such a work undertaken by the state, with the aid of the general government, is the work of private persons for private and selfish motives is absolutely without foundation. . . . As to plaintiff's contention that Bayou Pierre is a navigable stream, 'we have carefully considered the vo- [191 luminous testimony on that part of the case, and we are clear that the upper part of Bayou Pierre, in which the dam in question is situated, is not navigable, and that the navigation of even the lower part of Bayou Pierre, a considerable distance below the dam, is attended with many obstacles and difficulties. On this point the district judge says: 'From Grande Ecore, where it (Bayou Pierre) enters Red river, to a point some miles below its junction with Tone's bayou, a stream flowing out of the river, Bayou Pierre has been frequently navigated by steamboats; but from the point of junction to the dam in question it has never been navigated and is unnavigable. Between these two points it is nothing but a high water outlet, going dry every summer at many places, choked with rafts and filled with sand, reefs, etc. It has no channel; in various localities it spreads out into shallow lakes and over a wide expanse of country, and is susceptible of being made navigable just as a ditch could be if it were dug deep and wide enough and kept supplied with a sufficiency of water.' We fully concur in this finding. Besides, Bayou Pierre is wholly within the state, and the authority of the legislature over it is complete. *Hamilton* v. *Vicksburg, S. & P. R. Co.* 34 La. Ann. 975; *Boykin* v. *Shaffer*, 13 La. Ann. 129."

Now, the foregoing findings by the trial court, approved and affirmed by the supreme court of Louisiana, that is, the non-navigability of the stream, and the concurrent participation of the United States and the state in the building of the dam, are purely questions of fact, and therefore, as we have said, are conclusive.

It is clear that if these questions of fact are adequate to determine the controversy between the parties, and broad enough to maintain the judgment independent of any Federal question, that we are without jurisdiction, although the state court may have also decided such a question. *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111]; *Connecticut, New York & N. E. R. Co.* v. *Woodruff*, 153 U. S. 689 [38: 869]; *Hammond* v. *Connecticut Mut. F. Ins. Co.* 150 U. S. 633 [37: 1206].



Digitized by Google

The claim is that the court below erroneously 192] decided a *Federal question, which it is asserted is absolutely necessary to maintain its decree independently of the conclusions by it expressed on the foregoing propositions of fact. This argument is deduced from that portion of the decision below which held that even if the stream was navigable it was nevertheless competent for the state authority to obstruct or entirely close it, because, being wholly within the state, it was under its exclusive jurisdiction and authority. Such power, it is argued, if ever possessed by the state, depended solely on the absence of congressional legislation, asserting the reserved authority of the general government over all navigable streams, including even those wholly within a state, and therefore ceased to exist from the enactment by Congress of the law of September 19, 1890. 26 Stat. at L. 454, chap. 907. By the statute relied on Congress forbade the construction of "any bridge . . . or other works over or in any . . . navigable waters of the United States under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill or in any manner alter or modify the course, location, condition, or capacity of the channel of said navigable waters of the United States unless approved by the Secretary of War." But by its plain terms this statute relates solely to navigable waters, and one of the propositions of fact found by the supreme court of the state is that the stream in question was not navigable. The necessary effect, therefore, of accepting this finding is to take the case out of the reach of the law relied on, and this causes the question of fact, that is, non-navigability, to be wholly and adequately sufficient to maintain the judgment without reference to the statute in question.

It is sought to avoid this inevitable conclusion by contending that the fact found below is not that the stream was non-navigable, but only that it was so at the particular place where the dike was proposed to be built. Non-navigability at the particular place, it is argued, does not exclude the implication that the impeding of the water at that point would 193] *obstruct the flow of water and injure the navigable stream below the dam, thereby bringing the case directly under the terms of the statute. But this construction of the finding below is entirely too narrow. An examination of the record and a consideration of the entire context of the opinion of the supreme court of the state make it clear that the whole controversy below was whether the dam, if erected at the particular place in question, would affect or injure the navigability of the stream below, and that the finding of fact that the stream was not navigable at the point where the dam was to be erected was substantially a conclusion that the erection of the dam bore no relation to and would have no effect in obstructing the navigation of the stream known as Bayou Pierre below the dam, and which stream the court recognized as being navigable in a qualified sense. The record discloses that Bayou Pierre leaves the Red river a short distance below the city of Shreveport, and, after a long and meandering course, re-enters the Red river just above the town of Grand Ecore. The proposed dam crosses Bayou Pierre a short distance from the point where it leaves Red river. Below the point of the dam a stream, known as Tone's bayou, which also flows out of the Red river, empties into and forms a junction with Bayou Pierre. The portion of the bayou which the court found to be occasionally navigable was that below the junction of Tone's bayou. As to the portion above the junction of Tone's and Bayou Pierre, that is, in the direction of the dam, the finding of fact is as follows: "Between these two points it is nothing but a high-water outlet, going dry every summer at many places, choked with rafts and filled with sand, reefs, etc. It has no channel; in various localities it spreads out into shallow lakes and over a wide expanse of country and is susceptible of being made navigable just as a ditch could be if it were dug deep and wide enough and kept supplied with a sufficiency of water." The obvious effect of this finding is that the qualified navigability existing in Bayou Pierre below the inflow into that stream of the water from Tone's bayou, is wholly uninfluenced by water leaving Red river by way *of the upper mouth of [194 Bayou Pierre. Indeed, the finding amounts to saying that the stream formed by the junction of Bayou Pierre and Tone's bayou is a new and in reality a distinct and different stream (although called by the same name) from the stream above the junction, and in which it is proposed to erect the dam. From these considerations it obviously results that the expression of opinion *arguendo* by the state court as to the power of the state of Louisiana to control a navigable stream wholly within its borders, even if erroneous, was unnecessary to the decision of the cause, and that the decree by that court rendered is adequately sustained by the conclusion of fact as to the non-navigability of the stream. This being the case, it is unnecessary to consider whether the finding that the work of building the dam was concurrently carried on by the state and the United States is not also sufficient to sustain the decree below, since it practically determines that the dam was being constructed in conformity to the act of Congress.

*Dismissed for want of jurisdiction.*



Digitized by Google

†ADAMS EXPRESS COMPANY
*v.*
OHIO STATE AUDITOR.

HENRY SANFORD, President of the Adams Express Company, *Appt.*,
*v.*
EBENEZER W. POE, Auditor of the State of Ohio, *et al.*

HENRY SANFORD, President of the Adams Express Company, *Appt.*,
*v.*
EBENEZER W. POE, Auditor of the State of Ohio, *et al.*

JAMES C. FARGO, President of the American Express Company, *Appt.*,
*v.*
EBENEZER W. POE, Auditor, etc., *et al.*

THOMAS C. PLATT, President of the United States Express Company, *Appt.*,
*v.*
EBENEZER W. POE, Auditor, etc., *et al.*

CLARENCE A. SEWARD, Vice President of the Adams Express Company, *Appt.*,
*v.*
EBENEZER W. POE, Auditor, etc.

JAMES C. FARGO, President of the American Express Company, *Appt.*,
*v.*
EBENEZER W. POE, Auditor, etc.

THOMAS C. PLATT, President of the United States Express Company, *Appt.*,
*v.*
EBENEZER W. POE, Auditor, etc.

(See S. C. Reporter's ed. 194-255.)

*Ohio law creating state appraisers and assessors constitutional—state decision—express company's property—Federal restriction—interstate commerce—due process of law—equal protection of the laws—valuations.*

1. The Ohio law of April 27, 1893, commonly styled "the Nichols law," as amended May 10, 1894, creating a state board of appraisers and assessors of the property in Ohio of telegraph, telephone, and express companies, and prescribing the rule and method of assessment, is constitutional.
2. That a decision of the supreme court of the state sustaining the constitutionality of a state statute was obtained in a prepared case which did not involve a genuine controversy will not prevent this court from following it.
3. The property of an express company distributed through different states constitutes but a single plant united in a single specific use, and, for the taxation of that portion of it which is within any state, the contracts for transportation facilities, and the capital necessary to carry on the business, whether represented in tangible or intangible property, in the state, as well as its horses, wagons, safes, pouches, and furniture, may be included in the assessment.
4. There is no Federal restriction which will prevent property from being assessed at the value which it has as used and by reason of its use.
5. Taxation on or determined by the proportion of the capital of an express company employed in a state through which its business is carried on, fairly ascertained, is essentially a property tax, and, as such, not an interference with interstate commerce.
6. Regarding the property of an interstate express company as a unit profit-producing plant at the value which it has as used and by reason of its use, for the purpose of fixing the value of that portion of the property in one state, and considering the value of its capital stock as an essential factor in, though not as a necessary equivalent of, the value of the entire property, do not amount to an assessment on property situated in other states, and for that reason constitute a taking of property without due process of law.
7. An express company is not denied the equal protection of the laws by classifying it with railroad and telegraph companies as subject to the unit rule of taxation, which estimates the value of the whole plant, though situated in different states, as an entirety, for the purpose of determining the value of the property in one state.
8. Where the method of appraisement prescribed by the law is pursued and there are no specific charges of fraud, the valuations will not be held excessive upon evidence tending only to show that they were so.

[Nos. 337-340, 398-400.]

*Argued December 10, 11, 1896. Decided February 1, 1897.*

APPEALS from the United States Circuit Court of Appeals for the Sixth Circuit in the first four of above cases (Nos. 337, 338, 339, 340) and appeals from the Circuit Court of the United States for the Southern District of Ohio in the last three cases (Nos. 398, 399, 400) to review decrees affirming the final decrees of the Circuit Court, and to review decrees of the Circuit Court dissolving the temporary injunction, sustaining the demurrers, and dismissing the suit in said actions brought by the several express companies, appellants, against Ebenezer W. Poe, auditor of the state of Ohio, *et al.*, to enjoin the certification of the apportioned valuations to the county auditors of the property of the express companies for the purpose of taxation. *Affirmed.*

See same cases below, 61 Fed. Rep. 449, 470; 51 Ohio St. 492; 64 Fed. Rep. 9; 37 U. S. App. 378, 399, 69 Fed. Rep. 546, 557.

Statement by Mr. Chief Justice **Fuller:**

These are cases involving the constitutionality of certain laws of the state of Ohio providing for the taxation of telegraph, telephone, and express companies, and the validity of assessments of express companies thereunder.

The general assembly of Ohio passed, April 27, 1893, an act to amend and supplement §§ 2777, 2778, 2779, and 2780 of the Revised

†The title of this case as published in the advance sheets was *Sanford* v. *Poe*. But inasmuch as the case on rehearing was entitled by the court *Adams Express Company* v. *Ohio State Auditor* the same title is adopted here.

NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

*As to power of states to tax*, see note to Dobbins v. Erie County Comrs. 10: 1022.

*As to exemption from taxation; whether a contract or not; not implied*,—see note to Tucker v. Ferguson, 22: 805.

*As to sale of lands for taxes; strict compliance with statute necessary*,—see note to William v. Peyton, 4: 518.

*As to when taxes illegally assessed can be recovered back*, see note to Erskine v. Van Arsdale, 21: 63.



Digitized by Google

Statutes of that state (commonly styled "the Nichols law"), which was amended May 10, 1894. The law created a state board of appraisers and assessors, consisting of the auditor of state, treasurer of state, and attorney general, which was charged with the duty of assessing the property in Ohio of telegraph, telephone, and express companies. By the act as amended, between the 1st and 31st days of May annually each telegraph, telephone, and express company doing business in Ohio was re-
197] quired *to file a return with the auditor of state, setting forth among other things the number of shares of its capital stock; the par value and market value (or, if there be no market value, then the actual value) of its shares at the date of the return; a statement in detail of the entire real and personal property of said companies and where located, and the value thereof as assessed for taxation. Telegraph and telephone companies were required to return, also, the whole length of their lines, and the length of so much of their lines as is without and is within the state of Ohio, including the lines controlled and used, under lease or otherwise. Express companies were required to include in the return a statement of their entire gross receipts, from whatever source derived, for the year ending the 1st day of May, of business wherever done; and of the business done in the state of Ohio, giving the receipts of each office in the state; also the whole length of the lines of rail and water routes over which the companies did business within and without the state. Provision was made in the law for the organization of the board, for the appointing of one of its members as secretary and the keeping of full minutes of its proceedings. The board was required to meet in the month of June and assess the value of the property of these companies in Ohio. The rule to be followed by the board in making the assessment was that "in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

As to telegraph and telephone companies, the board was required to apportion the valuation among the several companies through which the lines ran, in the proportion that the length of the lines in the respective counties bore
198] to the *entire length in the state; in the case of express companies, the apportionment was to be made among the several counties in which they did business, in the proportion that the gross receipts in each county bore to the gross receipts in the state.

The amount thus apportioned was to be certified to the county auditor, and placed by him on the duplicate "to be assessed, and the taxes thereon collected the same as taxes assessed and collected on other personal property," the rate of taxation to be the same as that on other property in the local taxing district.

The valuation of all the real estate of the companies, situated in Ohio, was required to be deducted from the total valuation as fixed by the board.

Provisions were made for hearings and for the correction of erroneous and excessive valuations, as follows:

"At any time after the meeting of the board on the 1st Monday in June, and before the assessment of the property of any company is determined, any company or person interested shall have the right, on written application, to appear before the board and be heard in the matter of the valuation of the property of any company for taxation. After the assessment of the property of any company for taxation by the board, and before the certification by the auditor of state of the apportioned valuation to the several counties, as provided in § 2780, the board may, on the application of any interested person or company, or on its own motion, correct the assessment or valuation of the property of any company, in such manner as will, in its judgment, make the valuation thereof just and equal. The provisions of § 167 of the Revised Statutes shall apply to the correction of any error or overvaluation in the assessment of property for taxation by the state board of appraisers and assessors, and to the remission of taxes and penalties illegally assessed thereon."

Section 167 of the Revised Statutes, referred to, reads thus:

"Sec. 167. He [the auditor of the state] may remit such taxes and penalties thereon as he ascertains to have been illegally assessed, and such penalties as have accrued or may accrue in *consequence of the negligence or error [199 of any officer required to do any duty relating to the assessment of property for taxation, or the levy or collection of taxes, and he may, from time to time, correct any error in any assessment of property for taxation or in the duplicate of taxes in any county; provided that when the amount to be remitted in any one case shall exceed $100, he shall proceed to the office of the governor and take to his assistance the governor and attorney general, and in all such cases may remit no more than shall be agreed upon by a majority of the officers named."

Instead of distributing the valuation, as under the act of 1893, the state board by the act of 1894 was to certify it to the auditor of state, whose duty it was made to apportion and certify the valuation among the counties.

In No. 337 the taxes for 1893 were involved; and in Nos. 338, 339, and 340, the taxes for 1894. These are appeals from the circuit court of appeals for the sixth circuit. In Nos. 398, 399, and 400 the taxes for 1895 were involved. These are appeals from decrees of the circuit court for the southern district of Ohio.

The original suits were brought in the circuit court to enjoin the certification of the apportioned valuations to the county auditors, as to 1893, against the state board; as to 1894 and 1895, against the auditor of state.

The circuit court, Taft, J., on April 23,



Digitized by Google

1894, after a preliminary opinion, filed opinions in the case of the Western Union Telegraph Company against the state board (61 Fed. Rep. 449) and in No. 337 (61 Fed. Rep. 470) holding the Nichols law to be invalid under the Constitution of Ohio. On the 1st of May following the supreme court of Ohio decided that the Nichols law was constitutional and valid. 51 Ohio St. 492.

Thereupon the circuit court reversed its ruling, and accepted the decision of the supreme court of the state, and Judge Taft filed a further opinion holding that the assessments were valid. 64 Fed. Rep. 9.

In all the cases the final decrees of the cir-
200] cuit court *dissolved the temporary injunctions which had been granted, sustained demurrers, and dismissed the bills.

The circuit court of appeals affirmed the cases taken to it on appeal. 37 U. S. App. 378, 399, 69 Fed. Rep. 546, 557.

The proceedings of the state board in making the assessments for 1895 and certain correspondence are set forth in the records as if exhibits to the bills. The action of the board, relative to express companies, is thus given:

"The board having given each express company doing business in Ohio, whose property in Ohio is hereinafter assessed, opportunity to appear and be heard personally by the board, and having heard all companies which desired to be heard through their officers, agents, or counsel, and having carefully considered the facts set out in the returns, schedules, and supplementary statements of such companies and all evidences of value and all matters bearing upon the question of the value of the property of the companies which, in the judgment of the board, would assist it in arriving at the true value, in money, of the entire property of each of said companies within the state of Ohio, on motion, the state board of appraisers and assessors unanimously fix and determine the values of the property of express companies hereinafter named in Ohio to be taxed therein at the amounts set out in the following table:

| | |
|---|---|
| The Adams Express Company.... | $533,095.80 |
| The American Express Company. | 499,873.60 |
| The United States Express Company..... | 488,264.70" |

This valuation was made July 24, 1895. On the 2d of August, counsel for the companies wrote the auditor requesting to be advised of the assessments when made, in order that they might apply for a correction. On the 7th of August the secretary of the board informed counsel of the assessments. On August 10, counsel wrote asking "upon what calculation, if any, the apparently precise amounts of the assessments, especially in the case of the express companies, are based, and how the figures are arrived at."

The auditor replied for the board that "the
201] method pursued *by the state board of appraisers and assessors this year in assessing the property in Ohio of the Western Union Telegraph Company and the express companies you represent is not different from that followed in former years, which has been sustained by the courts, and is set forth in the records of the board."

Attention was called to certain *data* lacking in the companies' returns, and counsel were informed that opportunity would be afforded for a hearing on September 2 at 10 o'clock A. M.; but the three bills involving these assessments were filed August 14, 1895. Subsequently returns were filed as of May 1, 1895, showing—

As to the Adams Express Company. Number of shares: 120,000. Market value: $140 to $150. Taxable value of real estate owned in Ohio: $25,170. Value of personal property, including moneys and credits, owned by company in Ohio: $42,065. Total value of real estate owned outside of Ohio: $3,005,157.52. Total value of personal property owned outside of Ohio: $1,117,426.05. Entire gross receipts from whatever source received within the state for the year: $282,181. Whole length of lines of rail and water routes over which the company was doing business: 29,647 miles. Length without the state: 27,518 miles. Within the state: 2,129 miles.

As to the United States Express Company. Number of shares: 100,000. Par value: $100. Market value: $40. Taxable value of real estate owned in Ohio: $22,190. Value of personal property, including moneys and credits, owned in Ohio: $28,488. Entire gross receipts from whatever source derived within the state: $358,519. Length of lines within the state over which the company was doing business: 3,011 miles.

As to the American Express Company. Number of interests: 180,000. Par value: $100. Market value: $112. Taxable value of real estate in Ohio: $58,660. Value of personal property, including moneys and credits, in Ohio, $23,480. Total value real estate outside of Ohio: $4,891,259. Total value of personal property outside of Ohio: $1,661,759. Gross receipts within the state: $275,446. Whole length of lines: 35,295 miles. Length within the state: 1,731 miles.

*The companies made no return of [202
their entire gross receipts of business wherever done, nor of the terms of their contracts or arrangements for transportation.

These returns stated and the bills repeated that aside from the real estate mentioned the companies had no property in the state of Ohio "except certain horses, wagons, harness, trucks, safes, and office fixtures located at different points," and that their actual value was given. That "the business of the company in the state consists in carrying packages on passenger and express trains, steamboats, and stages in the care and custody of its employees who accompany the packages. The express company has no ownership of nor interest in these means of conveyance, and simply pays to the railroad companies and the owners of the steamboats and stage coaches for the passage of messengers and their accompanying packages. The horses, wagons, and trucks are used by it in the collection and delivery of these packages. There is no peculiarity about this property; it is of an ordinary kind, whose true value in money must be measured by the ordinary standards, and is easily ascertained and determined."



Digitized by Google

Each of the bills in Nos. 398, 399, and 400 alleged that the scheme of taxation contemplated by the act, "while professing to provide for taxation of property in the state of Ohio, does not, in fact, do so, inasmuch as it directs the state board of appraisers, in determining the value of the property of express companies in said state for the purpose of taxation, to be 'guided by the value of said property as determined by the value of the entire capital stock of said company . . . in the proportion which the same (*viz.*, the property of the companies within the state) bears to the entire property of said companies, as determined by the value of the capital stock thereof;'" that "the value of the capital stock or shares of said company and of express companies generally is determined, not so much by the value of the property and appliances which they use in carrying on their business, as by the skill, diligence, fidelity, and success with which they conduct their business. Said company employs many thousands of men who are constantly
**203]** engaged in carrying express *packages, many of them of great value, from one part of the country to another, and its income and the value of its shares are largely the result of their efforts, fidelity, and integrity, and of skillful management and supervision of the business. Said company furthermore owns real and personal property of great value aside from the appliances of its express business, which is not held or taxable in the state of Ohio, and some of which is not taxable at all, all of which, however, together with the business connections of the company and the reputation and goodwill which it has earned in the course of more than fifty years of public service, enter largely into the value of its capital shares;" that the market price of the company's shares does not "afford any fair, reasonable, or just method of estimating the value of its property or fixing the basis of value for the purpose of taxation, because the market price is speculative and variable, depending upon financial conditions not at all connected with this company, its business, or its prop erty; and your orator insists that said scheme of taxation is unfair, illegal, unjust, and unequal and is a regulation of and a tax upon interstate commerce and a taking of its property without due process of law;" that the act and the assessments made thereunder are in contravention of the Constitution of the United States because the act provides for the assessment of, and the assessments embrace, property not situated within the jurisdiction of the state of Ohio, and the property of the companies is therefore taken without due process of law; and that the scheme as a special one imposes an illegal burden on interstate commerce, and denies the equal protection of the laws.

*Messrs.* **Lawrence Maxwell, Jr.,** *Clarence A. Seward, James C. Carter,* and *Frank H. Platt,* for appellants:

The circuit court erred in sustaining the demurrers to the bills and in dismissing the bills. The assessments complained of are not in fact assessments against the plaintiffs in respect of their property held or owned by them in the state of Ohio, or within the taxing jurisdiction of that state, but are really an attempt, under the guise of taxing the plaintiff's property within the state, to enforce against them the payment of a tax upon their business, which is largely interstate commerce, or for the privilege of doing such business in the state of Ohio, by placing a fictitious and artificial value upon their property; and the assessments and the statute of Ohio purporting to authorize them are therefore in contravention of the Constitution of the United States, especially of the interstate commerce clause of § 8, article 1, and of § 2, article 4, and of § 1, article 14.

We do not concede that the assessments complained of in the bills are authorized by the Nichols law, or that the supreme court of Ohio would justify them if they were before that court. If not, the demurrers should have been overruled on the ground that the allegations of the bills show the assessments to be illegal, even assuming the statute itself to be a valid law; and this court, having jurisdiction of the entire case, should now overrule the demurrers on that ground, even if the court should be of opinion that the Nichols law itself does not contravene any provisions of the Constitution of Ohio or of the United States; because, if the Nichols law, in the view of this court, properly construed, requires the property of express companies, such as it is, to be assessed on the basis of its ordinary value as property, it is manifest that that has not been done, and that the assessments made by the state board, increasing that value ten and twenty fold, cannot be sustained, and warrant the interposition of a court of equity.

Cooley, Taxn. 2d ed. 785; *Cummings* v. *Merchants' Nat. Bank,* 101 U. S. 153 (25: 903); *Pittsburg, C. C. & St. L. R. Co.* v. *Backus,* 154 U. S. 421 (38: 1031).

But the circuit court, and the circuit court of appeals (in the cases of 1893 and 1894) held that the assessments complained of had been made in pursuance of a definite rule or principle of appraisement, recognized and established by the Nichols law, as construed by the supreme court of Ohio. Our argument, therefore, is addressed to the question whether that rule is valid, under the Federal Constitution.

The cases raised a Federal question, *viz.*, whether the rule of assessment prescribed by the Ohio statute and adopted by the state board, for taxation of express companies, contravenes the Federal Constitution.

Taking the allegations of the bills in connection with the returns made by the express companies to the state board, and the transcript of the proceedings of the state board upon those returns, it is manifest that what the board did, and what the demurrers to the bills admit that they did, was, not to assess the defendants, on the basis of the market value of such of their tangible property as was found within the state of Ohio, and on their moneys and credits in the state, but to treat the companies as owning dividend-producing plants, whose value is represented by the market value of their shares, and to assign a portion of that value to the state of Ohio, as being property subject to taxation in that state. The basis of the apportionment made by the board to Ohio is not disclosed; it was evidently haphazard



Digitized by Google

and arbitrary; but that is not material now. The point is that the state board deliberately and intentionally followed a certain rule and principle of assessment, being the rule prescribed by the statute of the state, as construed by its supreme court, and the validity of that rule is therefore raised by the record, and presents a Federal question which must be decided in our favor, if we can show that the rule contravenes any of the provisions of the Federal Constitution. In other words, the question is not one merely of valuation, but of the legality, under the Federal Constitution, of the rule which the statute of Ohio prescribes for the assessment of express companies.

The circuit court of appeals, although deciding the Federal question against the plaintiffs, did not deny that the Federal question arose. They decided it against the plaintiffs because, to use their own language, they were of opinion that "the fact that the property of the express companies was valued as a unit profit-producing plant did not violate any Federal restriction upon the taxing power of a state within which a part of that plant is found. The value of property depends in a large degree upon the use to which it is put. If a railroad may be valued as a unit rather than as a given number of acres of land, plus so many tons of rails, and so many thousand ties and a certain number of depots, shops, etc., there is no sufficient reason why the property of an express company should not be treated as a unit plant. If the state of Ohio had a right to tax the property within the state, and to assess it at its true cash value, there is no Federal restriction which will prevent such property from being assessed at the value which it has, as used and by reason of its use," citing *Western U. Teleg. Co.* v. *Massachusetts*, 125 U. S. 530 (31: 790); *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 (35: 613), 3 Inters. Com. Rep. 595.

If the Nichols law justifies the assessments complained of, it contravenes the interstate commerce clause of the Federal Constitution, because the assessments, while purporting to be upon the property of the plaintiffs within the state, are, in fact, levied upon the plaintiffs' business (which is largely interstate commerce), by placing a fictitious and artificial value upon their property.

Under the interstate commerce clause of the Federal Constitution it is not competent for a state to tax a nonresident person or corporation engaged in interstate commerce, upon their occupation or business. The state's power of taxation in such cases is limited to a tax upon such of the property of the person or corporation as is found within the taxing jurisdiction of the state, and that property must be taxed without discrimination. It is just as much a violation of this rule of the Federal Constitution to levy a tax ostensibly on property, but really on business, by ascribing an artificial or fictitious value to the property, as to make the levy directly and in terms upon business.

*Crutcher* v. *Kentucky*, 141 U. S. 47, 58 (35: 649, 652).

The question then is whether assessments, such as the bills allege were made by the state board, and such as Judge Taft admits the state board were authorized by the Ohio statute to make against these express companies, are really assessments against them in the respect of property held or owned by them in the state of Ohio. If not, they cannot be sustained under the Federal Constitution.

In his final opinion, Judge Taft seems to have overlooked the infirmity, under the Federal Constitution, of an appraisement which "was not an appraisement of the property of the company in Ohio at all." He failed to realize that, if such was the character of the appraisement—if it was what he declared it to be, "not a property *ad valorem* tax," but "an income tax," in other words a tax upon the business of the company, it was clearly illegal, under the Federal Constitution, independent of any consideration arising under the Constitution of the state.

Judge Lurton in the circuit court of appeals supports the assessments for 1893 and 1894 as assessments against property.

Judge Lurton's view comes to this: that the horses and wagons of an express company may be assessed at ten or twenty fold their value, according as they happen to be used in connection with a business that yields profits. But that is not assessing the property as property. It is assessing the profits of the business, which, as against an express company engaged in interstate commerce, cannot be done. The only assessment that can be made against such a company is upon such of its property, considered as property, as is found within the state that levies the tax.

To say that this sort of detached and fugitive property, simply because it is employed in the business of an organized express company, is unit property, like a railroad or telegraph, is only another way of attempting to justify an assessment against the business of a company, under the pretense of assessing its property.

The idea that the property of the express companies can be treated as unit property, and assessed otherwise than according to its ordinary value, is inconsistent with the observations of this court in *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 354 (35: 1035, 1040), 3 Inters. Com. Rep. 810.

The rule for the assessment of express companies, prescribed by the Nichols law, discriminates against the property of express, telegraph, and telephone companies, on account of its mere ownership, as compared with all other property in the state, and therefore denies to those companies the equal protection of the law, in contravention of the 14th Amendment of the Federal Constitution.

I do not deny the power of the legislature to classify property. But power to classify is not arbitrary. It must be classification in fact, and not discrimination. Property cannot be classified in respect of mere ownership. The same kind and character of property devoted to the same uses, within the same taxing districts, cannot be taxed by one rule against one class of persons and by a different rule against another class. But that is precisely what the Nichols law attempts to do.

The classification of railroad and telegraph property as unit property is not a classification according to ownership, but according to intrinsic difference in the character, use, and



Digitized by Google

situation of such property, and the difficulty attending the ascertainment of its value otherwise than as a unit. These considerations make the separate classification of such property, not merely convenient, but necessary, as well as natural and reasonable. But the property owned by express companies within the state of Ohio is not different in its character, uses, or situation from other similar property within the state, nor is there any greater difficulty in ascertaining its value for the purpose of taxation.

Express companies do not make any different use of their horses, wagons, safes, office furniture, or such other property as the bills show them to have within the state, than that which is made of the same kind of property by other inhabitants of the state. This value is easily ascertainable, and is susceptible of assessment and taxation in accordance with the laws which apply generally to the taxation of property within the state.

The Nichols law is in contravention of the 14th Amendment, for the further reason that it taxes property not within the taxing jurisdiction of the state of Ohio.

It has been held more than once in this court that the power of a state to tax the property of nonresidents is limited to such of their property as is found within the state; in other words, that a state cannot tax lands lying beyond its borders, nor personal property domiciled in another state.

*Hays* v. *Pacific Mail S. S. Co.* 58 U. S. 17 How. 596, 599 (15: 254, 255); *Northern C. R. Co.* v. *Jackson*, 74 U. S. 7 Wall. 262 (19: 88); *St. Louis* v. *Wiggins Ferry Co.* 78 U. S. 11 Wall. 423 (20: 192); *Cleveland, P. & A. R. Co.* v. *Pennsylvania* ("*State Tax on Railway Gross Receipts*") 82 U. S. 15 Wall. 300 (21: 179); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 206, 210 (29: 158, 163, 164), 1 Inters. Com. Rep. 382.

The ground upon which this immunity is secured, under the Federal Constitution, has not been clearly stated in all the cases. The earlier ones arose prior to the adoption of the 14th Amendment, but we submit that it is depriving a person of property without due process of law, in contravention of the 14th Amendment, for a state to tax property not within its jurisdiction.

*Hays* v. *Pacific Mail S. S. Co.* 58 U. S. 17 How. 596 (15: 254); *St. Louis* v. *Wiggins Ferry Co.* 78 U. S. 11 Wall. 423 (20: 192); *Northern C. R. Co.* v. *Jackson*, 74 U. S. 7 Wall. 262 (19: 88).

It is immaterial upon what ground, as a result of these cases, we rest the doctrine that the states have no jurisdiction to tax real estate lying beyond their borders, or personal property domiciled in another state. The doctrine itself must be accepted as thoroughly established.

But the Nichols law, as construed below, not only attempts to tax, as property, that which is not property at all, such as goodwill, reputation, and business capacity, but to tax property that is not situated or domiciled in Ohio; for the bills allege that among the assets of the plaintiffs, which enter largely into the value of their capital shares, is real and personal property of great value, aside from the appliances of their express business, which is not held or taxable in the state of Ohio, and some of which, such as government bonds, is not taxable at all.

There is no necessary or proper relation between the value of the property of an express company and the value of its capital shares. *People* v. *Coleman*, 126 N. Y. 433, 12 L. R. A. 762.

If the rule of assessment, applied by the state board against the plaintiffs, contravenes the Federal Constitution, it is immaterial whether that rule is prescribed by the statute, or whether it is adopted, independent of the statute, by the board itself.

*Yick Wo* v. *Hopkins*, 118 U. S. 356 (30: 220).

Upon this point Mr. Justice Matthews said: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Wickham*, 92 U. S. 259 (23: 543); *Chy Lung* v. *Freeman*, 92 U. S. 275 (23: 550); *Ex parte Virginia*, 100 U. S. 339 (25: 676); *Neal* v. *Delaware*, 103 U. S. 370 (26: 567); *Soon Hing* v. *Crowley*, 113 U. S. 703 (28: 1145)."

In *Cummings* v. *Merchants' Nat. Bank*, 101 U. S. 153 (25: 903), a tax assessment against national banks was upset, not because the statute which imposed it violated any principle of the Federal Constitution, but because the officers charged with the administration of the statute had adopted a method of unequal valuation.

*Messrs.* **Thomas McDougall,** and *F. S. Monnett*, Attorney General of Ohio, for appellees:

The constitutionality of this law under the Ohio Constitution is settled by the decision of the Ohio supreme court.

*State, Poe,* v. *Jones*, 51 Ohio St. 492.

The decision of the supreme court of the state is final upon the question of the conformity of the state law to the state Constitution.

*Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421 (38: 1031); *Burgess* v. *Seligman*, 107 U. S. 32 (27: 365); *Carroll County Supers.* v. *Smith*, 111 U. S. 556 (28: 517).

The opinion of the circuit court says: "When different constructions have been given to a statute or a Constitution by a state court, the Federal courts are not bound to follow the later decisions if thereby contract rights which accrued under earlier rulings will be injuriously affected. *Douglass* v. *Pike County*, 101 U. S. 677 (25: 968); *Carroll County Supers.* v. *United States*, 85 U. S. 18 Wall. 71 (21: 771); *Rowan* v. *Runnels*, 46 U. S. 5 How. 134 (12: 85). But the case at bar calls for the application of no such principle."

The only question raised by appellants which is before this court is whether the law violates the Federal Constitution.

If the law violates the Federal Constitution, then the demurrers were erroneously sustained. If the law does not violate the Fed-



Digitized by Google

eral Constitution, then the only other question raised by the appellants is the difference of opinion between them and the board of appraisers as to the value of their property. The appellants are not entitled to have this court consider any question of difference of opinion as to the value of their property as assessed by the board for taxation merely by asserting that such action violates the Federal Constitution unless it appears that the law under which the valuation was made does violate that Constitution. These cases are to be heard on demurrer, and if this court decides that the action complained of does violate the Federal Constitution, it will thereby decide that the bills do not sufficiently allege such violation, that the facts set up in the bills do not show such violation; in other words, that facts which would raise a Federal question are not alleged, and that there is no such Federal question in the cases.

The act does not deny to the appellants due process of law nor equal protection of the laws.

The pleadings, together with the law itself, show the following facts with reference to this subject: The law itself states the times of the sessions of the board. The returns made by the companies are the statements of their cases to the boards, and they may appear, if they so desire, to make oral statement. Upon application, any of the companies affected has the right to appear before the board prior to the determination of the assessment, to be heard on the question of the valuation of its property for taxation. It appears from the pleadings, as a matter of fact, that the companies were present, and were heard in the matter of the valuation of their property for taxation.

After the valuation of the property of any company for taxation, and before the certification by the auditor of state of the apportioned valuations to the several counties, the board may, upon the application of any interested person, or on its own motion, correct the assessment.

If the board refuses to correct the assessment regarded by the company as erroneous, it may appeal, under Ohio Rev. Stat. § 167, to a board composed of the governor, auditor of state, and attorney general.

By Ohio Rev. Stat. § 5848, the illegal levy and collection of taxes may be enjoined; and further, if compelled to pay the tax, complainants may sue to recover it back.

It cannot be questioned that these provisions and remedies, under the decisions of this court and of the Ohio supreme court, constitute due process and equal protection of the laws.

*State, Poe,* v. *Jones,* 51 Ohio St. 492; *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky* ("*Kentucky R. Tax Cases*") 115 U. S. 321 (29: 417); *Davidson* v. *New Orleans,* 96 U. S. 97 (24: 616); *Taylor* v. *Secor* ("*State R. Tax Cases*") 92 U. S. 575, 610 (23: 663 672); *McMillen* v. *Anderson,* 95 U. S. 37 (24: 335); *Pittsburg, C. C. & St. L. R. Co.* v. *Backus,* 154 U. S. 421 (38: 1031); *Pacific Exp. Co.* v. *Seibert,* 142 U. S. 339 (35: 1035), 8 Inters. Com. Rep. 810; *Missouri P. R. Co.* v. *Mackey,* 127 U. S. 205 (32: 107).

The law does not violate the Constitution of the United States by interfering with interstate commerce.

The law simply provides a method for the valuation of property for taxation, and the tax laid upon the valuation made is a tax on the property of the companies in Ohio, and is not a tax upon interstate commerce. The details of that method are all directed toward ascertaining the value in money of the property in Ohio. The tax imposed is not a license tax, nor a tax on a business or occupation, nor on transportation through the state, nor upon receipts from business done outside of Ohio, nor upon property outside of Ohio. The tax imposed upon the valuation made under the law is simply a tax on the property of the companies within the state of Ohio. Such a tax is not an interference with interstate commerce in the sense in which such an interference is prohibited by the Federal Constitution.

*Cleveland, P. & A. R. Co.* v. *Pennsylvania* ("*State Tax on Railway Gross Receipts*") 82 U. S. 15 Wall. 298 (21: 168); *Cleveland, C. C. & St. L. R. Co.* v. *Backus,* 154 U. S. 445 (38: 1046), 4 Inters. Com. Rep. 677; *Maryo* v. *Baltimore & O. R. Co.* 127 U. S. 117 (32: 94); *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18 (35: 613), 8 Inters. Com. Rep. 595.

The property of a corporation may be fairly valued as a unit for purposes of taxation. This has been decided so often and so definitely, that it would hardly seem to need additional argument. It is contended by counsel for appellants that the property of the companies included under this law should be valued item by item, and the aggregate of the values of the different items taken separately is the value of the property of the companies for taxation. The state of Ohio claims, on the contrary, that the real value of the property of the corporations under discussion cannot be ascertained by simply valuing the items of real and personal property, taken separately, and finding the total. The entire property of any one of these corporations as a unit, and used for a specific purpose and in a certain place, has a value to the corporation, by reason of its unity and the use to which it is put, which is much greater than the value of the mere items of property taken separately. Taken together, it constitutes a plant, a machine, which has a value by reason of the assembling of its parts, the place where it is located, and the use to which it is put. This is the basis of its selling value. This fixes the selling value of its stock. This evidences the actual money invested and which, if not so invested, would be taxed as money.

How shall the amount of property in Ohio be apportioned?

In the case of a telegraph company, the proportion which the mileage in Ohio bears to the mileage of the whole company represents a fair proportion of the capital used in Ohio; and in the case of an express company, the proportionate length of the routes traversed by the company in Ohio to the entire routes traversed by the company represents the fair proportion of the corporate capital or property used in Ohio. There may be exceptional circumstances, such as the existence of a large amount of real estate or some other specified



Digitized by Google

property at the home office, which increases the proportion of the entire property to be found in that state, and decreases the proportion to be found in all other states. But this fact or facts should be brought to the attention of the board, and they are authorized to make due allowance for it, and it will be presumed that they did make full allowance for it.

It is thus seen that there is no tax laid on the property outside of the state, but such property is merely brought to the attention of the board for the purpose of aiding it in arriving at the value of the property as a whole in order to reach the value of the portion of the property used in the state. It is clear, also, that it is not the profits of the business that are being taxed; the profits of the business are not a subject of inquiry. The profitableness of the use of the property may contribute to the value of the property for taxation, but the profits themselves are not taxed; they are not even known to the board.

It has been decided by the courts over and over again that this method of valuing property is a fair one; that it constitutes a bona fide valuation of property for taxation; that it is, in effect as well as in name, a property tax; that it is not a tax on the business or the earnings or the profits of the companies, but on their property; that the property of these corporations may be valued as a unit upon the basis of the value of their capital stock, and other evidence, and that the proportion of the entire valuation thus made, belonging to any one state, may be estimated on the mileage basis as above described.

*State, Poe,* v. *Jones*, 51 Ohio St. 492; *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware R. Tax*") 85 U. S. 18 Wall. 232 (21: 896); *Western U. Teleg. Co.* v. *Massachusetts*, 125 U. S. 530 (31: 790); *Leloup* v. *Port of Mobile*, 127 U. S. 640-649 (32: 311-314), 2 Inters. Com. Rep. 134; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18-23 (35: 613-616), 3 Inters. Com. Rep. 595; *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 431 (38: 1038).

We regard the cases of *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439 (38:1041), 4 Inters. Com. Rep. 677, and *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421 (38: 1031) *et seq.*, as conclusive on this subject.

With reference to the claim that the law interfered with interstate commerce by placing a fictitious value upon the property of the company, this court said, in the case of *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 445-447 (38: 1043), 4 Inters. Com. Rep. 677: "It has been again and again said by this court that while no state could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce."

*Marye* v. *Baltimore & O. R. Co.* 127 U. S. 117 (32: 94); *Pullman's Palace Car. Co.* v. *Pennsylvania*, 141 U. S. 18 (35: 613), 3 Inters. Com. Rep. 595.

If the law is constitutional, the court will not review the action of the board thereunder, unless fraud is charged.

*Wagner* v. *Loomis*, 37 Ohio St. 571; *Kelly* v. *Pittsburgh*, 104 U. S. 80 (26: 659); *Taylor* v. *Secor* ("*State R. Tax Cases*") 92 U. S. 575 (23: 663); *Kennard* v. *Louisiana*, 92 U. S. 480 (23: 478); *Davidson* v. *New Orleans*, 96 U. S. 97 (24: 616); *Kirtland* v. *Hotchkiss*, 100 U. S. 491 (25: 558); *Bowman* v. *Lewis* ("*Missouri* v. *Lewis*") 101 U. S. 22 (25: 989); *German Nat. Bank* v. *Kimball*, 103 U. S. 732 (26: 469); *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421 (38: 1031).

Appellants are not entitled to the injunctions prayed for against the board of the state auditors.

Causes of action against the state auditor have been improperly joined with causes of action against county auditors in said suits, and said defendants have been improperly joined therein.

*Walter* v. *Northeastern R. Co.* 147 U. S. 370 (37: 207).

An injunction will not lie against the board.

*Jones* v. *Davis*, 35 Ohio St. 479; *Western R. Co.* v. *Nolan*, 48 N. Y. 518; *Dows* v. *Chicago*, 78 U. S. 11 Wall. 108 (20: 65).

The bills do not show that the amount is large enough in any case to invoke the jurisdiction of the United States courts.

*Fishback* v. *Western U. Teleg. Co.* 161 U. S. 96 (40: 630); *Walter* v. *Northeastern R. Co.* 147 U. S. 370 (37: 207); *United States* v. *Sayward*, 160 U. S. 493 (40: 508).

*Messrs.* **John K. Richards**, *F. S. Monnett*, Attorney General of Ohio, and *John L. Lott*, Assistant Attorney General of Ohio, for appellees:

Where the constitutionality of a law is involved every possible presumption is in favor of its validity, and this continues until the contrary is shown beyond a reasonable doubt.

*Cincinnati, W. & Z. R. Co.* v. *Clinton County Comrs.* 1 Ohio St. 82; *State, Atty. Gen.*, v. *Cincinnati*, 20 Ohio St. 33; *Marmet* v. *State*, 45 Ohio St. 64; *State, Atty. Gen.*, v. *Covington*, 29 Ohio St. 113; *State, Heron*, v. *Smith*, 44 Ohio St. 372; *Powell* v. *Pennsylvania*, 127 U. S. 678 (32: 253); *Pelton* v. *Commercial Nat. Bank*, 101 U. S. 143 (25: 901).

The Nichols law is based upon the essential difference existing between the property of telegraph, telephone, and express companies and other property. The property of these companies is in nature and use a unit, and to be justly valued, so that the companies may bear their fair share of the public burdens, and must be treated for assessment purposes as a unit.

*Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 34 (35: 621), 3 Inters. Com. Rep. 595; *Western U. Teleg. Co.* v. *Massachusetts*, 125 U. S. 530 (31: 790).

As to an express company, it owns horses, wagons, pouches, office furniture, safes, and other implements for carrying on the transportation business; but it also owns leases of transportation facilities and capital and money to operate lines extending throughout the country. A part of this property has a situs in the towns where there are offices, a part is carried to and fro throughout the state on the lines over which the express company operates. The property is used together in one business, that of transporation, and is valuable because it is so used. An express company is akin to a railroad company. It operates over a large territory, or its property would not have the value it does. To operate lines extending



Digitized by Google

over a large territory requires a considerable capital and this capital is of such a character that it can only be ascertained and valued as a unit and cannot be reached and assessed by local officers.

Because of these inherent differences, it is not only proper, but wise, for the state to classify the property of these companies for taxation. Such classification does not violate the Constitution of Ohio and is in accord with the legislative policy of the state. There are separate provisions for the valuation of the property of individuals, of merchants, of manufacturers, of unincorporated banks, of incorporated banks, of corporations in general, of railroads, of insurance companies. The end of the law is equality of burdens, which can only be reached through classification.

*Wagoner* v. *Loomis*, 37 Ohio St. 571.

The method of valuing the property of a telegraph company as a unit, taking the capital stock as a guide and distributing such valuation according to mileage, is a just and fair mode of assessment, which has been sustained in numerous decisions. The value of the capital stock guides but does not control.

*Western U. Teleg. Co.* v. *Massachusetts*, 125 U. S. 530 (31: 790); *Ratterman* v. *Western U. Teleg. Co.* 127 U. S. 411 (32: 229), 2 Inters. Com. Rep. 59; *Leloup* v. *Port of Mobile*, 127 U. S. 641 (32: 312), 2 Inters. Com. Rep. 134; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 (29: 158), 1 Inters. Com. Rep. 382; *Taylor* v. *Secor* (*"State R. Tax Cases"*), 92 U. S. 575 (23: 663); *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217 (35: 994), 3 Inters. Com. Rep. 807; *Massachusetts* v. *Western U. Teleg. Co.* 141 U. S. 40, 45 (35: 628, 630); *Minot* v. *Philadelphia, W. & B. R. Co.* (*"Delaware R. Tax"*) 85 U. S. 18 Wall. 206 (21: 888); *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 429 (38: 1037); *Western U. Teleg. Co.* v. *Taggart*, 163 U. S. 1 (*ante*, 49).

The property of an express company constitutes a plant for transportation purposes. The assessment of the Ohio property did not exceed a fair proportion of the value of this plant, taking into consideration the value of the capital stock and other facts, whatever basis of apportionment may be taken. In fact, no rule of appraisement aside from that laid down in the Nichols law was adopted; the result presents the best judgment of the board, in the light of the law and all the facts before it. If the assessment be erroneous, it is in consequence of a mistake of judgment, which the court will neither review nor correct.

*State, American Exp. Co.*, v. *State Board of Assessment* (S. D.) 53 N. W. 192.

There is no denial of the equal protection of the law. The Federal cases recognize the right of a state to classify property for taxation, and use such methods of valuation as, in the judgment of the legislature, will result in equality of burdens.

*Barbier* v. *Connolly*, 113 U. S. 31 (28: 925); *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 234 (33: 892, 894); *Home Ins. Co.* v. *New York*, 134 U. S. 594 (33: 1025); *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339 (35: 1035), 3 Inters. Com. Rep. 810; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 (35: 1051); *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205 (32: 107); *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky* (*"Kentucky R. Tax Cases"*) 115 U. S. 321 (29: 414); *Bowman* v. *Lewis* (*Missouri* v. *Lewis"*) 101 U. S. 22 (25: 989).

Due process of law is provided by the Nichols act, both in itself and when taken in connection with other statutes. There are provisions for notice, for statements, for hearings, for review and correction of erroneous and excessive valuations, and for contesting assessments.

*Davidson* v. *New Orleans*, 96 U. S. 97 (24: 616); *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701 (28: 569); *Taylor* v. *Secor* (*State R. Tax Cases"*) 92 U. S. 609 (23: 672); *McMillen* v. *Anderson*, 95 U. S. 37 (24: 335); *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky* (*"Kentucky R. Tax Cases"*) 115 U. S. 321 (29: 414); *Spencer* v. *Merchant*, 125 U. S. 345, 356 (31: 763, 768); *Palmer* v. *McMahon*, 133 U. S. 660 (33: 772).

In the absence of an allegation of fraud, the action of the board in fixing the valuation is conclusive, and the court will not review its judgment to determine whether its valuation is or is not excessive. Courts do not constitute themselves taxing authorities to determine on evidence the value of property for taxation.

*Taylor* v. *Secor* (*"State R. Tax Cases"*) 92 U. S. 610 (23: 672); *Kelly* v. *Pittsburgh*, 104 U. S. 78 (26: 658); *Kennard* v. *Louisiana*, 92 U. S. 480 (23: 478); *Davidson* v. *New Orleans*, 96 U. S. 97 (24: 616); *Kirtland* v. *Hotchkiss*, 100 U. S. 491 (25: 558); *Bowman* v. *Lewis* (*"Missouri* v. *Lewis"*) 101 U. S. 22 (25: 898); *German Nat. Bank* v. *Kimball*, 103 U. S. 732 (26: 469); *Wagoner* v. *Loomis*, 37 Ohio St. 571; *Stanley* v. *Albany County Supers.* 121 U. S. 535 (30: 1000); *Williams* v. *Albany County Supers.* 123 U. S. 154 (30: 1088); *Albuquerque Nat. Bank* v. *Perea*, 147 U. S. 87 (37: 91).

The tax provided by the Nichols law is not in any way a tax on the interstate business carried on by these companies, but upon the property of the companies in the state of Ohio, property having a situs in Ohio, and hence taxable there. There is therefore no violation of the commerce clause of the Constitution of the United States, and no levy of a tax on property without the jurisdiction of the state.

*Leloup* v. *Port of Mobile*, 127 U. S. 640 (32: 311), 2 Inters. Com. Rep. 134; *Lyng* v. *Michigan*, 135 U. S. 161 (34: 150), 3 Inters. Com. Rep. 148; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 (35: 613), 3 Inters. Com. Rep. 595; *Baltimore & O. R. Co.* v. *Maryland*, 88 U. S. 21 Wall. 473 (22: 684); *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460 (26: 1067); *Brown* v. *Houston*, 114 U. S. 623 (29: 257); *Ratterman* v. *Western U. Teleg. Co.* 127 U. S. 411 (32: 229), 2 Inters. Com. Rep. 59; *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217 (35: 994), 3 Inters. Com. Rep. 807; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 354 (35: 1040), 3 Inters. Com. Rep. 810; *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421 (38: 1031); *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688 (39: 311), 5 Inters. Com. Rep. 1.

Really, the only serious question ever raised in these cases was the constitutionality of the Nichols law, under the Ohio Constitution. The supreme court of Ohio in *State, Poe*, v. *Jones*, 51 Ohio St. 492, conclusively settled this question in favor of the law.



Digitized by Google

*Fairfield* v. *Gallatin County*, 100 U. S. 47 (25: 544); *Bucher* v. *Cheshire R. Co.* 125 U. S. 582 (31: 798); *Stutsman County* v. *Wallace*, 142 U. S. 293 (35: 1018); *Bauserman* v. *Blunt*, 147 U. S. 647 (37: 316).

*Mr.* **James C. Carter**, for the American Express Company, appellant:

Inasmuch as the state of Ohio had the rightful power to impose a tax upon the property of the express companies actually situated within its territory, if there is any invalidity in the assessments under notice it must be found in the manner in which they were laid.

What the state of Ohio assumed to do was to tax property, not because of its ownership by citizens of the state, but irrespective of citizenship and on account of its situs within the state. Nor did it assume to impose a specific tax, but a tax determinable by value. This property of the express companies was ordinary movable personal property, the actual value of which in money was easily determinable in the ordinary way. The method actually employed was this: The board required from the companies, and received (at least from the American Express Company) statements showing the value of its whole property, of that part actually situated in Ohio, the nominal amount of its capital stock, and its actual value as determined by the selling price of its shares. If the board had taken the actual value of the property in Ohio, it would have assessed it, the personalty (for the year 1895, and the difference between that and the other years is not material) at $23,430. The omissions to return some small items might slightly swell the amount. It utterly dismissed the actual value thus ascertained by the ordinary method, and proceeded with an attempt to ascertain what the value of it would be if it were treated as a certain fractional part of a supposed "unit profit-producing plant;" and to this end it assumed that the real value of the whole of this plant was determined by the value of the whole capital stock according to its selling price. Having thus ascertained the value of the whole unit plant, the problem remained to ascertain how much of that unit plant was in Ohio, and this was solved by the assumption that, as the actual value in Ohio of the specific personal property therein situated, valued according to the ordinary method, was to the value of the whole property of the company valued in like manner, so was the value of the part of the unit plant in Ohio to the whole value of the unit plant as determined by the whole value of the capital stock.

In this way property really of the value of $23,400 was valued and assessed for taxation for the year 1895 at $499,377.60.

The case, as thus stated, hardly leaves room for argument, for argument would assume that the error is not obvious and flagrant, whereas it is so obvious and flagrant that it scarcely seems worth while to inquire into the nature of the error. The valuations declared by the board of assessors are—must be—either purely capricious and arbitrary, in which case the error is plain, or the result of applying some test of valuation which has no just or reasonable relation to value, in which case the error is equally plain.

The laws under which the assessments were made required this mode of valuation, and we are entitled—indeed bound, in the absence of evidence to the contrary—to assume that the officers followed the law.

Whatever the supreme court of Ohio or the circuit court of appeals may have thought as to whether the board was bound to regard the value of the entire capital stock as alone determining the value of the entire property (as, according to these laws, it certainly was), neither pretends that it was not the principal test prescribed by the statute; and a law which makes a wholly erroneous test in the valuation of property the principal one is just as invalid as if it made it the only one.

Such laws are not valid enactments: and, first, they are in direct conflict with those provisions of the Federal Constitution which forbid the taking of property "without due process of law." If this be true the court will be in no manner embarrassed by any opinion of the supreme court of Ohio that the laws are not infractions of the Constitution of that state.

The property assessed was wholly or chiefly personal chattels, such as horses, wagons, etc. They were specific things having an actual situs in Ohio and taxable by that state. The state proposed to value them, not as specific things, but as a part of a distinct whole embracing these and many other things with them. Their value was easily ascertainable, in the ordinary method, by finding their market value, or the cost at which they could be produced and reproduced. The law required this ordinary mode to be ignored and a value to be placed upon them which should be determined by the value of the capital stock, a thing which had no relation whatever to their value; for nothing is more certain than that the value of this property would be precisely the same, could be bought for the same price, be sold for the same price, be produced and reproduced for the same price, whether the capital stock of the company was 50 per cent below or 100 per cent above par.

Under this method of valuation, whether the horses were lame or sound, or old or young, whether the wagons and harness were old or new, was of little consequence; but any valuable franchises which the company might possess which increased the profits of this business in other states, however remote, every favorable contract with railroad companies which increased the profits of its business, immediately added to the value of every horse, wagon, and harness in Ohio. And if a debt due to the company from a debtor in Ohio of $1,000 was included in its property there it became subject to valuation for the purposes of taxation at more than $15,000.

Is this "a taking of property" without due process of law? Certainly it is, unless the requirement of "due process of law" can in all instances be satisfied by a mere statutory enactment. We are not called upon at the present stage of constitutional jurisprudence to go into argument to show that this cannot be done. The safeguard which forbids the taking of property without due process of law is a protection against legislation. It cannot be met and overcome by a mere exercise of the power which it was erected to control.

Cooley, Const. Lim. 1st ed. 488.



Digitized by Google

Exact equality and justice are not possible in any system of taxation, and no one expects them. There are many methods which may be employed, and opinions differ concerning which is the best, and among these the legislature has an uncontrolled discretion. But one thing is essential to any method, and this is that it should have an eye to equality and uniformity. Without this, statutory enactments to compel the payment by the citizen of money in the name of taxes are mere arbitrary exactions; indeed, their proper name is robbery and they are none the less robbery because clothed with the exterior form of law.

The opinion seems to have been entertained in the circuit court of appeals and in the supreme court of Ohio that the question whether the safeguard of due process of law was satisfied amounted simply to the question whether the property owner had under the law opportunity to appear before the assessing board and be heard. No greater error could be committed. Opportunity to appear and be heard is useful when it affords a means of correcting injustice. It is valuable only when the party can appeal effectively to truth and justice. But of what use is it when the so-called law itself commands the injustice to be done? An appeal to the legal enactment is to no purpose in such a case.

Our system assumes that life, liberty, and property are secure only under the supremacy of the fundamental principles of reason and justice, which are independent of formal law. Where the legislative power is arbitrary and unlimited there is, of course, no protection against it to be found in the constitutional safeguard of the 14th Amendment that no person shall be deprived of life, liberty, or property without due process of law. But it has been more than once declared, with the approval of this court, that under our American systems there is no room for the exercise of arbitrary power.

The objection that men differ as to what these fundamental principles are cannot be listened to. It questions the existence of the principles, and thus utterly destroys constitutional government. We have no other ground for saying that a judicial proceeding which denies to the defendant an opportunity to be heard is unconstitutional, except that it violates the fundamental principles of reason and justice. But it is not true that civilized and enlightened men differ as to these principles. Upon all material points they are agreed. Were they not thus agreed constitutional government would be impossible. They are agreed, in the main, upon all the dictates of right reason, and so far as they are not agreed, so far our constitutional systems are imperfect, as all human institutions are.

In the application, indeed, of fundamental principles of reason and justice to legal enactments there are wide differences of opinion, and the difficulty thus occasioned is surmounted, so far as it can be, by the rule that laws are not to be pronounced unconstitutional except when they are clearly violative of such principles.

The laws in question are very clearly in violation of the Constitution of the state of Ohio and for this reason invalid.

Section 2 of article 12 of the Constitution of Ohio provides that "laws shall be passed, taxing, by a uniform rule, all moneys, credits, investments in bonds, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money." The laws in question violate this injunction in two particulars, as follows:

(1) Taxation in Ohio must be made by a uniform rule.

Different classes of persons and property may be arranged for the purposes of taxation and different methods be applied to each; but the classifications must not be arbitrary, still less designed to promote inequality.

Those who defend this law must maintain either, first, that under the Constitution of Ohio the legislature may make, for the purposes of taxation, such classes as in the exercise of full arbitrary power it pleases; or, second, that the value of horses and wagons owned by express companies so far differs from that of the same property owned by others as to justify the taxation of them by a different rule. Both propositions are erroneous on their face.

(2) This provision of the state Constitution also requires the taxation "of all real and personal property according to its true value in money." The provision was made to insure one rule of valuation, which, when applied to the same things, will produce the same result.

The proposition which those who support this law must maintain is that it is competent for the legislature to prescribe a rule of taxing horses by which an ordinary horse worth $150 may be assessed at anywhere from $5 to $5,000.

The property mentioned in the Constitution of Ohio is specific property having an actual existence *in rerum natura*, which may be occupied, where it is real estate, touched and handled in the case of chattels, and received or recovered in the case of debts and credits from, or by action against, actual persons who owe them. The property which, according to the notion under criticism, is taxed, is a pure abstraction having no situs, no existence, even, save in intellectual conception, something which can nowhere be seen or handled or made the subject of action.

This action is but another mode of abrogating constitutional law by changing at pleasure the meaning of words. It could easily be done if legislatures had the power of thus changing the meaning of language.

The error of regarding the express company property as a unit, is that it is not a unit in fact, but made so violently by the mere will of the Ohio legislature, and against the express provision of the Constitution of that state. If it can commit this violence in one case it can in all, and all protection against unjust taxation is gone.

The real object of the laws we are complaining of, and the real object accomplished if they are valid, was to reach property in this form. The laws are framed to embrace corporations notoriously of other states than Ohio, whose property generally, or whose



Digitized by Google

capital stock, or the shares of stockholders not resident in Ohio, were taxable in that state. It is of course quite manifest that the Ohio legislature would never have contrived the elaborate and anomalous provision for valuation contained in the Nichols law if it could have directly reached the capital stock of the companies.

This notion of a "unit profit producing plant," upon which, and which alone, any defense is made by the supreme court of Ohio of these assessments, if it could by possibility defend them, could do so only if adhered to throughout. But it is not so adhered to. It is adopted only in the case of personal property, and rejected so far as relates to real property. The law assumes that the real estate of the companies is assessed like other real estate, by other officers, where it is situated.

The laws in question impose taxes on property beyond the territorial jurisdiction of Ohio, and are invalid for this reason.

A tax on account of income depends upon the existence of an income and its amount, and is therefore said to be a tax upon income; and a tax upon the gross receipts of a business depends upon the carrying on of that business and the amount of the gross receipts, and is therefore called a tax upon business or on gross receipts.

The laws authorizing the assessments are invalid as an invasion of the constitutional guaranty of the equal protection of the laws.

Practically the two constitutional provisions which forbid the taking by any state of life, liberty, or property without due process of law, and the denial by any state of the equal protection of the laws, are very nearly the same.

But the notion that ordinary personal property is more valuable to express companies than to other persons in a sense that justifies a different valuation for taxation is a unmixed error.

If the foregoing views are well founded it follows that the laws under discussion deny to one class of property owners that assurance that their property shall be assessed according to its true value which it furnishes to others.

The laws under which these assessments were made are invalid also for the reason that they impose a burden upon interstate commerce.

There is no constitutional provision in terms forbidding the states to impose burdens by way of taxation upon interstate commerce. The prohibition is a necessary implication arising from the fact that the subject-matter is one placed exclusively under the sovereign control of Congress, and the imposition of burdens upon it by the states, whether by taxation or otherwise, would be a denial of that sovereignty and false assumption by the states of a power over it, which, if it existed, might be so exercised as to destroy it.

There is one necessary exception to the rule that the states cannot tax interstate commerce. Inasmuch as the existence of the states is necessary to the existence of interstate commerce that ordinary system of taxation which is necessary to the existence of the states, namely, taxation upon all the property within them, must be permitted, and the property employed in interstate commerce is not to be exempted. This exception is, indeed, rather apparent than real; for where no burden can be put upon property employed in interstate commerce without being at the same time put upon all other property, interstate commerce is not really burdened. Were it not subject to taxation in this form the effect would be to confer upon it an affirmative advantage equivalent to a pecuniary bounty equal to the amount of the tax from which it was exempted.

But a tax in any other form cannot be thus equalized over all private interests, and, if allowed, would be, or might easily be made to be, an especial burden.

The taxes levied by these Ohio laws are taxes directly depending upon the market value of the shares of the stockholders. That market value depends directly upon the present profits of the business and the fair expectation concerning its permanency. It is, very precisely, a capitalization of all the property and every advantage whether by way of franchise, contract privilege, or skill, possessed by the company. Among these advantages is the fact that the privilege of carrying it on is derived from and controlled by another sovereign government. A tax, therefore, upon a capitalization of all these elements is a tax upon the occupation itself, which it is certain that the states have no right to impose.

The practical test is conclusive. The question is whether the taxes are a burden. Everyone can see that if all the states should impose taxes similar to those we are dealing with (and if one state can do it all may), the business would be immediately destroyed. No express company could stand such an aggregate of taxation.

**Mr. Chief Justice Fuller** delivered the opinion of the court:

No difference material to the determination of the controversy exists between the cases, and as matter of convenience the statement refers to the amended act and the records in Nos. 398, 399, and 400.

The contention that the act in question is invalid because repugnant to the Constitution of the state of Ohio has been disposed of by the decision of the highest tribunal of that state sustaining its validity. *State, Poe,* v. *Jones*, 51 Ohio St. 492. These cases fall within no recognized exception to the general rule that the construction by the state courts of last resort of state constitutions and statutes will ordinarily be accepted by this court as controlling.

It is suggested that the decision of the supreme court of Ohio should not be followed because the case in which it was announced did not involve a genuine controversy, but was prepared for the purpose of obtaining an adjudication, and, under the circumstances, ought not to have been considered by that court. But it was for that tribunal to pass on this question, and, as it entertained jurisdiction and delivered a considered opinion which appears in the official reports of the court as its judgment of the validity of the Nichols law under the Constitution of the state of Ohio, it



Digitized by Google

is not within our province to review its determination in that regard.

This brings us to the only inquiry which it concerns us to examine.

The legislation in question is claimed to be repugnant to the Constitution of the United States because in violation of the commerce clause of that instrument, and because operating to deprive appellants of their property without due process of law, and of the equal protection of the laws.

We assume that the assessments complained of were made in pursuance of the definite rule or principle of appraisement recognized and established by the Nichols law, as construed by the supreme court of Ohio, and the question is whether the law prescribing that rule is valid under the Federal Constitution.

The principal contention is that the rule contravenes the commerce clause because the assess-
220] ments, while purporting to *be on the property of complainants within the state, are in fact levied on their business, which is largely interstate commerce.

Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally as all business is affected by the necessity of contributing to the support of government. *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688 [39: 311, 5 Inters. Com. Rep. 1].

As to railroad, telegraph, and sleeping-car companies, engaged in interstate commerce, it has often been held by this court that their property in the several states through which their lines or business extended might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular state, without violating any Federal restriction. *Western U. Teleg. Co.* v. *Massachusetts*, 125 U. S. 530 [31: 790]; *Massachusetts* v. *Western U. Teleg. Co.* 141 U. S. 40 [35: 628]; *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217 [35: 994, 8 Inters. Com. Rep. 807]; *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421 [38: 1031]; *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439 [38: 1041, 4 Inters. Com. Rep. 671]; *Western U. Teleg. Co.* v. *Taggart*, 163 U. S. 1 [41: 49]; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 [35: 613, 8 Inters. Com. Rep. 595]. The valuation was, thus, not confined to the wires, poles, and instruments of the telegraph company; or the roadbed, ties, rails, and spikes of the railroad company; or the cars of the sleeping-
221] car company; but *included the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular state is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole (*Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 429 [38: 1037]); or taking as the basis of assessment such proportion of the capital stock of a sleeping-car company as the number of miles of railroad over which its cars are run in a particular state bears to the whole number of miles traversed by them in that and other states (*Pullman's Palace Car Co.* v. *Pennsylvania*, *supra*); or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a state bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state. *Western U. Teleg. Co.* v. *Taggart*, *supra*.

Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use.

The cars of the Pullman company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which value might be reached by the state authorities on the basis indicated.

No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons, and furniture, than that of railroad, telegraph, and sleeping-car companies, *to roadbed, rails, and ties, poles and [222 wires, or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches, and furniture, the contracts for transportation facilities, the capital necessary to carry on the business—whether represented in tangible or intangible property—in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others.

We repeat that while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business.

The same party may own a manufacturing establishment in one state and a store in



Digitized by Google

another, and may make profit by operating the two, but the work of each is separate. The value of the factory in itself is not conditioned on that of the store, or *vice versa*, nor is the value of the goods manufactured and sold affected thereby. The connection between the two is merely accidental and growing out of the unity of ownership. But the property of an express company distributed through different states is as an essential condition of the business united in a single specific use. It constitutes but a single plant, made so by the very character and necessities of the business.

It is this which enabled the companies represented here to charge and receive within the state of Ohio for the year ending May 1, 1895, $282,181, $358,519, and $275,446, respectively, on the basis, according to their respective returns, of $42,065, $28,488, and $23,480, of personal property owned in that state, returns which confessedly do not, however, take into account contracts for transportation and accompanying facilities.

Considered as distinct subjects of taxation, a horse is, indeed, a horse; a wagon, a wagon; a safe, a safe; a pouch, a pouch; but how is it that $23,480 worth of horses, wagons, safes, [223] *and pouches produces $275,446 in a single year? Or $28,488 worth, $358,519? The answer is obvious.

Reliance seems to be placed by counsel on the observation of Mr. Justice Lamar, in *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 354 [35: 1040, 3 Inters. Com. Rep. 810], that "express companies such as are defined by this act have no tangible property, of any consequence, subject to taxation under the general laws. There is therefore no way by which they can be taxed at all unless by a tax upon their receipts for business transacted." But the reference was to the legislation of the state of Missouri, and the scheme of taxation under consideration here was not involved in any manner.

The method of assessment provided by the Nichols law was as follows: "The said board shall proceed to ascertain and assess the value of the property of said express, telegraph, and telephone companies in Ohio, and in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

And this provision was thus construed by the supreme court of Ohio in *State, Poe*, v. *Jones* [51 Ohio St. 492]:

"The board, in determining the value of the company's property in this state for taxation, is not required to fix the value of such property upon the principle that the value of the entire property of the company shall be deemed the same as the value of its entire capital stock, thus making the respective values equivalents of each other. But, taking the market value of the entire capital stock as a *datum*, the board is to be only guided thereby in ascertaining the true value in money of the company's property in this state. The statute does not bind the board to find the value *of the entire property of the com- [224] pany equal to that of the entire capital stock."

The court further said:

"But the property of a corporation may be regarded, in the aggregate, as a unit, an entirety, as a plant designed for a specific object; and its value may be estimated, not in parts, but taken as a whole. If the market value—perhaps the closest approximation to the true value in money—of the corporate property as a whole were inquired into, the market value of the capital stock would become a controlling factor in fixing the value of the property. Should all the stockholders unite to sell the corporate plant as an entirety, they would not be inclined to sell it for less than the market value of the aggregate shares of the capital stock. Besides, while the amount of the capital stock may be limited by the charter and the laws governing it, the real and personal property of the corporation may be constantly augmented, and may keep pace with any increase in the value of the capital stock. The market value of the capital stock, it is urged, has no necessary relation to the value of the tangible property of the corporation. But such is the well-understood relation between the two that not only is the value of the capital stock an essential factor in fixing the market value of the corporate plant, but the corporate capital or property has a reflex action on the value of the capital stock. . . . If by reason of the goodwill of the concern, or the skill, experience, and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, considered as an entire plant, acquires a greater market value than it otherwise would have had, it cannot properly be said not to be its true value in money within the meaning of the Constitution, because goodwill and other elements indirectly entered into its value. The market value of property is what it will bring when sold as such property is ordinarily sold in the community where it is situated; and the fact that it is its market value cannot be questioned because attributed *somewhat to goodwill, franchise, skill- [225] ful management of the property, or any other legitimate agency. It will, we think, be conceded that the earning capacity of real estate owned by individuals may be considered in fixing its value for taxation. Take an office building on a prominent street in one of our large cities. It will not be doubted, that by care in the selection of tenants, and in the preservation of the reputation of the building, by superior elevator service, by vigilance in guarding and protecting the property, by the exercise of skill and knowledge in the general management of the premises, a goodwill of the establishment will be promoted which will tend to an extra increase in the earning capacity and value of the building. For the purpose of taxation, it would be none the less the true value in money of the building, because contributed to by the operative causes that



Digitized by Google

gave rise to the goodwill. We discover no satisfactory reason why the same rule should not apply to the valuation of corporate property—why the selling value of the capital stock, as affected by the goodwill of the business, should be excluded from the consideration of the board of appraisers and assessors under the Nichols law, charged with the valuation of corporate property in this state, especially as the capital stock, when paid up, practically represents, at least, an equal value of the corporate property."

Similar views were expressed by the circuit court of appeals (*Sanford* v. *Poe*, 37 U. S. App. 395), Judge Lurton, delivering the opinion, saying:

"The tax imposed is not a license tax, nor a tax on the business or occupation, nor on the transportation of property through the state, nor from points within the state to points in other states, nor from points in other states to points within the state. It purports to provide for a tax upon property within the state of Ohio. Though this property is employed very largely in the business of interstate commerce, yet that does not exempt it from the same liability to taxation as all other property within the jurisdiction of Ohio. This proposition is too well settled to need argument. . . . Neither does the fact that the [226] property of the express *companies was valued as a unit profit-producing plant violate any Federal restriction upon the taxing power of a state within which a part of that plant is found. The value of property depends in a large degree upon the use to which it is put. If a railroad may be valued as a unit, rather than as a given number of acres of land, plus so many tons of rails and so many thousand ties and a certain number of depots, shops, etc., there is no sufficient reason why the property of an express company should not be treated as a unit plant. If the state of Ohio had a right to tax the property within the state, and to assess it at its true cash value, there is no Federal restriction which will prevent such property from being 'assessed at the value which it has, as used, and by reason of its use.' . . . That an express company owns no line of railway and operates no railroad does not prevent the value of its property from being affected by the relation of each part to every other part, and the use to which a part is put as a factor in a unit business."

The line of reasoning thus pursued is in accordance with the decisions of this court already cited. Assuming the proportion of capital employed in each of several states through which such a company conducts its operations has been fairly ascertained, while taxation thereon, or determined with reference thereto, may be said in some sense to fall on the business of the company, it is only indirectly. The taxation is essentially a property tax, and, as such, not an interference with interstate commerce.

Nor, in this view, is the assessment on property not within the jurisdiction of the taxing authorities of the state and for that reason amounting to a taking of property without due process of law. The property taxed has its actual situs in the state and is therefore subject to the jurisdiction, and the distribution among the several counties is a matter of regulation by the state legislature. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22 [35: 613, 616, 3 Inters. Com. Rep. 595]; *Taylor* v. *Secor* ("*State R. Tax Cases*") 92 U. S. 575 [23: 663]; *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware R. Tax*") 85 U. S. 18 Wall. 206 [21: 888]; *Erie R. Co.* v. *Pennsylvania*, 88 U. S. 21 Wall. 492 [22: 595]; *Columbus S. R. Co.* v. *Wright*, 151 U. S. 470 [38: 238].

*In *Pullman's Palace Car Co.* v. *Penn-* [227 *sylvania, supra*, the rule is considered that personal property may be separated from its owner and he may be taxed on its account, at the place where it is, although not the place of his own domicil, and even if he is not a citizen or a resident of the state which imposes the tax; and the distinction between ships and vessels and other personal property is pointed out. The authorities are largely examined and need not be gone over again.

There is here no attempt to tax property having a situs outside of the state, but only to place a just value on that within. Presumptively all the property of the corporation or company is held and used for the purposes of its business, and the value of its capital stock and bonds is the value of only that property so held and used.

Special circumstances might exist, as indicated in *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 443 [38: 1031, 1044, 4 Inters. Com. Rep. 677], which would require the value of a portion of the property of an express company to be deducted from the value of its plant as expressed by the sum total of its stock and bonds before any valuation by mileage could be properly arrived at, but the difficulty in the cases at bar is that there is no showing of any such separate and distinct property which should be deducted, and its existence is not to be assumed. It is for the companies to present any special circumstances which may exist, and, failing their doing so, the presumption is that all their property is directly devoted to their business, which being so, a fair distribution of its aggregate value would be upon the mileage basis.

The states through which the companies operate ought not to be compelled to content themselves with a valuation of separate pieces of property disconnected from the plant as an entirety, to the proportionate part of which they extend protection, and to the dividends of whose owners their citizens contribute.

It is not contended that notice of the time and place of the meetings of the board was not afforded or that the companies were denied the opportunity to appear and submit such proofs, explanations, suggestions, and arguments with reference to the assessment as they desired.

*We are also unable to conclude that the [228 classification of express companies and railroad telegraph companies as subject to the unit rule, denies the equal protection of the laws. That provision in the 14th Amendment "was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways," nor was that amendment "intended to compel a state to adopt an iron rule of equal taxation." *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232 [33: 892].



Digitized by Google

In *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339 [35: 1035, 8 Inters. Com. Rep. 810], in which a tax on gross receipts of express companies in the state of Missouri was sustained, Mr. Justice Lamar, speaking for the court, well says:

"This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens."

And see *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky* (*"Kentucky R. Tax Cases"*) 115 U. S. 321 [29: 414]; *Home Ins. Co.* v. *New York*, 134 U. S. 594 [33: 1025].

The policy pursued in Ohio is to classify property for taxation, when the nature of the property, or its use, or the nature of the business engaged in, requires classification, in the judgment of the legislature, in order to secure equality of burden; and property of different sorts is classified under various statutory provisions for the purposes of assessment and taxation. The state Constitution requires all property to be taxed by a uniform rule and according to its true value in money, and it was held by the supreme court of Ohio in *State, Poe,* v. *Jones*, 51 Ohio St. 492, that the Nichols law did not violate that requirement.

In *Wagoner* v. *Loomis*, 37 Ohio St. 571, it was ruled that "statutory provisions, whereby different classes of property are listed and valued for taxation in and by different modes [229]*and agencies, are not necessarily in conflict with the provisions of the Constitution which requires all property to be taxed by a uniform rule and according to its true value in money." And the court said: "A faithful execution of the different provisions of the statutes would place upon the duplicate for taxation all the taxable property of the state, whether bank stocks or other personal property or real estate, according to its true value in money; and the equality required by the Constitution has no other test."

The constitutional test was held to be complied with, whatever the mode, if the result of the assessment was that the property was assessed at its true value in money.

Considering, as we do, that the unit rule may be applied to express companies without disregarding any other Federal restriction, we think it necessarily follows that this law is not open to the objection of denying the equal protection of the laws.

We have said nothing in relation to the contention that these valuations were excessive. The method of appraisement prescribed by the law was pursued and there were no specific charges of fraud. The general rule is well settled that "whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined." *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 434 [38: 1039]; *Western U. Teleg. Co.* v. *Taggart*, 163 U. S. 1 [41: 49].

*Decrees affirmed.*

Mr. Justice **White**, dissenting:

Not being able to concur in the opinion and judgment of the court in the foregoing cases, I am impelled, by what I conceive to be the serious nature of the questions involved, to state the reasons for my dissent.

*It is elementary that the taxing power [230 of one government cannot be lawfully exerted over property not within its jurisdiction or territory and within the territory and jurisdiction of another. The attempted exercise of such power would be a clear usurpation of authority, and involve a denial of the most obvious conceptions of government. This rule, common to all jurisdictions, is peculiarly applicable to the several states of the Union, as they are by the Constitution confined within the orbit of their lawful authority, which they cannot transcend without destroying the legitimate powers of each other, and therefore without violating the Constitution of the United States.

This limitation upon the taxing power was early declared by Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 316 [4: 579], where it was said (p. 429 [607]):

"All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."

In *Hays* v. *Pacific Mail S. S. Co.* 58 U. S. 17 How. 596 [15: 254], a tax imposed upon twelve steamships belonging to the company, which, while engaged in lawful trade and commerce between the port of San Francisco and ports and territories without the state, were temporarily within the jurisdiction of California, was held illegal. This court, by Mr. Justice Nelson, declared that the vessels were not properly abiding within the limits of California, so as to become incorporated with the other personal property of that state; that their situs was at the home port where the vessels belonged and where the owners were liable to be taxed for the capital invested and where the tax had been paid.

In *St. Louis* v. *Wiggins Ferry Co.* 78 U. S. 11 Wall. 423 [20: 192], the validity of a tax assessed by the city of St. Louis upon the boats of a ferry company, an Illinois corporation, as property within the city of St. Louis, was considered. This court held that Illinois was the home port of the boats, that they were beyond the jurisdiction of the authorities by which the taxes were assessed, *and that the [231 validity of the taxes could not be maintained. It was observed (p. 430 [194]):

"Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a state should enact that the citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to



Digitized by Google

its authority, or in any manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

In *Philadelphia & R. R. Co.* v. *Pennsylvania* ("*State Tax on Foreign-Held Bonds*") 82 U. S. 15 Wall. 300 [21: 179], a tax laid by the state of Pennsylvania on the interest paid by the railroad company on its bonds was held to be a tax upon the bonds, the property not of the debtor company but of its creditors, and that so far as such bonds were held by nonresidents of the state, they were property beyond its jurisdiction. It was declared that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a state is not a subject upon which the taxing power can be legitimately exercised, and that "the power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state." Of the act there under consideration, the court said (p. 321 [187]):

"It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contribution levied upon property held in other states, where it is subjected or may be subjected to taxation upon an estimate of its full value."

In *Morgan* v. *Parham*, 83 U. S. 16 Wall. 471 [21: 303], it was adjudged upon the authority of the *Hays Case*, *supra*, that the state of Alabama could not lawfully tax a vessel registered in New York, but employed in commerce between Mobile in that state and New Orleans in 232] Louisiana. The situs of the vessel *was held to be at the home port in New York, where its owner was liable to be taxed for its value.

The circumstance that the steamer might not actually have been taxed in New York during the years for which the taxes in controversy were levied was held to be unimportant. The court said (p. 478 [305]):

"Whether the steamer Frances was actually taxed in New York during the years 1866 and 1867 is not shown by the case. It is not important. She was liable to taxation there. That state alone had dominion over her for that purpose."

In *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware R. Tax*") 85 U. S. 18 Wall. 206 [21: 888], this court, in considering an objection interposed to a taxing act, that it imposed taxes upon property beyond the jurisdiction of the state, observed (p. 229 [895]): "If such be the fact, the tax to that extent is invalid, for the power of taxation of every state is necessarily confined to subjects within its jurisdiction."

In *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 [29: 158, 1 Inters. Com. Rep. 382], at pages 206–209 [163, 164]), Mr. Justice Field reviews the cases just cited. The Gloucester Ferry Company was a New Jersey corporation, and operated a ferry between Gloucester, New Jersey, and Philadelphia. The state of Pennsylvania laid a tax on the appraised value of the capital stock of the ferry company, which owned no property in Pennsylvania except the lease of a slip or dock, where its ferryboats put up in plying across the river, between the two states.

In this court it was sought in argument to support the tax in question by advancing the theory of a "homogeneous unit." The counsel said (p. 201 [161]):

"The tax is upon the capital stock of the corporation, 'not in separate parcels, as representing distinct properties, but as a homogeneous unit, partaking of the nature of personalty,' and taxable where its corporate functions are exercised or its business done. The franchise itself may constitute the material part of all its property, since not only its wharves and slips, but also its boats, might be leased, and, in that case, the tax would be measured by the value of the franchise represented by the extent of its exercise within the state, and not by its tangible property situated there. The extent of its property *subject [233 to the taxing power is immaterial. Its franchise would be worthless without the leasehold interest owned by it in the city of Philadelphia. The value of its franchise depends upon the leasehold, and it will therefore not do to say that it has no property within the jurisdiction of the taxing power. It does not seem necessary to inquire further as to an ownership of property within the jurisdiction of Pennsylvania."

But this court, speaking through Mr. Justice Field, completely answered the argument, as follows (p. 205 [162]):

"If by reason of landing or receiving passengers and freight at wharves, or other places in a state, they can be taxed by the state on their capital stock on the ground that they are thereby doing business within her limits, the taxes which may be imposed may embarrass, impede, and even destroy such commerce with the citizens of the state. If such a tax can be levied at all, its amount will rest in the discretion of the state. It is idle to say that the interests of the state would prevent oppressive taxation. Those engaged in foreign and interstate commerce are not bound to trust to its moderation in that respect; they require security."

Of the *Gloucester Ferry Case*, it was observed by this court in *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania*, 122 U. S. 344 [30: 1204, 1 Inters. Com. Rep. 808], that "it is hardly necessary to add that the tax on the capital stock of the New Jersey company, in that case, was decided to be unconstitutional, because, as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business was interstate commerce."

In *New York, L. E. & W. R. Co.* v. *Pennsylvania* (No. 1) 153 U. S. 646 [38: 853], this court denied the power of the state of Pennsylvania to require a foreign railroad company doing business within its borders to deduct therefrom when paying interest upon its obligations in New York the amount of a tax assessed by the state upon the bonds and moneyed capital owned by the residents of Pennsylvania. The money in the hands of the company in New York was held to be property beyond the jurisdiction of Pennsylvania. The court said (p.



Digitized by Google

646 [853]), that "no principle is better settled than that the power of a state, even its power 234] of taxation, *in respect to property, is limited to such as is within its jurisdiction."

This inherent want of power in every government to transcend its jurisdiction is subject, as already stated, to an additional limitation as to the several states of the Union, resulting from those provisions of the Constitution of the United States which, in so far as they restrict the power of the states, necessarily create limitations to which they are all subject and from which they cannot depart without a violation of the Constitution. It will not be necessary to allude to every special restriction on the power of the states resulting from the Constitution, but it will suffice for my present purpose to refer to one only, the necessary existence of which has often been recognized to have been one of the most cogent motives leading to the adoption of the Constitution, and upon the enforcement of which it has often been declared the perpetuity of our institutions depends, to wit, the inhibition resulting from the provision of the Constitution of the United States conferring on Congress power to regulate interstate commerce.

Under the interstate commerce clause of the Constitution, as held by this court, speaking through Mr. Justice Bradley, in *Leloup* v. *Port of Mobile*, 127 U. S. 648 [32: 314, 2 Inters. Com. Rep. 134]: "No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belong solely to Congress." The following cases were referred to as supporting the proposition thus enunciated: *Philadelphia & R. R. Co.* v. *Pennsylvania* ("*State Freight Tax*"), 82 U. S. 15 Wall. 232 [21: 146]; *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1 [24: 708]; *Mobile County* v. *Kimball*, 102 U. S. 691 [26: 238]; *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460 [26: 1067]; *Moran* v. *New Orleans*, 112 U. S. 69 [28: 653]; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 [29: 158, 1 Inters. Com. Rep. 382]; *Brown* v. *Houston*, 114 U. S. 622 [29: 257]; *Walling* v. *Michigan*, 116 U. S. 446 [29: 691]; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34 [29: 785]; *Wabash, St. L. &* 235] *P. R. Co.* v. *Illinois*, *118 U. S. 557 [30: 244, 1 Inters. Com. Rep. 31]; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489 [30: 694, 1 Inters. Com. Rep. 45]; *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326 [30: 1201, 1 Inters. Com. Rep. 308]; *Western U. Teleg. Co.* v. *Pendleton*, 122 U. S. 347 [30: 1187, 1 Inters. Com. Rep. 306]; *Ratterman* v. *Western U. Teleg. Co.* 127 U. S. 411 [32: 229, 2 Inters. Com. Rep. 59].

The following cases, since decided, enforce the same principle: *Asher* v. *Texas*, 128 U. S. 129 [32: 368, 2 Inters. Com. Rep. 241]; *Stoutenburgh* v. *Hennick*, 129 U. S. 141 [32: 637]; *Lyng* v. *Michigan*, 135 U. S. 161 [34: 150, 3 Inters. Com. Rep. 143]; *McCall* v. *California*, 136 U. S. 104 [34: 391, 3 Inters. Com. Rep. 181], and *Orutcher* v. *Kentucky*, 141 U. S. 47 [35: 649].

These authorities were reviewed by this court in *Brennan* v. *Titusville*, 153 U. S. 289 [38: 719, 4 Inters. Com. Rep. 658], where, speaking through Mr. Justice Brewer, it was held that a municipal corporation could not lawfully tax a nonresident manufacturer of goods for the privilege of endeavoring to sell his goods by means of an agent sent into the state to solicit orders therefor. This court there said (p. 303 [723]): "This tax is a direct charge and burden upon that business; and if a state may lawfully exact it, it may increase the amount of this exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the state is enabled to say that it shall not be carried on in this way, and to that extent to regulate it."

The question then arises, Does the tax imposed by the state of Ohio upon express companies violate either of the two elementary propositions to which I have just referred?

Under the law of Ohio express companies are taxed in three forms: First, their real estate is assessed for state, county, and municipal purposes in the same manner as is real estate within the state belonging to other companies and persons; second, such companies are also taxed upon their gross receipts derived from business done within the state (91 Ohio Laws, 237) and, third, they are additionally assessed by a state board. 90 Ohio Laws, 330, as amended by 91 Ohio Laws, 220. It is the assessment resulting from the last of these provisions which is involved in the cases now under consideration.

*In compliance with the law the com- [236 panies returned to the state board a statement for the year 1893, showing, first, the amount of capital stock and its par and market value; second, a detailed account of the entire real and personal property of the companies and its assessed value; and, third, their entire gross receipts during the taxing year for business done within the state of Ohio. For the years 1894 and 1895 the statements, under the requirements of the amendatory statute of May 10, 1894 (91 Ohio Laws, 220), exhibited, first, the number of shares of capital stock and its par and market value; second, a detailed statement of the real estate owned in Ohio and its assessed value; third, a full and correct inventory of the personal property, including moneys and credits owned in Ohio and the value thereof; fourth, the total value of the real and personal property, owned and situate outside of Ohio; fifth, the entire and gross receipts of the company, from whatever source derived, of business wherever done for the taxing year; and, sixth, the gross receipts of each company in Ohio, from whatever source derived.

It is proper here to notice that while the gross receipts in Ohio of express companies was required to be stated, there was no direction that mention should be made of the sum of the payments properly chargeable against such gross receipts, to wit, disbursements to railroad companies or individuals for transportation facilities, wages of its army of employees, care and maintenance of its horses, and other operating expenses.

Although the assessment on the real estate



Digitized by Google

and on the gross receipts may be relevant to some aspects of the controversy now examined, I eliminate them from consideration, as the direct issue here presented concerns the taxation asserted to be only upon the personal property.

The value of the personal property within the state of Ohio returned by the express companies was averred in each bill, and was conceded by the demurrer to have been correct. The valuation thus returned and the amount of the assessment levied on such personal property by the state board is shown in the following table:

237] *Assessment for 1893.*

| | Value as returned, and as alleged in the bills. | Value assessed by state board. |
|---|---|---|
| Adams Express Co. | $53,080 74 | $460,038 08 |
| American Express Co. | 27,300 00 | 400,576 45 |
| United States Express Co. | 26,318 00 | 397,300 00 |
| *Assessment for 1894.* | | |
| Adams Express Co. | $41,102 60 | $543,569 00 |
| American Express Co. | 21,795 00 | 446,142 00 |
| United States Express Co. | 26,383 00 | 481,348 00 |
| *Assessment for 1895.* | | |
| Adams Express Co. | $42,065 00 | $533,065 80 |
| American Express Co. | 23,430 00 | 499,878 60 |
| United States Express Co. | 28,438 00 | 488,264 70 |

It thus appears that for the year 1893, property possessing an actual value of but $106,698.74 was assessed as being worth $1,257,909.53; in 1894 property valued at $89,280.60 was assessed at $1,471,059.00; and for 1895, property worth but $93,933.00 was assessed at $1,520,734.10,—a total valuation during three years of property worth only $289,862.84 at $4,249,702.63.

In addition to this enormous taxation, the real estate and the gross receipts of the companies have also been taxed for all state, county, and municipal purposes. It cannot, I submit, be asserted with reason that the nearly four millions of excess on the assessment of the tangible property laid by the state board resulted from assessing only the actual intrinsic value of such property, since to so contend would be not only beyond all reason, but would also be destructive of the admission by the demurrer that the companies possessed no other personal property within the state of Ohio but that returned by them, and that its actual and intrinsic value was correctly set forth. The assessment, therefore, must necessarily have taken into consideration some other property, or some element of value other than the real intrinsic worth of the property assessed.

238] *The fact of the vast excess of the valuation over and above the admitted value of the property is not, however, the only mode by which it is conclusively demonstrated that the assessment resulted from the consideration and estimate by the state board of sources of value extrinsic to the property assessed. One of the assessments in controversy was made under the Ohio law of April 27, 1893, and the others under the law of May 10, 1894, and although there is some difference between the two statutes, they both, as I have already said, substantially require express companies to make return of their real and personal property within the state, the value thereof, the number of shares of their capital stock, their market value, and a statement of the gross receipts for business done within the state of Ohio during the taxing year from whatever source derived. Considering the obligation thus imposed to report the total value of the stock of the companies and all their gross earnings, as also the total routes over which their agents traveled, etc., and putting these things in connection with the extraordinary amount by which the valuation exceeds the actual value of the property assessed, it leaves no reasonable doubt that the sources of reported value, which were entirely outside of the territory and beyond the jurisdiction of the state of Ohio, were by some process of calculation added to the intrinsic value of the property within the state, thereby assessing, not only the property within the state, but a proportion also of all the property situated without its territorial boundaries.

The fact that it was by this method that the sum of the personal property liable for taxation was fixed by the board results clearly and unmistakably from the opinion of the supreme court of the state of Ohio in *State, Poe, v. Jones*, 51 Ohio St. 492, in which case the court sustained the validity of the taxes here questioned. The supreme court of Ohio therein declared that the state board, whose duty it was to assess express companies, was "not *required*† to fix the value of such property upon the principle that the value of the entire property of the company shall be deemed the same as the value of *its entire capital stock, [239 thus making the respective values equivalents of each other. But, taking the market value of the entire capital stock as a *datum*, the board is to be only guided thereby in ascertaining the true value in money of the company's property *in this state*. The statute does not bind the board to find the value of the entire property of the company equal to that of the entire capital stock." Although the requirement in so many words, to assess property outside the state, is thus said not to be found in the statute, yet that it in substance so provides is acknowledged, for, adds the Ohio court, "the property of a corporation may be regarded, in the aggregate, *as a unit, an entirety, as a plant designed for a specific object; and its value may be estimated, not in parts, but taken as a whole.* If the market value—perhaps the closest approximation to the true value in money—of the corporate property as a whole were inquired into, the market value of the capital stock would become a controlling factor in fixing the value of the property. . . . The market value of the capital stock, it is urged, has no necessary relation to the value of the tangible property of the corporation. But such is the well-understood relation between the two, that not only is the value of the capital stock an essential factor in fixing the market value of the corporate plant, but the corporate capital or property has a reflex action on the value of the capital stock. . . . If, by reason of the goodwill of the concern, or the skill, experience, and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, *considered as an entire plant*, acquires a

†The italics here and elsewhere in this quotation are mine.



Digitized by Google

greater market value than it otherwise would have had, *it cannot properly be said not to be its true value in money* within the meaning of the Constitution, because goodwill and other elements indirectly entered into its value. . . . We discover no satisfactory reason why the same rule should not apply to the valuation of corporate property—why the selling value of the capital stock, as affected by the goodwill of the business, should be excluded from the consideration of the board of appraisers and 240] assessors under the Nicholslaw,* charged with the valuation of corporate property in this state, especially as the capital stock when paid up practically represents, at least, an equal value of the corporate property."

Now, this language is susceptible only of one meaning, that is, that in assessing the actual intrinsic value of tangible property of express companies in the state of Ohio it was the duty of the assessing board to add to such value a proportionate estimate of the capital stock, so as thereby to assess, not only the tangible property within the state, but also along with such property a part of the entire capital stock of the corporation, without reference to its domicil, and equally without reference to the situation of the property and assets owned by the company from which alone its capital stock derives value. In other words, although actual property situated in states other than Ohio may not be assessed in that state, yet that it may take all the value of the property in other states and add such portion thereof as it sees fit, to the assessment in Ohio, and that this process of taxation of property in other states in violation of the Constitution becomes legal provided only it is called taxation of property within the state.

I submit that great principles of government rest upon solid foundations of truth and justice, and are not to be set at naught and evaded by the mere confusion of words. In considering a question of taxation in *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688 [39: 311, 5 Inters. Com. Rep. 1], to which case I shall hereafter refer, this court said (p. 698 [316]): "The substance and not the shadow determines the validity of the exercise of the power." It seems to me that to maintain the tax levied by the state of Ohio this ruling must be reversed, and the doctrine be announced that the shadow is of more consequence than the substance. Such result would appear to inevitably flow from the holding referred to, now affirmed by the court. Nothing, I submit, can be plainer than the fact that the value of the capital stock of a corporation represents all its property, franchises, goodwill,—indeed, everything owned by it wherever situated. I reiterate, therefore, that the rule which recognizes that for the purpose of assessing tangible property in one state you may take its full 241] worth and then add to the value* of such property a proportion of the total capital stock, is a rule whereby it is announced that the sum of all the property, or an arbitrary part thereof, situated in other states, may be joined to the valuation of property in one state for the purpose of increasing the taxation within that state. What difference can there be between an actual assessment by Ohio of property situated in New York, Pennsylvania, Massachusetts, or in any of the other states of the Union, and the taking by Ohio of an aliquot part of the value of all the property situated in such other states and adding it, for the purpose of assessment, to the value of property in Ohio? The recognition of this method breaks down both of the well-settled and elementary rules to which I have in the outset adverted.

*First, the rule which forbids one state to extend its power of taxation beyond its jurisdiction to property in another state.* If the express companies are domiciled in New York, and have millions of property there situated and subject to taxation, all of which give value to their capital stock and hence enter into the sum of its worth, how can it be that to tax a proportion of the value of all that property is not taxing the property itself? This proportion of the capital stock added to the inherent value of the property in the state of Ohio is, therefore, an actual taxation by the state of Ohio of property situated in the state of New York.

It seems to me that not only the illegality but the injustice of this taxation by the state of Ohio on these express companies which is now upheld, is clear. Let me suppose that the bonds, stocks, other investments and elements, which, representing the capital of the companies and therefore producing the resultant value of such capital stock, are situated in the states of New York, Pennsylvania, and Massachusetts, These items thus making up the value of the capital stock being so situated in such states are, of course, entirely and wholly at their full value assessable in those states. The attribution of an aliquot share of the value of the capital stock to the state of Ohio, and the consequent right of that state to tax such value, in no way deprives the states of New York, Pennsylvania, and Massachusetts of their right to assess* the property within [242 their borders for its full value. But as attributing to the state of Ohio a proportion of such property gives that state the right to tax the proportion allotted, it follows by an inevitable deduction that the recognition of the right here claimed practically subjects the property in the states of New York, Pennsylvania, and Massachusetts to double taxation, unless those states voluntarily forego the inherent power of taxation vested in them to levy a tax upon all the property within their respective jurisdictions. Certainly the states of New York, Massachusetts, and Pennsylvania would, if they were independent sovereignties, removed from the jurisdiction of the Constitution of the United States, be driven to protect, by retaliatory legislation, their citizens, as was the case between the states prior to the adoption of the Constitution. But having entered into the Union, these states are bereft of all such relief, and must thus look for the protection of their citizens to the remedies afforded by the Constitution itself. The rule now announced allows Ohio to exercise an authority in violation of the Constitution, and thereby strips not only the citizens of the other states but those states themselves of all redress by depriving them of the safeguards which it was the avowed purpose of the Constitution to secure.

*Second, as to the interstate commerce clause.*



Digitized by Google

It is clear that the recognition of a right to take an aliquot proportion of the value of property in one state and add it to the intrinsic value of property in another state and there assess it, is in substance an absolute denial and overthrow of all the great principles announced from the beginning, and enforced by the many decisions of this court, on the subject of interstate commerce. This results from the fact that the necessary consequence of the ruling in this case is this, that a corporation—and there is no distinction, in principle in the particular here considered, between a corporation and an individual—cannot go from one state into another state of the Union for the purpose of there engaging in interstate commerce business without subjecting itself to the certainty of having a proportion of all its property situated in the other states added to 243] the sum of property, *however small, which it may carry into the state to which it goes, for the purposes of taxation therein. Under this system, not only is an appalling penalty imposed for going from one state into another state, but the carrying on of interstate commerce itself becomes hampered and loaded with a burden threatening its absolute destruction.

The contradiction involved in the proposition is well illustrated by the legislation and decisions of the state of Ohio. Thus, as I have said, in addition to the tax imposed on express companies, which is here considered, the law of the state of Ohio, besides assessing their real estate, also imposes a tax on the gross receipts of such companies for business done within the state. In order to save the tax here in question, the law by which this last tax is imposed is careful to provide that nothing in the imposition of the tax therein provided, that is, the tax on gross receipts, shall be construed as impairing the right to the tax on tangible property already provided for (the tax here in question). Now, in passing upon the validity of this tax on gross receipts, the supreme court of Ohio treats it as not a double tax, because the previous tax is considered as one on tangible property. *Adams Exp. Co.* v. *State* (Ohio) 44 N. E. 506. We have, therefore, both the legislature and the court of last resort of the state of Ohio upholding the enormous valuation put upon the personal property for the purposes of the tax now before us, on the theory that such valuation includes an aliquot part of the capital stock and necessarily, therefore, also an equal portion of all the property and earnings of the company, both in and out of the state, and yet we have the same legislature and the same tribunal upholding the tax on gross receipts on the ground that the tax first provided is purely a tax upon tangible property. Thus the departure from the pathway of principle is marked in this instance, as it is always marked, by confusion and injustice.

The wound which the ruling announced, if I correctly apprehend it, inflicts on the Constitution, is equally as severe upon the unquestioned rights of the states as it is upon the lawful authority of the United States, because 244] whilst submitting *the states and their citizens to injustice and wrong committed by another state, it at the same time greatly weakens or destroys the efficacy of the interstate commerce clause of the Constitution.

But the contention is that however sound, as an original question, may be the reasoning upon which the tax is assailed, its validity is not now open to question, because the theory by which the state of Ohio added the value of property outside of the state to the intrinsic amount of property actually within the state for the purposes of taxation is asserted to be concluded by many adjudications of this court. The cases relied on to establish this proposition are cited in the opinion of the court. I submit that the statement made by this court in *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339 [35: 1035, 3 Inters. Com. Rep. 810], is a sufficient answer to this contention as regards all the cases relied on decided prior to that case. *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339 [35: 1035, 3 Inters. Com. Rep. 810], involved the question of the validity of a law of the state of Missouri imposing a tax upon the gross receipts of an express company in addition to the ordinary tax upon its tangible property. The court, finding the tax to be only on the business of the company within the state, held it not to be a tax on interstate commerce, and therefore valid. The court, through Mr. Justice Lamar, in speaking of the right of a state to classify express companies for the purpose of taxation, resulting from the fact that such companies were normally only owners of a small amount of tangible property in one state, said (p. 354 [1040]):

"On the other hand, express companies, such as are defined by this act, have no tangible property, of any consequence, subject to taxation under the general laws. There is therefore no way by which they can be taxed at all unless by a tax upon their receipts for business transacted. This distinction clearly places express companies defined by this act in a separate class from companies owning their own means of transportation."

The argument here advanced in favor of the tax, therefore, simply is that what this court said could not be done in a decision rendered in January, 1893, had theretofore been settled to the contrary by a line of adjudications. But the answer to *the contention in favor of [245 the tax does not rest alone upon this view. All the cases relied upon and referred to in argument were considered and interpreted in *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688 [39: 311, 5 Inters. Com. Rep. 1]. It becomes unnecessary, therefore, to review the prior cases in detail and analyze their reasoning, since this duty was effectually performed by this court in the opinion announced in the *Postal Telegraph Case*. The significance of the ruling in that case and the controlling nature of the principles which the opinion there rendered inculcated can better be understood by considering the controversy which that case determined, and the aspect in which it was necessarily presented to this court for adjudication. The case involved the validity of a tax imposed by the state of Mississippi on a telegraph company. The tax in the mere form of its imposition was undoubtedly on the occupation and business of the company, and therefore was an unlawful burden on interstate commerce, as the company was en-



Digitized by Google

gaged in such commerce. The controversy came to this court on error from the supreme court of the state of Mississippi. The attention of that court, in determining the issue presented to it, was called to all the previous decisions of this court. Considering these previous adjudications, the Mississippi court said that there was undoubtedly language in opinions of this court which seemed to support the validity of the tax there questioned, and there was also undoubtedly language in other lines of adjudication which seemed clearly to render the tax void under the Constitution of the United States. In view of the apparent conflict in the cases decided by this court, the Mississippi court, in its opinion, marshaled the authorities upon both sides, and expressed its hesitancy and diffidence in reaching a conclusion. The *Postal Telegraph Case*, therefore, pointedly called the attention of this court to all the previous cases and accentuated the arguments on both sides of the issue presented, and rendered it absolutely necessary for this court to construe and interpret all the previous adjudications. In this condition of things, in deciding the case and holding the tax valid, although in form a tax upon interstate commerce, this court said (p. 695 [315]):

246] "'It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment."

And again (p. 696 [315]):

"Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439, 445 [38: 1041, 4 Inters. Com. Rep. 677]."

Referring to the opinion of the supreme court of Mississippi, which directly involved all the issues presented by this case, the court said (p. 697 [316]):

"'And in the case at bar the supreme[247 court, in its examination of the liability of plaintiff in error for the taxes in question, said: 'It will be thus seen at once that this is a tax imposed upon a telegraph company, in lieu of all others, as a privilege tax, and its amount is graduated according to the amount and value of the property measured by miles. It is to be noticed that it is in lieu of all other taxes, state, county, and municipal. The reasonableness of the imposition appears in the record, as shown by the second count of the declaration and its exhibits, whereby the appellant seems to be burdened in this way with a tax much less than that which would be produced if its property had been subjected to a single ad valorem tax.' This exposition of the statute brings it within the rule where ad valorem taxes are compounded or commuted for a just equivalent, determined by reference to the amount and value of the property. Being thus brought within the rule, the tax becomes substantially a mere tax on property, and not one imposed on the privilege of doing interstate business. The substance, and not the shadow, determines the validity of the exercise of the power."

And summing the whole up, the court concluded (p. 700 [317]):

"We are of opinion that it was within the power of the state to levy a charge upon this company in the form of a franchise tax, but arrived at with reference to the value of its property within the state and in lieu of all other taxes, and that the exercise of that power by this statute, as expounded by the highest judicial tribunal of the state in the language we have quoted, did not amount to a regulation of interstate commerce or put an unconstitutional restraint thereon."

This construction of the previous cases decided by this court elucidates and makes plain the fact that they proceeded upon and were intended to enforce the rule that the validity of a state tax would be determined by the substantial results of the burden imposed, and not by the mere form which it assumed, and although the form of the imposition might seem to bring the tax within the reach of the inhibition against levying a charge upon property beyond the jurisdiction of the state, or within the prohibitions of the Constitution of the United States "forbidding the laying of burdens[248 on interstate commerce, this court would not interfere therewith provided the exaction in substance amounted to no more than the sum of the taxation which the state might lawfully impose upon the property actually within its jurisdiction, and provided that in reality the burden laid by the state was not an interference with interstate commerce. This explanation and this rule was the answer given to the question directly presented as to the significance and interpretation of the previous decisions now cited as authority for the proposition that it is within the power of a state not only to



Digitized by Google

tax at will property beyond its jurisdiction, but also to substantially destroy interstate commerce by heaping direct and onerous burdens thereon. Such explanation and ruling were also reiterated in the recent decision in *Western U. Teleg. Co.* v. *Taggart*, 163 U. S. 1 [41 L. ed. 49], where, at page 18 [55], it is clearly intimated that a taxing law could not be upheld which in its necessary operation was shown to be oppressive and unconstitutional.

Testing the tax in controversy by the rule laid down in the *Postal Telegraph Case*, it becomes in reason impossible to conclude otherwise than that it is both in form and substance taxation by the state of Ohio of property beyond its jurisdiction, and that it also is an imposition by that state of a burden on interstate commerce. It cannot with fairness be argued that the amount of the tax is only such sum as would have resulted from a levy upon the property actually in the state, when the record admits that the aggregate value of such property for the taxing years of 1893, 1894, and 1895 amounted only to two hundred and odd thousand dollars, while the assessment exceeds this amount by nearly four millions of dollars. It cannot be said that this vast excess does not embrace property situated outside of Ohio, when both the text of the statute of that state and such text as expounded by the supreme court of the state clearly show that the sum of the excess is arrived at by adding to the property in the state the value of property situated outside thereof. Nor can it be contended that the tax here involved is not a tax on interstate commerce, in view of the fact that from the **249** ]nature of the criteria of value adopted *an aliquot part of the avails and receipts of the company of every kind is added to the taxing value in the state of Ohio, although that state had also imposed a tax upon the gross receipts from business of a purely state nature.

But, dismissing absolutely from consideration the authoritative construction of all the prior decisions of this court, announced in *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688 [39: 311, 5 Inters. Com. Rep. 1], and conceding for the sake of argument that the previous adjudications now relied on are unexplained by that case, and that they substantially hold that there is a so-called unit rule properly applicable to the assessment for taxation of the continuous lines of telegraph and railroad companies, such concession does not in reason admit the validity of the method adopted by the state of Ohio for assessing the tangible personal property of express companies. Before proceeding to discuss this proposition, however, I call attention to the fact that I intentionally refrain from placing a sleeping-car company in the same category with telegraph and railroad companies, because the decision in the case of *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 [35: 613, 3 Inters. Com. Rep. 595], was not founded upon the theory, nor did it purport to assert, that the property or plant of a sleeping-car company was a unit, and that of necessity a part of such property may be measured by a rule applicable to continuous lines of road. In that decision the court merely emphasized the holding that the tax was one laid upon one hundred cars of the company, possessing an actual situs in Pennsylvania. In the statement of the case (p. 20 [614]) the decision of the supreme court of Pennsylvania was quoted verbatim, in which it was declared that the tax on the capital stock of the Pullman Company was in reality but a tax on its property; that the coaches of the company were such property, and that the fact that the coaches might also be operated in other states would simply reduce the value of the property in Pennsylvania justly subject to taxation there. This court practically adopted the views so expressed by the state court. When, however, it was said (p. 26 [617]) that the method of assessment, to wit, taking a proportion of the capital stock ascertained on the mileage basis, as the value of one hundred sleeping cars *was a just and equitable method, [**250** such statement was made with reference to the facts held to exist in the case before the court. What were those facts? The taxes demanded covered a period of eleven years, and excluding interest from the time when payable and the attorney general's commission for collecting, aggregated but $16,321.89. *Pullman's Palace Car Co.* v. *Com.* 107 Pa. 158. Surely, this court might well say that a rule of taxation which operated to assess on one hundred sleeping cars a tax of less than $1,500 per annum was, in the absence of any showing to the contrary, just and equitable to the company. No such showing was made. The objection advanced by counsel to the method of taxation was not that the results produced were inequitable, but that (theoretically, not practically) the method adopted was improper. Indeed, the facts of that case caused the ruling there made to be but an example of the principle subsequently explicitly announced in *Postal Telegraph Cable Co.* v. *Adams*, *ubi supra*.

It is, I submit, undeniable that if there be such a unit rule applicable to the continuous lines of telegraph and railroad companies, its existence pushes the power of state taxation, as to these particular kinds of property, at least to the confines of the Constitution, and therefore if under the rule of *stare decisis* the cases which announce it should be followed, they should not be extended. The mere ownership, however, by an express company, of personal property within a state presents no case for the application of a unit rule. What unity can there be between the horses and wagons of an express company in Ohio with those belonging to the same company situated in the state of New York? The conception of the unity of railroad and telegraph lines is necessarily predicated upon the physical connection of such property. To apply a rule based upon this condition to the isolated ownership, by an express company, of movable property in many states, in reality declares that a mere metaphysical or intellectual relation between property situated in one state and property found in another creates as between such property a close relation for the purposes of taxation. But this theory by an enormous stride at once advances the unit rule beyond every *constitutional barrier, and causes such [**251** rule or theory to embrace property between which there is not and cannot in the nature of things be any real union or relation whatever.



Digitized by Google

If mere intellectual union between property be thus adopted, as a rule of taxation, then all the restrictions upon the power of a state to tax property arising from the fact that the situs of such property is beyond its jurisdiction, as well as of the restraints arising from the interstate commerce clause of the Constitution, are destroyed. Certainly, the mere fact that the same owner has movable property in one state and movable property in another state, does not from the fact of the one ownership create a link of continuity between the property for the purpose of taxation. The fact that if the movable property situated in one state earns profits, and the movable property in the other likewise so earns, and that these profits go to the common owner, does not create such unity for the purpose of taxation so as to make the property assessable in each state. This court has effectually determined that where a corporation is engaged in interstate business, no one of the states has the power to tax the receipts of such company derived from interstate commerce business, and that the power of the states as to taxation on earnings is limited to those derived from the business done within the state. This line of concluded authority is illustrated and referred to in the recent opinion in *Osborne* v. *Florida*, decided at this term (165 U. S. —, [*ante*, 232]). It is therefore manifest that where property owned in common, belonging to the same person and situated in different states, contributes to earnings and the proceeds of these earnings go into the treasury of the owner, and lie side by side therein, that the fact that there is a common owner, that there is a common business, and that all the results of the business are in immediate contact in the common treasury, gives no power to the state to tax the whole, but only to levy on that which comes from the state business alone. How, I submit, can it now be announced that there is an imaginary unity between personal property widely separated because that property has a common owner, without, at the same time, re-
252 versing the settled adjudications of this court on the subject of the power of a state to tax the earnings from interstate commerce?

But a few illustrations will serve at once to make clear what I submit is the impossibility in reason of declaring that as a legal fact or fiction property is unified, when between such property there is no unity or physical relation whatever.

Take, for example, the case of *Brennan* v. *Titusville*, 153 U. S. 289 [38: 719, 4 Inters. Com. Rep. 658]. Of what value is the ruling in that case, that a manufacturer cannot be compelled to pay a license for the doing, through his agent, of the business of interstate commerce by selling his goods in a state into which such agent enters for that purpose, if the mere fact that the agent takes into the state $1,000 worth of goods creates a supposed intellectual union between those goods and the vast stock and capital of the manufacturer located in another state, so as to enable the attribution of an aliquot part of the wealth of the manufacturer to the goods in the custody of the agent for the purpose of taxation? Would it not be as true in such case to say that the capital and wealth of the manufacturer facilitates and increases the capacity of the agent to transact business and adds value to the property the agent has for sale, as to say that the horses and wagons of an express company in New York and its capital there facilitate and aid the agents of such company and add value to the tangible property employed by such agents in transacting business in Ohio? It certainly cannot, I submit, with reason be said that there is not the same unity between the operations of a manufacturer who makes his goods in one state and sells them in another as there is between the operations of an express company. The sale of the manufactured goods is as essentially necessary to the profits of the manufacturer as is the manufacture of the goods themselves. No profit can result from the one without the other, and to attribute a supposed unity to the business of an express company, and to deny such unity to that of a manufacturer, is, as I understand it, to declare that there is a difference when there is no possible difference.

If the rule contended for by the state of Ohio be true, why would it not apply to a corporation, partnership, or individual engaged [253 in the dry goods business or any other business having branches in various states? Would it not be as proper to say of such agencies, as it is of the agencies of express companies, that there is an intellectual unity of earnings between the main establishment and all such agencies, and therefore a right to assess goods found in an agency with relation to the capital and wealth of the original house and all the other branches situated in other states? Take the case of a merchant carrying on a general commercial business in one state and having connections of confidence and credit with another merchant of great capital in another state. If this rule be true, can it not also be said that such merchant derives advantages in his business from the sum of the capital in other states which may be availed of to extend his credit and his capacity to do business, and that therefore his tangible property must be valued accordingly? Suppose bankers in Boston, Philadelphia, and New York of great wealth, owning stocks and bonds of various kinds, send representatives to New Orleans with a limited sum of money there to commence business. These representatives rent offices and buy office furniture. Is it not absolutely certain that the business of those individuals would be largely out of proportion to the actual capital possessed by them, because of the fact that reflexly and indirectly their business and credit are supported by the home offices? In this situation, the assessor comes for their tax return. He finds noted thereon only a limited sum of money and the value of the office furniture. What is to prevent that official under the rule of supposed metaphysical or intellectual unity between property from saying: "It is true you have but a small tangible capital, and your office furniture is only worth $250, but the value of property is in its use, and as you have various elements of wealth situated in the cities named, I will assess your property because of its use at $1,000,000?" Such conduct would be exactly in accord with the power of taxation which it is here claimed the state of Ohio



Digitized by Google

possesses, and which, as I understand it, the court now upholds. To give the illustrations, I submit, is to point to the confusion, injustice, and impossibility of such a rule.

254] *Nor, in conclusion, I submit is there any force in the argument advanced at bar that we have entered a new era requiring new and progressive adjudications, and that unless this court admits the power of the state of Ohio to tax to be as claimed, it will enable aggregations of capital to escape just taxation by the several states. This assertion, at best, but suggests that unless constitutional safeguards be overthrown, harm will come and wrong will be done. In its last analysis the claim is but a protestation that our institutions are a failure, that time has proved that the Constitution should not have been adopted, and that this court should now recognize that fact and shape its adjudications accordingly. The claim is as unsound as the fictitious assertion of expediency by which it is sought to be supported. If it be true that by the present enforcement of the Constitution and laws property will escape taxation, the remedy must come, not from violating the Constitution, but from upholding it.

Within the power lodged in Congress to regulate commerce between the states ample authority exists to enact the necessary legislation to prevent the just relations between the states, and the regulation of such commerce from becoming the pretext for avoiding the proper burdens of either state or national taxation. As the necessity arises such apt powers will doubtless be brought into operation. The recognition of the right of taxation exerted by the state of Ohio in these cases must if followed in other states not only reproduce the illegality and injustice here shown, but greatly increase it, as every new imposition will be a new levy on property already taxed, and result in an additional burden on interstate commence. If the principles by which such results are brought about be recognized as lawful under the Constitution, not only will Congress be deprived of all power to protect the citizens of the respective states and the states themselves from these conditions, but it will also be rendered impotent to devise under the power to regulate commerce any just and fair regulation to prevent the interstate commerce clause from being made a shield for avoiding taxation, and to cause property engaged in such

255] commerce to be subjected to just *and uniform taxation on the part of the several states. Thus, by holding that the states possess the power claimed in this case to exist, not only will a wrong be committed, but that wrong will be permanently and without remedy engrafted into our constitutional system.

I am authorized to say that Mr. Justice **Field**, Mr. Justice **Harlan**, and Mr. Justice **Brown** concur in this dissent.

AMERICAN EXPRESS COMPANY, *Plf. in Err.*,
*v.*
STATE OF INDIANA.

ADAMS EXPRESS COMPANY, *Plf. in Err.*,
*v.*
STATE OF INDIANA.

UNITED STATES EXPRESS COMPANY, *Plf. in Err.*,
*v.*
STATE OF INDIANA.

*Taxes on express companies.*

(See S. C. Reporter's ed. 255, 256.)

The Indiana law under which the taxes were assessed in this case against express companies is constitutional. *Adams Exp. Co. v. Ohio State Auditor*, *ante*, p. 683, followed.

[Nos. 469-471.]

*Argued December 10, 11, 1896. Decided February 1, 1897.*

IN ERROR to the Circuit Court of Marion County, Indiana, to review a judgment of that court against the defendant in each of the above cases in favor of the State of Indiana, plaintiff, entered by direction and judgment of the State Supreme Court, on reversal of the judgment of the said lower court; the said judgments now here for review being for the recovery of unpaid taxes for the years 1893 and 1894. *Affirmed.*

See same case below, 42 N. E. 483.

*Messrs.* **Lawrence Maxwell, Jr.**, **James C. Carter**, *Clarence A. Seward*, *Frank H. Platt*, *Albert Baker*, and *Edward Daniels* for plaintiffs in error.

*Messrs.* **William A. Ketcham**, Attorney General of Indiana, **Judson Harmon**, *Alonzo Greene Smith*, *Leon O. Bailey*, and *Merrill Moores* for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

*These were three actions instituted by [256 the state of Indiana in the circuit court of Marion county in that state against the American Express Company, the Adams Express Company, and the United States Express Company, to recover unpaid taxes for the years 1893 and 1894.

The defendants filed answers, setting up, among other defenses, that the act under which the taxes were assessed was invalid because in

NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

*As to power of states to tax*, see note to Dobbins v. Erie County Comrs. 10: 1022.

*As to exemption from taxation; whether a contract or not; not implied*,—see note to Tucker v. Ferguson, 22: 805.

*As to sale of lands for taxes; strict compliance with statute necessary*,—see note to Williams v. Peyton, 4: 518.

*As to when taxes illegally assessed can be recovered back*, see note to Erskine v. Van Arsdale, 21: 63.



Digitized by Google

contravention of the Constitution of the United States.

The causes were consolidated and tried by the circuit court, which made a special finding of facts and stated conclusions of law thereon in favor of the defendants, and entered judgment accordingly. The consolidated cause having been carried on appeal to the supreme court of the state, the judgment below was reversed, and the cause remanded, with instructions to restate the conclusions of law and to enter judgment against the defendant in each case as specifically directed. 42 N. E. 488. This was done, and from the judgments so entered writs of error were sued out from this court.

The legislation of the state of Indiana, the validity of which is attacked in these cases, so far corresponds with that of the state of Ohio that the questions presented upon this record are the same, in effect, as those considered in *Adams Exp. Co.* v. *Ohio State Auditor*, and other cases, just decided (165 U. S. 194 [*ante*, 683]), and require no re-examination.

For the reasons there given *the judgments are affirmed.*

Mr. Justice **White** dissenting:

Mr. Justice **Field**, Mr. Justice **Harlan**, Mr. Justice **Brown**, and myself dissent from the judgment of the court in these cases. As there is no substantial difference between the legal questions presented in the Ohio cases and those in the present cases, the reasons stated in the dissent announced in the former are relevant here, and are referred to as furnishing the reasons for this dissent.

---

257] L. I. ROSENCRANS, *Plf. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 257-264.)

*Jurisdiction of circuit court—statute—changing place of trial—sufficiency of indictment.*

1. The jurisdiction of the circuit court of the United States for the southern division of the district of Montana, in criminal cases, is coextensive with the district.
2. The force and effect of statutes clearly defining the jurisdiction of the courts should not be disturbed by a mere implication flowing from subsequent legislation.
3. A mere transfer of the place of trial from one division of a district of the United States to another is not ground of error when not challenged at the time or objected to on the trial.
4. A draft is sufficiently described in an indictment for destroying a registered letter containing it, by naming its amount, drawee, number, and place of payment, adding that the grand jurors are unable to give a more particular description.

[No. 552.]

*Submitted January 11, 1897. Decided February 1, 1897.*

IN ERROR to the Circuit Court of the United States for the District of Montana to review a judgment convicting L. I. Rosencrans of the crime of destroying a registered letter in his possession as a railway postal clerk. *Affirmed.*

Statement by Mr. Justice **Brewer**:

The act (25 Stat. at L. 682) admitting Montana into the Union provided that the state should constitute one judicial district, and that the sessions of the circuit and district courts of the United States should be held at Helena, in Lewis and Clarke county, that being the capital of the state. On July 20, 1892, the following act was passed (27 Stat. at L. 252):

"That the territory embraced within the following counties in the district of Montana, to wit: Beaverhead county, Madison county, and the county of Silver Bow, shall hereafter constitute and be known as the southern division of the district of Montana, and regular terms of the circuit and district courts of the United States for said district may be held at Butte City, Montana, on the 1st Tuesday in February and the 1st Tuesday in September of each year; and the said courts so sitting at Butte shall have and exercise the same jurisdiction and authority in all civil actions, pleas, or proceedings, and in all prosecutions, infor-[258 mations, indictments, or other criminal or penal proceedings conferred by the general laws on the district and circuit courts of the United States; and where one or more defendants in any civil cause shall reside in said division, and one or more defendants to such cause shall reside out of said division, but in said district, then the plaintiff may institute his action either in the court having jurisdiction over the latter or in the said division. That this act shall not affect the jurisdiction, power, and authority of the court as to actions, prosecutions, and proceedings already begun and pending in said district, but the same will proceed as though this act had not been passed, except that the court shall have power, which it may exercise at discretion, to transfer to the court in said division such of said pending actions, prosecutions, and proceedings as might properly be begun therein under the provisions of this act."

On March 18, 1895, an indictment in five counts was presented in the circuit court, charging the defendant with violating U. S. Rev. Stat. § 5467, which reads:

"Any person employed in any department of the postal service who shall secrete, embezzle, or destroy any letter, packet, bag, or mail of letters intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail carrier, mail messenger, route agent, letter carrier, or other person employed in any department of the postal service, . . . and which shall contain any . . . draft, check, warrant, . . . or any other article of value, or writing representing the same, . . . shall be punishable by imprisonment at hard labor for not less than one year nor more than five years."

---

NOTE.—*For criminal jurisdiction of United States courts as to locality*, see note to United States v. Wiltberger, 5: 37.

*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1: 640.



Digitized by Google

The fourth count, upon which alone the defendant was found guilty, charged that on the 13th day of July, 1894, "in the state and district of Montana and within the jurisdiction of this court," the defendant, "a person employed in the postal service of the United States, to wit, a railway postal clerk, . . . and in the discharge of the duties of that position on the Great Northern Railway, between the station of 259]* Havre, in the county of Choteau, and the station of Kalispell, in the county of Flathead, in said state of Montana," did destroy a registered letter and the contents thereof, which letter had "come into his possession as such railway postal clerk, and which was intended to be and was then and there being conveyed by United States mail, and which said registered letter had been deposited in the mail at the United States postoffice at Sacramento," directed to "Mrs. Emilie Heistans Greitzer, Gasthaus etzel b. Einsedeln Ct. Schwizz, Schweizerland, which said registered letter contained a draft for 50 francs, D. O. Mills & Co., No. d. 08250, on Paris, France (a more particular description of which is to the grand jurors aforesaid unknown)."

The term of the circuit court for the district of Montana, at which the grand jury was impaneled and at which this indictment was presented, was held at the city of Butte, in the southern division of the district. Thereafter, the defendant having been arrested, on motion of the United States district attorney, the indictment was remitted for trial to the term of court to be held at Helena, in Lewis and Clarke county, in the other division of the district. No objections to this transfer were made by the defendant. Trial being had, the jury found the defendant guilty, as heretofore stated, under the fourth count. A motion in arrest, in which for the first time the question of jurisdiction was raised, having been made and overruled, the defendant was sentenced to imprisonment for the term of one year; whereupon this writ of error was sued out.

*Messrs.* **Thomas H. Carter** and **S. S. Burdett** for plaintiff in error.

*Mr.* **Holmes Conrad,** Solicitor General, for defendant in error.

MR. Justice **Brewer** delivered the opinion of the court:

Counsel for defendant state that the main question for determination is one of jurisdiction: 260] First, of the grand *jury in the southern division of the district of Montana to find the indictment; and, second, whether, such indictment having been found, the court had authority to remit it to the other division for trial.

It is insisted that the circuit court for the southern division had jurisdiction under the act of 1892 of only such offenses as were committed within the limits of the division; that therefore the grand jury had no authority to find an indictment for an offense such as this, apparently committed in the other division. The solution of this question depends upon the construction to be given to the act of 1892. By U. S. Rev. Stat. § 563, the district courts are given jurisdiction "of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts." By § 629, ¶ 20, the circuit courts have "concurrent jurisdiction with the district courts of crimes and offenses cognizable therein."

These statutes declare the general rule, that jurisdiction is coextensive with district. That being the general rule, no mere multiplication of places at which courts are to be held, or mere creation of divisions, nullifies it. Indeed, the place of trial has no necessary connection with the matter of territorial jurisdiction. By U. S. Rev. Stat. § 581, it is provided that "a special term of any district court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require." And by § 739, that "the trial of offenses punishable with death shall be had in the county where the offense was committed, where it can be done without great inconvenience." Jurisdiction in the trial courts being thus bounded by district, we find many acts, some increasing in a district the places of trial, and others in terms subdividing the district into divisions: The former have no effect on the matter of jurisdiction. Some of these latter acts specifically limit the jurisdiction in criminal actions of the courts held in a division to the territory within that division; as, for instance, in respect to Alabama (23 Stat. at L. 18), Louisiana (25 Stat. at L. 388), Michigan *(20 Stat. at L. [261 175), Ohio (20 Stat. at L. 101, 21 Stat. at L. 63), Tennessee (21 Stat. at L. 175), Texas (25 Stat. at L. 783, 786); while, on the other hand, some contain no such provision, as in the case of Minnesota (26 Stat. at L. 72; *Post* v. *United States*, 161 U. S. 583, 585 [40: 816, 817]), though this was changed by a subsequent act (28 Stat. at L. 102). *Post* v. *United States, supra.*

In the light of this legislation, with its diversity of provision, we are called upon to construe the act of 1892, creating the southern division of the district of Montana. The first part of the section simply creates the division and defines its limits. This is followed by the general declaration that the courts so sitting in Butte, the place at the southern division in which they are to be held, "shall have and exercise the same jurisdiction and authority in all civil actions, pleas, or proceedings, and in all prosecutions, informations, indictments, or other criminal or penal proceedings conferred by the general laws upon the circuit and district courts of the United States." If the section stopped here there would be no question. The mere creation of a division does not disturb the general jurisdiction over the district. And, in addition, the language just quoted makes an affirmative grant to the courts when sitting at Butte, of all the jurisdiction, civil and criminal, vested in the circuit and district courts; that is, a jurisdiction coextensive with the district. The latter part of the section causes all the doubt in respect to the matter. In that are found two provisions, one, that where one or more of the defendants in any civil cause reside in one division and one or more in another, the plaintiff may institute his action in either division. This of course has no bearing on the question of jurisdiction in criminal cases. The second, that the act should not affect the jurisdiction of



Digitized by Google

the court as to actions, prosecutions, and proceedings already begun; that they should proceed where they were commenced, with a proviso that the court might in its discretion transfer all such actions, etc., as might properly be begun in the new division to the court
262] in that division. *This language is broad enough to include criminal actions. Too much stress should not be placed on the word "properly." The creation of divisions and the multiplication of places of trial are for the convenience of litigants, bringing the trial nearer to them and their witnesses. There is a manifest propriety, even when no jurisdictional necessity, in conducting criminal prosecutions as near to the place of the offense as possible. The idea of the vicinage is familiar to criminal law. And all that Congress may have intended by this second provision was to make it clear that the court should have the power to transfer to this new division any pending proceeding which might with more convenience and therefore propriety be prosecuted at the place at which in the new division the sessions of the court were to be held. It must, however, be conceded that these provisions do carry some implication that a distribution has been made of territorial jurisdiction between the courts of the two divisions, and the question we have to determine is whether this implication is sufficient to create a distribution which the statute has not in terms made. It may be said, and with force, that there is no need of the last half of the section; that it is superfluous, unless upon the assumption that there has been a distribution of jurisdiction, civil or criminal or both, coextensive with the territories of the two divisions, and yet can it be adjudged that Congress has created such distribution when it has not in terms directed it, simply because some expressions in the statute imply its existence? The question is a difficult one, and yet we think the true rule of construction is this: When there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. In other words, where Congress has expressly legislated in respect to a given matter that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation. Especially is this rule to control when it appears that Congress in some cases has made express
263] provision for effecting a *change. This does not conflict with the doctrine stated in *Re Bonner*, 151 U. S. 242, 256 [38: 149, 151], that the jurisdiction of a court in criminal cases cannot "be enlarged by any mere inferences from the law or doubtful construction of its terms." It is rather the converse of that, for the effort is to destroy a jurisdiction otherwise clearly existing, by mere inferences and doubtful construction.

This may be a case of mere omission, but it is an omission which the courts cannot supply. We cannot assume that because Congress in creating some divisions distributed jurisdiction it meant, in creating other divisions, to also so distribute it, and when we find that in some cases of division it distributed the jurisdiction and in other cases not, we are not justified in assuming that in this case it intended a distribution which it did not in terms make simply because of the use of the language which somewhat implies that a distribution had already been made.

So far as the mere transfer of the place of trial from one division to another, it would seem, in the absence of express prohibition, to be within the competency of the court having full jurisdiction over the entire district, and certainly presents no ground of error when it is not at the time challenged, and the trial proceeds without objection.

These considerations also show that there is no force in the objection that the indictment does not specify the place at which the grand jury that found it was sitting, and also as to the certainty of the venue.

The only remaining question is in reference to the description of the draft which was in the letter destroyed. It is insisted that this is not sufficient. This objection cannot be sustained. The gravamen of the charge is the destruction of the letter. It is an offense against the postal laws of the United States, and while the letter must contain a draft, check, or some other thing of value or supposed value in order to bring the case within the compass of this statute, yet it is unnecessary to describe this draft, check, etc., with the same precision as if forgery or some other crime directed against the instrument itself was charged. A full description *of the check
264 or draft being unessential, it is clearly sufficient when the grand jury say that the instrument having been destroyed they are unable to give any further description than such as is found in this indictment, for that, as will be seen, contains some matters of description and identification. There being no other questions presented in the record, and in these appearing no error, *the judgment of the circuit court is affirmed.*

Mr. Justice **Gray** and Mr. Justice **White** dissent.

---

THE VALENCIA, Her Tackle, etc., William G. Boulton *et al.*, Claimants, *Appts.*,
*v.*
WILLIAM H. ZIEGLER *et al.*

(See S. C. ("The Valencia") Reporter's ed. 264-273.)

*Maritime lien for coal.*

A maritime lien on a vessel is not created by supplying coal to it on the order of a charterer, without any order or procurement of the master or his expressed consent, where the charterer was required by the charter to provide and pay for

NOTE.—*As to lien for repairs and necessaries for vessels domestic and foreign; and for supplies, salvage, and freight; proceedings in rem for,*—see notes to Blaine v. The Charles Carter, 2: 636; The Palmyra, 6: 531, and The General Smith, 4: 609.

*As to lien of the contract of affreightment on the vessel, and for damages to goods,* see note to The Freeman v. Buckingham, 15: 341.



Digitized by Google

the coal, and had an office at the port of supply so that the party providing it could easily have ascertained the ownership of the vessel and the relation of the charterer to it, although he acted in fact on a belief that the vessel was responsible.

[No. 51.]

*Submitted May 7, 1896. Decided February 1, 1897.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit certifying a question in a suit brought by William H. Ziegler *et al.* against the steamship Valencia *et al.* to enforce a maritime lien on said steamship for supplies of coal furnished to her. *Question answered.*

The facts are stated in the opinion.

*Messrs.* **F. R. Coudert** and **Joseph Kling**, for appellants:

In the absence of an agreement or understanding that the credit of the vessel was pledged for the supplies, the burden of proof was on the libellants to prove that the supplies were not furnished on the personal credit of the charterer.

Where supplies are ordered by the master in a foreign port, the proof that the supplies were necessary is sufficient to establish a presumption that the credit of the vessel was pledged to secure such supplies.

*The Grapeshot* v. *Wallerstein* (*"The Grapeshot"*) 76 U. S. 9 Wall. 129 (19: 651).

But even this presumption is rebutted where it is proved that the master had funds in his hands to pay for such supplies, and this was known to the materialmen, or that the materialmen acted in bad faith.

*Hazlehurst* v. *The Lulu* (*"The Lulu"*) 77 U. S. 10 Wall. 192 (19: 906).

The materialman is presumed, in dealing with the owner, to rely upon his personal credit. To obtain a lien on the vessel the materialman must show that there was an understanding that the goods were sold on the credit of the vessel, or that the owner was known to be insolvent.

*The St. Jago de Cuba*, 22 U. S. 9 Wheat. 409 (6: 122); *Thomas* v. *Osborn*, 60 U. S. 19 How. 22 (15: 534); *Stephenson* v. *The Francis*, 21 Fed. Rep. 715; *The Samuel Marshall*, 54 Fed. Rep. 396; *The Norman*, 28 Fed. Rep. 383; *The Now Then*, 55 Fed. Rep. 523; *The Suliote*, 23 Fed. Rep. 919; *The Pirate*, 32 Fed. Rep. 486; *The Glenmont*, 34 Fed. Rep. 402; *The Aeronaut*, 36 Fed. Rep. 497; *The Stroma*, 41 Fed. Rep. 599; *The Alvira*, 63 Fed. Rep. 144; *The Columbus*, 67 Fed. Rep. 556.

There are three cases in this court where a maritime lien has been sustained where supplies have been ordered by the charterer (*The Guy* v. *Tall* (*"The Guy"*) 76 U. S. 9 Wall. 758 (19: 710); *Pendergast* v. *The Kalorama* (*"The Kalorama"*) 77 U. S. 10 Wall. 204 (19: 941); *The Patapsco* v. *Boyce* (*"The Patapsco"*) 80 U. S 18 Wall. 329 (20: 696)), but an examination of these cases shows that they do not involve any disapproval of the general principle.

The supplies having been ordered by the charterers who were under obligation to supply coal, no agency can be inferred on the part of the charterers to pledge the credit of the vessel. If the libelant had personal knowledge of this fact, no maritime lien for such supplies could be sustained.

*Stephenson* v. *The Francis*, 21 Fed. Rep. 715; *The Stroma*, 41 Fed. Rep. 599; *Hazlehurst* v. *The Lulu* (*"The Lulu"*) 77 U. S. 10 Wall. 192 (19: 906).

No necessity or apparent necessity is shown for a lien.

*Pratt* v. *Reed*, 60 U. S. 19 How. 359, 361 (15: 660, 661); *Thomas* v. *Osborn*, 60 U. S. 19 How. 29 (15: 537).

*Messrs.* **Wm. W. Goodrich** and **John A. Deady**, for appellees:

Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship.

*The Patapsco* v. *Boyce* (*"The Patapsco"*) 80 U. S. 13 Wall. 329 (20: 696); *Hazlehurst* v. *The Lulu* (*"The Lulu"*) 77 U. S. 10 Wall. 192 (19: 906); *Pendergast* v. *The Kalorama* (*"The Kalorama"*) 77 U. S. 10 Wall. 504 (19: 941).

The said statute was not designed to apply to foreign vessels, and the courts have invariably construed the state statutes creating liens on vessels to apply only to domestic vessels.

*The Lyndhurst*, 43 Fed. Rep. 841; *The Chusan*, 2 Story, 455.

Mr. Justice **Harlan** delivered the opinion of the court:

This case is before us upon a question certified by the United States circuit court of [265 appeals for the second circuit under the act of March 3, 1891, chap. 517 (26 Stat. at L. 826).

The facts out of which the question arises are as follows: Upon orders given by the New York Steamship Company, a New Jersey corporation engaged in business at the city of New York, the libellants at different times, at that port, furnished and delivered coal on board of the steamship Valencia for its specific use. The vessel was registered at Wilmington, North Carolina, but was owned by citizens of New York. The coal was necessary to enable it to make a series of regular trips from New York to and from the ports of Maine. In some instances the orders for the coal were sent direct by mail; in others, through a broker, either by the general manager of the company or by the superintendent of the dock. The libellants began to supply the coal on the 30th day of April, 1890, and furnished, from time to time down to and including July 5th, six cargoes, bills for which were sent to the office of the steamship company in the city of New York, and were paid by it.

None of the coal was delivered by the order of the master or by his procurement or with his expressed consent.

The corporation operated the steamship under a charter requiring it "to provide any pay for all the coals," etc. The libellants were not aware of the existence of the charter at the time they furnished the coal, nor did they know where the ship hailed from, whether she was foreign or domestic, nor what was her credit. They were at the time without knowledge of the ownership of the vessel or of the relations between it and the New York Steamship Company, except that that company "appeared to be directing its operation." They



Digitized by Google

made no inquiry as to the solvency of the steamship company, or as to the ownership or nationality of the vessel, but, in the belief that the ship was responsible for supplies furnished, delivered the coal as above stated, charging the same on its books to "S. S. Valencia, and owners, New York," in some cases "city," in others "Pier 49, E. R., New York."

No fact proved in the case warranted the in-
266] ference that *either the master or the charterer agreed to pledge the credit of the vessel for the coal.

By N. Y. Laws 1862, chap. 482, it is provided: "§ 1. Whenever a debt amounting to $50 or upwards as to a seagoing or ocean-bound vessel . . shall be contracted by the master, owner, charterer, builder, or consignee of any ship or vessel, or the agent of either of them, within this state for either of the following purposes: 1st. On account of work done or materials or other articles furnished in this state for or towards the building, repairing, fitting, furnishing, or equipping such ship or vessel; 2d. For such provisions and stores furnished within this state as may be fit and proper for the use of such vessel at the time the same were furnished, . . . such debt shall be a lien upon such vessel, her tackle, apparel, and furniture," etc. No lien was filed under the statute of the state.

Libellants insisted that for other supplies of coal of the aggregate value of $1,608.75, furnished in the months of June, July, and August, they were entitled to a maritime lien on the ship. The district court having sustained their claim, an appeal was prosecuted to the circuit court of appeals.

The question certified to this court is whether, upon the above facts, the libellants obtained a maritime lien on the steamship for the supplies thus furnished and not paid for.

In *The Kate*, decided at the present term,—in which case the libellant claimed a maritime lien on a vessel for coal furnished upon the order of a charterer who was bound by the charter party to provide and pay for all coal required by the vessel,—this court said: "The principle would seem to be firmly established that when it is sought to create a lien upon a vessel for supplies furnished upon the order of the master, the libel will be dismissed if it satisfactorily appears that the libellant knew, or ought reasonably to be charged with knowledge, that there was no necessity for obtaining the supplies, or, if they were ordered on the credit of the vessel, that the master had, at the time, in his hands, funds which his duty required that he should apply in the purchase of
267] needed supplies. *Courts of admiralty will not recognize and enforce a lien upon a vessel when the transaction upon which the claim rests originated in the fraud of the master upon the owner, or in some breach of the master's duty to the owner, of which the libellant had knowledge, or in respect of which he closed his eyes, without inquiry as to the facts." Again: "If no lien exists under the maritime law when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully as against the owner, pledge the credit of the vessel for such supplies, much less is one recognized under that law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent the owner in the business of the vessel, but who, as the claimant knew, or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them." 164 U. S. 458, 469, 470 [*ante*, 512, 517, 518].

The libellants contend that although the coal was furnished on the order of the charterer, and not on that of the master, they have a maritime lien on the vessel to secure their claim, and cite in support of that view *The Grapeshot* v. *Wallerstein* (*"The Grapeshot"*) 76 U. S. 9 Wall. 129 [19: 651]; *Hazlehurst* v. *The Lulu* (*"The Lulu"*), 77 U. S. 10 Wall. 192, 197 [19: 906, 907]; *Pendergast* v. *The Kalorama* (*"The Kalorama"*), 77 U. S. 10 Wall. 204, 210, 213, 214 [19: 941, 942, 944]; and *Patapsco* v. *Boyce* (*The Patapsco"*), 80 U. S. 13 Wall. 329 [20: 696].

In *The Grapeshot* it was said, among other things, that "where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given to the ship, a presumption will arise, conclusive, in the absence of evidence to the contrary, of necessity for credit;" in *The Lulu*, that "experience shows that ships and vessels employed in commerce and navigation often need repairs and supplies in course of a voyage, when the owners of the same are absent, and at times and places when and where the master may be without funds, and may find it impracticable to communicate seasonably with the owners of the vessel upon the subject," and that "contracts for repairs and supplies under such circumstances, may be made by the *mas-
[268 ter to enable the vessel to proceed on her voyage, and if the repairs and supplies were necessary for that purpose, and were made and furnished to a foreign vessel or to a vessel of the United States in a port other than the port of the state where the vessel belongs, the prima facie presumption is that the repairs and supplies were made and furnished on the credit of the vessel, unless the contrary appears from the evidence in the case;" and in *The Kalorama*—in which case all the advances were made at the request of the master, in the absence of the owner, or by the owner in person when he was present, and with the understanding that they were made on the credit of the vessel—that "the necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship, unless it is shown that the master had funds or that the owner had sufficient credit, and that the repairers, furnishers, and lenders of the money knew those facts or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel."

These were cases of supplies furnished on the order of the master, and what was said by this court must, therefore, be taken in the light of the principle, that as the master of the ship



Digitized by Google

stands in the position of agent or representative of the owners, the latter "are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessaries furnished for her use." *The Aurora*, 14 U. S. 1 Wheat. 95, 101 [4: 45, 46], or, as expressed in *The St. Jago de Cuba*, 22 U. S. 9 Wheat. 409, 416 [6: 122, 124], the law maritime, in order that the ship may get on, "attaches the power of pledging or subjecting the vessel to materialmen, to the office of shipmaster, and considers the owner as vesting him with those powers by the mere act of constituting him shipmaster." Upon this ground, as was said in *The J. E. Rumbell*, 148 U. S. 1, 9 [37: 345, 346], maritime liens or privileges for necessary ad-
269] vances *made or supplies furnished in good faith to the master in a foreign port to keep a vessel fit for sea "are preferred to a prior mortgage, or to a forfeiture to the United States for a precedent violation of the navigation laws." The relations of the master to the vessel and its owners, as well as to shippers of cargo, are such that his power and duty of determining what part of the common adventure shall be sacrificed for the safety of the rest, and when and how the sacrifice shall be made, were held in *Ralli* v. *Troop*, 157 U. S. 386, 400, 401 [39: 742, 749], to appertain to him, "*magister navis*, as the person intrusted with the command and safety of the common adventure, and of all the interests comprised therein, for the benefit of all concerned, or to someone who, by the maritime law, acts under him or succeeds to his authority."

In the case of *The Patapsco* it appeared that the supplies were furnished to the vessel in a foreign port. This court, recognizing the case to be an embarrassing one and not free from difficulty, proceeded on the ground that, as according to the weight of the evidence the supplies were furnished on the credit of the ship, and not on that of the company which used it, and which was notoriously insolvent, there was a lien on the vessel that should not be displaced except upon affirmative proof that the credit was given to the company to the exclusion of the vessel. Nothing, however, was said in that case to justify the contention that a lien will arise for necessary supplies furnished a vessel, in a foreign port, on the order of a charterer, if the libelant at the time knew, or by reasonable diligence could have ascertained, that it was being run under a charter that obliged the charterer to provide and pay for all needed supplies. That case turned largely upon its special facts, and was so presented to this court as to restrict its inquiry to the single point whether the coal was furnished to the Patapsco on the credit of the vessel or of the owners. In point of fact the Patapsco was run under a charter party by the Commercial Steamboat Company a corporation of Rhode Island. But that corporation owned and operated steamers of its own on the same line in which the Patapsco was employed; and the court in examining the case seemed to
270] have *treated that company as the owner of all the vessels used on its line. This is apparent from the opinion, which states that "whether the coal was furnished on the credit of the vessel or of the owners is the only point of inquiry in this case."

Nor is there anything in *The Guy* v. *Tall*, ("*The Guy*") 76 U. S. 9 Wall. 758 [19: 710], which bears directly on the question now presented. The opinion was very brief and stated nothing more than that upon the facts established that case was governed by the principles announced in *The Grapeshot* v. *Wallerstein* ("*The Grapeshot*") decided at the same term (76 U. S. 9 Wall. 129 [19: 651]). According to the reporter's statement of the facts it was a case of repairs ordered by one claiming to be the proprietor and agent of the company operating the vessel, and who "seemed to have been the owner." It was substantially the case of necessary repairs made pursuant to an agreement or understanding with the owner that they were made on the credit of the vessel, the owner himself being known to be insolvent and unworthy of credit.

In the present case, the question of lien or no lien on the vessel arises under circumstances not disclosed or discussed in any of the cases upon which libellants rely. Although the libellants were not aware of the existence of the charter party under which the Valencia was employed, it must be assumed upon the facts certified that by reasonable diligence they could have ascertained that the New York Steamship Company did not own the vessel, but used it under a charter party providing that the charterer should pay for all needed coal. The libellants knew that the steamship company had an office in the city of New York. They did business with them at that office, and could easily have ascertained the ownership of the vessel and the relation of the steamship company to the owners. They were put upon inquiry, but they chose to shut their eyes and make no inquiry touching these matters or in reference to the solvency or credit of that company. It is true that libellants delivered the coal in the belief that the vessel, whether a foreign or a domestic one, or by whomsoever owned, would be responsible for the value of such coal. But such a belief is not sufficient in itself to give a maritime lien. If that belief was founded upon the supposition *that[271 the steamship company owned the vessel, no lien would exist, because in the absence of an agreement, express or implied, for a lien, a contract for supplies made directly with the owner in person is to be taken as made "on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived." *The St. Jago de Cuba*, 22 U. S. 9 Wheat. 409, 416, 417 [6: 122, 124]. And if the belief that the vessel would be responsible for the supplies was founded on the supposition that it was run under a charter party, then the libellants are to be taken as having furnished the coal at the request of the owner *pro hac vice* (*Stephenson* v. *The Francis*, 21 Fed. Rep. 715, 717; *The Samuel Marshall*, 54 Fed. Rep. 397, 399), without any express agreement for a lien, and in the absence of any circumstances justifying the inference that the supplies were furnished with an understanding that the vessel itself would be responsible for the debt incurred. In the present case, we are informed by the record that there was



Digitized by Google

no express agreement for a lien, and that nothing occurred to warrant the inference that either the master or the charterer agreed to pledge the credit of the vessel for the coal.

In *Beinecke* v. *The Secret*, 3 Fed. Rep. 665 (United States district court for the southern district of New York), which was a suit against a vessel owned by a foreign corporation having an office and transacting business in New York, and with good credit there, but operated by Murray, Ferris, & Co., a New York firm, under a charter party requiring the charterers to furnish all supplies, Judge Choate said: "They [the libellants] knew they were dealing with New York parties and not with the foreign owner or the master, who presumably represents the owner; and they were put upon inquiry as to the interest and relation of Murray, Ferris, & Co. to the vessel, and are chargeable with the facts they might have ascertained on such inquiry. They could easily have learned that Murray, Ferris, & Co. had no right or power to bind the owners or the vessel for the supplies, and that they were, in fact, the owners, so far as concerned parties supplying the ship." So, in *The Norman*, 28 Fed. Rep. 383, Judge McKennan said: "But 272]Murray, Ferris, & Co. [the *charterers] were residents of New York, at which port the vessel was lying when the coal was furnished, and they furnished it directly, without the intervention of the official representatives of the vessel. They were the owners of the *pro hac vice*, because they had possession of the vessel and she was at their sole disposal until the end of the charter. These facts repel the implication that the coal was furnished upon the credit of the vessel, but warrant the inference that it was furnished upon the personal credit of the charterers and ostensible owners. At least they were sufficient to put the libellant upon inquiry as to the actual relations of Murray, Ferris, & Co. to the vessel and their obligations under the charter party, and this must have resulted in the knowledge that the act of the charterers could not, under the circumstances, impose a lien on the vessel." In *The Samuel Marshall*, 49 Fed. Rep. 754, 757, affirmed in 6 U. S. App. 383, Judge Severens said: "If the vessel is then in the use, possession, and control of others than the owner a presumption arises that such others are liable to pay the charges incident to the employment, and if the party furnishing the supplies knew or should have known the facts in regard to the use and control of the vessel, there is the same reason for the presumption against the credit being given to the vessel, when the charterer or other person standing in a similar relation to the vessel resides at the port of supply, as in cases where the owner operating the vessel on his own account resides at such port, and where there is the same reason there should be the same law." See also *The Suliote*, 23 Fed. Rep. 919; *The Pirate*, 32 Fed. Rep. 486; *The Glenmont*, 34 Fed. Rep. 402; *Hill* v. *The Golden Gate*, 1 Newb. Adm. 308.

Under what circumstances, if under any, a charterer who has control and possession of a vessel under a charter party requiring him, at his own cost, to provide for necessary supplies and repairs, may pledge the credit of the vessel, it is not necessary now to determine. We mean only to decide, at this time, that one furnishing supplies or making repairs on the order simply of a person or corporation acquiring the control and possession of a vessel under such a charter party cannot *acquire a [273 maritime lien if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim.

For the reasons stated *the question certified to this court is answered in the negative.*

---

CELESTINE PIM, *Plff. in Err.*,
*v.*
ST. LOUIS and St. Louis Sectional Dock Company.

(See S. C. Reporter's ed. 273, 274.)

*Federal question.*

The claim of a Federal right comes too late, so far as the revisory power of this court is concerned, when set up for the first time after final decision of the case by the state supreme court, and then by petition for rehearing which is overruled without determination of or allusion to the alleged Federal question.

[No. 180.]

*Argued January 27, 1897. Decided February 1, 1897.*

IN ERROR to the Supreme Court of the State of Missouri to review a judgment of that court affirming a judgment of the Circuit Court of the City of St. Louis in favor of the defendants, the City of St. Louis *et al.*, in an action brought by Celestine Pim, plaintiff, for the recovery of certain real estate in the city of St. Louis. *Dismissed.*

See same case below, 122 Mo. 654.

The facts are stated in the opinion.

*Messrs.* **Leverett Bell** and *Henry B. Davis* for plaintiff in error.

*Mr. W. C. Marshall* for defendants in error.

Court declined to hear counsel for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This was an action for the recovery of certain real estate in the city of St. Louis, of the possession of which the plaintiff in error, who was the plaintiff below, alleged that she was illegally and wrongfully deprived by the defendants. The city denied the plaintiff's claim and relied upon continuous adverse possession for ten years prior to the accruing of the plaintiff's cause of action.

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and William v. Norris, 6: 571.

*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question*,—see note to Hamblin v. Western Land Co. 37: 267.



Digitized by Google

We held at the present term, in *Chicago & N. W. R. Co.* v. *Chicago*, 164 U. S. 454, 457 [*ante*, 274]*511, 512], as had frequently before been adjudged, that this court could not review the final judgment of the highest court of the state, alleged to have denied a right protected by the Constitution of the United States, unless such right was specially set up or claimed in the state court by the party against whom the judgment was rendered. U. S. Rev. Stat. § 709.

It is contended on this writ of error that the judgment below deprived the plaintiff in error of her property without due process of law, and that this result was accomplished by applying to the case a certain statute of limitations of Missouri as construed and enforced by the highest court of that state.

Upon inspecting the record we find that no Federal right was set up or claimed, in any form, until after the final decision of the case by the supreme court of Missouri, and then by a petition for rehearing. That petition was overruled by that court without any determination of the alleged Federal question, indeed without any allusion to it. The claim of a Federal right came too late, so far as the revisory power of this court is concerned. *Loeber* v. *Schroeder*, 149 U. S. 580, 585 [37: 856, 860]; *Sayward* v. *Denny*, 158 U. S. 180, 183 [39: 941, 942].

It is contended that the cases of *Huntington* v. *Attrill*, 146 U. S. 657 [36: 1123]; *Marchant* v. *Pennsylvania R. Co.* 153 U. S. 380 [38: 751]; and *Scott* v. *McNeal*, 154 U. S. 34 [38: 896]; recognized some exceptions to this general rule. But an examination of the first and last named of those cases, as reported, will show that a Federal right was specially claimed in and was passed upon by the state court. In *Marchant* v. *Pennsylvania R. Co.* it does not distinctly appear from the opinion of the court that the Federal right alleged to have been violated was specially claimed in the state court. But the record of that case shows not only that such was the fact, but that the jurisdiction of this court in that case was beyond question.

The writ of error must be dismissed for want of jurisdiction.

*Dismissed.*

---

275] ROBERT ROBERTSON *et al.*, *Appts.*,
v.
BARRY BALDWIN.

(See S. C. Reporter's ed. 275-303.)

*Power of justices of the peace to arrest deserting seamen—13th Amendment—contracts of seamen.*

1. The power of justices of the peace to arrest deserting seamen and to deliver them on board their vessel is not within the definition of "judicial power" as defined by the Constitution of the United States, and it may lawfully be conferred by Congress upon state officers.

2. Compulsory service of deserting seamen in fulfilment of their contracts is not in violation of the 13th Amendment of the Federal Constitution, which prohibits involuntary servitude.

3. The provision against involuntary servitude in the 13th Amendment was not intended to apply to the contracts of seamen.

[No. 334.]

*Argued December 15, 1896. Decided January 25, 1897.*

APPEAL from a judgment of the District Court of the United States for the Northern District of California dismissing a writ of habeas corpus issued upon the petition of Robert Robertson *et al.* *Affirmed.*

Statement by Mr. Justice **Brown:**

This was an appeal from a judgment of the district court for the northern district of California, rendered August 5, 1895, dismissing a writ of habeas corpus issued upon the petition of Robert Robertson, P. H. Olsen, John Bradley, and Morris Hanson.

The petition set forth, in substance, that the petitioners were unlawfully restrained of their liberty by Barry Baldwin, marshal for the northern district of California, in the county jail of Alameda county, by virtue of an order of commitment made by a United States commissioner, committing them for trial upon a charge of disobedience of the lawful orders of the master of the American barkentine Arago; that such commitment was made without [276 reasonable or probable cause, in this: That at the time of the commission of the alleged offense, petitioners were held on board the Arago against their will and by force, having been theretofore placed on board said vessel by the marshal for the district of Oregon, under the provisions of U. S. Rev. Stat. § 4596, subd. 1, and §§ 4598 and 4599, the master claiming the right to hold petitioners by virtue of these acts; that §§ 4598 and 4599 are unconstitutional and in violation of § 1 of art. 8, and of the 5th Amendment to the Constitution; that § 4598 was also repealed by Congress on June 7, 1872 (17 Stat. at L. 262), and that the 1st subdivision of § 4596 is in violation of the 13th Amendment, in that it compels involuntary servitude.

The record was somewhat meagre, but it sufficiently appeared that the petitioners had shipped on board the Arago at San Francisco for a voyage to Knappton in the state of Washington; thence to Valparaiso; and thence to such other foreign ports as the master might direct, and return to a port of discharge in the United States; that they had each signed shipping articles to perform the duties of seamen during the course of the voyage; but, becoming dissatisfied with their employment, they left the vessel at Astoria, in the state of Oregon, and were subsequently arrested under the provisions of U. S. Rev. Stat. §§ 4596 to 4599, taken before a justice of the peace, and by him committed to jail until the Arago was ready for sea (some sixteen days), when they were taken from the jail by the marshal and placed on board the Arago against their will; that they refused to "turn to" in obedience to the orders of the master; were arrested at San Francisco, charged with refusing to work in violation of U. S. Rev. Stat. § 4596; were subsequently examined before a commissioner of the circuit court, and by him held to answer such charge before the district court for the northern district of California.



Digitized by Google

Shortly thereafter they sued out this writ of habeas corpus, which, upon a hearing before the district court, was dismissed, and an order made remanding the prisoners to the custody of the marshal.

277] *Whereupon petitioners appealed to this court.

*Messrs.* **Jackson H. Ralston,** *James G. Maguire,* and *H. W. Hutton* for appellants.

*Mr.* **Holmes Conrad,** Solicitor General, for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

Upon what ground the court below dismissed the writ, and remanded the petitioners, does not appear, but the record raises two questions of some importance. First, as to the constitutionality of U. S. Rev. Stat. §§ 4598, and 4599, in so far as they confer jurisdiction upon justices of the peace to apprehend deserting seamen, and return them to their vessel; second, as to the conflict of the same sections and also § 4596 with the 13th Amendment to the Constitution, abolishing slavery and involuntary servitude.

Section 4598, which was taken from § 7 of the act of July 20, 1790, reads as follows:

"Sec. 4598. If any seamen who shall have signed a contract to perform a voyage shall at any port or place desert, or shall absent himself from, such vessel without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of the peace within the United States, upon the complaint of the master, to issue his warrant to apprehend such deserter, and bring him before such justice; and if it then appears that he has signed a contract within the intent and meaning of this title, and that the voyage agreed for is not finished or altered, or the contract otherwise dissolved, and that such seaman had deserted the vessel, or absented himself without leave, the justice shall commit him to the house of correction or common jail of the city, town, or place, to remain there until the vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman."

278] *Section 4599, which was taken from § 53 of the shipping commissioners' act of June 7, 1872, authorizes the apprehension of deserting seamen, with or without the assistance of the local public officers or constables, and without a warrant, and their conveyance before any court of justice or magistrate of the state to be dealt with according to law.

Section 4596, which is also taken from the same act, provides punishment by imprisonment for desertion, refusal to join the vessel, or absence without leave.

1. The first proposition, that Congress has no authority under the Constitution to vest judicial power in the courts or judicial officers of the several states, originated in an observation of Mr. Justice Story in *Martin* v. *Hunter,* 14 U. S. 1 Wheat. 304, 330 [4: 97, 103], to the effect that "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." This was repeated in *Houston* v. *Moore,* 18 U. S. 5 Wheat. 1, 27 [5: 19, 25], and the same general doctrine has received the approval of the courts of several of the states. *United States* v. *Lathrop,* 17 Johns. 4; *Ely* v. *Peck,* 7 Conn. 239; *United States* v. *Campbell* (Ohio Com. Pleas), 6 Hall's L. J. 113. These were all actions for penalties, however, wherein the courts held to the familiar doctrine that the courts of one sovereignty will not enforce the penal laws of another. *Huntington* v. *Attrill,* 146 U. S. 657, 672 [36: 1123, 1129]. In *Com.* v. *Feely,* 1 Va. Cas. 321, it was held by the general court of Virginia in 1813 that the state courts could not take jurisdiction of an indictment for a crime committed against an act of Congress.

In *Ex parte Knowles,* 5 Cal. 300, it was also held that Congress had no power to confer jurisdiction upon the courts of a state to naturalize aliens, although, if such power be recognized by the legislature of a state, it may be exercised by the courts of such state of competent jurisdiction.

In *State* v. *Butler,* 12 Niles' Reg. 115, 231, it was held in 1817 by Judges Bland and Hanson of Maryland that Congress had no power to authorize justices of the peace to issue warrants for the apprehension of offenders against the laws of the United States. A directly [279 contrary view, however, was taken by Judge Cheves of South Carolina in *Ex parte Rhodes,* 12 Niles' Reg. 264.

The general principle announced by these cases is derived from the 3d article of the Constitution, the 1st section of which declares that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish," the judges of which courts "shall hold their offices during good behavior," etc.; and by the 2d section, "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens, or subjects."

The better opinion is that the 2d section was intended as a constitutional definition of the judicial power (*Chisholm* v. *Georgia,* 2 U. S. 2 Dall. 419, 475 [1: 440, 464]), which the Constitution intended to confine to courts created by Congress; in other words, that such power extends only to the trial and determination of "cases" in courts of record, and that Congress is still at liberty to authorize the judicial officers of the several states to exercise such power as is ordinarily given to officers of courts not of record; such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the



Digitized by Google

United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself. This was the view taken by the supreme court of Alabama in *Ex parte Gist*, 26 Ala. 156, wherein the authority of justices of the peace and other such officers to arrest and commit for a violation of the criminal law of the United 280] States *was held to be no part of the judicial power within the 3d article of the Constitution. And in the case of *Prigg* v. *Pennsylvania*, 41 U. S. 16 Pet. 539 [10: 1060], it was said that, as to the authority conferred on state magistrates to arrest fugitive slaves and deliver them to their owners, under the act of February 12, 1793, while a difference of opinion existed, and might still exist upon this point in different states, whether state magistrates were bound to act under it, no doubt was entertained by this court that state magistrates might, if they chose, exercise the authority, unless prohibited by state legislation. See also *Moore* v. *Illinois*, 55 U. S. 14 How. 18 [14: 306]; *Ex Kaine*, 55 U. S. 14 How. 103 [14: 345].

We think the power of justices of the peace to arrest deserting seamen and deliver them on board their vessels is not within the definition of the "judicial power" as defined by the Constitution, and may be lawfully conferred upon state officers. That the authority is a most convenient one to intrust to such officers cannot be denied, as seamen frequently leave their vessels in small places, where there are no Federal judicial officers, and where a justice of the peace may usually be found, with authority to issue warrants under the state laws.

2. The question whether §§ 4598 and 4599 conflict with the 13th Amendment, forbidding slavery and involuntary servitude, depends upon the construction to be given to the term "involuntary servitude." Does the epithet "involuntary" attach to the word "servitude" continuously, and make illegal any service which becomes involuntary at any time during its existence; or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into? If the former be the true construction, then no one, not even a soldier, sailor, or apprentice, can surrender his liberty, even for a day; and the soldier may desert his regiment upon the eve of battle, or the sailor abandon his ship at any intermediate port or landing, or even in a storm at sea, provided only he can find means of escaping to another vessel. If the latter, then an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going 281] and coming to the will of *another during the continuance of the contract,—not that all such contracts would be lawful, but that a servitude which was knowingly and willingly entered into could not be termed involuntary. Thus, if one should agree, for a yearly wage, to serve another in a particular capacity during his life, and never to leave his estate without his consent, the contract might not be enforceable for the want of a legal remedy, or might be void upon the grounds of public policy, but the servitude could not be properly termed involuntary. Such agreements for a limited personal servitude at one time were very common in England, and by statute of June 17, 1823 (4 Geo. IV., chap. 34, § 3), it was enacted that if any servant in husbandry or any artificer, calico printer, handscraftsman, miner, collier, keelman, pitman, glassman, potter, laborer, or other person, should contract to serve another for a definite time, and should desert such service during the term of the contract, he was made liable to a criminal punishment. The breach of a contract for personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors, and possibly some others, nor would public opinion tolerate a statute to that effect.

But we are also of opinion that, even if the contract of a seaman could be considered within the letter of the 13th Amendment, it is not, within its spirit, a case of involuntary servitude. The law is perfectly well settled that the first ten Amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people *to keep and [282 bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (art. 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion (*United States* v. *Ball*, 163 U. S. 662, 672 [41: 300, 303]); nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment. *Brown* v. *Walker*, 161 U. S. 519 [49: 819], and cases cited. Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the deposition of witnesses who have died since the former trial.

The prohibition of slavery in the 13th Amendment is well known to have been adopted with reference to a state of affairs which had existed in certain states of the Union since the foundation of the government, while the addition of the words "involuntary servitude" were said in *Butchers' Benev. Asso.* v. *Crescent City L. S. L. & S. H. Co.* ("*Slaughter-House Cases*") 83 U. S. 16 Wall. 36 [21: 394], to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and



Digitized by Google

less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptions,—such as military and naval enlistments,—or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, Where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview.

From the earliest historical period the con-
283]tract of the sailor *has been treated as an exceptional one and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained—as Molloy forcibly expresses it, "to rot in her neglected brine." Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some cases, the safety of the ship itself. Hence, the laws of nearly all maritime nations have made provision for securing the personal attendance of the crew on board, and for their criminal punishment for desertion, or absence without leave during the life of the shipping articles.

Even by the maritime law of the ancient Rhodians, which is supposed to antedate the birth of Christ by about 900 years, according to Pardessus (1 Lois Maritime, 250), if the master or the sailors absented themselves by night, and the vessel were lost or damaged, they were bound to respond in the amount of the loss.

In the compilation of maritime laws, known as the Consulate of the Sea, it was also provided that a sailor should not go ashore without permission, upon the penalty of being obliged to pay any damage occasioned by his absence, and, in default of his being able to respond, of being thrust in prison until he had paid all such damage. Chaps. 121, 124; 2 Pardessus, 146-148.

A like provision is found in the Rules of Oleron, promulgated in the reign of Henry III., by which (art. 5) the seamen were forbidden to leave the ship without the master's consent. "If they do and by that means she happens to be lost or damnified, they shall be answerable for the damage." 1 Pet. Adm. xi. A similar prohibition is found in art. 17 of the laws of Wisbuy. 1 Pet. Adm. lxxiii.

The laws of the towns belonging to the Hanseatic League, first enacted and promulgated in 1597, were still more explicit and severe. No seaman might go ashore without the con-
284]sent *of the master or other officer, and, if he remained longer than the time allowed, was condemned to pay a fine or suffer an imprisonment (arts. 22, 23); and by art. 40, if a seaman went ashore without leave, and the ship happened to receive any damage "he shall be kept in prison upon bread and water for one year," and if any seaman died or perished for the want of the assistance of the absent seaman, the latter was subject to corporal punishment; and, by art. 43, "if an officer or seaman quits a ship and conceals himself, if afterwards he is apprehended, he shall be delivered up to justice to be punished; he shall be stigmatized in the face with the first letter of the name of the town to which he belongs." 1 Pet. Adm. ci. cv. cvi.

By the marine ordinance of Louis XIV., which was in existence at the time the Constitution was adopted (title 3, art. 3), "if a seaman leaves a master without a discharge in writing before the voyage is begun, he may be taken up and imprisoned wherever he can be found, and compelled to restore what he has received, and serve out the time for which he had engaged himself for nothing; and if he leaves the ship after the voyage is begun, he may be punished corporally." Art. 5. "After the ship is laded, the seamen shall not go ashore without leave from the master, under pain of 5 livres for the first fault; and may be punished corporally if they commit a second."

The present commercial code of France, however, makes no express provision upon the subject; but by the general mercantile law of Germany, art. 532, "the master can cause any seaman, who, after having been engaged, neglects to enter upon or continue to do his duties, to be forcibly compelled to perform the same."

By the Dutch Code, art. 402, "the master or his representative can call in the public force against those who refuse to come on board, who absent themselves from the ship without leave, and refuse to perform to the end of the service for which they were engaged."

Nearly all of the ancient commercial codes either make provision for payment of damages by seamen who absent *themselves from[285
their ships without leave, or for their imprisonment, or forcible conveyance on board. Some of the modern commercial codes of Europe and South America make similar provisions. Argentine Code, art. 1154. Others, including the French and Spanish codes, are silent upon the subject.

Turning now to the country from which we have inherited most immediately our maritime laws and customs, we find that Malynes, the earliest English writer upon the law merchant, who wrote in 1622, says in his *Lex Mercatoria* (vol. 1, chap. 23) that "mariners in a strange port should not leave the ship without the master's license, or fastening her with four ropes, or else the loss falls upon them. . . . In a strange country, the one half of the company, at least, ought to remain on shipboard, and the rest who go on land should keep sobriety and abstain from suspected places, or else should be punished in body and purse; like as he who absents himself from the ship is ready to sail. Yea, if he give out himself worthier than he is in his calling, he shall lose his hire; half to the admiral, and the other half to the master." Molloy, one of the most satisfactory of early English writers upon the



Digitized by Google

subject, states that if seamen depart from a ship without leave or license of the master, and any disaster happens, they must answer, quoting article 5 of the Rules of Oleron in support of his proposition.

There appears to have been no legislation directly upon the subject until 1729, when the act of 2 Geo. II. chap. 36, was enacted "for the better regulation and government of seamen in the merchants' service." This act not only provided for the forfeiture of wages in case of desertion, but for the apprehension of seamen deserting or absenting themselves, upon warrants to be issued by justices of the peace, and, in case of their refusal to proceed upon the voyage, for their committal to the house of correction at hard labor. Indeed, this seems to have furnished a model upon which the act of Congress of July 20, 1790 (1 Stat. at L. 131), for the government and regulation of seamen in the merchants' service, was constructed. The provisions of this act
286] were substantially repeated by the *act of 1791 (31 Geo. III. chap. 39), and were subsequently added to and amended by acts of 5 & 6 Wm. IV. chap. 19, and 7 & 8 Vict. chap. 112.

The modern law of England is full and explicit upon the duties and responsibilities of seamen. By the merchants' shipping act of 1854 (17 & 18 Vict. chap. 104), § 243, a seaman guilty of desertion might be summarily punished by imprisonment, by forfeiture of his clothes and effects and all or any part of his wages. Similar punishment was meted out to him for neglecting or refusing to join his ship or to proceed to sea, or for absence without leave at any time. By § 246, "whenever, at the commencement or during the progress of any voyage, any seaman or apprentice neglects or refuses to join or deserts from or refuses to proceed to sea in any ship in which he is duly engaged to serve," the master was authorized to call upon the police officers or constables to apprehend him without warrant and take him before a magistrate who, by art. 247, was authorized to order him to be conveyed on board for the purpose of proceeding on the voyage.

The provision for imprisonment for desertion seems to have been repealed by the merchants' seamen (payment of wages and rating) act of 1880; but the 10th section of that act retained the provision authorizing the master to call upon the police officers or constables to convey deserting seamen on board their vessels.

This act, however, appears to have been found too lenient, since in 1894 the whole subject was reconsidered and covered in the new merchants' shipping act (57 & 58 Vict. chap. 60), of 748 sections, § 221 of which provides not only for the forfeiture of wages in case of desertion, but for imprisonment with or without hard labor, except in cases arising in the United Kingdom. The provision for the arrest of the deserting seaman, and his conveyance on board the ship, is, however, retained both within and without the kingdom. §§ 222, 223. This is believed to be the latest legislation on the subject in England.

The earliest American legislation which we
287] have been able *to find is an act of the colonial general court of Massachusetts, passed about 1668, wherein it was enacted that any mariner who departs and leaves a voyage upon which he has entered shall forfeit all his wages, and shall be further punished by imprisonment or otherwise, as the case may be circumstanced; and if he shall have received any considerable part of his wages, and shall run away, he shall be pursued as a disobedient runaway servant. Mass. Col. Laws, ed. 1889, 251, 256.

The provision of U. S. Rev. Stat. § 4598, under which these proceedings were taken, was first enacted by Congress in 1790. 1 Stat. at L. 131, § 7. This act provided for the apprehension of deserters and their delivery on board the vessel, but apparently made no provision for imprisonment as a punishment for desertion; but by the shipping commissioners' act of 1872 (17 Stat. at L. 243, § 51), now incorporated into the United States Revised Statutes as § 4596, the court is authorized to add to forfeiture of wages for desertion imprisonment for a period of not more than three months, and for absence without leave imprisonment for not more than one month. In this act and the amendments thereto very careful provisions are made for the protection of seamen against the frauds and cruelty of masters, the devices of boarding-house keepers, and, as far as possible, against the consequences of their own ignorance and improvidence. At the same time discipline is more stringently enforced by additional punishments for desertion, absence without leave, disobedience, insubordination, and barratry. Indeed, seamen are treated by Congress, as well as by the Parliament of Great Britain, as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians: *Quemadmodum pater in filios, magister in discipulos, dominus in servos vel familiares.* The ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly.

In the face of this legislation upon the subject of desertion and absence without leave, which was in force in this country *for more[288 than sixty years before the 13th Amendment was adopted, and similar legislation abroad from time immemorial, it cannot be open to doubt that the provision against involuntary servitude was never intended to apply to their contracts.

*The judgment of the court below is therefore affirmed.*

Mr. Justice **Gray** was not present at the argument, and took no part in the decision of this case.

Mr. Justice **Harlan** dissenting:

The appellants shipped on the American barkentine Arago, having previously signed articles whereby they undertook to perform the duties of seamen during a voyage of that vessel from San Francisco (quoting from the record) "to Knappton, state of Washington, and thence to Valparaiso, and thence to such other foreign ports as the master may direct, and return to a port of discharge in the United



Digitized by Google

States." The vessel was engaged in a purely private business.

As stated in the opinion of the court, the appellants left the vessel at Astoria, Oregon, without the consent of the master, having become dissatisfied with their employment. The grounds of such dissatisfaction are not stated.

Upon the application of the master, a justice of the peace at Astoria, Oregon, proceeding under U. S. Rev. Stat. §§ 4596–4599, issued a warrant for the arrest of the appellants. They were seized, somewhat as runaway slaves were in the days of slavery, and committed to jail without bail "until the Arago was ready for sea." After remaining in jail some sixteen days, they were taken by the marshal and placed on board the Arago against their will. While on board they refused to "turn to" or to work in obedience to the orders of the master. Upon the arrival of the barkentine at San Francisco they were arrested for having refused to work on the vessel, and committed for trial upon that charge.

If the placing of the appellants on board the Arago at Astoria against their will was illegal, then their refusal to work while thus forcibly held on the vessel could not be a criminal offense, and their detention and subsequent ar-
289] rest *for refusing to work while the vessel was going from Astoria to San Francisco were without authority of law. The question therefore is whether the appellants, having left the vessel at Astoria, no matter for what cause, could lawfully be required against their will to return to it, and to render personal services for the master.

The government justifies the proceedings taken against the appellants at Astoria by U. S. Rev. Stat. §§ 4596, 4598, 4599.

By § 4596 it is provided: "Whenever any seaman who has been lawfully engaged, or any apprentice to the sea service, commits any of the following offenses, he shall be punishable as follows: First. For desertion, by imprisonment for not more than three months, and by forfeiture of all or any part of the clothes or effects he leaves on board, and of all or any part of the wages or emoluments which he has then earned. Second. For neglecting and refusing, without reasonable cause, to join his vessel, or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel sailing from any port, either at the commencement or during the progress of any voyage; or for absence at any time, without leave and without sufficient reason, from his vessel or from his duty, not amounting to desertion, or not treated as such by the master; by imprisonment for not more than one month, and also, at the discretion of the court, by forfeiture of his wages, of not more than two days' pay, and for every twenty-four hours of absence, either a sum not exceeding six days' pay, or any expenses which have been properly incurred in hiring a substitute. Third. For quitting the vessel without leave after her arrival at her port of delivery and before she is placed in security, by forfeiture out of his wages of not more than one month's pay. Fourth. For wilful disobedience to any lawful command, by imprisonment for not more than two months, and also, at the discretion of the court, by forfeiture out of his wages of not more than four days' pay. Fifth. For continued wilful disobedience to lawful commands or continued wilful neglect of duty, by imprisonment *for not more than six months, [290 and also, at the discretion of the court, by forfeiture, for every twenty-four hours continuance of such disobedience or neglect, of either a sum not more than twelve days' pay, or sufficient to defray any expenses which have been properly incurred in hiring a substitute. Sixth. For assaulting any master or mate, by imprisonment for not more than two years. Seventh. For combining with any others of the crew to disobey lawful commands, or to neglect duty, or to impede navigation of the vessel or the progress of the voyage, by imprisonment for not more than twelve months."

These provisions are brought forward from the act of June 7, 1872, chap. 322, § 51. 17 Stat. at L. 273.

Section 4598 provides: "If any seaman who shall have signed a contract to perform a voyage shall at any port or place desert or shall absent himself from such vessel without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of the peace within the United States, upon the complaint of the master, to issue his warrant to apprehend such deserter, and bring him before such justice; and if it then appears that he has signed a contract within the intent and meaning of this title, and that the voyage agreed for is not finished, or altered, or the contract otherwise dissolved, and that such seaman has deserted the vessel, or absented himself without leave, the justice shall commit him to the house of correction or common jail of the city, town, or place, to remain there until the vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman."

This section is the same as § 7 of the act of July 20, 1790, chap. 29. 1 Stat. at L. 134.

By § 4599—which is substantially the same as § 53 of the above act of June 7, 1872—it is provided: "§ 4599. Whenever, either at the commencement of or during any voyage, any seaman or apprentice neglects or *refuses [291 to join, or deserts from or refuses to proceed to sea in, any vessel in which he is duly engaged to serve, or is found otherwise absenting himself therefrom without leave, the master or any mate or the owner or consignee or shipping commissioner may, in any place in the United States, with or without the assistance of the local public officers or constables, who are hereby directed to give their assistance if required, and also at any place out of the United States, if and so far as the laws in force at such place will permit, apprehend him without first procuring a warrant; and may thereupon, in any case, and shall, in case he so requires and it is practicable, convey him before any court of justice or magistrate of any state, city, town, or county within the United States, authorized to take cognizance of offenses of like degree and kind, to be dealt with according to the provisions of law governing such cases; and may, for the purpose of conveying him before



Digitized by Google

such court or magistrate, detain him in custody for a period not exceeding twenty-four hours, or may, if he does not so require, or if there is no such court at or near the place, at once convey him on board. If such apprehension appears to the court or magistrate before whom the case is brought to have been made on improper or on insufficient grounds, the master, mate, consignee, or shipping commissioner who makes the same, or causes the same to be made, shall be liable to a penalty of not more than $100; but such penalty, if inflicted, shall be a bar to any action for false imprisonment."

The decision just made proceeds upon the broad ground that one who voluntarily engages to serve upon a private vessel in the capacity of a seaman for a given term, but who, without the consent of the master, leaves the vessel when in port, before the stipulated term is ended, and refuses to return to it, may be arrested and held in custody until the vessel is ready to proceed on its voyage, and then delivered against his will, and if need be by actual force, on the vessel to the master.

The 13th Amendment of the Constitution of the United States declares that "neither slavery nor involuntary servitude, except as a punish-[292]ment for crime, whereof the party *shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Slavery exists wherever the law recognizes a right of property in a human being; but slavery cannot exist in any form within the United States. The 13th Amendment uprooted slavery as it once existed in this country, and destroyed all of its badges and incidents. It established freedom for all. "By its own unaided force and effect it abolished slavery and established freedom." The amendment, this court has also said, "is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *United States* v. *Stanley* (*"Civil Rights Cases"*), 109 U. S. 1, 20 [27: 835, 842].

As to involuntary servitude, it may exist in the United States; but it can only exist lawfully as a punishment for crime of which the party shall have been duly convicted. Such is the plain reading of the Constitution. A condition of enforced service, even for a limited period, in the private business of another, is a condition of involuntary servitude.

If it be said that government may make it a criminal offense, punishable by fine or imprisonment or both, for anyone to violate his private contract voluntarily made, or to refuse without sufficient reason to perform it—a proposition which cannot, I think, be sustained at this day, in this land of freedom—it would by no means follow that government could, by force applied in advance of due conviction of some crime, compel a freeman to render personal services in respect of the private business of another. The placing of a person, by force, on a vessel about to sail, is putting him in a condition of involuntary servitude, if the purpose is to compel him against his will to give his personal services in the private business in which that vessel is engaged. The personal liberty of individuals, it has been well said, "consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Bl. Com. chap. 1, p. 134.

*Can the decision of the court be sus-[293]tained under the clause of the Constitution granting power to Congress to regulate commerce with foreign nations and among the several states? That power cannot be exerted except with due regard to other provisions of the Constitution, particularly those embodying the fundamental guaranties of life, liberty, and property. While Congress may enact regulations for the conduct of commerce with foreign nations and among the states, and may, perhaps, prescribe punishment for the violation of such regulations, it may not, in so doing, ignore other clauses of the Constitution. For instance, a regulation of commerce cannot be sustained which, in disregard of the express injunction of the Constitution, imposes a cruel and unusual punishment for its violation, or compels a person to testify in a criminal case against himself, or authorizes him to be put twice in jeopardy of life or limb, or denies to the accused the privilege of being confronted with the witnesses against him, or of being informed of the nature and cause of the accusation against him. And it is equally clear that no regulation of commerce established by Congress can stand if its necessary operation be either to establish slavery or to create a condition of involuntary servitude forbidden by the Constitution.

It is said that the statute in question is sanctioned by long usage among the nations of the earth, as well as by the above act of July 20, 1790.

In considering the antiquity of regulations that restrain the personal freedom of seamen, the court refers to the laws of the ancient Rhodians, which are supposed to have antedated the Christian era. But those laws, whatever they may have been, were enacted at a time when no account was taken of man as man, when human life and human liberty were regarded as of little value, and when the powers of government were employed to gratify the ambition and the pleasures of despotic rulers rather than promote the welfare of the people.

Attention has been called by the court to the laws enacted by the towns of the Hanseatic League four hundred years ago, by one of which a seaman who went ashore without leave could, in certain contingencies, be kept in prison "upon bread *and water for one[294] year," and by another of which an officer or seaman who quit his ship and concealed himself could be apprehended and "stigmatized in the face with the first letter of the name of the town to which he belonga." Why the reference to these enactments of ancient times, enforced by or under governments possessing arbitrary power inconsistent with a state of freedom? Does anyone suppose that a regulation of commerce authorizing seamen who quit their ship without leave to be imprisoned "upon bread and water for one year," or which required them to be "stigmatized in the face" with the letter of the town or state to which they belonged, would now receive



Digitized by Google

the sanction of any court in the United States?

Reference has also been made to an act of the colonial general court of Massachusetts, passed in 1647, declaring that a seaman who left his vessel before its voyage was ended might be "pursued as a runaway servant." But the act referred to was passed when slavery was tolerated in Massachusetts with the assent of the government of Great Britain. It antedated the famous Declaration of Rights, promulgated in 1780, in which Massachusetts declared, among other things, that "all men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."

The effect of that declaration was well illustrated in *Parsons* v. *Trask*, 7 Gray, 478 [66 Am. Dec. 502]. That case involved the validity of a contract made in a foreign country in 1840 by an adult inhabitant thereof with a citizen of the United States, "to serve him, his executors and assigns" for the term of five years, "during all of which term the said servant her said master, his executors or assigns, faithfully shall serve, and that honestly and obediently in all things, as a good and faithful servant ought to do." It was sought to enforce this contract in Massachusetts. After carefully examining the provisions of the contract, the court said: "As to the nature, then, of the service to be performed, the place where [295]and the person *to whom it is to be rendered, and the compensation to be paid, the contract is uncertain and indefinite; indefinite and uncertain, not from any infirmity in the language of the parties, but in its substance and intent. It is, in substance and effect, a contract for servitude, with no limitation but that of time; leaving the master to determine what the service should be, and the place where and the person to whom it should be rendered. Such a contract, it is scarcely necessary to say, is against the policy of our institutions and laws. If such a sale of service could be lawfully made for five years, it might, from the same reasons, for ten, and so for the term of one's life. The door would thus be open for species of servitude inconsistent with the first and fundamental article of our Declaration of Rights, which, *proprio vigore*, not only abolished every vestige of slavery then existing in the commonwealth, but rendered every form of it thereafter legally impossible. That article has always been regarded not simply as the declaration of an abstract principle, but as having the active force and conclusive authority of law." Observing that one who voluntarily subjected himself to the laws of the state must find in them the rule of restraint as well as the rule of action, the court proceeded: "Under this contract the plaintiff had no claim for the labor of the servant for the term of five years, or for any term whatever. She was under no legal obligation to remain in his service. There was no time during which her service was due to the plaintiff, and during which she was kept from such service by the acts of the defendants."

It may be here remarked that the shipping articles signed by the appellants left the term of their service uncertain, and placed no restriction whatever upon the route of the vessel after it left Valparaiso, except that it should ultimately return to some port in the United States.

Under the contract of service it was at the volition of the master to entail service upon these appellants for an indefinite period. So far as the record discloses, it was an accident that the vessel came back to San Francisco when it did. By the shipping articles, the appellants could not quit the vessel until it returned to a port of the *United States, [296 and such return depended absolutely upon the will of the master. He had only to land at foreign ports, and keep the vessel away from the United States, in order to prevent the appellants from leaving his service.

Nor, I submit, is any light thrown upon the present question by the history of legislation in Great Britain about seamen. The powers of the British Parliament furnish no test for the powers that may be exercised by the Congress of the United States. Referring to the difficulties confronting the Convention of 1787, which framed the present Constitution of the United States, and to the profound differences between the instrument framed by it and what is called the British Constitution, Mr. Bryce, an English writer of high authority, says in his admirable work on the American Commonwealth: "The British Parliament has always been, was then, and remains now, a sovereign and constituent assembly. It can make and unmake any and every law, change the form of government or the succession to the Crown, interfere with the course of justice, extinguish the most sacred private rights of the citizen. Between it and the people at large there is no legal distinction, because the whole plenitude of the people's rights and powers reside in it, just as if the whole nation were present within the chamber where it sits. In point of legal theory it is the nation, being the historical successor of the Folk Moot of our Teutonic forefathers. Both practically and legally, it is today the only and the efficient depository of the authority of the nation, and is therefore, within the sphere of law, irresponsible and omnipotent." Vol. 1, p. 32. No such powers have been given to or can be exercised by any legislative body organized under the American system. Absolute, arbitrary power exists nowhere in this free land. The authority for the exercise of power by the Congress of the United States must be found in the Constitution. Whatever it does in excess of the powers granted to it, or in violation of the injunctions of the supreme law of the land, is a nullity, and may be so treated by every person. It would seem, therefore, evident that no aid in the present discussion can be derived from the legislation of Great Britain touching the rights, duties, and *responsibilities of seamen [297 employed on British vessels. If the Parliament of Great Britain, Her Britannic Majesty assenting, should establish slavery or involuntary servitude in England, the courts there would not question its authority to do so, and would have no alternative except to sustain legislation of that character. A very short act of Parlia-



Digitized by Google

ment would suffice to destroy all the guaranties of life, liberty, and property now enjoyed by Englishmen. "What," Mr. Bryce says, "are called in England constitutional statutes, such as Magna Charta, the Bill of Rights, the Act of Settlement, the Acts of Union with Scotland and Ireland, are merely ordinary laws, which could be repealed by Parliament at any moment in exactly the same way as it can repeal a highway act or lower the duty on tobacco." Parliament, he further says, "can abolish when it pleases any institution of the country, the Crown, the House of Lords, the Established Church, the House of Commons, Parliament itself." Vol. 1, p. 237. In this country, the will of the people as expressed in the fundamental law must be the will of courts and legislatures. No court is bound to enforce, nor is anyone legally bound to obey, an act of Congress inconsistent with the Constitution. If the 13th Amendment forbids such legislation in reference to seamen as is now under consideration, that is an end of the matter, and it is of no consequence whatever that government in other countries may by the application of force, or by the infliction of fines and imprisonment, compel seamen to continue in the personal service of those whom they may have agreed to serve in private business.

Is the existing statute to be sustained because its essential provisions were embodied in the act of 1790? I think not, and for the reason, if there were no other, that the 13th Amendment imposes restrictions upon the powers of Congress that did not exist when that act was passed. The supreme law of the land now declares that involuntary servitude, except as a punishment for crime of which the party shall have been duly convicted, shall not exist anywhere within the United States.

The only exceptions to the general principles [298] I have referred *to, so far as they relate to private business, arise out of statutes respecting apprentices of tender years. But statutes relating to that class rest largely upon the idea that a minor is incapable of having an absolute will of his own before reaching majority. The infant apprentice, having no will in the matter, is to be cared for and protected in such way as, in the judgment of the state, will best subserve the interests both of himself and of the public. An apprentice serving his master pursuant to terms permitted by the law cannot, in any proper sense, be said to be in a condition of involuntary servitude. Upon arriving at his majority, the infant apprentice may repudiate the contract of apprenticeship, if it extends beyond that period. 1 Parsons, Cont. 50. The word "involuntary" refers primarily to persons entitled, in virtue of their age, to act upon their independent judgment when disposing of their time and labor. Will anyone say that a person who has reached his majority and who had voluntarily agreed, for a valuable consideration, to serve another as an apprentice for an indefinite period, or even for a given number of years, can be compelled, against his will, to remain in the service of the master?

It is said that the grounds upon which the legislation in question rests are the same as those existing in the cases of soldiers and sailors. Not so. The army and navy of the United States are engaged in the performance of public, not private duties. Service in the army or navy of one's country according to the terms of enlistment never implies slavery or involuntary servitude, even where the soldier or sailor is required against his will to respect the terms upon which he voluntarily engaged to serve the public. Involuntary service rendered for the public, pursuant as well to the requirements of a statute as to a previous voluntary engagement, is not, in any legal sense, either slavery or involuntary servitude.

The further suggestion is made that seamen have always been treated by legislation in this country and in England as if they needed the protection of the law in the same sense that minors and wards need the protection of parents and guardians, and hence have been often described as "wards of admiralty." *Some [299] writers say that seamen are in need of the protection of the courts, "because peculiarly exposed to the wiles of sharpers and unable to take care of themselves." 1 Parsons, Ship. & Adm. 32. Mr Justice Story in *Harden* v. *Gordon*, 2 Mason, 541, 555, said that "every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel, because they are thoughtless and require indulgence, because they are credulous and complying, and are easily overreached." Mr. Justice Thompson, in *Cadmus* v. *Matthews*, 2 Paine, 229, 240, said: "In considering the obligations of seamen, arising out of their contract in shipping articles, according to the formula in common use, due weight ought to be given to the character and situation of this class of men. Generally ignorant and improvident, and probably very often signing the shipping articles without knowing what they contain, it is the duty of a court to watch over and protect their rights, and apply very liberal and equitable considerations to the enforcement of their contracts."

In view of these principles, I am unable to understand how the necessity for the *protection* of seamen against those who take advantage of them can be made the basis of legislation compelling them, against their will and by force, to render personal service for others engaged in private business. Their supposed helpless condition is thus made the excuse for imposing upon them burdens that could not be imposed upon other classes without depriving them of rights that inhere in personal freedom. The Constitution furnishes no authority for any such distinction between classes of persons in this country. If, prior to the adoption of the 13th Amendment, the arrest of a seaman and his forcible return under any circumstances to the vessel on which he had engaged to serve could have been authorized by an act of Congress, such deprivation of the liberty of a freeman cannot be justified under the Constitution as it now is. To give any other construction to the Constitution is to say that it is not made for all, and that all men in this land are not free and equal before the law, but that one class may be so far subjected to involuntary servitude *as to be compelled by force to [300] render personal services in a purely private business with which the public has no concern whatever.



Digitized by Google

The court holds that within the meaning of the Constitution the word "involuntary" does not attach to the word "servitude" continuously, and make illegal a service which was voluntary at the outset, but became involuntary before the agreed term of service was ended; consequently "an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going and coming to the will of another during the continuance of the contract; not that all such contracts would be lawful, but that a servitude which was knowingly and willingly entered into could not be termed involuntary. Thus," the court proceeds, "if one should agree, for a yearly wage, to serve another in a particular capacity during his life, and never to leave his estate without his consent, the contract might be void upon grounds of public policy, but the servitude could not be properly termed involuntary. Such agreements for a limited personal servitude at one time were very common in England, and by statute of June 17, 1823 (4 Geo. IV. chap. 84), it was enacted that if any servant in husbandry, or any artificer, calico printer, handcraftsman, miner, collier, keelman, pitman, glassman, potter, laborer, or other person, should contract to serve another for a definite time, and should desert such service during the term of the contract, he was made liable to a criminal punishment. The breach of a contract for a personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors, and apprentices, and possibly some others; nor would public opinion tolerate a statute to that effect."

It seems to me that these observations rest upon an erroneous view of the constitutional inhibition upon involuntary servitude.

Of the meaning and scope of the constitutional interdict upon slavery no one can entertain doubt. A contract by which one person **301** agrees to become the slave of *another would not be respected in any court, nor could it become the foundation of any claim or right, even if it were entered into without constraint being used upon the person who assumed to surrender his liberty and to become the property of another. But involuntary servitude, no matter when it arises, if it be not the result of punishment for crime of which the party has been duly convicted, is as much forbidden by the Constitution as is slavery. If that condition exists at the time the authority of the law is invoked to protect one against being forcibly compelled to render personal services for another, the court cannot refuse to act because the party seeking relief had voluntarily agreed to render such services during a given period. The voluntary contracts of individuals for personal services in private business cannot justify the existence anywhere or at any time in this country of a condition of involuntary servitude not imposed as a punishment for crime, any more than contracts creating the relation of master and slave can justify the existence and recognition of a state of slavery anywhere, or with respect to any persons, within the jurisdiction of the United States. The condition of one who contracts to render personal services in connection with the private business of another becomes a condition of involuntary servitude *from the moment he is compelled against his will* to continue in such service. He may be liable in damages for the nonperformance of his agreement, but to require him, against his will, to continue in the personal service of his master is to place him and keep him in a condition of involuntary servitude. It will not do to say that by "immemorial usage" seamen could be held in a condition of involuntary servitude, without having been convicted of crime. The people of the United States, by an amendment of their fundamental law, have solemnly decreed that "except as a punishment for crime, whereof the party shall have been duly convicted," involuntary servitude shall not exist in any form in this country. The adding another exception by interpretation simply, and without amending the Constitution, is, I submit, judicial legislation. It is a very serious matter when a judicial tribunal, by the construction of an act of Congress, defeats the expressed will of the *legislative branch of **[302** the government. It is a still more serious matter when the clear reading of a constitutional provision relating to the liberty of man is departed from in deference to what is called usage which has existed, for the most part, under monarchical and despotic governments.

In considering this case it is our duty to look at the consequences of any decision that may be rendered. We cannot avoid this duty by saying that it will be time enough to consider supposed cases when they arise. When such supposed cases do arise, those who seek judicial support for extraordinary remedies that encroach upon the liberty of freemen will of course refer to the principles announced in previous adjudications, and demand their application to the particular case in hand.

It is therefore entirely appropriate to inquire as to the necessary results of the sanction given by this court to the statute here in question. If Congress, under its power to regulate commerce with foreign nations and among the several states, can authorize the arrest of a seaman who engaged to serve upon a private vessel, and compel him by force to return to the vessel and remain during the term for which he engaged, a similar rule may be prescribed as to employees upon railroads and steamboats engaged in commerce among the states. Even if it were conceded—a concession to be made only for argument's sake—that it could be made a criminal offense, punishable by fine or imprisonment or both, for such employees to quit their employment before the expiration of the term for which they agreed to serve, it would not follow that they could be compelled, against their will and in advance of trial and conviction, to continue in such service. But the decision to-day logically leads to the conclusion that such a power exists in Congress. Again, as the legislatures of the states have all legislative power not prohibited to them, while Congress can only exercise certain enumerated powers for accomplishing specified objects, why may not the states, under the principles this day announced, compel all employees of railroads engaged in domestic commerce, and all do-



Digitized by Google

mestic servants, and all employees in private 303] establishments, *within their respective limits, to remain with their employers during the terms for which they were severally engaged, under the penalty of being arrested by some sheriff or constable, and forcibly returned to the service of their employers? The mere statement of these matters is sufficient to indicate the scope of the decision this day rendered.

The 13th Amendment, although tolerating involuntary servitude only when imposed as a punishment for crime of which the party shall have been duly convicted, has been construed, by the decision just rendered, as if it contained an additional clause expressly excepting from its operation seamen who engage to serve on private vessels. Under this view of the Constitution, we may now look for advertisements, not for runaway servants as in the days of slavery, but for runaway seamen. In former days overseers could stand with whip in hand over slaves and force them to perform personal service for their masters. While, with the assent of all, that condition of things has ceased to exist, we can but be reminded of the past when it is adjudged to be consistent with the law of the land for freemen who happen to be seamen to be held in custody that they may be forced to go aboard private vessels and render personal services against their will.

In my judgment the holding of any person in custody, whether in jail or by an officer of the law, against his will, for the purpose of compelling him to render personal service to another in a private business, places the person so held in custody in a condition of involuntary servitude forbidden by the Constitution of the United States; consequently, that the statute as it now is, and under which the appellants were arrested at Astoria and placed against their will on the barkentine Arago, is null and void, and their refusal to work on such vessel after being forcibly returned to it could not be made a public offense authorizing their subsequent arrest at San Francisco.

I dissent from the opinion and judgment of the court.

---

## 304] WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*, v. STATE OF INDIANA.

(See S. C. Reporter's ed. 304-310.)

*Penalty for nonpayment of taxes—legislative discretion.*

1. A penalty of 50 per cent for nonpayment of taxes by a telegraph company, doing business in the state, which is imposed by Ind. act March 6, 1893, is not unconstitutional as a denial to such company of the equal protection of the law, or as an arbitrary classification, or as a deprivation of property without due process of law.

2. The amount of penalty to be imposed for nonpayment of taxes is in the discretion of the legislature.

[No. 649.]

*Submitted December 11, 1896. Decided February 1, 1897.*

IN ERROR to the Supreme Court of the State of Indiana to review a judgment of that court, affirming the judgment of the Circuit Court of Marion County in that state in favor of the plaintiff, the State of Indiana, against the Western Union Telegraph Company for the amount of taxes on the property of said company for certain years and the penalty of 50 per cent for the failure or refusal to pay the same. *Affirmed.*

See same case below (Ind.) 44 N. E. 798.

Statement by Mr. Chief Justice **Fuller:**

Under an act of the general assembly of Indiana of March 6, 1891, in respect of the assessment and collection of taxes upon all property within the jurisdiction of the state, it was provided that payment of the taxes in the year succeeding their assessment might be made in two instalments, and a penalty of 10 per cent was denounced for the first six months of delinquency and of an additional 6 per cent for the second six months.

On March 6, 1893, an amendatory act was passed providing for the taxation of telegraph, telephone, palace-car, sleeping-car, drawing-room car, dining-car, express, fast-freight and joint stock associations, companies, copartnerships, and corporations transacting business in the state, of which § 11 was as follows:

*"In case any such association, copart [305 nership, or corporation as named in this supplemental and amendatory act, shall fail or refuse to pay any taxes assessed against it in any county or township in the state, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the state of Indiana by the prosecuting attorneys of the different judicial circuits of the state on the relation of the auditors of the different counties of this state, and the judgment in said action shall include a penalty of 50 per cent of the amount of taxes so assessed and unpaid, together with reasonable attorneys' fees for the prosecution of such action, which action may be prosecuted in any county into, through, over, or across which the line or route of any such association, copartnership, company, or corporation shall extend, or in any county where such association, company, copartnership, or corporation shall have an office or agent for the transaction of business. In case such association, company, copartnership, or corporation shall have refused to pay the whole of the taxes assessed against the same by said state board of tax commissioners, or in case such association, company, copartnership, or corporation shall have refused to pay the taxes, or any portion thereof assessed to it in any particular county or counties, township or townships, such action

NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

*As to power of states to tax*, see note to Dobbins v. Erie County Comrs. 10: 1022.

*As to when an injunction to restrain the collection of a tax will be granted*, see note to Dows v. Chicago, 20: 65.

*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.



Digitized by Google

may include the whole or any portion of the taxes so unpaid in any county or counties, township or townships, but the attorney general may, at his option, unite in one action the entire amount of the tax due, or may bring separate actions in each separate county or township, or join counties and townships, as he may prefer. All collection of taxes for or on account of any particular county made in any such suit or suits shall be by said auditor of state accounted for as a credit to the respective counties for or on account of which such collections were made by said auditor of state at the next ensuing settlement with such county, but the penalty so collected shall be credited to the general fund of the state; and upon such settlement being made the treasurers of the several counties shall, at their next settlements, enter credits upon the proper duplicates in their offices, and at the next settlement with such [306] county report the *amount so received by him in his settlement with the state, and proper entries shall be made with reference thereto: *Provided, however*, That in any such action the amount of the assessment fixed by said state board of tax commissioners and apportioned to such county, or apportioned by the county auditor to any particular township, shall not be controverted."

In December, 1893, the Western Union Telegraph Company brought suit against the auditors and treasurers of the various counties in the state of Indiana through or in which its lines extended, to enjoin the collection of the taxes assessed for the year 1893, on the ground that the act of 1893 was unconstitutional. This cause was decided in favor of the validity of the law in the circuit court of Marion county, from which an appeal was taken to the supreme court of Indiana, where the judgment was affirmed. *Western U. Teleg. Co.* v. *Taggert*, 141 Ind. 281. A writ of error was sued out from this court to the supreme court of Indiana to review that decision, and the judgment of that court was affirmed. *Western U. Teleg. Co.* v. *Taggart*, 163 U. S. 1 [41: 49].

In August, 1894, the telegraph company filed a bill in the circuit court of the United States for the district of Indiana against the auditor of the state of Indiana to enjoin him from certifying to the auditors of the various counties the assessments on its property made by the state board of tax commissioners for the year 1894, on the ground of the unconstitutionality of the act of 1893. A demurrer was sustained to the bill, and it was thereupon dismissed. *Western U. Teleg. Co.* v. *Henderson*, 68 Fed. Rep. 588. From this decree of the circuit court an appeal was taken to this court and the cause docketed February 17, 1896, which appeal was dismissed by appellant, December 7, 1896.

On May 7, 1894, the state of Indiana brought suit against the company in the circuit court of Marion county to recover the taxes for 1893, and subsequently, on June 11, 1895, filed a supplemental complaint therein, seeking judgment for the delinquent taxes for the year 1894. The state recovered judgment for the amount of the taxes and penalties thereon for the years named, including the penalty of 50 per cent, and the telegraph company appealed to the supreme court of the state, where the judgment was affirmed. *Western U. Teleg. Co.* v. *State* (Ind.) 44 N. E. 798. The *cause [307] was then brought to this court on writ of error.

*Messrs.* **Samuel O. Pickens, Willard Brown,** and **Charles W. Wells** for plaintiff in error.

*Messrs.* **William A. Ketcham,** Attorney General of Indiana, **Alonzo Greene Smith,** and **Merrill Moores** for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Whether the 50 per cent penalty clause of the act of 1893 contravenes the Constitution of the United States is the question presented on this writ. If it does not, the question whether that penalty was properly included in the judgment rendered against the telegraph company was for the determination of the state courts.

The necessity of classifying the subjects of taxation in order to reach uniform and just results, as far as possible, is not denied; nor that the infliction of penalties on delinquency is a usual and legitimate mode of compelling the prompt payment of taxes. But the contention is that this provision for a 50 per cent penalty is an arbitrary discrimination, not falling within the principle of classification, and therefore open to constitutional objection as amounting to a denial of the equal protection of the laws and a deprivation of property without due process of law.

The supreme court of Indiana was of opinion that by reason of the differences in the nature of these companies and the uses to which their property was devoted in the prosecution of their business from other taxpayers and their property and business, the legislature was justified in placing them in a class by themselves and subjecting them to the particular method of effecting collection by means of penalties and suit for recovery of judgment for the delinquent taxes with penalties added.

*Under the act of March 6, 1891, tax- [308] payers and their property were variously classified in respect to the nature of their business and property, as, for instance, associations for banking purposes, not incorporated, were placed in one class, while the shares of capital stock of banks located within the state, whether organized under the laws of the state or the United States, were placed in another and assessed to the owners thereof, special provision being made for the bank to retain dividends belonging to the stockholders until the taxes should be paid (Ind. act. 1891, chap. 99, §§ 59-66); insurance companies, not organized under the laws of the state, were placed in another class, and it was provided that any insurance company failing or refusing for more than thirty days to render an account for its premium receipts and pay taxes thereon, should forfeit $100 per day for each day the report was withheld or payment delayed, to be recovered in an action, authority being also conferred on the auditor of state to revoke the authority of the defaulting company to do business (§ 67); express companies were placed in another class and provision made for the forfeiture of $100 per day for failure to render the particular account provided for and pay the required taxes



Digitized by Google

thereon, to be recovered in an action, the companies being prohibited from carrying on business until the payment was made (§ 68). Similar provisions were made as to telegraph companies (§ 69), telephone companies (§ 70), and sleeping-car companies (§ 71), and the same in substance as to bridge and ferry companies (§ 72). Street railroads, waterworks, gas, manufacturing and mining companies, insurance companies, and other associations incorporated under the laws of the state, etc., were subjected to still a different provision (§ 73). Railroad companies (§§ 76-88) and building, loan, and savings institutions (§ 89) were also placed in different classes.

The act of March 6, 1893, repealed the sections of the prior act relating to express, telegraph, telephone, and sleeping-car companies, and, with other provisions, prescribed this 50 per cent penalty and provided for an action for the delinquent taxes and penalties, by way of se-

**309**] curing collection. The ordinary remedies by levy, distraint, and sale were manifestly believed by the general assembly to be open, as to these companies and their properties, to objection as interfering with the exercise of their public functions, and directly impeding the transaction of interstate commerce; and the impracticability of pursuing the ordinary methods of collection, in view of that objection, furnished a sufficient ground for the adoption of another mode as better suited to the exigency because not involving the suspension of the discharge of public duty in that regard.

It has been repeatedly laid down, as stated by Mr. Justice Lamar, in *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 351 [35: 1035, 1039, 3 Inters. Com. Rep. 810], "that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens;" and it is equally true as to the particular means taken to enforce the collection of taxes, one rule may be adopted in respect of the admitted use of one kind of property and another rule in respect of the admitted use of another, in order that all may be compelled to contribute their proper share to the burdens of government.

As to railroad companies, it had been decided in Indiana that, under existing statutes, neither the franchise and the privileges of such companies, nor any lands, easements, or things essential to their existence, or necessary to the enjoyment of their franchise, could be sold on execution to satisfy judgments at law against them, while their rolling stock, when not in actual use, was liable to seizure and sale; and that the legislature had deemed it the wiser course to leave the method of coercing payment in each case to the flexible jurisdiction of a court of chancery rather than to prescribe a method which might be suited to one case and not to another. *Louisville, N. A. & C. R. Co.* v. *Boney*, 117 Ind. 501 [3 L. R. A. 435].

In respect of the companies under consideration, the infliction of a severe penalty and the recovery of judgment in a suit for taxes and penalties, which judgment would bear interest (as it had been held delinquent taxes did not,

*Evansville & T. H. R. Co.* v. *West*, 139 [**310** Ind. 254), and could be collected through the appointment of a receiver, by sequestration or otherwise, if in such manner as enabled the discharge of public duties to be maintained, was assumed, on grounds of public policy, to be the least objectionable and most efficient course to be pursued.

Judgments having been rendered at law, whatever course might be adopted thereupon for their collection would be necessarily such as would conserve the public interest and would not stay the operations the companies were organized to carry on.

The amount of the penalty was a matter for the legislature to determine in its discretion, and the supreme court refers to the imposition of penalties in other instances under the statutes of Indiana, varying according to the particular subjects of taxation, apparently calculated to operate with quite as much harshness.

It may properly be further remarked that these companies could have avoided incurring this liability, since, if desirous of testing the legality of the taxes assessed against them, they could have paid them under protest and brought suit to recover back the money so paid, if unlawfully exacted, or applied to the proper authorities for relief, adequate provision being made by the laws of Indiana for the prompt return thereof in case of the invalidity of the assessment, in whole or in part. Ind. Stat. 1894, §§ 7915, 7916.

We are unable to discover any ground for holding that the Federal Constitution was violated by this law, and agree in the view which the supreme court of the state expressed in the premises.

*Judgment affirmed.*

---

## WARREN E. PRICE, *Plff. in Err.*, [311
*v.*
## UNITED STATES.

(See S. C. Reporter's ed. 311-315.)

*Depositing in the mails obscene matter—decoy letters.*

1. An allegation that defendant knowingly deposited in the mails a publication "the character of which is so obscene, lewd, and lascivious that said book would be offensive if set forth in this indictment," sufficiently charges that the book was in fact obscene, lascivious, or lewd, and that he knew it to be so.
2. It is no defense for the mailing of obscene publications that they are sent to a government inspector who has written decoy letters asking for them.

[No. 625.]

*Submitted January 19, 1897. Decided February 15, 1897.*

NOTE.—*As to obstructing the mail: what constitutes the offense,*—see note to United States v. Kirby, 19: 278.

*As to liability of postmaster general and postmaster for loss and detention of letters and papers,* see note to Dunlop v. Munroe, 3: 329.



Digitized by Google

IN ERROR to the District Court of the United States for the Northern District of California to review a judgment convicting Warren E. Price under U. S. Rev. Stat. § 3893, for depositing in the mails of the United States obscene, lewd, and lascivious matter. *Affirmed.*

The facts are stated in the opinion.

*Messrs.* **Warren E. Price,** *in propria persona*, and *Burnette G. Haskell*, for plaintiff in error.

*Mr.* **J. M. Dickinson,** Assistant Attorney General, for defendant in error.

Mr. Justice **Peckham** delivered the opin ion of the court:

The plaintiff was indicted under U. S. Rev. Stat. § 3893, for depositing in the mails of the United States obscene, lewd, and lascivious matter. After trial, he was convicted and sentenced to eighteen months' imprisonment in the California state prison, and to pay a fine of $500. Upon writ of error sued out from this court the record is now before us for review.

The indictment contained five counts, the first, second, and fourth of which charged the defendant with giving information as to where obscene matter might be obtained, and the third and fifth charged him with depositing such matter in the mails. A motion was made before trial to quash all the counts of the indict-[312]ment, and it was granted as to the first, second, and fourth, and denied as to the third and fifth counts. The defendant then demurred to the indictment on the ground that it did not charge that the matter was nonmailable, nor did it charge that it was obscene or lewd or lascivious or of an indecent character. The demurrer was overruled and the parties went to trial. After his conviction of the offense stated in the third and fifth counts the defendant moved in arrest of judgment on the ground, among other things, that it was nowhere in either of these counts alleged that the book or pamphlets, or either of them, was in fact obscene, lewd, or lascivious, or of an indecent character, and that they were nonmailable matter. The motion was overruled and the defendant sentenced as above stated.

There are but two grounds upon which the sufficiency of the indictment is attacked; the first being that there is no direct allegation in either count that the defendant knew that the book that he deposited in the mail was obscene or lewd or lascivious, the only charge being, as is claimed, that he knowingly deposited a book, the contents of which were, as a matter of fact, lewd and lascivious, the point being the alleged absence of any charge that he knowingly deposited a book which in fact was obscene, lascivious, and lewd, and which he knew was of that character.

The further ground is taken that there is in truth no allegation that the matter was obscene or lewd or lascivious, but the indictment contains nothing more than a mere expression of the opinion of the pleader that it was so obscene as to be unfit for repetition in the indictment.

We think there is no force in either contention. The plain meaning of the indictment is that the defendant deposited in the mails a book which he knew to be obscene, and that in truth it was obscene, and so much so as to render it improper and offensive to place the same upon the public record of the court. The indictment is substantially like the one which we held to be sufficient in *Rosen* v. *United States*, 161 U. S. 29 [40: 606]. The indictment in that case, as it is set forth in the report, states that the accused, on the 24th day of April, 1893, within the southern district of New York, "did unlawfully, wilfully, and knowingly *deposit and cause to be deposited in [313] the postoffice of the city of New York, for mailing and delivery by the postoffice establishment of the United States, a certain obscene, lewd, and lascivious paper, which said paper then and there, on the first page thereof, was entitled 'Tenderloin Number, Broadway,' and on the same page were printed the words and figures following,—that is to say: 'Volume 11, number 27; trademark, 1892; by Lew Rosen; New York. Saturday, April 15, 1893; ten cents a copy, $4.00 a year, in advance;' and thereupon, on the same page, is a picture of a cab, horse, driver, and the figure of a female, together (underneath the said picture) with the word 'Tenderloineuse,' and the said paper consists of twelve pages, minute description of which, with the pictures therein and thereon, would be offensive to the court and improper to spread upon the records of the court because of their obscene, lewd, and indecent matters; and the said paper on the said twenty-fourth day of April, in the year one thousand, eigh hundred and ninety-three, was inclosed in a wrapper and addressed as follows,—that is to say: 'Mr. Geo. Edwards, P. O. box 510, Summit, N. J.,'—against the peace of the United States and their dignity, and contrary to the statute of the United States in such case made and provided."

In that case we held that the general charge that defendant unlawfully, wilfully, and knowingly deposited and caused to be deposited in the postoffice a certain obscene, lewd, and lascivious paper, as therein described, might not unreasonably be construed as meaning that the defendant was and must have been aware of the nature of its contents at the time he caused it to be put into the postoffice for transmission and delivery. Mr. Justice Harlan, in delivering the opinion of the court in that case, said: "Of course he did not understand the government as claiming that the mere depositing in the postoffice of an obscene, lewd, and lascivious paper was an offense under the statute, if the person so depositing it had neither knowledge nor notice, at the time, of its character or contents. He must have understood from the words of the indictment that the government imputed to *him knowl-[314] edge or notice of the contents of the paper so deposited. In their ordinary acceptation, the words 'unlawfully, wilfully, and knowingly,' when applied to an act or thing done, import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing; and when used in an indictment in connection with the charge of having deposited in the mails an obscene, lewd, and lascivious paper, contrary to the statute in such case made and provided, could not have been construed as applying to the mere depositing in the mail of a paper the contents of which at the time



Digitized by Google

were wholly unknown to the person depositing it. The case is therefore not one of total omission from the indictment of an essential averment, but, at most, one of the inaccurate or imperfect statement of a fact; and such statement, after verdict, may be taken in the broadest sense authorized by the words used, even if it be adverse to the accused."

A distinction is attempted to be taken between the *Rosen Case* and the one at bar for the reason, as is stated, that the indictment in the former case contained a direct charge that the defendant did deposit in the postoffice a certain obscene, lewd, and lascivious paper, whereas in this case no such charge is made, but only that the defendant knowingly deposited, etc., a printed book and pamphlet "the character of which is so obscene, lewd, and lascivious that said book would be offensive if set forth in full in this indictment." In other words, it is said that when an indictment contains a charge that a book "is so obscene, lewd, and lascivious" that it would be offensive to set it forth in full in the indictment, it is not thereby charged that the book was in fact obscene, lewd, or lascivious. It takes stronger eyes than we possess to discover any real and material difference in the meaning of the two expressions. The plain English of an allegation that a book is so obscene and indecent as to be offensive, if set forth in full in an indictment and placed upon the records of the court, is that the book is obscene in fact and to the degree described. No one denies that there are degrees of obscenity, any more than that two and two make four, but when a book is stated to be so obscene that it would be offen-315 sive if set forth in full in an indictment, such allegation imports a sufficient degree of obscenity to render the production nonmailable and obscene under the statute.

This indictment is sufficient because it does, in fact, contain a charge that the book was obscene, to the knowledge of the defendant, who knowingly and wilfully, with such knowledge, deposited it in the mail and thus violated the statute. No one, on reading the third and fifth counts of the indictment, could come to any other conclusion in regard to their meaning, and when this is the case an indictment is good enough.

There is no danger of the defendant in such case being deprived of any of his just rights by holding the indictment to be good. If there were any defect at all in such an indictment it should, as was stated in the *Rosen Case*, be regarded after verdict as one of form under U. S. Rev. Stat. § 1025, providing that the proceedings on an indictment found by a grand jury in any district, circuit, or other court of the United States shall not be affected "by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant."

One further ground for a reversal is made by counsel for plaintiff in error. It appears from the bill of exceptions that the government inspector who instigated the prosecution in this case had been informed that the statute was being violated, and for the purpose of discovering the fact whether or not the plaintiff in error was engaged in such violation, the inspector wrote several communications of the nature of decoy letters, which are set forth in the record, asking the plaintiff in error to send him through the mail certain books of the character covered by the statute, which the plaintiff in error did, as is alleged by the prosecution and as has been found by the verdict of the jury. This has been held to constitute no valid ground of objection. *Rosen* v. *United States*, 161 U. S. 42 [40: 610]; *Andrews* v. *United States*, 162 U. S. 420 [40: 1028].

*There is no error in the record and the judgment of the court below must be affirmed.*

---

## UNITED STATES, *Appt.*, [316
## v.
## JOSHUA GORHAM.

(See S. C. Reporter's ed. 316-322.)

*Judgment for Indian depredations.*

Judgment for Indian depredations may be rendered against the United States alone, under the act of March 3, 1891, where the tribe of Indians to which the depredators belong cannot be identified, although by the act the court is required to determine, if possible, the tribe which committed the wrong, and render judgment against the United States and against such tribe when identified.

[No. 187.]

*Argued January 28, 1897. Decided February 15, 1897.*

APPEAL from a judgment of the Court of Claims in favor of Joshua Gorham against the United States for damages for the destruction of plaintiff's property by the Comanche and Kiowa Indians. *Affirmed.*

See same case below, 29 Ct. Cl. 97.

Statement by Mr. Justice **Peckham**:

The appellee herein filed his petition against the United States and the Comanche and Kiowa Indians in the court of claims on the 4th day of September, 1891, in which he claimed to recover damages for the destruction of his property on the 20th day of January, 1868, by the Comanche and Kiowa Indians, in amity with the United States, at Indian creek, in Cooke county, Texas. The property destroyed consisted of horses, mares, and colts, of the alleged value of $1,890.

The government filed an answer to such petition, in which it denied each and every allegation therein contained. The case was duly tried before the court, which found as facts that the claimant was at the time of the loss of his property, and ever since has been, a citizen of the United States, and that in the year 1868 he was the owner of the property described in his petition, and that it was of the total value of $1,890; that it was destroyed or taken from him by Indians belonging to the Indian tribes, at the time in amity with the United States, and the depredation was without just cause or provocation on the part of claimant, and that

NOTE.—*As to Indians and Indian tribes, their status and rights; jurisdiction and control over them,* —see note to Worcester v. Georgia, 8: 483.



Digitized by Google

it did not appear at the time of the depredation that any Indian troubles existed; that no part of the property included in the computation had been returned or paid for. Upon these findings the court decided as conclusions of law that the plaintiff was entitled to recover from the United States the value of the property, $1,390; and that his petition as against the Comanche and Kiowas should be dismissed. Judgment was accordingly entered against the [317] United States for the sum named and *for a dismissal against the Indians. A motion by the United States for a new trial was overruled, and thereafter an appeal was allowed to this court. Reported below in 29 Ct. Cl. 97.

The appellant assigns for errors of fact:

(1) That the court erred in finding that claimant's property was taken or destroyed by Indians belonging to Indian tribes at the time in amity with the United States.

(2) In finding that the depredation was committed without just cause or provocation on the part of the claimant or his agent.

(3) In finding that it does not appear that any Indian troubles existed at the time of the depredation.

Errors of law are assigned:

(1) That the court erred in its conclusion of law that the claimant should recover from the United States the sum of $1,390; and,

(2) It erred in entering judgment against the United States.

*Messrs.* **Alexander Porter Morse** and *Charles B. Howry*, Assistant Attorney General, for appellant.

*Mr.* **John Wharton Clark** for appellee.

Mr. Justice **Peckham** delivered the opinion of the court:

There is here but a single question for this court to review, and that relates to the right of the court of claims to render judgment against the United States alone under the Indian depredation act where the tribe of Indians to which the depredators belong cannot be identified, and such inability is stated and judgment rendered against the United States only.

The act in question is entitled, "An Act to Provide for the Adjudication and Payment of Claims Arising from Indian Depredations," approved March 3, 1891. (26 Stat. at L. 851, chap. 538).

Under that act jurisdiction is conferred upon the court of claims to inquire into and finally adjudicate, in the manner provided in the act, first, all claims for the property of citizens of the United States taken or destroyed by Indians [318] *belonging to any band or tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

The 2d section of the act waives all questions of limitation as to the time and manner of presenting such claims, provided that no claim accruing prior to July 1, 1865, is to be considered by the court unless the claim shall be allowed or has been or is pending, prior to the passage of the act, before Congress or before the other officers named therein.

The 3d section provides that all claims shall be presented to the court by petition, setting forth the facts upon which such claims are based, "the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, *as near as may be*, the property lost or destroyed, and the value thereof, and any other facts connected with the transactions and material to the proper adjudication of the case involved."

The 4th section provides for service of the petition upon the Attorney General of the United States, and makes it his duty to appear and defend "the interests of the government and of the Indians in the suit." It provides for the filing of a proper plea by the Attorney General, and that in case of his neglect to do so the claimant may proceed with the case, but he "shall not have judgment for his claim or for any part thereof unless he shall establish the same by proof satisfactory to the court."

The 5th section provides, among other things, "that the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, *and against the tribe of Indians committing the wrong, when such can be identified.*"

The 6th section provides that the amount of the judgment rendered against any tribe of Indians shall be charged against the tribe by which or by the members of which the court shall find that the depredation was committed, and shall be *deducted and paid in the [319] following manner: "First, from annuities due said tribe from the United States; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third, if no such funds are due or available, then from any appropriation for the benefit of said tribe other than appropriations for their current and necessary support, subsistence, and education; and fourth, if no such annuity, fund, or appropriation is due or available, then the amount of the judgment shall be paid from the Treasury of the United States: *Provided*, That any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund, or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe."

The 8th section provides "that immediately after the beginning of each session of Congress the Attorney General of the United States shall transmit to the Congress of the United States a list of all final judgments rendered in pursuance of this act in favor of claimants and against the United States, and not paid as hereinbefore provided, which shall thereupon be appropriated for in the proper appropriation bill."

The 10th section provides for an appeal by the claimant or the United States or the tribe of Indians, or other party thereto interested in any proceeding brought under the provisions of the act.

The scheme of the act is to provide payment to the citizen for property destroyed under the circumstances stated in the 1st section, and



Digitized by Google

where the Indians can be identified to make them, through the funds coming to them from the government, pay back to it the amount it pays by reason of the property so destroyed. We think the liability of the government to pay, upon proof of the facts set forth in the 1st section, was not intended to be dependent upon the ability of the claimant to identify the particular tribe of or the individual Indians who committed the depredations. If the identification could be made they were to repay the gov-
320 ]ernment, *but the indemnification of the citizen was not to be dependent upon that fact.

When this case was before the court of claims it received the very careful attention of that court, and scarcely anything can be added to its well-considered opinion delivered by Judge Nott in directing judgment against the United States and dismissing the petition against the Comanche and Kiowa Indians.

In conferring jurisdiction in this class of cases upon the court of claims, it will be seen that Congress conferred it in regard to all claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge. So long as the depredations were committed upon the property of citizens of the United States, and by Indians in amity with the government, without just cause, etc., jurisdiction and authority to inquire into and finally adjudicate upon such claims was granted to the court. This broad ground of jurisdiction would, unless circumscribed by the subsequent provision of the act, permit an adjudication against the United States alone. There is nothing in any other portion of the act which provides in terms for joining as co-defendants with the United States the tribes or bands of Indians by whom the alleged illegal acts were committed. The 3d section of the act merely provides for the contents of the petition, and by such section it is made the duty of the petitioner to state in his petition "the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, as near as may be," etc. This is for the obvious purpose of giving some notice to the government of the alleged facts upon which the claim is based so that the proper defense, if any exist, may be made to the claim.

Section 4, among other things, grants the right to any Indian or Indians interested in the proceedings to appear and defend by an attorney employed by such Indian or Indians, with the approval of the Commissioner of Indian Af-
321 ] fairs, *if he or they so choose to do; but if no such appearance is made, it still remains the primary duty of the Attorney General, under the provisions of the same 4th section, to appear and defend the interest of the government and of the Indians in the suit, and no claimant can have judgment for his claim or any part thereof unless he shall establish the same by proof satisfactory to the court.

Taking into consideration that, by the 5th section, it is the duty of the court to determine in each case, "if possible, the tribe of Indians or other persons by whom the wrong was committed, and to render judgment in favor of the claimant or claimants against the United States and against the tribe of Indians committing the wrong, when such can be identified," it may be fairly claimed that, reading all the provisions together, the act makes it necessary, when known, to join with the United States the Indians or tribe of Indians by whom the illegal acts are alleged or are supposed to have been committed. Although the 4th section provides for the defense of the claim by the law officer of the government under any circumstances, yet as the interest of the Indians is embraced in the inquiry before the court because of their liability, to a judgment against them, if identified, and to a payment of that judgment out of the annuities or otherwise as provided for in the 6th section, it is proper to allow them to appear and defend also by their own attorney. But the 5th section provides for judgment in favor of claimant and against the United States in any event, where the property of a citizen has been destroyed under the circumstances provided in the statute, but only against the tribe of Indians committing the wrong "when such can be identified," and of course it follows that if they cannot be identified no judgment can go against them. The United States would then be left as alone responsible for the property destroyed provided the proofs were of the character mentioned in the 1st section of the act; that is, the claimant would be bound to prove that he was a citizen of the United States at the time of the taking or destruction of his property; that it had been taken by Indians belonging to some band or tribe or *nation in amity with [322
the United States, without just cause or provocation on the part of the owner or agent in charge, and that it had not been returned or paid for.

Unless it can be asserted that it is impossible to make out a cause of action for such destruction of property by the class of Indians mentioned in the 1st section, without identifying such class as mentioned in the 5th section, we can see no objection to a recovery against the United States alone in this case. We do not think that it is impossible to prove facts of the nature set forth in the 1st section, although they may have occurred under such circumstances as to prevent identification of the particular tribe or band of Indians committing the illegal act. The circumstances of the case might show beyond any reasonable doubt that the property had been destroyed by Indians; that it was at the time so situated with regard to various bands of Indians, all of whom were in amity with the United States, as to make it impossible to identify the particular band to which the Indians belonged who committed the depredation, but that from the facts it could not be successfully questioned that the Indians of one or the other of these bands had committed the depredation. Under such circumstances we think the claimant would bring his cause within the provisions of the act in question. He would have proved that his property had been destroyed by Indians belonging to a band or tribe in amity with the United States, but which of several bands of that description he would be unable to identify. Consequently the judgment would go against the United States, but not against any



Digitized by Google

particular band because of the failure of the proof.

We think after a careful examination of the whole act that the court of claims was right in entering judgment against the United States alone. The claimant having died pending the suit, the question as to the appointment and appearance of an administrator may be dealt with in the court of claims.

*The judgment of that court is therefore affirmed.*

---

323] RUFUS E. GRAVES, *Plff. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 323-330.)

*False entries in bank reports.*

Entries of overdrafts under the heading "Loans and discounts" in a report as to the condition of a national bank, when they were made by depositors who had permission to make them under arrangements with the proper managers of the bank for credit, are not false entries under U. S. Rev. Stat. § 5209, when made in good faith and in the belief of the right to make them.

[No. 31.]

*Argued January 4, 5, 1897. Decided February 15, 1897.*

IN ERROR to the District Court of the United States for the Northern District of Iowa to review a judgment of that court convicting Rufus E. Graves under U. S. Rev. Stat. § 5209, of making false entries in reports of the condition of the Commercial National Bank of Dubuque, of which he was president. *Reversed*, and cause remanded for a new trial.

See same case below, 58 Fed. Rep. 634.

The facts are stated in the opinion.

*Mr.* **C. C. Cole** for plaintiff in error.

*Mr.* **Edward B. Whitney**, Assistant Attorney General, for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

The plaintiff in error was convicted in the United States district court for the northern district of Iowa, under U. S. Rev. Stat. § 5209, of making false entries in certain reports in regard to the condition of the Commercial National Bank of Dubuque, of which he was president.

The indictment contained sixteen counts, all but six of which were taken from the jury, the remaining counts being the fourth, fifth, seventh, eighth, ninth, and tenth.

The fourth and seventh counts relate to the making of alleged false entries in the returns made respectively on the 5th days of August and October, 1887. Those counts (each relating to one of the two returns) charged that the plaintiff in error falsely *understated* the amount of overdrafts paid by the bank and remaining unpaid to it on the date mentioned in the count.

The ninth and tenth counts relate to [324 the same reports, and each count charges that the plaintiff in error falsely *overstated* the amount of loans and discounts which the bank had made and which stood on its books at the date mentioned, the claim in fact being that, as to the sum of about $20,000 contained in the item of "loans and discounts," the return was a false statement.

The point in dispute is in regard to which heading of the returns the items amounting to about $20,000 should have been placed under; whether they should have been treated as overdrafts or as loans and discounts.

The proof regarding these four counts shows that there are in substance two charges of making false entries under the two heads of "overdrafts" and "loans and discounts" in the returns dated respectively August and October, 1887.

The fifth and eighth counts relate to the making of entries alleged to have been false in the returns for the same two quarters, and relating to the liabilities of the directors, it being therein charged that those liabilities were stated in each report at a sum much less than the actual fact required it.

The plaintiff in error having been duly arraigned upon the indictment pleaded not guilty, and was placed on trial at a term of the district court for the northern district of Iowa, eastern division, held in December, 1893, and was convicted upon the counts above mentioned.

In the course of the trial and for the purpose of proving the guilt of the accused under the fourth count, the government gave evidence that from the books of the bank there appeared under the head of loans and discounts, on August 1, 1887, the sum of $490,133.78; that the plaintiff in error was the president of the bank and as such signed the quarterly report to the comptroller of the currency as to the condition of the bank at the time last named; that under the head of loans and discounts he placed in the report to the comptroller the sum of $551,048.60, which, as is seen, is an increase of about $60,000 over the amount as shown by the bank's books on that date. One of the items going to make up this increase was the sum of $30,465, and this sum was part of a sum of $23,413.38 appear-[325 ing in the bank's books to have been drawn out by certain depositors in excess of the amounts appearing in such accounts to their credit. In this way it appeared on the books of the bank that there were overdrafts, on the above date, to the extent of $23,413.38. In the return to the comptroller the amount of overdrafts was stated to have been, at the close of business on the 1st of August, 1887, $2,948.38, when in truth, as is alleged, it was the sum above named, $23,413.38. The amount taken from the above item of overdrafts was placed by the plaintiff in error in the same report under the head of loans and discounts, thus increasing that sum by that amount. Other items were placed under that heading so as to make up the difference between the $490,000 and the $551,000 as above stated. The government claims the plaintiff in error had no right to

NOTE.—*As to liability of bank for general deposits*, see note to Planter's Bank v. Union Bank, 21: 473.

*As to special deposits, responsibility of bank for*, see note to First Nat. Bank v. Graham, 25: 750.



Digitized by Google

take those items amounting to over $20,000 from the heading "overdrafts" and place them under that of "loans and discounts," and that an intentional act of that kind was in violation of the statute, if meant to deceive. The plaintiff in error urged that he had the legal right to do as he did, and upon being called to the witness stand he testified substantially as follows:

"Certain overdrafts were classified and were put in the reports as loans and discounts, because the different persons making such overdrafts had spoken to the managers of the bank and obtained permission to make the same. Those overdrafts which had not been arranged for were reported as overdrafts. Those that were included in loans and discounts were accounts that had been arranged for and permission asked to overdraw. In other accounts treated as overdrafts were those where the person drew his check in advance without asking permission, and when this was done it was treated as an overdraft. Where they asked permission to overdraw and such permission was granted it was classified as a loan. The overdraft made upon permission of the bank was treated as a loan. The reports severally contained the overdrafts treated as a part of the loans and discounts, while the others were classed in the reports as overdrafts. (The wit-[326]ness names the persons *whose accounts were included in the loans and discounts, and each of whom had permission and had arranged for the overdraft; also the names and amounts of those whose accounts were overdrawn.)

"All these matters were brought before the board in detail. Explanations of the permission to overdraw were made to the board at their meetings. Each and all those accounts included in the loans and discounts had permission to overdraw and had arranged therefor. A classified list of overdrafts, showing the book loans and overdrafts proper, were laid before the directors at each of their meetings. A loan in the form of an overdraft account was classified as book loan and the others as overdrafts. They were presented to the directors in two lists; one headed as book loans and the other as overdrafts, and in this way they were presented to the board of directors at each of their meetings. Those persons having book loans were granted them for different reasons. The book loans were made to parties who had been to the bank and made arrangements to overdraw. The overdrafts were where checks were presented and paid without any arrangement or authority for the drawers to overdraw their accounts. Where an account had been overdrawn at first without permission, and parties thereafter made arrangement for its continuance for a few days, it was classed under the heading book loans."

Explanations of his action were given in regard to the other items in the report to the comptroller, making up the $60,000 increase of loans and discounts, the sufficiency of which it is not necessary here to discuss. It appears from the reasons stated by the plaintiff in error for changing the amounts of "loans and discounts" and "overdrafts," that the items making up the $20,000 were regarded by him as a loan by the bank, and not an overdraft; and although it appeared from an examination of the individual accounts of depositors in the bank, that more money had been drawn by certain of them than stood to their credit on the books of the bank, yet he thought this did not necessarily show that the excess of the draft over the amount of the credit was an overdraft, but that when the overdrafts had been arranged for by the *depositors with the[327] managers of the bank and consent been given by them that such overdrafts should be made and would be honored to the amount agreed upon, such a transaction amounted to a loan, and not an overdraft. Under these circumstances the court charged the jury, among other things, as follows:

"The further question remains as to this 'loans and discount' entry in the report to the comptroller, Did the defendant make a false entry in such report, when he entered as 'loans and discounts' the further sum of $20,465, which he has testified before you is composed of part of the overdrafts that day shown by the books of the bank to exist in the accounts of various depositors whose names he has given you? It will be convenient to consider this question in connection with the further charge in the indictment, with reference to said report of August 1, 1887, that defendant made a false entry in said report as to overdrafts.

"The proof shows that the amount of overdrafts entered in said report was the aggregate of $2,948.38, and defendant has testified before you that the aggregate overdrafts upon that day, as shown by the books of the bank, was the sum of $23,413.38, so that the books of the bank, at the close of business on August 1, 1887, show an aggregate of overdrafts in excess of that entered in said report of $20,463. In other words, while the books of the bank, in the progress of their regular keeping from day to day, showed the accounts of the depositors to be then overdrawn in the aggregate of $23,413.38, the entry in the report to the comptroller as to the condition of overdrafts that day was $20,465, less than shown by the books, and the entry in such report was the sum of $2,948.38.

"You will have noticed that this difference ($20,465) is the exact amount which defendant testifies he entered from or took from the overdraft account of the books of the bank, and put into the entry in the report as to 'loans and discounts.' And the matter may be thus stated: If defendant rightly did this,—that is, if in so doing he made a report to the comptroller of the true condition of the bank,—he did not then make a false entry in these particulars. But if the entry in *reporting[328] the overdraft that day as $2,948.38, instead of $23,413.38, was not a truthful entry, then, it would naturally follow that the entry in the 'loans and discounts' of said $20,465 of overdrafts was also not a truthful entry. For this sum of $20,465 of overdrafts could not have been truthfully entered in both overdrafts and loans and discounts. In which did a truthful entry of the condition of the bank require it to be entered?

"Now, there is no difficulty in understanding what an overdraft is. There is no conflict in the testimony on this point. The books of the bank as testified to by defendant and by all



Digitized by Google

the witnesses, and as themelves in evidence before you, show that an overdraft occurs whenever a depositor overdraws the amount of his deposit. I deposit in a bank $1,000 subject to be checked out. I commence to check it out. And whenever the amount of my checks paid by the bank exceeds the amount of the funds I have deposited, an overdraft occurs in my account, and such overdraft is the amount the bank has thus paid, over and beyond the amount I have deposited.

"Where, then, in the report to the comptroller should these overdrafts appear? You will find upon looking at the report made to the comptroller that it contains a heading called 'Overdrafts,' This heading is 'overdrafts,' plainly and simply and without more 'overdrafts.' *This is the form the comptroller has prescribed and which it was the duty of the defendant to follow and to enter correctly and truthfully whenever he made an entry in said report with regard to the condition of the bank as to overdrafts.*

"Counsel for defendant have argued to you that an overdraft is, in fact, a loan, and that, therefore, the defendant was justified in including 'overdrafts' in 'loans and discounts.' But the comptroller demanded that the bank should report 'overdrafts' in one place in the report, as well as 'loans' in another place. Defendant assumed to report 'overdrafts.' Did he make a true entry thereof? No explanation on the report advises the comptroller that the entry as to 'overdrafts' is an impartial or incomplete entry as to 'overdrafts' actually existing at the time the report assumed to give them.

329]* "There is no separate heading of 'overdrafts arranged for' in the report."

The effect of this charge was to tell the jury in substance that the plaintiff in error was required by the law to place under the heading "overdrafts" the full sum which the bank books showed had been drawn out by the depositors of the bank over and above the amounts which they had severally deposited therein; that a failure to do this was a failure to comply with the law, and that a transfer of any portion of such excess from the heading "overdrafts" to the heading "loans and discounts" was the making of a false entry, and under the general directions of the charge, if intentionally and wilfully made, it was a violation of the statute and a crime on the part of the plaintiff in error. It took away from the jury the right to even consider, upon the question of intent, the explanation given by the plaintiff in error for his changing the $20,000 item from under the heading "overdrafts" to that of "loans and discounts."

If the jury believed the testimony given by the plaintiff in error in regard to the arrangements which had been made by certain depositors in the bank with its proper managers to give them credit at the bank for a larger sum than appeared on the credit side of their accounts, up to a certain amount and for a certain time, and if under such circumstances the plaintiff in error made the entries in good faith and in the belief of his right so to do, they were not false entries within the meaning of the statute, and he was not guilty of a violation thereof in making them. The charge of the learned judge substantially took away this defense and held the plaintiff in error guilty if he knowingly and wilfully placed the alleged overdrafts under the heading of loans and discounts, a fact about which there was no dispute, ignoring thereby the right of the plaintiff in error to have the jury pass upon the question whether they had been arranged for in good faith as demand loans. This evidence had necessarily a prejudicial effect upon the defendant with regard to the other counts (fifth and eighth) of the indictment.

*We think the court erred in the above [330 charge, and *the judgment must therefore be reversed*, and the cause remanded with instructions to grant a new trial.

Mr. Justice **Harlan** dissents.

---

DISTRICT OF COLUMBIA, *Appt.*,
*v.*
GEORGE E. JOHNSON, Administrator, etc.

DISTRICT OF COLUMBIA, *Appt.*,
*v.*
MARGARET R. SHECKELS *et al.*

(See S. C. Reporter's ed. 330-339.)

*Interest, when not to be collected from the government—act of February 13, 1895—interest on claim.*

1. Interest is not to be collected from the government in the absence of language specially providing for its payment.
2. An allowance of board rates, instead of contract rates, by the act of Congress of February 13, 1895, in favor of contractors with the District of Columbia, being a pure gratuity establishing a claim which was previously illegal, will not make the claim bear interest prior to the date of the statute.
3. The District of Columbia is not entitled to interest on a counterclaim against a contractor for an illegal excess paid him on a contract, where the counterclaim itself is extinguished by the act of Congress of February 13, 1895, establishing the validity of a previously illegal claim for board rates instead of contract rates.

[Nos. 617, 618.]

*Submitted January 4, 1897. Decided February 15, 1897.*

APPEALS from judgments of the Court of Claims, one in favor of George E. Johnson, administrator, claimant, and the other in favor of Margaret R. Sheckels, claimant, against the District of Columbia, for certain claims against the District for work done under various contracts relating to improvements in

NOTE.—*As to interest, when recoverable as damages or on money*, see note to Sneed v. Wister, 5: 717.

*As to rate of interest after maturity*, see note to Ohio v. Frank, 26: 531.

*As to the rule of calculation of interest*, see note to Story v. Livingston, 10: 200.

*As to suspension of interest during war*, see note to Ward v. Smith, 19: 207.



Digitized by Google

the city of Washington *Reversed*, and cases remanded for further proceedings.

See same cases below, 31 Ct. Cl. 395.

The facts are stated in the opinion.

*Messrs.* **Joshua Eric Dodge**, Assistant Attorney General, and **Robert A. Howard**, Special Assistant Attorney, for appellants.

*Mr.* **J. J. Johnson** for Johnson, administrator, appellee.

*Mr.* **W. L. Cole** for Sheckels *et al.*, appellees.

Mr. Justice **Peckham** delivered the opinion of the court:

These are appeals from the court of claims which gave judgments in favor of the appellees in actions commenced by them in December, 331] 1880, pursuant to the provisions of *the act of June 16, 1880, entitled "An Act to Provide for the Settlement of all Outstanding Claims against the District of Columbia, and Conferring Jurisdiction on the Court of Claims to Hear the Same, and for Other Purposes." 21 Stat. at L. 284; 31 Ct. Cl. 395.

The actions relate to work done under various contracts with the authorities of the District of Columbia between 1871 and 1876. These contracts were a few among a very large number of others, entered into with the authorities of the District of Columbia by many different persons, and relating to improvements then in contemplation and partly in course of completion in the city of Washington. Those in question here were originally made with one Peter McNamara, in or about the year 1872, for work in the nature of grading, sewering, and filling various streets in that city. The contracts were in writing and stated the specific prices which were agreed upon for the various items of work to be performed under the contract.

At the time these contracts were entered into, an act of Congress, approved February 21, 1871 (16 Stat. at L. 419, chap. 62), forbade the municipal authorities to contract except in writing, and forbade the allowance of extra compensation for work done under a written contract. Notwithstanding this legislative prohibition the board of public works then existing, without authority and in plain violation of the terms of the act, raised the prices agreed to be paid under the contracts with McNamara to what are called "board rates" (that is, rates allowed by the board of public works), the effect of which was to enormously increase the cost of the work done under them. In this way the work upon the improvements went on until 1874, when Congress, by an act approved June 20, of that year (18 Stat. at L. 116), abolished the District government and substituted another in its stead. The 6th section of the act constituted the first and second comptrollers of the Treasury of the United States a board of audit for the settlement of all unfunded or floating debts of the District of Columbia and of the board of public works as specified in such section, and the section further 332] provided that the board of *audit should issue to each claimant a certificate signed by the board and countersigned by the comptroller of the District stating the amount found to be due to each and on what account.

The 7th section of the act provided that the sinking fund commissioners of the District should cause bonds of the District of Columbia to be prepared, bearing date August 1, 1874, and payable fifty years thereafter, with interest at the rate of $8\frac{65}{100}$ per cent per annum, payable semi-annually, which bonds the sinking fund commissioners were authorized to exchange at par for like sums for any class of indebtedness named in the preceding 6th section, including certificates of the auditing board provided in the act. The section contained the following statement: "And the faith of the United States is hereby pledged that the United States will, by proper proportional appropriations as contemplated in this act, and by causing to be levied upon the property within said District such taxes as will do so, provide the revenues necessary to pay the interest on said bonds as the same may become due and payable, and create a sinking fund for the payment of the principal thereof at maturity."

By general resolution, approved March 14, 1876 (19 Stat. at L. 211), Congress abolished the board of audit, and forbade the further issue of bonds.

By another act, approved June 11, 1878 (20 Stat. at L. 102, 104, 105), a permanent government was established for the District of Columbia, and in it the commissioners were required to annually make assessments for all expenses of the District, which, upon being submitted to the Secretary of the Treasury and approved by him, were to be laid before Congress; and it was then provided that "to the extent to which Congress shall approve of said assessments, Congress shall appropriate the amount of 50 per centum thereof, and the remaining 50 per centum of such approved assessments shall be levied and assessed upon the taxable property and privileges in said District other than the property of the United States and of the District of Columbia." In this manner Congress assumed the payment of a portion of the bonds and expenses of the District.

*Under the authority of these statutes, [333 the bonds of the District of Columbia, carrying interest at the rate of $8\frac{65}{100}$ per cent, were issued and used to a certain extent in the payment of the indebtedness of the District incurred as above mentioned. In 1880 there still remained outstanding many certificates which had been delivered by the board of audit under the 6th section of the act of 1874, and many accounts against the District were also outstanding and unprovided for.

On the 16th of June, 1880 (21 Stat. at L. 284), Congress passed "An Act to Provide for the Settlement of all Outstanding Claims against the District of Columbia, and Conferring Jurisdiction on the Court of Claims to Hear the Same, and for Other Purposes." That act conferred jurisdiction on the court of claims in regard to all such claims against the District of Columbia as then existed, arising out of contracts made by the late board of public works and extensions thereof, and to other claims mentioned in the section; and the act conferred upon the court the same power and provided that it should proceed in the same manner and should be governed by the same rules in respect to the mode of hearing,



Digitized by Google

determination, and adjudication of claims as in those against the United States.

The 2d section provided that the claims should be prosecuted by the contractor, his personal representative, or his assignee, in the same manner and subject to the same rules, so far as applicable, as claims against the United States are prosecuted therein. Judgments were to be entered, and for the payment thereof the 6th section provided as follows:

"The Secretary of the Treasury is hereby authorized to demand of the sinking fund commissioner of the District of Columbia so many of the three sixty-five bonds authorized by act of Congress approved June 20, 1874, and acts amendatory thereof, as may be necessary for the payment of the judgments; and said sinking fund commissioner is hereby directed to issue and deliver to the Secretary of the Treasury the amount of three sixty-five bonds required to satisfy the judgments; which bonds shall be received by said claimants at par in payment of such judgments, and shall bear date Au-
334] gust 1, 1874, *and mature at the same time as other bonds of this issue: *Provided*, That before the delivery of such bonds as are issued in payment of judgments rendered as aforesaid on the claims aforesaid, the coupons shall be detached therefrom from the date of said bonds to the day upon which such claims were due and payable; and the gross amount of such bonds heretofore and hereafter issued shall not exceed, in the aggregate, $15,000,000: *Provided*, The bonds issued by authority of this act shall be of no more binding force as to their payment on the government of the United States than the three sixty-five bonds issued under authority of the act of June 20, 1874."

The mode of payment thus provided for was changed subsequently by a provision in the act approved March 3, 1881 (21 Stat. at L. 458, 466), as follows:

"The Treasurer of the United States, as *ex officio* sinking fund commissioner, is hereby authorized, whenever in his opinion it will be more advantageous for the interest of the District of Columbia to do so, to sell the bonds authorized to be issued under the provisions of the 6th section of the act of the Congress of the United States, entitled 'An Act to Provide for the Settlement of all Outstanding Claims against the District of Columbia, and Conferring Jurisdiction on the Court of Claims to Hear the Same, and for Other Purposes,' approved June 16, 1880, for the satisfaction of the judgments which may be rendered by said court of claims under the provisions of said act, and pay the said judgments from the proceeds of said sales, instead of delivering to said judgment claimants the said bonds as provided for in said act."

A large number of actions were brought against the District under these statutes, and among them the two actions in question. They were brought by the executrix of McNamara and by the assignee of a portion of his claim against the District for the purpose of recovering payment of the balance alleged to be due under the various contracts which McNamara had secured from the municipal authorities. They were consolidated into one action on motion of the Attorney General, and proceeded to trial before a referee. The referee found upon the trial *a certain amount due the claimants by [335 reason of the work done under the contracts mentioned in the actions. He also found that there was due from the McNamara estate to the defendant, the District of Columbia, over and above the sum due from the District of Columbia to such estate, the amount of $6,694.41, being the excess which had been paid to McNamara at "board rates" for work done under his contracts, and which sum was over and above the amount which was due him at the rates provided for in his contracts, and the referee further found that such amount was due to the defendant as a counterclaim June 1, 1874, with interest from that date. The report of the referee having been filed was excepted to by claimants, but the defendant took no exception to the report, and there the matter rested until after the passage of the act of February 13, 1895 (28 Stat. at L. 664, chap. 87).

Prior to the passage of that act many of those contractors in whose favor "board rates" had been allowed instead of the prices which were contained in the contracts executed by them had brought suits against the District of Columbia of a nature similar to the two suits now here, and had based their claims as to the balance due them with reference to the board rates allowed for work under the contracts instead of the prices named in such contracts. These claims had been held to be illegal, and the District of Columbia had successfully defended the actions and had succeeded in obtaining judgments allowing counterclaims in its favor for the difference between the prices as named in the contracts and those which had been paid by the board. The court of claims had decided many cases to that effect, among which are those of *Roche* v. *District of Columbia*, 18 Ct. Cl. 217; *Barnard* v. *District of Columbia*, 20 Ct. Cl. 257; *Barnes* v. *District of Columbia*, 22 Cl. Cl. 366, and *Eslin* v. *District of Columbia*, 22 Ct. Cl. 395, 29 Ct. Cl. 370. This court had held the same proposition in *Barnard* v. *District of Columbia*, 127 U. S. 409 [32: 207]. The ground upon which the recovery on the counterclaim had been allowed was the illegality of altering the prices named in the contracts and of paying any greater sums for the work contracted to be done than was provided for in the written contracts, and payments beyond those sums were held to have been illegal.

*Prior to the passage of the act of 1895, [336 therefore, it is undisputed there was no claim, legal or equitable, which the parties could successfully maintain against the District of Columbia for the recovery at "board rates" for work done under written contracts with the municipal authorities, but such work could only be legally paid for at the prices named in the various contracts for such work.

Under the statute of 1880, it had been customary for the court of claims, in deciding questions arising in this class of cases, to state the day upon which the claims awarded by it had become due and payable, so that under the 6th section of the act of 1880, if payment were to be made in the 3 $\frac{65}{100}$ bonds, the coupons thereon might be detached from the date of the bonds to the date upon which the claims were by the judgment of the court found to



Digitized by Google

have been due and payable. If, instead of paying judgments by the delivery of the bonds as provided for in the act of 1880, the Treasurer of the United States proceeded under the act of March 8, 1881, to sell the bonds, he might do so, and with the proceeds pay the judgments rendered by the court of claims.

Matters were in this condition when the act of February 18, 1895, was passed, which provided as follows (28 Stat. at L. 664):

"That in the adjudication of claims brought under the provisions of the act entitled 'An Act to Provide for the Settlement of All Outstanding Claims against the District of Columbia, and Conferring Jurisdiction on the Court of Claims to Hear the Same, and for Other Purposes,' approved June 16, 1880 (21 Stat. at L. 284), the court of claims shall allow the rates established and paid by the board of public works; and whenever said rates have not been allowed, the claimant or his personal representative shall be entitled, on motion made within sixty days after the passage of this act, to a new trial of such cause."

Under this act these claimants again presented their cases to the court of claims (no judgment having been entered upon the previous finding of the referee that the estate was indebted to the District), and thereupon the court 337 ]granted *judgment to the administrator of McNamara and to the executrix of his assignee, respectively, by allowing the claimants compensation for work done under the contracts at the rates established and paid by the board of public works (instead of the contract prices), and the court held as a conclusion of law that those sums which were thus allowed by virtue of the act of 1895 were, according to its true intent and meaning, due and payable, one portion to the administrator of McNamara, February 1, 1872, and another portion February 1, 1876, and still another portion to the executrices of Theodore Sheckels, assignee, April 1, 1878. The effect of the finding is to allow interest on these sums secured under the provisions of the act of 1895, for about twenty years.

The claim of the appellant is that the amount allowed by the court of claims did not, as a matter of law, become due or payable until after the passage of the act of February 18, 1895, and the granting of a judgment by virtue of that act. The appellant further insists that, although the effect of the act was to extinguish its counterclaim so far as the principal sum was concerned, yet, as the referee found that principal sum was due the defendant, with interest from June 1, 1874, the claim for interest itself was not so extinguished, and that such interest should have been allowed as a counterclaim against the claim made by the estate of the contractor against the appellant.

In the opinion of the court of claims delivered in these cases it is conceded, and, indeed, there is no dispute in regard to it, that the finding of the referee was correct, at the time he made it, as to the amount of the counterclaim legally existing in favor of the defendant and against the claimants, and the only ground upon which that finding can be attacked is based upon the act of February 18, 1895. The question, therefore, is as to the effect of that act. Did this enactment so far change existing facts and law as not only to permit a recovery of the board rates instead of the contract rates, but did it also make that sum "due and payable" twenty years before its passage? Under the holdings of the court of claims and of this court, it is perfectly apparent that the result of the passage of the act of *1895 was simply to bestow a pure gratu- [338 ity to the amount of the difference between the contract price and the board rates upon those persons included within its provisions. There is no element of a legal or an equitable claim within the proper meaning and signification of those words on the part of any of those who will profit by the act of 1895, against the municipal authorities of the District. That act bestowed a pure and simple gift.

Those who are to profit by it are those who had entered into a fair and legal written contract with the District authorities to do certain work at prices named in the contract and at a time when a law of Congress prohibited the granting of any extra compensation for contract work, and when it provided that all contracts should be in writing, signed by the parties making the same, and a copy thereof filed in the office of the secretary of the District. Viewed in the light of a gratuity, a gift, wholly without consideration, the statute itself must receive a strict construction; not such a construction as will prevent the fair meaning thereof from taking effect, but such as shall not be enlarged by inferences or implications not plainly to be drawn from the language of the act.

The United States has pledged its faith for the payment of claims arising out of these transactions when properly proved. Unless, therefore, the claim for interest against the government is clear and beyond question, it must be denied. Interest is not to be collected from the government in the absence of language specially providing for its payment. *United States* v. *Sherman*, 98 U. S. 565 [25: 235]; *United States* v. *Verdier*, 164 U. S. 213 [*ante*, 407]. We are unable to see how it can be correctly stated that the claims in question became "due and payable" at the time of the completion of the work under these contracts more than twenty years ago, when it is conceded that but for the passage of the act of 1895 there was no legal or valid claim whatever, and that the right to any recovery depends upon the language used in that act. The statute of 1895 simply, as we have said, conferred a gratuity upon the persons covered by its provisions, and the reasonable construction of such an act is to say that the gratuity thus given becomes "due and payable" *only [339 from the time when the act which gave it was passed. To make the amount of the gratuity thus given "due and payable" twenty years before the passage of the act giving it, so as thereby to allow interest from that time upon the amount of such gratuity, requires the clearest and most certain expression of legislative will to that effect. We do not find any such expression in the act here under consideration. Although it permits the court of claims to allow the rates used and paid by the board of public works, yet, as that allowance is a



Digitized by Google

mere gift, the further burden of twenty years' interest on it should not be added to the gift without the use of the very plainest language.

For these reasons we think the court of claims erred in holding that any portion of the moneys which might be due the claimants, and which arose by virtue of the act of 1895, became due and payable at any time before the passage of that act.

The claim of the appellant to offset against any recovery here the amount of the interest from June 1, 1874, on its counterclaim found due in its favor against the claimants, in the report of the referee, we think cannot be admitted. The effect of the passage of the act of 1895 is in substance the same as if the counterclaim, which is the principal sum, had been paid, and when that is the case the interest becomes thereby extinguished. *Pacific R. Co.* v. *United States*, 158 U. S. 118 [39: 918].

These views lead us to the conclusion that *the judgments of the Court of Claims must be reversed* and the cases remanded to that court for further proceedings not inconsistent with this opinion.

---

**340]** DISTRICT OF COLUMBIA, *Appt.*,
*v.*
JOSEPH T. H. HALL.

(See S. C. Reporter's ed. 340, 341.)

*District of Columbia v. Johnson, ante, 734, followed.*

[No. 619.]

*Submitted January 4, 1897. Decided February 15, 1897.*

APPEAL from a judgment of the Court of Claims in favor of Joseph T. H. Hall against the District of Columbia for the value of certain work done under a contract. *Reversed*, and case remanded for further proceedings.

See same case below, 31 Ct. Cl. 376.

The facts are stated in the opinion.

*Messrs.* **Joshua Eric Dodge**, Assistant Attorney General, and **Robert A. Howard**, Special Assistant Attorney, for appellant.

*Mr.* **Edwin Forrest** for appellee.

Mr. Justice **Peckham** delivered the opinion of the court:

This is another of the same character of actions as those above disposed of. Hall was one of the contractors for doing work of the same nature, and filed his petition under the act of 1880 in December of that year. In that petition he alleged that he had done certain work and that he was paid for his work, under his contract, by certain certificates which were worth only 50 per cent of their face value, and which he consented to receive only at that rate, and he asked for judgment for the other 50 per cent of his contract price. He failed in the primary object of that suit, but he did recover on some other ground a small judgment of about $1,000, which was entered June 1, 1885. Subsequently, and in pursuance of the act of 1895, he applied for a new trial for the purpose of claiming the "board rates" compensation for the work done by him at contract prices, under circumstances mentioned in the foregoing cases. The court of claims gave judgment in his favor for that difference between the two rates, and found that under the true intent and meaning of the acts of 1895 and 1880 the sum for which it gave judgment "became due and payable on the 1st of January, 1877," which was the date when the plaintiff had completed his work under the contract. 31 Ct. Cl. 376.

*For the reasons mentioned in the fore-**[341** going cases, *the judgment of the Court of Claims in this case must also be reversed*, and the cause remanded for further proceedings not inconsistent with that opinion.

---

DISTRICT OF COLUMBIA, *Appt.*,
*v.*
WILLIAM M. DICKSON, etc.

(See S. C. Reporter's ed. 341, 342.)

*District of Columbia v. Johnson, ante, 734, followed.*

[No. 620.]

*Submitted January 4, 1897. Decided February 15, 1897.*

APPEAL from a judgment of the Court of Claims in favor of William M. Dickson against the District of Columbia. *Reversed*, and case remanded for further proceedings.

See same case below, 31 Ct. Cl. 399.

The facts are stated in the opinion.

*Messrs.* **Joshua Eric Dodge**, Assistant Attorney General, and **Robert A. Howard**, Special Assistant Attorney, for appellant.

*Mr.* **V. B. Edwards** for appellee.

Mr. Justice **Peckham** delivered the opinion of the court:

In this case, which is of the same general nature as the foregoing cases, the petitioner, who was the assignee of one of the contractors, filed his original petition in the court of claims December 15, 1880. The case, after being heard, was submitted to that court on the 26th of May, 1882, and was by it dismissed on the 29th of May, 1882. On the 6th of April, 1895, the judgment was vacated and a new trial granted by virtue of the act of February 18, 1895. 31 Ct. Cl. 399.

The difference between the contract price and board-rate price was claimed, and Dickson, as assignee, was allowed to recover $1,886.30 for such difference, belonging to him by virtue of the assignment, and which sum the court held to have "been due and payable June 2, 1873, within the meaning and intent of the act of February 18, 1895, and the act of June 16, 1880."

*For the same reasons as given in the **[342** foregoing cases, *this judgment of the Court of Claims must also be reversed*, and the cause remanded, with the same directions as in the other cases.



Digitized by Google

MARTHA HOPKINS, Martha M. Lee, Stephney Forrest, *et al.*, *Appts.*,
*v.*
WILLIAM H. GRIMSHAW.

(See S. C. Reporter's ed. 342-358.)

*Parties to suit—evidence—termination of trust—resulting trust—perpetuities—equity jurisdiction—partition of land—complete relief.*

1. The rights of the principal parties to a suit to enforce a resulting trust in land are not affected by the joinder of one named as trustee to whom they had made conveyances merely to enable him to bring suit, and who had brought a suit which was voluntarily dismissed before the present bill was filed.
2. A widow who is not a party to or interested in a suit is incompetent, under the act of July 2, 1864, chap. 222 (13 Stat. at L. 374), to testify to private conversations between her and her husband in his lifetime.
3. Slight testimony to a casual remark of a supposed trustee, more than forty years ago, falls far short of the clear proof required by a court of equity, whenever a trust in real estate is sought to be implied, against the terms of a deed of conveyance, by parol evidence of payment of the price by a third person.
4. A trust in a conveyance to trustees of an unincorporated society for a burial ground "and for no other purpose whatever" ends, at the latest, when the land ceases to be used as a burial ground and the society is dissolved.
5. A resulting trust to the grantor and his heirs arises when the trust created by such conveyance is terminated by the land ceasing to be used as a burial ground and the dissolution of such society, whether the conveyance was by way of gift or for valuable consideration.
6. The rule against perpetuities is inapplicable to a resulting trust which arises on the failure of an estate granted for a particular use which has ceased.
7. Chancery has jurisdiction to enforce a resulting trust.
8. A bill for partition of land may be maintained in equity when the title of the plaintiffs is purely equitable.
9. Complete relief, including the question of any allowance to a defendant for expenses, may be granted by a court of equity after it has acquired jurisdiction.

[No. 18.]

*Argued December 16, 17, 1895. Decided February 15, 1897.*

APPEAL from a decree of the Supreme Court of the District of Columbia dismissing a suit in equity brought by Martha Hopkins *et al.* against William H. Grimshaw *et al.*, to enforce a resulting trust in, and to obtain partition of land in, the city of Washington. *Reversed*, and case remanded for further proceedings.

Statement by Mr. Justice **Gray**:

This was a bill in equity, filed May 24, 1889, against William H. Grimshaw, and against Mary J. Brooks, an heir of Stephney Forrest, by the other heirs of Forrest, and by "Horace S. Cummings, trustee," to enforce a resulting trust in, and to obtain partition of, land in the city of Washington, conveyed by Forrest to David Redden and others, trustees for the [343 Union Beneficial Society of the city of Washington, for a burial ground. The case was heard upon pleadings and proofs, and was in substance as follows:

By deed dated August 9, 1845, and recorded October 21, 1845, William Nolan, commissioner of public buildings, in consideration of the sum of $129.93, recited to be paid by the grantee, conveyed to "Stephney Forrest, his heirs and assigns forever," ten lots comprising the north half of square 1089 in the city of Washington.

By deed not dated, but acknowledged September 25, 1845, and recorded October 21, 1845, Stephney Forrest, for a like consideration, conveyed the same land to "David Redden, Daniel Simms, and William Barton, trustees for the Union Beneficial Society of Washington city," to have and to hold to said Redden, Simms, and Barton "and their successors in office forever, for the sole use and benefit of the Union Beneficial Society of the city of Washington as aforesaid, for a burial ground, and for no other purpose whatever."

Stephney Forrest died in 1855, having been twice married, and leaving six children by his first wife, and one daughter (since Mary J., Brooks) by his second wife, Rachel Forrest, who also survived him. He was a member of the society; and the answer alleged that he purchased the land in behalf of the society and with its money.

The only evidence offered in support of this allegation consisted of depositions of Rachel Forrest, his widow, and of Mary J. Brooks, their daughter, taken in November, 1889, the material parts of which were as follows: Mrs. Forrest testified that she was now eighty-five years old; that she knew her husband bought this land for the society, because, before he left home on the morning of the day of his purchase, he told her that he was going to buy the land for the society, and to get the money from the society to buy it and came back and showed her a bundle which he said contained the money, and later in the day told her that he had bought the land for the society; and that she never talked with her daughter about this, or mentioned it to anyone until the day she testi-

NOTE—*That lands bought with trust money and deeded to trustee belong to cestui que trust; any statement by trustee, or credit in account, amounts to declaration of trust; profit gained by trustee by sale of property belongs to the cestui que trust,*—see note to Wormley v. Wormley, 5: 651.

*As to parol trust on conveyance of land, good; where one takes title for another at judicial sale he is trustee,*—see note to Hughes v. Edwards, 6: 142.

*At common law, devise of lands generally, without words of perpetuity or limitation, confers a life estate only, unless there is manifest intention to give the fee; rule followed in United States unless changed by statute,*—see note to King v. Ackerman, 17: 292.

*That when parties interested are numerous, part may maintain a bill in equity for benefit of all,* see notes to Smith v. Swormstedt, 14: 942, and Bacon v. Robertson, 15: 499.

*As to parties necessary in equity; want of; when a defense; when objection to be made,*—see notes to Morgan v. Morgan, 4: 343, and Marshall v. Beverley, 5: 97.



Digitized by Google

fied in this case. Mrs. Brooks testified that, [344] when she was thirteen *or fourteen years old, she heard her father, as he left home one morning, say that he was going to the secretary of the society to get the money to buy the land for the society. The plaintiffs' counsel, at the hearing, objected to this testimony of Forrest's widow and daughter as insufficient to establish a trust; and to the widow's testimony as incompetent to prove statements made by her husband to her.

The Union Beneficial Society of the city of Washington was an unincorporated association of colored persons, formed by articles of association in writing in 1841, by which provision was made for visiting sick and infirm members, and for applying to their relief money appropriated for that purpose; and for paying, upon the death of any member, certain sums out of the funds of the society "toward defraying the funeral expenses," and "to the widow, orphan children, or legal representatives, of such deceased member;" the funds of the society were to be derived from entrance fees, monthly dues, and other pecuniary contributions of the members, and fines imposed upon them for violations of the articles; and "whilst six members of this institution unite for its continuance, it shall not be broken."

For many years after the deed of Forrest to the trustees, the land was used by the society for the burial of its members, and also for the burial of any other colored inhabitants of the city upon the payment of certain fees. Since 1852, at least, fees so obtained, instead of being applied to the use of the society, were divided from time to time among its members. The last admission of a new member was in 1870, and the members gradually dwindled in number until 1882, when there were only three members, one being Philip Wells, its president. For the five years before 1883, there were 1,589 interments; and from January, 1883, to November 13, 1883, there were 560 bodies interred, many of them one upon another. On November 13, 1883, further interments were prohibited by the board of health; and none were made afterwards. It did not appear that since 1887 the society did anything, kept any records, or held any meetings.

All the trustees named as grantees in the deed [345] from Stephney *Forrest being dead, the defendant Grimshaw, who was a son-in-law of Mrs. Brooks, obtained, in 1887 and 1888, conveyances to himself, as follows: 1st. Deeds from Mrs. Forrest and Mrs. Brooks, of their interests in the land. 2d. A deed from Philip Wells, the president of the society, purporting to convey all its and his interests in the land. 3d. Deeds of the land from the heirs of the trustees aforesaid.

In February, 1889, the board of health, upon the petition of Grimshaw, claiming to have authority from the surviving members of the society, ordered him to exhume all the bodies interred in this burial ground, and to remove them to other cemeteries; and he did so at his own expense, amounting, as he testified, to the sum of $2,000.

The bill alleged that the plaintiffs and the defendants sued and were sued in their own right, except Cummings, who sued as trustee under the trust afterwards mentioned; and that on March 20 and 27, 1889, the land in question was conveyed to him by the other plaintiffs, by deeds which (as put in evidence at the hearing) purported to convey that land to Cummings in fee, "in and upon the trusts, nevertheless, hereinafter mentioned and declared, that is to say, in trust to sell and convey the same to such person or persons, in fee simple or otherwise, and upon such terms and conditions, as Franklin H. Mackey, of the District of Columbia, shall in writing direct, and the proceeds of said sale to distribute according to the terms of a paper of even date herewith, and signed in duplicate by the party of the first part, one copy of which is in the hands of the said Cummings, and the other in the hands of the said Mackey; and the purchaser or purchasers of said property shall not be required to see to the application of the purchase money." The paper so referred to, concerning the distribution of proceeds of sales, was not in the record transmitted to this court.

The bill further alleged that, "by virtue of said deeds, complainant Cummings now holds the entire legal title in trust for the other complaintiffs to said property, except the interest of the defendant William H. Grimshaw; and that a complete and perfect title to the same will be held by the complainants when this court has decreed the reverter which complainants *are entitled to have declared by [346] reason of the terms of the said original deed from Stephney Forrest to said trustees."

The bill prayed that the land "be decreed to have reverted to the heirs of Stephney Forrest, by reason of the terms and provisions and purposes of the original conveyance of said Stephney Forrest, and the order of the municipal authorities, and the carrying out of said order;" that a commission be appointed to make partition of the land between Grimshaw as grantee of Mrs. Brooks, one of the heirs of Stephney Forrest, and the plaintiffs, his other heirs; that the deeds to Grimshaw from the heirs of the trustees be declared to be a cloud upon the plaintiffs' title, and of no effect to pass any title in the land, and be directed to be surrendered for cancelation; and for further relief.

Grimshaw, in his answer to the bill, denied that Cummings sued as trustee, and alleged that he sued in his own right and for his own benefit; and at the hearing, in support of this allegation, introduced a bill in equity, filed by Cummings alone April 16, 1889, similar to the present bill, except in alleging that by the deeds to him from Forrest's heirs the entire and full beneficial interest and estate vested in him. That bill was dismissed by Mr. Mackey, as solicitor for Cummings, on the same day on which he filed the present bill as solicitor for the plaintiffs therein.

The answer further averred that the deeds to Grimshaw from the heirs of the original trustees were procured by him at the instance and for the benefit of the Union Beneficial Society, and he held the land in trust for the society, and for no other use or purpose whatsoever; and denied that those deeds were clouds upon the plaintiffs' title; denied the plaintiffs' title; and denied that any title vested in Stephney Forrest's heirs, by reverter or otherwise; and averred that the deed from Forrest vested in the trustees named therein an absolute and



Digitized by Google

indefeasible estate in fee simple; and that the society used the land solely for the purpose of a burial ground as long as it was lawful so to use it, and only ceased such use when compelled to do so by law. To this answer the plaintiffs filed a general replication.

347] *Mrs. Brooks never filed an answer; and the plaintiffs, before the hearing, dismissed their bill as against her.

Upon the hearing, the supreme court of the District of Columbia dismissed the bill "without prejudice to the rights of the complainants to claim, in any proper suit or proceeding, such right, if any, as the said Stephney Forrest may have been entitled to, in said real estate, as a member of said Union Beneficial Society." The plaintiffs appealed to this court.

*Messrs.* **H. O. Claughton** and **Franklin H. Mackey** for appellant.

*Messrs.* **J. J. Darlington** and *W. L. Cole* for appellee.

Mr. Justice **Gray** delivered the opinion of the court:

Stephney Forrest, in 1845, purchased a parcel of land in Washington, and conveyed it to three persons, "trustees for the Union Beneficial Society of Washington city," *habendum* to them "and their successors in office forever, for the sole use and benefit of the Union Beneficial Society of the city of Washington as aforesaid, for a burial ground, and for no other purpose whatever." Forrest died in 1855; and all three trustees afterwards died.

The Union Beneficial Society was an unincorporated association for the mutual aid of its members in case of sickness, and for their burial in case of death. This land was used by the society for a burial ground for nearly forty years, and then, by order of the board of health, ceased to be so used; and all the bodies which had been buried there were exhumed and removed to other cemeteries. Grimshaw afterwards procured conveyances of the land to himself from the heirs of the trustees named in Forrest's deed, as well as from Forrest's widow and from Mrs. Brooks, one of his heirs, and from Wells, the last president of the society and one of its three surviving members. And the society (which, by the terms of its articles of association, was to continue so long as it had six mem-

348] bers) *does not appear to have since done any acts, held any meetings, or kept any records, and was practically dissolved and extinct.

The present bill was filed by the other heirs of Forrest against Grimshaw and Mrs. Brooks, praying for a decree that the land had reverted to Forrest's heirs; and for a partition of the land between the plaintiffs and Grimshaw as grantee of Mrs. Brooks; and for cancelation of the deeds from the heirs of the trustees to Grimshaw, as being a cloud upon the plaintiffs' title; and for general relief.

The original joinder of Mrs. Brooks as a defendant is unimportant. By reason of having conveyed her right to Grimshaw, she had no interest in the suit, and filed no answer; and the plaintiffs, before the hearing, dismissed their bill as against her.

Nor can the joinder of "Horace Cummings, trustee," as a plaintiff in this bill, affect the rights of the principal parties to the suit. The deeds made to him by the other plaintiffs, two months before this suit was brought, and produced at the hearing, showed that the land was conveyed by them to Cummings in trust to sell and convey it to such persons and upon such terms and conditions as their solicitor should direct, and to distribute the proceeds of such sale according to the terms of a paper, copies of which were in the hands of the solicitor and of Cummings respectively. Although that paper is not in the record, the terms of those deeds clearly show Cummings to have been a mere trustee to bring suit and to sell the land for the benefit of the other plaintiffs, and not in his own behalf, notwithstanding the allegation in the bill thereafter filed by him alone and voluntarily dismissed upon the filing of the present bill, that by those deeds the whole beneficial interest and estate vested in him. Perhaps, as suggested by the counsel of the appellee, the former bill was dismissed for fear of the rule of law, recognized in *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44, 63 [22: 551, 555], that a right of entry for breach of a condition subsequent cannot be alienated.

The allegation in the answer, that Forrest purchased this land in behalf of the society, and with its money, is supported *by no[349 competent and sufficient evidence. The only evidence upon this point was the testimony, taken forty years after the transaction, of Forrest's widow and daughter, respectively the grandmother and the mother of Grimshaw's wife.

The first question presented in relation to this testimony is whether the widow was a competent witness to prove admissions or declarations supposed to have been made by her husband in conversation with her.

At common law, upon grounds of public policy, husband and wife (with some exceptions not here material) were not permitted, even by consent, to give evidence for or against each other, or to testify, even after the ending of the marriage relation by death or divorce, to private communications which took place between them while it lasted. *Stein* v. *Bowman*, 38 U. S. 13 Pet. 209, 222 [10: 129, 135]; *O'Connor* v. *Majoribanks*, 4 Man. & G. 435, 5 Scott, N. R. 394; 1 Greenl. Ev. §§ 334-337.

The Congress of the United States, by a clause originally inserted in the civil appropriation act of July 2, 1864, chap. 210, § 3 (13 Stat. at L. 351), and embodied in U. S. Rev. Stat. § 858, has enacted that there shall be no exclusion of any witness in a civil action because he is a party to or interested in the issue tried. But that clause has merely removed all disqualifications of witnesses for interest, and does not affect the exclusion of testimony of a husband or wife upon grounds of public policy. *Lucas* v. *Brooks*, 85 U. S. 18 Wall. 436, 453 [21: 779, 783]; *Bassett* v. *United States*, 137 U. S. 496, 505 [34: 762, 764].

Congress, on the same day, passed another act, entitled "An Act Relating to the Law of Evidence in the District of Columbia," by which it was enacted "that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, in the District of Columbia, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence,



Digitized by Google

within said District, the parties thereto, and the persons in whose behalf any such action or other proceeding may be brought or defended, 350] and any and all persons interested *in the same, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to said action or other proceeding: Provided, That nothing herein contained shall render any person who is charged with any offense, in any criminal proceeding, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall, in any criminal proceeding, render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, or in any proceeding instituted in consequence of adultery; nor shall any husband be compellable to disclose any communication made to him by his wife during the marriage, nor shall any wife be compellable to disclose any communication made to her by her husband during the marriage." Act of July 2, 1864 (13 Stat. at L. 374, chap. 222).

This act (except in the restriction to the District of Columbia) was taken, almost word for word, from modern English statutes; the first half of it (except the words "and any and all persons interested in the same," who had been made competent witnesses by the statute of 6 & 7 Vict. chap. 85) from § 2 of the statute of 14 & 15 Vict. chap. 99; the first two clauses of the proviso from § 3 of that statute; and the last two clauses, being those concerning husband and wife, from the statute of 16 & 17 Vict. chap. 83, § 3.

The same act has been re-enacted in the Revised Statutes of the District of Columbia, with hardly any change, except in substituting for the words "except as hereinafter excepted" the words "except as provided in the following section;" and in making the proviso a separate section, omitting the words, "provided that nothing herein contained," and beginning with the words, "nothing in the preceding section." D. C. Rev. Stat. §§ 876, 877.

The latter part, which constituted the proviso in the act of 1864, chap. 222, and which now 351] forms § 877 of the Revised *Statutes of the District of Columbia, is upon its face, and according to its uniform construction in the courts of the District of Columbia, not new and affirmative legislation, but wholly negative, and by way of proviso or exception out of the enactment which goes before; and therefore has no application to any cases other than those in which the husband or wife, called as a witness, is a party, in name or in fact, to the suit, or interested in it; and does not make a husband or wife, not a party to or interested in the suit, competent to testify, before or after the death of the other, to private communications between the latter and the witness. *United States* v. *Guiteau*, 1 Mackey, 498, 547, 548 [47 Am. Rep. 247]; *Clark* v. *Krause*, 2 Mackey, 559, 572; *Holtsman* v. *Wagner*, 5 Mackey, 15, 16; *Beals* v. *Brown*, 6 Mackey, 574, 577. See also *Barbat* v. *Allen*, 7 Exch. 609; *Percival* v. *Caney*, 14 Jur. 1056, 1062, cited 7 Exch. 611; *Alcock* v. *Alcock*, 5 De G. & S. 671; *Reg.* v. *Payne*, L. R. 1 C. C. 349, 355; *Reg.* v. *Thompson*, L. R. 1 C. C. 377.

Stephney Forrest's widow was neither a party to nor interested in this suit, having conveyed all her interest in the subject thereof to the defendant Grimshaw before the suit was brought. She was therefore incompetent to testify to private conversations between her and her husband in his lifetime; and a conversation between them in their own home, in the presence of no one but their young daughter, who does not appear to have taken any part in it, must be deemed to be a private conversation, within the rule. *Jacobs* v. *Hesler*, 113 Mass. 157.

The daughter herself may have been a competent witness to such a conversation. But her testimony, which amounted to no more than that she heard her father, as he left home one morning, say that he was going to the secretary of the society to get money to buy land for the society, was clearly insufficient to prove that he bought the land with money of the society, or that the society had any greater or other title, legal or equitable, than appeared to be conveyed to it by the deed made by him to, and accepted by, the trustees in its behalf. Such slight testimony to a casual remark of the *supposed trustee, more than forty[352 years ago, falls far short of the clear proof required by a court of equity, whenever a trust in real estate is sought to be implied, against the terms of a deed of conveyance, by parol evidence of payment of the price by a third person. *Prevost* v. *Grats*, 19 U. S. 6 Wheat. 481 [5: 311]; *Slocum* v. *Marshall*, 2 Wash. C. C. 397; *Smith* v. *Burnham*, 3 Sumn. 435.

We are then brought to the principal question in the case, which is of the nature and effect of the deed from Forrest to trustees for the Union Beneficial Society for a burial ground. The first inquiry which naturally arises is whether the deed was for a charitable use, in the legal sense. If it was, the conveyance would not be open to any legal objection by reason of the length of time during which the trust might last, or because of the society named not being a corporation. *Ould* v. *Washington Hospital*, 95 U. S. 303 [24: 450]; *Russell* v. *Allen*, 107 U. S. 163, 171 [27: 397, 400]. And the trustees, although the deed did not in terms run to their heirs and assigns, would take the legal estate in fee. *Russell* v. *Allen*, *supra*; *Potter* v. *Couch*, 141 U. S. 296, 309 [35: 721, 729]; *Easterbrooks* v. *Tillinghast*, 5 Gray, 17, 21.

A grant for the maintenance of a churchyard or burial ground in connection with a church or religious society, or of a public burial ground, or a burial ground of all persons of a certain race, class, or neighborhood, might be considered as in the nature of a dedication for a pious and charitable use. *Beatty* v. *Kurtz*, 27 U. S. 2 Pet. 566, 583, 584 [7: 521, 527]; *Cincinnati* v. *White*, 31 U.S. 6 Pet. 431, 436 [8: 452, 455]; *Jones* v. *Habersham*, 3 Woods, 443, 470, and 107 U. S. 174, 183, 184 [27: 401, 405]; *Dexter* v. *Gardner*, 7 Allen, 243, 247; *Re Vaughan*, L. R. 33 Ch. Div. 187.

By the act of Congress of May 5, 1870, chap. 80, § 5, re-enacted in the Revised Statutes of the District of Columbia, provision has been made for the voluntary incorporation of ceme-



Digitized by Google

tery associations in the District of Columbia; and "any person or persons desiring to dedicate any lot of land, not exceeding 5 acres, as a burial ground or place for the interment for the dead, for the use of any society, association, or neighborhood," may convey such land by deed to the District of Columbia, "specifying
353] *in such deed the society, association, or neighborhood for the use of which the dedication is desired to be made, and thereby vest the title to such land in perpetuity for the uses stated in the deed." 16 Stat. at L. 106, 107; D. C. Rev. Stat. §§ 594-604.

But the conveyance now in question, made to private persons as trustees, twenty-five years before the passage of that act, was expressed to be "for the sole use and benefit of the Union Beneficial Society of the city of Washington as aforesaid, for a burial ground, and for no other purpose whatever." The articles of association of that society appear to have contemplated the burial of none but its own members; and the usage, which early sprang up, of permitting the interment in its burial ground of other inhabitants of the District of Columbia, upon the payment of certain fees, appears to have been adopted, not from any charitable motive, but as a source of private profit to the members of the association. It may be doubted whether, in the absence of express statute, the burial ground of such a society can be held to be a public charitable use. See *King* v. *Parker*, 9 Cush. 71; *Donnelly* v. *Boston Catholic Cemetery Asso.* 146 Mass. 163; *Anon.* 3 Atk. 277; *Pease* v. *Pattison*, L. R. 32 Ch. Div. 154; *Cunnack* v. *Edwards* [1896] 2 Ch. 679; *Re Buck* [1896] 2 Ch. 727.

If it be assumed, however, as most favorable to the defendant, that this deed created a charitable trust, it was not a grant indicating a general charitable purpose and pointing out the mode of carrying that purpose into effect, thus coming within the class of cases in which courts of chancery, when the particular mode had failed, have carried out the general purpose. *Church of Jesus Christ of L. D. S.* v. *United States*, 136 U. S. 1, 51-60 [34: 478, 494-497]; *Jackson* v. *Phillips*, 14 Allen, 539. But the trust was restricted, in plain and unequivocal terms, to the particular society to be benefited, as well as to the purpose of a burial ground, adding (as if to put the matter beyond doubt) "and for no other purpose whatever." The trust would end, therefore, at the latest, when the land ceased to be used as a burial ground and the society was dissolved. *Easterbrooks* v. *Tillinghast*, 5 Gray, 17; *Reed* v. *Stouffer*, 56 Md. 236,
354] 254; *Second Universalist Soc.* *v. *Dugan*, 65 Md. 460; *Re Rymer* [1895] 1 Ch. 19, 31, 32.

In *Easterbrooks* v. *Tillinghast*, above cited, an inhabitant of a town devised land to a trustee named, and his successors to be appointed as provided in the will, in trust to apply the income in support of the gospel and the maintenance of a pastor or elder in a church already existing in the town, of a certain faith and practice, so long as the members of that church "or their successors shall maintain the visibility of a church in said faith and order, and uniting in fellowship and communion with those who hold and practise said principles, and no others." Three years after the testator's death, the members of the church, reduced to two in number, voted and resolved, at a meeting called by public notice, that they would no longer endeavor to maintain the appearance of a visible church, and declared the church dissolved and extinct. The supreme judicial court of Massachusetts, speaking by Mr. Justice Metcalf, decided that the trustee took an estate in fee; but that, the church having been dissolved and having ceased to be a visible church, he held the land for the devisor's heirs at law as a resulting trust. 5 Gray, 21.

In *Rawson* v. *School Dist. No. 5*, 7 Allen, 125, cited by the defendant, the deed was to a town of land already, as the deed recited, "being improved for a burying place," *habendum* "to the said town of Uxbridge forever, to their only proper use, benefit, and behoof, for a burying place forever." There were no such negative words as in the deed before us, "and for no other purpose whatever;" the action was at law; and the only question argued or considered was whether the decree created an estate upon condition subsequent. While deciding that it did not, Chief Justice Bigelow said: "If it be asked whether the law will give any force to the words in a deed which declare that the grant is made for a specific purpose, or to accomplish a particular object, the answer is, that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee." 7 Allen, 130.

The somewhat similar cases of *Crane* v. *Hyde Park*, 135 *Mass. 147, and *Maho-* [355
*ning County* v. *Young*, 16 U. S. App. 253, also cited by the defendant, likewise turned upon a question of forfeiture for breach of a condition subsequent in a deed to a municipal corporation.

In the case at bar, the trust created by the deed having been terminated, according to its express provisions, by the land ceasing to be used as a burial ground, and the dissolution and extinction of a society for whose benefit the grant was made, there arises, by a familiar principle of equity jurisprudence, a resulting trust to the grantor and his heirs, whether his conveyance was by way of gift, or for valuable consideration. 2 Fonblanque, Eq. 116, 133, and notes; 2 Story, Eq. Jur. §§ 1199, 1200; Hill, Trustees, 113, 133; *Easterbrooks* v. *Tillinghast*, 5 Gray, 17, and *Reed* v. *Stouffer*, 56 Md. 460, above cited.

The question suggests itself whether the case at bar falls within the rule of law, known as the rule against perpetuities, by which an estate, legal or equitable, granted or devised by one person to another, which, by the terms of the instrument creating it, is not to vest until the happening of a contingency which may by possibility not occur within the period of a life, or lives in being (treating a child in its mother's womb as in being) and twenty-one years afterwards, is void for remoteness, and consequently a limitation over to a third person which may possibly not take effect within the period is void, and the estate remains in the first taker. That rule does not apply to a gift to a charity, with no intervening gift to or for the benefit of a private person or corporation; or to a contingent limitation over from



Digitized by Google

one charity to another. But it does apply to a grant or devise to a charity after one to a private person; as well as to a grant or devise to a private person, although limited over after an immediate gift to a charity. *Russell* v. *Allen*, 107 U. S. 163, 171 [27: 397, 400]; *Jones* v. *Habersham*, 107 U. S. 174, 185 [27: 401, 405]; *McArthur* v. *Scott*, 113 U. S. 340, 381, 382 [28: 1015, 1028]; *Brattle Square Church* v. *Grant*, 3 Gray, 142 [63 Am. Dec. 725]; *Theological Education Soc.* v. *Atty Gen.* 135 Mass. 285; *Re Tyler* [1891] 3 Ch. 252; *Re Bowen* [1893] 2 Ch. 491.

But when there is no limitation over in the grant or devise, and the grantor or devisor, or 356] the heirs of either, claim *the estate, not under the grant or devise, but because, by reason of the failure thereof, the estate, legal or equitable, as the case may be, reverts or results to him or them, the rule against perpetuities is inapplicable.

Even when the first gift is strictly upon condition subsequent, requiring an entry on the part of the grantor or devisor, or his heirs, to revest the estate in him or them, the American courts have treated their title as unaffected by the rule against perpetuities. *Cowell* v. *Colorado Springs Co.* 100 U. S. 55 [25: 547]; *Gray* v. *Blanchard*, 8 Pick. 284; *Austin* v. *Cambridgeport*, 21 Pick. 215; *Guild* v. *Richards*, 16 Gray, 309; *Tobey* v. *Moore*, 130 Mass. 448; Gray, Perpetuities, §§ 304-310.

But the deed in this case is clearly, in terms and effect, a conveyance in trust, with no words apt to create a condition. *Stanley* v. *Colt*, 72 U. S. 5 Wall. 119 [18: 502]; *Barker* v. *Barrows*, 133 Mass. 578; *Atty. Gen.* v. *Wax Chandlers' Co.* L. R. 6 H. L. 1. In such a case, it has been held, both in this country and in England, that, upon the failure of the trust declared in the deed, although depending upon a contingency which might not happen within the period prescribed by the rule against perpetuities, the resulting trust to the grantor and his heirs is not invalidated by the rule. *Easterbrooks* v. *Tillinghast*, 5 Gray, 17; *Stone* v. *Framingham*, 109 Mass. 303; *First Universalist Soc.* v. *Boland*, 155 Mass. 71 [15 L. R. A. 231]; *Re Randell*, L. R. 38 Ch. Div. 213, 218, 219; *Re Bowen* [1893] 2 Ch. 491, 494. In *Randell's Case*, Mr. Justice North said: "In my opinion, a direction that in a particular event a fund shall go in the way in which the law would make it go in the absence of such a direction, cannot be said to be an invalid gift, or contrary to the policy of the law." And in *Bowen's Case*, Mr. Justice Stirling said: "As property may be given to a charity in perpetuity, it may be given for any shorter period, however long; and the interest undisposed of, even if it cannot be the subject of a direct executory gift, may be left to devolve as the law prescribes."

In the case at bar, our conclusions as to the effect of Forrest's deed, assuming it to be in the nature of a valid dedication for a pious and char- 357 jitable use, may be summed *up as follows: The trustees named in the deed took the legal estate in fee. The equitable estate in fee was from the beginning, and always remained, in the grantor and his heirs. The trust declared in the deed, for a burial ground for the Union Beneficial Society, came to an end, according to its own express restriction and limitation, by the land ceasing to be used as a burial ground, and the dissolution of the society. Thereupon, the trustees held the legal estate in fee, subject to a resulting trust to the grantor's heirs, unaffected by the rule against perpetuities; and the legal estate of the trustees descended to their heirs, and passed by the deeds of the latter to the defendant, charged with this resulting trust.

The alternative that the trust expressed in Forrest's deed was not a charitable use, but was void as tending to create a perpetuity, and that the trustees, immediately upon the execution and delivery of the deed to them, held the land subject to a resulting trust for the grantor and his heirs, would be wholly inconsistent with the position always taken by the defendant Grimshaw, and by the trustees and the society under whom he claims title, and could not, therefore, inure to his benefit by way of defense to this suit, on the ground of laches, or otherwise. All Forrest's heirs (except Mrs. Brooks, who had conveyed her title to the defendant Grimshaw) have joined as plaintiffs in this bill to enforce the resulting trust in their favor. Both they and Grimshaw had acted upon the theory that the deed of Forrest created a valid trust for the Union Beneficial Society. The plaintiffs made no claim to the land, so long as it was used by that society for a burial ground. And neither the trustees, nor Grimshaw claiming under them, contended that they took an absolute title, free from the trust expressed in Forrest's deed. The real controversy between the plaintiffs and Grimshaw was as to the construction of the deed, and as to the duration of the express trust therein declared for the Union Beneficial Society.

The objection that the plaintiffs' only remedy is at law is unavailing. The bill, besides specifically praying that the land be decreed to have reverted to Forrest's heirs, and *that [358 a partition be ordered to be made between the defendant Grimshaw, as grantee of Mrs. Brooks, one of Forrest's heirs, and the plaintiffs, his other heirs, and that the deeds to Grimshaw from the heirs of the trustees be declared to be a cloud upon the plaintiffs' title, contains a prayer for general relief, under which the court may grant any relief justified by the facts stated in the bill and appearing in proof. *Jones* v. *Van Doren*, 130 U. S. 684, 692 [32: 1077, 1080].

Upon the allegations of the bill, and the proofs at the hearing, the trustees named in Forrest's deed, and their heirs, and Grimshaw as grantee of the latter, took the legal title in fee, in any aspect of the case, subject to a resulting trust for the heirs of the grantor. A resulting trust is a creature of equity, and can be enforced in a court of chancery only. *Watkins* v. *Holman*, 41 U. S. 16 Pet. 25, 59 [10: 873, 886]. Moreover, the title of the plaintiffs appearing upon the allegations and proofs to be purely equitable, the bill may also be maintained for partition of the land. Act of August 15, 1876 (19 Stat. at L. 202, chap. 297); *Willard* v. *Willard*, 145 U. S. 116 [36: 644]; *Lucas* v. *King*, 10 N. J. Eq. 277.

The court, having acquired jurisdiction of the bill upon both these grounds, was authorized to



Digitized by Google

retain it for the purpose of administering complete relief between the parties, including the question of any allowance to which Grimshaw might be entitled for the expense incurred in the removal of the bodies from the burial ground to other cemeteries, or upon any other account.

The decree below appears to have proceeded upon the misapprehension that the heirs of Forrest were not entitled to any relief, unless by reason of his membership in the Union Beneficial Society.

*Decree reversed*, and case remanded for further proceedings in conformity with this opinion.

---

359] JOSEPH ROBINSON, *Appt.*,
*v.*
WILLIAM A. CALDWELL.

(See S. C. Reporter's ed. 359-362.)

*Appeal to this court.*

An appeal to this court from the circuit court on the ground that the jurisdiction of the circuit court is in question cannot be maintained when the appellant has also taken an appeal to the circuit court of appeals and the whole case on its merits has been determined by it, although the construction of a treaty and the constitutionality of an act of Congress were drawn in question in the circuit court: such case can be taken to this court only upon certiorari after final decree upon the merits in the circuit court of appeals.

[No. 162.]

*Submitted January 19, 1897. Decided February 1, 1897.*

APPEAL from a decree of the Circuit Court of the United States for the District of Idaho adjudging the plaintiff, William A. Caldwell, to be the true and lawful owner of certain land and that his title be quieted against the claims of Joseph Robinson, the defendant. *Dismissed.*

See same case below, 59 Fed. Rep. 653; 29 U. S. App. 468.

The facts are stated in the opinion.

*Mr.* **J. M. Dickinson,** Assistant Attorney General, for appellant.

*Messrs.* **Charles A. Maxwell, George S. Chase,** and *James W. Reid* for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit was brought on the 20th day of October, 1893, by Caldwell against Robinson in the district court of the second judicial district of the state of Idaho.

It appears from the complaint that the plaintiff claimed to be the owner of a certain tract of land in Idaho, containing 640 acres, and that the validity of his title depended partly, if not altogether, upon the construction of a treaty made between the government of the United States and the Nez Perce Indians on the 11th day of June, 1855. 12 Stat. at L. 957. It also appears that there was drawn in question in the circuit court the constitutionality of the act of Congress of March 3, 1873. 17 Stat. at L. 627, chap. 324.

A temporary injunction was issued in the cause, enjoining the defendant and his servants, counsel, and agents, and all others acting in his behalf, from interfering or intermeddling with the plaintiff in the control and peaceable possession of the lands and premises described in the complaint.

Upon a petition subsequently filed in the state court by the defendant, the cause was removed into the circuit court of the United [360 States for the district of Idaho, northern division. By stipulation of the parties the case was transferred to the central division of that court.

The case was heard in the circuit court of the United States upon a motion to dissolve the injunction, and, also, pursuant to a stipulation of the parties upon the merits. A final decree was rendered adjudging the plaintiff to be the true and lawful owner of an undivided one-half interest in the land described in the complaint, and that his title be quieted against the claims, demands, and pretensions of the defendant, whom the decree perpetually estopped from setting up any claim to said land or to any part thereof, as described in the decree. 59 Fed. Rep. 653. From this decree the defendant asked and was allowed an appeal to this court. The citation on this appeal was served July 21, 1894.

It is conceded that the appellant also prosecuted an appeal to the circuit court of appeals, which determined the case February 4, 1895, in favor of the plaintiff, the opinion of that court being delivered by Judge Gilbert. 29 U. S. App. 468.

The opinion of Judge Beatty in the circuit court and of Judge Gilbert of the circuit court of appeals both show that the respective courts considered all the questions in the case requiring a construction of the treaty of 1855, and involving the validity of the act of March 3, 1873.

The case was not brought to this court from the circuit court of appeals upon certiorari, but is here upon appeal directly from the final decree in the circuit court of the United States.

Upon the present appeal the question is raised by the appellant as to the jurisdiction of the circuit court of the United States, the contention being that the plaintiff could not have brought an original suit in the circuit court of the United States, and therefore that the case was not removable from the state court. *Tennessee* v. *Union & P. Bank*, 152 U. S. 454 [38: 511]; *Chappell* v. *Waterworth*, 155 U. S. 102 [39: 85]. But no such question has been certified to this court, nor does it appear to have

NOTE.—*As to jurisdiction of the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

*As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws*,—see notes to Hart v. Lamphire, 7: 679, and Commercial Bank v. Buckingham, 12. 169.



Digitized by Google

been raised either in the circuit court or in the circuit court of appeals.

361] *In *McLish* v. *Roff*, 141 U. S. 661, 668 [35: 895], the court said that after a final judgment in the circuit court "the party against whom it is rendered must elect whether he will take his writ of error or appeal to the supreme court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole case; if the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to this court."

In *United States* v. *Jahn*, 155 U. S. 109, 114 [39: 87, 90], it was said: "(1) If the jurisdiction of the circuit court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court. (2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the circuit court of appeals, where, if the question of jurisdiction arises, the circuit court of appeals may certify it. (3) If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the circuit court of appeals, and the question of jurisdiction can be certified by that court. (4) If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the circuit court of appeals on the merits, and this he may do by way of cross-appeal or writ of error if the defendant has taken the case there, or independently if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the circuit court of appeals will suspend a decision upon the merits until the question of jurisdiction has been determined. (5) The same observations are applicable where a plaintiff objects to the jurisdiction, and is, or both parties are, dissatisfied with the judgment on the merits."

In *Chappell* v. *United States*, 160 U. S. 499, 509 [40: 510, 514], in which the constitutionality of an act of Congress was drawn in question,

362] *the court said: "No question of jurisdiction having been separately certified or specified, and the writ of error having been allowed without restriction or qualification, this court, under the other clause of the statute, above cited [§ 5], has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States was drawn in question; and, having acquired jurisdiction under this clause, has power to dispose, not merely of the constitutional question, but of the entire case, including all questions, whether of the jurisdiction or of merits."

As the construction of a treaty made under the authority of the United States and the constitutionality of an act of Congress were drawn in question in the circuit court, this court could have taken cognizance of the case upon the appeal from the circuit court and determined those questions, and having thus acquired jurisdiction of the cause, it could have determined any question of the jurisdiction of the circuit court appearing upon the record, whether certified or not. 26 Stat. at L. 826, chap. 517, § 5. But the defendant elected to prosecute also an appeal to the circuit court of appeals, and that court considered and determined the whole case upon its merits.

It was not the purpose of the judiciary act of 1891 to give a party who was defeated in a circuit court of the United States the right to have the case finally determined upon its merits both in this court and in the circuit court of appeals. As no question of jurisdiction was certified by the circuit court, and as the defendant chose not to await the action of this court upon the appeal to it from the circuit court, but invoked the jurisdiction of the circuit court of appeals upon the whole case, he must be held to have waived his right to any decision here upon his direct appeal from the circuit court.

We are of opinion that the present appeal must be dismissed. After the final decree upon the merits in the circuit court of appeals, this court, under the circumstances stated, could properly take cognizance of the case, in respect of any question involved in it, only upon certiorari.

*Appeal dismissed.*

---

THOMAS F. OAKES and Henry C. [363
Payne and Henry C. Rouse, Receivers of the Northern Pacific Railroad Company, *Plffs. in Err.*,

v.

CLARA MASE, Administratrix.

(See S. C. Reporter's ed. 363, 364.)

*Fellow servants.*

An engineer on one train is a fellow servant of a conductor of another train on the same road.

[No. 182.]

*Submitted January 28, 1897. Decided February 15, 1897.*

IN ERROR to the Circuit Court of Appeals for the Eighth Circuit to review a judgment affirming a judgment of the United States Circuit Court for the District of Minnesota, Third Division, in favor of Clara Mase, administratrix, against the receivers of the Northern Pacific Railroad Company, for damages for the death of plaintiff's intestate, caused by the defendant. *Reversed*, and judgment ordered in favor of defendant.

The facts are stated in the opinion.

*Mr.* **C. W. Bunn** for plaintiffs in error.

No counsel for defendant in error.

**Mr. Justice White** delivered the opinion of the court:

The defendant in error, who was plaintiff in the trial court, sued to recover damages caused by an injury, resulting in the death of her in-

NOTE.—*As to fellow servants and their negligence; who are fellow servants; vice principal; superior servant; liability of master,*—see note to Baltimore & O. R. Co. v. Baugh, 37: 773.



Digitized by Google

testate, whilst serving as an engineer on an engine of the defendant company in the state of Montana. After the cause was put at issue a jury was waived by a written stipulation, and it was submitted to the court for judgment on an agreed statement of facts. The facts stated established that the accident was caused by a switch negligently left open by the conductor of another train on the same road. The trial court, considering that the engineer on one train was not a fellow servant of the conductor on another train of the same road, gave judgment for the sum of the damage, which was fixed in the statement of facts. On error to the trial court the circuit court of appeals for the eighth circuit, although holding that the relation between the engineer on one train and the conductor on another was that of a fellow servant, yet affirmed the judgment on the ground that, by the statute law of Montana, the common-law rule as to the relation of master and servant was modified, hence the liability existed. The statute referred to is 364] *found in the Compiled Statutes of the State of Montana of 1887, and reads as follows:

"Sec. 697. That in every case the liability of the corporation to a servant or employee acting under the orders of his superior shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employee not appointed or controlled by him, as if such servant or employee were a passenger."

Pending this writ of error prosecuted to the judgment of affirmance rendered by the circuit court of appeals, the validity of the statute of Montana upon which that court based its decree was drawn in question before the supreme court of the state of Montana, where it was held that the statute was void under the Constitution of the state because it applied only to domestic corporations, and therefore operated a discrimation against such corporations. *Criswell* v. *Montana C. R. Co.* (Mont.) 44 Pac. 525. As this ruling of the court of last resort of the state of Montana interpreting the Constitution and laws of that state is binding here, the sole ground upon which the circuit court of appeals rested its judgment is destroyed, and the only question remaining is, Did the relation of fellow servant exist between an engineer operating a locomotive on one train and the conductor on another train of the same road? That such relation did exist is no longer an open question in this court. *Northern P. R. Co.* v. *Hambly*, 154 U. S. 349 [38: 1009]; *Northern P. R. Co.* v. *Charless*, 162 U. S. 359 [40: 999]; *Northern P. R. Co.* v. *Peterson*, 162 U. S. 346 [40: 994]; *Central R. Co.* v. *Keegan*, 160 U. S. 259 [40: 418].

It follows, necessarily, that *the judgment must be reversed*, and that judgment be entered in favor of defendants, and it is so ordered.

**Mr. Justice Harlan dissents.**

## LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, *Plff. in Err.*, [365

v.

## STATE OF OHIO *ex rel.* RUSSELL C. HUMPHREY.

(See S. C. Reporter's ed. 365-369.)

*Power of state court as to bridge over river—act of 1890—additional remedy.*

1. The power of a state court to order the removal or modification of a bridge by quo warranto proceedings, on the ground that it is a public nuisance impeding the navigation of a river which is wholly within the state, is not taken away by the act of Congress of 1890 requiring the approval of the Secretary of War as a condition of the erection of a bridge over navigable water.
2. The purpose of the act of 1890 was not to deprive the states of authority to grant power to bridge such streams, or to render lawful all bridges previously built without authority, but simply to create an additional remedy to prevent such structures from interfering with commerce.

[No. 156.]

*Argued January 15, 1897. Decided February 15, 1897.*

IN ERROR to the Supreme Court of the State of Ohio to review a judgment of that court affirming a judgment of the trial court rendered in proceedings by quo warranto ordering the defendant below, the Lake Shore & Michigan Southern Railway Company, to remove a bridge over the Ashtabula river or modify it by making an adequate draw span. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **George C. Greene** for plaintiff in error.

*Mr.* **T. E. Burton** for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

The judgment of the supreme court of the state of Ohio to which this writ of error was prosecuted affirmed a judgment of the trial court rendered in proceedings by quo warranto ordering the defendant below, an Ohio corporation, to absolutely remove a bridge or to modify its structure by creating an adequate draw span therein; the bridge being one by it erected and maintained over the Ashtabula river, a short distance above the point where that stream empties into Lake Erie. The legal conclusions of the lower court were rested upon certain specific findings of fact, *viz.*, that the bridge without a draw had been erected and was maintained without the consent of the state by an abuse, by the corporation, of the franchise held by it from the state, and that it was a public nuisance impeding the navigation of the river, which was wholly within the state of Ohio. Both the pleadings and the errors here assigned deny the jurisdiction of the state of Ohio or its courts to control the subject-matter of the *controversy, on the theory[366 that the determination of whether the defendant possessed the right to erect the bridge and to continue it, although constructed without authority, is a Federal and not a state question.



Digitized by Google

This contention is predicated on §§ 4, 5, and 7 of the act of Congress of September 19, 1890. (26 Stat. at L. 453, chap. 907).

The contention is that the statute in question manifests the purpose of Congress to deprive the several states of all authority to control and regulate any and every structure over all navigable streams, although they be wholly situated within their territory. That full power resides in the states as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the contrary, is conclusively determined. *Wilson* v. *Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 [7: 412]; *Withers* v. *Buckley*, 61 U. S. 20 How. 84 [15: 816]; *Cardwell* v. *American River Bridge Co.* 113 U. S. 205 [28: 959]; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1 [31: 629]; *Shively* v. *Bowlby*, 152 U. S. 33 [38: 344], and authorities there cited. Indeed, the argument at bar does not assail the rule settled by the foregoing cases, but asserts that as the power which it recognizes as existing in the state is predicated solely upon the failure of Congress to exert its paramount authority, therefore the rule no longer obtains, since the act of 1890 relied on, substantially amounts to an express assumption by Congress of entire control over all and every navigable stream, whether or not situated wholly within a state.

The correctness of this proposition is the sole question for consideration. The 4th section of the act relied on provides:

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States, is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the **367** duty of the said Secretary, first *giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken."

The 5th section makes it a misdemeanor to wilfully refuse to comply with the lawful orders of the Secretary of War in the premises, and for the prosecution of the offender by proceedings instituted by the proper district attorney. The portion of the 7th section which relates to the question in hand is as follows:

"And it shall not be lawful hereafter to commence the construction of any bride, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge-draw, bridge piers, and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers, and abutments, or other works, under an act of the legislature of any state, over or in any stream, port, roadstead, haven, or harbor, or other navigable water not wholly within the limit of such state."

On the face of this statute, it is obvious that it does not support the claim based upon it. Conceding, without deciding, *that the **[368** words "waterways of the United States," therein used, apply to all navigable waters, even though they be wholly situated within a state, and passing also without deciding the contention that Congress can lawfully delegate to the Secretary of War all its powers to authorize structures of every kind over all navigable waters, nothing in the statute gives rise even to the implication that it was intended to confer such power on the Secretary of War. The mere delegation to the Secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably necessary, its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that Congress conceived that it was lodging in the Secretary power to that end. When the distinction between an authorized structure so erected as to impede commerce and an unauthorized work of the same character is borne in mind, the fallacy of the contention relied on becomes apparent. The mere delegation of power to direct a change in lawful structures so as to cause them not to interfere with commerce cannot be construed as conferring on the officer named the right to determine when and where a bridge may be built. If the interpretation claimed were to be given to the act, its necessary effect would be that Congress, in creating an additional means to control bridges erected by authority of law, had, by implication, confirmed and made valid every bridge built without sanction of law.

The language of the 7th section makes clearer the error of the interpretation relied on. The provision that it shall not be lawful to thereafter erect any bridge "in any navigable river or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge . . . have been submitted to and approved by the Secretary of War," contemplated that the function of the Secretary should extend only to the form of future structures, since the act would not have provided for the future erection of bridges under state authority if its very purpose was to deny for the future all



Digitized by Google

369]*power in the states on the subject. The qualification affixed to the proviso which accompanies this section throws light on the entire statute and points obviously to the purpose intended to be accomplished by its enactment. The qualifying language is that the section shall not apply to any bridge "heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers, and abutments, or other works, under an act of the legislature of any state, over or in any stream, port, roadstead, haven, or harbor, or other navigable water, not wholly within the limits of such state." The construction claimed for the statute is that its purpose was to deprive the states of all power as to every stream, even those wholly within their borders, whilst the very words of the statute, saying that its terms should not be construed as conferring on the states power to give authority to build bridges on streams not wholly within their limits by a negative pregnant with an affirmative, demonstrate that the object of the act was not to deprive the several states of the authority to consent to the erection of bridges over navigable waters wholly within their territory. To hold that the act manifested an intention on the part of Congress to strip the several states of all authority over every navigable stream wholly within the state would require the obliteration of these qualifying words, and would therefore be the creation of a new statute by judicial construction. It follows, therefore, that, even conceding, *arguendo*, that the words 'navigable waters' as used in the act were intended to apply to streams wholly within a state, its obvious purpose was not to deprive the states of authority to grant power to bridge such streams, or to render lawful all bridges previously built without authority, but simply to create an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce.

*Affirmed.*

Mr Justice **Brewer** concurs in the result.

---

## 370] BURLINGTON GASLIGHT COMPANY, *Plff. in Err.*,
*v.*
## BURLINGTON, CEDAR RAPIDS, & NORTHERN RAILWAY COMPANY.

*Use by railroad of highway—when cannot be restrained.*

(See S. C. Reporter's ed. 370-378.)

1. A railroad may be permitted by city authorities to use a highway reserved for public use as a highway and for other public uses under the act of Congress of July 2, 1836, directing the platting of certain lands in Iowa into towns.
2. The use of such land for railroad purposes being a public use and within the authority granted by the original reservation, the extent of that use is a matter for determination by the public authorities and cannot be restrained by the plaintiff, an adjoining lotowner, whatever may be its rights to compensation for the injury to its lots.

[No. 173.]

*Argued January 26, 1897. Decided February 15, 1897.*

IN ERROR to the Supreme Court of the State of Iowa to review a decree of that court reversing a decree of the State District Court in favor of plaintiff and dismissing a suit brought by the Burlington Gaslight Company, plaintiff, against the Burlington, Cedar Rapids, & Northern Railway Company to enjoin it from interfering with the grade of a street, etc., and from narrowing the roadway in front of plaintiff's lots. *Affirmed.*

See same case below, 91 Iowa, 470.

Statement by Mr. Justice **Brewer**:

On July 2, 1836, Congress passed an act (5 Stat. at L. 70, chap. 268) directing the survey and platting of certain tracts of land in Iowa into towns, among others the town (now city) of Burlington, the work to be done under the direction of the surveyor general of the public lands, with a proviso "that a quantity of land of proper width on the river banks, . . . and running with the said river the whole length of said towns, shall be reserved from sale (as shall also the public squares) for public use, and remain forever for public use as public highways, and for other public uses." This act was amended on March 3, 1837 (5 Stat. at L. 178, chap. 36) by transferring the duty of surveying, etc., from the surveyor general to a board of commissioners. Both the original act and its amendment provided for a public sale of the lots as surveyed and platted. In pursuance of these statutes the town of Burlington was platted, a strip of land 200 feet in width, called "Front Street," being left between the eastern row of lots and the Mississippi river. February 14, 1853, Congress passed an act (10 Stat. at L. 157, chap. 67) granting to the cities of Burlington and Dubuque "the land bordering on the Mississippi river, in front of said cities, reserved by the act of July 2, 1836, for a public highway, and for other public uses, together with the accretions which may have formed thereto or in front thereof, to *be[371 disposed of in such manner as the corporate authorities of said cities may direct."

The 3d section provided:

"That the grant made by this act shall operate as a relinquishment only of the right of the United States in and to said premises, and shall in no manner affect the rights of third persons therein, or to the use thereof, but shall be subject to the same."

The plaintiff is the owner of five lots facing on Front street, holding them by a regular chain of title from the original purchasers at the government sale, and occupying them for its gas and manufacturing plant. For many years the defendant, under authority from the city, and apparently without objection, had been using a portion of this open ground between the lots and the river. It had constructed a retaining wall 36 feet east of the line of plaintiff's lots, and had graded and used all east of that for tracks, switches, and a freight house. Practically, therefore, the plaintiff was left a roadway in front of its lots of 36 feet in width. In 1892 the city council passed a resolution authorizing the railroad company to set this retaining wall back 15 feet, "the space said wall was set back to be used solely for the purpose of a wagon road." The effect of this was to narrow the roadway in front of



Digitized by Google

plaintiff's lots to about 20 feet, the wagon road east of the retaining wall being for approach to a new freight house the defendant was proposing to construct between that space and the river. In pursuance of this authority the railway company commenced to make the excavation and erect the wall. Upon this plaintiff filed its petition in equity in the Des Moines county district court to enjoin the work. A decree in its favor in the district court was reversed by the supreme court of the state, and one entered dismissing the suit (91 Iowa, 470), to reverse which decree of dismissal plaintiff sued out this writ of error.

*Mr.* **P. Henry Smythe** for plaintiff in error.

No counsel for defendant in error.

**Mr. Justice Brewer** delivered the opinion of the court:

372] *The act of 1853 operated to transfer to the city of Burlington the fee to this strip along the river front, together with full control over it, subject only to the laws of the state and individual rights theretofore vested. Indeed, independent of the act it would seem that the United States has no control over the question of the uses to which the strip shall be put. *United States* v. *Illinois C. R. Co.* 154 U. S. 225 [38: 971].

The use to which this land was reserved was not that of a highway alone, but "other public uses." This does not mean other public uses similar in character. The rule *noscitur a sociis* does not apply; for under the act of 1836 the reservation is not simply of this strip but of public squares whose use is obviously not of the same character as that of the highway. Indeed, as well said by the supreme court of the state, "the fact that the land reserved was 200 feet wide precludes the idea that it was intended for public travel alone." The further fact that the reservation was of a strip along the Mississippi river—a great navigable waterway—implies that the public uses to which this strip might be put included all public uses which would tend to facilitate commerce on such highway, including therein wharves, storehouses, etc.

Land devoted to the use of a railroad is devoted to public use, and under the settled law of Iowa a common highway may be used by a railroad without further compensation to adjoining landowners. *Barney* v. *Keokuk*, 94 U. S. 324, 341 [24: 224, 229], and cases from the supreme court of Iowa cited in the opinion.

The public having control over a highway may determine the manner in which it shall be improved, and, as a general rule, such improvement cannot be enjoined by an abutting lot or land owner, whatever may be his right to compensation growing out of the injury which such manner of improvement may bring to his property. This being true of ordinary highways, *a fortiori* is it true in respect to this property, which was not reserved for a highway alone, but for other public uses.

373] *It does not appear that the plaintiff was pecuniarily damaged. The supreme court of Iowa said in its opinion that "there is not one word in the evidence showing that the plaintiff would be damaged in any sum of money by the proposed change." Whether there be any damage or not, or whether it be true that the plaintiff, having suffered pecuniary injury, is entitled to compensation therefor, its right, if any, is limited to the matter of compensation, and does not, in the absence of constitutional provisions,—like those, for instance, found in the Constitution of Illinois,—entitle it to an injunction to restrain the proposed change.

The use of this strip for railroad purposes being a public use and within the authority granted by the original reservation, the extent of that use is a matter for determination by the public authorities and cannot be restrained by the plaintiff, an adjoining lot owner, whatever may be its rights to compensation for the injury to its lots.

*We see no error in the decision of the Supreme Court of the State, and it is affirmed.*

**Mr. Justice Peckham** dissents.

---

DENNIS DAVIS, *Plff. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 373-379.)

*Medical expert—evidence of—defense of insanity—instruction as to manslaughter.*

1. One testifying as a medical expert, who has stated all that he had seen and heard and given

NOTE.—*As to opinions as to sanity*, see note to Dexter v. Hall, 21: 73.

*As to the scope and limits of a cross-examination*, see note to Rea v. Missouri, 21: 707.

*Expert testimony, when admissible; opinions of non-experts, when admissible; medical experts; questions of science, skill, and trade; hypothetical case; form of question; effect of the evidence; rules in different states; extent of the evidence; railway cases, etc.*

A medical expert may give his opinion as to the probable cause of the death of a person.

Such as was produced by choking, from the finger marks on the neck. Boyle v. State, 61 Wis. 440.

Or which of two wounds produced death. Eggler v. People, 56 N. Y. 642.

As to the permanency of a person's loss of vision. Tinney v. New Jersey S. B. Co. 12 Abb. Pr. N. S. 1.

And how long he has probably been afflicted with it. Lush v. McDaniel, 18 Ired. L. 485; Edington v. Ætna L. Ins. Co. 77 N. Y. 564; Eckles v. Bates, 28 Ala. 655.

As to the severity and ordinary duration of a disease, and the probability of its recurrence. Linton v. Hurley, 14 Gray, 191; Willey v. Portsmouth, 35 N. H. 303; Filer v. New York C. R. Co. 49 N. Y. 42, 10 Am. Rep. 327.

The cause of the disease, and its remedy. Matteson v. New York C. R. Co. 62 Barb. 364.

The question whether a piece of paper picked up near the scene of an alleged homicide by shooting appeared to have been used as a wadding for a gun is not a question calling for the opinion of an expert. Manke v. People, 17 Hun, 410, 78 N. Y. 611.

Where a physician had examined a wound on the head of the deceased it was held competent for him to testify from what direction the blow came. Hopt v. Utah, 120 U. S. 430 (30: 708); Davis v. State, 38 Md. 15.

A surgeon may testify as to the nature, extent,



Digitized by Google

his own expert opinion thereon concerning the sanity of a person, need not be allowed to be asked what medical science teaches on the subject.

2. A witness who has testified as an expert on behalf of the defendant in a homicide case, as to his mental condition, may be asked on cross-examination if from his experience and conversation with him he thinks defendant killed the man because he threatened his life.

3. An instruction that insanity as a defense for crime is such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong or unconscious of the nature of the act he is committing, or so complete a destruction of the will or governing power of the mind that one's actions are not subject to it, but are beyond his control,—is sufficiently favorable to the defendant.

4. An instruction as to manslaughter is unnecessary when there is no testimony to reduce the offense, if any, below the grade of murder.

[No. 577.]

*Submitted January 19, 1897. Decided February 15, 1897.*

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment convicting Dennis Davis of the crime of murder. *Affirmed.*

See same case, 160 U. S. 469 (40: 499).

Statement by Mr. Justice **Brewer:**

On October 18, 1894, defendant was indicted in the circuit court of the United States for the western district of Arkansas for the crime of murder. A trial being had he was found guilty and sentenced to be hanged. This judgment was reversed by this court on the ground of error in the instructions of the court in respect to the matter of insanity. *Davis v. United States*, 160 U. S. 469 [40: 499]. A second trial was had, which resulted in a similar sentence, to review which this writ of error has been sued out.

The circumstances of the homicide were briefly these, and in respect to them there was no dispute: The deceased and defendant had a misunderstanding in regard to the making of a sugar cane crop which the defendant was making for the deceased on land rented from

---

depth, length, width, and direction of a fatal wound, with its precise location on the head, the amount of force requisite to produce it, and the probable shape of the instrument used; but it is not competent for him to testify as to the probable position of the deceased when he received the blows. Kennedy v. People, 39 N. Y. 245.

Where the contract contained a warranty that the cotton gin would "be equal in all respects to the best sawgin then in use." In an action upon the contract, wherein the defendant set up a breach of the warranty as a defense, it was held that the testimony of men competent, from education and experience, to express an opinion as to whether plaintiff's invention was in fact equal to the best sawgin, was competent. Scattergood v. Wood, 79 N. Y. 268, 35 Am. Rep. 515, 14 Hun, 269.

A physician may testify as to the nature of the affection complained of, although it is inside the body, its cause, and the probability of its being cured. Matteson v. New York C. R. Co. 35 N. Y. 487, 91 Am. Dec. 67. Whether there will probably be a return of inflammation, and its effect on the future health of the patient. Filer v. New York C. R. Co. 49 N. Y. 42, 10 Am. Rep. 327; Lincoln v. Saratoga & S. R. Co. 23 Wend. 425.

Upon the trial of an action upon a policy of life insurance containing a provision against suicide a medical witness, called by plaintiff, was asked: "Assuming that a person had that form of insanity which you denominate melancholia, and had committed suicide, would you attribute that suicide to the disease?" which question was admitted under objection. Held, error. Van Zandt v. Mutual Ben. L. Ins. Co. 55 N. Y. 169, 14 Am. Rep. 215.

In an action upon a policy of life insurance, the following questions: "From your experience and reading, and from your acquaintance with the mental condition of the deceased, what effect, if any, would you say this disease (melancholia) would have upon her as to her power to control her actions or to resist any impulse with which she might be seized? In this case how do you think it was?"—were held properly admitted. Koenig v. Globe Mut. L. Ins. Co. 10 Hun, 558.

In questions of science, skill, and trade, or others of the like kind, persons of skill, sometimes called experts, may not only testify to facts but are permitted to give their opinions in evidence. 1 Greenl. Ev. § 440; Yardley v. Cuthbertson, 108 Pa. 395, 56 Am. Rep. 218.

Their opinions are confined to their judgment on the facts proved. Yardley v. Cuthbertson, *supra*.

Where the facts stated are not complicated, and the evidence is not contradictory, and the terms of the question require the witness to assume that the facts stated are true, nothing more is required than a scientific opinion. Yardley v. Cuthbertson, *supra*; Sills v. Brown, 9 Car. & P. 601.

The expert in giving his opinion on a hypothetical case must not be called upon to pass upon disputed facts. Page v. State, 61 Ala. 18; Fairchild v. Bascomb, 35 Vt. 399; Lawson, Expert Ev. 151.

A medical man who is present at the trial, and has heard all the testimony, may be properly asked: Upon the hypothesis that the testimony given by the witnesses in this case is all true, what would be your opinion of the party's sanity? Jerry v. Townshend, 9 Md. 145.

His opinion is not conclusive, but is to be weighed by the jury like all other evidence. Tatum v. Mohr, 21 Ark. 355; Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701; State v. Bailey, 4 La. Ann. 376; Wood v. Barker (Mich.) 22 Am. L. Reg. 323; Lawson, Expert Ev. 151.

The jury are not bound by the opinions of medical experts. They are to consider all the evidence and if they believe T sane, to find in favor of the will, though four out of the five physicians examined in the case give their opinions that T was insane. Watson v. Anderson, 13 Ala. 202; Lawson, Expert Ev. 153.

As a general rule persons not medical men cannot give their opinions as to the existence, nature, or extent of disease in anyone. Lush v. McDaniel, 13 Ired. L. 485.

The opinions of witnesses, when they state facts within their personal knowledge as the ground of their opinions, are competent evidence, and are entitled to the consideration of the jury. Dickinson v. Dickinson, 61 Pa. 404; Shaver v. McCarthy, 110 Pa. 339; DeWitt v. Barley, 17 N. Y. 340, 9 N. Y. 371.

It is competent to admit in evidence the opinions of witnesses who were not experts, touching the testator's sanity, first stating their observations on which their opinions were based. Roe v. Taylor, 45 Ill. 485; Upstone v. People, 109 Ill. 175; American Bible Soc. v. Price, 115 Ill. 623; Lawson, Expect Ev. 476.

One who was not a physician, but who, as sheriff, had watched C's actions for some length of time, was permitted to give his opinion as to his sanity. Clark v. State, 12 Ohio, 490, 40 Am. Dec. 481; Clary v. Clary, 2 Ired. L. 78.



Digitized by Google

him. About a week thereafter, and on September 18, 1894, the defendant took a gun and slipped up to near where the deceased was at work picking cotton, shot and killed him while so at work and while unarmed and doing nothing towards harming defendant. He then ran away from the place where the shot was fired to the nearest town and surrendered himself to the officers, telling them that he had killed the deceased, and detailing the circumstances.

No counsel for plaintiff in error.

*Mr.* **J. M. Dickinson**, Assistant Attorney General, for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The principal defense presented on this trial, as on the former, was insanity. Indeed, the circumstances of the homicide were such as to preclude any other. The deceased, peacefully at work, unarmed and making no demonstrations against the defendant, was shot and killed by the latter, and this in consequence of a dispute more than a week old. The act thus done, if done by a man fully responsible for his actions, was unquestionably murder in the first degree. Counsel for defendant have filed no brief and made no argument. With the trial in the circuit court, suing out a writ of error and filing assignments of error, their connection with the case ceased. If this were a civil case, undoubtedly, under rule 16 of this court, the writ of error would be dismissed, or the record opened and an affirmance ordered without examination. And if it were a criminal case of small importance it is probable that the same disposition would be made, but as the offense charged, and of which the defendant was convicted, is murder, and the punishment death, we have felt it to be our duty to carefully examine the record, with all the assignments of error, in order to see that no injustice has been done the defendant. In this examination we have had the assistance of a brief prepared by the Assistant Attorney General, in which the views of the government are fully presented.

The first nine assignments of error refer to

---

A brother and other witnesses were asked to give their opinion, from their observation of one's appearance and conduct, of his sanity. Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441.

On a commission *de lunatico inquirendo*, acquaintances (not experts) were properly allowed to express their opinion as to the soundness of mind of the alleged lunatic. *Re* Vanauken, 10 N. J. Eq. 198.

In Pennsylvania it has always been the rule that after a nonprofessional witness has stated the facts upon which his opinion is founded, he is permitted to state his opinion as to the sanity or insanity of the testator. Forbes v. Caruthers, 3 Yeates, 527; Yardley v. Cuthbertson, 108 Pa. 395, 56 Am. Rep. 218.

In Texas it is held that evidence of this character is inadmissible. Gehrke v. State, 13 Tex. 568; Lawson, Expert Ev. 486.

In New York persons not experts, after testifying to facts and incidents in relation to a person, tending to show soundness or unsoundness of mind, may testify to the impression produced upon them thereby, and as to whether the acts and declarations testified to impressed them as rational or irrational; but they cannot be permitted to give an opinion as to the general soundness or unsoundness of mind of the person, or as to his mental capacity. People v. Strait, 148 N. Y. 566, 569; People v. Taylor, 138 N. Y. 398, 409; Paine v. Aldrich, 133 N. Y. 544, 547.

The jury are entitled to all the facts on which an insanity expert bases his opinion; if he rests his answer on facts and knowledge acquired by himself, he must impart them to the jury; if he answers a hypothetical question, the facts therein set forth are those proved on the trial. People v. Nino, 149 N. Y. 318, 327.

The opinion of medical experts, founded on testimony already in the case, can only be given on a hypothetical case; and the hypothesis must be clearly stated, so that the jury may know with certainty upon precisely what state of assumed facts the expert bases his opinion. Kerr v. Lunsford, 31 W. Va. 659, 2 L. R. A. 669.

In putting hypothetical questions to expert witnesses, counsel may assume the facts in accordance with their theory of them; it is not essential that he states the facts as they exist, but the hypothesis should be based on a state of facts which the evidence in the cause tends to prove. Kerr v. Lunsford, *supra*.

The opinions of witnesses not experts are entitled to little or no regard, unless they are supported by good reasons founded on facts which warrant them; but if the reasons and facts upon which they are founded are frivolous, the opinions of such witnesses are worth little or nothing. Kerr v. Lunsford, *supra*.

A question to a physician who has testified that from the fact that a wound had once broken out it was liable to do so again, as to whether that result is probable and likely to occur, is not obnoxious to the objection that it is too speculative. Penny v. Rochester R. Co. 7 App. Div. 595.

A physician who made a physical examination of a plaintiff in an action for personal injuries, in order to qualify himself to testify in the case, and who describes minutely the plaintiff's condition disclosed by such examination, may express an opinion, if he has one, as to the probable future condition of the plaintiff's health. Stever v. New York C. & H. R. R. Co. 7 App. Div. 392.

A question put to a physician as to whether a "direct hernia" at any time becomes dangerous to life, or dangerous or painful in any way, is not obnoxious to the objection that it is speculative. Stever v. New York C. & H. R. R. Co. *supra*.

An expert physician on a trial for murder alleged to have been done by poisoning, after testifying that he made a microscopical examination of the stomach and its contents, may testify as to his opinion as to the cause of death, based upon his examinations, and assuming that certain quantities of a given poison were found after death in the stomach. State v. Fournier, 68 Vt. 262.

A witness who testified that he heard no bell rung on a locomotive on approaching a crossing may also testify as to the distance at which he could hear a bell if rung. Seeley v. New York C. & H. R. R. Co. 8 App. Div. 402.

Testimony of a witness who has stated that he was about a quarter of a mile distant from the ringing post and that his hearing was good, that if the bell on the engine had been rung at the post he could have heard it, is not inadmissible as an expression of an opinion. Stever v. New York C. & H. R. R. Co. 7 App. Div. 392.

A medical witness may, in an action for personal injuries, give his opinion as to their probable dura-



Digitized by Google

matters transpiring in the introduction of testimony. Some of the questions presented by those assignments have been already determined by this court in prior cases and need not, therefore, be noticed in this opinion. The others are as follows: Several lay witnesses were called who testified as to their acquaintance with the defendant and their opinion as to his sanity. He also called two medical witnesses, Dr. J. C. Amis and Dr. T. J. Wright, each of whom had seen him after his arrest and 376]during *his confinement in jail, and had observed his conduct, actions, and demeanor. While the record does not contain a recital of all the testimony of these witnesses, enough is disclosed to show that the court permitted full inquiry of each as to what he had seen or heard of the actions and sayings of defendant; permitted each also to give fully his opinion as to the mental condition of defendant, and his belief as to the latter's knowledge of right and wrong and his ability to distinguish between them. Hypothetical questions were also put involving all the circumstances of the homicide and the prior and subsequent conduct and appearance of defendant, and their answers received to such questions.

In the course of his testimony Dr. Amis stated that defendant "would sit down on his spittoon and gaze down on the floor as if looking at some object, when none was there, manifesting no interest in anything that was going on; that although violently ill he was indifferent and unconcerned during his illness, was never worried about his condition, never saw any change in his expression, but he would sit and gaze in a dreamy, melancholy way with his mouth open and under jaw hanging down, having a vacant, meaningless stare, his face expressionless—just a blank." In reference to this matter he was subsequently asked this question: "What does medical science say as to that meaningless, vacant stare, and the lower jaw hanging down in a listless way? What does medical science teach as to that?" —which was objected to and the objection sustained and exception taken. No ground of objection was stated and no reason given for

tion. McCooey v. Forty-Second Street & G. Street Ferry R. Co. 79 Hun, 255.

A physician is competent to give an opinion in respect to a particular disease, although he has not had the experience of a specialist thereon. Cooper v. St. Paul City R. Co. 54 Minn. 379, 58 Am. & Eng. R. Cas. 598.

Opinions of witnesses as to the physical appearance and apparent state of health of a person are competent. Robinson v. Exempt Fire Co. 103 Cal. 1, 24 L. R. A. 715.

Nonprofessional witnesses in a suit for personal injuries may testify from their own observation to the condition and appearance of the plaintiff during his illness and to his complaints of suffering, although some of the statements of the witnesses are mere matters of opinion and conclusion. Baltimore & O. R. Co. v. Rambo, 59 Fed. Rep. 75, 8 C. C. A. 6.

Nonexpert witnesses may testify that plaintiff in an action for personal injuries was apparently healthy; that they saw her doing her household work and going about, and that she had a rosy complexion before the accident, but not afterwards; that her complexion was strong and hearty, but since the accident there is a difference as to her color, and that her face looks pale, delicate, and unhealthy; or that after the accident she was not near so stout, and her color is almost gone. Cannon v. Brooklyn City R. Co. 9 Misc. 282.

A nonprofessional witness may be asked how a person with whom he is intimately acquainted appeared or looked in respect to health at a certain time, as such question does not call for an expert opinion. Cannon v. Brooklyn City R. Co. *supra*.

The rate of speed of a railway train is not a subject of expert testimony; and an opinion is competent upon the question although the witness does not have the degree of knowledge peculiar to experts called upon to testify where expert testimony is required. Sculley v. New York, L. E. & W. R. Co. 80 Hun, 197.

In an action for personal injuries from a collision between a street car and plaintiff's wagon, a witness who watched the approach of the car and saw the collision may testify as to the apparent speed of the car. Eckington & S. H. R. Co. v. Hunter, 23 Wash. L. Rep. 401.

The question of the time necessary for a four-horse truck to travel a given distance is not the subject of expert testimony. Myer v. Brooklyn City R. Co. 10 Misc. 11.

One may express an opinion as to whether another is suffering with pain, although he is not an expert. Girard Coal Co. v. Wiggins, 52 Ill. App. 69.

Anyone may express an opinion as to whether another was intoxicated at a given time. Parker v. Parker, 52 Ill. App. 333.

A nonexpert witness may describe a suppurating abscess and tell where it is located. Lund v. Masonic L. Asso. 61 Hun, 287.

A nonprofessional witness who has opportunities to observe a sick or injured person may give his opinion as to the weakness or helplessness of such person and the suffering endured, based upon such observation and limited to the time thereof. Lake Shore & M. S. R. Co. v. Gaffney, 9 Ohio C. C. 32, 2 Ohio Dec. 212.

The opinion of a physician, based entirely upon his reading of medical authorities, that a certain disease can rarely be cured by a surgical operation, is competent. Jackson v. Boone, 93 Ga. 662.

A surgeon who describes fully and minutely the character of an injury by which plaintiff's leg was broken may give his opinion as to the position of the leg and the point from which the blow came. Johnson v. Steam Gauge & L. Co. 146 N. Y. 152.

Upon the issue as to whether the present physical condition and bodily sufferings of plaintiff in an action for personal injuries were the result of an accident, the opinions of competent physicians as to whether such condition and sufferings could have resulted therefrom are admissible. McDonald v. New York C. & St. L. R. Co. 13 Misc. 651.

A physician may testify that the condition of an injured person could have been produced by contact with a heavily charged electric wire. Block v. Milwaukee Street R. Co. 89 Wis. 371, 27 L. R. A. 365.

A physician may testify to his opinion about the permanency of the shortening of plaintiff's leg as a result of an injury, from its known condition at the time of the trial. Reynolds v. Niagara Falls, 81 Hun, 353.

It is competent for an expert physician to testify that the thickening of the pleura which he found will be permanent, and that he knows it to a reasonable certainty. Eifinger v. Brooklyn Heights R. Co. 13 Misc. 389.

A physician may be asked what symptoms would ordinarily and necessarily accompany an injury of the character which the evidence tends to show, as such question does not call for conclusions of fact, but is upon a subject of science peculiarly within a physician's knowledge. Cole v. Fall Brook Coal Co. 87 Hun, 584.



Digitized by Google

sustaining the objection. It would seem probable that, inasmuch as the witness had shown himself qualified to testify as a medical expert, as he had stated all that he had seen and heard, and given his own expert opinion thereof, the court deemed it improper or unnecessary to enter into any examination as to what the witness thought medical science would say of defendant's conduct and appearance. It may have been because the matter had been sufficiently brought out in the prior testimony of the witness, but probably the reason we have suggested is the correct one, and in that view 377]we are *of the opinion that the ruling furnishes no ground for disturbing the judgment. After a witness has once qualified himself as an expert and given his own professional opinion in reference to that which he has seen or heard, or upon hypothetical questions, then it is ordinarily opening the door to too wide an inquiry to interrogate him as to what other scientific men have said upon such matters, or in respect to the general teachings of science thereon, or to permit books of science to be offered in evidence. *Collier* v. *Simpson*, 5 Car. & P. 78. At any rate, the trial court must have some discretion as to the limit to be placed in any given case upon the extent to which the expert testimony may be carried, and when upon direct examination the opinion of the witness is fully disclosed, we think it cannot be said that the court erred in declining to permit on the same direct examination an inquiry into what is in some aspects both collateral and hearsay.

Again, when Dr. Wright was on the stand and had finished his direct examination, he was asked by the district attorney the following question: "You think from your experience with him, from your conversation with him, that he killed the man because he threatened his life; your idea is that he killed the man because he threatened his life?" which question was objected to, the objection overruled, and the witness permitted to answer. The answer which he gave was: "Well, in part; and because he thought his own life was in danger, and because he thought he had the right to destroy this menace to his own life." We think this was clearly within the proper limits of cross-examination; and therefore the objection was properly overruled.

The remaining fifty-one assignments run to the charge of the court and to the refusal to give a series of special instructions asked by defendant. It would be a waste of time to attempt to notice each assignment separately, although we have examined all. On the first trial the court had charged the jury that every man was presumed to be sane; that insanity was a special defense, and that to make out such defense it must be established to the reasonable satisfaction of the jury, and that the burden of proof thereof rests with defendant. 378]* This court was of opinion that this was not the correct rule of law; that while it was true that every man is presumed to be sane, yet whenever by the testimony the question of insanity is raised then the fact of sanity, as any other essential fact in the case, must be established to the satisfaction of the jury beyond a reasonable doubt. On the second trial (the record of which is now before us for consideration) the court charged the law in accordance with the rule laid down by this court—quoting the very language of our opinion—and also defined what was meant by insanity in language which, under the circumstances of this case, was in no degree prejudicial to the rights of the defendant, as follows:

"The term 'insanity' as used in this defense means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control."

Although the court in addition to this specific language enlarged upon the question, its charge in reference to the matter of insanity covering several pages of the record, and containing quotations from many adjudged cases, we find nothing which qualifies or restricts the definition as above quoted.

Seventeen special instructions were asked by defendant, all of which, except the last, were in respect to the presumption of innocence, reasonable doubt, and insanity, matters which the court had fully treated of in the general charge; and of course repetition or restatement in the language of counsel was unnecessary.

The last instruction asked was in reference to manslaughter. But under the evidence there was no occasion for any statement of the law on this. There was no testimony to reduce the offense, if any there was, below the grade of murder. If the defendant was sane and responsible for his actions, there *was[379 nothing upon which any suggestion of any inferior degree of homicide could be made, and therefore the court was under no obligation (indeed it would simply have been confusing the minds of the jury) to give any instruction upon a matter which was not really open for their consideration. *Sparf* v. *United States*, 156 U. S. 51, 63 [39: 343, 347]; *Stevenson* v. *United States*, 162 U. S. 313, 315 [40: 980, 981].

These are all the matters presented by the assignments of error, and all the questions of any importance disclosed by the record.

*We find no error in the rulings of the court, and its judgment is therefore affirmed.*

---

GERMANIA IRON COMPANY *et al.*, *Appts.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 379-385.)

*Patent for land, when set aside.*

A patent for land issued, from inadvertence and

NOTE.—*As to errors in surveys and descriptions in patents for lands, how construed*, see note to Watts v. Lindsey, 5: 423.

*That patents for land may be set aside for fraud*, see note to Miller v. Kerr, 5: 381.

*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.



Digitized by Google

mistake, in violation of a rule to suspend action pending motions for review of the Secretary's decisions, and in ignorance of the fact that there was such a motion pending, as well as pending appeals from the local land officers, will be set aside in order that the matters of fact involved in these contests may be settled by the land department.

[No. 53.]

*Argued October 20, 1896. Decided February 15, 1897.*

APPEAL from a decree of the United States Circuit Court of Appeals for the Eighth Circuit affirming the decree of the United States Circuit Court for the District of Minnesota, sustaining a suit in equity brought by the United States to set aside a patent and canceling such patent for land in the state of Minnesota. *Affirmed.*

See same case below, 19 U. S. App. 10.

Statement by Mr. Justice **Brewer:**

On November 20, 1889, a patent was issued by the United States to Thomas Reed for the southwest quarter of the northeast quarter and lots 1 and 2 of section 30, township 63, north of range 11 west, containing 112 acres, in the Duluth land district of the state of Minnesota. On October 13, 1891, the United States filed in the circuit court of the district of Minnesota a bill in equity to set aside such patent, making Thomas Reed the patentee and the appellants in this case parties defendant. These appellants claimed title by conveyances from Reed. Reed made default in the suit, but the appellants appeared and answered, and to their **380]** answer *a replication was filed. Whereupon, some testimony having been taken, the case was submitted to the court with certain stipulations of fact; and upon the pleadings and these stipulations a decree was entered sustaining the bill and canceling the patent. On appeal to the circuit court of appeals this decree was affirmed (19 U. S. App. 10), and thereafter an appeal was taken to this court.

The facts as shown by the pleadings and stipulations are these: On July 21, 1885, Orilie Stram, formerly Moreau, attempted to make a location of the land in controversy with Sioux half-breed scrip. The validity of these locations was contested by other parties, and on February 18, 1889, the Secretary of the Interior, who had jurisdiction over the matter and the parties, canceled such scrip locations, and ordered that the land be held for disposal under the public land laws of the United States. On February 23, 1889, Thomas Reed applied to make soldier's additional homestead entry of the lands, which application was sustained by the local land officers, and a final certificate issued to him on that day. "At the same time that Reed made his entry Charles P. Wheeler applied to locate the southwest quarter of the northeast quarter of said section 30 with Valentine scrip," and "Warren Wing had applied to enter lot 2 of said section 30 under U. S. Rev. Stat. § 2306. . . . On the morning of the day when the Reed entry was allowed William M. Stokes was, among other applicants to make various kinds of entries before and at the time of the opening of the doors of the local land office at Duluth, present at said doors and attempting to enter . . . said southwest quarter of the northeast quarter of said section 30 as a soldier's additional homestead." The applications of Wheeler, Wing, and Stokes were severally denied, and appeals were taken from such denials to the Commissioner of the General Land Office.

On February 18, 1889, the time of the decision by the Secretary of the Interior in respect to the attempted location by Orilie Stram, and ever since, there has been in existence in the Department of the Interior a rule that motions for review of decisions of the Secretary of the Interior should be filed in the office *of the Commissioner of the General **[381** Land Office, and that the Commissioner should thereupon suspend action under the decision sought to be reviewed. Motions for review of the decision of date February 18 were duly made and filed on March 13 and 15, 1889, respectively, by the parties affected adversely by said decision. Thereupon an order was made suspending all action under the decision sought to be reviewed, and such order was of force and such motions were pending unheard and undetermined at the time and after the issuing of the patent sought to be canceled, and the patent was issued in direct violation or in ignorance of such order. At the time of the issue of such patent the appeals of Wheeler, Wing, and Stokes were also pending unheard and undetermined, and have not been since heard or determined.

"While said appeals and motions were pending and undisposed of, a clerk of the General Land Office at Washington, whose duty it was to examine entries of the character described, in ignorance of the pendency of said conflicting claims, said motions, and said appeals, approved the lands described in the said patent for patenting to Thomas Reed, one of the defendants hereto, and a patent was, upon such approval, issued to him on the 20th day of November, 1889; that said patent was signed by the secretary to the President and countersigned by the recorder of the General Land Office, each of whom, at the time they signed and countersigned said patent as aforesaid, were in ignorance of the pendency of the aforesaid conflicting claims, and acted wholly upon the said approval of said clerk. The approval of the entry for patent and the signatures to the patent were made, notwithstanding the fact that a caveat pointing out the conflicts was on file with the rest of the entry papers relating to the lands involved and such approval and signatures were made in ignorance of the contents of said caveat."

The appellants made no claim as bona fide purchasers, and the case stood as though it were a proceeding against the patentee alone. So far as it bore on the question of good faith, it was admitted that the land was worth $75,000, as alleged in the bill.

*Mr.* **William W. Billson** for appellants.

*Mr.* **J. M. Dickinson,** Assistant Attorney General, for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

Appellants contend that this bill cannot be



Digitized by Google

sustained because, first, no fraud is proved or even charged against the patentee; second, there is no showing that the other applicants for these lands had or have any rights superior to the patentee; third, that it is neither proved nor alleged that the patentee was not equitably as well as legally entitled to the lands; fourth, that the utmost that appears is the premature issue of a patent through mistake and inadvertence and in disregard of one of the rules of the department, and that such matters lay no foundation for the interposition of a court of equity unless accompanied by a trespass on some substantial right. They insist that a vendor cannot ask the aid of a court of equity to avoid his deed on the mere ground of irregularity on the part of his agents unless he also shows that the grantee in such deed was not equitably entitled to the conveyance; that the courts never attempt to do a useless thing, and that it would be idle to enter a decree canceling a patent, when for aught that appears it would be the duty of the government, after some formal proceedings and compliance with certain regulations, to reissue to the patentee a patent for the same lands. In other words, their contention is that this whole litigation is merely a dispute about form and order of proceeding, and not about substantial rights. Many authorities from this court and others are cited showing the conditions under which courts of equity will interfere to cancel patents and deeds on the ground of fraud, or by reason of other facts showing that the patentee or grantee is not of right entitled to the land. We have no disposition to weaken the force of these authorities, or to question their control in cases to which they are applicable. A patent from the United States is a solemn muniment of title not lightly to be challenged or set aside, and all that has been heretofore said in support of the sanctity of such an instrument we reaffirm.

383] *But the theory of this bill is outside the scope of all such cases. It does not rest upon doubtful and uncertain testimony. The facts are conceded, and there is, therefore, certainty as to what they are. The only question presented is as to the right which flows from these undisputed and admitted facts. It is in effect a suit by the government to restore to a tribunal to which it has committed exclusive jurisdiction over certain matters that jurisdiction which, through inadvertence and mistake, it has been deprived of. "Relief, when deeds or other instruments are executed by mistake or inadvertence of agents, as well as upon false suggestions, is a common head of equity jurisprudence." *Hughes* v. *United States*, 71 U. S. 4 Wall. 232, 286 [18: 303, 304]. Congress has intrusted to the land department the disposal of the public lands, and has invested the officers of that department with exclusive jurisdiction over many things in connection with such disposition. Their determination in respect to questions of fact in all matters of contest is exclusive and final. The issue of a patent is in effect the final determination of that department in favor of the patentee and against the contestants of all disputed questions of fact—a determination which it is not the function of courts to review except upon conditions of fraud, etc., which permit courts of equity to investigate and pass judgment upon all determinations of all tribunals. By inadvertence and mistake a patent in this case has been issued, and the effect of such issue is to transfer the legal title and remove from the jurisdiction of the land department the inquiry into and consideration of such disputed questions of fact.

The contention of the appellants is substantially that the courts must consider and determine those disputed questions of fact and exercise a jurisdiction not committed to them, before they restore to the land department the jurisdiction of which it has been wrongfully deprived. But why should the courts be called upon to consider and determine questions of fact, and after a determination adversely to the patentee relegate the matter for re-examination and determination in the land department? Is not the duty of the court fully performed when it ascertains that through such inadvertence *and mistake the department [384 which has jurisdiction over such matters has been deprived thereof? It restores to such department its lost jurisdiction, and leaves to the tribunal designated by Congress the full power to discharge the duties conferred upon it. It is true that it does not affirmatively appear in this case that the patentee was not entitled equitably to the land, or that the contestants had any superior right thereto, but his rights and their rights depend upon questions of fact, such as priority of application, etc., the determination of which by act of Congress has been committed to the land department. It, and not a court of equity, is the tribunal intrusted by the law with jurisdiction over such matters, and the latter may not inquire what ought to have been the determination of the former, but whether it has been wrongfully deprived of the power to make such determination.

The question is not one simply between the government and the patentee—a vendor and vendee—such as was presented in *United States* v. *Central P. R. Co.* 26 Fed. Rep. 479. In that case there were no adverse or contesting rights; equitably the patentee was entitled to the land, and the only real objection was that the patent had been prematurely issued. A court might properly decline to set aside a patent when it affirmatively appeared that immediately after such action it would be the duty of the department to issue a new one. Here there are adverse claimants, there are contestants of the patentee's right, and the mere existence of a question of contested fact, the mere fact of a dispute between several parties, is sufficient ground for a court of equity returning the matter for examination to the tribunal which Congress has created for such purposes. This is not a mere matter of procedure between the government and the patentee, but a question of the forum for the adjudication of controversies between individual litigants.

The case of *Badeau* v. *United States*, 130 U. S. 439 [32: 997] is not in point, for there the only question was one between the United States and the claimant, and involved simply the amount of money due to the latter. The case of *Williams* v. *United States*, 138 U. S. 514 [34: 1026], is more in point, for in that case



Digitized by Google

385]*this court sustained a decree canceling a patent although no fraud was shown, and its issue was simply owing to inadvertence and mistake. We are of the opinion that the ruling of the circuit court and the court of appeals was correct; that the matters of fact involved in these contests should be settled by the land department; that when, through inadvertence and mistake, a patent has been wrongfully issued, by which the jurisdiction of the land department over these disputed questions of fact is lost, a court of equity may rightfully interfere and restore such lost jurisdiction, to do which it becomes necessary to cancel the patent.

To deny relief in this case would open the door to many possibilities of wrong. It appears that although an order had been made to suspend all action in respect to the application for this patent, somehow or other the clerk having charge of the proceedings in respect to it was ignorant of such order, and that although in the papers handed to him was the formal entry of an appearance for a contestee, he failed to examine such instrument, and assumed that it was a mere entry of an appearance in behalf of the applicant. Upon the showing made in this case he was innocent of wrong intent, but if such omission can be operative to deprive the land department of its appropriate jurisdiction, it affords too strong an inducement for an intentional omission, proof of which may well be beyond the power of the government.

*The decree of the Court of Appeals is affirmed.*

Mr. Justice **Gray** was not present at the argument and took no part in the decision of this case.

---

386] JAMES M. DEWEESE, Jr., *Appt.*,
*v.*
JACOB REINHARD *et al.*

(See S. C. Reporter's ed. 386-394.)

*Power of equity to enjoin an action at law—want of equity.*

1. A suit in equity to enjoin the further prosecution of an action at law cannot be maintained on grounds which would constitute a complete defense in the action at law.
2. One who attempts to make a homestead entry of land knowing that it has been selected and certified to the state under a grant for internal improvements, and long ago transferred to purchasers for value who have invested large sums in reliance upon the title, will not be aided by a court of equity in attacking the title under such grant which has been acquiesced in as valid for many years.

[No. 151.]

*Argued January 13, 14, 1897. Decided February 15, 1897.*

APPEAL from a decree of the United States Circuit Court of Appeals for the Eighth Circuit affirming the decree of the United States Circuit Court for the District of Nebraska dismissing a suit in equity brought by James M. Deweese, Jr., plaintiff, against Jabob Reinhard *et al.*, to enjoin the prosecution of an action of ejectment brought by Reinhard *et al.*, and to quiet the title of said Deweese to land in Saline county, Nebraska. *Affirmed.*

See same case below, 19 U. S. App. 698.

Statement by Mr. Justice **Brewer:**

The controversy in this case respects the northeast quarter of section 14, township 5, range 3, situate in Saline county, Nebraska. The facts are these: The state of Nebraska upon its admission into the Union became entitled, by virtue of § 8 of the act of Congress, September 4, 1841 (5 Stat. at L. 455), to 500,000 acres of public land to aid in promoting its internal improvements. March 26, 1868, the state selected 359,708 acres of land, including the tract in controversy, as part of this grant. March 24, 1870, the selection was approved by the Commissioner of the General Land Office, who, in his certificate of approval, certified that the lists had been "carefully examined and compared with the township plats and tract books of this office and are found to be free from conflict; and I respectfully recommend that the same be approved subject to any valid interfering rights which may have existed at the date of selection." March 29, 1870, this action was approved by the Secretary of the Interior in these words: "Approved subject to all the rights above mentioned." *The lists duly certified were [387 transmitted to the state and recorded in the proper office. April 20, 1871, the state of Nebraska patented 100,000 acres of these lands, including the tract in controversy, to the Midland Pacific Railway Company in execution of a contract made by the state, through an act of its legislature, February 15, 1869. Neb. Laws 1869, p. 153. The appellees hold under a chain of title from the Midland Pacific Railway Company, the deed to Jacob Reinhard, one of the appellees, and Frederick Fieser, being dated November 11, 1878, they at the time paying for the land $12 per acre. On May 12, 1892, Frederick Fieser died, and his heirs and devisees are, in addition to Jacob Reinhard, the appellees in this case. The appellees and their grantors have paid the taxes of every kind levied upon the land since the patent from the state, amounting at the time of the decree in the circuit court to $1,375.81.

The claim of appellant was initiated on May 31, 1883, more than fifteen years after the selection by the state, more than thirteen years after the approval by the Secretary of the Interior of such selection and the certification to the state, twelve years after the state had conveyed the land away to its grantee, and nearly five years after the deed to appellees. It was initiated by an occupation of the tract and an application to enter it as a homestead. This application was rejected by the local land officers, and their action in this matter was affirmed by the Commissioner of the General Land Office and the Secretary of the Interior. On July 6, 1888, the appellant, who had been

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

*That patents for land may be set aside for fraud*, see note to Miller v. Kerr, 5: 381.

*As to whether equity will relieve against a mistake of law*, see notes to Hunt v. Rousmanier, 7: 27, and Hunt v. Rousmanier, 5: 589.



Digitized by Google

in continuous possession ever since his first entry, tendered the local office proof that he had complied with the terms and conditions of the homestead laws of the United States, and demanded a patent for the land. This was denied by the local land officers, and from such denial no appeal was taken. The theory upon which the appellant proceeded was that the land was within the limits of the grant made by the United States to the Burlington & Missouri River Railroad Company by act of Congress July 2, 1864 (13 Stat. at L. 356, 364, 388] chap. 216), and that by the act *of March 6, 1868 (15 Stat. at L. 39, chap. 20), the even-numbered sections within such limits were raised to double minimum lands, and, while subject to homestead and pre-emption entry, were not subject to private entry; that therefore the selection by and certification to the state were absolutely void and passed no title; that the title remained in the United States until he by full compliance with the requirements of the homestead laws acquired an equitable right to the land.

An action of ejectment having been commenced by Reinhard and Fieser on November 16, 1885, in the United States circuit court for the district of Nebraska, to recover possession, a bill in equity was filed by the appellant in the same court on October 8, 1888, to enjoin the further prosecution of that action and to quiet his title. Upon pleadings and proof the circuit court entered a decree dismissing the bill, which decree was affirmed by the circuit court of appeals (19 U. S. App. 698), from which decree an appeal was taken to this court.

*Messrs.* **G. M. Lambertson** and *J. W. Deweese* for appellant.

*Messrs.* **Charles E. Magoon** and **Charles Offutt** for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

On the threshold of this case we are confronted with the question whether, assuming that the appellant has any rights in the land, a case is presented for the interference of a court of equity. His contention is that notwithstanding the action of the Interior Department in certifying the land to the state, and the subsequent conveyances in the chain of title from the state to the appellees, such apparent legal title was absolutely void because by the acts of Congress the land was not subject to selection by the state, it being within the limits of the land grant to the Burlington & Missouri River Railroad Company, and reserved for homestead and pre-emption, but not for private entry. All the facts upon which his contention rests are 389] *matters of statute and record, and any defense to the apparent legal title created by them was available in the action to recover possession. For if it be true as contended that this land thus certified to the state was not under the acts of Congress land open to selection, the validity of such certification, as of a patent, can be challenged in an action at law. *Burfenning* v. *Chicago, St. P. M. & O. R. Co.* 168 U. S. 321 [41: 175], and cases cited in the opinion.

But the mandate of the statute (U. S. Rev. Stat. § 723), affirming in this respect the general doctrine in respect to the jurisdiction of courts of equity, is that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." This general proposition has been affirmed by this court in a multitude of cases, among others the following, in which the jurisdiction of courts of equity to restrain proceedings at law was denied on the ground that there existed a full and adequate defense, available in the legal action. *Hungerford* v. *Sigerson*, 61 U. S. 20 How. 156 [15: 869]; *Phœnix Mut. L. Ins. Co.* v. *Bailey*, 80 U. S. 13 Wall. 616, 628, [20: 501, 503], in which it was said: "Where a party, if his theory of the controversy is correct, has a good defense at law to 'a purely legal demand,' he should be left to that means of defense, as he has no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy." *Grand Chute* v. *Winegar*, 82 U. S. 15 Wall. 373 [21: 174]. It follows from these considerations that if this suit in equity is to be regarded as simply one to restrain the action at law, it cannot be sustained because upon the appellant's own theory he has a full, adequate, and complete defense at law.

But it is contended by appellant that his suit is something more than one to restrain the action at law; that it is a suit to quiet his title and to hold the appellees as trustees of the legal title for his benefit; that the restraint of the law action is simply incidental to and in furtherance of the main relief, which is the quieting of his title. Assuming for the purposes of this case that his contention in this respect is correct, we *agree with the court of appeals [390 that the showing in his bill is not one that appeals in the slightest degree to the conscience of a chancellor. The theory upon which the appellant proceeds is substantially that because he has not a legal title a court of equity must enforce and establish his right, or, in other words, that the lack of legal title creates an equitable duty. We are unable to assent to this contention. Something more than the absence of legal title is necessary to call into action the process of a court of equity. The right, whatever it may be and from what source derived, must be not only one not protected by legal title, but in and of itself appealing to the conscience of a chancellor. A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.

Upon his own showing the plaintiff's conduct demands condemnation rather than commendation. The title to vacant land within the states that originally formed the United States remained in those states severally, while the title to land subsequently acquired by the United States, whether through cession from the original states, by conquest or treaty, has been retained by the general government—lands within the state of Texas furnishing the one notable exception. Though Congress on the admission of the new states has not trans-



Digitized by Google

ferred to them the vacant lands within their limits, it has made to them large grants for school and other purposes. In carrying out this policy, in 1841 Congress passed an act granting to certain named states and to each state subsequently admitted into the Union 500,000 acres of land to aid in internal improvements, the selection of such lands to be made in such manner as the legislature of the respective states should provide. Such selections were subject to the approval of the land department of the United States, but when so made and approved the lands were to be certified to the state, and such certification was to have all the effect of a patent. Now, assuming that the contention of the plaintiff is correct, **391** ]that *subsequent legislation of Congress had the effect of providing that such selection should be made from certain classes of lands, and that the tract in controversy did not belong to any of those classes, the fact remains that the land was selected by the state, and such selection approved by the land department, and that the land so selected and thereafter certified was land belonging to the United States. At the time of such selection and certification the only parties in interest were the United States and the state. Concede the fact that, through inadvertence, mistake, or (of which there is no evidence) wrong on the part of the officials, this land was improperly selected and certified, yet the United States for thirteen years never questioned in any way the rightfulness of the selection and certification, or challenged the title which was apparently confirmed thereby to the state. It may be conceded that no error or wrong on the part of the officers of the land department concludes the United States, and that they might, whenever they saw fit, by proper proceedings set aside the title thus apparently conveyed. But they took no steps. They acquiesced in the transaction. The land was land which the United States had power to convey. Congress could by special act or otherwise have transferred this specific tract to the state. The records of the transaction were public and open. It was no secret conveyance by which title was wrongfully conveyed to the state, but a matter of record of which everybody, both governments included, were chargeable with notice. Not only was the title thus apparently transferred unchallenged, but also the state dealt with it as its own property, and conveyed it in satisfaction of one of its contracts. It passed from grantee to grantee, the last sale being at the price of $12 an acre. And further, the state during the years subsequent to its conveyance treated the land as subject to taxation, and they who purchased from it paid taxes thereon amounting to over $1,000.

After all this, the plaintiff, assuming to do that which the United States had not done—that is, treat the selection and certification as void—and acting not for the United States but for himself, attempted to build up a right in **392** ]himself to *the land. This was not done in ignorance of the claims of others, for when he first applied to enter the land as a homestead he was notified by the officers of the land department that it had already been selected and certified to the state, and his application to enter was on that account rejected. The county records also notified him of the several conveyances and the amount of money paid by the appellees. He was therefore simply an intruder. It is earnestly insisted by counsel that Congress by its legislation has set apart certain classes of land for the benefit of preemptors and those desiring to enter homesteads; that the government thereupon became, as it were, a trustee, holding the title to those lands in trust for all who should elect to make themselves *cestuis que trust;* that the plaintiff, availing himself of this legislation, took the steps prescribed by the statute and made himself therefore a *cestui que trust*, with a beneficial right to this land, and the right to challenge not only all subsequent but also any prior action taken by his trustee in disregard of such beneficial right. We cannot agree to this contention. Whatever rights such so-called *cestui que trust* may have against his trustee, the government, or all parties claiming under the government subsequent to the time of the initiation of his proceedings, he is not in a position to challenge any action of his so-called trustee anterior to that time. The government did not bind itself by its statutes to keep any lands for subsequent occupation and purchase, and if prior to such occupation it has even though mistakenly conveyed away a tract to a third party, such conveyance, although voidable at its instance, cannot be challenged by a mere intruder. And when such conveyance is of long standing, and the transaction has been acquiesced in for many years by the government, and parties relying upon the title apparently conveyed have invested large sums of money, then an attempt by such an intruder to set aside all these transactions and to appropriate the property to himself is offensive to every sense of right and justice, and equity will lend no helping hand to such effort. The authorities cited in the opinion of the court of appeals sustain this conclusion. *Cooper* v. *Roberts*, 59 U. S. 18 How. *173 [15: 388]; *Spencer* v. *Lapsley*, 61 U. [**393** S. 20 How. 264 [15: 902]; *Cragin* v. *Powell*, 128 U. S. 691 [32: 566]. This last case is quite pertinent. It appeared that in 1841 the United States had issued to one Bach patents to certain surveyed and described lands, the title to which by subsequent conveyances passed to Cragin. In 1877, Powell, a surveyor, was employed by Cragin to make a survey of his property, and discovering, as he supposed, an error by which lands apparently included within the survey and patent were, in fact, outside of its limits, persuaded one Samuel Wolf to obtain a patent which would cover the lands thus erroneously, as contended, included in the first survey, and afterwards purchased those lands from Wolf. Thereupon he commenced a suit "to fix the boundaries," the effect of which if the boundary was established according to his claim would be to set over to him lands which, as he alleged, were erroneously included in the first survey and patent, but which had been all these years occupied and cultivated by Bach, the patentee, and his grantees. A decree in his favor in the circuit court was reversed, and the case remanded with instructions to dismiss the bill, Mr. Justice Lamar saying in the opinion (p. 700 [569]):

"The appellee, Powell, is a surveyor who, in the year 1877, while employed by appellant



Digitized by Google

to make a survey of his plantation, thought he discovered an error in the public lands, whereby it would appear that his lands were not, in fact, situated on Bayou Four Points. From his own evidence it is shown that he induced Wolf to obtain the patent from the state of Louisiana for the land which he, the said appellee, purchased from him. When he purchased this land from Wolf he knew that the tracts to which he was laying claim had been possessed and cultivated by the appellant for a long period of years. An advantage thus obtained a court of equity will not readily enforce. As was said in *Taylor* v. *Brown*, 9 U. S. 5 Cranch, 234, 256 [3: 88, 94]: 'The terms of the subsequent location prove that the locator considered himself as comprehending Taylor's previous entry within its location. . . . He either did not mean to acquire the land within Taylor's entry, or he is to be considered as a man watching for the accidental 394] mistakes of others, and preparing to take advantage of them. What is gained at law by a person of this description equity will not take from him; but it does not follow that equity will aid his views.'"

Without, therefore, determining whether the selection and certification of these lands was absolutely void or simply voidable at the election of the government, or valid and beyond any right of challenge on the part of the government or anyone else, we are of the opinion that equity will not help the plaintiff in his suit, and *the decree of the Court of Appeals is affirmed.*

---

## AUGUSTA P. GLOVER *et al.*, *Appts.*, *v.* MARY E. PATTEN *et al.*

(See S. C. Reporter's ed. 394-413.)

*Settlement affirmed—parties to action to charge an estate—legatees, when not joined—acknowledgment of indebtedness—suit in equity—statute of limitations — advancement — evidence—presumption as to bequest—interest.*

1. An infant may affirm a contract or settlement made for her benefit, and may sue upon it as if she were originally a party to it.

2. A child who because of infancy was not a party to a document settling and adjusting an indebtedness of a mother as guardian to her children, but who ratified it after maturity, may be joined as a party in an action to charge the mother's estate with the indebtedness thereby acknowledged.

3. Legatees need not be joined in a suit by daughters who are also executrices, but do not sue as such, but bring suit in their own right to establish an indebtedness of the estate to them.

4. A document which a guardian procures all her daughters except one, who is an infant, to sign, stating the amount of indebtedness from her as guardian to them, although not signed by herself, may constitute an acknowledgment of indebtedness on her part to each of the children, including the infant.

5. A suit in equity to establish an indebtedness of an estate to the plaintiffs, who are executrices, may be maintained because they cannot bring an action at law.

6. A claim by an executor against his estate is not within the statute of limitations in force in the District of Columbia.

7. An advancement to a child by a parent who is in debt to the child is presumed to be a satisfaction of the debt *pro tanto.*

8. In a contest between heirs or next of kin, communications of the ancestor to an attorney who drew a will or similar document are not privileged.

9. A presumption that indebtedness of a testatrix to children is extinguished by a general bequest to them does not arise where the will is made several years before the indebtedness is liquidated,—especially where it appears that the testatrix did not consider that the indebtedness to one of the children was extinguished, and where giving effect to such presumption would make one of the children preferred to the others.

10. Interest should not be allowed on an indebtedness by a mother as guardian to her daughters, most of whom were of age, during the time they lived with her without any charge for maintenance.

[No. 78.]

*Argued January 5, 6, 1897. Decided February 15, 1897.*

APPEAL from a decree of the Court of Appeals of the District of Columbia decreeing that the complainants were entitled to the relief prayed for in a suit in equity brought by

---

NOTE.—*Infants, contracts by and acts of, when voidable by or binding on them; bills and notes; bonds; mortgages; conveyances; leases; marriage settlements; arbitration; subscriptions; and other voidable acts; avoidance of acts and contracts by; by whom avoidance made; liability of infant as partner; time for avoidance; ratification of infants' acts and contracts; what constitutes.*

Acts and contracts of infants are in some cases binding on them, and in others voidable at their election.

The bills and notes of infants are voidable only, and this whether they are or are not negotiable. Fant v. Cathcart, 8 Ala. 725; Buzzell v. Bennett, 2 Cal. 101; Strain v. Wright, 7 Ga. 568; La Grange Collegiate Inst. v. Anderson, 63 Ind. 367, 30 Am. Rep. 224; Best v. Givens, 3 B. Mon. 72; Reed v. Batchelder, 1 Met. 559; Boody v. McKenney, 23 Me. 517; Minock v. Shortridge, 21 Mich. 304; State v. Plaisted, 43 N. H. 413; Goodsell v. Myers, 3 Wend. 479; Baldwin v. Van Deusen, 37 N. Y. 487; Armfield v. Tate, 7 Ired. L. 258; Everson v. Carpenter, 17 Wend. 419.

An indorsement or assignment of a bill or note by an infant is voidable only and the indorsee may sue him on a ratification. Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; Frazier v. Massey, 14 Ind. 382; Briggs v. McCabe, 27 Ind. 327, 89 Am. Dec. 503; Dulty v. Brownfield, 1 Pa. 497.

Where an infant signs a promissory note as surety his contract is voidable only. Owen v. Long, 112 Mass. 403; Harner v. Dipple, 31 Ohio St. 72, 27 Am. Rep. 496; Fetrow v. Wiseman, 40 Ind. 148; Williams v. Harrison, 11 S. C. 412; Shropshire v. Burns, 46 Ala. 108; Cole v. Pennoyer, 14 Ill. 158; Cummings v. Powell, 8 Tex. 80; Mustard v. Wohlford, 15 Gratt. 329, 76 Am. Dec. 209; Scott v. Buchanan, 11 Humph. 468; Patchin v. Cromach, 13 Vt. 330; Curtin v. Patton, 11 Serg. & R. 305.

Bonds by infants are voidable. Conroe v. Birdsall, 1 Johns. Cas. 127, 1 Am. Dec. 105; Patchin v. Cromach, 13 Vt. 330; Blake v. Livingston County Supers. 61 Barb. 149; Weaver v. Jones, 24 Ala. 420; Mustard v. Wohlford, 15 Gratt. 329, 76 Am. Dec. 209.

Mortgages by an infant are voidable only and are



Digitized by Google

Mary E. Patten *et al.*, complainants, against Augusta P. Glover *et al.*, to construe the last will and testament of Anastasia Patten, her mother, and to charge the estate with certain claims. *Affirmed.*

See same case below, 1 App. D. C. 466.

Statement by Mr. Justice **Brown**:

395] *This was a bill in equity filed in the Supreme Court of the District of Columbia by Mary E. Patten, Josephine A. Patten, Edith Patten, and Helen Patten, against their sister, Augusta P. Glover, wife of John M. Glover, in aid of the jurisdiction of the supreme court as an orphans' court, to construe the will of their mother, Anastasia Patten, and to charge the estate with certain claims of the complainants prior to a general distribution of the assets.

The facts of the case are substantially as follows: Complainants and defendant Augusta P. Glover are the five daughters of Edmund Patten, late of the state of Nevada, deceased, and of Anastasia Patten, who, after her husband's death, took up her residence in Washington and died September 11, 1888, leaving a will executed in San Francisco December 28, 1879.

Edmund Patten, her husband, died November 16, 1872, intestate, his widow becoming his administratrix and also the guardian of each of his children, all of whom were then, and for some years continued to be, minors under the age of twenty-one years. By the law of Nevada, Mrs. Patten became entitled, upon her husband's death, to one half his estate, the other half descending to his children. As administratrix and guardian, she took possession of the entire estate, and retained the same down to the time of her death. She made no accounting either as administratrix or guardian, nor did she keep any regular accounts or preserve her vouchers.

In September, 1885, apparently because of a desire on the part of the sureties on her bond, or some of them, to have her accounts settled, Mrs. Patten undertook to adjust her indebtedness to her children. She called in the services of Curtis J. Hillyer, a friend of her husband and herself, and the result was the preparation of the following document intended to take the place of a formal account and vouchers:

Whereas our mother, Anastasia Patten, as guardian for us, received in the years 1873–'4–'5, certain amounts of money, being our portion by inheritance of the estate of our deceased father; and whereas no special separate investments of the *money so received [396 have been made by our said guardian, but the same has been by her kept and safely invested in connection with moneys belonging to her in her own right derived from the said estate; and whereas our said guardian has up to the present date had entire charge of our maintenance and education, and has during the past thirteen years incurred a large amount of family expenses for our benefit, of which expenses no account has been kept by her; and whereas we and our said guardian are now desirous of settling the account between us

---

valid until disaffirmed. Skinner v. Maxwell, 66 N. C. 45; State v. Plaisted, 43 N. H. 413; Monumental Bldg. Asso. No. 2 v. Herman, 33 Md. 128; Eagle Fire Co. v. Lent, 6 Paige, 635; Palmer v. Miller, 25 Barb. 399; Richardson v. Boright, 9 Vt. 368; Gilchrist v. Ramsay, 27 U. C. Q. B. 500.

This is the rule also with chattel mortgages. Miller v. Smith, 26 Minn. 248, 37 Am. Rep. 407; Corey v. Burton, 33 Mich. 30; Chapin v. Shafer, 49 N. Y. 407, 411.

Conveyances by an infant are voidable, but valid until disaffirmed. Schaffer v. Lavretta, 57 Ala. 14; Tunison v. Chamblin, 88 Ill. 378; Phillips v. Green, 5 T. B. Mon. 345; Kendall v. Lawrence, 22 Pick. 540; Davis v. Dudley, 70 Me. 236, 35 Am. Rep. 318; Dixon v. Merritt, 21 Minn. 196; Allen v. Poole, 54 Miss. 323; Ferguson v. Bell, 17 Mo. 347; Gillett v. Stanley, 1 Hill, 121; Bool v. Mix, 17 Wend. 119, 31 Am. Dec. 285; Eagle Fire Co. v. Lent, 6 Paige, 635; Skinner v. Maxwell, 66 N. C. 45; Roberts v. Wiggin, 1 N. H. 73, 8 Am. Dec. 38; Tucker v. Moreland, 35 U. S. 10 Pet. 58 (9: 345); Irvine v. Irvine, 76 U. S. 9 Wall. 617 (19: 800).

Leases by or to infants are voidable. Griffith v. Schwenderman, 27 Mo. 412; Holmes v. Blogg, 2 Moore, 552, 8 Taunt. 508.

Marriage settlements made by an infant are voidable. Temple v. Hawley, 1 Sandf. Ch. 153; Jones v. Butler, 30 Barb. 641; Levering v. Heighe, 3 Md. Ch. 365.

If an infant submit to arbitration, he may execute or avoid the award at his election. Bacon, Abr. *Arbitration C*; Godfrey v. Wade, 6 J. B. Moore, 488; Harvey v. Ashley, 3 Atk. 607; Holt v. Ward, Fitzgibbon, 175, 275.

An executed compromise by an infant of a claim against him is voidable. Pitcher v. Turin Plankroad Co. 10 Barb. 436.

The compromise by an infant of an action for slander is voidable. Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec. 489.

So where an infant bought stock he was allowed to recover back the purchase money. Robinson v. Weeks, 56 Me. 102.

An infant's subscription for stock is voidable either during infancy or within a reasonable time thereafter. Re Nassau Phosphate Co. L. R. 2 Ch. Div. 610; Ebbett's Case, L. R. 5 Ch. App. 302; Baker's Case, L. R. 7 Ch. App. 115.

For the delay necessary to create a ratification by the infant, see Mitchell's Case, L. R. 9 Eq. 363 (two years); Ebbett's Case, L. R. 5 Ch. App. 302 (ten months). But see Hart's Case, L. R. 6 Eq. 512, where a lapse of three years was held not to amount to an affirmance.

Executed contracts of infants are voidable. Hill v. Anderson, 5 Smedes & M. 216; Robinson v. Weeks, 56 Me. 102; Adams v. Beall, 67 Md. 53 (appeal from justice's decision); Robbins v. Cutler, 26 N. H. 178.

Judgments. Trapnall v. State Bank, 18 Ark. 53; Walkenhorst v. Lewis, 24 Kan. 420; Wheeler v. Ahrenbeak, 54 Tex. 535; Kemp v. Cook, 18 Md. 130.

Contract of charter party. Thompson v. Hamilton, 12 Pick. 425, 23 Am. Dec. 619.

Usurious contract. Millard v. Hewlett, 19 Wend. 301.

Agreement to carry and deliver money. West v. Penny, 16 Ala. 186.

Agreement to convey. Carrell v. Potter, 29 Mich. 377.

Promise to pay a joint debt. Kennedy v. Doyle, 10 Allen, 161.

An infant soldier's gift of his bounty and pay is voidable. Holt v. Holt, 59 Me. 465; Welch v. Welch, 108 Mass. 562.

The privilege of the infant of avoiding his acts or contracts is personal to himself and cannot be taken advantage of by adults with whom he deals



Digitized by Google

in a just and equitable manner without attempting to secure technical accuracy in such settlement; and whereas our said mother and guardian has submitted to us for inspection all accounts and papers in her possession touching or relating to the receipts and disbursements entering into such accounting, and we have personally general knowledge concerning the family expenses during said period; and whereas from such examination and knowledge we believe that by a payment to each of us by our said guardian of the sum of $101,600 an equitable settlement will be made and full justice done to each of us:

Now, therefore, each of us for herself agrees to accept the said sum of $101,600 in full and complete settlement of all accounts, claims, and demands between us and each of us and our said mother and guardian, and in full satisfaction of all claims and demands of whatever character arising out of or connected with the administration of said estate or the said relation of guardian and ward, and each of us for herself authorizes and requests that upon presentation of this agreement and a receipt for the above amount the court having jurisdiction thereof will, without further investigation of accounts so far as they concern either of us, pass the final accounts of our mother as administratrix and guardian, and by proper decree discharge those liable as bondsmen for her action in either capacity.

(Signed) Mary Ellen Patten.
Katherine Augusta Patten.
Josephine Antoinette Patten.
Edith Patten.

*This paper was signed by all the complainants except Helen, and by the defendant Augusta. Helen, being then a minor, did not sign it, but subsequently adopted and accepted the adjustment and settlement evidenced by the paper. [397

This paper was never presented by Mrs. Patten to the proper court, and it was in her possession when she died. She did not at that time pay to her children, or any of them, the sum therein mentioned in settlement of her indebtedness to them, but subsequently and in February, 1887, when her daughter Augusta was on the point of marrying her husband, John M. Glover, she assigned and transferred to her United States government bonds of the par value of $80,000, and the actual value of $102,800, with the benefit of the interest accruing thereon since the preceding 1st day of January. Then Augusta married and left her mother's home.

Mrs. Patten did not at that time pay or give her other daughters anything on account of her indebtedness to them. In the following autumn, however, namely, on October 15, 1887, she made for them and in their names an investment of the sum of $45,000, being at the rate of $11,250 for each, which the complainants claimed to have been a payment on account of her indebtedness to them. It was undisputed that the interest on this investment, from the time it was made until Mrs. Patten's death and thereafter, was always deposited in bank to the credit of the appellees and for their account.

Within a year after this transaction, namely,

---

for their own benefit. Hartness v. Thompson, 5 Johns. 160; Gates v. Davenport, 29 Barb. 160; Voorhees v. Wait, 15 N. J. L. 343; Patterson v. Lippincott, 47 N. J. L. 457, 54 Am. Rep. 178; Brown v. Caldwell, 10 Serg. & R. 114, 13 Am. Dec. 660.

Acts of infants cannot be avoided by third persons in any collateral proceeding. Beardsley v. Hotchkiss, 96 N. Y. 201; Holmes v. Rice, 45 Mich. 142; Doane v. Covel, 56 Me. 527; Aisworth v. Cordtz, 31 Miss. 32; Ward v. The Little Red, 8 Mo. 358; Rose v. Daniel, 3 Brev. 488; Breckenridge v. Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71; Kane v. Boycott, 2 H. Bl. 511; Blake v. Livingston County Supers, 61 Barb. 149; Winchester v. Thayer, 129 Mass. 129.

The maker of a note cannot refuse payment to an indorsee because the indorsee is an infant. Taylor v. Croker, 4 Esp. 187; Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; Hardy v. Waters, 38 Me. 450; Frazier v. Massey, 14 Ind. 382.

Sureties and indorsers for, and all joint promisors with, an infant are bound, even though the infant escaped liability. Motteux v. St. Aubin, 2 W. Bl. 1133; Hartness v. Thompson, 5 Johns. 160; Taylor v. Dansby, 42 Mich. 82; Mason v. Denison, 15 Wend. 64.

The privilege of an infant of avoiding his acts or contracts passes to his heirs or personal representatives. Dominick v. Michael, 4 Sandf. 374; Bozeman v. Browning, 31 Ark. 364; Dinsmore v. Webber, 59 Me. 103; Austin v. Charlestown Female Seminary, 8 Met. 196, 41 Am. Dec. 497; Jefford v. Ringold, 6 Ala. 544; Parsons v. Hill, 8 Mo. 135.

An infant may be a partner and bind the firm by his acts, but he incurs no liability while an infant, and he is not responsible for the debts of the firm, and may, when he comes of age, or before, disaffirm the partnership agreement and also the debts of the firm. Lindley, Partn. 74; Mason v. Wright, 13 Met. 306; Folds v. Allardt, 35 Minn. 488; Osburn v. Farr, 42 Mich. 134; Van Winkle v. Ketcham, 3 Cal. 322; Avery v. Fisher, 28 Hun, 506; Bush v. Linthicum, 59 Md. 344; Keegan v. Cox, 116 Mass. 289.

He cannot, however, as against his copartners, insist that in taking the partnership accounts he shall be credited with the profits and not be debited with the losses. Lindley, Partn. 75; Kitchen v. Lee, 11 Paige, 107, 42 Am. Dec. 101.

And where the infant has drawn out a large share of his contribution to the capital, it was held that he must bear his proportion of the loss of capital on the failure of the firm. Moley v. Brine, 120 Mass. 324.

The infant cannot repudiate the partnership and sue for his services or for money contributed. Page v. Morse, 128 Mass. 99.

But in Sparman v. Keim the infant was allowed to rescind the partnership agreement and recover his investment, less what he had received. 83 N. Y. 245.

And as against the creditors of the firm he has no higher rights to the firm property than the adult partners; his only right is immunity from personal liability. Bates, Partn. § 147; Yates v. Lyon, 61 N. Y. 344; Bush v. Linthicum, 59 Md. 344; Furlong v. Bartlett, 21 Pick. 401; Pelletier v. Conture, 149 Mass. 269, 1 L. R. A. 863.

Where, in a suit against a firm, an infant partner pleads infancy, and judgment is entered against the other partners, it may be satisfied out of the property of the firm. Whittemore v. Elliott, 7 Hun, 518.

When an infant has conveyed real estate, he cannot affirm or avoid his conveyance on the ground of infancy until he has arrived at the age of majority. Schneider v. Stahr, 20 Mo. 269; Hastings v. Dollarhide, 24 Cal. 195; Emmons v. Murray, 16 N. H. 385; Cummings v. Powell, 8 Tex. 80; Tillinghast v. Holbrook, 7 R. I. 230; Walsh v. Powers, 43 N. Y. 23; Slaughter v. Cunningham, 34 Ala. 260, 60 Am.



Digitized by Google

on September 11, 1883, Mrs. Patten died, without having done anything further towards settling her accounts as administratrix or guardian or paying her indebtedness to the appellees. It was found that she had left a will bearing date December 23, 1879, some seven years after her husband's death, and nearly six years before the preparation and execution of the paper in September, 1885.

By the terms of this will, Mrs. Patten devised and bequeathed the whole of her estate, subject to $45,000 in legacies, to her five daughters, and named as her executrices such of them as might have attained the age of majority at the time of her death and who should [398] not be otherwise incapacitated to *undertake the trust. By virtue of the latter provision all of the daughters were appointed and qualified in the supreme court of the District of Columbia as executrices, but, as the will was executed in the presence of two witnesses only, it was invalid to pass real estate situate in the District of Columbia, and as the greater part of Mrs. Patten's estate at the time of her death consisted of such real estate, it descended to her daughters, as though she had died intestate.

The daughters having all qualified as executrices, and having entered upon the discharge of their duties, the appellees, claiming to be creditors of the estate of which they were also executrices, presented to the supreme court of the District of Columbia a petition wherein, after reciting the indebtedness of Mrs. Patten to all of her daughters, including Mrs. Glover, by reason of her guardianship, it was alleged that in September, 1885, the amount of her indebtedness was adjusted, settled, and determined by mutual agreement (except as to Helen), evidenced by the paper writing of that month hereinbefore set forth; that Helen, being fully advised in the premises, adopted and accepted the said agreement and settlement; that by virtue of the premises Mrs. Patten became and was indebted to each of the petitioners and to Mrs. Glover, as of that date, in the sum of $101,600; that on February 17, 1887, as of January 1, 1887, Mrs. Patten paid on account of her indebtedness to Mrs. Glover $102,800, by transferring to her bonds of the United States; that afterwards Mrs. Patten paid each of the petitioners on account the sum of $11,250, and that by virtue of the premises the estate of Mrs. Patten stood indebted accordingly; but, as the petitioners were advised that they might not retain for their claims, unless passed by the court, they accordingly in their petition prayed the court to pass upon and authorize the payment of the same.

To this petition Mrs. Glover, the remaining executrix, appeared and filed an answer, admitting the inheritance by her and the complainants of the estate aforesaid from their father, and set forth in substance that the said testatrix did become guardian of the complainants and said defendant, as alleged, and did receive their said estate aforesaid as such guardian, *but that said testatrix never [399] formally settled her accounts as such guardian, she not having been called upon so to do; that the document above set forth was drawn and

---

Dec. 468; Allen v. Poole, 54 Miss. 323; Tucker v. Moreland, 35 U. S. 10 Pet. 58 (9: 345); Sims v. Everhardt, 102 U. S. 300 (26: 87).

But in other transactions, especially where personal property or executory contracts are involved, the infant may avoid at any time. Towle v. Dresser, 73 Me. 252; Rice v. Boyer, 108 Ind. 472, 58 Am. Rep. 53; Childs v. Dobbins, 55 Iowa, 205; Briggs v. McCabe, 27 Ind. 327, 89 Am. Dec. 503; Bailey v. Barnberger, 11 B. Mon. 113; Shipman v. Horton, 17 Conn. 481; Riley v. Mallory, 33 Conn. 201; Carr v. Clough, 28 N. H. 280, 59 Am. Dec. 345; Kitchen v. Lee, 11 Paige, 107, 42 Am. Dec. 101; Willis v. Twambly, 13 Mass. 204; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Monumental Bldg. Asso. No. 2 v. Herman, 33 Md. 128; Stafford v. Roof, 9 Cow. 626.

An infant may, after arriving at full age, waive his privilege of avoidance, and by acts, words, or writings, ratify or affirm his voidable contracts, so that he will be bound by them. Such a ratification may be shown by proof of an express promise to pay the debt made by the infant after he becomes of age, or by proof of such acts of the infant after he becomes of age, as fairly and justly lead to the inference that he intended to ratify the contract and pay the debt. Tobey v. Wood, 123 Mass. 88, 25 Am. Rep. 27; Catlin v. Haddox, 49 Conn. 492; Tibbets v. Gerrish, 25 N. H. 41; Fetrow v. Wiseman, 40 Ind. 148; Edmunds v. Mister, 58 Miss. 765; Harner v. Dipple, 31 Ohio St. 72, 27 Am. Rep. 496; Turner v. Gaither, 83 N. C. 357, 35 Am. Rep. 574; Hedges v. Hunt, 22 Barb. 150; Hoit v. Underhill, 9 N. H. 436, 32 Am. Dec. 380.

The contracts of an infant which are only suspended during his minority may be revived and ratified by him on arriving at age, upon the same principles and for the same reasons and by the same means as a debt barred by the statute of limitations may be revived and restored to its pristine vigor and efficacy. Henry v. Root, 33 N. Y. 526; Ackerman v. Runyon, 1 Hilt. 169; Bay v. Gunn, 1 Denio, 108.

If there is any evidence of ratification it is for the jury to determine whether there is an affirmation or not. Irvine v. Irvine, 76 U. S. 9 Wall. 617, 628 (19: 800, 804).

An indication to abide by the award of arbitrators may be held a ratification. Jones v. Phœnix Bank, 8 N. Y. 228; Barnaby v. Barnaby, 1 Pick. 221; Benham v. Bishop, 9 Conn. 330, 23 Am. Dec. 358.

Silence for an unreasonable time after attaining majority, in connection with a use, retention, or disposition in any way of the consideration received by the infant, constitutes a sufficient ratification to bind the infant. Lawson v. Lovejoy, 8 Me. 405, 23 Am. Dec. 526; Boyden v. Boyden, 9 Met. 519; Boody v. McKenney, 23 Me. 517; Robinson v. Hoskins, 14 Bush, 393; Deason v. Boyd, 1 Dana, 45; Belton v. Briggs, 4 Desauss. Eq. 469; Delano v. Blake, 11 Wend. 85, 25 Am. Dec. 617; Irvine v. Irvine, 76 U. S. 9 Wall. 617 (19: 800).

But mere silence is not usually a confirmation. Wallace v. Latham, 52 Miss. 291; Prout v. Wiley, 28 Mich. 164; Gillespie v. Bailey, 12 W. Va. 70, 29 Am. Rep. 445; Keil v. Healey, 84 Ill. 104, 25 Am. Rep. 434; Davis v. Dudley, 70 Me. 236, 35 Am. Rep. 318.

Express acts of repudiation of course free the infant from liability. Scranton v. Stewart, 52 Ind. 68; McGill v. Woodward, 3 Brev. 401; Hill v. Anderson, 5 Smedes & M. 216; Aldrich v. Grimes, 10 N. H. 194; Willis v. Twambly, 13 Mass. 204; Tunison v. Chamblin, 88 Ill. 378; Baker v. Kennett, 54 Mo. 82.

Suing to set aside a transaction is a disaffirmance. Gillespie v. Bailey, 12 W. Va. 70, 29 Am. Rep. 445; St. Louis, I. M. & S. R. Co. v. Higgins, 44 Ark. 293; Bagley v. Fletcher, 44 Ark. 153; House v. Alexander, 105 Ind. 109, 55 Am. Rep. 189.



Digitized by Google

signed in order to enable said testatrix formally to close her accounts as guardian aforesaid, but that the amounts agreed by the terms of said paper to be accepted by the complainants and said defendant were never paid, nor was any evidence of indebtedness given to them or any of them; and that, notwithstanding said paper, the accounts of said testatrix as guardian as aforesaid remained open at the time of her death, and the said estate of the complainants and the said defendant was dealt with by said testatrix after the execution of said paper in the same manner as before the same was so drawn and signed; that therefore, by reason of the circumstances, a trust existed on the part of the said testatrix towards the complainants and the said defendant in respect of their said estate, and that the relation of said testatrix to the complainants and the said defendant was recognized and treated by her to the day of her death as that of trustee and *cestuis que trustent* and not of debtor and creditors.

Defendant further set forth and contended that, by her last will and testament, the said testatrix devised, subject to certain bequests of comparatively trifling amount, all her estate, real and personal, as well the estate of the said defendant and the complainants held in trust for them as her own estate; that such devise operated the extinguishment, discharge, and payment of any claim upon the part of the complainants in the premises; that their claims ceased to be provable as debts against the estate of said testatrix; that such alleged extinguishment, discharge, and payment are not affected by the fact that the said defendant and the complainants took title to the real estate of said testatrix by descent instead of by devise, in consequence of the insufficient execution of the will; and that the several indebtednesses alleged by these complainants were never recognized or acted upon by said testatrix and no part payments were made by her on account thereof.

Upon consideration of the petition and answer, the court made an order that further action upon the petition be suspended "until said other matters whereof this court has not 400]jurisdiction shall be first tried and determined in the appropriate tribunal in such manner as counsel may advise."

Thereupon, on January 8, 1890, complainants filed their original bill in this cause, to which Augusta P. Glover interposed a demurrer and answer, and also filed a cross bill in which her husband joined. This was followed by a variety of answers, motions, demurrers, and amendments unnecessary to be set forth in detail, as the material facts already sufficiently appear. Subsequently a considerable amount of oral and documentary evidence was taken and returned; and the cause having been transferred to the court of appeals of the District in pursuance of the act of Congress approved February 9, 1893, that court on November 8, 1893, entered a decree that the complainants were entitled to the relief prayed for, and that the cause be remanded to the supreme court with directions to enter a decree in conformity with the opinion of the court. 1 App. D. C. 466. From this decree Augusta and her husband appealed to this court.

*Mr.* **Charles J. Bonaparte,** for appellants:

Helen Patten is improperly joined as complainant.

There is a nonjoinder of necessary parties defendant.

The bill discloses no good cause of action.

The equity set up by the bill is simply the absence of a legal remedy to enforce a legal right.

The cause of action set up by the bill is barred by limitations.

The case of the appellees depends upon the testimony of incompetent witnesses, and upon evidence otherwise inadmissible.

The testimony of the complainants as to their mother's alleged statements to them, and the transactions to which she was a party, whether in or out of the alleged presence of the appellant Augusta, should be excluded from the consideration of the court, since they also were incompetent to testify regarding these matters.

Whenever the purpose of the applicant is to obtain the advice of a lawyer, whatever may subsequently transpire between the lawyer consulted and the applicant, is privileged from disclosure unless at the instance or with the consent of the latter.

*Bowers* v. *Briggs*, 20 Ind. 189; *Bacon* v. *Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627, 15 Hun, 28.

Every statement should be privileged which is made to an attorney or counselor for the purpose, on the part of the client, of getting advice as to the law on the facts stated; the motive of the party who makes the statement, and the character of the party who hears it, make it privileged.

*Andrews* v. *Simms*, 33 Ark. 771; *Reed* v. *Smith*, 2 Ind. 160; *Foster* v. *Hall*, 12 Pick. 89, 23 Am. Dec. 400; *Beam* v. *Quimby*, 5 N. H. 94; *Cross* v. *Riggings*, 50 Mo. 335; *Wade* v. *Ridley*, 87 Me. 368; *Alexander* v. *United States*, 138 U. S. 353 (34: 954).

All communications made to a professional adviser are to be held confidential; no injunction of secrecy is needful in such cases to give them this character.

Weeks, Attys. § 149; *McLellan* v. *Longfellow*, 33 Me. 494, 54 Am. Dec. 599.

An account stated does not extinguish or supersede or alter the previous debts respecting which it was stated.

*Fidgett* v. *Penny*, 1 Cromp. M. & R. 108; *Smith* v. *Page*, 15 Mees. & W. 683; *Perry* v. *Attwood*, 6 El. & Bl. 691.

The testimony is inadmissible by reason of incompetency on the part of the witnesses furnishing it, except the evidence of Snyder and Beall, and this evidence is wholly insufficient to remove the bar of the statute, or to establish for any purpose a distinct acknowledgment of a specific debt.

*Bell* v. *Morrison*, 26 U. S. 1 Pet. 351 (7: 174).

It is questionable whether parol evidence is admissible at all for the purpose of rebutting this presumption.

Williams, Exrs. 7th Eng. ed. 1302.



Digitized by Google

*Mr.* **Henry E. Davis,** for appellees:

The defense of limitations cannot be set up against an executor's claim, whether the executor be sole or one of several.

*State* v. *Reigart*, 1 Gill, 1, 39 Am. Dec. 628; *Brown* v. *Stewart*, 4 Md. Ch. 368; *Spencer* v *Spencer*, 4 Md. Ch. 456; *Semmes* v. *Magruder*, 10 Md. 247.

Where one who, although an attorney at law, acted as a friend, there is no privilege.

*Beeson* v. *Beeson*, 9 Pa. 279; *Romberg* v. *Hughes*, 18 Neb. 579; *Rex* v. *Brewer*, 6 Car. & P 363; *Branden* v. *Gowing*, 7 Rich. L. 459; *Thompson* v. *Kilborne*, 28 Vt. 750; *Goltea* v. *Wolcott*, 14 Ill. 89; *Hoffman* v. *Smith*, 1 Cal. 157; 19 Am. & Eng. Enc. Law, 136, note.

Even where the acknowledged relation of attorney and client existed, to make it privileged, the attorney must have derived his knowledge from that relation.

*Chillicothe Ferry Road & Bridge Co.* v. *Jameson*, 48 Ill. 281; *Crawford* v. *McKissack*, 1 Port. (Ala.) 433; *Morgan* v. *Shaw*, 4 Madd. 57; *Wilson* v. *Rastall*, 4 T. R. 753; *Hatton* v. *Robinson*, 14 Pick. 416, 25 Am. Dec. 415; *Foster* v. *Hall*, 12 Pick. 89, 23 Am. Dec. 400; *Gower* v. *Emery*, 18 Me. 82.

The communication, to be privileged, must have been made to the attorney in his character of legal adviser, and in regard to the business about which the legal advice was sought.

*Earl* v. *Grout*, 46 Vt. 113; *McMannus* v. *State*, 2 Head, 213; *Oliver* v. *Cameron*, McArth. & M. 237; *Fleck* v. *Neill*, 26 Tex. 273; *Coon* v. *Swan*, 30 Vt. 6; *Brown* v. *Matthews*, 79 Ga. 1.

The communication, to be privileged, must have been received in the relation of attorney and client, and in the course of professional business, and must have been confidential.

*Sharon* v. *Sharon*, 79 Cal. 636, 678; *Rochester City Bank* v. *Suydam*, 5 How. Pr. 255; *House* v. *House*, 61 Mich. 69; *Cady* v. *Walker*, 62 Mich. 157; *Mobile & M. R. Co.* v. *Yeates*, 67 Ala. 164; *Fulton* v. *Maccracken*, 18 Md. 528, 81 Am. Dec. 620; *Hager* v. *Shindler*, 29 Cal. 63; *Henderson* v. *Terry*, 62 Tex. 284; *Hebbard* v. *Haughian*, 70 N. Y. 54; 1 Greenl. Ev. p. 322, § 239, note (b).

That which is proposed to be communicated to another party, as a foundation for bargaining, is not privileged.

*Burnside* v. *Terry*, 51 Ga. 186; *Chapman* v. *Peebles*, 84 Ala. 283; *Rice* v. *Rice*, 14 B. Mon. 417; 1 Greenl. Ev. p. 328, note and cases.

Where the question is as to the meaning of an act in which the attorney participated, there is no privilege.

*Chapman* v. *Peebles*, 84 Ala. 283.

Where the assumed client is dead, and the testimony would tend to make known and subserve his purpose, it is admissible.

*Re Layman's Will*, 40 Minn. 372; *Blackburn* v. *Crawford*, 70 U. S. 3 Wall. 175 (18: 186); *Russell* v. *Jackson*, 15 Jur. 117; *Greenough* v. *Gaskell*, 1 Myl. & K. 98; Whart. Ev. § 591.

And the privilege belongs to the client alone and his representatives as against third parties, and not *inter esse*.

*Gresley* v. *Mousley*, 2 Jur. N. S. 156.

A legacy is not a satisfaction unless very plainly shown either by the will itself or such a state of facts as leaves no doubt.

*Waters* v. *Howard*, 8 Gill, 262; *Reynolds* v. *Robinson*, 82 N. Y. 103, 37 Am. Rep. 555.

The legacy must equal or exceed the debt.

*Owings* v. *Owings*, 1 Harr. & G. 485.

And the debt must have been liquidated in whole.

*Gilliam* v. *Brown*, 43 Miss. 641; *Van Riper* v. *Van Riper*, 2 N. J. Eq. 1.

And contracted before execution of the will.

*Crouch* v. *Davis*, 23 Gratt. 62, 93; *Heisler* v. *Sharp*, 44 N. J. Eq. 167.

A devise of land will not satisfy a pecuniary debt.

*Partridge* v. *Partridge*, 2 Harr. & J. 63; *Eaton* v. *Benton*, 2 Hill, 576, 581.

Nor will a gift of residue, because, the amount being uncertain, it may be less than the debt.

*Thynne* v. *Glengall*, 2 H. L. Cas. 131, 154, and cases cited.

Mr. Justice **Brown** delivered the opinion of the court:

The object of this bill is to determine certain questions in aid of another branch of the same court, sitting as an orphans' court, and already in possession of a petition by the complainants to establish an indebtedness against the estate of their mother, action upon which petition was suspended by that branch of the court, awaiting the determination of these questions.

The theory of the complainants is that the amount of Mrs. Patten's indebtedness to her daughters was adjusted and settled by mutual agreement of the parties, evidenced by the instrument of September, 1885, at the sum of $101,600 each: that defendant, Augusta P. Glover, received her share upon her marriage, by a transfer of $80,000 of the United States bonds, worth $102,800, and that the [401 complainants received a credit in October, 1887, of $11,250 each.

The theory of the appellants is that the relation of the testatrix to her children was that of trustee, and not of debtor, and that the will, by reason of its provisions, operated the extinguishment, discharge, and payment of the complainants' claims, and that said claims ceased to be provable as debts against the estate.

Several assignments of error are filed, which will be disposed of in their order.

1. That Helen was improperly joined in the bill as complainant, because she was not a party to the instrument of September, 1885. Being a minor she did not sign the instrument, and would not have been bound by it if she had done so; but if there were any indebtedness to the children, it arose from the fact that the mother was guardian of all of them; that the law made no discrimination between them, and such indebtedness was due as much to Helen as to the others. While the instrument makes no mention of the children by name, it was evidently intended as much for her benefit as that of the other sisters, and upon her arriving at her majority, she had her election either to disaffirm it, or to adopt it as an adjustment of the amount due to herself. She chose the latter alternative, and in her petition to the orphans' court of May 10, 1889, for the allowance of her claim, avers:



Digitized by Google

"That the petitioner, Helen Patten, being fully advised in the premises, now adopts and accepts said agreement and the settlement aforesaid as though she had duly participated in the same at the time of the making thereof." An infant may affirm a contract or settlement thus made for her benefit, and may sue upon it as if she were originally a party to it. Irrespective, however, of any promise which the law might imply from the procurement by Mrs. Patten of the execution of this instrument by her daughters, if there were any indebtedness arising from her relation as guardian to her children, it existed in favor of Helen as much as the others, and as evidence of the amount of such indebtedness this document is as potent in her behalf as in that of her sisters.

402] *2. The second assignment, that there is nonjoinder of necessary parties defendant, is a based upon the theory that there are three legatees interested in the estate to the amount of $45,000; that there is no averment that these legatees have been paid, or can be paid in full, out of the personal estate, if the claims of the complainants and those of other creditors are satisfied. There is nothing in this objection. The complainants do not sue as executrices, but expressly aver that they bring the suit "in their own right" as creditors of their mother's estate, and for the purpose of establishing their debt. To such a suit other creditors are not necessary parties. The case of *Dandridge* v. *Washington*, 27 U. S. 2 Pet. 370 [7: 454], is directly in point. This was a suit brought by the plaintiff against the executors of the will of Mrs. Martha Washington to obtain payment of legacies bequeathed to to him in her last will. In reply to an objection that the residuary legatees under the will should have been made parties, Mr. Chief Justice Marshall observed: "They have undoubtedly an interest in reducing the sum to be allowed out of it to the complainant, but they have the same interest in reducing every demand on the estate. Whatever remains sinks into the residuum, and that residuum is diminished as well by the claims of creditors and specific legatees as by this. In all such cases the executors represent the residuary legatees and guard the interests. It is a part of that duty which requires them to protect the interests of the estate. In such suits the residuary legatees are never made parties. To require it would be an intolerable burden on those who have claims on an estate in the hands of executors." If this be the law with respect to residuary legatees, who are necessarily and directly interested in defeating every other claim against the estate, with much greater force is the rule applicable to specific legatees, who are in much less danger of being affected by the allowance of other claims. That such legatees need not be joined is as clearly settled as that other libellants need not be joined as respondents in a suit in admiralty to establish a claim against a vessel, although they may be admitted to defend. *Wiser* v. *Blachly*, 1 Johns. 403] Ch. 437; *Pritchard* v. **Hicks*, 1 Paige, 270; *West* v. *Randall*, 4 Mason, 181; Daniell, Ch. Pr. chap. 5, § 2.

3. That there is no equity in the bill. Defendants' position in this connection is, that the case made is an indebtedness *created* by the instrument of September, 1885, to which Helen was not a party; that there was no agreement by Mrs. Patten to pay the sum named, or any sum whatever, and that the paper constituted a mere offer on the part of each of her children to receive a specified sum in satisfaction of her claim against her as guardian; that this paper, therefore, is no contract, and contains no promise on the part of the mother; that the only right which the complainants have to come into equity arose from the fact that, being executrices, they cannot sue themselves, and, therefore, cannot recover by action at law the debt due them by their testatrix; that if the bill failed to show that they could have sued at law during their mother's lifetime, or could now sue her executrices, were they someone else than themselves, they have no better standing in equity than at law.

This, however, is a somewhat inaccurate statement of the complainants' case. The averment of the amended bill is (¶ 6) that in her lifetime the said testatrix was indebted to the complainants and the defendant Augusta P. Glover, by reason of the fact that they had inherited from their father an estate which was received and retained by the testatrix as their guardian, and that in "September, 1885, the amount of indebtedness of said testatrix in the premises, on account of the estate aforesaid, was adjusted, settled, and determined by mutual agreement of the said testatrix on the one part, and on the other the complainants and the said defendant, except the complainant Helen Patten," who was a minor. The amended bill further avers (¶ 12) that "it then was, and for a long time theretofore had been, the duty in law of said testatrix, guardian as aforesaid, to deliver to them and each of them their said estate as aforesaid, the same consisting in contemplation of law exclusively of money; that thereby the said testatrix, as guardian aforesaid, was and had theretofore become in law the debtor of the complainants *and the said defendant and each of them[404 without regard to said paper so drawn and signed as aforesaid, and the said paper was only in law an adjustment, accounting, and settlement between the said testatrix, guardian as aforesaid, on the one part, and the complainants and said defendant, on the other, having for its object and purpose the ascertainment of the amount of indebtedness of the said testatrix to the complainants and the said defendant and each of them."

As, under the laws of Nevada, the children were entitled to one half their father's estate, and as the mother received the entire estate and dealt with it as if she were the sole proprietor, although she was in fact guardian and trustee for her children as to their share, it requires no argument to show that she held a moiety in trust for them; was bound to account to them whenever an account was demanded, and was bound to pay to each of them one fifth of such moiety. Regularly this accounting should have been made to the court in Nevada which granted the letters of administration, but as there was no one interested in the estate except herself and her children, she adopted the easier course of settling with them directly, and procured from them their assent to



Digitized by Google

ie instrument of September, 1885. While Helen was not a party to this instrument, by reason of nonage, as she stood in the same position the estate as her sisters, and was equally a creditor of her mother, there is no reason why the instrument may not be used as an acknowledgment of her mother's indebtedness to her, as well as to the others. The fact that the sisters became executrices of their mother's will did not cancel such indebtedness, but rendered it impossible to bring an action at law, inasmuch as they would be plaintiffs in their own right and defendants as executrices. They did, however, petition the orphans' court for the allowance of their claims, making their sister, the only person interested adversely to them, a party to the proceeding. That court, instead of passing on the matter directly, thought it a proper subject for the advice of a court of chancery, and directed this bill to be filed. We are of opinion that upon its face it discloses a good cause of action.

405] *4. That the cause of action is barred by the statute of limitations. It has always been held by the supreme court of Maryland that the act of 1715, which is still in force in this district (*Shepherd* v. *Thompson*, 122 U. S. 231, 234 [30: 1156, 1157]), does not apply to a claim by an executor against his estate, inasmuch as the executor cannot sue himself at law. *State, Stevenson*, v. *Reigart*, 1 Gill, 1; *Brown* v. *Stewart*, 4 Md. Ch. 368; *Spencer* v. *Spencer*, 4 Md. Ch. 456; *Semmes* v. *Magruder*, 10 Md. 242.

Irrespective of this, however, it appears that in October, 1887, Mrs. Patten loaned $45,000 to one John E. Beall, and took a note payable to the order of the four complainants, which was subsequently paid to them. The testimony of the complainants as to this transaction is objected to upon the ground that by U. S. Rev. Stat. § 858, "in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or settlement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." Conceding the statute to be applicable to this case, it does not apply to the testimony of Beall himself, who swore to making a loan of this amount from Mrs. Patten, and giving a note payable to the order of the four complainants, Mrs. Patten stating "that the money was advanced to them out of the fund belonging to them out of their father's estate, and that she wished them to have the income of that amount of money;" that "she wished the interest notes made payable at intervals of three months, so that they might have the income, and she used the words 'pin money;' and further declared that she never had made them any allowance, and she wished them to have for themselves, every three months, the interest of this money to spend for themselves." She also said "that $45,000 was being distributed in this manner to the four girls as a part of what was coming to them from their father's estate, and she said that she had made advances to Mrs. Glover." The note was subsequently paid to the four daughters. The testimony of another witness is to the effect that Mrs. Patten told him "that it was some money she *wanted to give those four [406 girls for pin money to give them a sense of independence, . . . and, further, that she had already provided for the other daughter—the married daughter—quite liberally, and she thought that she ought to give these girls something."

This testimony is not only uncontradicted, but accords with the probabilities of the case. It is scarcely reasonable to suppose that Mrs. Patten, who was indebted to her daughters in the sum of over $400,000, should have advanced them the large sum of $45,000 purely as a gift, and with no intention of being credited with it upon her debt, particularly in view of her statement to the witness Beall, that she made advances to Mrs. Glover. We think this must be regarded as payment upon the account of her indebtedness, and that it removed the bar of the statute of limitations.

In aid of this construction there is the presumption that where a parent, being a debtor to his child, makes an advancement to such child, it is presumed to be a satisfaction *pro tanto* of the debt. 1 Pom. Eq. Jur. § 540; *Plunkett* v. *Lewis*, 3 Hare, 316.

5. That the communications made by Mrs. Patten to the witness Hillyer were privileged, from the fact that she consulted him as her legal adviser. There is some doubt as to whether she did consult him in that capacity, or simply as a friend who had for a good many years been the attorney of her husband. It is clear that, while she visited him frequently concerning the settlement of her account as administratrix and guardian, she paid him nothing and he made no charge against her. But whatever view be taken of the facts, we are of opinion that, in a suit between the devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged, if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin. That reason is thus stated by Lord Brougham in *Greenough* v. *Gaskell*, 1 Myl. & K. 98: "But it is out of regard *to the interests of justice, which cannot[407 be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counselor half his case."

In *Russell* v. *Jackson*, 9 Hare, 387, the contest was between the heirs at law and a devisee. The heirs claimed that the devise was upon a trust, unexpressed because illegal. It was held that a solicitor, by whom the will was drawn, should be allowed to testify what was said by the testator contemporaneously upon the subject. Vice Chancellor Turner, in delivering the opinion of the court, observed: "In the cases of testamentary disposition, the very foundation on which the rule proceeds seems



Digitized by Google

to be wanting; and in the absence, therefore, of any illegal purpose entertained by the testator there does not appear to be any ground for applying it. . . . That the privilege does not, in all cases, terminate with the death of the party, I entertain no doubt. That it belongs equally to parties claiming under the client as against parties claiming adversely to him, I entertain as little doubt; but it does not, I think, therefore follow that it belongs to the executor as against the next of kin in such a case as the present. In the one case the question is whether the property belongs to the client or his estate, and the rule may well apply for the protection of the client's interest. In the other case the question is to which of two parties claiming under the client the property in equity belongs, and it would seem to be a mere arbitrary rule to hold that it belongs to one of them rather than to the other."

An epitome of this case is given in the opinion of Mr. Justice Swayne in *Blackburn* v. *Crawford*, 70 U. S. 8 Wall. 175, 193 [18: 186, 193], in which case, on a question of marriage and legitimacy, an attorney who drew the will for the alleged husband, in which the children of the connection set up as wedlock [408] were described *as the natural children of the testator, might testify as to what was said by the testator about the character of the children and his relations to their mother, in interviews between himself and the testator preceding and connected with the preparation of the will.

As was said in that case, page 194 [194]: "The client may waive the protection of the rule. The waiver may be express or implied. We think it as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give his testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its object and in direct conflict with the reason upon which it is founded." See also *Hunt* v. *Blackburn*, 128 U. S. 464, 470 [32: 488, 491].

The same rule has been applied in several cases in the state courts: *Re Layman's Will*, 40 Minn. 371; *Scott* v. *Harris*, 118 Ill. 447; *Graham* v. *O'Fallon*, 4 Mo. 388; *Goddard* v. *Gardner*, 28 Conn. 172; Whart. Ev. § 591; Weeks, Attys. § 165.

6. The objection that the complainants were incompetent to testify as to their mother's statements, and as to transactions in which she took part, is entitled to some weight, and is not free from doubt. There is much reason, however for saying that, as the object of this testimony was not to prove complainants' claim against the estate, but to show that their sister Augusta had had a similar claim, and had been paid, and the testimony related to conversations between Mrs. Patten and her daughter Augusta, the statute did not apply—in other words, that it was not a transaction with or a statement by the testator within the meaning of the statute. *Monongahela Nat. Bank* v. *Jacobus*, 109 U. S. 275 [27: 935]; Whart. Ev. § 468.

We do not, however, consider this testimony indispensable to the maintenance of complainants' bill. Discarding it for the present from our consideration of the case, there is no doubt that Mrs. Patten became the guardian and trustee for *her children to the extent of one half [409] of her husband's estate; that she rendered no account of her stewardship; that, at the suggestion of the witness Hillyer, she procured the document of September, 1885, to be drawn up and signed by her daughters; that by this instrument each of the daughters, except Helen, agreed to accept the sum of $101,600 in full and complete settlement of their accounts, claims, and demands between each of them and their mother, arising out of or connected with the administration of their father's estate, and requested that, upon the presentation of this agreement and a receipt for that amount, the court having jurisdiction would, without further investigation, pass the final accounts of their mother as administratrix and guardian, and discharge her bondsmen. There is no doubt, too, that in the month of February, 1887, Mrs. Patten called at the bank of Riggs & Co. and inquired of a member of the firm what amount of bonds, with the premium added, would make up a sum somewhat over $100,000, stating that "her purpose was to transfer these bonds to one of her daughters about to be married;" that he furnished her the necessary figures, "somewhere in the neighborhood of $79,000, which made up about the amount she wished to use," and that he gave her a memorandum of them; that Mrs. Patten told him afterwards that she put these bonds under her daughter's plate, and that she went off and forgot them. The testimony of the complainants, which for this purpose is competent and uncontradicted, was that Mrs. Glover asked the witness Josephine on one occasion when she had returned home, where she had been; that she replied that she had been to the Treasury, where her mother went to transfer her bonds to her name to the amount of $80,000, to which Mrs. Glover said, "that is not enough." Josephine replied: "It is too much; if I had not been there you would have gotten but $79,000;" that she saw the bonds in the possession of her sister, Mrs. Glover, who returned them to her mother with a request that she should keep them for her, and that they were subsequently sent to her at St. Louis by registered mail; that Mrs. Glover repeatedly said to her sisters that "when she was married she would ask for her money; that she had a *right to it, and she would ask for it," and [410] that she repeatedly admitted afterwards having received her share of her father's estate. This admission is sworn to by each one of the complainants, and is entirely uncontradicted.

The court below was of opinion that, upon this state of facts, the complainants were entitled to the relief prayed, and in this opinion we concur. We can come to no other conclusion than that, upon the undisputed facts of the case, there was an indebtedness by Mrs. Patten to her daughters; that such indebtedness was liquidated by the agreement of September, 1885, and that the defendant Mrs. Glover received an amount in bonds which, at their market value, was somewhat greater than $100,000. As this payment was made to her upon the eve of her marriage, and as the amount was evidently computed as near as



Digitized by Google

could be to the amount of the indebtedness, as stated in the agreement of September, 1885, the presumption is that it was intended as an advance and as a satisfaction of the debt. 1 Pom. Eq. Jur. § 540; *Plunkett* v. *Lewis*, 3 Hare, 316.

7. The claim that the general bequest to her daughters, contained in Mrs. Patten's will, was an extinguishment of her debt to them, is equally unfounded. The appellants rely, in this connection, upon the general proposition that, where a debtor bequeaths to his creditor a legacy equal to or greater than the amount of his debt, it shall be presumed, in the absence of a contrary intent inferable from the will, that the legacy was intended to be in satisfaction of the debt. Had Mrs. Patten, subsequent to the execution of the agreement of September, 1885, made special bequests to her daughters, or either of them, of amounts equal to or greater than the amount of her indebtedness to them, the rule might, perhaps, be invoked as an answer to their claim; but the rule is in fact nothing more than a presumption, and may be rebutted by slight evidence that such was not the intention of the testator. *Spencer* v. *Spencer*, 4 Md. Ch. 456; *Gilliam* v. *Brown*, 48 Miss. 641; *Williams* v. *Crary*, 4 Wend. 443, 5 Cow. 368; *Eaton* v. *Benton*, 2 Hill, 576; *Reynolds* v. *Robinson*, 82 N. Y. 103 [37 Am. Rep. 555]; 411]* *Heisler* v. *Sharp*, 44 N. J. Eq. 167; *Homer* v. *McGaughy*, 62 Pa. 189; *Crouch* v. *Davis*, 28 Gratt. 62. These cases hold that the mere fact that the debt was unliquidated is enough to rebut the presumption.

It requires no argument to demonstrate that the rule has no application to a case where the bequest is a general one—all of the property of the testator "to be divided between them share and share alike"—and the will is made six years before the indebtedness is liquidated. That Mrs. Patten evidently did not consider her debt to her daughter Augusta extinguished by the will is evident from the fact that she paid the amount at the time of the marriage of her daughter, and there is no reason to suppose that she intended to treat her differently from her other daughters. Evidently the whole theory of a debt being extinguished by a bequest presupposes a bequest subsequent to the indebtedness, and while the indebtedness may have been said to have arisen in this case upon the receipt of the children's moiety of their father's estate, it was never treated by any of the parties in the light of an indebtedness, until the amount had been liquidated by the arrangement of September, 1885.

The effect of rejecting the claim of the complainants would be to prefer Mrs. Glover to her sisters to the extent of $102,800, when there is absolutely nothing in the will of the mother, in the arrangement of September, 1885, or in the facts or circumstances of the case, to indicate that this was ever contemplated by Mrs. Patten, or by the daughters themselves. The instincts of a mother would naturally lead her to put her daughters upon an exact equality, and the case is manifestly one for the application of the legal maxim that "equality is equity." That it ever entered her mind that one of her daughters should be preferred to the others in the very large sum of $102,800 is extremely improbable.

8. Whether the fact that Mrs. Glover had been paid her share of the indebtedness was strictly pertinent to the issue or not, it was alleged in the bill and in the amended bill, was first demurred to, and then denied in the additional answer. The fact had some tendency to prove that the *indebtedness, which [412 was incurred and liquidated in favor of all the sisters under the same circumstances was a genuine one, was recognized both by the testatrix and Mrs. Glover as such, and that the bill was not an attempt on the part of the complainants to obtain a preference over their sister.

It would have been more satisfactory if the defendant had offered herself as a witness and given her version of the transaction, or at least had put forward some testimony tending to show a different theory; but as she preferred to rest her case upon the testimony of the complainants, and as the facts proved are susceptible of but one construction, we can only assent to the conclusion of the court below.

The fact that Mrs. Patten did not pay, or agree to pay, her daughters interest upon the amount of her indebtedness as liquidated, is urged as a reason for holding that she continued to regard herself as trustee for her children in respect to their share of their father's estate, and never contemplated that an indebtedness to them had been recognized. This, however, seems inconsistent with the instrument of September, 1885, which was evidently prepared for a purpose, and was wholly unnecessary, if her relation to her daughters were solely that of a trustee for their benefit. If it were for the purpose of fixing her liability, for which the sureties upon her bond were to be responsible, it would scarcely be consistent to hold that, so far as concerned her relations with her daughters, it was not intended to create a liability. It either created a liability or it did not. If it did, it was a liability to her children. If it did not, the instrument was useless.

It is true that no interest, as such, was paid or promised, but as an offset to that the daughters were never charged with their expense of maintenance, although most of them were of age. What the result would have been, if an account had been regularly opened and interest credited to each daughter and a charge made against each for her maintenance, we can only conjecture; but in the loose way in which business is usually done between members of the same family and household, it is not singular that no such account was kept. If Mrs. Glover had not received her share, it would make but *little practical differ- [413 ence whether the agreement of September, 1885, were treated as an operative instrument, or merely one for the purpose of satisfying the sureties on the administratrix's bond. As the effect of the latter construction would be to prefer Mrs. Glover to this amount over her sisters, the court will construe it as the parties themselves have construed it. It is apparent from what has been said that no interest should be allowed prior to the death of Mrs. Patten.

*The decree of the court below is therefore affirmed.*



Digitized by Google

ATLANTIC & PACIFIC RAILROAD COMPANY, *Plff. in Err.*,
*v.*
ROBERT MINGUS.

(See S. C. Reporter's ed. 413-442.)

*Forfeiture of land grant—express words—extension of construction of railroad—breach of condition—extinguishing Indian title—noncompletion of road—condition precedent.*

1. The option of forfeiting the railroad land grant of July 27, 1866, is not defeated by the "further condition" in § 9, that on any breach of the conditions the United States may do any and all acts and things which may be needful and necessary to secure the speedy completion of the road.
2. No express words of forfeiture or reinvestiture of title are necessary to authorize a forfeiture of a grant of public lands for breach of condition.
3. An extension of the time for construction of a railroad for which lands are granted until such time as mortgagees may see fit to foreclose is not made by a statute authorizing a mortgage of the road which shall extend only to so much of the land as shall be coterminous with such part of the road as shall be "constructed at the time of the foreclosure of said mortgage."
4. A public grant of land may be forfeited for breach of condition by legislative act, without any judicial proceeding.
5. Failure of the United States to extinguish Indian title to lands through which a railroad is to run does not prevent the forfeiture of a railroad land grant, under a provision that the United States will extinguish such title "as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession."
6. The right to declare a railroad land grant forfeited for noncompletion of the road is not defeated by subsequently making Indian reservations in the region through which the road is to pass, when these are made opposite portions of the road already built, and do not seriously interfere with the prosecution of the work.
7. A survey of public lands, which a land grant provides that the President shall cause to be made, is not a condition precedent to the right to declare a forfeiture of the grant for noncompliance with its conditions,—at least when the failure did not prevent the grantee from realizing the full value of the land grant by mortgage.

[No. 100.]

*Argued December 15, 16, 1896. Decided February 15, 1897.*

IN ERROR to the Supreme Court of the Territory of New Mexico to review a judgment of that court affirming the judgment of the District Court for San Miguel County in that Territory in favor of the defendant, Robert Mingus, in an action of ejectment brought by the Atlantic & Pacific Railroad Company against him, to recover a parcel of land. *Affirmed.*

See same case below (N. M.) 34 Pac. 592.

Statement by Mr. Justice **Brown**:

This was an action of ejectment brought by the railroad company in the district court for San Miguel County, New Mexico, to recover of the defendant, Mingus, a parcel of land, to which the plaintiff claimed title under its land grant, made by act of Congress of July 27, 1866 (14 Stat. at L. 292, chap. 278). Upon the trial it gave evidence tending to show that the land in controversy was part of an odd-numbered section of public lands within the primary limits of the grant, and was vacant, and in all respects subject to the grant, both at the date thereof and at the date of the definite location of the road (March 12, 1872), and therefore passed to and became vested in the company at that date.

Defendant pleaded not guilty, and relied upon a patent for the same land issued December 10, 1891, to one Albert W. Bray, founded upon a pre-emption filing made January 9, 1888. Whilst conceding the original vesting of title in the railroad company on March 12, 1872, and its undisturbed continuance until July 6, 1886, defendant claimed that under an act of Congress, approved upon that day (24 Stat. at L. 128, chap. 687), declaring a forfeiture of the land grant, the title of the company was annulled and became revested in the United States, and, from that time, the land was properly subject to pre-emption.

Plaintiff denied the validity of the alleged act of forfeiture; contended that it was ineffectual to annul its title, and hence that the patent of the defendant was issued without authority and was void upon its face.

The facts of the case were substantially as follows:

The company was originally incorporated by act of Congress of July 27, 1866 (14 Stat. at L. 292, chap. 278) and by § 1 of the act was authorized to construct a continuous railroad and telegraph line from "the town of Springfield, in the state of Missouri, *thence to the western [415] boundary line of said state, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian river, thence to the town of Albuquerque on the river Del Norte, and thence by way of the Agua Frio or other suitable pass to the headwaters of the Colorado Chiquito, and thence along the 35th parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific. The said company shall have the right to construct a branch from the point at which the road strikes the Canadian river eastwardly, along the most suitable route as selected, to a point in the western boundary line of Arkansas at or near the town of Van Buren."

By § 2 authority was given to the company to take materials from the public lands adjacent to the line of the road for its construction, and the United States agreed to "extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act."

By § 3 there was granted to the company, for the purpose of aiding in the construction

NOTE—*As to land grants to railroads*, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 22: 794.



Digitized by Google

of the railroad and telegraph, etc., "every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and 10 alternate sections of land per mile on each side of said railroad whenever it passes through any state.

By § 6 the President of the United States was to cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, "after the general route shall be fixed, and as fast as may be required by the construction of said railroad."

The 8th, 9th, and 17th sections were as follows:

"Sec. 8. *And be it further enacted*, That each [416] and every *grant, right, and privilege herein are so made and given to and accepted by said Atlantic & Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than 50 miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the 4th day of July, anno Domini eighteen hundred seventy-eight.

"Sec. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic & Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

"Sec. 17. *And be it further enacted*, That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which may be granted to or conferred on said company by the Congress of the United States, by the legislature of any State, or by any corporation, person, or persons, or by any Indian tribe or nation through whose reservation the road herein provided for may pass; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use, for the purpose aforesaid: *Provided*, That any such grant or donation, power, aid, or assistance from any Indian tribe or nation shall be subject to the approval of the President of the United States."

By the 20th section the right was reserved to Congress, "at any time, having due regard for the rights of said Atlantic & Pacific Railroad Company," to "add to, alter, amend, or repeal this act."

The company proceeded with its organization, but up to April 20, 1871, had only been able to construct 75 miles of its road, including 34 miles in the Indian territory, extending west- [417] ward *from its eastern terminus at Springfield, Missouri. Along that construction in the state of Missouri, there was but little unappropriated public land available under the grant to aid in building the road. From the west line of Missouri to the west line of the Indian territory, about 350 miles, the lands were unsurveyed, and were wholly embraced in Indian titles which the United States had not extinguished, and none of those lands were available to aid in construction. From thence, through New Mexico and Arizona to the Colorado river, the route of the road ran through numerous reservations occupied by hostile and warlike Indians, the boundaries of which reservations were subsequently enlarged by the United States, and new reservations created. Most of the lands which were not included in such unextinguished Indian occupancy were then unsurveyed, and were largely taken up by unadjusted Mexican land claims. It also appears that the surveying and engineering parties of the company were stopped by orders from the Secretary of the Interior from continuing westward through the Indian territory, and the company was unable to proceed until March, 1871, and then only upon executing a bond in the sum of half a million of dollars, conditioned for the protection of the Indian tribes, through whose territory the line of route was required to pass by the act of Congress.

For these reasons the company was compelled to stop work and appeal to Congress for express authority to mortgage its land grant in advance of the construction of the road, so as to secure capital for the prosecution of the work. Thereupon, on April 20, 1871, Congress passed an act authorizing the company to mortgage its property, with a proviso that, "if the company shall hereafter suffer any breach of the conditions of the act above referred to [July 27, 1866], under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage." 17 Stat. at L. 19, chap. 33.

*Under the authority of this act the [418] company executed mortgages to the aggregate amount of $31,500,000, of which $3,590,629 was secured by mortgages upon the central division of the road extending from the west line of Missouri to Albuquerque, and embracing the lands here in controversy.

By July 4, 1878, the date fixed by the act of 1866 for the completion of the road, the company had constructed only 125 miles out of the 2,267 miles contemplated for the entire line; but, in order to have an outlet to the markets of St. Louis, and the transportation facilities of the Mississippi river, it had, in October, 1870, purchased the Southern Pacific railroad, then built from Pacific City, 37 miles west of St. Louis, to Springfield. Owing, as is claimed, to the financial panic of 1873, and the failure of the United States to extinguish the Indian titles through the Indian territory, or of the company to acquire them, no substantial progress was made with the road from 1871 until about the beginning of 1880, when the company made such arrangements as to enable it to resume the work of construction. In order to do this, however, it had to give up operations in the Indian territory, and by mak-



Digitized by Google

ing connection with the Atchison, Topeka, & Santa Fé, whose construction had then reached the line of the Atlantic & Pacific at Albuquerque in New Mexico, it became practicable to build westward to the Pacific ocean, and thus avoid many of the obstacles and hindrances which had been encountered in the Indian territory. There were then constructed and equipped, at a cost of $16,000,000, about 50 miles more in the Indian territory, and 560 miles westward from Albuquerque to "The Needles" on the Colorado river, all of which were examined and accepted by order of the President. It also acquired, by contract of purchase at an expense of $7,290,000, 243 miles of road from "The Needles" to Mojave, California, which had been constructed by the Southern Pacific Railroad Company, and by a trackage contract with the Southern Pacific the Atlantic & Pacific obtained the right to run its own cars to San Francisco, and to conduct to that point an independent and competitive 419] freight and passenger business. *On July 6, 1886, the company had about 1,228 miles of constructed road, equipped and in operation, of which, however, it had itself constructed only 747 miles. That portion of the line from Sepulpa, in the Indian territory, to Albuquerque, and from Mojave to the Pacific, were in 1886 and still remain unconstructed.

Upon this state of facts, on July 6, 1886, Congress passed an act (24 Stat. at L. 123, chap. 637) declaring all the lands, excepting the right of way, "adjacent to and coterminous with the uncompleted portions of the main line of said road embraced within both the granted and indemnity limits, as contemplated" by the act of organization, to be "forfeited and restored to the public domain." The validity of this act raised the only question at issue between the parties.

Upon the trial, the court directed a verdict for the defendant; plaintiff sued out a writ of error from the supreme court of the territory, which affirmed by a divided court the judgment of the court below (34 Pac. 592), whereupon plaintiff sued out a writ of error from this court.

*Messrs.* **E. J. Phelps, A. B. Browne,** and *A. T. Britton*, for plaintiff in error:

When the grant was, on March 12, 1872, identified by the filing and acceptance of the map of definite location, the legal title to the land in controversy vested in the railroad company as of the date of the grant, and unless thereafter devested by voluntary relinquishment, or by due process of law, the railroad company and its assigns have the continuing right of possession against all subsequent claimants or patentees.

*United States* v. *Southern P. R. Co.* 146 U. S. 594, 595 (36: 1097, 1098); *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241 (35: 999); *Wright* v. *Roseberry*, 121 U. S. 488 (30: 1039).

As the land in controversy was part of an odd-numbered section, not mineral, situate within the primary limits of the grant and along the line of definite location filed and approved March 12, 1872, and not included within any of the exceptions from the grant, but in all respects subject thereto, the legal title of the railroad company attached and the right of possession continued perfect as against a subsequent patentee under the United States, unless such legal title has been devested by voluntary relinquishment or by due process of law.

There is no pretense of voluntary relinquishment, but the court below has decided that the legal title vested in the railroad company, subject to a reserved right in the United States to enforce a legislative forfeiture of the grant, upon failure to construct within a prescribed time; that there was a breach of such condition subsequent; and that the act of July 6, 1886, lawfully declared forfeiture, and, by mere force of the statute, reinvested the legal title in the United States.

What were the conditions subsequent of the grant of July 27, 1866?

The court below has assumed that the same right of absolute forfeiture which, in other land grants by Congress was expressly reserved to the United States, was equally reserved in this grant by necessary implication.

But suppose that there had been no conditions subsequent—no reservation of rights to the government—but simply a grant without conditions? In such case there could be no invoking of the analogy of other grants based upon conditions subsequent, and with reservation of right to the grantor. Such case would clearly be controlled by the principle of *Cedar Rapids & M. R. R. Co.* v. *Courtright*, 88 U. S. 21 Wall. 315 (22: 583), where this court held that the title to 120 sections authorized to be sold before construction was absolute, because, "no conditions, therefore, of any kind were imposed upon the state in the disposition of this quantity, Congress relying upon the good faith of the state to see that its proceeds were applied for the purposes contemplated by the act."

In such case, at the utmost, the United States would only be entitled to the same equitable remedy that might obtain in case of a private grantor where consideration had wholly failed. It would have to be pursued in a court of chancery, and could not be effected by a mere legislative declaration.

We therefore maintain that the conditions subsequent of the act of 1866 are not to be read in the light or analogy of other and wholly variant statutes. They are to be tested by their own expressions, with resort, in case of ambiguity, to the purpose of Congress as shown by contemporaneous history.

Where the conditions are clearly expressed, resort should neither be had to other grants nor to the common law to ascertain the rights and remedies of the granting party. In making this grant, it was competent for Congress to attach any conditions to it and to prescribe the penalty for their nonperformance.

It did, in fact, prescribe, in § 19, that unless a fixed stock subscription and payment should be made in a stated time the whole act "shall be null and void." That provision distinguishes with greater emphasis the entirely variant language of the other conditions subsequent of the grant of lands.

The several other grants, already made subject to the conditions of construction contained in § 9, were made and to be accepted subject to the further condition that if "the said com-



Digitized by Google

pany make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

Therefore Congress expressly said, in case the conditions of construction were not seasonably performed, not that the grant should be null and void; not that the lands should revert to the United States; not that the grant and franchises should be forfeited; but that the United States might take the necessary steps to secure the speedy completion of the road.

If default by the railroad company occurred or was compelled through failure of the United States to perform its contract obligations, could the United States enforce such conditions subsequent?

The grant of July 27, 1866, coupled with the obligations on part of the government attached thereto, was not only a law which incorporated the company, but it was also a legislative contract. To the performance of such contract obligations the government was as much bound as the grantee.

*Union P. R. Co.* v. *United States* (*"Sinking Fund Cases"*) 99 U. S. 719 (25: 501).

The grant of lands was to enable the Atlantic & Pacific Railroad to secure a construction fund. The absolute necessity for such governmental aid was the basis of the grant. In the theory of the law the road could not be built without it, hence Congress said that we will give you this grant to aid you in raising moneys for construction purposes, and we require you to utilize its proceeds by completing construction within a given time, but, as the grant would be otherwise valueless to you, we will agree to do the things necessary to put it into available shape. Those absolutely necessary things, and without which the lands were scarcely worth a penny, were to extinguish the Indian titles and to survey the lands (Act of July 27, 1866, §§ 2, 6). The road had to be built from Springfield, Missouri, southwest to the Indian territory and thence west for 350 miles through the Indian territory. It was promptly built to and as far into the civilized parts of the Indian territory as the condition of the unextinguished title would permit. Then it had to cease operations and await the promised action of the United States in extinguishing those titles.

It could scarcely be contended that the railroad company was obliged to transport by wagons (the only possible available method) from Vinita to the western line of the Indian territory, 350 miles, all its laborers, equipments, ties, railway iron, and rolling stock, and then upon the borders of New Mexico commence the westward construction of over 1,600 miles of railway, leaving this gap of 350 miles, through which no unauthorized party could pass.

Especially so when all along the line also of that 1,600 miles a large proportion of its land grant was swallowed up by existing Indian reservations, which have not only been continued to this date, but have been largely added to, and new ones created.

The United States has never commenced to put the land grant into condition to be sold, or to be utilized as a profitable means of raising money for construction purposes. On the contrary, it has still further burdened these titles with the very clouds it had stipulated to remove.

The time provisions must be construed upon the basis of a prior fulfilment of the governmental stipulations as to the condition of the titles. The time of such fulfilment was from questions of public policy, and from considerations looking to the welfare of the Indians, coupled with a reserved discretion in the grantor, but so long as that discretion was exercised, and performance withheld, the United States was not in position to assert a right of forfeiture.

The same reasoning applies to the provision to survey the lands, and possibly with greater force. There were no considerations of public policy to restrain the United States from making surveys where at least the lands were public. It was simply a failure to make the appropriations necessary to put the surveying parties in the field. It was a palpable omission to perform an agreed duty.

The United States can lawfully exercise no reserved right of forfeiture or otherwise under the contract of July 27, 1866, so long as the United States effectually bars the way to agreed performance by the railroad company by failure to make the grant available through the stipulated extinguishment of the Indian titles and by identifying the grant by surveys. The principle contended for has been heretofore announced by this court.

*Davis* v. *Gray*, 83 U. S. 16 Wall. 230 (21: 456).

Were not the rights reserved to the United States by the act of July 27, 1866, subordinated to the rights acquired by the subsequent act of April 20, 1871?

This question is equally pertinent whatever may be determined to be the reserved power of the United States under the act of July 27, 1866.

At the time of the enactment of the law of April 20, 1871, the railroad company was in default as to the condition contained in § 8 of the act of July 27, 1866. Construction had ceased for several years. Whatever was the reserved power of the United States upon condition broken, it had then attached and was fully enforceable. Upon and applicable to this condition of existing default and right of reentry for condition broken, the act of 1871 was enacted. If it had been the intention of Congress that upon such existing default construction should cease and the enterprise terminate, it would surely have legislated in this act of 1871, in unambiguous terms, for the resumption of the grant, or upon the continuance of such right of resumption, if that was the reserved power in the act of 1866. Instead of this the action of Congress, upon the construction for which we contend, was in exact conformity with the powers reserved in §§ 9 and 20, *viz.*: to alter or add to the act so as to promote the construction and insure the completion of the road. For that purpose the act of 1871 offered a fresh inducement to the investment of private capital in this national work. To that end, it authorized the com-



Digitized by Google

pany to mortgage its lands to secure bonds to be issued, with the one solitary limitation in the form of a proviso, that, in case of subsequent breach of condition, the right of the mortgagees should only extend to lands coterminous with road constructed—not at the time of the breach of condition, not at the time of attempted forfeiture by the United States, but at the time of the foreclosure of said mortgage.

It is surely a reasonable contention, that if by the terms of the original act an absolute forfeiture of the grant was to be the consequence of a breach of condition, and if it had been the intention of Congress, while granting subsequent authority to mortgage the grant, to limit the right of mortgagees to lands appertaining to road constructed at date of the breach, or at date of forfeiture, Congress would have said so in apt terms. It would not have left room for doubt as to its intent.

It is reasoned, that the concluding words of this 1871 act must be treated as surplusage, or be construed as they read, "at the time of forfeiture by the United States," instead of "at the time of the foreclosure of said mortgage."

It is, however, obvious that if those concluding words of the law of 1871 are treated as surplusage, then that entire act must equally be treated as surplusage.

This follows, for the reason that, if those concluding words do not take on their legal meaning, the whole act is meaningless; it has effected nothing that did not quite as plainly and lawfully exist before it was enacted.

Construction of the road was the objective point of legislation. Termination of the enterprise was not contemplated.

Therefore Congress, by this act of 1871, intentionally legislated, first, to condone all past default, the language used being "that if the company shall hereafter suffer any breach of the conditions" etc.; second, to entirely change the conditions of the legislative contract so as to subordinate the reserved power of the government to the rights of the mortgagees. The words "at the time of re-entry upon conditions broken" were purposely stricken from the meaning of the contract, and in lieu thereof were inserted the equally plain but essentially variant words "at the time of the foreclosure of the mortgage."

This was in harmony with the previous legislation of Congress as to the Union Pacific Railroad and its branches under the acts of 1862 and 1864.

Yet by § 10 of the act of July 2, 1864, Congress authorized the company to secure its own bonds by a first mortgage, and made the government lien a second mortgage. And whilst the authority to so mortgage was to be exercised "on the completion of each section of said road," yet that expressly waived *pro tanto* the forfeiture of the "whole of all of said railroads" etc.

Whilst authorizing the company to mortgage all its property, earned and unearned, Congress protected the United States and the company, in event of foreclosure, by limiting in that contingency the rights of the mortgagees to the then earned lands, thus preserving the unearned lands as a basis for capital with which to complete the road.

*Aldridge* v. *Williams*, 44 U. S. 3 How. 24 (11: 476).

A trust will never be permitted to fail or be defeated by the refusal or omission of a trustee to execute a power which has been so given that it should and can be exercised.

2 Story, Eq. 976 *et seq.*; 1 Perry, Tr. 320.

The assumed difficulties in the true construction of this law will disappear so as to harmonize all of its parts with preceding legislation, if construction does not proceed upon the ancient basis of a technical common-law condition, but rather upon the modern doctrine of a trust coupled with the grant.

Sugden, Powers, 122.

The legal title once vested under the act of July 27, 1866, cannot be devested by mere legislative declaration, containing no provision for any judicial inquiry into the facts upon which it is founded and extending to the grantee no opportunity of urging any equitable or other consideration by reason of which the breach of condition might be excused, or the condition itself be discharged.

The act of 1886 is a naked declaration of forfeiture and a legislative restoration of the lands to the public domain. It contains no recital of breach of condition. It alleges no failure of performance upon the part of the grantee. It provides for no judicial inquiry into alleged facts of failure to perform, nor the legal effect thereof, nor offsets thereto. It authorizes no subsequent proceedings of any kind to effect a forfeiture or to extend a hearing to the parties in interest. It contains no suggestion of any purpose of devoting the lands to the completion of the road in some other way, or even through some other agency. There is no provision protecting the vested rights of the mortgagees, nor making the proposed restoration of the lands subject to their possible rights. The law simply declares forfeiture and requires an immediate restoration of the lands to the public domain. It seeks by legislative declaration to devest the outstanding fee-simple title, and by mere force of the statute to reinvest that title absolutely in the United States.

The power of the United States to take these lands from the railroad company and apply them in some other way or through some other agency to the construction of the "continuous" highway provided for by the act of 1866 may not be seriously challenged, but the forfeiture act of 1886 does not even pretend to do that. It simply restores the lands to the public domain, and thereby subjects them to sale and entry under the general public land laws. Where then, as in this case, the United States patents them off to an individual entryman, it is manifest they cannot be applied to the purpose to which they were thus originally dedicated, *viz.*, the final completed construction of this "continuous" national and governmental highway under the contract of the United States to devote them to that purpose and no other.

A mere legislative declaration is not valid so as to effectuate that purpose; it operates simply as an announcement of the legislative will to assert the reserved rights of the government; but some proceeding, which shall have a semblance of "due process of law," must follow, to determine the rights involved, so as to de-



Digitized by Google

vest the title of the grantee and to reinvest it in the grantor.

Upon common-law principles it would clearly be incompetent for the government to simply legislate the title granted back into itself, without some method being provided for determining the nature and effect of the alleged conditions subsequent, or whether same had been broken, or waived, or performance thereof excused, and some ascertainment of the lands to be directly affected.

The government, dealing in its own case and with its own contract, stands in no different attitude from an individual. The individual must resort to some appropriate judicial proceeding to support his claim that the conditions of his contract have been broken.

3 Hamilton's Works, 518, 519.

And where this court has heretofore recognized the power to proceed by direct legislative declaration, the operation of that right has uniformly been restricted to cases where the granting act in express terms reserved the authority to so declare a forfeiture.

*Farnsworth* v. *Minnesota & P. R. Co.* 92 U. S. 66 (23: 535).

It truly cannot be successfully maintained that such express authority to declare a legislative confiscation of the grant is reserved by the terms of the Atlantic & Pacific act.

For these several reasons we submit that the act of July 6, 1886, is unconstitutional and void. It is not that "due process of law" which would be effectual to devest the legal title of the railroad company.

The legislation of Congress pertaining to this grant should be construed as an entirety. It should be read in connection with contemporaneous facts and having due relation to the intended object of Congress and to the protection guaranteed to those who advance the moneys for construction purposes.

For nine out of twelve years prescribed for completion by the company no engineering or construction party could operate upon 500 miles of the prescribed route eastward from New Mexico except under armed guard; and during much of that time it would have required a large force of the United States army to maintain them there.

The company did not abandon the project, but struggled on against the appalling difficulties confronting it. A financial panic which paralyzed all railroad building in the west for five years magnified and multiplied these. Nevertheless, when the forfeiture act was passed, the company had built and in operation on the located line about 1,000 miles, in two separate sections, of railroad which does not pay, and never will pay, until the original plan is carried out.

By its charter, read in the light of the times when it was made, and by the acts of the government then and afterwards, the company asks that its rights be measured.

By the express words of that charter those rights were made inviolable. The power to alter, amend, or repeal the act is only to be exercised "with due regard for the rights of the Atlantic & Pacific Company." Forfeiture of its lands without inquiry cannot be accomplished without a complete disregard of those rights.

*Messrs.* **J. M. Dickinson,** Assistant Attorney General, and *Joseph H. Call*, Special United StatesAttorney, for the United States, by special leave:

The United States had a right to forfeit the land grant for the breach of these conditions subsequent.

Litt. 328–330; Comyn, Dig. *Condition*, A. 2; 2 Wood, Com. Law, Powell's ed. 505, 512 *et seq.*; *Wheeler* v. *Walker*, 2 Conn. 201, 7 Am. Dec. 264; *Sharon Iron Co.* v. *Erie*, 41 Pa. 341; *Taylor* v. *Cedar Rapids & St. P. R. Co.* 25 Iowa, 371; *Attorney General* v. *Merrimack Mfg. Co.* 14 Gray, 612; *Hadley* v. *Hadley Mfg. Co.* 4 Gray, 145; *Rawson* v. *School Dist. No. 5*, 7 Allen, 128, 83 Am. Dec. 670; *Caw* v. *Robertson*, 5 N. Y. 125; *Pickle* v. *McKissick*, 21 Pa. 232; *Hooper* v. *Cummings*, 45 Me. 359; *Chapin* v. *School Dist. No. 2*, 35 N. H. 450; *Wiggin* v. *Berry*, 22 N. H. 114; *Hayden* v. *Stoughton*, 5 Pick. 534; *Wright* v. *Tuttle*, 4 Day, 326.

Although the grant to the Atlantic & Pacific Company was a contract as well as a law, there was no breach of any obligation resting upon the government which deprived it of the right to declare a forfeiture.

*Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 742 (23: 638); *Butts* v. *Northern P. R. Co.* 119 U. S. 55 (30: 330).

The company certainly did not suffer through not being able to identify its lands, for it promptly put mortgages on all of the lands from Albuquerque to Missouri, its central division, as early as 1871, although it never built a foot of road between Albuquerque and the Indian territory. It floated bonds on its entire road aggregating $30,000,000.

To support the contention of appellant that the government lost its right to declare a forfeiture by a failure to survey, the case of *Davis* v. *Gray*, 83 U. S. 16 Wall. is cited and a passage from page 230 (21: 456) is quoted as conclusive of the question.

That was a case in equity. This is a suit at law, and the parties are the Atlantic & Pacific Company and a grantee of the government. There is no room for a play of equitable principles. It is a matter *stricti juris*.

This is a suit at law, an action of ejectment, a trial of legal title, in which the plaintiff to prevail must show a good legal title.

Though, upon the authority of *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44 (21: 551); *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241 (35: 999); *United States* v. *Southern P. R. Co.* 146 U. S. 595 (36: 1097), and other cases,—the title to the land in question vested in the Atlantic & Pacific Company upon the filing of the map of definite location, yet this title was subject to forfeiture for breach of conditions subsequent.

This case emphatically calls for the application of the settled rule that those claiming rights against the government must stand upon express provisions.

*Dubuque & P. R. Co.* v. *Litchfield*, 64 U. S. 23 How. 88 (16: 509); *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 740 (23: 637); *Coosaw Min. Co.* v. *South Carolina*, 144 U. S. 562 (36: 542).

While it is now elementary law in railroad land grants that the title passed upon filing of map of definite location, it was not so generally accepted when the act of 1871 was passed.



Digitized by Google

The doctrine was announced for the first time in 1875 in *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 741 (23: 637), but was not called for. It was repeated in 1878 in *Missouri, K. & T. R. Co.* v. *Kansas P. R. Co.* 97 U. S. 496 (24: 1096). The question was first squarely decided as a litigated point in 1882 in *Van Wyck* v. *Knevals*, 106 U. S. 364 (27: 202).

The act was entirely for the benefit of the railroad company. The presumption is that it prepared the act.

*Slidell* v. *Grandjean*, 111 U. S. 437 (28: 329).

The forfeiture act of 1866 was valid and forfeited the rights of the Atlantic & Pacific Company.

*United States* v. *Repentigny*, 72 U. S. 5 Wall. 211, 267 (18: 627, 645); *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44, 63 (22: 551, 555); *Farnsworth* v. *Minnesota & P. R. Co.* 92 U. S. 49, 66 (23: 530, 535); *McMicken* v. *United States*, 97 U. S. 204, 217 (24: 947, 951); *Van Wyck* v. *Knevals*, 106 U. S. 360, 368 (27: 201, 203).

No counsel appeared for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

While the value of the land involved in this case is small, the question at issue between the parties affects the validity of the entire land grant of the company adjacent to and coterminous with all that part of the main line of the road not completed on July 6, 1886. The case turns wholly upon the validity of the act of that date, forfeiting that portion of the land grant.

Plaintiff claims in this connection that the act was invalid, inasmuch as the United States had failed to perform their own obligations in two particulars: *First*, that they not only failed to extinguish the Indian title to lands along the prescribed route of the road, but had since further encumbered the grant by the creation of additional Indian reservations, carved out of the granted lands. *Second*, that they also largely failed to survey the lands as required by the 6th section, although repeatedly urged and requested to do so by the railroad company.

1. The reserved rights of the United States with respect to this land grant are contained in the 8th, 9th, and 20th sections of the original act, and are as follows: By § 8 the grant was made subject to the condition that the company should commence work within two years from the approval of the act, and should complete not less than 50 miles a year after the second year, and should complete the main line [427] of *the whole road by July 4, 1878. By § 9 a "further condition" was imposed: that if the company made any breach of the conditions of the act, and allowed the same to continue for upwards of one year, the United States might do anything which might be needful and necessary to secure the speedy completion of the road. And by § 20 the general power was reserved to Congress to alter, amend, or repeal the act, subject only to a due regard for the rights of the company.

The position of the plaintiff is that the rights of the United States were fixed and limited by § 9; that Congress did not intend that the grant should ever be forfeited, but that, upon a breach of any of the conditions, the United States could only take steps itself to insure the speedy completion of the road.

What steps the government could take in that direction, and what the effects of its action upon the land grant might be, it is difficult to decide. It would seem highly inequitable, however, that if the government were compelled to go on and complete the road at its own expense the company should yet be able to retain the land grant, the condition of which was the completion of the road at its expense. The act makes no provision whatever for the disposition of the land grant in this contingency. What remedy the government would have had in case it had elected itself to go on and complete the road is left entirely to conjecture. Some further action on the part of Congress would seem to have been necessary.

Aside from this difficulty, however, we are clearly of opinion that Congress intended to impose this simply as a "further condition," consequent upon a breach by the railroad company of its stipulations, and to reserve to the United States the option of forfeiting the grant entirely, or of taking measures to insure the speedy completion of the road. This further condition was obviously intended for the benefit of the government, and with no purpose of merging other conditions, or of superseding other remedies to which it might be entitled. While, by the act of July 27, 1866, like other similar acts passed about the same time, it was doubtless intended that the grant should operate *in præsenti*, it certainly never could have been contemplated that, in case the *com-[428 pany took no steps toward the completion of the road, the government could not forfeit the grant, and could resort to no other remedy than building the road itself. It certainly would be highly inequitable as well as impolitic that the company should retain the land grant and do nothing toward the construction of the road, or that the lands granted should be permanently withdrawn from the public domain. A more reasonable interpretation would be to say that Congress contemplated a possibility that the company might proceed in good faith with the construction of the road, and might so nearly approach its completion that it would be for the best interests of the government to go on itself and complete it rather than to insist upon an entire forfeiture of the grant. Even if § 9 were intended as a limitation upon the power of Congress, which might otherwise be inferred from § 8, the power reserved by § 20 to alter, amend, or repeal the act, except so far as its exercise might interfere with the just rights of the company, being the latest expression of the legislative will, may properly be construed to dominate the others.

But little light is to be gained in the consideration of this question by referring to the conditions for forfeiture or reinvestment of title under other railway land grant acts. There is no such uniformity in the terms of their conditions subsequent as to lead us to give any different construction to the three sections in question than such as their lan-



Digitized by Google

guage plainly requires. It cannot be supposed that Congress intended to vest a title in the railway company to this enormous grant of lands without contemplating that the government might in some way reacquire it in case of a failure of the company to comply with the conditions of the grant. No express provision for a forfeiture was required to fix the rights of the government. If an estate be granted upon a condition subsequent, no express words of forfeiture or reinvestiture of title are necessary to authorize the grantor to re-enter in case of a breach of such conditions. *Stanley* v. *Colt*, 72 U. S. 5 Wall. 119 [18: 502]; *Mead* v. *Ballard*, 74 U. S. 7 Wall. 290 [19: 190]; *Ruch* v. *Rock Island*, 97 U. S. 693 [24: 1101]; *Hayden* v. *Stoughton*, 5 Pick. 528; *Jackson* v. *Allen*, 3 Cow. 220; *Gray* v. *Blanchard*, 8 Pick. 284. And the fact that *Congress imposed as a further condition the right to complete the road itself did not deprive it of the power of resorting to other remedies to which the breach of such conditions entitled it. **429**

2. As to the proper construction of the act of April 20, 1871. This act, in general terms, authorized the railroad company to make and issue its bonds in such sums as it pleased, and to mortgage its road, etc., to secure them, with a proviso that if the company should *thereafter* suffer any breach of the conditions of its act of organization, the rights of those claiming under the mortgage of the land grant should extend only to so much thereof as should be "coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage." Conceding that, with respect to the rights of the mortgagees, at least, this act was a condonation of the breach of any condition which had previously occurred, it left the rights of the government unimpaired with respect to any breach which should thereafter occur, and expressly limited the rights of the mortgagees to such land as should appertain to and be coterminous with the completed portion of the road at the time of the foreclosure. It is insisted by the plaintiff that the final words of this act indicate an intention on the part of Congress to extend the time for the construction of the road until such time as the mortgagees might see fit to foreclose. But we do not so read it. There is nothing in the act evincing an intention on the part of Congress to waive any of the conditions of the act of 1866, except so far as such conditions had already been broken. Congress doubtless anticipated that the mortgage might be foreclosed, and desiring to provide against the possible contingency that the mortgagees might claim the right to sell the entire land grant upon the foreclosure, declared that it should operate only upon that part of the grant appertaining to the completed portion. If there were any ambiguity in this act we should feel bound, upon familiar principles, to give the government the benefit of the doubt. *Dubuque & P. R. Co.* v. *Litchfield*, 64 U. S. 23 How. 66, 88 [16: 500, 509]; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 740 [23: 634, 637]; *Coosaw Min. Co.* v. *South Carolina*, 144 U. S. 550, 562 [36: 537, 542]. But in our view there is no case made calling for the application of this rule, as the intention of Congress to simply limit the remedy of the mortgagees seems entirely clear. The original act being silent upon the subject of mortgaging the grant, there is reason to suppose that Congress passed the act for the purpose of resolving any doubts that capitalists may have entertained with respect to such power. The mortgagees, standing in the place of the mortgagor, had no greater rights than it had, and must be held to have known that they were taking an estate which was defeasible upon condition broken. It cannot be supposed that Congress intended to postpone indefinitely, or until the mortgagees chose to foreclose, any remedy it might have against the mortgagor for a breach of its covenants. The plain meaning of the proviso is to permit any foreclosure of the mortgage to operate only upon such lands as are opposite and appurtenant to that part of the road which should be constructed at the time of the foreclosure, but not to extend for a day the time within which the road should be completed. The act also had a purpose in its assurance to mortgagees that no forfeiture would be insisted upon for conditions already broken, and that they might safely advance their money, if no breach should thereafter occur. Except to this extent there was no intention by this act to alter, amend, or repeal the act of 1866.

3. Coming now to the act of 1886, forfeiting the grant, it is claimed in the first place that Congress has no right by simple act to forfeit a title already vested, without providing for a judicial inquiry as to whether there has been a breach of a condition on the part of the grantee, and the legal effect of such breach; and, also, whether there has not been a breach on the part of the United States which would estop them from claiming a forfeiture. There is no doubt that, where an estate is granted subject to a condition subsequent, the mere fact that there has been a breach of such condition will not revest the title in the grantor without some act or declaration upon his part. *Ruch* v. *Rock Island*, 97 U. S. 693 [24: 1101]. In this case it was said by Mr. Justice Swayne that "it was not denied by the plaintiff that the title had passed, and that the *estate had **431** vested by the dedication. If the conditions subsequent were broken, that did not *ipso facto* produce a reverter of the title. The estate continued in full force until the proper step was taken to consummate the forfeiture. This could be done only by the grantor during his lifetime, and after his death by those in privity of blood with him." In the case of a private grant this is ordinarily done by re-entry on the part of the grantor, although, as was said in this case, "bringing suit for the premises by the proper party is sufficient to authorize a recovery without actual entry or a previous demand of possession." *Cowell* v. *Colorado Springs Co.* 100 U. S. 55 [25: 547]; *Austin* v. *Cambridgeport*, 21 Pick. 215; *Jackson* v. *Crysler*, 1 Johns. Cas. 125; *Hosford* v. *Ballard*, 39 N. Y. 147; *Cruger* v. *McLaury*, 41 N. Y. 219; *Cornelius* v. *Den, Ivins*, 26 N. J. L. 376.

But where the grant is a public one, this court has held, in a series of cases, that the remedy of the government is by an inquest of office or office found, a judicial proceeding but



Digitized by Google

little used in this country, or by a legislative act directing the possession and appropriation of the land.

Blackstone defines an inquest of office as "an inquiry made by the King's officer, his sheriff, coroner, or escheator, *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the King to the possession of lands or tenements, goods or chattels. This is done by a jury of no determinate number, being either twelve, or less, or more. . . . These inquests of office were devised by law, as an authentic means to give the King his right by solemn matter of record, without which he, in general, can neither take nor part from anything." 3 Bl. Com. 258, 259.

The necessity of an inquest of office was considered by this court at an early day in two cases. In *Smith* v. *Maryland*, 10 U. S. 6 Cranch, 286 [3: 225], it was held that, by the confiscation act of Maryland, passed in 1780, before the adoption of the Constitution, interests in land were completely devested by operation of law, without office found. The validity of the act was apparently not considered. 432] *The case of *Fairfax* v. *Hunter*, 11 U. S. 7 Cranch, 603 [3: 458], involved the title to a large tract of land in Virginia, granted to Lord Fairfax. The lands were devised by will to Denny Fairfax, a British subject, who never became a citizen of the United States, but always resided in England, and was an alien enemy. In 1789, the governor of the commonwealth of Virginia granted the lands by patent to Hunter, a citizen of Virginia, who entered into possession prior to the institution of the action. It was the opinion of the court that the title acquired by an alien by purchase is not devested until office found, although it was contended that the common law as to inquests of office had been dispensed with by statute, so as to make the grant to Hunter complete and perfect. As to this point Mr. Justice Story observed (p. 622 [459]): "We will not say that it was not competent for the legislature (supposing no treaty in the way), by a special act to have vested the land in the commonwealth without an inquest of office for the cause of alienage. But such an effect ought not, upon principles of public policy, to be presumed upon light grounds; that an inquest of office should be made in cases of alienage is a useful and important restraint upon public proceedings. . . . It prevents individuals from being harassed by numerous suits introduced by litigious grantees. It enables the owner to contest the question of alienage directly by a traverse of the office. It affords an opportunity for the public to know the nature, the value, and the extent of its acquisitions, *pro defectu hæredis;* and above all it operates as a salutary suppression of that corrupt influence which the avarice of speculation might otherwise urge upon the legislature. The common law, therefore, ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." It was further held that during the war the lands in controversy were never, by any public law, vested in the commonwealth. It was also held that the treaty of 1794 with Great Britain completely protected and confirmed the title of Denny Fairfax. Mr. Justice Johnson, dissenting, was of opinion that the interest acquired by Denny Fairfax under the devise was a mere scintilla *juris*, and that that *scintilla was extinguished [433 by the grant of the state vesting the tract in Hunter; that it was competent for the state to assert its rights over an alien's property by other means than by an inquest of office; that in Great Britain, in the case of treason, an inquest of office had been expressly dispensed with by the statute of 33 Hen. VIII. chap. 30, and that he saw no reason why it was not competent for the legislature of Virginia to do the same.

Subsequent cases in this court have asserted this power to exist beyond any controversy. As was said in *United States* v. *Repentigny*, 72 U. S. 5 Wall. 211, 268 [18: 627, 646]: "The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings." Practically the same language is used in *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44, 63 [22: 551, 555]. In *Farnsworth* v. *Minnesota & P. R. Co.* 92 U. S. 49, 66 [23: 530, 535], we said: "A forfeiture by the state of an interest in lands and connected franchises, granted for the construction of a public work, may be declared for non-compliance with the conditions annexed to their grant or to their possession when the forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. Such mode of ascertainment and determination—that is, by judicial proceedings—is attended with many conveniences and advantages over any other mode, as it establishes as matter of record, importing verity against the grantee, the facts upon which the forfeiture depends, and thus avoids uncertainty in titles and consequent litigation. But that mode is not essential to the devestiture of the interest where the grant is for the accomplishment of an object in which the public is concerned, and is made by a law which expressly provides for the forfeiture when that object is not accomplished. Where land and franchises are thus held, any public assertion by legislative act of the ownership of the state, after default of the grantee—such as an act resuming control of them and appropriating them to particular uses, or granting them *to [434 others to carry out the original object—will be equally effectual and operative."

These cases were all quoted with approval, and the doctrine reasserted in *McMicken* v. *United States*, 97 U. S. 204, 217 [24: 947, 952]; *Van Wyck* v. *Knevals*, 106 U. S. 360, 368 [27: 201, 204].

These cases are not put upon the ground that the United States reserved the right to declare a forfeiture, or even provided expressly for a reversion of title in case of a breach, but upon the general ground that the government was vested with the same right as a private grantor, upon breach of a condition subsequent, though such right was, from the necessities of the case, to be exercised in a somewhat different manner, *viz.*, by legislative act instead of re-entry.



Digitized by Google

But while we think the practice of forfeiting by legislative act is too well settled to be now disturbed, we do not wish to be understood as saying that this power may be arbitrarily exercised, or that the grantee may not set up in defense any facts which he might lay before a jury in a judicial inquisition. It would comport neither with the dignity of the government, nor with the constitutional rights of the grantee, to hold that the government by an arbitrary act might devest the latter of his title when there had been no breach of the conditions subsequent, or when the government itself had been manifestly in default in the performance of its stipulations. The inquiry in each case is a judicial one, whether there has been, upon either side, a failure to perform, and it makes but little practical difference whether such inquiry precedes or follows the re-entry or act of forfeiture.

The charge, in this connection, is that the government not only failed in its legal obligation to extinguish the Indian titles and to survey the lands, but, upon the contrary, has still further burdened these titles with the very cloud it stipulated to remove by additional reservations in favor of the Indians. The main contest in the case has been upon this point. In locating the road between Springfield, in Missouri, and Albuquerque, in New Mexico, the most direct route lay, for 350 miles, through the Indian territory. To determine whether the government has been dere-
435 ]lict in this particular, it is *necessary to compare the several sections of the act to ascertain exactly what the grant covered, and to what extent the legal rights of the grantee were impaired by the nonaction of the government. By the 3d section of the act a grant was made of 20 sections per mile on each side of the line through the *territories*, and 10 sections per mile through the states, subject to the conditions that "whenever, on the line thereof, the United States shall have full title not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office, and whenever, prior to said time, any of said sections or part of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof." If the grant stood upon this language alone, there could be no doubt that, as the lands in the Indian territory had been set apart for the sole use and occupation of various Indian tribes, they were reserved lands within the meaning of that section. *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733 [23: 634]. It was held in this case that a grant of lands, in similar terms to the one under consideration, did not apply to lands which had been reserved to the Osage tribe of Indians within the state of Kansas whether the Indian right were extinguished before or after the definite location of the route. See also *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 629 [28: 1122]; *Bardon* v. *Northern P. R. Co.* 145 U. S. 535 [36: 806].

Indeed, it is open to serious doubt whether that large tract of land, known distinctively as the Indian territory, is a territory of the United States within the meaning of the act. While, for certain purposes, such, for instance, as the enforcement of the criminal and internal revenue laws, it has been recognized as such, and within the jurisdiction of the United States (*United States* v. *Rogers*, 45 U. S. 4 How. 567 [11: 1105]; *207 ½ lb. Papers S. Tobacco* v. *United States* ("*The Cherokee Tobacco*") 78 U. S. 11 Wall. 616 [20: 227]), a reference to some of the treaties under which it is held by the Indians, indicates that it stands in an entirely different relation to the United States from *other[436 territories, and that for most purposes it is to be considered as an independent country. Thus, in the treaty of December 29, 1835 (7 Stat. at L. 478), with the Cherokees, whereby the United States granted and conveyed by patent to the Cherokees a portion of this territory, the United States, in article 5, covenanted and agreed that the land ceded to the Cherokees should "in no future time, without their consent, be included within the territorial limits or jurisdiction of any state or territory;" and by further treaty of August 6, 1846 (9 Stat. at L. 871), provided (art. 1) "that the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit, and a patent shall be issued for the same." So, too, by treaty with the Choctaws of September 27, 1830 (7 Stat. at L. 333), granting a portion of the Indian territory to them, the United States (art. 4) secured to the "Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no territory or state shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants, and that no part of the land granted them shall ever be embraced in any territory or state: but the United States shall forever secure said Choctaw Nation from and against all laws except such as from time to time may be enacted in their own national councils, not inconsistent," etc. And in a treaty of March 24, 1832 (7 Stat. at L. 366), with the Creeks (art. 14), the Creek country west of the Mississippi was solemnly guaranteed to these Indians," nor shall any state or territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them."

Under the guaranties of these and other similar treaties the Indians have proceeded to establish and carry on independent governments of their own, enacting and executing their own laws, punishing their own criminals, appointing their own officers, raising and expending their own revenues. Their position, as early as 1855, is indicated by the following extract *from the opinion of this court in *United*[437 *States* v. *Cox*, 59 U. S. 18 How. 100, 103 [15: 299, 301]:

"A question has been suggested whether the Cherokee people should be considered or treated as a foreign state or territory. The fact that they are under the Constitution of the Union and subject to acts of Congress regulating trade is a sufficient answer to the sugges-



Digitized by Google

tion. They are not only within our jurisdiction, but the faith of the nation is pledged for their protection. In some respects they bear the same relation to the Federal government as a territory did in its second grade of government under the ordinance of 1787. Such territory passed its own laws, subject to the approval of Congress, and its inhabitants were subject to the Constitution and acts of Congress. The principal difference consists in the fact that the Cherokees enact their own laws, under the restriction stated, appoint their own officers, and pay their own expenses. This, however, is no reason why the laws and proceeds of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign but a domestic territory—a territory which originated under our Constitution and laws."

Similar language is used with reference to these Indians in *Holden* v. *Joy*, 84 U. S. 17 Wall. 211, 242 [21: 528, 534]. Under these circumstances it could scarcely be expected that the United States should be called upon to extinguish, for the benefit of a railroad company which had chosen to locate its route through this territory, a title guaranteed to the Indians by solemn treaties and which had been possessed by them for upwards of forty years with the powers of an almost independent government.

The terms of the 2d section of the land grant act indicate that nothing of this kind was contemplated. The United States did not agree to extinguish the Indian title absolutely but only "as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession." Whether an extinguishment of an Indian title at all was consistent with public policy and the welfare of the Indians could only be determined by [438]Congress or the executive *officers of the government; whether it could be obtained by voluntary cession could only be determined by the acts of the Indians themselves.

In *Butts* v. *Northern P. R. Co.* 119 U. S. 55 [30: 330], wherein a grant to the Northern Pacific Railroad, with a similar provision for the extinguishment of Indian titles, was under consideration, it was held that, under the principal treaties applicable to that case, the grant operated to convey the fee to the company, subject to the right of occupancy by the Indians, but that the right of the Indians could not be interfered with or determined, except by the United States; that no private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government, and were not open to contestation in the judicial tribunals. It appeared in that case that the United States had full title to the lands, subject to a mere right of occupancy on the part of the Indians.

With respect to the power of the United States to extinguish the Indian titles, it was observed in *Beecher* v. *Wetherby*, 95 U. S. 517, 525 [24: 440, 441]: "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action toward the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians."

The railroad company was in no position to insist that the government should extinguish these titles, at least without affirmatively proving that the Indians were willing to make the cession, and that it was consistent with public policy and their own general welfare to permit them to do so. It made the government its arbiter in this particular. Indeed, it is doubtful if the engagement of the government amounted to anything more than an expression of its willingness to assist the company in acquiring Indian titles, if the company could persuade the Indians to relinquish such titles, and the government *considered it con-[439 sonant with their welfare to do so. The stipulation should be read in connection with the 17th section of the act which authorized the company to accept grants from "any Indian tribe or nation through whose reservation the road herein provided for may pass," provided that any such grant or donation, power, aid, or assistance from any Indian tribe or nation should be subject to the approval of the President of the United States. This proviso is obviously inconsistent with any general undertaking on the part of the government to extinguish all Indian titles. That it required the United States absolutely and at all hazards to extinguish such titles, and to take from the Indians a strip of land 40 miles in width through the entire territory, and open it to settlement, is not only inconsistent with their treaties and with their agreement with the company, but one which involved a grave disturbance, if not practically the upsetting of a long-established Indian government. In fact, Congress promised nothing in this particular from which the company could claim a legal breach of their agreement, without at least showing that the Indians were willing to cede that portion of their territory, and that public policy and their own welfare required this to be done.

Plaintiff admits that there was a reserved discretion in the government as to the circumstances under which the Indian titles should be extinguished, but insists that, so long as that discretion was exercised and performance withheld, the government was in no position to assert a right of forfeiture—in other words, that so long as fulfilment by the company remained impossible, by reason of the failure of the government to keep its promises, no matter for what reason, the power to insist upon performance by the railroad was postponed. We consider this construction of the compact unsound. The railroad company took its chances with the government in this particular. The latter might not deem it sound policy or for the welfare of the Indians to extinguish their title, or it might not procure their assent. Under neither contingency would the company have the right to complain nor to set up this nonperformance as a defense to its own failure to build *the road. Knowing the[440 title under which the Indians held this territory, the company should, when it contemplated the



Digitized by Google

construction of the road, have obtained some positive assurances from the Indians that they would permit the road to be built. It seems that by treaties made in 1866 with the Seminoles, the Choctaws and Chickasaws, the Creeks, the Delawares, and the Cherokees (14 Stat. at L. 755–799), provision was made for a right of way for certain railways from north to south, and from east to west, through the Indian territory; but the very fact that these treaties made no provision for a grant of lands to the railways through this territory as appurtenant to their line of road was notice to the companies that no such grant was contemplated. Indeed, these very treaties made additional provisions for the exercise of legislative power by the several Indian nations, and contained additional guaranties for their legislative independence and self-government—guaranties quite inconsistent with a grant to the railway of alternate sections of land 40 miles in width, and the opening of the other alternate sections to purchase as public lands. All of these treaties were entered into prior to the land grant act of July 21, 1866, and both parties must have had them in view at that time.

4. The defense that other reservations were made to these Indians after this act was passed stands upon a somewhat different basis. So far as these Indian reservations were in the Indian territory they are immaterial, since we have already held that lands in that territory did not pass, and it could make no difference whether they were reserved for one tribe or another. Of the reservations in New Mexico and Arizona most of them were made after July 4, 1878, the time fixed for the completion of the road, and at a time when the government had a right to declare the grant forfeited. All these reservations, too, were made opposite portions of the road which were actually built, and cannot be made available as an excuse for not completing the other portions. None of them seem to affect in any way the lands coterminous with the unconstructed portion. There was no restriction upon the right of the government to dispose of public lands [441] in any way it saw fit prior to the filing of the map of definite location; and if it assumed to dispose of lands within the grant, after the rights of the railroad company had attached, such action might be void, but it would be no answer to the obligation of the company to complete its road within the stipulated time. Some of these reservations, too, were made in pursuance of treaties made with the Indians prior to the land grant act, and were apparently made in pursuance of a plan to confine the Indians within designated boundaries of territories previously occupied by them. These reservations did not seem to have seriously interfered with the company in the prosecution of its work, or, with the exception of those in the Indian territory, to have been seriously insisted upon as an answer to the proposed forfeiture of its land grant.

5. It is finally contended that the government failed to fulfil its obligation to survey the lands, and that this was a condition precedent to its right to declare a forfeiture. This obligation is contained in the 6th section in the following language: "That the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad." Evidently the failure to do this did not prevent the company from realizing the full value of the land granted by mortgaging the road, and it is open to doubt whether it could, under any circumstances, be insisted upon as a defense to the forfeiture. It is true that the railroad company offered to furnish the money for such surveys, and that the United States refused to accept it; but such offer was not made until 1881, three years after the time stipulated for the completion of the road, and at a time when the government had a right to treat the land grant as forfeited, although the act of forfeiture was not passed for five years thereafter.

Upon the whole it does not seem to us that Congress exceeded its powers in forfeiting this grant. The plaintiff company seems to have undertaken its great enterprise in building a transcontinental railroad without adequate appreciation of the difficulties to be surmounted, which finally caused a total suspension of its work; and when, in 1880, after the panic of 1873 had spent its force, it resumed operations, the time had already expired for the completion of the road, and it was only by the inaction or indulgence of Congress that it was permitted to proceed. So far as the road was built and accepted by the government after that time, it was probably entitled to receive its appropriate land grant, but this was rather a matter of favor than of strict right. During this long period, from 1871 to 1880, it should, under its charter, have constructed at least 50 miles per year, and should have completed the whole road by July 1, 1878. But it did nothing. After this long inaction of nine years and its practical abandonment of the work, the company was not in a position to demand of the government a strict and literal performance of its obligations when it had so completely failed to meet its own. While the reservation of some of these lands for the benefit of the Indian tribes might not have been consistent with its obligations to extinguish Indian titles, if the company had been prosecuting its work according to its contract, we do not think that it is entitled to complain that the government did not deal with it precisely as if it lived up to its undertaking.

*The judgment of the court below must therefore be affirmed.*

Mr. Justice **Gray** was not present at the argument and took no part in the decision of this case.



Digitized by Google

**443] *Ex parte* JOHN CHETWOOD, JR., *Petitioner.***

(See S. C. Reporter's ed. 443-462.)

*Receiver of national bank—filing of petition—agent elected by stockholders—jurisdiction—property in possession of court—writs of error—certiorari.*

1. A receiver of a national bank appointed by the comptroller of the currency is not the officer of any court, but the agent and officer of the United States.
2. The filing of a petition by a national bank receiver in a Federal court does not operate to make him an officer of that court, or to place the assets of the bank within the control of the court in the sense in which control is acquired where a receiver is appointed by the court.
3. The substitution of an agent elected by the stockholders of a national bank for a receiver, under the act of Congress of August 23, 1892, cannot oust the jurisdiction of a state court in a suit against the bank and receiver.
4. The jurisdiction of a court once attached cannot be arrested or taken away by proceedings in another court.
5. Where property is actually in the possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court of concurrent jurisdiction.
6. A circuit court of the United States cannot interfere with the granting of writs of error from this court, either by restraining the parties from applying therefor, or by directing the dismissal of such writs after they have been granted.
7. Certiorari may be issued by this court to review judgments in contempt proceedings which are rendered in excess of jurisdiction, if there is no other adequate remedy.

[No. 7, Original.]

*Argued January 11, 1897. Decided February 15, 1897.*

PETITION for the vacating of or prohibition upon orders of Circuit Court in the suit of Stateler v. California National Bank, enjoining the bank and John Chetwood, Jr., from prosecuting a writ of error; directing Chetwood to dismiss another writ of error; and punishing him and E. G. Knapp, of counsel, for contempt in suing out said writs of error. *Writ of certiorari allowed.*

Statement by Mr. Chief Justice **Fuller:**

This is a petition for the vacating of or prohibition upon certain orders of the circuit court of the United States for the northern district of California in the suit of *Stateler* v. *California National Bank of San Francisco*, enjoining (as was held) the bank and John 444]Chetwood, Jr., from *prosecuting a writ of error from this court in the name of the bank as plaintiff in error; directing Chetwood to dismiss a second writ of error from this court; and punishing Chetwood and E. G. Knapp, of counsel, as for a contempt of the circuit court in suing out said writs of error. Leave was granted to file the petition, and a rule to show cause was entered thereon, to which return was made.

The facts necessary to be considered appear to be as follows:

In October, 1886, the California National Bank of San Francisco was organized under the national banking laws with a paid-up capital stock of $200,000, and petitioner became and remains a stockholder therein. In December, 1888, the bank became insolvent, and the comptroller of the currency, on January 14, 1889, appointed one S. P. Young receiver thereof.

July 19, 1890, petitioner began his suit in equity in the superior court of the city and county of San Francisco against the bank, Richard P. Thomas, Robert R Thompson, Richard A. Wilson, and S. P. Young as receiver, "and therein and thereby, on behalf of said bank and himself as a representative stockholder therein, specially set up and claimed the right to hold said defendants Thomas, Thompson, and Wilson, as officers and trustees and directors of said bank, accountable to it in equity, under and in pursuance of the statutes and laws of the United States, for sundry breaches of their trust as such officers, directors, and trustees," etc.

Thomas was the president, and with Thompson and Wilson formed the executive committee of the board of directors of the bank. The complaint set forth the by-laws with respect to the separate duties and liabilities of the president and said executive committee, and charged gross negligence against each of them in discharge thereof, whereby the bank, through the fraudulent acts of its cashier in making excessive and unsecured loans and advances, was rendered insolvent; and plaintiff prayed a "joint and several money judgment against them, the said Richard P. Thomas, Robert R. Thompson, and Richard A. Wilson, for the sum of $400,000, with legal *interest [445 thereon from the time of such loss, and costs herein, be rendered and entered by this court in this case in favor of said corporation, the California National Bank of San Francisco, and that said corporation, and this plaintiff, do have such further order, decree, judgment, and relief as may be meet and agreeable to equity."

The complaint further averred, and it was so found on the hearing of the case, that Chetwood had, prior to the commencement of such suit, requested the officers of the bank, the receiver thereof, and the comptroller of the currency, severally, to bring and prosecute the same against the alleged delinquent officers, which requests were refused.

It appears from an affidavit attached to the return that "the receiver, when so made a defendant, and as such served with process, answered, and followed his refusal to bring the suit by opposition and hostility thereto."

NOTE.—*As to powers and duties of receiver*, see note to Davis v. Gray, 21: 447.

*As to receivers, appointment and powers; receivers' certificates; contracts of receivers; liability for claims and for damages; payment of wages, etc.; lien of receiver's certificates; liability of purchaser at foreclosure sale; suits by receiver; liability of, for personal injuries and for taxes,*—see note to Olcott v. Headrick, 35: 351.

*As to certiorari in United States courts*, see note to Clark v. Hackett, 17: 69.



Digitized by Google

On April 27, 1894, the trial court ordered judgment in favor of the plaintiff for the benefit of the bank against Thomas, Thompson, and Wilson, and referred the case to a referee to examine and report in respect of the amount for which judgment should be entered. The referee reported to the court a total loss of $166,919 suffered by the bank by reason of the acts and omissions of the defendants, but not the amount for which each was severally responsible. Thereafterwards Thompson and Wilson paid into court $27,500, whereupon the court made an order dismissing them from the suit, and on November 20, 1894, rendered judgment for the plaintiff for the use and benefit of the bank against Thomas for $139,419, with interest at 7 per cent per annum from December 15, 1888, being for the sum of $166,919, reported by the referee, less the $27,500 paid by Thompson and Wilson. Thomas appealed from this judgment to the supreme court of California, and that court held that the dismissal of Thompson and Wilson was a retraxit and operated in law as a full satisfaction of the cause of action, and upon that ground reversed the judgment against Thomas and entered a personal judgment against Chetwood for costs, etc. *Chetwood* v. *California Nat.* [446] *Bank* (Cal.) 45 Pac. 704. *To review that judgment a writ of error was sued out from this court, bearing date September 24, 1896. This writ of error was allowed by Mr. Justice Field, who approved a bond and signed a citation running in the name of the California National Bank of San Francisco as plaintiff in error to Richard P. Thomas as defendant in error, service of which on Thomas, Stateler, S. P. Young, and R. A. Wilson was accepted. Chetwood also accepted service, but asked that he be entered as a plaintiff in error, and that for that purpose the writ of error be amended. The case was docketed by the clerk of this court as No. 673, under the title of *California National Bank of San Francisco* v. *Thomas.*

The receiver of the bank never authorized or aided in the prosecution of the suit, nor claimed nor attempted to take control or possession thereof, nor of the judgment entered therein, nor of any part of the $27,500 paid into the state court by Thompson and Wilson.

The comptroller of the currency in July, 1894, had paid all the creditors of the bank whose claims had been proved or allowed, except shareholders who might have been creditors of the bank, together with all the expenses of the receivership, and the redemption of the bank's notes having been provided for by deposit of lawful money therefor with the United States treasurer, a meeting of the stockholders of the bank was called pursuant to the act of August 3, 1892 (27 Stat. at L. 345, chap. 360), at which Thomas, holding nine hundred and sixty shares of the stock and controlling sixty shares more, threw, as is alleged, one thousand and twenty votes, being a majority, in favor of discontinuing the receiver, and of the selection of T. K. Stateler, as agent of the bank, to succeed the receiver, Young, in the settlement of its affairs. Stateler was thereupon declared elected, Chetwood protesting, and on February 26, 1895, the comptroller and the receiver executed an assignment of all assets of said bank then in their hands or subject to their order or control to said Stateler.

On March 19, 1895, and pending the appeal of Thomas in the supreme court of the state, Stateler voluntarily appeared in the superior court of San Francisco and moved for *an [447] order directing that so much of the $27,500 as then remained in that court be paid over to him, which motion was resisted by petitioner and denied by the superior court. From this order Stateler appealed to the supreme court of the state, which reversed it and directed that the money be paid over to him. *Chetwood* v. *California Nat. Bank* (Cal.) 45 Pac. 854. Petitioner thereupon sued out a writ of error from this court, which was allowed by the chief justice of California, citation duly issued and served, bond approved, and, as the money was in the custody of the superior court and drawing interest, the writ was made a supersedeas. The record was filed in this court and the cause docketed as No. 674. This writ bears date October 17, and appears to have been allowed October 22.

January 4, 1896, while both the appeals of Thomas and Stateler were pending in the supreme court of the state and undetermined, Stateler filed an original bill in the circuit court of the United States for the district of California against the bank and Chetwood, alleging that as such agent he was an officer of the United States, and that he had sole power to act for the bank and its shareholders, to the exclusion of the stockholders, directors, and officers thereof. This bill contained, among other allegations, the following:

"Your orator further avers that heretofore, to wit, on the 21st day of February, 1889, and prior to the commencement of any of the suits hereinbefore mentioned, S. P. Young, the receiver of the defendant banking association, did file in this honorable court a petition entitled '*In Re* Application of Receiver of the California National Bank for the Sale of Personal Property;' and which said petition, among other things, recited that said California National Banking Association had been duly adjudged insolvent by the comptroller of the currency of the United States; that the petitioner therein had been by said comptroller duly appointed the receiver of such association, and that said petitioner had duly qualified as such receiver and entered upon the performance of the duties of his office, and that as such receiver there had come into his possession certain personal property of said banking association, and thereupon in and by said petition the said receiver of *said banking as- [448] sociation thereupon submitted himself and the affairs of said banking association to the jurisdiction of this honorable court, as provided by the national banking laws of the United States and the amendments thereof, and thereupon asked for and obtained from this honorable court an order authorizing him to sell the property described in said petition, and to apply the proceeds thereof as provided by law, and that the filing of said petition was a necessary step in the winding up of the affairs of said defendant banking association; that thereafter and from time to time the said receiver did obtain from this honorable court orders directing him to sell various pieces of property



Digitized by Google

belonging to said banking association and to compromise various debts due to said banking association, and did, as such receiver, institute in this honorable court suits to collect moneys due said banking association, all of which said proceedings and suits were necessary steps in the winding up of the affairs of said defendant banking association, and, as such receiver, did in every way and as provided by the Revised Statutes of the United States and the amendments thereto hold himself amenable to the orders of this honorable court; and your orator avers that the jurisdiction of this honorable court over the affairs of said defendant banking association did attach on the 21st day of February, 1889, as aforesaid, and that the affairs of said defendant banking association have never been wound up, but that your orator is now engaged in winding up the affairs of said defendant banking association, and that it will be necessary for him to bring various suits to collect the outstanding assets of said association, and, among others, a suit against the defendant John Chetwood, Jr., to recover the moneys so as aforesaid due and owing from him to the defendant banking association, and that it is necessary for him to bring this suit and to obtain the relief herein prayed for, so that he can proceed to wind up the affairs of said defendant banking association without further interference from the defendants John Chetwood, Jr., or the alleged board of directors of said insolvent association."

The prayer was for a decree adjudging that [449] complainant "is *the duly elected, qualified, and acting agent of the defendant bank, to wit, the California National Bank of San Francisco, and as such exclusively entitled to have and receive in his custody and under his control all the moneys and property of said bank, and to collect the outstanding indebtedness due to said bank, whether the same be evidenced by open accounts, bills, notes, or judgments of record, to the end that the affairs of the bank may be wound up, its property converted into money, and its money distributed among its shareholders, as provided by the national banking laws of the United States; that all the acts of the defendant banking association through its alleged board of directors, as herein set forth, since the appointment of a receiver to take charge of its affairs, as herein set forth, be adjudged null and void, and that its board of directors has no authority to take any action touching the affairs of the association; that the said bank, its board of directors, officers, and employees, and the said John Chetwood, Jr., his agents and servants, and each and every of their said attorneys, solicitors, and counselors, be forever restrained and enjoined from denying the rights of your orator to the said office of agent of said banking association, and from denying his right as such to the exclusive control of the assets of said bank, as above set forth, and from commencing any further litigation against him as such agent, and from prosecuting or defending any action heretofore brought by them or either of them against your orator as such agent touching his right to said office and touching his exclusive right as such agent to collect the assets of said bank, except the suit, now pending in this court, brought by them as aforesaid against your orator on the 12th day of November, 1895, and which suit your orator hereby especially exempts from the operation of any injunction that may hereafter be granted herein, and that the said bank, its board of directors, officers, and employees, and the said defendant Chetwood, his agents and servants, and each and every of their said attorneys, solicitors, and counselors, be forever restrained and enjoined from commencing any further suits to collect any outstanding debts due the said bank, whether the same *be evidenced by an open [450] account, bill, note, or judgment, and particularly from attempting in any manner to collect the judgment heretofore recovered for said bank against the said Richard P. Thomas and hereinbefore referred to, and from further prosecuting the suit brought by them in the superior court of Alameda county to place a receiver in charge of the Standard Soap Company, as hereinbefore set forth;" for an order to show cause why an injunction should not issue, and a temporary restraining order; and for general relief.

The circuit court, on February 24, 1896, entered the following order:

"It is now ordered, adjudged, and decreed that until the further order of this court or of the judge thereof, the defendants, the California National Bank of San Francisco, its directors, officers, and employees, and said John Chetwood, Jr., his agents, servants, attorneys, solicitors, or any other representative, are hereby restrained and enjoined from commencing any further litigation against the complainant, as agent of said bank, and from commencing any further suits to collect any outstanding debts due said bank, whether the same be evidenced by open accounts, bills, notes, or judgments, or otherwise, or from in any way whatever taking or attempting to take any control or possession of any of the funds or assets or property of the said bank, and from settling and allowing or attempting to settle or allow any attorneys' charges or any other fees, expenses, or costs growing out of or which it may be claimed grew out of any past litigation in this matter, and from in any way disposing of or encumbering any of the assets, money, or property of said bank; but the defendants are not hereby enjoined from prosecuting or defending to final determination any actions in this matter now pending in the supreme court of the state of California or in this court."

In September, 1896, petitioner gave notice and attempted to move in his action in the superior court of San Francisco for an allowance for fees and costs, whereupon Stateler moved in the circuit court to punish petitioner and his counsel for so doing; and some days later moved for a further order punishing petitioner and his counsel, as well as one Vanderslice, *claiming to be president of the bank, and [451] Thompson, his counsel, for being concerned in suing out each of the writs of error in cases now numbered 673 and 674 on the docket of this court. Rules to show cause were entered. As to the matter of the motion in the state court for an allowance, it appeared that petitioner had withdrawn his application, and the



Digitized by Google

circuit court adjudged the punishment of costs only, as it held the violation of its order had been merely technical.

As to the other rule to show cause, the court on the 19th of November, 1896, entered an order which, after discharging Vanderslice and Thompson, thus continued:

"3d. That at the time of applying for a writ of error to the Supreme Court of the United States, in the name of the defendant bank, to review the action of the supreme court of the state of California in reversing the judgment recovered by John Chetwood, Jr., in the superior court of the city and county of San Francisco, state of California, against Richard P. Thomas in the action of John Chetwood, Jr., plaintiff, *v.* California National Bank of San Francisco *et al.*, defendants, the said E. G. Knapp was ignorant of the fact that an injunction had issued out of this court in this case on the 24th day of February, 1896, enjoining the defendants herein and their attorneys from using the name of the bank in any of the litigations referred to in the amended bill in this action, and that by reason thereof the said E. G. Knapp is not guilty of any contempt of this court in applying for said writ of error, and that said order to show cause, as regards the action of the said E. G. Knapp in applying for said writ of error, is hereby discharged as to the said E. G. Knapp.

"4th. That at the time of applying for a writ of error to the Supreme Court of the United States, in the name of the defendant bank and John Chetwood, Jr., the defendants here, to review the action of the supreme court of the state of California upon the appeal taken by the complainant here from an order of the superior court of the city and county of San Francisco, state of California, in the action of John Chetwood, Jr., plaintiff, *v.* California National Bank of San Francisco *et al.*, defendants, made by said superior court on the 8th day [452] of July, 1895, refusing to turn over to the complainant here, as the agent of the bank, a certain fund of money on deposit in said superior court to the credit of said action, and which said fund then belonged and now belongs to said bank and which said fund the complainant here, as the agent of said bank, was then entitled and is now entitled to receive and have in his custody, to the end that it may be distributed among the shareholders of said bank under the advice and direction of this court, as provided by law, and which said writ of error was applied for and obtained for the purpose of raising in that action the question of the validity of the election and qualification of the complainant as the agent of said defendant bank and for the purpose of preventing said fund from coming into the hands of the complainant as agent of said bank, so that it might be used by the said defendant, John Chetwood, Jr., for attorneys' fees and costs incurred by him in the litigation referred to in the amended bill herein and in prosecuting the writ of error referred to in paragraph 3 hereof, the said E. G. Knapp well knew that an injunction had duly issued out of this court in this action on the 24th day of February, 1896, enjoining the defendants herein and their attorneys from any further litigation in and about said fund outside the supreme court of the state of California and from using the name of the bank in any further litigation in and about said fund or the matters referred to in the amended bill herein, and well knew that it had been adjudged by this court in this action that this court had the sole and exclusive jurisdiction over the matter of winding up said defendant national bank and had the sole and exclusive jurisdiction over the question as to whether or not said complainant was the duly elected and qualified agent of said bank, and that in applying for said last-named writ of error the said E. G. Knapp has been guilty of a contempt of this court.

"5th. That the applications for both of the writs of error, hereinbefore referred to, were made by the said E. G. Knapp, claiming to be counsel for said bank; that the said E. G. Knapp did not then represent and never has at any of the times herein referred to represented said bank as its attorney, and did not then, and never has at any of the times herein referred to, represented said bank as its [453] attorney, and did not then and never has had authority to make either of said applications in its name; and that both of said applications were made by the said E. G. Knapp at the instance and request and with the full knowledge and approval of the defendant John Chetwood, Jr., and that in making both of said applications the said defendant John Chetwood, Jr., has been guilty of a contempt of this court.

"6th. It is further ordered and adjudged that the defendant John Chetwood, Jr., and said E. G. Knapp pay the costs of this proceeding; and that in prosecuting the writ of error referred to in paragraph 3 hereof, and which said writ of error was obtained in the name of the defendant bank, they altogether refrain from further using the name of said bank; and they are hereby forbidden to use the name of said bank in any way, manner, or form in the further prosecution of said writ of error.

"7th. It is further ordered and adjudged that the defendants herein and E. G. Knapp, the attorney for said defendants, dismiss in the Supreme Court of the United States the writ of error referred to in paragraph 4 hereof, obtained from the chief justice of the state of California, to review the action of the supreme court of the state of California, on the appeal of Thomas K. Stateler, complainant herein, from the order made on the 8th day of July, 1895, by the superior court of the city and county of San Francisco, state of California, in the action entitled 'John Chetwood, Jr., Plaintiff, *v.* The California National Bank of San Francisco *et al.*, Defendants,' and which said writ of error was made returnable before the Supreme Court of the United States on the 15th day of December, 1896, and which said proceeding in said Supreme Court of the United States is entitled 'The California National Bank of San Francisco and John Chetwood, Jr., Representative Stockholder thereof, Plaintiffs in Error, *v.* T. K. Stateler (Agent), S. P. Young (Receiver), Robert A. Wilson, Richard R. Thompson, and Richard P. Thomas, Defendants in Error;' that said writ of error be dismissed free of all cost to said complainant, and that the defendants herein have and pro-



Digitized by Google

454] duce *evidence of the dismissal thereof before this court within twenty (20) days from the date hereof."

It appeared that Chetwood had commenced suit in the circuit court directly attacking the validity of Stateler's election; and also that it was claimed that the bank had regularly maintained a board of directors, and that officers had been elected, pending the receivership and the subsequent agency.

The petition alleged that petitioner and Knapp were authorized to appear on behalf of the bank, and that they had been employed by the president and the vice president of the bank and certain other shareholders to appear on behalf of the bank and prosecute the writs of error, and had given security that they would so prosecute said writs and make their pleas good, and attached to the petition was the affidavit of Vandersice in the superior court of San Francisco, subscribed and sworn to October 24, to the effect that he was the president of the California National Bank of San Francisco, and that "said corporation has, through him and the authority given him by the board of directors, retained and employed E. G. Knapp, an attorney and counselor at law, as attorney to represent it in this court and in the supreme court of this state and of the United States, if necessary."

The record contains very many matters not above set forth, but the foregoing are deemed sufficient so far as the questions determined by the court are concerned.

Section 5234 of the Revised Statutes provides that on refusal of any national bank to pay its circulating notes and its consequent default, "the comptroller of the currency may forthwith appoint a receiver and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, 455] *if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasury of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

By the act of June 30, 1876 (19 Stat. at L. 63, chap. 156), the authority of the comptroller to appoint a receiver was given, under the circumstances enumerated, and, among them, whenever the comptroller became satisfied on examination of its affairs that the bank was insolvent.

The substitution of an agent for the receiver is provided for by the act of June 30, 1876, as amended by the act of August 3, 1892 (27 Stat. at L. 345, chap. 360). When the comptroller has paid the debts of the particular bank, not including shareholders who are creditors of such association, and all expenses, and the redemption of the bank's circulating notes shall have been provided for as prescribed, the comptroller calls a meeting of the shareholders, at which they determine by a majority vote whether the receiver shall be continued to wind up the affairs of the bank or an agent shall be appointed for that purpose. "In case the said meeting shall by a vote of a majority of the stock in value and number of shares determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided, and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the comptroller of the currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and *control of [456 said comptroller and said receiver, or either of them; and for this purpose said comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper, and upon the execution and delivery of such instrument to the said agent the said comptroller and the said receiver shall by virtue of this act be discharged from any and all liabilities to such association, and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument, the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof, for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond."

*Messrs.* **A. B. Browne**, *A. T. Britton*, and *Robert Rae* for petitioner.

*Mr.* **Robert Brent Mitchell** for respondent.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The writs of error removed the original suit in both its branches to this court, and whether



Digitized by Google

or not jurisdiction may be entertained of both or either of them, it is for this court to determine when the question properly arises.

457] *And so if there be controversy in respect of the form of the writs, parties, citation and service, or otherwise, these are matters for the disposition of this court without interference from any other.

We find it impossible to accept any ground suggested for the assumption by the circuit court of jurisdiction to compel Chetwood to desist from using the name of the bank on the writ of error in the case against Thomas, and to dismiss absolutely the writ of error in the case involving Stateler's effort to obtain control of the funds.

It is true, as stated in *Ex parte Tyler*, 149 U. S. 164, 181 [37: 689, 695], that "no rule is better settled than that when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned, and cannot be disturbed without the leave of the court; and that if any person, without leave, intentionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor." But we do not regard these proceedings as falling within that rule.

As neither the bank's officers or directors, nor the receiver, nor the comptroller, would, on demand, bring suit, Chetwood's suit, on behalf of himself and other stockholders of the California National Bank of San Francisco to recover judgment in the bank's favor for the alleged wrongful acts of the managing agents of the corporation, must be assumed, on this record, to have been properly instituted, and it is not contended that this was ever challenged by the receiver or by Stateler claiming as his successor. The receiver was made a party defendant thereto, but took no steps to remove the cause to the Federal court, and, as is averred, assumed an attitude of hostility to the prosecution of the suit, and did nothing to aid in securing judgment against the officers of the bank, whose alleged breach of trust and liability therefor was the sole foundation for the action. Nor is it questioned that the suit was rightly brought in the state court. *Whittemore* v. *Amoskeag Nat. Bank*, 134 U. S. 527 [33: 1002].

The receiver was appointed by the comptroller of the currency, January 14, 1889, and

458] Chetwood commenced his suit *July 19, 1890. The receiver was not the officer of any court, but the agent and officer of the United States, as ruled by Mr. Justice Gray, on circuit, in *Price* v. *Abbott*, 17 Fed. Rep. 506, and by Mr. Justice Jackson, then circuit judge, in *Armstrong* v. *Trautman*, 36 Fed. Rep. 276. And see *Porter* v. *Sabin*, 149 U. S. 473, 470 [37: 815, 818]; *Platt* v. *Beach*, 2 Ben. 303; *Frelinghuysen* v. *Baldwin*, 12 Fed. Rep. 395; *Armstrong* v. *Ettlesohn*, 36 Fed. Rep. 209.

It has been so often decided that the authority vested in the comptroller to appoint a receiver of a defaulting or insolvent national bank, or to call for a ratable assessment upon its stockholders, is not open to objection because vesting that officer with judicial power in violation of the Constitution, that we have recently declined to re-examine that question. *Dushnell* v. *Leland*, 164 U. S. 684 [*ante*, 244].

The receiver acts under the control of the comptroller of the currency and the moneys collected by him are paid over to the comptroller, who disburses them to the creditors of the insolvent bank. Under U. S. Rev. Stat. § 5234, when the receiver deems it desirable to sell or compound bad or doubtful debts, or to sell the real and personal property of the bank, it devolves upon him to procure "the order of a court of record of competent jurisdiction," but the funds arising therefrom are disbursed by the comptroller, as in the instance of other collections.

The circuit court did not have the assets or property of this bank in its possession on July 19, 1890, nor was the leave of that court necessary in order that the receiver might be made a party defendant to the action instituted by Chetwood on that day.

In the bill filed by Stateler in the circuit court, January 4, 1896, to enjoin Chetwood and the bank, the averment is made that on February 21, 1889, the receiver filed an application in the circuit court entitled "*In re* Application of Receiver of the California National Bank for the Sale of Personal Property," and the bill asserts as a conclusion of law that thereby "the said receiver submitted himself and the affairs of said banking association to the jurisdiction of this honorable court."

459] The application thus referred to is not made part of the return to the rule, but from the averments of the bill in regard to it, and from the terms of the national banking law itself, we think it plain that no such result followed its presentation. Our attention has been called to no case in which it has been held that the filing of such petitions by national bank receivers in the Federal courts operates to make the receiver an officer of the court or to place the assets of the bank within the control of the court in the sense in which control is acquired where a receiver is appointed by the court.

As we have said, Chetwood's right to bring the suit in the state court against the officers of the bank must be held as not open to dispute on this record, and the bank was properly made a party.

Whether the bank's name was necessarily or rightly used in the prosecution of the writs of error, we are not now called on to decide.

The suit was properly brought in the state court, proceeded to judgment, and was carried to the supreme court of California on appeal. These courts undeniably had jurisdiction over the suit and the parties. About four years after the suit was commenced, Stateler was elected agent to succeed the receiver, and the usual assignment by the comptroller and receiver, to him as such, was executed. The legality of Stateler's election, though controverted, must be conceded for the purposes of this application. But did the substitution of an agent for the receiver oust the jurisdiction of the state court? Certainly not. He was no more an officer of the circuit court in the first instance than the receiver was. The agent proceeds in the settlement with like authority to that conferred upon the receiver, although at the conclusion of his duty he is required to render to the circuit or district court of the United States for the district where the business of the bank is carred on "a full ac-



Digitized by Google

count of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond;" and thus he and his bondsmen are protected by the final order of the Fed-
460 eral *court upon the performance of the conditions imposed. But there is nothing in the language of the statute from which it can be inferred that it was the intention that the jurisdiction of state courts of competent and concurrent jurisdiction, first obtained, should be interfered with by restraining orders issued by Federal courts on the application of such an agent. The agent may indeed intervene in a case in the state court and receive the fruits of the litigation to be administered subject to the final approval of the Federal court, and, accordingly, Stateler as agent submitted himself to the jurisdiction of the state courts and applied for an order turning over to him the fund so far as realized. Nevertheless the agent must abide the result and cannot control it through the interposition of another independent and concurrent jurisdiction.

The doctrine is firmly established that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court, and that where property is actually in the possession of one court of competent jurisdiction such possession cannot be disturbed by process out of another court of concurrent jurisdiction. *Moran* v. *Sturges*, 154 U. S. 256 [38: 981], and cases cited. And by U. S. Rev. Stat. § 720, the granting of injunctions to stay proceedings in any court of a state is prohibited in express terms. It is unnecessary here to point out such exceptions or limitations as may exist.

Obviously the circuit court could not restrain the prosecution of this suit in the state courts, and we are equally clear that if Federal questions arose, the circuit court could not prevent this court, or a justice thereof, or the presiding judge of the state court, from granting writs of error, by restraining the parties from applying therefor; nor could it properly direct their dismissal, having been granted. Cases transferred to this court must be dealt with by this court. Of course it is quite possible that the litigation had gone far enough after the state supreme court had passed upon it, but parties cannot be deprived of the right to prolong it, if the right exists, in this manner and under such circumstances.

461] *Considered apart from the construction placed upon it by the circuit court, we should say that the injunction order of February 24, 1896, was not intended to restrain either Chetwood or the bank, or both, from prosecuting the writs of error from this court. The concluding words of the order are "but the defendants are not hereby enjoined from prosecuting or defending to final determination any actions in this matter now pending in the supreme court of the state of California or in this court." According to the practice in this court a writ of error has been treated rather as a continuation of the original litigation than the commencement of a new action. *Nations* v. *Johnson*, 65 U. S. 24 How. 195, 205 [16: 628, 632]; *Cohens* v. *Virginia*, 19 U. S. 6 Wheat. 410 [5: 292]. But in any view we should not have thought that writs of error were included within the scope of the order, or that the circuit court designed to interfere in such a way with the prosecution of the principal controversy as to arbitrarily stop the case on the judgment of the supreme court of the state if it proved adverse to the bank and its interested stockholders, and leave them, if such order were lawful, wholly without further remedy, if such they had; or to preclude one of the parties from attempting to obtain a review of the judgment in the matter of the rights of Stateler, however that might be determined in the state supreme court, whose decisions on both appeals were rendered after the entry of the restraining order.

The circuit court, however, has otherwise construed the order, and has adjudged petitioner and his counsel guilty of contempt in its violation as thus construed. And it has directed petitioner to dismiss one of the writs of error and to desist from using the name of the bank in the other, in advance of what we may determine as to either of these matters when coming on to be disposed of.

As in our opinion the circuit court exceeded its jurisdiction in thus proceeding, we are constrained to make the rule absolute.

By § 14 of the judiciary act of September 24, 1789 (1 Stat. at L. 81, chap. 20), carried forward as § 716 of the Revised Statutes, this court and the circuit and district *courts [462 of the United States were empowered by Congress "to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law;" and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *American Const. Co.* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 380 [37: 486, 490]. And although, as observed in that case, this writ has not been issued as freely by this court as by the court of Queen's bench in England, and, prior to the act of March 3, 1891 (26 Stat. at L. 826, chap. 517), had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice. Tidd, Pr. *398; Bacon, Abr. tit. *Certiorari*.

Judgments in proceedings in contempt are not reviewable here on appeal or error (*Hayes* v. *Fischer*, 102 U. S. 121 [26: 95]; *Re Debs*, 158 U. S. 573 [39: 1095], 159 U. S. 251), but may be reached by certiorari in the absence of any other adequate remedy.

The writ of certiorari will be allowed to bring up the record so that the order adjudging Chetwood and his counsel in contempt for being concerned in suing out the writs of error, and directing them, or either of them, to refrain from prosecuting the one writ in the name of the bank and to dismiss the other, may be revised and annulled. We presume, after what we have said, it will not be necessary for the writ to issue.

*Rule absolute; certiorari allowed.*



Digitized by Google

463] UNITED STATES, *Appt.*,
*v.*
WINONA & ST. PETER RAILROAD COMPANY, Winona & St. Peter Land Company, *et al.*

(See S. C. Reporter's ed. 463-482.)

*Bona fide purchasers of public lands—acts of 1887 and 1896—recovering value of lands.*

Bona fide purchasers protected by the act of Congress of 1896 respecting the cancelation of patents and certifications of public lands include a purchaser of such land for value in good faith believing that he is acquiring a perfect title, although he may be charged by the records with knowledge of certain entries which by the true rules of construction would make the title defective.

The acts of 1887 and 1896 confirmed the title of a purchaser from a railroad company of lands certified or patented for its benefit, notwithstanding errors or irregularities in the land department or that the lands were excepted from the operation of the grant if within its limits, providing he purchased in good faith, paid value, and the lands were public lands and free from individual or other claims.

2. Nor can the government recover from the railroad company the value of such lands so erroneously certified through a mistake of the land department when other lands which could have been properly certified have since been sold to other parties so that there is no way of filling the grant.

[No. 321.]

*Argued November 30 and December 1, 1896. Decided February 16, 1897.*

APPEAL from a decree of the United States Circuit Court of Appeals for the Eighth Circuit affirming the decree of the Circuit Court of the United States for the District of Minnesota dismissing a suit in equity brought by the United States, plaintiff, against the Winona & St. Peter Railroad Company *et al.*, for cancelation of a certification to the state of Minnesota of certain lands for the benefit of said company, and a restoration of the lands to the public domain. *Affirmed.*

See same case below, 32 U. S. App. 272.

Statement by Mr. Justice **Brewer:**

This was a bill in equity filed by the United States in the circuit court for the district of Minnesota under authority of the act of Congress March 3, 1887 (24 Stat. at L. 556, chap 376) providing for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, etc. The charge was that the lands specified in the bill had been wrongfully certified to the state of Minnesota for the benefit of the defendant company, and the prayer was for a cancelation of such certification and a restoration of the lands to the public domain. After answers by the railroad company and some of the other defendants an agreed statement of facts was prepared, upon which, with the pleadings, the case was submitted to the circuit court for decision. Upon hearing a decree was entered dismissing the *bill, [464 which thereafter was affirmed by the circuit court of appeals for the eighth circuit. 32 U. S. App. 272.

By the agreed statement the following facts appear, and upon them the rights of the parties depend: On March 3, 1857, Congress passed an act (11 Stat. at L. 195, chap. 99) granting to Minnesota to aid in the building of certain lines of railroad the alternate odd-numbered sections for 6 sections in width on each side of the line of each road. The amount of this grant was increased by the act of March 3, 1865 (13 Stat. at L. 526, chap. 105) to 10 sections per mile. By appropriate state legislation the defendant railroad company became one of the beneficiaries of this grant. It duly constructed its road, and the construction was accepted and approved. The lands in controversy were within the limits and terms of the grant, and were certified to the state nearly all in the years 1872, 1873, 1874, and 1875, though two tracts were not so certified until the year 1879. At the time of the filing by the railroad company of its map of definite location there were on the records and files of the Land Office homestead entries or pre-emption filings upon these lands, regular in form and prima facie valid, some of them having been made intermediate the time that the line of the railroad was surveyed, staked out, and marked on the face of the earth and the date of the filing of the map of definite location, and some having been made prior to the first-named time. Proceedings were had in the General Land Office, after proper notice by publication, by which all these entries and filings were duly canceled prior to the certification of the lands to the state of Minnesota. The cancelations were generally on the ground of abandonment, and from the time thereof up to the filing of the agreed statement of facts, July 26, 1893, none of the persons who had made such homestead entries or pre-emption filings had ever made any claim to the lands, so far as shown by the records of the land department. The railroad company sold and conveyed the lands to parties who paid value and bought believing that the company's title was unimpeachable. Further, after the patent from the state the lands were subjected to taxation, and the land company, the grantee from *the railroad company [465 of most of these lands, alone paid over $8,000 of taxes while it held the title. It was not pretended that the amount of lands certified for the benefit of the defendant railroad company (including therein the lands in controversy) exceeded the grant. In other words, it was not claimed that the railroad company ever got more lands than it was entitled to, but only that these particular tracts were wrongly certified to it.

It was also admitted "that on, before, and

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

*That patents for land may be set aside for fraud*, see note to Miller v. Kerr, 5: 381.

*As to errors in surveys and descriptions in patents for lands, how construed*, see note to Watts v. Lindsey, 5: 423.

*As to land grants to railroads*, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.



Digitized by Google

for a long time after the certification of the lands in question to the state on account of the railroad grants it was uniformly held and ruled by the Secretary of the Interior and the other officers of the land department of the United States: (*a*) That the line of a railroad became and was definitely fixed so as to attach the grant to the odd-numbered sections within the granted limits as soon as surveyed, staked out, and marked on the face of the earth; and (*b*) that a homestead entry in all respects regular and legal excepted the land covered thereby from the operation of a railroad grant attaching during the existence of such entry; that the validity of a homestead entry was open to question by the company, and if it was shown that such entry was fraudulent or irregular in its inception, or that it had been abandoned before the right of the road attached, it was held not to except the land from the grant, but the burden of so showing was upon the company, and, in the absence of such proof, the entry being valid upon its face was held to except the land from the grant, even though subsequently abandoned; and (*c*) that a preemption claim, which may have existed to a tract of land at the time of the attachment of a railroad grant, if subsequently abandoned and not consummated, even though in all respects legal and bona fide, was held not to operate to defeat the grant, but, upon the failure of such claim, the land covered thereby was held to inure to the grant as of the date when such grant became effective; and (*d*) that the rights under the grants attached to the lands in the granted and indemnity limits as of the same date, and that selection was not deemed necessary to attach the grant to any spe-
[466] cific tract within the indemnity *limits; and (*e*) that the lands within the indemnity limits were withdrawn at the same time as those within the primary or granted limits; and (*f*) that within the common limits of like character of two contemporaneous grants each was held to be entitled to an undivided moiety of the lands within such common limits; and (*g*) that in pursuance of and in accordance with the aforesaid rules, the grants to and for each and all of the land-grant railroad companies in the state of Minnesota were, before, at, and for a long time after, the certification of the lands in question, administered."

The act of March 3, 1887, is found printed below.†

*After the passage of that act, and on [467] March 3, 1891, Congress passed an act (26 Stat. at L. 1093) containing this provision: "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." And on *March 3, 1896, Congress passed [468]

†*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior be and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

Sec. 2. That if it shall appear, upon the completion of such adjustments respectively, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through, or under grant from the United States to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States.

Sec. 3. That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be reinstated, within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any; and if there be no such purchasers, then to bona fide settlers residing thereon.

Sec. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants, respectively, shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the government price of similar lands; and in case of neglect or refusal of such company to make payment, as hereafter specified, within ninety days after the demand shall have been made, the Attorney General shall cause suit or suits to be brought against such company for the said amount: *Provided*, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: *And provided*, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

Sec. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reasons excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section, which at the date of such sales were in the bona fide occupation of adverse claimants un-



Digitized by Google

a still further act (29 Stat. at L. 42, chap. 39) which is also found in the footnote.†

*Mr.* **Holmes Conrad,** Solicitor General, for appellant:

The certification by the Secretary of the Interior to the state of Minnesota of the lands described in the bill of complaint for the benefit of the Winona & St. Peter Railroad Company, after homestead and pre-emption rights had attached to such lands and while the lands were still covered by these entries, was an act not merely voidable, but absolutely void, because control over and power of disposition of said lands by the Interior Department had ceased.

*United States* v. *Stone*, 69 U. S. 2 Wall. 535 (17: 767); *United States* v. *Maxwell Land Grant Co.* 121 U. S. 380 (30: 958); *Wright* v. *Roseberry*, 121 U. S. 516 (30: 1047); *United States* v. *San Jacinto Tin Co.* 125 U. S. 284 (31: 751); *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 361 (33: 365); *Whitney* v. *Taylor*, 158 U. S. 88 (39: 907); *Weeks* v. *Bridgman*, 159 U. S. 545 (40: 254); *Burfenning* v. *Chicago & St. P. R. Co.* 163 U. S. 323 (41: 175); *Castello* v. *Bonnie*, 15 U. S. Land Dec. 367; *Lewis* v. *Shaw*, 57 Fed. Rep. 516; *United States* v. *Budd*, 144 U. S. 154 (36: 384); *Windsor* v *McVeigh*, 93 U. S. 274 (23: 914); *Stimson Land Co.* v. *Rawson*, 62 Fed. Rep. 426.

The Winona & St. Peter Railway Company and the grantees of these lands under conveyances from that company are not in the position of bona fide purchasers for value without notice.

*United States* v. *California & O. Land Co.* 148 U. S. 48 (37: 360); *United States* v. *Winona & St. P. R. Co.* 67 Fed. Rep. 969; *Burr* v. *Gresley*, 10 U. S. App. 409, 52 Fed. Rep. 926.

The act of 1887 was intended by Congress to correct and avert the consequences of previous mistakes in the land department; to reinstate in certain cases the rights of those who, by reason of such mistakes, were deprived of privileges under the homestead or pre-emption laws; to protect persons who in good faith had purchased from or under the railroad companies; and in general to confirm and establish titles rather than to destroy or overturn them; —and in its operation the court shall be resorted to only for the purpose of restoring to the government the title to such lands as may have been certified or patented without au-

---

der the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries, and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the 1st day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

Sec. 6. That where any such lands have been sold and conveyed, as the property of any railroad company, for the state and county taxes thereon, and the grant to such company has been thereafter forfeited, the purchaser thereof shall have the prior right, which shall continue for one year from the approval of this act, and no longer, to purchase such lands from the United States at the government price, and patents for such lands shall thereupon issue: *Provided*, That said lands were not, previous to or at the time of the taking effect of such grant, in the possession of or subject to the right of any actual settler.

Sec. 7. That no more lands shall be certified or conveyed to any state or to any corporation or individual for the benefit of either of the companies herein mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such state, corporation, or individual would be rightfully entitled.

†*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of § 8 of chap. 561 of the acts of the 2d session of the 51st Congress, and amendments thereto, is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided*, That no suit shall be brought or maintained nor shall recovery be had for lands, or the value thereof, that were certified or patented in lieu of other lands, covered by a grant, which were lost or relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry.

Sec. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or at his option, as prescribed in §§ 3 and 4 of chapter 376 of the acts of the 2d session of the 49th Congress.

Sec. 3. That if, at any time prior to the institution of suit by the Attorney General to cancel any patent or certification of lands erroneously patented or certified, a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified.



Digitized by Google

thority of law and which the company refuses voluntarily to return.

*Kearce* v. *Little*, 14 U. S. Land Dec. 25; *Drake* v. *Button*, 14 U. S. Land Dec. 18; *Northern P. R. Co.* v. *McKinley*, 14 U. S. Land Dec. 237; *Stebbins* v. *Croke*, 14 U. S. Land Dec. 498; *Fletcher* v. *Brerton*, 14 U. S. Land Dec. 554; *St. Paul, M. & M. R. Co.* 13 U. S. Land Dec. 353; *St. Louis, I. M. & S. R. Co.* 13 U. S. Land Dec. 559; *Cloessner* v. *United States & P. R. Co.* 12 U. S. Land Dec. 280; *Re Central P. R. Co.* 11 U. S. Land Dec. 588; *Wright* v. *Coble*, 9 U. S. Land Dec. 199; *Fairchild* v. *Des Moines Valley R. Co.* 9 U. S. Land Dec. 687; *Re Winona & St. P. R. Co.* 9 U. S. Land Dec. 649; *Weeks* v. *Bridgman*, 159 U. S. 545 (40: 254.

The present suit is between the United States and the Winona Company, which holds the lands and refuses to relinquish them. Its claim must stand or fall upon the acts of its aid, and it is sufficient for this case to determine that the lands in dispute were not included in the grants in aid of the Winona road. What becomes of them after they are recovered by the United States is a matter of no concern whatever to the Winona Company.

*United States* v. *Southern P. R. Co.* 146 U. S. 604 (36: 1100).

The lands were by mistake certified in aid of the Sioux City road. The legal effect of that certification was, as this court has determined, to convey them for the use and benefit of the Winona Company.

The Secretary of the Interior, under whose direction this suit was instituted, in proceeding to adjust the grants in aid of the Winona road, found these lands in the possession of the Winona Company, claimed by it under its grants, and that company cannot shield itself from the operation of the adjustment act, and of its own granting acts, by insisting that these lands fell or were certified to the Sioux City road.

A proper construction of the granting acts in aid of the two roads does not sustain the position taken by the Winona Company.

The courts have uniformly construed these grants strictly against the grantee companies. They are never extended beyond the scope of their express provisions, and wherever the question as to reservations and exceptions has arisen, or there appear conflicting claims between two or more companies, great care has been exercised to exclude from grants lands which have been reserved, appropriated, or devoted to another purpose by every reasonable construction in favor of such reservation, on the theory that it has been the evident intention and purpose of Congress, in all such grants, to limit them in their operation to such lands only as the United States had the clear and unquestioned right to convey at the time without disturbing existing relations or producing vexatious conflicts.

*Bardon* v. *Northern P. R. Co.* 145 U. S. 543 (36: 810); *United States* v. *Missouri, K. & T. R. Co.* 141 U. S. 358, 368, 374 (35: 766, 768, 771); *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733 (23: 634); *United States* v. *Northern P. R. Co.* 152 U. S. 296 (38: 448).

So it has been held in the foregoing and many other cases, that such grants shall operate at a fixed time and shall take only such lands as are at that time public lands.

*United States* v. *Southern P. R. Co* 148 U. S. 570–581 (36: 1091–1096).

Nor is it ever held, in the absence of express provision, that Congress, having devoted lands to one purpose, intends by a subsequent grant to convey them conditionally for another.

*Bardon* v. *Northern P. R. Co.* 145 U. S. 543 (36: 810); *United States* v. *Missouri, K. & T. R. Co.* 141 U. S. 358 (35: 766).

The Secretary of the Interior was without jurisdiction or power to convey, by certification or otherwise, to the territory of Minnesota, or to anyone else, lands to which homestead or pre-emption rights had attached before the line of railroad had been definitely fixed by the filing of a map thereof in the office of the Secretary of the Interior.

*Steel* v. *St. Louis Smelt. & Ref. Co.* 106 U. S. 447 (27: 226); *Lake Superior Ship Canal, R. & I. Co.* v. *Cunningham*, 155 U. S. 373 (39: 189); *Shiver* v. *United States*, 159 U. S. 494 (40: 231); *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 629 (28: 1122); *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357 (33: 363); *Whitney* v. *Taylor*, 158 U. S. 85 (39: 906); *Sioux City & I. F. Town Lot & Land Co.* v. *Griffey*, 143 U. S. 32 (36: 64).

If, then, at the time of the certification by the Secretary of these lands to the state of Minnesota, the line of definite location of the railroad had not been fixed by filing the maps in the office of the Secretary of the Interior, no title whatever vested in the railroad, even under a grant by the governor of Minnesota of such land. And if at the time of the filing of such map homestead and pre-emption rights had already attached, then these were excepted from such grant

The power is lodged with the Secretary of the Interior to ascertain and determine facts upon the existence of which may depend the conveyance by him of title to public lands of the United States. His determination of such facts is final and conclusive. But it is going entirely too far to insist, as is done here by counsel for appellee, that the determination as to whether one is or is not a bona fide purchaser from or under the United States is a fact which the Secretary of the Interior may conclusively establish and determine.

Whether one is such a purchaser or not may —and in this case in a large measure does—depend upon the existence of power in the Secretary to convey such lands. For one cannot be a bona fide purchaser unless he from whom he purchase have power to sell.

The Secretary cannot be the judge of the existence and extent of the powers which he assumes to exercise. In no aspect of this case can it be claimed that the state of Minnesota, or the railroad company, or the land company, or the purchasers from either, were purchasers without notice. As we have already shown, the act itself gave notice of the reservation in favor of homestead and pre-emption claimants. The records of the land offices, both local and general, afforded notice of the existence of the homestead and pre-emption entries; and also of the official communication from Hendricks, Commissioner of the General Land Office, to the governor of Minnesota of July 21, 1857.



Digitized by Google

(Rec. 149), that the title of the territory would not rest under the land grant until the maps of definite location were filed in the office of the Secretary of the Interior.

All these not only put subsequent purchasers upon inquiry, but actually afforded full and complete notice of the outstanding equitable rights of the homestead and pre-emption entrymen.

We submit that the question of bona fide purchasers cannot properly arise in this case, brought under the act of March 3, 1887. The only object of proceedings under that act being to have declared void the certification of lands under railroad grants, if upon the facts proved the court should be satisfied that the lands were certified without authority of law.

*United States* v. *Sioux City & St. P. R. Co.* 46 Fed. Rep. 506.

The lands being excepted from the operation of the acts, never in fact having been granted by Congress, should not have been certified, and the officers of the land department, in certifying them, acted wholly without authority or jurisdiction, and such certification conveyed no right, title, or interest whatever.

*Burr* v. *Greeley*, 10 U. S. App. 409, 52 Fed. Rep. 926; *Sampeyreac* v. *United States*, 32 U. S. 7 Pet. 222–240 (8: 665–671); *Williamson* v. *Ball*, 49 U. S. 8 How. 566, 568 (12: 1200, 1201); *Gaines* v. *New Orleans*, 73 U. S. 6 Wall. 642, 715 (18: 950, 964); *Moffat* v. *United States*, 112 U. S. 24-31 (28: 628–625); *Williamson* v. *Berry*, 49 U. S. 8 How. 495, 544, 545, 550 (12: 1170, 1191, 1193); *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 641, 644 (28: 1126, 1127); *Doolan* v. *Carr*, 125 U. S. 624, 633 (31: 846, 849); *St. Louis Smelt. & Ref. Co.* v. *Kemp*, 104 U. S. 646, 647 (26: 878, 879); *Steel* v. *St. Louis Smelt. & Ref. Co.* 106 U. S. 452, 453 (27: 228, 229); *Wilcox* v. *Jackson, M'Connel*, 38 U. S. 13 Pet. 511 (10: 270); *Best* v. *Doe, Polk*, 85 U. S. 18 Wall. 117 (21: 808); *Dubuque & P. R. Co.* v. *Litchfield*, 64 U. S. 23 How. 66 (16: 500); *Williams* v. *Baker*, 84 U. S. 17 Wall. 147 (21: 561); *Iowa Homestead Co.* v. *Des Moines Nav. & R. Co.* 84 U. S. 17 Wall. 164 (21: 622); *Wolcott* v. *Des Moines Nav. & R. Co.* 72 U. S. 5 Wall. 686 (18: 691); *Litchfield* v. *Webster County*, 101 U. S. 774 (25: 926); *Wolsey* v. *Chapman*, 101 U. S. 767 (25: 919); *Bullard* v. *Des Moines & F. D. R. Co.* 122 U. S. 175 (30: 1126).

It is the duty of the government to see to it that the public-land laws are justly and fairly administered. This duty has been undertaken and the right of the United States to maintain such proceedings as this has been frequently recognized by this court.

*United States* v. *Missouri, K. & T. R. Co.* 141 U. S. 380 (35: 773); *United States* v. *Beebe*, 127 U. S. 342 (32: 123); *United States* v. *San Jacinto Tin Co.* 125 U. S. 286 (31: 752); *Williams* v. *United States*, 138 U. S. 517 (34: 1028).

*Messrs.* **Thomas Wilson**, *J. A. Tawney*, and *H. M. Lamberton*, for appellees:

While it is admitted that as the law is now settled by this court a homestead entry of pre-emption filing on a tract of land within the place limits of a railroad grant when the line is definitely fixed excepts that tract from the grant, and that a line of road is not definitely fixed until the map showing the definite location is filed with the Secretary of the Interior, we contend that this rule should not be in this case applied so as to devest rights vested according to the pre-existing rule.

*Lyon* v. *Richmond*, 2 Johns. Ch. 60; *Barton* v. *Drake*, 21 Minn. 303.

When a line of decisions, whether originally right or wrong, has become a rule of property, as the early rule in this class of cases had, it will thereafter be followed without question as to transactions entered into in reliance on such rule.

*Bank of Utica* v. *Mersereau*, 3 Barb. Ch. 530, 577, 49 Am. Dec. 189; *United States* v. *The Recorder*, 1 Blatchf. 318; *Stuart* v. *Laird*, 5 U. S. 1 Cranch, 299, 309 (2: 115, 118); *Rogers* v. *Goodwin*, 2 Mass. 477, 478; *United States* v. *Burlington & M. R. R. Co.* 98 U. S. 341 (25: 200).

If upon any state of facts a conveyance or patent might have been lawfully issued, the court will presume, as against such attack as this, that the facts justifying it existed, and to overcome that presumption the evidence must be clear and conclusive.

*St. Louis Smelt. & Ref. Co.* v. *Kemp*, 104 U. S. 646 (26: 878); *Polk* v. *Wendell*, 18 U. S. 5 Wheat. 304 (5: 94); *Bank of United States* v. *Dandridge*, 25 U. S. 12 Wheat. 69, 70 (6: 554); *Bagnell* v. *Broderick*, 38 U. S. 13 Pet. 450 (10: 242); *Field* v. *Seabury*, 60 U. S. 19 How. 323, 332 (15: 650, 654); *Hughes* v. *United States*, 71 U. S. 4 Wall. 232, 236 (18: 303, 304); *Jackson* v. *Lawton*, 10 Johns. 23, 6 Am. Dec. 311; *Delassus* v. *United States*, 34 U. S. 9 Pet. 134 (9: 78); *Minter* v. *Crommelin*, 59 U. S. 18 How. 87, 88 (15: 279); *Clements* v. *Macheboeuf*, 92 U. S. 425 (23: 503); *United States* v. *Maxwell Land Grant Co.* 121 U. S. 379, 382 (30: 958, 959); *Colorado Coal & I. Co.* v. *United States*, 123 U. S. 316 (31: 186); *Jackson* v. *Cole*, 4 Cow. 596, 597; *United States* v. *Budd*, 144 U. S. 154 (36: 384); *United States* v. *Meeker*, 50 Fed. Rep. 146, 147.

The certified lists of these lands by the Secretary of the Interior to the state conveyed as complete a title as a patent.

*Frasher* v. *O'Connor*, 115 U. S. 102 (29: 311); *Chandler* v. *Calumet & H. Min. Co.* 149 U. S. 92 (37: 662); *United States* v. *Des Moines Nav. & R. Co.* 142 U. S. 541 (35: 1108); *Cartner* v. *United States*, 149 U. S. 662, 675 (37: 890, 894); *Minnesota Land & Invest. Co.* v. *Davis*, 40 Minn 455, 457; *Winona & St. P. Land Co.* v. *Ebilcisor*, 52 Minn. 312; *Southern M. R. Co.* v. *Kufner*, 2 U. S. Land Dec. 492.

The complainants have failed to prove that, according to any construction of the statute, these lands were excepted from the grant to the defendant railroad company.

The lands in aid of this very line were ordered withdrawn a considerable time before the line was located.

After such withdrawal no homestead or pre-emption right to the lands could legally be initiated as against the grant.

*Spencer* v. *McDougal*, 159 U. S. 62 (40: 76); *St. Paul & P. R. Co.* v. *Northern P. R. Co.* 139 U. S. 18 (35: 84); *Hamblin* v. *Western Land Co.* 147 U. S. 531, 536 (37: 267, 271).

The suit is an attempt by the complainants to take advantage of an alleged technical error of their own officers, for which none of these defendants were responsible.



Digitized by Google

*Van Wyck* v. *Knevals*, 106 U. S. 360 (27: 201); *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 629 (28: 1122).

So far as the lands in question, certified to the state for the Sioux City Company, are concerned, both legal and equitable title passed to the state from the United States by such certification. *St. Paul & S. C. R. Co.* v. *Winona & St. P. R. Co.* 112 U. S. 724 (2:8 878); *Ryan* v. *Central P. R. Co.* 99 U. S. 382 (25: 305); *Bardon* v. *Northern P. R. Co.* 145 U. S. 545 (36: 811).

Every tract of land involved in this suit, except those certified to the Sioux City Company, and, with the exception of a few acres, those certified to that company also, are held and owned by bona fide purchasers for value from the railroad company or its grantees, and their title is unimpeachable.

*Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 (20: 485); *St. Louis Smelt. & Ref. Co.* v. *Kemp*, 104 U. S. 636 (26: 875); *Steel* v. *St Louis Smelt. & Ref. Co.* 106 U. S. 447 (27: 226); *Noble* v. *Union River Logging R. Co.* 147 U. S. 165 (37: 123); *Knight* v. *United Land Asso.* 142 U. S. 161 (35: 974).

It is not open to question but that if the legal title did pass, a bona fide purchaser from the railroad company acquired not only the legal but the equitable title unimpeachable by the United States or anyone claiming under them. *Colorado Coal & I. Co.* v. *United States*, 123 U. S. 307 (31: 182); *United States* v. *Des Moines Nav. & R. Co.* 142 U. S. 510 (35: 1099); *United States* v. *Dalles Military Road Co.* 140 U. S. 599 (35: 560); *United States* v. *California & O. Land Co.* 148 U. S. 31 (37: 354).

In the administration of the public-land system of the United States, questions of fact are for the consideration and judgment of the land department, and its judgment thereon is final. *Burfenning* v. *Chicago, St. P. M. & O. R. Co.* 163 U. S. 323 (41: 175); *Lee* v. *Johnson*, 116 U. S. 48 (29: 570).

The United States are estopped to question the right or title of the defendant railroad company or its grantees. *United States* v. *Central P. R. Co.* 26 Fed. Rep. 479; *Brown* v. *Buena Vista County*, 95 U. S. 157 (24: 422); *United States* v. *Willamette Valley & C. M. Wagon Road Co.* 54 Fed. Rep. 807; *Galliher* v. *Cadwell*, 145 U. S. 368 (36: 738); *United States* v. *San Jacinto Tin Co.* 125 U. S. 285 (31: 751).

The United States have not such an interest in the subject matter as to authorize them to maintain this suit. *United States* v. *Minor*, 114 U. S. 233 (29: 110); *United States* v. *San Jacinto Tin Co.* 125 U. S. 278 (31: 747); *Curtner* v. *United States*, 149 U. S. 662 (37: 890); *Hardt* v. *Heidweyer*, 152 U. S. 547 (38: 548).

Mr. Justice **Brewer** delivered the opinion of the court:

473] *There are other matters disclosed in the record, such as the claim at one time asserted by the St. Paul & Sioux City Railroad Company to these lands or a part of them, the litigation between the two companies, and the final decision by this court; also certain transactions between the railroad company and a land company and the litigation resulting therefrom, together with a series of conveyances by the railroad and the land company of the lands. But in view of the conclusions to which we have come upon the facts stated, we deem it unnecessary to cumber the record with any detailed mention of those matters.

These facts appear: First. The railroad company has constructed its road and has earned the land grant. Second. It has received no more land than Congress by the act referred to proposed to grant to aid in the construction of the road. Third. At the time that the lands were certified to the state for its benefit they were not subject to any homestead or pre-emption entry. They were free from all claims other than those of the railroad company itself, and were, except as subject to such claims, in the fullest sense public lands and within the jurisdiction of the land department. Fourth. Up to March 2, 1885 (when *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 629 [28: 1122], was decided by this court), the uniform ruling of the land department had been that the title to railroad lands became settled at the time the line of the railroad was surveyed, staked out, and marked on the face of the earth, and not at the time of the filing of the map of definite location in the land department; that a homestead entry, though apparently regular and valid, was open to question by the railroad company, and if shown to have been fraudulent or irregular in conception, or that it had been abandoned before the right of the company attached, was held not to except the land from the grant; and also that a pre-emption claim existing at the time of the attaching of a railroad grant, if subsequently abandoned and not consummated—even though in all respects legal and bona fide—did not defeat the grant, but upon the failure of such claim the land covered thereby inured to the grant as of the date when it became effective. Fifth. *Under[474 such rules of construction the land in controversy was all properly certified to the state for the benefit of the railroad company. Sixth. The lands were sold and conveyed by the railroad company to parties who paid full value and bought in good faith, believing the title which the railroad company assumed to convey to be perfect.

It is in the light of these facts that the scope and effect of the legislation of Congress are to be considered and determined. There is certainly much of equity in the contention of the appellees. The railroad company has constructed the road, in aid of whose construction Congress made this grant. Even though retaining all these tracts, it has failed to receive as large an amount of land as Congress proposed to give. With full performance on its side, it has not received all that Congress proffered. Of course, in entering upon its work it took all the chances of failure of title of any particular tract, and therefore has no legal ground of complaint, and yet it may with reason say that, though it must be content with such lands as the government at the time of the filing of the map of definite location could rightfully convey, it ought not to be deprived of any which the government did convey, and could convey without wrong to anyone, and which were embraced in the description of the lands which Congress proposed to give. No individual is wronged by permit-



Digitized by Google

ting this certification to stand; no pre-emptor or person seeking to enter any tract as a homestead has been deprived of his rights or privileges by virtue of this certification. The land was free from all individual claims. It was within the absolute control of Congress. It belonged to the government, and it is only in the assertion of a technical rule of construing land grants, first declared by this court long after the certification, that the government now asks to have that set aside and the title to these lands restored. No fraud or wrong is imputable to the company. No effort to secure a misconstruction by the land department, but only an acceptance of the then settled rule of construction and the taking of the lands which, under such construction, it was entitled to receive. Conceding that that construction was erroneous, yet it was one made by the officers [475] of the department *charged with the duty of administering the grant and determining what lands did and what did not pass, the only tribunal to which the company could then apply, and upon whose rulings it was bound to act. Many years have passed since the certification, and since the company, in reliance upon the title it believed it had acquired, has disposed of the lands, and other parties have become interested in and have dealt with the lands as private property. Contracts have been entered into, suits maintained,—carried even to this court,—and decrees and judgments entered and rendered in full reliance upon the title supposed to have been conveyed. Surely after such a lapse of time, and after so many transactions in and in respect to these lands, the appellees are justified in saying that they have large claims upon the equitable consideration of the courts.

The 1st section of the act of 1887 directs the Secretary of the Interior to adjust all railroad land grants in accordance with the decisions of this court; and the 2d, that upon such adjustment the Attorney General shall commence the proper proceedings to cancel all patents, certification, or other evidences of title erroneously issued. If these two sections were all the legislation of Congress bearing upon the subject it might be difficult to sustain the conclusions of the lower courts; or to deny to the government the relief sought by this bill, for, by the construction placed upon such railroad grants in *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 629 [28: 1122], and other cases, these lands did not pass under the railroad grant because at the time of the filing of the map of definite location they were on the records of the department claimed under homestead and pre-emption entries. The lapse of time would be no bar, for statutes of limitation cannot be invoked against the government.

But these sections are not all the legislation. Congress evidently recognized the fact that notwithstanding any error in certification or patent there might be rights which equitably deserved protection, and that it would not be fitting for the government to insist upon the letter of the law in disregard of such equitable rights. In the first place, it has distinctly recognized the fact that when there are no adverse [476] *individual rights, and only the claims of the government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration. In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the government, such conveyances should, after the lapse of a prescribed time, be conclusive against the government, and this notwithstanding any errors, irregularities, or improper action of its officers therein.

Thus, in the act of 1891, it provided that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter to be issued such suits should only be brought within six years after the date of issue. Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the land department. The act of 1896 extended the time for the bringing of suits for patents theretofore issued for five years from the passage of that act. It is true that these appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress to uphold titles arising under certification or patent by providing that after a certain time the government, the grantor therein, should not be heard to question them.

But limitation was not the only protection given. The act of 1896, which extended the period of limitation, followed such extension with this provision: "But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed." It is true this act was passed after the commencement of this suit—*indeed, after the decision by [477] the court of appeals—but it is none the less an act to be considered. There can be no question of the power of Congress to terminate, by appropriate legislation, any suit brought to assert simply the rights of the government. This suit was instituted by the Attorney General in obedience to the direct command of Congress, as expressed in the act of 1887, and Congress could at any time prior to the final decree in this court direct the withdrawal of such suit; and it accomplishes practically the same result when, by legislation within the unquestioned scope of its powers, it confirms in the defendants the title to the property which it was the purpose of the suit to recover. So, if this act of 1896, taken by itself alone, or in conjunction with preceding legislation, operates to confirm the title apparently conveyed by the certification to the state for the benefit of the railroad company, that necessarily terminates this suit adversely to the government, and compels an affirmance of the decisions of the lower courts without the necessity of any inquiry into the reasons advanced by those courts



Digitized by Google

for their conclusions. We are of the opinion that Congress intended by the sentence we have quoted from the act of 1896 to confirm the title which in this case passed by certification to the state. It not only declares that no patents to any lands held by a bona fide purchaser shall be vacated or annulled, but it confirms the right and title of such purchasers. Given a bona fide purchaser, his right and title is confirmed, and no suit can be maintained at the instance of the government to disturb it.

It is earnestly contended by the government that the present holders of the title are not "bona fide purchasers;" that that term has a fixed and well-defined meaning, as announced in the frequent decisions of this and other courts; that, as said in 2 Pom. Eq. Jur. § 745, "the essential elements which constitute a bona fide purchaser are, therefore, three,—a valuable consideration, the absence of notice, and presence of good faith" (*United States* v. *California & O. Land Co.* 148 U. S. 31, 42 [37: 354, 360]; that while two of these essential elements may be found, to wit, a valuable consideration and the presence of good faith, the third, the absence of notice, is lacking; that all men are con-[478] clusively *presumed to know the law, and that as the true rule of construction in reference to these grants was laid down by this court, the purchasers were bound to know such true rule; that the records of the Land Office disclosed the existence of these homestead entries and pre-emption filings, and, therefore, they who purchased from the railroad company knew, or at least were chargeable with knowledge, of the fact that those lands could not rightfully have been certified to the railroad company, but were excepted from the terms of the grant, and in fact remained the property of the government. It is further insisted that, as Congress in this statute used this well understood expression, it intended only the protection of such parties as came within the scope of this settled meaning. It is said that the only cases to be covered by this provision were those in which the state or the railroad company by presentation to the land office, before the filing of the map of definite location, of a forged relinquishment by the pre-emptor, or one having made a homestead entry, or by some other fraudulent representations, secured a certification or patent to the tracts, and thereafter sold and conveyed to one who purchased in ignorance of the fraud.

We are unable to agree with this contention of counsel, for several reasons: In the first place, the situation as it was known to exist makes against any such narrow construction. While instances of such fraudulent conduct on the part of the state to which the lands were certified, or the company to which the lands were patented, might exist, yet in the nature of things they would be few and hardly worth the special notice of Congress, while, on the other hand the fact that there had been a difference between the land department and the courts, one construction obtaining in the former prior to the decisions by the latter, and the further fact that by this difference of construction many tracts had been erroneously certified or patented, must have been well known to Congress, and naturally therefore a subject for its legislation. Further, there was no need of any legislation to protect a "bona fide purchaser." This had been settled by repeated decisions of this court. *United States* v. *Burlington & M. R. *Co.* 98 U. S. 334, 342 [479] [25: 198, 200]; *Colorado Coal & I. Co.* v. *United States*, 123 U. S. 307, 313 [31: 182, 184], reaffirmed in *United States* v. *California & O. Land Co.* 148 U. S. 31, 41 [37: 354, 359]. For in each of those cases it was decided that, although a patent was fraudulently and wrongfully obtained from the government, if the land conveyed was within the jurisdiction of the land department, the title of a bona fide purchaser from the patentee could not be disturbed by the government, so that this provision was absolutely unnecessary if that which is now claimed by counsel for the government is all that was intended by Congress. We do not mean to assert that because legislation to cover such a contingency was unnecessary, therefore the language used by Congress necessarily implies something other and different, because of course it may have been that Congress intended nothing but a simple declaration of the law as it was known to exist. At the same time the fact that under one construction it was needless raises a presumption that something more was intended, and that Congress had in view the protection of other parties than were already protected by general law.

But we need not rest on these inferences and presumptions. Other provisions of the acts of 1887 and 1896 make clear the intent of Congress. Section 3 of the act of 1887 provides that if the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any railroad grant it may be reinstated, provided he has not located another claim or made an entry in lieu of the one so canceled, and also did not voluntarily abandon such entry. By this section Congress provided for a reinstating of the title of one deprived thereof by an erroneous ruling of the land department, but, at the same time, limited the right of reinstating to cases in which the original entryman had not voluntarily abandoned his entry, or had not since that time made a new entry. In other words, it was limiting the restoration of the title of the original entryman to cases in which he had a continuing and present equitable right to recognition. As to all other cases, Congress reserved the determination of the equities between the government, the railroad *company, and [480] purchasers from the latter, and in subsequent sections it made provision for the adjustment of such equities.

Section 4 of the same act, expressly referring to all other lands erroneously certified or patented to any railroad company, provides that citizens who had purchased such lands in good faith should be entitled to the lands so purchased and to patents therefor issuing directly from the United States, and that the only remedy of the government should be an action against the railroad company for the government price of similar lands. It will be observed that this protection is not granted to simply bona fide purchasers (using that term in the technical sense), but to those who have one of the elements declared to be essential to a bona fide purchaser, to wit, good faith. It



Digitized by Google

matters not what constructive notice may be chargeable to such a purchaser if, in actual ignorance of any defect in the railroad company's title, and in reliance upon the action of the government in the apparent transfer of title by certification or patent, he has made an honest purchase of the lands. The plain intent of this section is to secure him the lands, and to reinforce his defective title by a direct patent from the United States, and to leave to the government a simple claim for money against the railroad company. It will be observed that the technical term "bona fide purchaser" is not found in this section, and while it is provided that a mortgage or pledge shall not be considered a sale so as to entitle the mortgagee or pledgee to the benefit of the act, it does secure to everyone who in good faith has made an absolute purchase from a railroad company protection to his title, irrespective of any errors or mistakes in the certification or patent.

Section 5 of the same act applies to cases in which no certification or patent has issued, and yet the lands sold by the railroad company are the numbered sections prescribed in its grant and coterminous with the constructed portions of its road, and it is there provided that where the lands so sold by the company "are for any reason excepted from the operation of the grant to said company," the purchaser may obtain title directly from the government [481] by paying to it the *ordinary government price of such lands. It is true the term used here is "bona fide purchaser," but it is a bona fide purchaser from the company, and the description given of the lands, as not conveyed and "for any reason excepted from the operation of the grant," indicates that the fact of notice of defect of title was not to be considered fatal to the right. Congress attempted to protect an honest transaction between a purchaser and a railroad company, even in the absence of a certification or patent. These being the provisions of the act of 1887, the act of 1896, confirming the right and title of a bona fide purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a "bona fide purchaser," has, nevertheless, purchased in good faith from the railroad company.

We have been referred in the arguments of this and other cases to the debates in Congress, and to the reports of the committees of the two houses to whom the bills were referred as confirmatory of the conclusions we have reached, but it is unnecessary to consider any of the evidence derived from these sources, if, indeed, it is open to consideration, for the language of the two acts is clear, and fully discloses the intent of Congress. Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing, also, that the lands were public lands in the statutory sense of the term, and free from individual or other claims.

If it be suggested that under the scope of these acts, though the suit must fail so far as it is one to set aside and cancel the certification, it may yet be maintained against the defendant railroad company for the value of the lands so erroneously certified, and that the decree should be modified to this extent, *it is [482] sufficient to say that, first, the government has not asked any such decree; second, that it may be doubtful whether for the mere purpose of recovering money an action at law must not be the remedy pursued; but lastly and chiefly, that it does not appear from this record either that the railroad company received an excess of lands or has even received (these lands included) the full quantity of lands promised in the grant; and further, that it does not appear that there were not within the granted or indemnity limits lands which the company might have rightfully received but for this erroneous certification. It will hardly be contended that if, simply through a mistake of the land department, these lands were certified when, at the time, other lands were open to certification which could rightfully have been certified and which have since been disposed of by the government to other parties, so that there is now no way of filling the grant, the government can nevertheless recover the value of the lands so erroneously certified. In other words, the mistake of the officers of the government cannot be both potent to prevent the railroad company obtaining its full quota of lands, and at the same time potent to enable the government to recover from the company the value of lands erroneously certified. Our conclusion, therefore, is that upon the record as it is presented, *the decree of the Court of Appeals was right, and it is affirmed.*

---

UNITED STATES, *Appt.*,

*v.*

UNION PACIFIC RAILWAY COMPANY, Henry Gay, M. J. Wellsloger, and William Hoard.

[No. 319.]

*Argued December 1, 2, 1896. Decided February 15, 1897.*

APPEAL from a decree of the United States Circuit Court of Appeals for the Eighth Circuit. *Affirmed.*

*Mr.* **Holmes Conrad,** Solicitor General, for appellant.

*Messrs.* **John F. Dillon,** *Harry Hubbard, J. M. Dillon,* and *T. F. Garver* for appellees.

---

UNITED STATES, *Appt.*,

*v.*

ST. PAUL & SIOUX CITY RAILROAD COMPANY *et al.*

[No. 322.]

*Argued November 30 and December 1, 1896, with United States* v. *Winona & St. P. R. Co. No. 321, ante, 789. Decided February 15, 1897.*

APPEAL from a decree of the United States Circuit Court of Appeals for the Eighth Circuit. *Affirmed.*



Digitized by Google

*Mr.* **Holmes Conrad,** Solicitor General, for appellant.

*Messrs.* **Thomas Wilson,** *J. A. Tawney,* and *H. M. Lamberton* for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

The facts in these cases are different from the facts in the case just decided. But the principles announced in the foregoing opinion are conclusive of the rights of the parties herein, and so, without any statement in detail of the facts, and for the reasons given in that opinion, *the decrees in these cases will be affirmed.*

---

## WINONA & ST. PETER RAILROAD COMPANY *et al.*, *Appts.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 483-486.)

*Pre-emption right.*

Possession by a pre-emption claimant whose filing had been made and never canceled on the records of the land office, which began before any claim of right to the land by a railroad company, either by filing its map of definite location or surveying and staking its line, constitutes such notice to a purchaser from the railroad company as to prevent the latter from being deemed a bona fide purchaser who is protected by the acts of Congress of 1887 and 1896, when the land was erroneously certified to the railroad company.

[No. 602.]

*Submitted December 1, 1896. Decided February 15, 1897.*

APPEAL from a decree of the United States Circuit Court of Appeals for the Eighth Circuit reversing the decree of the Circuit Court of the United States for the District of Minnesota, dismissing a suit brought by the United States against the Winona & St. Peter Railroad Company *et al.*, to set aside the certification of a patent in favor of said company to public lands. The decree of the court of appeals remanded the case with instructions to enter a decree granting the relief prayed for. *Affirmed.*

See same case below, 32 U. S. App. 306.

Statement by Mr. Justice **Brewer:**

This was a bill filed by the United States in the circuit court of the United States for the district of Minnesota against the Winona & St. Peter Railroad Company, the Winona & St. Peter Land Company, and Thomas Marshall, Jr. The suit was one to set aside the certification of a patent made to the state of Minnesota for the benefit of the defendant railroad company of the northeast quarter of 484] section 35, *township 106 north, range 18 west, which certification was of date December 1, 1862. After answers, proof, and an agreed statement as to certain facts, a decree was entered by the circuit court, August 29, 1894, dismissing the bill. On appeal to the court of appeals for the eighth circuit this decree was, on May 6, 1895, reversed (32 U. S. App. 306), and the case remanded with instructions to enter a decree granting the relief prayed for.

It appears from the agreed statement that on July 3, 1857, Thomas Marshall, Jr., one of the defendants, made a pre-emption filing at the local land office of the land in controversy, which filing was prima facie regular and valid, and was never canceled on the records of the land office; the construction of the railroad of the defendant railroad company was conceded; and it was agreed that on the 1st of March, 1877, defendant Marshall, being still in possession and claiming to be the owner thereof, the defendant land company, which had a conveyance from the railroad company, commenced an action of ejectment against him in the district court of Dodge county, Minnesota, that court having jurisdiction of the subject-matter; that Marshall appeared in such action, and such proceedings were had that on the 9th day of December, 1878, the court rendered judgment in favor of the plaintiff for the possession of the land; that no appeal was taken from such judgment, and that the same now remains in full force and effect; and that in pursuance thereof said Marshall surrendered possession to the defendant land company, and since that time the defendant land company has remained in possession and paid the taxes; that Marshall, on November 15, 1887, filed with the Commissioner of the General Land Office, and now has pending before the land department, an application for reinstatement of his rights to said land, which application has not been acted upon, as it is held by the said department that it has no jurisdiction to pass thereon. Other facts are agreed to, such as are stated in the opinion in the case No. 321 of the United States against the same railroad company and others, just decided.

*Messrs.* **J. A. Tawney** and *H. M. Lamberton* for appellants.

*Mr.* **Holmes Conrad,** Solicitor General, for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

The differences between this case and that referred to in the foregoing statement are these: Anterior to any claim of right by the railroad company, by virtue either of filing its map of definite location or of surveying and staking upon the ground its line, a pre-emption filing was placed upon the land which was never canceled. There remained therefore on the records until after the certification to the state a claim of a right to pre-empt. The party making this claim continued in possession by himself or tenant until not only the construction of the railroad but until after the conveyance by the railroad company to the land company, and so remained in possession until a suit of ejectment was brought by the land company in 1877.

On the strength of these facts the court of appeals was of opinion that the land company could not be considered one purchasing in good

NOTE.—*As to pre-emption rights,* see note to United States v. Fitzgerald, 10: 785.

*As to land grants to railroads,* see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.



Digitized by Google

faith from the railroad company; that it took its conveyance with notice, from possession, of all the rights and claims of the party so in possession, and therefore that it did not bring itself within the protecting clauses of the act of March 3, 1887 (24 Stat. at L. 556, chap. 376) and there was nothing to stay the right of the government to have this certification so erroneously issued canceled. With that conclusion we concur. That the land was erroneously certified is, under the prior decisions of this court, not open to question; and the acts of 1887 and 1896 have, as indicated in the opinion in the prior case, the purpose of protecting only **486** ]that party whose purchase from *the railroad company must be considered one in good faith. It is essential to the protection of these statutes that the party purchasing from the railroad company has no notice by any fact subsequent to and independent of the certification or patent of any defect in title. Such a purchaser cannot claim to be one in good faith if he has notice of facts outside the records of the land department disclosing a prior right. The protection goes only to matters anterior to the certification and patent. The statute was not intended to cut off the rights of parties continuing after the certification, and of which at the time of his purchase the purchaser had notice. Only the purely technical claims of the government were waived.

Here the claimant Marshall was in possession, had been in possession for twenty years; the land was not wild and vacant land. His possession was under a recorded claim of title, and under such a claim as forbade the issue of a patent. In other words, the land was erroneously certified. There was, and continued to be, an individual claimant for the land. There was no cancelation on the records of the land department of his claim. He continued in possession, and was in possession not only when the certification was made but when the land company purchased. Its purchase, therefore, was not one made in good faith, and there is nothing disclosed to stay the mandate of the statute for the adjustment of the land grant, and a suit to set aside the certificate erroneously issued.

*The decree of the Circuit Court of Appeals is affirmed.*

---

JOSEPH R. DUNLOP, *Plff. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 486, 504.)

*Bill of particulars—proprietorship of newspaper—course of business of postoffice—proof of mailing papers—discretion of court—knowledge of obscene paper—remarks of counsel—charge, when not objectionable—presumption of innocence.*

1. An indictment not demurrable on its face will not become so by the addition of a bill of particulars.
2. The discretion of the trial court in respect to requiring a bill of particulars of printed matter alleged as obscene in an indictment is not subject to review on writ of error.
3. A newspaper in which a person's name after the word "by" is printed just below the name of the paper is admissible to prove the proprietorship of such person, on an indictment against him for publishing in such paper obscene matter, —especially when it is shown by other evidence that he is its proprietor and publisher.
4. The customs and course of business and duties of employees of the postoffice may be proved by government officers in that department to raise a presumption that papers delivered by postoffice employees were delivered in the usual way after having been mailed at the postoffice.
5. Proof that copies of a newspaper were actually received at a postoffice in large numbers every day for mailing, and were mailed, is admissible to show that copies of a 5 o'clock edition of that paper, received as part of the mail matter of certain persons, were part of the paper so mailed and came through the postoffice.
6. The exercise of the discretion of the court in refusing to require matter which is alleged to be too obscene to be spread upon the records of the court is not subject to review on writ of error.
7. The responsible head of a newspaper establishment is sufficiently proved to have known the indecent character of the contents of his paper after several years' proprietorship and complaints made to him on the subject.
8. Improper remarks of counsel promptly withdrawn when the court held them improper will generally be deemed to be cured.
9. A charge that the jury should apply the same rules of good sense to the facts in evidence that they would apply to any other subject that comes under their consideration in life is not improper.
10. A charge that obscene publications must be calculated with the ordinary reader to deprave his morals or lead to impure purposes is not objectionable as amounting to a statement that a publication which tends to deprave the morals in any way whatever comes within that class, as there can be no misapprehension as to what is meant.
11. An instruction that the presumption of defendant's innocence is stronger than the presumption that messengers or other postoffice employees who deposited papers in boxes in the course of distributing the mails took them from the mails is properly refused.

[No. 472.]

*Argued December 21, 1896. Decided February 15, 1897.*

IN ERROR to the District Court of the United States for the Northern District of Illinois to review a judgment convicting Joseph R. Dunlop for unlawfully depositing in the postoffice at Chicago, for mailing and delivery, a newspaper called the "Chicago Dispatch" containing obscene, lewd, lascivious, and indecent matter. *Affirmed.*

Statement by Mr. Justice **Brown:**

This was a writ of error to review the conviction of the plaintiff in error for unlawfully depositing and causing to be deposited, upon the days set out in the various counts, in the postoffice at Chicago, for mailing and delivery, a newspaper called the "Chicago Dispatch," containing obscene, lewd, lascivious, and indecent matter. There were thirty-two counts in the indictment. The district attorney, under order of the court, elected to proceed upon the first, sixth, twelfth, sixteenth, twenty-sixth, and thirty-second counts. The other counts were quashed, and no evidence was offered to sustain the first count.



Digitized by Google

The sixth count was as follows:

"And the grand jurors aforesaid under their oath aforesaid do further present that the said Joseph R. Dunlop, on the 6th day of July, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in 489] the *postoffice of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled 'The Chicago Dispatch,' one of which said copies was then and there directed to 'Mr. Montgomery,' at Chicago aforesaid; another to 'R. M. Williams, box 801,' at St. Louis, Missouri, and the rest to divers persons, respectively, to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the 5 o'clock edition of the day in this count aforesaid and number 840 of the said paper, print, and publication, and contained (amongst other things) on the eleventh page thereof and under the headings of 'personal' and 'baths,' certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided."

The other counts differed from this only in the dates of the newspapers alleged to have been mailed, and the days upon which they were deposited in the postoffice.

The testimony introduced by the government tended to show that there was published in the city of Chicago, during the year 1895, and the three years immediately prior thereto, a daily and weekly newspaper entitled "The Chicago Dispatch;" that the plaintiff in error, Joseph R. Dunlop, was the publisher of said newspaper during those years; that copies of the Chicago Dispatch in large numbers were deposited in the Chicago postoffice for mailing and delivery during said years, daily except Sunday; that the copies of the Chicago Dispatch described in the indictment as directed to "Mr. Montgomery" at Chicago, and the copies of the Chicago Dispatch described in the indictment as directed to "R. M. Williams, box 801," at St. Louis, Missouri, were deposited for mailing and delivery at the postoffice in Chicago on the dates of said several copies; that all the copies of said Chicago Dispatch, so directed to said R. M. Williams and Mr. Montgomery, contained therein, under the headings of "Personal" and "Baths," certain advertisements 490] that were obscene, *lewd, lascivious, and indecent; and that the plaintiff in error, by reason of being the publisher of said Chicago Dispatch, was liable for the alleged depositing in said postoffice of said newspapers, so directed to said R. M. Williams and Mr. Montgomery.

Defendant was found guilty, and after motions for a new trial and in arrest of judgment had been overruled, was sentenced to imprisonment at hard labor in the penitentiary for two years, and to pay a fine of $2,000 and costs.

Thereupon he sued out this writ, assigning sixty-one errors as grounds for reversal. These errors related to the refusal of the court, prior to the trial, to order the district attorney to file the printed matter, alleged to be obscene, or copies of the same; to the admission of improper testimony, including all the newspapers introduced; to the refusal of the court at the close of the testimony of the government to direct a verdict of not guilty; to prejudicial remarks made by the district attorney in his argument to the jury; to the giving of improper instructions; and to the refusal to give proper instructions requested on behalf of the plaintiff in error.

*Messrs.* **William S. Forrest, A. H. Garland,** and *R. C. Garland* for plaintiff in error.

*Messrs.* **Judson Harmon,** Attorney General, and **J. M. Dickinson,** Assistant Attorney General, for defendant in error.

**Mr. Justice Brown** delivered the opinion of the court:

In passing upon this case we shall notice only such errors as were pressed upon our attention in the argument or briefs of counsel.

1. The first assignment is to the alleged error of the court in overruling the motion of the defendant, made prior to the trial, to require the district attorney to file the printed matter alleged in the indictment to be obscene, lewd, lascivious, and indecent, for the purpose of enabling the defendant to demur to the indictment. Defendant's petition for *this or- [491 der stated as the reason for it that if the advertisements complained of were not filed, his counsel "must investigate and critically examine" over three thousand advertisements and notices, and that he would "necessarily be confused and embarrassed," and unable "to make suitable preparations to sustain his defense." It is nowhere stated that he desired it for the purpose of demurring to the indictment, and if it had been furnished it would not have been the subject of demurrer, since it is no part of the record. *Com.* v. *Davis*, 11 Pick. 432. If the indictment be not demurrable upon its face, it would not become so by the addition of a bill of particulars.

Beyond this, however, the application is one addressed to the discretion of the court, and its action thereon is not subject to review. *Rosen* v. *United States*, 161 U. S. 29, 35 [40: 606, 608]; *Com.* v. *Giles*, 1 Gray, 466; *Com.* v. *Wood*, 4 Gray, 11; *State* v. *Bacon*, 41 Vt. 526 [98 Am. Dec. 616]. While such applications are ordinarily, and should be, granted, wherever the accused is liable to be surprised by evidence for which he is unprepared, it is difficult to see how the defendant in this case was prejudiced by its refusal. The alleged obscene matter was contained in a published newspaper to which his own name was attached as proprietor, and of which he had in fact been the proprietor for several years, the days and editions of which were set forth in the several counts. He was duly informed upon the trial of what particular advertisements the government complained, and requested the court to charge the jury that they were not obscene, within the meaning of the law. He thus gained every advantage that he could possibly have had by the production of the advertisements prior to the trial.

2. The second and five other assignments of error are taken to the admission of the following advertisements of proprietorship, appearing in the several editions set forth in the indict-



Digitized by Google

ment, upon the ground that there was no proof that the newspapers from which they were taken were copies of the Chicago Dispatch, and that they did not tend to show who was 492] the publisher:

The Dispatch.

By JOSEPH R. DUNLOP.

AN INDEPENDENT AFTERNOON DAILY PAPER

THREE EDITIONS DAILY—12, 3 AND 5 O'CLOCK.

Official Paper of the City of Chicago

—AND—

Official Paper of Cook County.

It is difficult to see how the identity of the paper called the Chicago Dispatch, which the indictment averred that the defendant deposited in the postoffice for mailing, could have been more conclusively proved than by the production of a newspaper called the Dispatch and purporting to be the official paper of the city of Chicago. In that particular the paper proved itself.

While the addition of the words "by Joseph R. Dunlop" might not have been, standing alone, sufficient evidence of his being the proprietor of the paper, and the cause of its being mailed, yet, in view of the fact that the name of the publisher usually follows the name of the paper in that connection, it certainly had a tendency in that direction, and was therefore admissible, particularly when it was shown by other testimony that defendant had stated that he was the proprietor and publisher of this paper; that a paper of this name had been for a long time printed and circulated by him; that it had for a long time and in large numbers passed through the postoffice; that he had negotiated for the renting of a building for the purpose of publishing a paper called the Dispatch; that he had conversations with witnesses in regard to the publication of a paper of that name; that, as proprietor, he had caused papers, similar to these, to be sent through the postoffice, and that the accounts for postage had been rendered to him.

3. The eighth assignment was taken to an alleged error in permitting the witness McAfee to testify that it was the duty of a certain mes- 493]senger of the postoffice inspector, *whose office was in the postoffice building at St. Louis, Missouri, to take the mail from the postoffice, and distribute it in the private boxes of persons who had desk room in the inspector's office.

The thirteenth assignment was taken to a similar alleged error in permitting the witness Montgomery to testify that it was among the duties of a government employee, not a mail carrier, to take from a table called "the round table," in the mailing department of the Chicago postoffice, a copy of the Dispatch, and deliver it to him in the office occupied by him as superintendent of mails in the government building at Chicago, and that it was in this way that the newspapers identified by Montgomery were received by him.

Each count in the indictment, upon which the trial was had, charged a mailing of the Dispatch to Montgomery at Chicago, as well as one to Williams, box 801, at St. Louis.

Montgomery's testimony tended to show that he had been superintendent of the mails at the Chicago postoffice for six years past; had charge of the receipt and despatch of all mails in and out of that office, and knew that there was a publication passing through the office known as the Chicago Dispatch; that he received the papers put in evidence in the Chicago postoffice from what is known as the "round table," the place at which the mail comes into the office from a platform, where it is received direct from the publication office; that it was delivered to him by a messenger through the regular channels of the mail in the same manner that all other papers of this kind were delivered, and subsequently turned over to Mr. McAfee. He was then asked the question, "What are the duties of that messenger?"—that is, the one who brought to his office from the "round table" in the postoffice building the papers he had identified. To this question objection was made.

The witness McAfee testified that he was a postoffice inspector, commissioned but not paid by the government, and was also a commission agent of the Western Society for the Prevention of Vice; that on June 12, 1895, he addressed a letter to the Dispatch of Chicago, enclosing therein the sum of *$1.25, re- [494 questing the Dispatch to be sent to R. M. Williams, box 801, St. Louis, Missouri, for three months from date, signing the letter "R. M. Williams;" that he received the papers, identified by him, from his box in the inspector's office in St. Louis, that he did not take them from his box in the postoffice; that his mail was put in the box by a messenger from the inspector's office, whose office was in the postoffice building; that the only way that he knew that the paper came in the mail was that he found it in his private box in the inspector's office; that he had received his mail in that way for ten years; that it was not a postoffice box in the same sense as 801, but was simply a box where his mail was deposited. He was then asked "Who was this messenger who delivered these papers?" to which objection was made, and he answered that he was a messenger for gathering the mail for inspectors, and distributing it in boxes provided in the postoffice.

The testimony of both of these witnesses was objected to upon the ground that they testified nothing as to the delivery of these papers of their own personal knowledge. It is claimed that the error consisted in assuming that the papers, purporting to be the Dispatch which McAfee testified that he found in his private box in the inspector's office, were deposited in that box by the clerk or messenger, and then in permitting McAfee to testify that it was the duty of the clerk or messenger to take the mail from the postoffice, and distribute the same in certain private boxes in the inspector's office. A similar objection was made to the testimony of Montgomery.

It is unnecessary to dwell upon these assignments at any length. While the witnesses



Digitized by Google

were not personally cognizant of the fact that these very papers were placed in their private boxes, it was perfectly competent for them to prove the customs of the postoffice, the course of business therein, and the duties of the employees connected with it. If it were the duty of this messenger to take these papers from the office and deliver them in the private boxes of these witnesses, and the papers identified were there found, it would be proper for the jury to infer that they had been delivered in the usual way, after having been mailed at the 495] postoffice in the city of *publication. Both of these witnesses were government officers, and testified as to the course of business in the respective offices with which they were connected. There was no error in permitting them to do so.

This question was elaborately considered by Mr. Justice Bradley in *Knickerbocker L. Ins. Co.* v. *Pendleton*, 115 U. S. 339 [29: 432], in which evidence of the custom and usage of a bank, offered in support of the evidence of the cashier of his conviction and belief that a draft had been presented for payment, came within the rule which allowed the course of business to be shown for the purpose of raising a presumption of fact in aid of collateral testimony. Indeed, the authorities are abundant to the proposition that, where a question is made whether a certain paper or other document has reached the hand of the person for whom it is intended, proof of a usage to deliver such papers at the house, or of the duty of a certain messenger to deliver such papers, creates a presumption that the paper in question was actually so delivered. Business could hardly be carried on without indulging in the presumption that employees, who have certain duties to perform and are known generally to perform such duties, will actually perform them in connection with a particular case. Thus, if it be shown that a letter, properly stamped, has been mailed, there is a presumption that it reached the person addressed; or, if letters properly directed to a gentleman be left with his servant, it is reasonable to presume that they reached his hands. *Macgregor* v. *Keily*, 8 Exch. 794; *Skilbeck* v. *Garbett*, 7 Q. B. 846; *Hetherington* v. *Kemp*, 4 Campb. 193; *Dana* v. *Kemble*, 19 Pick. 112; *Goetz* v. *Bank of Kansas City*, 119 U. S. 551 [30: 515]; 1 Greenl. Ev. § 40.

4. Thirteen assignments of error were taken to the ruling of the court in permitting the government to prove that, during the three years preceding the trial, and also during the period covered by the dates of the papers admitted in evidence, namely July 6 to October 19, 1895, a newspaper, purporting to be the Chicago Dispatch, was regularly, on each day except Sunday, received in great quantities at the Chicago postoffice for mailing and delivery. 496] *The object of the government in offering this testimony was to show that, upon the days stated in the several counts, large numbers of copies of this paper were actually received at the Chicago postoffice for mailing, and that, though said copies were not identified as the papers described in the indictment, the packages may be presumed to have contained them. As every copy of the same edition of a paper is almost necessarily an exact duplicate of every other copy of the same edition, proof that a certain edition was mailed in large quantities every day at a certain postoffice was certainly competent evidence that papers received by the two persons mentioned in the indictment, purporting to be of that edition, were in fact among the number that were mailed upon that date. Unless the paper were marked before delivery to the postoffice at Chicago, it would be impossible to say whether that identical paper was mailed; but if large numbers of that edition were mailed every day, it would be practically safe for the jury to assume that the papers identified were among the number. This testimony, taken in connection with that of the two witnesses, McAfee and Montgomery, showed with reasonable, if not absolute, certainty that the papers which they received and identified were among those which had been actually mailed. It is true that this testimony did not affirmatively show that the papers thus received belonged to the 5 o'clock edition of the Dispatch, but, while this may have detracted from the force of the testimony, it did not render it incompetent. As the evidence showed that large quantities of this paper were mailed every day, and that McAfee and Montgomery received, as part of their mail matter, copies of the 5 o'clock edition of that paper, it was for the jury to say whether these copies were not a part of the papers that were so mailed.

5. The twenty-fifth and six following assignments were taken to the admission of the copies of the Dispatch set forth in the indictment. These exhibits were substantially copies of each other. Such of the advertisements as were relied upon were marked, by order of the court, in blue pencil during the argument to the jury. They were objected to upon *the ground that the evidence failed to [497 show that they were deposited in the postoffice by the defendant, or that they were copies of the Chicago Dispatch: both of which objections have been already disposed of. Also that it did not appear that they contained matter that was too long or too obscene to be set out in the indictment, or to be spread upon the records of the court. Whether the matter was too obscene to be set forth in the record was a matter primarily to be considered by the district attorney in preparing the indictment; and, in any event, it was within the discretion of the court to say whether it was fit to be spread upon the records or not. We do not think that error will lie to the action of the court in this particular.

6. The thirty-second assignment of error was taken to the action of the court in refusing to direct a verdict of not guilty at the close of the testimony. This assignment is based partly upon the ground that there was no sufficient evidence of the mailing of the papers in question, which has already been disposed of, and partly because the evidence failed to show that the defendant knew that any of the advertisements complained of were contained in the copies of the Chicago Dispatch put in evidence; or that these papers contained anything which was obscene or indecent. We think, however, that the evidence was amply sufficient to lay before the jury. It was shown that Mr. McAfee had repeatedly talked with the de-



Digitized by Google

fendant about his paper, of which he admitted himself to be the responsible head; that defendant was told there had been complaints made about its character, and that, in the opinion of the district attorney, the advertisements under the heads of "Personal" and "Baths" were improper and illegal; that Mr. Dunlop replied that he scarcely ever saw the advertisements until after they had been published; that he had instructed his agent to scrutinize them with more care. He said that all of the newspapers had carried such advertisements in times past, until they became wealthy, and then complained about others that did the same. He did not deny a general knowledge of the contents of his paper, and it was scarcely 498]*possible that he could have been the responsible head of the establishment for a number of years, as the testimony tended to show, without personal knowledge of the character of the advertisements.

7. The thirty-fifth and thirty-sixth assignments of error were taken to certain remarks made by the district attorney in his argument to the jury, one of which is as follows: "I do not believe that there are twelve men that could be gathered by the venire of this court within the confines of the state of Illinois, except where they were bought and perjured in advance, whose verdict I would not be willing to take upon the question of the indecency, lewdness, lasciviousness, licentiousness, and wrong of these publications." To this language counsel for the defendant excepted. The court held that it was improper, and the district attorney immediately withdrew it. The action of the court was commendable in this particular, and we think this ruling, and the immediate withdrawal of the remark by the district attorney, condoned his error in making it, if his remark could be deemed a prejudicial error. There is no doubt that, in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused. In such cases, however, if the court interfere, and counsel promptly withdraw the remark, the error will generally be deemed to be cured. If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since, in the ardor of advocacy and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.

Complaint is also made of the remark of the district attorney to the following effect: "Now, gentlemen, it is not necessary for me to tell you what the massage treatment is; how a man is stripped naked, from the sole of his feet to the crown of his head, and is rubbed with the hands." If the counsel gave a wholly erroneous definition of the word "massage," or misled the jury by giving them a false impression of the operation, the remark might be prejudicial, and possible ground for error. But as the word 499] is defined as "a rubbing *or kneading of the body," an operation which could hardly be carried on unless the person were devested of his clothing, we see no error in the remark of the district attorney in this case. As the massage treatment is comparatively a recent device, it is quite possible that it may not have been understood by all the members of the jury, but if the district attorney fairly explained to them what it is ordinarily understood to be, and gave an explanation which was not radically wrong, there was no impropriety in his doing so.

A large number of exceptions were taken to various portions of the charge to the jury, and to the refusal of the court to give certain instructions requested by the defendant. Some of these have already been passed upon in connection with the testimony; some are too obviously frivolous to justify discussion, but two or three of them demand an independent consideration.

8. The forty-second and forty-third assignments were taken to the following instructions:

"It is your duty to come to a conclusion upon all those facts, and the effect of all those facts, the same as you would conscientiously come to a conclusion upon any other set of facts that would come before you in life. . . . There is no technical rule, there is no limitation in courts of justice, that prevents you from applying to them (the facts and circumstances in evidence) just the same rules of good common sense, subject always, of course, to a conscientious exercise of that common sense, that you would apply to any other subject that came under your consideration and that demanded your judgment."

There was no error in these instructions. One of the main objects of a jury trial is to secure to parties the judgment of twelve men of average intelligence who will bring to bear upon the consideration of the case the sound common sense which is supposed to characterize their ordinary daily transactions. If cases were to be decided alone by the application of technical rules of law and evidence, it could better be done by men who are learned in the law and who have made it the study of their lives; and while it is entirely true that the jury *are bound to receive the law from the [500 court, and to be guided by its instructions, it by no means follows that they are to abdicate their common sense, or to adopt any different processes of reasoning from those which guide them in the most important matters which concern themselves. Their sound common sense brought to bear upon the consideration of testimony, and in obedience to the rules laid down by the court, is the most valuable feature of the jury system and has done more to preserve its popularity than any apprehension that a bench of judges will wilfully misuse their power. To construe these instructions as authorizing the jury to depart from the rules of evidence and to decide the case upon abstract notions of their own, or from facts gathered outside of the testimony, is hypercritical. They were simply told to come to a conclusion upon the facts that had been proved, and to apply to those facts the same rules of good sense that they would apply to any other subject that came under their consideration and demanded their judgment. In these remarks the court gave a just and accurate definition of their functions. It certainly would have been error to have told them to apply to the facts proved any other rules than those which their good common sense dictated, or to set up any other standard of judgment than that which



Digitized by Google

influenced them in the ordinary business of life.

9. Error is also assigned to the following instruction of the court, upon the subject of obscene publications:

"Now, what is (are) obscene, lascivious, lewd, or indecent publications is largely a question of your own conscience and your own opinion; but it must come—before it can be said of such literature or publication—it must come up to this point: that it must be calculated with the ordinary reader to deprave him, deprave his morals, or lead to impure purposes. . . . It is your duty to ascertain in the first place if they are calculated to deprave the morals; if they are calculated to lower that standard which we regard as essential to civilization; if they are calculated to excite those feelings which, in their proper field, are all right, but which, transcending the limits of that proper field, play most of the mischief in the world."

501] *The construction placed by counsel upon this is, that it practically directed the jury that obscene literature was such as tended to deprave the morals of the public *in any way whatever*, whereas the true test of what constitutes obscene literature is that which tends to deprave the morals in one way only, namely, by exciting sensual desires and lascivious thoughts. It is not, however, the charge given by the court that was too broad, but the construction put upon it by counsel. The alleged obscene and indecent matter consisted of advertisements by women, soliciting or offering inducements for the visits of men, usually "refined gentlemen," to their rooms, sometimes under the disguise of "Baths" and "Massage," and oftener for the mere purpose of acquaintance. It was in this connection that the court charged the jury that, if the publications were such as were calculated to deprave the morals, they were within the statute. There could have been no possible misapprehension on their part as to what was meant. There was no question as to depraving the morals in any other direction than that of impure, sexual relations. The words were used by the court in their ordinary signification, and were made more definite by the context and by the character of the publications which had been put in evidence. The court left to the jury to say whether it was within the statute, and whether persons of ordinary intelligence would have any difficulty of divining the intention of the advertiser. We have no doubt that the finding of the jury was correct upon this point.

10. Error is also assigned to the action of the court in refusing to instruct the jury that the presumption of innocence was stronger than the presumption that the government employees who delivered the newspapers to Mr. Montgomery in the Chicago postoffice building obtained such papers from the mails, or than the presumption that the person who deposited them in the box in the St. Louis postoffice building, from which box the witness McAfee took the papers, obtained them from the mails. The court had already charged the jury "that until the government proves beyond a reasonable doubt that he knowingly caused to be de-
502]posited such a publication in the *mails, the presumption of innocence stands between any penalty that the court might inflict, or any verdict that you might pronounce, and the defendant. That presumption of innocence is only overcome when these facts I have named as the gist of the offense are, in your judgment, established beyond a reasonable doubt." The court further instructed the jury that "the presumption of innocence means that it is a presumption of the law that the defendant did not deposit or cause to be deposited in the postoffice for mailing, any of the newspapers admitted in evidence, and this presumption should continue and prevail in the minds of the jury in such a way as to cause them to find the defendant not guilty, unless, from all the evidence in the case, beyond a reasonable doubt, the jury are convinced that the newspapers, or some of the newspapers, admitted in evidence, were deposited or caused to be deposited in the postoffice for mailing by the defendant." The court made a similar charge with reference to the knowledge of the defendant that the publications contained indecent matters.

The position of the defendant in this connection is that the presumption of the defendant's innocence in a criminal case is stronger than any presumption, except the presumption of the defendant's sanity and the presumption of knowledge of the law, and that he was entitled to a direct charge that the presumption of the defendant's innocence was stronger than the presumption that the messengers, who deposited these papers in their proper boxes, took them from the mails. If it were broadly true that the presumption of innocence overrides every other presumption, except those of sanity and knowledge of the law, it would be impossible to convict in any case upon circumstantial evidence, since the gist of such evidence is that certain facts may be inferred or presumed from proof of other facts. Thus, if property recently stolen be found in the possession of a certain person, it may be presumed that he stole it, and such presumption is sufficient to authorize the jury to convict, notwithstanding the presumption of his innocence. So, if a person be stabbed to death, and another, who was last seen in his company, were arrested near the spot with a *bloody dagger in his pos-[503 session, it would raise, in the absence of explanatory evidence, a presumption of fact that he had killed him. So, if it were shown that the shoes of an accused person were of peculiar size or shape, and footmarks were found in the mud or snow of corresponding size or shape, it would raise a presumption, more or less strong according to the circumstances, that those marks had been made by the feet of the accused person. It is true that it is stated in some of the authorities that where there are conflicting presumptions, the presumption of innocence will prevail against the presumption of the continuance of life, the presumption of the continuance of things generally, the presumption of marriage and the presumption of chastity. But this is said with reference to a class of presumptions which prevail independently of proof to rebut the presumption of innocence, or what may be termed abstract presumptions. Thus, in prosecutions for seduction, or for enticing an unmarried female to a house of ill-fame, it is necessary to aver and



Digitized by Google

prove affirmatively the chastity of the female, notwithstanding the general presumption in favor of her chastity, since this general presumption is overridden by the presumption of the innocence of the defendant. *People* v. *Rodenigas*, 49 Cal. 9; *Com.* v. *Whittaker*, 131 Mass. 224; *West* v. *State*, 1 Wis. 209; *Zabriskie* v. *State*, 43 N. J. L. 640 [39 Am. Rep. 610]; 1 Greenl. Ev. § 35. This rule, however, is confined to cases where proof of the facts raising the presumption has no tendency to establish the guilt of the defendant, and has no application where such proof constitutes a link in the chain of evidence against him.

In such cases as the one under consideration, it is not so much a question of comparative presumptions, one against the other, as one of the weight of evidence to prove a certain fact, namely, that these papers were taken from the mails. It was a question for the jury to say whether the facts proved in this connection satisfied them beyond a reasonable doubt, and notwithstanding the presumption of innocence, that these papers were taken from the mails; and the abstract instructions requested would only have tended to confuse them, since, if literally followed, it would have compelled a verdict of acquittal.

504] *Upon a careful consideration of the record in this case, we are of opinion that there was no error of which the defendant was justly entitled to complain, and *the judgment of the court below is therefore affirmed.*

---

## UNITED STATES, *Appt.*,
*v.*
## HENRY G. McMILLAN *et al.*

(See S. C. Reporter's ed. 504-517.)

*Fees of clerk of territorial court—duty to account.*

1. It is the duty of the clerk of a district court of the territory of Utah to account to the United States for the fees received by him from private parties in civil actions, and from the territory on account of territorial business.
2. Such clerk need not account to the United States for sums received by him for declarations of intention and for naturalizations of aliens.

[No. 164.]

*Argued January 21, 1897. Decided February 15, 1897.*

APPEAL from a judgment of the Supreme Court of the Territory of Utah affirming the judgment of the Third Judicial District Court of that Territory in favor of the defendant, in an action brought by the United States against Henry G. McMillan, clerk of the said third judicial district court, and the sureties on his official bond, to recover fees received by him and not accounted for. *Reversed*, and case remanded to the United States circuit court for the district of Utah for further proceedings.

See same case below, 10 Utah, 184.

Statement by Mr. Justice **Gray**:

This was an action brought December 31, 1892, in the third judicial district court of the territory of Utah, by the United States against Henry G. McMillan, clerk of that court, and the sureties on his official bond, to recover the amount of certain fees received by him and not accounted for.

The complaint contained two counts, the first of which alleged that "between January 8 and December 31, 1889, inclusive, the said Henry G. McMillan, while clerk as aforesaid, and as such, earned, collected, and received from different sources, as the fees and emoluments of his said office, $7,458.70, of which sum $988.90 was earned and received in United States business; $3,776 for declarations of intention and naturalizations; and $2,693.80 from private persons in civil litigation, and from the territory of Utah, on account of territorial business;" that he was entitled to retain, of the moneys aforesaid, the sum of $1,984.93 as his personal compensation, and the further sum of $1,744.05 as the reasonable and necessary expenses of his office, as allowed by the Attorney [505 *General of the United States; that it was his duty, as clerk aforesaid, on January 31, 1890, to account for and to pay over to the United States all moneys so earned and received by him as aforesaid in excess of these two sums; and that he neglected and failed so to do.

The second count was precisely like the first, except that it related to fees received between January 1 and December 31, 1890, inclusive, and specified different sums.

The defendants demurred to the complaint as not stating facts sufficient to constitute a cause of action. The court sustained the demurrer, and, the attorney for the United States saying that he could not amend the complaint, judgment was rendered for the defendants. The United States appealed to the supreme court of the territory, which affirmed the judgment. 10 Utah, 184. The United States sued out this writ of error.

*Messrs.* **Joshua Eric Dodge**, Assistant Attorney General, and *Charles C. Binney*, Assistant Attorney, for appellant.

*Messrs.* **Arthur Brown** and *J. L. Rawlins* for appellees.

Mr. Justice **Gray** delivered the opinion of the court:

The questions presented by the case are whether "the fees and emoluments of his office," for which it is the duty of the clerk of a district court of the territory of Utah to account to the United States, include: 1st. Fees received by him from private parties in civil actions, and from the territory, on account of territorial business; 2d. Sums received by him for declarations of intention and for naturalizations of aliens.

The true answer to each of these questions appears to us, if not to be found in, at least to be necessarily inferred from, one of two judgments of this court, both delivered by Mr. Justice Blatchford, who, from his long experience in the *district and circuit courts, was [506 peculiarly familiar with questions of this kind. *United States* v. *Averill*, 130 U. S. 335 [32: 977]; *United States* v. *Hill*, 120 U. S. 169 [30: 627]. The weight of those decisions, as applied to the case at bar, may be the better ap-



Digitized by Google

precisted by recapitulating the legislation supposed to affect the case.

The Congress of the United States, by the act of February 26, 1853, chap. 80, entitled "An Act to Regulate the Fees and Costs to be Allowed to Clerks, Marshals, and Attorneys of the Circuit and District Courts of the United States, and for Other Purposes," enacted in § 1, that, in lieu of the compensation then allowed by law, the fees and costs therein specified, and no other compensation, should be taxed and allowed to "attorneys, solicitors, and proctors in the United States courts, to United States district attorneys, clerks of the district and circuit courts, marshals, witnesses, jurors, commissioners, and printers in the several states;" and, in § 3, that such district attorneys, clerks, and marshals should make half-yearly returns in writing to the Secretary of the Interior, "embracing all the fees and emoluments of their respective offices, of every name and character;" that "no clerk of a district court, or clerk of a circuit court, shall be allowed by the said Secretary to retain, of the fees and emoluments of his said office, or, in case both of said clerkships shall be held by the same person, of the said offices, for his own personal compensation, over and above the necessary expenses of his office, and necessary clerk hire included, also to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding $3,500 per year for any such district clerk or circuit clerk, or at and after that rate for such time as he shall hold the office;" and that every such officer should, with each return made by him, pay into the Treasury of the United States "any surplus of the fees and emoluments of his office, which his half-yearly return, so made as aforesaid, shall show to exist over and above the compensations and allowances hereinbefore authorized to be retained and paid by him." 10 Stat. at L. 161, 166.

That statute did not mention the clerks of the [507] territorial *courts. But by § 12 of the civil appropriation act of March 3, 1855, chap. 175, the provisions of the act of 1853 were extended to Utah and other territories, "as fully, in all particulars, as they would be had the word 'territories' been inserted in" the clause last quoted above from § 1 of that act, "after the word 'states,' and the same had read 'in the several states and in the territories of the United States;' this clause to take effect from and after the date of said act, and the accounting officers will settle the accounts within its purview accordingly." 10 Stat. at L. 671.

By the express words and the necessary effect of this section of the act of 1855, "the provisions," that is to say, all the provisions of the act of 1853, and, among others, those concerning "clerks of the district and circuit courts . . . in the several states," were extended to Utah and other territories "as fully and in all particulars" as if the clause "in the several states" had read "in the several states and in the territories of the United States." Clerks of district or circuit courts in the territories were thus subjected, not only to the fee bill established by the act of 1853, but also to the directions of that act, that "clerks of the district and circuit courts" should be allowed no other compensation than the fees and costs therein specified; that they should make half-yearly returns, "embracing all the fees and emoluments of their respective offices, of every name and character;" that "no clerk of a district court, or clerk of a circuit court," should be allowed to retain, of the fees and emoluments of his office, or, if holding both clerkships, of the two offices, for his personal compensation, a sum exceeding $3,500 a year; and that every such clerk should pay any surplus into the Treasury of the United States.

Notwithstanding this Congressional legislation, the legislature of the territory of Utah, by a statute of January 21, 1859, adopted a fee bill for the clerks and other officers of the supreme court and district courts of the territory, differing from the fee bill established by the acts of Congress of 1853 and 1855. Laws of Utah of 1851–1870, p. 71. And by a territorial statute of February 20, 1874, chap. 28, a new fee bill was *adopted, also differing [508 from that established by the acts of Congress. Utah Laws 1874, p. 37.

By chapter 16 of title 13, entitled "The Judiciary," of the Revised Statutes of the United States, approved June 22, 1874, Congress again, in § 823, established a fee bill, founded on that of 1853, and enacted that the fees and costs therein prescribed, "and no other compensation," should "be taxed and allowed to . . . clerks of the circuit and district courts," and to other officers and persons in those courts, "in the several states and territories, except in cases otherwise expressly provided by law;" in § 828 prescribed the "clerks' fees" for different items of services; in §§ 833, 839, and 844, substantially re-enacted the provisions of § 3 of the act of 1853, relating to the returns, the limit of the amount to be retained (transferring, however, the supervision from the Secretary of the Interior to the Attorney General, in accordance with the act of June 22, 1870, chap. 150, § 15 (16 Stat. at L. 164), and the payment of the surplus into the Treasury of the United States by clerks of district and circuit courts; and in § 1883 provided that the fees and costs to be allowed "to the clerks of the Supreme and district courts" and other officers "in the territories of the United States, shall be the same for similar services by such persons, as prescribed in chapter 16, title *The Judiciary*, and no other compensation shall be taxed or allowed." And by the act of Congress of June 23, 1874, chap. 469, § 7, "the act of the Congress of the United States, entitled 'An Act to Regulate the Fees and Costs to be Allowed Clerks, Marshals, and Attorneys of the Circuit and District Courts of the United States, and for Other Purposes,' approved February 26, 1853, is extended over and shall apply to the fee of like officers in said territory of Utah; . . . and all laws of said territory, inconsistent with the provisions of this act are hereby disapproved." 18 Stat. at L. 256.

The words "except in cases expressly otherwise provided by law," in U. S. Rev. Stat. § 823, doubtless referred to the cases (also excepted out of § 839) mentioned in §§ 840 and 842, by the first of which "the clerks of the several circuit and district courts in California, Oregon, *and Nevada," were entitled to [509 charge double fees, and to retain and be allowed a double maximum compensation; and by the



Digitized by Google

other of which, in prize causes, the clerks might be allowed to retain an additional compensation not exceeding one half of the usual maximum.

With those exceptions, Congress thus, in 1874, by acts passed on two successive days (the Revised Statutes on June 22, and the other act on June 23), substantially re-enacted, as including the territories, all the provisions of the acts of 1853 and 1855; and, in the act of June 23, 1874, as if to emphasize its intention to cover the whole subject, both of the fees to be taxed, and of the maximum amount thereof to be retained by every clerk of a district court in the territory of Utah, expressly disapproved "all laws of said territory, inconsistent with the provisions of this act."

Yet the fee bill which had been adopted by the territorial statute of February 20, 1874, was afterwards retained by the legislature of Utah in codifying the statutes of the territory. Utah Comp. Laws 1876, §§ 2378 *et seq.*; Utah Comp. Laws 1888, §§ 5541 *et seq.*

By a provision inserted in the civil appropriation act of March 3, 1883, chap. 143, the clerk of the supreme court of the District of Columbia was subjected to U. S. Rev. Stat. §§ 833 and 844, 22 Stat. at L. 631.

In *United States* v. *Averill*, 130 U. S. 335 [32: 977], this court, at October term, 1888, reversing the judgment of the supreme court of the territory of Utah, reported in 4 Utah, 416, adjudged that Congress, by the acts above referred to, in extending to clerks of the district courts of the territory the statutes applicable to clerks of district and circuit courts of the United States in a state of the Union, included not only those provisions which regulated the separate items and sums of fees to be taxed and collected by the clerk, but also those provisions which restricted the aggregate amount allowed or permitted to be retained by him, and those which required him to pay the surplus into the Treasury of the United States.

Mr. Justice Blatchford, speaking for this court, after reviewing the legislation of Congress upon
510] the subject, concluded as *follows: "The fees mentioned in § 1883, as 'to be allowed' to clerks of the district courts in the territories, cover the fees to be retained by them for compensation for services. Sections 823 and 839 are in chapter 16 of the title mentioned. They prescribe the fees to be allowed to and retained by clerks of district courts; 'and no other compensation' can, under § 1883, be allowed to be retained by clerks of the district courts in Utah for personal compensation, than is, by the provisions of chapter 16 of the title mentioned, prescribed to be allowed to be retained by the clerks of the district courts named in § 839, for personal compensation." 130 U. S. 340, 341 [32: 979].

In that case, indeed, no question was presented as to the classes of fees to be accounted for, and to be included in ascertaining the amounts to be retained, by the clerks of the district courts of the territory. And the position of the appellee, that in all cases to which the United States were not a party, he was entitled to fees taxed according to the territorial fee bill, and was not bound to account for them to the United States, is supported by an opinion given by the Attorney General to the First Comptroller of the Treasury on December 2, 1891 (a copy of which was annexed to the appellee's brief), as well as by the opinions of the supreme court of the territory in *Marts* v. *Ogden City Street R. Co.* 9 Utah, 459, and in the present case. 10 Utah, 184.

But that position appears to us to be inconsistent with the manifest intent of Congress, apparent upon the face of the acts above referred to, and with the reasoning upon which this court based its decision in *United States* v. *Averill*, above cited.

Doubtless, the courts of a territory are not, strictly speaking, courts of the United States, and do not come within the purview of acts of Congress which speak of "courts of the United States" only. *Clinton* v. *Englebrecht*, 80 U. S. 13 Wall. 434, 447 [20: 659, 663]; *Reynolds* v. *United States*, 98 U. S. 145, 154 [25: 244, 246]; *McAllister* v. *United States*, 141 U. S. 174 [35: 693]; *Thiede* v. *Utah*, 159 U. S. 510, 514, 515 [40: 237, 241], and other cases there cited. But it is equally indubitable that Congress, having the entire dominion and sovereignty, national and municipal, Federal and state, over *the territories of the United States,
511] so long as they remain in the territorial condition, may itself directly legislate for any territory, or may extend the laws of the United States over it, in any particular that Congress may think fit. As said by Chief Justice Waite, speaking for this court, "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the states." *First Nat. Bank* v. *Yankton County*, 101 U. S. 129, 133 [25: 1046, 1047]. See also *Church of Jesus Christ of L. D. S.* v. *United States*, 136 U. S. 1, 44 [34: 478, 491]; *Shively* v. *Bowlby*, 152 U. S. 1, 48 [38: 331, 349], and other cases there cited.

By the organic act of the territory of Utah, as of other territories of the United States, the legislative power of the territory extended only "to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States;" all statutes of the territory, if disapproved by Congress, were "to be null and of no effect;" and the Constitution and all laws of the United States, not locally inapplicable, were extended over and declared to be in force in the territory. Act of September 9, 1850, chap. 51, §§ 6, 17; 9 Stat. at L. 454, 458; U. S. Rev. Stat. §§ 1850, 1851, 1891.

In each territory, the supreme court and the district courts were established, the general nature of their jurisdiction defined, and the mode of appointment of their clerks prescribed by Congress, as appears in U. S. Rev. Stat. tit. 23. By § 1865 of those statutes, the district courts were to be held by one of the justices of the supreme court of the territory, appointed by the President under the Constitution and laws of the United States. The district courts of the territory were vested, by § 1868, with general "chancery as well as com-



Digitized by Google

mon-law jurisdiction;" and by § 1910, with "the same jurisdiction in all cases under the Consti-
512 ]tution and laws of the United *States, as is vested in the circuit and district courts of the United States," with a right of appeal to the supreme court of the territory; and by § 1871 it was provided that there should be but one clerk of each district court in the territory, appointed and designated by the presiding judge, as well as that "only such district clerk" should be entitled to a compensation from the United States.

Congress then, in the exercise of its sovereign and supreme power of legislation over the territories of the United States, had extended, in the clearest and fullest manner, to the clerks of the district courts of the territories, all the provisions of the statutes of the United States, establishing a fee bill, and restricting both the sums of the fees and emoluments to be received, and the maximum amount thereof to be retained, by the clerks of the courts of the United States held within a state; and it had expressly disapproved all laws of the territory of Utah, inconsistent with the legislation of Congress.

Among the provisions of the act of 1853, and of U. S. Rev. Stat. tit. 13, chap. 16, expressly extended by Congress to the territories, is the provision that the maximum personal compensation of a clerk of a district court or of a circuit court of the United States shall be no greater if he holds both clerkships than if he holds only one. This clearly indicates the intention of Congress that the maximum compensation of the clerk of a territorial district court should not be increased even if his fees and emoluments were derived from two distinct sources of authority.

But the fees and emoluments of the appellee were not derived from two offices or from two sources of authority, but from a single office and a single appointment. Each district court of the territory, vested by Congress with the jurisdiction which the circuit and district courts of the United States have over cases arising under the Constitution and laws of the United States, and also with general jurisdiction, at law and in equity, was, in the execution of either branch of its authority, whether exercising Federal or general jurisdiction, one and the same court, deriving its existence and its judicial powers from Congress; and its clerk,
513 ] whether dealing *with Federal or territorial business, was one and the same clerk, holding a single appointment under an act of Congress and from a judge commissioned by the President of the United States.

Whenever Congress has considered the amount of the compensation authorized to be received and retained by the clerk of a court, either of the United States or of a territory, to be insufficient, it has authorized him to charge double fees, and to be allowed a double maximum compensation, as in the courts of the United States held in the states of California, Oregon, and Nevada, by U. S. Rev. Stat. § 840, above cited; or to tax double fees, without increasing his maximum compensation, as in the courts of the territories of New Mexico and Arizona, by the act of August 7, 1882, chap. 436. 22 Stat. at L. 344; *McGrew* v. *United States*. 23 Ct. Cl. 278.

The United States have no greater interest, in cases to which they are not a party, in a court of the United States, than in a territorial court. The acts of Congress, regulating the fees to be received, the accounts to be rendered, and the compensation to be retained, by the clerks, are no more limited to cases or fees in which the United States are interested, in the district courts of the territories, than in the circuit and district courts of the United States.

For these reasons, we are of opinion that the fees received by the appellee from private parties in civil actions, and from the territory, on account of territorial business, must be included in his returns, and be considered in computing the aggregate compensation to be allowed to and retained by him; and that, to this extent, the judgment of the supreme court of the territory is erroneous, and must be reversed.

The question of the appellee's right to retain, or his duty to account for, sums received by him in naturalization proceedings, depends upon distinct and peculiar considerations.

The only place, it is believed, in the statutes of the United States, in which fees received by the clerk in such proceedings have ever been mentioned, is in one of the earlier naturalization acts. The act of April 14, 1802, chap. 28, enacted in § 1 that an alien's declaration of intention to *become a citizen might be made[514 before a court of record of one of the states or of a territory of the United States or before a circuit or district court of the United States; and, in § 2, that a report in behalf of an applicant for naturalization, stating his name, birthplace, age, nation, and allegiance, the country whence he migrated, and the place of his intended settlement, should be received and recorded by the clerk of the court; and that the clerk should receive 50 cents for recording such report, and 50 cents for a certificate thereof under his hand and seal of office. 2 Stat. at L. 153. The provision as to a clerk's fees has been omitted in the later naturalization acts. Conkling's U. S. Practice, 4th ed. 722; U. S. Rev. Stat. tit. 30; Act of February 1, 1876, chap. 5 (19 Stat. at L. 2). And no act of Congress, regulating the fees and accounts of clerks of courts, has fixed the sums which they might charge, or specifically required them to account to the United States for services performed for aliens presenting to the court, through the clerk, preliminary declarations of intention to become citizens, or final applications for naturalization.

At the time of the passage of the naturalization act of 1802, above referred to, the only statutes affecting the compensation of clerks of the circuit and district courts of the United States fixed their compensation at $5 a day for attending court; 10 cents a mile for travel; such fees as were allowed in the supreme court of the state; and a reasonable compensation, to be allowed by the court, for any kind of service for which the laws of the state made no allowance. Act of March 3, 1791, chap. 22, § 2 (1 Stat. at L. 217); Act of May 8, 1792, chap. 36, § 3 (1 Stat. at L. 277). The earliest legislation restricting the aggregate amount which clerks might retain, or requiring any returns from them, was in the appropriation act of March 3, 1841, chap. 35; and the provisions



Digitized by Google

of § 3 of the act of 1853, already cited, had their origin in the appropriation act of May 18, 1842, chap. 29, No. 167, which, however, vested in the Secretary of the Treasury the supervisory power over their accounts, afterwards transferred to the Secretary of the Interior by the act of March 3, 1849, chap. 108, § 4, and to the Attorney General by the act of June 22, 1870, chap. 150, § 15. 5 Stat. at L. 427, 483; 9 **515**] Stat. *at L. 395; 16 Stat. at L. 164. By the act of August 16, 1856, chap. 124, § 1, reenacted in U. S. Rev. Stat. 846, their accounts were to be examined and certified by the district judge, before being presented to the accounting officers of the Treasury for settlement; and to be then subject to revision upon their merits by those officers. 11 Stat. at L. 49.

The case of *United States* v. *Hill*, 120 U. S. 169 [30: 627], arose in this way: It was an action brought December 4, 1884, in the circuit court of the United States for the district of Massachusetts, by the United States upon the official bond of the clerk, appointed in 1879, of the district court for that district, to recover a large amount of fees of $1 and $2 each, respectively, charged and received by him for a declaration of intention to become a citizen, and for a final naturalization and certificate thereof. The judgment of the circuit court reported in 25 Fed. Rep. 375, in favor of the defendants, was affirmed by this court, speaking by Mr. Justice Blatchford, at October term, 1886, upon the following grounds: U. S. Rev. Stat. § 823, re-enacting § 1 of the act of 1853, applies prima facie to taxable costs and fees in ordinary suits between party and party prosecuted in a court. There is no specification of naturalization matters in the fees of clerks. From as early as 1839, it has been the practice of the clerks of the courts of the United States for that district to charge the fees of $1 and $2 in naturalization proceedings, in gross sums, without any division for specific services according to any items of the fee bill. The clerk of the district court had never included these fees in his returns of fees and emoluments. From 1842 and including 1884 his accounts were examined and approved by the district judge; they then went from 1842 to 1849 to the Secretary of the Treasury, from 1849 to 1870 to the Secretary of the Interior, and since 1870 to the Attorney General; and they were, during this long period, examined and adjusted by the accounting officers of the Treasury, with the naturalization fees not included. This long practice amounted to a contemporaneous and continuous construction of the statute by the concurring interpretation of judicial and executive officers **516**] *charged with the duty of carrying out its provisions. 120 U. S. 181, 182 [30: 632].

After that decision, the clerks of the courts of the United States in Massachusetts and in some other states, at least, continued to omit, in the returns of their official fees and emoluments, sums received for their services and naturalization proceedings; and attempts made from time to time to require them to include such fees in their returns have proved unsuccessful. *United States* v. *Hill*, 123 U. S. 681, [31 275]; Attorney General's Report for 1890, xx.; 52d Congress, 1st sess. H. R. Bills 9612, 9613, and Reports No. 1966, pp. 22, 23, and Nos. 1969, 1970; 53d Congress, 1st sess. H. R. Bill 3963, and Report No. 111.

In the Fifty-second Congress on July 21, 1892, the committee on the judiciary of the House of Representatives reported a bill, approved by the Attorney General and by the first comptroller of the Treasury, entitled "A Bill to Amend Section 833 of the Revised Statutes of the United States Relating to Semi-annual Returns of Fees by District Attorneys, Marshals, and Clerks," and purporting to amend that section by inserting, after the words "all fees and emoluments of his office, of every name and character," the words "including all naturalization fees," and by requiring each clerk's return to contain "a true statement of all naturalization fees." On January 17, 1893, the bill was amended in the House by adding at its close these words: "That in each of the three judicial districts of the state of Alabama there shall be a district attorney and a marshal,"—and, as amended, was passed by the House and sent to the Senate. On February 13, 1893, the committee on the judiciary of the Senate reported that the bill be amended by striking out all the enacting clause, except the words which had been added by amendment in the House; and the bill in this shape, with its title amended accordingly, and thus leaving out everything relating to returns of fees, was passed by both Houses, vetoed by the President, and passed over the veto. 52d Congress, 1st sess. H. R. Bill 9612, Report No. 1969; 24 Congr. Rec. 649, 1508, 1582, 1656, 1661, 2287, 2381, 2433, 2523, 2524; Act of March 3, 1893, chap. 220 (27 Stat. at L. 745).

*The judiciary committee of the House[**517** of Representatives, on the same day on which they reported that bill, also reported a bill, having the like approval, entitled "A Bill to Amend Section 828 of the Revised Statutes of the United States Relating to Clerk's Fees," and purporting to amend that section by adding, at the end thereof, these words: "For filing declaration of intention to become a citizen by an alien, $1; for final papers and all services connected therewith, $2." This bill, after being passed by the House, was referred to the committee on the judiciary of the Senate, and no further proceedings thereon appear to have been had. 52d Congress, 1st sess. H. R. Bill 9613, Report No. 1970; 24 Congr. Rec. 650, 684.

In the next Congress a bill embodying the provisions of those two bills was reported by the committee on the judiciary of the House of representatives, passed by the House, referred to the committee on the judiciary of the Senate, and not afterwards heard of. 53d Congress, 1st sess. H. R. Bill 3963, Report No. 111; 25 Congr. Rec. 2608, 2657, 2663, 2710.

Congress not having legislated upon the subject since the decision of this court in *United States* v. *Hill*, 120 U. S. 169 [30: 627], and no special usage or sound reason being shown for not applying a uniform rule in all the courts established by authority of Congress in the states and in the territories, the supreme court of the territory of Utah rightly held, in accordance with that decision, that the appellee



Digitized by Google

was not obliged to return to the United States, as part of the emoluments of his office, sums received for his services in naturalization proceedings.

But the erroneous ruling of that court upon the other branch of the case requires its *judgment to be reversed*, and the case remanded (pursuant to the act of July 16, 1894, chap. 138, § 17 (28 Stat. at L. 111) to the circuit court of the United States for the district of Utah for further proceedings in conformity with this opinion.

---

518) ELLEN L. SMITH, Executrix, *et al.*,
*v.*
VULCAN IRON WORKS.

EDWIN NORTON *et al.*
*v.*
MILTON A. WHEATON.

(See S. C. Reporter's ed. 518-526.)

*Power of circuit court of appeals—when merits of case cannot be reconsidered—writ of certiorari.*

1. Under the act of March 3, 1891, an appeal to the circuit court of appeals from an interlocutory order or decree of the circuit court, granting an injunction and ordering an account, in a patent case, may be from the whole order or decree, and upon such appeal the circuit court of appeals has authority to consider and decide the case upon its merits, and thereupon to render or direct a final decree dismissing the suit.
2. The merits of the case, having been once determined by the circuit court of appeals in reversing an interlocutory decree of the circuit court granting an injunction in a patent case, and remanding it with instructions to dismiss the bill, are not open to reconsideration at a later stage of the same case, either in that court or in the court below.
3. The discretionary power of issuing a writ of certiorari will not be exercised by this court to review a decision of the circuit court of appeals in dismissing an appeal from the circuit court, where the only difference that could result would be an affirmance instead of a dismissal, and would not affect the essential rights of the parties.

[Nos. 200, 639.]

*Argued January 19, 1897. Decided February 15, 1897.*

PETITIONS for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit, in suits in equity for the infringement of a patent, to review a decree in the first case reversing the decree of the circuit court and in the second case to review a decree dismissing an appeal. *Writ of certiorari dismissed in the first case; and in the second case writ of certiorari denied.*

See same cases below, 15 U. S. App. 217, 577, 29 U. S. App. 409, 44 U. S. App. 118, 425.

Statement by Mr. Justice **Gray**:

In each of these cases, the circuit court of the United States for the northern district of California, upon a bill in equity for the infringement of a patent for an invention, an answer denying the validity and the infringement of the patent, a general replication and a hearing, entered an interlocutory decree, adjudging that the patent was valid and had been infringed, granting an injunction, and referring the case to a master to take an account of profits and damages. From that decree, in each case, the defendant appealed to the circuit court of appeals for the ninth circuit.

In the first case, the defendant, at the time of taking the appeal, filed in the circuit court an assignment of errors, alleging error in holding that the patent was valid, and that it had been infringed. The plaintiff moved the circuit court of appeals to dismiss the appeal, so far as it involved any question except whether an injunction should be awarded. But that court denied the motion; and, upon a hearing, examined the questions of validity and infringement, decided them in favor of the defendant, and entered a decree reversing the decree of the circuit court. 15 U. S. App. 217, 577. On petition of the plaintiff, this court, on January 28, 1895, granted a writ of certiorari to the circuit court of appeals.

In the second case, the circuit court of appeals affirmed the decree of the circuit court, 29 U. S. App. 409; but, *upon a rehearing, [519 decided that there had been no infringement, reversed its own decree and that of the circuit court, and remanded the case with instructions to dismiss the bill; and afterwards denied a petition for a rehearing, and a motion to certify questions of law to this court. 44 U. S. App. 118, 425. The circuit court, upon receiving the mandate of the circuit court of appeals, and without hearing the plaintiffs, entered a final decree dismissing the bill. An appeal from this decree was taken by the plaintiff to the circuit court of appeals, and upon the defendant's motion and without any hearing on the merits, was dismissed by that court. The plaintiff, on November 9, 1896, presented to this court a petition for a writ of certiorari; and the court thereupon granted a rule to show cause why the writ should not issue to bring up the decree of the circuit court of appeals, "so that it may be determined whether, upon an appeal upon an interlocutory decree granting a temporary injunction in a patent case, the circuit court of appeals can render or direct a final decree on the merits."

That question was now, by leave of the court, orally argued in both cases, the parties in the first case stipulating in writing that, if the decision of this court upon that question should be in favor of the jurisdiction of the circuit court of appeals, the case should be dismissed by the appellees.

*Messrs.* **Calderon Carlisle** and *William G. Johnson* for Vulcan Iron Works.

*Messrs.* **John H. Miller** and *M. M. Estes* for petitioners.

*Mr.* **Milton A. Wheaton**, in proper person, for himself.

NOTE.—*As to what is "final decree," or judgment of state or other court from which appeal lies*, see note to Gibbons v. Ogden, 5: 302.

*As to certiorari in United States courts*, see note to Clark v. Hackett, 17: 69.



Digitized by Google

Mr. Justice **Gray** delivered the opinion of the court:

The act of March 3, 1891, chap. 517, establishing circuit courts of appeals, after providing in § 5 for appeals from the circuit courts and **520** ]district courts directly to this court in *certain classes of cases, and in § 6 for appeals from final decisions of those courts to the circuit court of appeals in all other cases, including cases arising under the patent laws, further provides, in § 7, that "where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: *Provided*, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, during the pendency of such appeal." 26 Stat. at L. 828.

The questions presented by each of these cases are whether, in a suit in equity for the infringement of a patent, an appeal to the circuit court of appeals from an interlocutory order or decree of the circuit court, granting an injunction, and referring the case to a master to take an account of damages and profits, may be from the whole order or decree, or must be restricted to that part of it which grants the injunction; and whether the circuit court of appeals, upon such an appeal, may consider and decide the merits of the case, and, if it decides them in the defendant's favor, may order the bill to be dismissed.

Upon these questions there has been some diversity of opinion among the circuit courts of appeals of the different circuits. But those courts have now generally concurred in taking the broader view of the appeal itself, and of the power of the appellate court.

In the earliest of such appeals, the cases were examined on the merits, and, upon a reversal of the order or decree appealed from, the authority to direct the bill to be dismissed was assumed, without question, in the circuit courts of appeals for the fifth circuit: *Dudley E. Jones Co.* v. *Munger Improv. Cotton Mach.* **521** ]*Mfg. Co.* *(December, 1891) 2 U. S. App. 55; for the first circuit; *Richmond* v. *Atwood* February, (1892) 5 U. S. App. 1; and for the second circuit: *American Paper Pail & B. Co.* v. *National Folding Box & P. Co.* (July, 1892) 1 U. S. App. 283. The cases in the fifth and first circuits were afterwards reconsidered upon petitions for rehearing. In the fifth circuit, the decree was modified so as only to direct the injunction to be dissolved. *Dudley E. Jones Co.* v. *Munger Improv. Cotton Mach. Mfg. Co.* (May, 1892) 2 U. S. App. 188. But in the first circuit, the power of the circuit court of appeals, upon such an appeal, to consider the merits of the case, and to order the bill to be dismissed, was maintained, after thorough discussion of the subject on principle and authority, in an opinion delivered by Judge Aldrich. *Richmond* v. *Atwood* (September, 1892) 5 U. S. App. 151.

This view has since prevailed, not only in the first circuit: *Marden* v. *Campbell Printing Press & Mfg. Co.* (May, 1895) 33 U. S. App. 123; *Wright & C. Wire Cloth Co.* v. *Clinton Wire Cloth Co.* (May, 1895) 33 U. S. App. 188, 206, 236; but also in the second circuit: *Florida Const. Co.* v. *Young* (December, 1892) 11 U. S. App. 683, 685; *Bidwell Cycle Co.* v. *Featherstone* (August, 1893) 14 U. S. App. 632, 655; *Curtis* v. *Overman Wheel Co.* (December, 1893) 20 U. S. App. 146; *Westinghouse Air Brake Co.* v. *New York Air Brake Co.* (October, 1894) 26 U. S. App. 248, 358; *Kilmer Mfg. Co.* v. *Griswold* (April, 1895) 35 U. S. App. 246; in the third circuit: *Union Switch & Signal Co.* v. *Johnson R. Signal Co.* (May, 1894) 17 U. S. App. 609, 611, 620; *Erie Rubber Co.* v. *American Dunlop Tire Co.* (July, 1895) 28 U. S. App. 470, 513, 522; in the seventh circuit: *Temple Pump Co.* v. *Goss Pump & Rubber Bucket Mfg. Co.* (October, 1893) 18 U. S. App. 229; *Northwestern Stove Repair Co.* v. *Beckwith* (October, 1893) 18 U. S. App. 245; *Electric Mfg. Co.* v. *Edison Electric Light Co.* (May, 1894) 18 U. S. App. 637, 643; *Card* v. *Colby* (November, 1894) 24 U. S. App. 460, 480, 486; *Standard Elevator Co.* v. *Crane Elevator Co.* (October, 1896) 46 U. S. App. —; in the eighth circuit: *Lockwood* v. *Wickes* (June, 1896) 40 U. S. App. 136, overruling same case (December, 1895) 36 U. S. App. 321; and in the ninth circuit: *Consolidated Piedmont Cable Co.* v. *Pacific Cable R. Co.* (July, 1893) 15 U. S. App. 216; *Butte City* [**522** *Street R. Co.* v. *Pacific Cable R. Co.* (February, 1894) 15 U. S. App. 341; *Vulcan Iron Works* v. *Smith* (May, 1894) 15 U. S. App. 577; *Wheaton* v. *Norton* (January, 1895) 29 U. S. App. 409, and (October, 1895) 44 U. S. App. 118, 170.

In the fourth circuit the question does not appear to have arisen in a patent case. But where, upon a bill in equity to restrain a supervisor of registration from interfering with the right to vote at the election of delegates to a convention to revise the Constitution of the state of South Carolina, the circuit court of the United States for the district of South Carolina had, by successive orders, granted and continued a temporary injunction, the circuit court of appeals, upon appeal from these orders, entered a decree not only reversing the orders, but directing the bill to be dismissed; the Chief Justice saying: "Although the appeal is from interlocutory orders, yet, as we entertain no doubt that such a bill cannot be maintained, we are constrained, in reversing these orders, to remand the cause with a direction to dismiss the bill." *Green* v. *Mills* (1895) 25 U. S. App. 383, 398 [30 L. R. A. 90]. An appeal from that decree was dismissed by this court, without touching this question. 159 U. S. 651 [40: 293].

In the sixth circuit, on the other hand, in a case in which the circuit court had entered an interlocutory decree sustaining the validity of the patent, adjudging that there was an infringement, ordering an account of damages and profits, and granting an injunction, and had allowed an appeal from so much only of that decree as granted the injunction, and de-



Digitized by Google

nied an appeal from the rest of the decree, the circuit court of appeals, in an opinion delivered by Mr. Justice Jackson (then circuit judge) with the concurrence of Judge Taft and Judge Hammond, held that the appeal had been properly restricted by the circuit court, and that the circuit court of appeals had no authority, upon this appeal, to hear and fully determine the merits of the case, but that those remained, notwithstanding the appeal, within the jurisdiction and control of the circuit court. That decision was made before the second decision in *Richmond* v. *Atwood*, 5 U. S. App. 151, 523] above cited, *had been reported, and without reference to the practice of courts of chancery elsewhere. And it was said in the opinion: "It would doubtless have been well if, in the creation of this court, the 7th section of the act had permitted or authorized an appeal from interlocutory decrees sustaining the validity of patents and adjudging their infringement, so as to obviate in many cases the taking of expensive accounts, and the delays incident thereto." *Columbus Watch Co.* v. *Robbins* (October, 1892) 6 U. S. App. 275, 281. A certificate thereupon made by the circuit court of appeals, for the purpose of obtaining the instructions of this court, was dismissed by this court, with Mr. Justice Jackson's concurrence, because no question of law was distinctly certified, and because the circuit court of appeals had decided the case before granting the certificate. 148 U. S. 266 [37: 445].

That decision was long treated as settling the practice in that circuit on appeals from such interlocutory decrees, and as permitting the questions of validity and infringement to be considered only so far as they affected the granting or refusal of an injunction. *Blount* v. *Société Anonyme* (November, 1892) 6 U. S. App. 335; *Columbus Watch Co.* v. *Robbins* (October, 1894) 22 U. S. App. 601, 634; *Duplex Press Co.* v. *Campbell Press Co.* (July, 1895) 37 U. S. App. 250; *Thompson* v. *Nelson* (November, 1895) 37 U. S. App. 478; *Goshen Co.* v. *Bissell Co.* (December, 1895, and February, 1896) 37 U. S. App. 555, 689.

But, at last, the circuit court of appeals of the sixth circuit, in an able and elaborate opinion delivered by Judge Lurton, with the concurrence of Judge Taft and Judge Hammond, being a majority of the court which had made the decision in *Columbus Watch Co.* v. *Robbins*, 6 U. S. App. 275, above cited, expressly overruled that decision, and brought the practice in that circuit into harmony with the practice prevailing in other circuits. *Bissell Co.* v. *Goshen Co.* (March, 1896) 43 U. S. App. 47; *Dueber Co.* v. *Robbins* (May, 1896) 43 U. S. App. 891.

By the practice in equity, as administered in the court of chancery and the House of Lords in 524] England, and in the *courts of chancery and courts of error in the states of New York and New Jersey, appeals lay from interlocutory, as well as from final, orders or decrees; and upon an appeal from an interlocutory order or decree the appellate court had the power of examining the merits of the case, and upon deciding them in favor of the defendant, dismissing the bill, and thus saving to both parties the needless expense of a further prosecution of the suit. Palmer, House of Lords Practice, 1; 2 Daniell, Ch. Pr. (1st ed.) 1491, 1492; *Forgay* v. *Conrad*, 47 U. S. 6 How. 201, 205 [12: 404, 406]; *Le Guen* v. *Gouverneur*, 1 Johns. Cas. 436, 498, 499, 507–509 [1 Am. Dec. 121]; *Bush* v. *Livingston*, 2 Cal. 66, 86 [2 Am. Dec. 316]; *Newark & N. Y. R. Co.* v. *Newark*, 23 N. J. Eq. 515.

But under the judicial system of the United States, from the beginning until the passage of the act of 1891, establishing circuit courts of appeals, appeals from the circuit courts of the United States in equity or in admiralty, like writs of error at common law, would lie only after final judgment or decree; and an order or decree in a patent cause, whether upon preliminary application or upon final hearing, granting an injunction and referring the cause to a master for an account of profits and damages, was interlocutory only, and not final, and therefore not reviewable on appeal before the final decree in the cause. Act of September 24, 1789, chap. 20, §§ 13, 22 (1 Stat. at L. 81, 84); act of March 3, 1803, chap. 40 (2 Stat. at L. 244); U. S. Rev. Stat. §§ 691, 692, 699, 701; *Forgay* v. *Conrad*, *supra*; *Barnard* v. *Gibson*, 47 U. S. 7 How. 650 [12: 857]; *Humiston* v. *Stainthrop*, 69 U. S. 2 Wall. 106 [17: 905]; *Keystone Manganese & I. Co.* v. *Martin*, 152 U. S. 91 [33: 275]; *McGourkey* v. *Toledo & O. C. R. Co.* 146 U. S. 536, 545 [36: 1079, 1083]; *American Const. Co.* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 378, 379 [37: 486, 489].

The provision of § 7 of the act of 1891, that where "upon a hearing in equity" in a circuit court "an injunction shall be granted or continued by an interlocutory order or decree," in a cause in which an appeal from a final decree might be taken to the circuit court of appeals, "an appeal may be taken from such interlocutory order or decree granting or continuing such injunction" to that court, authorizes, according *to its grammatical construc- [525 tion and actual meaning, an appeal to be taken from the whole of such interlocutory order or decree, and not from that part of it only which grants or continues an injunction.

The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests, but also to save both parties from the expense of further litigation, should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it.

The power of the appellate court over the cause, of which it has acquired jurisdiction by the appeal from the interlocutory decree, is not affected by the authority of the court appealed from, recognized in the last clause of the section, and often exercised by other courts of chancery, to take further proceedings in the cause, unless in its discretion it orders them to be stayed pending the appeal. *Hovey* v. *McDonald*, 109 U. S. 150, 160, 161 [27: 888, 891, 892]; *Re Haberman Mfg. Co.* 147 U. S. 525 [37: 266]; *Messonnier* v. *Kauman*, 3 Johns. Ch. 66.

In each of the cases now before the court, therefore, the circuit court of appeals, upon



Digitized by Google

appeal from the interlocutory decree of the circuit court, granting an injunction and ordering an account, had authority to consider and decide the case upon its merits, and thereupon to render or direct a final decree dismissing the bill.

In the second case, it was argued, in support of the petition for a writ of certiorari, that the circuit court, upon receiving the mandate of the circuit court of appeals directing a dismissal of the bill, erred in entering a final decree accordingly without further hearing; and that the circuit court of appeals erred in dismissing an appeal from that decree. But the rule to show cause did not proceed upon that ground. And the merits of the case, having been once de-[526]termined by the appellate court in reversing the interlocutory decree, were not open to reconsideration at a later stage of the same case, either in that court or in the court below. *Re Sanford Fork & Tool Co.* 160 U. S. 247 [40: 414], and cases there cited; *Great Western Teleg. Co.* v. *Burnham*, 162 U. S. 339 [40: 991]. Had the case been heard anew in each court after the first mandate, the only difference in the result would have been an affirmance, instead of a dismissal upon the second appeal. That difference, not affecting the essential rights of the parties, is no ground upon which this court should exercise its discretionary power of issuing a writ of certiorari.

It follows that, *in the first case*, in accordance with the stipulation of the parties, *the writ of certiorari heretofore granted is dismissed; and, in the second case, the writ of certiorari is denied.*

Judgments accordingly.

---

## *Ex parte* ISRAEL C. KOLLOCK, *Petitioner.*

(See S. C. Reporter's ed. 525-533.)

*Oleomargarine law valid—primary object of same.*

1. Requiring retail dealers in oleomargarine to put it up in packages marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, does not constitute a delegation of power to those officers to determine what acts shall be criminal, but the act of Congress of August 2, 1886, sufficiently defines the offense by requiring the packages to be marked and branded, prohibiting the sale of packages that are not, and prescribing the punishment for sales in violation of its provisions, leaving the mere description of particular marks, stamps, and brands to be determined by those officers.
2. The oleomargarine legislation does not differ in character from the internal revenue laws contained in U. S. Rev. Stat. §§ 3312, 3395, 3445, 3446, etc., but the primary object in both is the same, namely, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue, rather than the protection of purchasers.

[No. 9, Original.]

*Argued January 25, 1897. Decided March 1, 1897.*

ON THE PETITION of Israel C. Kollock alleging that he was unlawfully deprived of his liberty on conviction and sentence to fine and imprisonment for violation of the act of August 2, 1886, in regard to oleomargarine, and praying for a writ of habeas corpus. *Writ denied.*

See same case below, 25 Wash. L. Rep. 41.

Statement by Mr. Chief Justice Fuller:

Kollock was indicted in the supreme court of the District of Columbia for the violation of the 6th section of the act of Congress approved August 2, 1886 (24 Stat. at L. 209, chap. 840), entitled "An Act Defining Butter, also Imposing a Tax upon and Regulating the Manufacture, Sale, Importation, and Exportation of Oleomargarine," and also for carrying on in the District the business of a retail dealer in oleomargarine without having paid the special tax thereon. He was arraigned, tried, [527] and convicted on each indictment and was sentenced to fine and imprisonment on the first, and to fine on the second, with costs on both, and to stand committed further in default of payment.

December 14, 1896, he was committed to the custody of the United States marshal of the District of Columbia, and on the same day filed his petition in this court alleging that he was deprived of his liberty unlawfully, in that the law under which he was convicted is in violation of the Constitution and laws of the United States, for the reason that "it is not within the power of the Congress of the United States under the Constitution of the United States to delegate to the Commissioner of Internal Revenue or the Secretary of the Treasury of the United States, or any other person, authority or power to determine what acts shall be criminal, and the said act of Congress aforesaid does not sufficiently define, or define at all, what acts done or omitted to be done within the supposed purview of the said act shall constitute an offense or offenses against the United States;" and praying for a writ of habeas corpus.

Leave was given to file the petition and a rule to show cause was entered thereon, petitioner being admitted to bail, to which the marshal made return that he held petitioner pursuant to the judgment and sentence of the supreme court of the District of Columbia, until he was released from custody on giving bail in compliance with the order of this court. It appeared that Kollock had appealed to the court of appeals of the District of Columbia, which affirmed the judgments below (25 Wash. L. Rep. 41) in accordance with the decision of that court in *Prather* v. *United States*, 24 Wash. L. Rep. 395.

The act of Congress in question consists of twenty-one sections: Sections 1 and 2 define butter and oleomargarine; § 3 imposes special taxes on manufacturers, wholesale dealers, and retail dealers in oleomargarine; § 4 prescribes penalties for carrying on business as manufacturer, wholesale dealer, and retail dealer without payment of taxes; and § 5, the duty [528] of the manufacturer as to notice, etc., keeping books, etc., and conduct of business.

Section 6 is as follows:

"That all oleomargarine shall be packed by



Digitized by Google

the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than 10 pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding 10 pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than $1,000 and be imprisoned not more than two years."

Section 7 provides that every manufacturer shall affix a label on each package manufactured under penalty; § 8, for a tax on the manufacture to be represented by coupon stamps, the requirements of law as to stamps relating to tobacco and snuff being made applicable; § 9, for the assessment of taxes on oleomargarine sold without using stamps; § 10, for an additional tax on imported oleomargarine; § 11, a penalty for purchasing or receiving for sale any oleomargarine not branded or stamped according to law; § 12, a penalty for purchasing or receiving for sale any oleomargarine from any manufacturer who has not paid the special tax; § 13, for the destruction [529] of stamps on *stamped packages when empty; and § 14, for a chemist and microscopist in the office of the Commissioner, etc., and the Commissioner is authorized to decide what substances, etc., submitted to inspection in contested cases shall be taxed under the act.

Section 15 is as follows:

"That all packages of oleomargarine subject to tax under this act that shall be found without stamps or marks as herein provided, and all oleomargarine intended for human consumption which contains ingredients adjudged, as hereinbefore provided, to be deleterious to the public health, shall be forfeited to the United States. Any person who shall wilfully remove or deface the stamps, marks, or brands on packages containing oleomargarine taxed as provided herein shall be guilty of a misdemeanor, and shall be punished by a fine of not less than $100 nor more than $2,000, and by imprisonment for not less than thirty days nor more than six months."

Section 16 provides for the exportation of oleomargarine; and § 17 imposes a penalty for fraud by the manufacturer in relation to the tax.

Section 18 is as follows:

"That if any manufacturer of oleomargarine, any dealer therein, or any importer or exporter thereof, shall knowingly or wilfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of $1,000; and if the person so offending be the manufacturer of or a wholesale dealer in oleomargarine, all the oleomargarine owned by him, or in which he has any interest as owner, shall be forfeited to the United States."

Section 19 provides for the recovery of fines, etc.

Sections 20 and 21 read:

*"Sec. 20. That the Commissioner of [530] Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act.

"Sec. 21. That this act shall go into effect on the ninetieth day after its passage; and all wooden packages containing 10 or more pounds of oleomargarine found on the premises of any dealer on or after the ninetieth day succeeding the date of the passage of this act shall be deemed to be taxable under § 8 of this act, and shall be taxed, and shall have affixed thereto the stamps, marks, and brands required by this act, or by regulations made pursuant to this act; and for the purposes of securing the affixing of the stamps, marks, and brands required by this act, the oleomargarine shall be regarded as having been manufactured and sold, or removed from the manufactory for consumption or use, on or after the day this act takes effect; and such stock on hand at the time of the taking effect of this act may be stamped, marked, and branded under special regulations of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury; and the Commissioner of Internal Revenue may authorize the holder of such packages to mark and brand the same and to affix thereto the proper tax-paid stamps."

The first indictment against Kollock set forth that pursuant to the authority conferred on the Commissioner of Internal Revenue by the 6th section of the act of August 2, 1886, "the said Commissioner, with the approval of the Secretary of the Treasury, did, on the 12th day of March, in the year of our Lord one thousand, eight hundred, and ninety-one, prescribe certain regulations, in substance and to the effect, among other things, that the wooden or paper packages in which retail dealers in oleomargarine were required by said act of Congress to pack the oleomargarine sold by them, such retail dealers, should have printed or branded upon them in the case of each sale the name and address of the retail dealer making the same; likewise the words 'pound' and 'oleomargarine' in letters not less than ¼ of 1 inch square, and likewise a figure or figures of the same size indicating (in connection with said words 'pound' and 'oleomargarine') the *quantity of oleomargarine so sold, writ-[531] ten, printed, or branded on such wooden or paper packages and placed before the said word 'pound,' and that the said words 'oleomar-



Digitized by Google

garine' and 'pound' so required to be printed or branded on such packages as aforesaid in the case of each sale as aforesaid and the said figure or figures so indicative of quantity as aforesaid in the case of each sale as aforesaid and so required to be written, printed, or branded on such packages as aforesaid should be so placed thereon as to be plainly visible to the purchaser at the time of the delivery to him, such purchaser, by such retail dealers of the oleomargarine sold to such purchaser by them, such retail dealers."

And thus continued:

"That on the fourteenth day of January, in the year of our Lord one thousand eight hundred and ninety-six, and at the District aforesaid, one Israel C. Kollock, late of the District aforesaid, being then and there engaged in business as a retail dealer in oleomargarine at a store of him, the said Israel C. Kollock, situated on Fourth street southeast, in the city of Washington, in the said District, did then and there and at said store knowingly sell and deliver to a certain Florence Davis ¼ of 1 pound of oleomargarine as and for butter, which said ¼ of 1 pound of oleomargarine was not then and there and at the time of such sale and delivery thereof packed in a new wooden or paper package having then and there printed or branded thereon the name and address of him, the said Israel C. Kollock, in letters ¼ of 1 inch square and the words 'pound' and 'oleomargarine' in letters of like size and a figure or figures of like size written, printed, or branded thereon indicative (in connection with said words 'pound' and 'oleomargarine') of the quantity of oleomargarine so sold and delivered to her, the said Florence Davis, as aforesaid, and which said ¼ of 1 pound of oleomargarine at the time it was so knowingly sold and delivered to her, the said Florence Davis, as aforesaid, by him, the said Israel C. Kollock, as aforesaid, was then and there and at the time of the sale and delivery thereof as aforesaid packed in a paper package upon which [532] there had not *been printed, branded, or written any or either of the marks and characters aforesaid so required by the said regulations to be placed thereon as aforesaid, as he, the said Israel C. Kollock, then and there well knew, against the form of the statute, etc., etc."

*Messrs.* **Jeremiah M. Wilson** and **Henry E. Davis** for petitioner.

*Mr.* **Holmes Conrad,** Solicitor General, for respondent.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By the terms of the act, manufacturers of oleomargarine are required to pack it in wooden packages "marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe;" and all sales by manufacturers and wholesale dealers must be in "original stamped packages."

Retail dealers are required to "pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe."

And fine and imprisonment are denounced on "every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law."

Kollock was convicted, as a retail dealer in oleomargarine, of knowingly selling and delivering ¼ pound of that commodity, which was not packed in a wooden or paper package bearing thereon any or either of the marks or characters provided for by the regulations and set forth in the indictment. *It is con- [533] ceded that the stamps, marks, and brands were prescribed by the regulations, and it is not denied that Kollock had the knowledge, or the means of knowledge, of such stamps, marks, and brands. But it is argued that the statute is invalid because it "does not define what act done or omitted to be done shall constitute a criminal offense," and delegates the power "to determine what acts shall be criminal" by leaving the stamps, marks, and brands to be defined by the Commissioner.

We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution. But here the law required the packages to be marked and branded; prohibited the sale of packages that were not; and prescribed the punishment for sales in violation of its provisions; while the regulations simply described the particular marks, stamps, and brands to be used. The criminal offense is fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail. The regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offense. We think the act not open to the objection urged, and that it is disposed of by previous decisions. *United States* v. *Bailey*, 34 U. S. 9 Pet. 238 [9: 113]; *United States* v. *Eaton*, 144 U. S. 677 [36: 591]; *Caha* v. *United States*, 152 U. S. 211 [38: 415].

In the last case Caha had been convicted of perjury, under U. S. Rev. Stat. § 5392, in a contest in a local land office in respect of the validity of a homestead entry, the oath having been administered by one of the land officers before whom the contest had been carried on. It was contended that the indictment alleged no offense, because the statute made no provision for such a contest before those officers, and therefore it could not be said that the oath was taken in a "case in which a law of the United States authorized an oath to be administered."

But it was held by this court, in view of the general grant *of authority to the land de- [534] partment, to prescribe appropriate regulations for the disposition of the public lands; the rules and regulations prescribed by that department



Digitized by Google

for contests in all cases of such disposition, including homestead entries; and the frequent recognition by acts of Congress of contests in respect to that class of entries, that the local land officers in hearing and deciding upon a contest as to a homestead entry constituted a competent tribunal, and the contest so pending before them was a case in which the laws of the United States authorized an oath to be administered.

As bearing on the case in hand, we cannot do better than to quote at length from Mr. Justice Brewer, delivering the opinion, as follows:

"This is not a case in which the violation of a mere regulation of a department is adjudged a crime. *United States* v. *Bailey*, 34 U. S. 9 Pet. 238 [9: 118], is in point. There was an act of Congress making false testimony in support of a claim against the United States perjury, and the defendant in that case was indicted for making a false affidavit before a justice of the peace of the commonwealth of Kentucky in support of a claim against the United States. It was contended that the justice of the peace, an officer of the state, had no authority under the acts of Congress to administer oaths, and that, therefore, perjury could not be laid in respect to a false affidavit before such officer. It appeared, however, that the Secretary of the Treasury had established as a regulation for the government of his department and its officers in their action upon claims, that affidavits taken before any justice of the peace of any of the states should be received and considered in support of such claims. And upon this the conviction of perjury was sustained, Mr. Justice McLean alone dissenting. It was held that the Secretary had power to establish the regulation, and that the effect of it was to make the false affidavit before the justice of the peace perjury within the scope of the statute, and this notwithstanding the fact that such justice of the peace was not an officer of the United States. Much stronger is the case at bar, for the tribunal was composed of officers of the government of 535] the United States; it was created *by the Land Department in pursuance of express authority from the acts of Congress. This perjury was not merely a wrong against that tribunal or a violation of its rules or requirements; the tribunal and the contest only furnished the opportunity and the occasion for the crime, which was a crime defined in and denounced by the statute. Nor is there anything in the case of *United States* v. *Eaton*, 144 U. S. 677, 688 [36: 591, 594], conflicting with the views herein expressed. In that case the wrong was in the violation of a duty imposed only by a regulation of the Treasury Department. There was an act entitled 'An Act Defining Butter; also Imposing a Tax upon and Regulating the Manufacture, Sale, Importation, and Exportation of Oleomargarine,' which contained several sections forbidding particular acts, and imposing penalties for violation thereof. And in addition there was a general provision in § 18 that 'if a party shall knowingly or wilfully, omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, . . . he shall pay a penalty,' etc. There was authority given to the Commissioner of Internal Revenue to make all needful regulations for carrying into effect the act. In pursuance of that authority the Commissioner required the keeping of a book in a certain form, and the making of a monthly return—matters which were in no way referred to in the various sections of the statute prescribing the duties resting upon the manufacturer or dealer in oleomargarine, although subsequently to this statute, and subsequently to the offense complained of, and on October 1, 1890, Congress passed an act, by § 41 of which wholesale dealers in oleomargarine were required to keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue should require. It was held by this court that the regulation prescribed by the Commissioner of Internal Revenue, under that general grant of authority, was not sufficient to subject one violating it to punishment under § 18. It was said by Mr. Justice Blatchford, speaking for the court: 'It is necessary that a sufficient statutory authority should exist for *declaring any act [536 or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in § 41 of the act of October 1, 1890. Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.' This, it will be observed, is very different from the case at bar, where no violation is charged of any regulation made by the department. All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, at which the defendant committed the crime of perjury in violation of § 5392. We have no doubt that false swearing in a land contest before the local land office in respect to a homestead entry is perjury within the scope of said section."

The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue. And, considered as a revenue act, the designation of the stamps, marks, and brands is merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer. *United States* v. *Symonds*, 120 U. S. 46 [30: 557]; *Ex parte Reed, [537



Digitized by Google

100 U. S. 13 [25: 538]; *Smith* v. *Whitney*, 116 U. S. 181 [29: 605]; *Wayman* v. *Southard*, 23 U. S. 10 Wheat. 42 [6: 262].

We concur with the court of appeals that this provision does not differ in principle from those of the internal revenue laws, which direct the Commissioner of Internal Revenue to prepare suitable stamps to be used on packages of cigars, tobacco, and spirits; to change such stamps when deemed expedient; and to devise and regulate the means for affixing them. Rev. Stat. §§ 3312, 3395, 3445, 3446, etc.

By § 3446, the Secretary and the Commissioner were empowered to alter or renew or change the form, style, and device "of any stamp, mark, or label used under any provision of the laws relating to distilled spirits, tobacco, snuff, and cigars, when in their judgment necessary for the collection of revenue tax or the prevention or detection of frauds thereon; and may make and publish such regulations for the use of such mark, stamp, or label as they find requisite;" and by the act of March 1, 1879 (20 Stat. at L. 327, chap. 125, § 18), the section was amended so as to provide that the Commissioner, with the approval of the Secretary, might "establish and, from time to time, alter, or change the form, style, character, material, and device of any stamp, mark, or label used under any provisions of the laws relating to internal revenue." The oleomargarine legislation does not differ in character from this, and the object is the same in both, namely, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue. Protection to purchasers in respect of getting the real and not a spurious article cannot be held to be the primary object in either instance, and the identification of dealer, substance, quantity, etc., by marking, and branding must be regarded as means to effectuate the objects of the act in respect of revenue.

And we are of opinion that leaving the matter of designating the marks, brands, and stamps to the Commissioner, with the approval of the Secretary, involved no unconstitutional delegation of power.

*Writ denied.*

---

538] **Ex parte* SAMUEL J. McCAULLY, *Petitioner.*

*Ex parte* WILLIAM O. LUSBY, *Petitioner.*

[Nos. 8, 10, Original.]

(See S. C. Reporter's ed. 538.)

*Messrs.* **Jeremiah M. Wilson** and **Henry E. Davis** for petitioners.

*Mr.* **Holmes Conrad**, Solicitor General, for respondent.

THE CHIEF JUSTICE: These are petitions for habeas corpus to discharge petitioners from confinement on convictions under the oleomargarine law on the ground of the unconstitutionality of that enactment. So far as that question is concerned, it is conceded that the records are substantially the same as the record in *Ex parte Kollock*, just decided [*ante*, 813], and the applications must be disposed of in the same way.

*Writs denied.*

LEANDER J. McCORMICK, *Plff. in Err.*,
v.
MARKET NATIONAL BANK of Chicago, *Dft. in Err.*

(See S. C. Reporter's ed. 538-553.)

*Jurisdiction of this court—lease by national bank, when invalid—notice—amount of recovery.*

1. This court has jurisdiction to review a judgment of the highest court of a state against the validity of a lease made by a national banking association which has made and filed its articles of association and organization certificate, but is not yet authorized to transact business except such as is incidental and preliminary to its organization, when the lessor specially set up and claimed a right to recover on the lease under U. S. Rev. Stat. § 5136, on the grounds that it was within said exception as to business, in said statute, and that the bank had power under the statute to make the lease.
2. A lease by a national banking association after it has made and filed its articles of association and organization certificate with the Comptroller of the Currency, but before it has received from him a certificate authorizing it to do business, made for a term of five years, determinable at the end of any year by either party, of an office to be occupied for banking business, is within the prohibition of U. S. Rev. Stat. § 5136, which prohibits the transaction of any business "except such as is incidental and necessarily preliminary to its organization," until authorized by the Comptroller to commence business.
3. A person dealing with a corporation which is formed under general laws by the recording or filing in a public office of the required articles of association and certificate is bound to take notice of the documents recorded or filed, upon which, as authorized and controlled by the general laws, depend the existence of the corporation, the extent of its corporate powers, and its capacity to act as a corporation.
4. A lease made by a corporation contrary to the express prohibition of a statute is void, and cannot be made good by estoppel so as to support an action to recover anything beyond the value of what the corporation actually received and enjoyed.

[No. 554.]

*Submitted December 7, 1896. Decided March 1, 1897.*

WRIT OF ERROR to the Supreme Court of the State of Illinois to review a judgment affirming a judgment of the State Appellate Court which affirmed a judgment of the Superior Court of Cook County, Illinois, in favor of the plaintiff, Leander J. McCormick, against the Market National Bank of Chicago,

NOTE.—*As to jurisdiction of United States Supreme Court dependent on amount; interest added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy,*—see note to Gordon v. Ogden, 7: 592.

*As to construction of grants to corporations; corporations have only powers granted or those necessary to carry into effect powers granted; can act only in the mode prescribed by the law creating,* see notes to Charles River Bridge v. Warren Bridge, 9: 773, and Beaty v. Knowler, 7: 813.



Digitized by Google

for the amount of rent due upon a lease from the plaintiff to the defendant. *Affirmed.*

See same case below, 61 Ill. App. 88, 162 Ill. 100.

Statement by Mr. Justice **Gray**:

This was an action brought July 17, 1895, by McCormick against the Market National Bank of Chicago, Illinois, in the superior court of Cook county in the state of Illinois, and was submitted by the parties, waiving a trial by jury, to that court, upon an agreed statement of facts, in substance as follows:

On January 31, 1893, articles of association were signed, and an organization certificate was signed and acknowledged, by nine citizens of Illinois, before a notary public, and both were transmitted to the Comptroller of the Currency, as required by U. S. Rev. Stat. tit. 62 (the material parts of which are copied in the margin†), for the purpose of making them a national banking association at Chicago 540] by the aforesaid name; and were *on February 3, 1893, recorded, and afterwards carefully preserved, in the Comptroller's office.

On January 31, 1893, at a meeting of the directors of the bank, chosen by the stockholders, and named in the articles of association, a president and a cashier were duly elected; and the directors caused a seal to be made for the bank; On February 9, 1893, the president, pursuant to a resolution of the directors, signed and sealed with the corporate seal a lease in writing from the plaintiff to the bank of certain offices in Chicago, "to be used and occupied by said Market National Bank as a banking office, and for no other purpose," for the term of five years from May 1, 1893, at a yearly rent of $18,000, payable in equal monthly instalments. By an agreement made part of the lease, the plaintiff was to make certain alterations *and repairs at his own [541 expense; either party might cancel the lease on May 1 of any year by giving ninety days' notice in writing; and no rent was to be charged until the bank took possession. On April 12, 1893, the parties made a supplemental agreement, by which the plaintiff was to make further alterations, the bank paying half the cost thereof. All the alterations and repairs were made by the plaintiff as agreed; the cost, paid by him, of the alterations made under the agreement of April 12, 1893, being $2,475.

Upon the completion of the alterations, on

†Sec. 5133. Associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed. . . . These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.

Sec. 5134. The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

First. The name assumed by such association.

Second. The place where its operations of discount and deposits are to be carried on.

Third. The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders, and the number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this title.

Sec. 5135. The organization certificate shall be acknowledged before a judge of some court of record or notary public, and shall be, together with the acknowledgment thereof, authenticated by the seal of such court or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office.

Sec. 5136. Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power:

First. To adopt and use a corporate seal.

Second. To have succession for the period of twenty years from its organization, unless it is sooner dissolved . . . or unless its franchise becomes forfeited.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them, and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, bylaws not inconsistent with law.

Seventh. To exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on their business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes, according to the provisions of this title.

But no such association shall transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking.

Sec. 5168. Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this title, and the association transmitting the same notifies the Comptroller that at least 50 per cent of its capital stock has been duly paid in, and that such association has complied with all the provisions of this title required to be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this title required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence the business of banking.

Sec. 5169. If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business, the Comptroller shall give to such a association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business.

Sec. 5170. The association shall cause the certificate issued under the preceding section to be published, in some newspaper printed in the city or county where the association is located, for at least sixty days next after the issuing thereof.

Sec. 5190. The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate.



Digitized by Google

June 22, 1893, the president and cashier, in the name of the bank, took possession of the demised premises, and put in fixtures and furniture, blank books and stationery, necessary to carry on a banking business, and they were not removed until April 30, 1895.

542] *Of the whole capital stock of $1,000,000, provided for in the articles of association, no more than the sum of $331,594 was ever paid in. And the bank was never authorized by the Comptroller of the Currency to commence, and never did commence, the business of banking.

The officers of the bank, from time to time, corresponded with the plaintiff, using letter heads with the name, location, and place of business of the bank and the names of its officers printed thereon, and signing in their official capacity.

The plaintiff, at the time of the negotiations for the lease, and of its execution, and of the taking possession of the demised premises by the officers of the bank, understood and believed that it was legally organized as a national bank, and as such was ready to do banking business, and had the power to enter into the lease and agreements aforesaid; and had no knowledge or information to the contrary until August 15, 1893, when the officers of the bank informed him that the bank had never been authorized by the Comptroller of the Currency to commence the business of banking, and had no power to enter into the lease, and had abandoned all further proceedings for carrying on the banking business, and offered to surrender the lease, but he refused to accept the surrender. On September 20, 1893, the president of the bank caused the key of the office to be left on the desk of the plaintiff's agent, he refusing to accept it.

On July 15, 1893, the nine persons who had signed the aforesaid articles of association and organization certificate, signed and transmitted to the Comptroller of the Currency a certificate revoking them; and he placed it on file in his office. On the same day five of those persons and seven others signed and acknowledged, and forwarded to the Comptroller, other articles of association and organization certificate, for the purpose of making them a national bank by the same name, with a capital of $500,000; and they were forthwith recorded in the Comptroller's office. On July 25, 1893, the persons signing the latter articles of association and organization certificate abandoned all further proceedings with regard to the or-

543] ganization of the bank as therein *provided, and with regard to its commencing the business of banking.

On October 4, 1893, the parties agreed in writing that, without prejudice to the rights of either, the plaintiff should take possession of the premises, and endeavor to lease them and to collect the rent thereof. The plaintiff made every effort to obtain a tenant accordingly, but was unable to do so.

On January 8, 1895, the plaintiff gave written notice to the president of the bank of his intention to terminate the lease on May 1, 1895, in accordance with its terms.

The cashier paid the rent, according to the lease, until July 22, 1893. But the bank refused to pay any rent subsequently accruing; and never paid its half of the cost of the alterations made under the agreement of April 12, 1893.

If upon the facts stated, without regard to the form of the pleadings, the court should be of opinion that the plaintiff was entitled to recover, judgment was to be rendered for him for such sum as he was entitled to, with costs; otherwise, judgment for the defendant, with costs.

The plaintiff asked the court to find, as matter of law, the following propositions:

"1st. That the execution of the lease in question by the defendant was incidental and necessarily preliminary to its organization, and to its entering upon a banking business.

"2d. That the execution of the lease in question was a proper exercise of the powers possessed by such defendant to make contracts under U. S. Rev. Stat. § 5136, ¶ 3.

"3d. That the limitation or last clause of ¶ 7 of said section does not apply to the powers conferred by ¶¶ 1 to 6 in said section; that the Market National Bank of Chicago had the power to enter into said lease, and to legally bind itself thereby.

"4th. That there was no want of power on the part of said defendant to execute said lease, but merely a defective organization, and said bank cannot plead such defective organization to defeat a recovery.

"5th. That said contract of lease has been fully executed.

*"6th. That the said plaintiff was not [544 bound to ascertain whether or not the said defendant was properly and legally organized; and that, if the plaintiff relied upon the representations and statements of the proper officers of said defendant, that the bank was properly and legally organized and empowered to make and enter into said lease, he is entitled to recover the stipulated rental named therein, and the defendant is estopped to deny its liability.

"7th. That the said defendant, by its acts, conduct, and declarations, as shown by the agreed statement of facts in this case, is estopped from alleging that it was not fully organized as a banking corporation under the laws of the United States, and from alleging that it did not have the power to execute the lease in question.

"8th. That the plaintiff under the facts in this case as agreed upon, is entitled to recover judgment, at the rate agreed upon in said lease, from July 22, 1893, up to May 1, 1895, and also to recover one half of the expenses of repairing and changing the said premises, according to the stipulation, with interest upon each instalment as it became due, at the rate of 5 per cent per annum."

The court refused to find the foregoing propositions of law, or any of them; and the plaintiff duly excepted to the refusal.

The court found for the plaintiff, and gave judgment in his favor for the rent from July 22 to August 15, 1893, and for half the cost of the alterations made by the plaintiff under the agreement of April 12, 1893, with interest, amounting in all to the sum of $2,548.85.

The judgment was affirmed, on successive appeals of the plaintiff, by the appellate court and by the supreme court of Illinois, 61 Ill. App. 33, 162 Ill. 100. The plaintiff thereupon



Digitized by Google

sued out this writ of error. The assignments of error upon each appeal, as well as upon the writ of error, were based upon the propositions of law above stated.

*Mr.* **A. M. Pence** for plaintiff in error.
*Mr.* **Hiram T. Gilbert** for defendant in error.

545] *Mr. Justice **Gray** delivered the opinion of the court:

By the national bank act, a national banking association, "upon duly making and filing articles of association and an organization certificate" with the Comptroller of the Currency, "shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, shall have power," "to adopt and use a corporate seal," "to have succession for the period of twenty years from its organization," "to make contracts," "to sue and be sued, as fully as natural persons," to elect and dismiss officers, to make by-laws, and to exercise "all such incidental powers as shall be necessary to carry on the business of banking." "But no such association shall transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking." Rev. Stat. § 5136.

The question upon which this case turned was whether a national banking association which, after having duly made and filed its articles of association and organization certificate with the Comptroller of the Currency, but not having received from him a certificate authorizing it to do banking business, enters with the owner of real estate into a contract of lease, for a term of five years, determinable at the end of any year by either party, of an office to be occupied by the association as a banking office, is bound by the lease according to its provisions.

This action was brought by the lessor in such a lease against the defendant as lessee. The first question that presents itself upon the record is whether this court has jurisdiction of this writ of error.

The defendant contended, and the highest court of the state of Illinois adjudged, that the contract of lease sued on was not incidental and necessarily preliminary to the organization of the corporation, and therefore, by virtue of the last clause of § 5136 of the national 546]bank act, above cited, *having been executed by the defendant before being authorized by the Comptroller of the Currency to commence the business of banking, did not bind the defendant.

If the decision had been the other way, it would, as admitted at the bar, have been a decision against an immunity set up and claimed by the defendant under a statute of the United States, and therefore reviewable by this court on writ of error. *Swope* v. *Leffingwell*, 105 U. S. 3 [26: 939]; *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67 [35: 107]; *Metropolitan Nat. Bank* v. *Claggett*, 141 U. S. 520 [35: 841]; *Chemical Nat. Bank* v. *Hartford Deposit Co.* 161 U. S. 1 [40: 595].

It does not, however, follow that the plaintiff is not entitled to a review by this court of the judgment, so far as it was against him.

The plaintiff, in the courts of the state, and by his assignment of errors filed with the writ of error sued out from this court, specially set up and claimed a right to recover, so far as concerned the construction of that section of the statute, upon two grounds.

His first ground was that the execution of the lease by the defendant was "incidental and necessarily preliminary to its organization," and therefore within the exception of the last clause of the section in question. As to that ground the case stands thus: The defendant relied on the prohibition to transact any business until it had been authorized by the Comptroller of the Currency to commence the business of banking. The plaintiff relied on the exception out of that prohibition. The decision against the plaintiff, therefore, was a decision against a right claimed by him under a statute of the United States.

The case, in this particular, is analogous to those arising under the provision of the bankrupt act, that a bankrupt who had in all things conformed to his duty under the act should receive a discharge from all his debts, with certain exceptions, among which were debts created by his fraud or embezzlement, or by his defalcation as a public officer, or while acting in a fiduciary character. U. S. Rev. Stat. §§ 5114, 5117. In *Strader* v. *Baldwin*, 50 U. S. 9 How. 261 [13: 130], indeed, under the like provision of a former bankrupt act, where 547 a bankrupt, being sued upon a debt, pleaded his discharge, and the plaintiff replied that the debt was contracted while acting in a fiduciary capacity, and the decision of the state court was in favor of the defendant, this court held that it had no jurisdiction, because the decision below was in favor of the right set up by the defendant. But the court there failed to notice that the decision, while in favor of the right or immunity, set up by the defendant, of a discharge under the bankrupt act, was also against the right or immunity, set up by the plaintiff, under the clause excepting fiduciary debts from the effect of that discharge. And the case has accordingly been overruled in similar cases arising under the recent bankrupt act, in which this court has taken jurisdiction, not only when the writ of error was sued out by the defendant (*Neal* v. *Scruggs* ("*Neal* v. *Clark*") 95 U. S. 704 [24: 586]), but also when it was sued out by the plaintiff; because, as was said by Chief Justice Waite in delivering judgment in the latest case upon this point, the plaintiff "specially set up and claimed an immunity, under § 5117 of the Revised Statutes, from the operation of the discharge in bankruptcy, because of the fraudulent and fiduciary character of his debt, and the decision was against him." *Hennequin* v. *Clews*, 111 U. S. 676 [28: 565]; *Palmer* v. *Hussey*, 119 U. S. 96, 98 [30: 362, 363].

The plaintiff's second ground likewise affords ample support for the appellate jurisdiction of this court. It was specially set up and claimed by the plaintiff that, taking the whole section together, the defendant, from the date of filing with the Comptroller of the Currency its articles of association and its organization



Digitized by Google

certificate, became a corporation empowered to make contracts appropriate to the business of banking; and that any such contracts were valid as between the parties to them, even if they violated the restriction in the last clause of the section, and therefore might afford a reason for which the United States could enforce a forfeiture of the charter. This position of the plaintiff was, in effect, that, so far as he was concerned, the bank had power under the statute of the United States to make the contract sued on; and the decision of the highest court of the state, that the statute, 548] *rightly construed, did not give such power to the bank, was a decision against the right so specially set up and claimed by the plaintiff under a statute of the United States, and is therefore reviewable by this court. U. S. Rev. Stat. § 709.

But we are of opinion that there was no error in that decision.

While by the earlier provisions of U. S. Rev. Stat. § 5136, the association, upon filing its articles of association and its organization certificate with the Comptroller of the Currency, becomes "as from the date of the execution of the organization certificate," and "for the period of twenty years from its organization," a body corporate, with the usual powers of a banking corporation, yet, by the last clause of that section, Congress has enacted that "no such association shall transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking."

By subsequent sections of the national bank act, the Comptroller is required to make a careful examination into the condition of the association; and, taking into consideration a full statement upon the oaths of the president and cashier, and of a majority of the directors, and any other facts which may come to his knowledge, by means of a special commission of inquiry, or otherwise, to ascertain and determine that at least 50 per cent of the capital stock has been duly paid in, and that the association has in all other respects complied with the provisions of the national bank act, required to be complied with before commencing the business of banking: and thereupon, and not before, to make and to give to the association a certificate, under his hand and official seal, that the association has complied with all those provisions, and is authorized to commence the business of banking. U. S. Rev. Stat. §§ 5168, 5169. The Comptroller, as this court has said, is "clothed with jurisdiction to decide as to the completeness of the organization." *Casey* v. *Galli*, 94 U. S. 673, 679 [24: 168, 170]; *Bushnell* v. *Kneeland*, 164 U. S. 684 [*ante*, 598].

Until the association has been authorized by 549] the Comptroller *to commence the business of banking, § 5136 peremptorily forbids the corporation to "transact any business" whatever, whether appertaining or not to the business of banking, "except such as is incidental and necessarily preliminary to its organization." The only business which it is permitted to transact is "such as is incidental and necessarily preliminary," not to carrying on, or even to commencing, the business of banking, but "to its organization," that is to say, such as is requisite to complete its organization as a corporation, which might doubtless include electing directors and officers, receiving subscriptions and payments for shares, procuring a corporate seal, and a book for recording its proceedings, temporarily hiring a room, and contracting any small debts incidental to the completion of its organization.

To take a lease is certainly to "transact business," within the meaning of the statute; and a lease for a term of years, at a large rent, of offices to be occupied by the bank "as a banking office, and for no other purpose," however necessary it might be for the transacting, or even for the commencing, of banking business by a corporation whose organization had been completed, and which had been lawfully authorized to commence the business of banking, is in no sense incidental or necessarily preliminary to the organization of the corporation.

The provision of § 5190, that "the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate," refers to its "usual business," after obtaining the certificate from the Comptroller; and to "the place," that is, the city or town, in which, after it has been authorized by the Comptroller's certificate to commence its business of banking, its "office or banking house" is located.

The lease sued on, therefore, was clearly prohibited by the very terms of the statute from which the association assumed to derive its power to execute the lease.

The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court *has often recognized and affirmed, [550 upon three distinct grounds: the obligation of anyone contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. *Pearce* v. *Madison & I. R. Co.* 62 U. S. 21 How. 441 [16: 184]; *Pittsburg, C. & St. L. R. Co.* v. *Keokuk & H. Bridge Co.* 131 U. S. 371, 384 [33: 157, 161]; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 48 [35: 55, 64].

When the corporation is created by a charter granted by the legislature, any person dealing with it is bound to take notice of the terms of the charter, and of the general laws restricting or defining the powers of the corporation. *Pearce* v. *Madison & I. R. Co.* above cited; *Zabriskie* v. *Cleveland, C. & C. R. Co.* 64 U. S. 23 How. 381, 398 [16: 488, 497]; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71 [25: 950]; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 680 [30: 83, 284]. In like manner, when the corporation is formed under general laws, by the recording or filing in a public office of the required articles of association and certificate, any person dealing with the association is bound to take notice of the documents recorded or filed, upon which, as authorized and controlled by the general



Digitized by Google

laws, depend the existence of the corporation, the extent of its corporate powers, and its capacity to act as a corporation. *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1, 25 [32: 837, 842]; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 48 [35: 55, 64].

It is settled by a long series of decisions of this court, that a lease of a railroad by one railroad corporation to another, which is beyond the corporate powers of either, is unlawful and void, and cannot be made good by ratification or estoppel, so as to sustain an action upon the lease; that this is so, not only when the lease is ultra vires of the lessor corporation, and therefore open to the objection of disabling it from performing those duties to the public, its performance of which was the consideration upon which it received its charter from the state, but even if the lease is *ultra vires* of the lessee corporation only, and there-
551 ]fore not open to that particular *objection. *Thomas* v. *West Jersey R. Co.*, *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.*, *Oregon R. & Nav. Co.* v. *Oregonian R. Co.*, and *Central Transp. Co.* v. *Pullman's Palace Car Co.* above cited; *St. Louis, V. & T. H. R. Co.* v. *Terre Haute & I. R. Co.* 145 U. S. 393, 404 [36: 748, 753].

The case at bar is no less clear than those just referred to. Congress, indeed, in establishing the system of national banks, instead of undertaking to grant special charters of incorporation upon its own judgment of the expediency of doing so in each case, has allowed corporations to be organized by voluntary acts of the associates, under the general conditions defined in the statute. But the capacity of these voluntary associations to make contracts and to transact business has not been left to depend upon their own will, however formally expressed, without any public authority having ever passed upon their responsibility and fitness. On the contrary, Congress has intrusted to the Comptroller of the Currency the power and the duty of making a careful examination into the condition of the association, including the amount of its capital stock actually p d in, and its compliance with the requirements of the statute in other respects, and, if the result of his examination is satisfactory, of granting to the association an official certificate that it is authorized to commence the business of banking; and has forbidden the corporation to transact any business whatever, except so far as required to perfect its organization, until it has received the certificate of the Comptroller.

The result of the Comptroller's examination, and his certificate of that result, and of the authority thereupon granted the corporation to commence the business of banking, of course appear on the records of his office, as do the articles of association and the organization certificate previously transmitted to him. Every one dealing with the corporation is bound to take notice of the facts thus appearing on a public record, upon which, by the very terms of the national bank act, depend the right of the association to exist as a corporation, and its capacity to transact business.

The Comptroller's examination and certificate
552 ] are required, *not only for the security of those dealing with the bank, but also for the protection of the stockholders, for, without them, stockholders who had paid in the amount of their subscriptions might find themselves held liable for debts contracted by the corporation, without its having obtained the payments due from other stockholders, and otherwise complied with the requirements of the act.

One important object of Congress, in requiring the fitness of each corporation for carrying on business, with safety to its stockholders and to all persons dealing with it, to be ascertained and certified by a public officer before the corporation should have power to transact any business whatever, except to complete its organization as a corporation, doubtless was to create and maintain public confidence in the new system of national banks established by Congress to take the place of the local banks to which the people had been accustomed.

The cases on which the plaintiff principally relied are distinguishable in essential elements from the case at bar. *Whitney* v. *Wyman*, 101 U. S. 392 [25: 1050]; *Harrod* v. *Hamer*, 32 Wis. 162, and *Hammond* v. *Straus*, 53 Md. 1, depended on provisions of local statutes, differing from those of the national bank act; and in *Whitney* v. *Wyman* the corporation, after being authorized to commence business, had ratified the previous contract. *Chubb* v. *Upton*, 95 U. S. 665 [24: 523], was to the familiar point that one who has contracted with a *de facto* corporation cannot set up irregularity in its organization in defense of a suit upon the contract. *Smith* v. *Sheeley*, 79 U. S. 12 Wall. 358 [20: 430], merely held that when land had been conveyed for full value to a *de facto* corporation, the grantor and those claiming under him could not afterwards deny its capacity to take the title. *Union Nat. Bank* v. *Matthews*, 98 U. S. 621 [25: 188], and *National Bank* v. *Whitney*, 103 U. S. 99 [26: 443], depended upon U. S. Rev. Stat. § 5137, specifying the purposes for which a national bank might purchase, hold, and convey real estate, which, as construed by the court, did not make void mortgages taken for other purposes by a banking association authorized to transact business. See also *Fritts* v. *Palmer*, 132 U. S. 282, 293 [33: 317, 321], and cases cited; *Thompson* v. *St. Nicholas Nat. Bank*, 146 U. S. 240, 251 [36: 956, 961].

*The present case is not one of irregu-[553
larity of organization, or of abuse of a legal power, but of an attempt to exercise a power expressly prohibited by statute.

The lease sued on having been executed by the defendant, contrary to the express prohibition of the statute, which peremptorily forbade the corporation to transact any business, unless to perfect its organization, and thus denied it the capacity of entering into any contract whatever except in perfecting its organization, the lease is void, cannot be made good by estoppel, and will not support an action to recover anything beyond the value of what the defendant has actually received and enjoyed. *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 54–61 [35: 55, 67–69]; *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67 [35: 107].

The plaintiff, who by the judgment below has recovered rent at the rate stipulated in the



Digitized by Google

lease for all the time of the defendant's occupation, as well as all that the defendant had agreed to pay towards the repairs, has certainly no ground of complaint; and the defendant, not having sued out a writ of error, is in no position to object to the amount recovered.

*Judgment affirmed.*

---

DAVID G. SWAIM, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 553-568.)

*Court martial—prosecutor—sentence cannot be collaterally attacked—decision, when not reviewed—questions of procedure—effect of its judgment—returning proceedings—pay of officer.*

1. The President of the United States as commander-in-chief has the power to validly convene a general court-martial, even where the commander of the accused officer to be tried is not the accuser; U. S. Rev. Stat. § 1342, does not restrict such power.

2. The President is not shown to be the accuser or prosecutor of a person tried by court-martial merely because, on an accusation made by another person to the Secretary of War, the President appoints a court of inquiry and on its report by order of the Secretary of War refers the subject to an officer with directions to prepare charges and specifications, and afterwards appoints a general court-martial to hear them.

3. A sentence by court-martial held by officers inferior in rank to the accused cannot be collaterally attacked on the ground that the 79th article of war, providing that an officer shall not be tried by officers inferior to him in rank when it can be avoided, was violated, since it must be presumed that the officers to compose the court-martial were detailed in pursuance of law.

4. The decision of a court-martial in determining the validity of a challenge of the right of an officer to sit on the trial because of his enmity and dislike toward the accused cannot be reviewed by the court of claims in a collateral action.

5. Questions of procedure—such as errors in the admission or exclusion of evidence and permitting a person to act as judge advocate who was not properly appointed or sworn—cannot constitute grounds of collateral attack on the decision of a court-martial.

6. Where a court-martial has jurisdiction of the person accused and of the offense charged, and has acted within the scope of its lawful powers, its proceedings and sentence cannot be reviewed or set aside by the civil courts.

7. The claim that no offense was shown by the facts before a court-martial cannot be effectual to avoid the sentence on collateral attack in a civil court.

8. The action of the President in twice returning proceedings to a court-martial, urging a more severe sentence, is justified by the Army Regulations of 1881, § 923, which have superseded the provision in the British mutiny act prohibiting any recommendation of the increase of a sentence, if that provision was ever in force in this country.

9. An officer in the army suspended from duty is not entitled to emoluments or allowances.

[No. 33.]

*Argued January 7, 1897. Decided March 1, 1897.*

APPEAL from a judgment of the Court of Claims dismissing the petition of David G. Swaim, to declare void the proceedings and sentence of a court-martial suspending him from rank and duty and forfeiting one half of his pay for certain years, and for judgment against the United States for the amount of his pay and allowances retained in pursuance of said sentence. *Affirmed.*

See same case below, 28 Ct. Cl. 173.

Statement by Mr. Justice **Shiras:**

On February 28, 1891, David G. Swaim filed in the court of claims a petition against the United States, alleging that he was on the 30th day of June, 1884, and still was, judge advocate general of the army of the United States, with the rank, pay, and allowance of a brigadier general therein. He complained that, by reason of the unlawful creation and action of a certain court-martial, he had been, on February 24, 1885, suspended from rank and duty for twelve years, and that one half of his pay had been forfeited for that period. For reasons set forth in the petition, the claimant asked that the proceedings, findings, and sentence of the said court-martial should be declared to be void, and that judgment should be rendered, awarding him the amount of his pay and allowances retained in pursuance of the said sentence.

The court of claims made, upon the evidence, certain findings of fact, and, on the 27th day of February, 1893, entered a final judgment dismissing the claimant's petition. From that judgment an appeal was taken to this court.

*Messrs.* **J. H. Gillpatrick, Benjamin Butterworth,** *Julian C. Dowell,* and *David G. Swaim,* in proper person, for appellant.

*Mr.* **Judson Harmon,** Attorney General, for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

The theory of the claimant's petition was that the sentence *of the court-martial [555 was void, and hence constituted no defense to his action for his retained pay.

It was said by this court in *Dynes* v. *Hoover,* 61 U. S. 20 How. 82 [15: 845], that "with the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts."

*Keyes* v. *United States,* 109 U. S. 336 [27: 828

NOTE.—*As to naval courts-martial; jurisdiction of, as to persons and officers; how constituted, etc.,*—see note to Wilkes v. Dinsman, 12: 618.



Digitized by Google

954], was, like the present, a suit in the court of claims to recover back pay alleged to have been wrongfully retained by reason of an illegal judgment of a court martial, and the rule was laid down thus: "That the court-martial, as a general court-martial, had cognizance of the charges made, and had jurisdiction of the person of the appellant, is not disputed. This being so, whatever irregularities or errors are alleged to have occurred in the proceedings, the sentence of dismissal must be held valid when it is questioned in this collateral way," but "where there is no law authorizing the court-martial, or where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment."

In *Smith* v. *Whitney*, 116 U. S. 167 [29: 601], these cases were cited with approval, and numerous other decisions, both English and American, were cited to the same effect. We shall have occasion to revert to this case at a subsequent portion of this opinion when examining some of the objections urged to the action of the court-martial.

With these general principles in view we shall now briefly consider the several contentions urged on behalf of the appellant.

The first of these challenges the authority of [556] the President *of the United States to appoint the general court-martial in question. The argument is based on the phraseology of the 72d article of war, contained in § 1342 of the Revised Statutes, as follows:

"Any general officer, commanding the army of the United States, a separate army, or a separate department, shall be competent to appoint a general court-martial, either in time of peace or in time of war. But when any such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the President, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President for his approval or orders in the case."

It is claimed to be the legal implication of this section that the power of the President to appoint a court-martial is restricted to the single case where the commander of an officer charged with an offense is himself the accuser or prosecutor, and that, as in the present case, General Sheridan, the immediate commander of the appellant, was not the accuser or prosecutor, the right of the President to make the order convening the court-martial did not arise. In other words, the contention is that in the 72d article of war, just quoted, is found the only power of the President, as commander-in-chief of the armies of the United States, to appoint a general court-martial.

This view of the President's powers, in this particular, was asserted in *Runkle* v. *United States*, 19 Ct. Cl. 396, but was not approved by the court of claims, which held that when authority to appoint courts-martial was expressly granted to military officers, the power was necessarily vested in the commander-in-chief, the President of the United States. Chief Justice Drake, after quoting from writers on military law in support of the statement that the authority of the President to appoint general courts-martial had, in fact, been exercised from time to time from an early period, said:

"As commander-in-chief the President is authorized to give orders to his subordinates, and the convening of a court-martial is simply the giving of an order to certain officers *to [557] assemble as a court, and, when so assembled, to exercise certain powers conferred upon them by the articles of war. If this power could not be exercised, it would be impracticable, in the absence of an assignment of a general officer to command the army, to administer military justice in a considerable class of cases of officers and soldiers not under the command of any department commander, as, for example, a large proportion of the officers of the general staff, and the whole body of the retired officers."

On appeal, the judgment of the court of claims was reversed by this court on the sole ground that the record did not disclose that the sentence of the court-martial had been approved by the President, as prescribed in express terms by the 72d article of war. As this court, in its opinion, did not think fit to notice or discuss the question of the power of the President to appoint the court-martial, the case must be deemed an authority for the proposition that the court-martial had been properly convened by the order of the President as commander-in-chief.

It may be interesting to notice, as part of the history of this question, that the Senate of the United States, by a resolution adopted February 7, 1885, directed its committee on the judiciary to report, among other things, whether, under existing law, an officer may be tried before a court-martial appointed by the President in cases where the commander of the accused officer to be tried is not the accuser, and that the committee, after an examination of the question, expressed its conclusions in the following language:

"Under the present Constitution, when, for the first time, in 1806, Congress enacted a Code on the subject, it changed the imperative language of the articles of war existing under the confederation, and simply provided that any general officer commanding an army, etc., may appoint general courts-martial, thus evidently intending to confer an authority, and not to exclude the inherent power residing in the President of the United States under the Constitution. The substance of this provision has been in force ever since, and from the formation of the Constitution until the present time the committee *is advised that the Presi- [558] dent of the United States has, at all times, when in his opinion it was expedient, constituted general courts-martial.

"In this state of the history of legislation and practice, and in consideration of the nature of the office of commander-in-chief of the armies of the United States, the committee is of opinion that the acts of Congress which have authorized the constitution of general courts-martial by an officer commanding an army, department, etc., are, instead of being restrictive of the power of the commander-in-chief, separate acts of legislation, and merely provide for the constitution of general courts martial by officers subordinate to the com-



Digitized by Google

mander-in-chief, and who, without such legislation, would not possess that power, and that they do not in any manner control or restrain the commander in chief of the army from exercising the power which the committee think, in the absence of legislation expressly prohibitive, resides in him from the very nature of his office, and which, as has been stated, has always been exercised."

Without dwelling longer on this question, we approve the conclusion reached by the court of claims, that it is within the power of the President of the United States, as commander-in-chief, to validly convene a general court-martial even where the commander of the accused officer to be tried is not the accuser.

The contention that the President of the United States was, in the present case, the accuser or prosecutor of the appellant, within the meaning of the 72d article of war, is, we think, wholly unfounded. The accusation was made by one A. E. Bateman, in a letter addressed to the Secretary of War, dated April 16, 1884. Thereupon, on April 22, 1884, the President appointed a court of inquiry to examine into the accusations made in the letter of Bateman to the Secretary of War. Upon the report of the court of inquiry, by order of the Secretary of War, the subject was referred to Major R. N. Scott, with directions to prepare charges and specifications against General Swaim; and on June 30, 1884, the President appointed the [559] general court-martial which *proceeded to hear and pass upon the specifications. It is not seen how these routine orders which led to the trial of the appellant can be construed as making the President his accuser or prosecutor.

It is next contended that, even if the court-martial in the present case were validly convened by the order of the President, yet that it was constituted in violation of the 79th article of war, which provides that "officers shall be tried only by general courts-martial; and no officer shall, when it can be avoided, be tried by officers inferior to him in rank."

It appears that a majority of the court-martial as organized for the trial was composed of colonels, officers inferior in rank to the appellant, whose rank was that of brigadier general; and it is argued that the record does not affirmatively disclose that the appointment of officers inferior in rank to the accused was unavoidable by reason of some necessity of the service.

In *Martin* v. *Mott*, 25 U. S. 12 Wheat. 19 [6: 537], it was contended that, where the articles of war provided that "general courts-martial may consist of any number of commissioned officers from five to thirteen inclusively; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service;" and where the court-martial in question consisted of six officers only,—the court was not legally formed, because the government's pleading in the case did not affirmatively show that thirteen officers could not have been appointed "without manifest injury to the service."

Replying to this, the court, through Mr. Justice Story, said:

"Supposing these claims applicable to the court-martial in question, it is very clear that the act is merely directory to the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive."

In *Mullan* v. *United States*, 140 U. S. 240 [35: 489], the case was one where Mullan sued in the court of claims to recover pay as commander in the navy accruing after he had been dismissed by the sentence of a court-martial, which sentence was *alleged to be void, [560] because the court was illegally formed, in that five of its seven members were junior in rank to the accused, the 39th article for the government of the United States navy providing that in no case, where it can be avoided without injury to the service, shall more than one half, exclusive of the President, be junior to the officer to be tried. But this court, through Mr. Justice Harlan, said: "Whether the interests of the service admitted of a postponement of his trial until the court could be organized of which at least one half of its members, exclusive of the President, would be his seniors in rank, or whether the interests of the service required a prompt trial upon the charges preferred, by such officers as could be then assigned to that duty by the commander-in-chief of the squadron, were matters committed by the statute to the determination of that officer. And the courts must assume—nothing to the contrary appearing upon the face of the order convening the court—that the discretion conferred upon him was properly exercised, and, therefore, that the trial of the appellant by a court, the majority of whom were his juniors in rank, could not be avoided 'without injury to the service,'" citing *Martin* v. *Mott*, 25 U. S. 12 Wheat. 19 [6: 537].

In the present case, several considerations might have determined the selection of the members of the court, such as the health of the officers within convenient distance, or the injury to the public interests by detaching officers from their stations. The presumption must be that the President, in detailing the officers named to compose the court-martial, acted in pursuance of law. The sentence cannot be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to the accused was or was not avoidable.

Error is assigned to the court of claims in overruling an exception to the action of the court-martial in permitting, after objection made, an officer to sit on the trial whom the appellant, in the performance of his official duty, on several occasions severely criticised in official reports, and whose enmity and dislike had been thereby incurred. This error *is sufficiently disposed of by quoting the provisions of the 88th article of war: [561] "Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time." The decision of the court-martial in determining the validity of the challenge could not be reviewed by the court of claims in a collateral action.

Objections were made to the action of the court-martial in permitting a person to act as judge advocate who was not appointed by the



Digitized by Google

convening officer of the court-martial, nor sworn to the faithful performance of his duty; in receiving oral and secondary evidence of an account when books of original entry were available; in receiving evidence to implicate the accused in signing false certificates relating to money which formed no part of the subject-matter of the charges on trial; in refusing to permit evidence as to the bad character of a principal witness for the prosecution; in refusing to hear the testimony of a material witness for the defense.

It was the opinion of the court of claims that the errors so assigned could not be reviewed collaterally, and that they did not affect the legality of the sentence; and in so holding we think that court followed the authorities. Such questions were merely those of procedure, and the court-martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its proceedings and sentence cannot be reviewed or set aside by the civil courts. *Dynes* v. *Hoover*, 61 U. S. 20 How. 65 [15: 888]; *Ex parte Reed*, 100 U. S. 13 [25: 538]; *Smith* v. *Whitney*, 116 U. S. 167 [29: 601]; *Johnson* v. *Sayre*, 158 U. S. 109 [39: 914].

It is strongly urged that no offense under the 62d article of war was shown by the facts, and that the court of claims should have so found and have held the sentence void. If this position were well taken it would throw upon the civil courts the duty of considering all the evidence adduced before the courts-martial and of determining whether the accused was guilty of conduct to the prejudice of good order and military discipline in violation of the articles of war.

562] *But, as the authorities heretofore cited show, this is the very matter that falls within the province of courts-martial, and in respect to which their conclusions cannot be controlled or reviewed by the civil courts. As was said in *Smith* v. *Whitney*, 116 U. S. 178 [29: 604], "of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law. . . . Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business."

In *United States* v. *Fletcher*, 148 U. S. 84 [37: 378], will be found observations to the same effect.

It is earnestly contended that upon the fourteenth finding of the court of claims it was the duty of that court to set aside the sentence. That finding was as follows:

"The court-martial having reached a finding and having thereupon sentenced claimant upon the charges promulgated, in said general court-martial orders, No. 19, and the reviewing officer having referred to the court for trial another set of charges alleging fraud and conduct unbecoming an officer and a gentleman, under the 60th and 61st articles of war, as promulgated in general court-martial orders No. 20, of 1885, and the court-martial having heard all the evidence for the prosecution therein (except an absent witness, but with a statement as to what such witness would testify to), thus making a prima facie case against claimant, and he not having presented a defense, the reviewing authority returned the case promulgated in said court-martial order 19 to the court for reconsideration and a more severe sentence, with an opinion of the Attorney General hereinbefore set forth, which proceedings were with closed doors, and of which claimant had no notice at the time."

*In order to apprehend the legal effect[563 of this finding we should read a portion of the history of the case as stated in the opinion of the court of claims:

"The question of fraud being out of the case, and the court-martial having properly acquitted the claimant on the charge of conduct unbecoming an officer and a gentleman, imposed this sentence: 'To be suspended from rank, duty, and pay for the period of three years.' The record then went to the President and was by him referred to the Attorney General. On the 11th of February, 1885, the President returned the record to the court martial 'for reconsideration as to the findings upon the first charge only, and as to the sentence, neither of which are believed to be commensurate with the offenses as found by the court in the first and third specifications under the first charge.' The President also communicated to the court the opinion of the Attorney General, 'whose views,' he added, 'upon the matter submitted for reconsideration have my concurrence.' . . . The court-martial, notwithstanding the strictures of the Attorney General, properly adhered to its determination that the facts found did not constitute the offense charged, but it imposed a second sentence upon the accused, the language of which is as follows: 'The court, upon mature reconsideration, has not found the accused guilty of such a degree of wrongful or deceitful conduct as to justify a finding of guilty of conduct unbecoming an officer and a gentleman, and has therefore respectfully adhered to its finding upon the first charge.'"

But the court imposed the following sentence: "'To be suspended from rank and duty for one year, with forfeiture of all pay for the same period, and at the end of that period to be reduced to the grade of judge advocate with the rank of major in the judge advocate general's department.'" This sentence the President likewise disapproved, because, as he thought, that part of the sentence that provided that the accused should be reduced in rank could not be carried into effect by the Executive alone, but would require a nomination by the President and a confirmation by the Senate, and then only in case of an existing vacancy.

*"The court a third time deliberated, [564 and then imposed the sentence which was approved by the President and carried into effect, and which the claimant now attacks. It is to be



Digitized by Google

suspended from rank and duty for twelve years and forfeit one half his monthly pay every month for the same period.'"

It is claimed that the action of the President in thus twice returning the proceedings to the court-martial, urging a more severe sentence, was without authority of law, and that the said last sentence having resulted from such illegal conduct was absolutely void. This contention is based upon the proposition that the provision in the British mutiny act, which was in force in this country at the time and prior to the American Revolution, and which regulates proceedings in courts-martial, is applicable. This provision was as follows: "The authority having power to confirm the findings and sentence of a court-martial may send back such findings and sentence, or either of them, for revision once, but not more than once, and it shall not be lawful for the court on any revision to receive any additional evidence, and when the proceedings only are sent back for revision the court shall have power, without any direction, to revise the sentence also. In no case shall the authority recommend the increase of a sentence, nor shall the court-martial, on revisal of the sentence, either in obedience to the recommendation of the authority or for any other reason, have the power to increase the sentence awarded."

Even if it be conceded that this provision of the British mutiny act was at any time operative in this country, the subject is now covered by the Army Regulations, 1881, § 923, relied upon by the attorney general in his letter to the President and cited by the court of claims, which is as follows:

"When a court-martial appears to have erred in any respect, the reviewing authority may reconvene the court for a consideration of its action, with suggestions for its guidance. The court may thereupon, should it concur in the views submitted, proceed to remedy the errors pointed out, and may modify or completely change its findings. The object of reconvening the court in such a case is to afford **565** it an opportunity *to reconsider the record for the purpose of correcting or modifying any conclusions thereupon, and to make any amendments of the record necessary to perfect it."

This regulation would seem to warrant the course of conduct followed in the present case. In *Ex parte Reed*, 100 U. S. 13 [25: 538], a somewhat similar contention was made. There a court-martial had imposed a sentence which was transmitted with the record to Admiral Nichols, the revising officer, who returned it with a letter stating that the finding was in accordance with the evidence, but that he differed with the court as to the adequacy of the sentence. The court revised the sentence and substituted another and more severe sentence, which was approved. The accused filed a petition for a writ of habeas corpus in this court; and it was claimed that the court had exhausted its powers in making the first sentence, and, also, that it was not competent for the court-martial to give effect to the views of the revising officer by imposing a second sentence of more severity. The Navy Regulations were cited to the effect that the authority who ordered the court was competent to direct it to reconsider its proceedings and sentence for the purpose of correcting any mistake which may have been committed, but that it was not within the power of the revising authority to compel a court to change its sentence, where, upon being reconvened by him, they have refused to modify it, nor directly or indirectly to enlarge the measure of punishment imposed by sentence of a court-martial. This court held that such regulations have the force of law, but that as the court-martial had jurisdiction over the person and the case, its proceedings could not be collaterally impeached for any mere error or irregularity committed within the sphere of its authority; that the matters complained of were within the jurisdiction of the court-martial; that the second sentence was not void; and, accordingly, the application for a writ of habeas corpus was denied. We agree with the court of claims that the ruling in *Ex parte Reed*, *supra*, in principle, decides the present question.

We think that the court of claims did not err in holding *that wherean officer is sus- **566** pended from duty he is not entitled to emoluments or allowances. *Mileage & Commutation Cases* ("*United States* v. *Phisterer*") 94 U. S. 219 [24: 116].

We have felt constrained to, at least briefly, consider the several propositions urged upon us with so much zeal and ability on behalf of the appellant, though we might well have contented ourselves with a reference to the able and elaborate opinion of the court of claims delivered by Justice Nott. 28 Ct. Cl. 173.

As we have reached the conclusion that the court-martial in question was duly convened and organized, and that the questions decided were within its lawful scope of action, it would be out of place for us to express any opinion on the propriety of the action of that court in its proceedings and sentence. If, indeed, as has been strenuously urged, the appellant was harshly dealt with, and a sentence of undue severity was finally imposed, the remedy must be found elsewhere than in the courts of law.

*The decree of the Court of Claims is affirmed.*

---

JAMES H. DE VAUGHN *et al.*, *Appts.*,
*v.*
SARAH W. HUTCHINSON *et al.*

(See S. C. Reporter's ed. 566-578.)

*State laws govern transfer of property—rule in Shelley's Case—construction of devise.*

1. The law of a state in which land is situated governs its descent, alienation, and transfer and the effect and construction of wills and other conveyances.

2. The rule in *Shelley's Case* was introduced into Maryland as part of the common law, and has

NOTE.—*At common law, devise of lands generally, without words of perpetuity or limitation, confers a life estate only, unless there is manifest intention to give the fee; rule followed in United States unless changed by statute,*—see note to King v. Ackerman, 17: 292.

*As to precedent and subsequent conditions in wills and deeds*, see note to Taylor v. Mason, 6: 101.



Digitized by Google

continued in force in that state and in the District of Columbia.

3. A devise to a daughter for life, and at her decease to her heirs begotten of her body and to their heirs and assigns, shows an intention that her children shall become the root of a new succession and take as purchasers, and not as heirs.

[No. 114.]

*Argued October 30, 1896. Decided March 1, 1897.*

APPEAL from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of that District dismissing a suit in equity brought by James H. De Vaughn *et al.*, plaintiffs, against Sarah W. Hutchinson *et al.*, to procure a declaration that a certain devise became void and thereupon certain real estate became vested in the plaintiffs as heirs at law, etc. *Affirmed.*

See same case below, 8 App. D. C. 50.

Statement by Mr. Justice **Shiras:**

Samuel De Vaughn, a resident of the District of Columbia, died on the 5th day of July, 567]1867, leaving a last will and *testament dated April 20, 1861. This will was admitted to probate September 1, 1867, and was, as to those of its provisions which are involved in the present litigation, as follows:

"I give and bequeath unto my sister, Susan Brayfield, all my personal property of whatever description.

"Item. I give and devise unto my sister Susan Brayfield the whole square four hundred and eighty-three and improvements, also lots twenty, twenty-one, and part of lot twenty-two, in square three hundred and seventy-eight, situated in the city of Washington, during her natural life, and at her death to her daughters Mary Rebecca Brayfield, Catharine Sophia Harrison, and Martha Ann Mitchell, to be divided in the following manner, that is to say: Martha Ann shall have one half of lot twenty, as subdivided, being 73 feet deep, having on the same two houses. To Catharine Sophia, the other half (being the east half) of said lot twenty, having also on the same two houses, and Mary Rebecca shall have the corner store situated on lot twenty-one. Catharine Sophia shall have the two houses next south of said corner store on said lot twenty-one, and Martha Ann shall have the next two houses south of the two to Catharine Sophia, and adjoining the same on said lot twenty-one, and Mary Rebecca shall have the whole of that part of lot twenty-two, as subdivided from lot twenty and improvements, during their natural lives, and after their death to their heirs begotten of their bodies, and to their heirs and assigns forever.

"I also desire that square four hundred and eighty-three shall be subdivided at the death of my sister Susan Brayfield, and distributed as follows: Mary Rebecca Brayfield shall have the whole front on K street, 90 feet deep to a 10-foot alley, which comprises lots one and two, with all improvements on the same. Martha Ann Mitchell shall have 90 feet on Sixth street, running that breadth through the square to Fifth street, and Catharine Sophia Harrison shall have the remainder north portion of said square four hundred and eighty-three, during their natural lives, and at their death to be equally divided among the heirs of their bodies begotten, share and share alike, and to their heirs and assigns forever.

*"Item. I give and devise to Mary Re-[568 becca Brayfield the east part of lot nineteen, in square three hundred and seventy-eight, and all improvements on said lot, front and rear, during her natural life, and after her death to her heirs and assigns forever.

"Item. I give and devise to Catharine Sophia Harrison the east part of lot seventeen, in square three hundred and seventy-eight, including all improvements, and also that part as subdivided in the rear in said square, during her natural life, and after her death to the heirs of her body begotten, and to their heirs and assigns forever.

"Item. I give and devise to Martha Ann Mitchell, daughter of Susan Brayfield, the west part of lot eighteen in square three hundred and seventy-eight, and all improvements, including that part as subdivided in the rear on said square, and to her heirs and assigns forever.

"I give and bequeath to my mother during her natural life, out of the rents of lots Nos. twenty, twenty-one, and part of twenty two, in square three hundred and seventy-eight, and also the whole of square four hundred and eighty-three, devised to my sister Susan Brayfield, the sum of $25 per month; or, if properly provided for by my said sister, then only $5 per month for her own use as she may think proper.

"Item I give and devise to my brother John DeVaughn, in square four hundred and eight, lot D and parts of lot five in square four hundred and five, and lot two in square four hundred and eighty-seven, and all improvements, also lot eleven in square five hundred and seventeen, lots four and five in square four and five in square seven hundred and eighty-five, and to his heirs and assigns forever. All of which property is situated in the city of Washington, District of Columbia.

"Item. I give and devise to my brother William DeVaughn, of the city of Alexandria, state of Virginia, lot three in square one thousand and ninety-five, lot one in square six hundred and seventy-seven, lot four in square forty-four, lot two in square one hundred and twenty-nine. Also lots B, C, D, F, and G in square forty-three, all lying and being in the city *of Washington and District of Co-[569 lumbia, also the house and lot on Henry street in the city of Alexandria, state of Virginia, and to his heirs and assigns forever."

Martha Ann Mitchell, one of the devisees named in the will, died in the year 1866, before the death of the testator, Samuel De Vaughn, leaving as her only children and heirs at law Benjamin D. Mitchell, Richard R. Mitchell, and Sarah W. Hutchinson. Mrs. Susan Brayfield, the tenant for life, died in December, 1891.

In May, 1892, James H. De Vaughn, Emily De Vaughn, and Rebecca J. Kirk, as heirs at law of Samuel De Vaughn, brought, in the supreme court of the District of Columbia, a bill in equity against William H. De Vaughn and others, also heirs at law of Samuel De Vaughn. The purpose of the bill was to have declaration that by reason of the decease of



Digitized by Google

Martha Ann Mitchell during the lifetime of the testator the devise to her lapsed and became void, and that thereupon, upon the death of the testator and of Susan Brayfield, the real estate described in said devises became vested in the heirs at law of the said testator as if the said testator had died intestate as to said real estate; and, upon such declaration, that the said real estate should be sold and the proceeds of such sale should be distributed among the parties lawfully entitled thereto as heirs at law of the said Samuel De Vaughn.

To this bill appeared Benjamin D. V. Mitchell and others, the children of the said Martha Ann Mitchell, who were living at the death of the said testator, and who filed a demurrer to said bill. Upon argument in the supreme court of the District of Columbia, the demurrer was sustained, and, the complainants electing to stand on their said bill, a final decree was entered, dismissing the bill and awarding an account of rents and profits.

From this decree an appeal was taken to the general term, but the cause was thereafter transferred to and heard in the court of appeals of the District of Columbia, and on April 2, 1894, the decree of the supreme court was affirmed. From the decree of the court of appeals an appeal was duly prayed and allowed to this court.

*Messrs.* **H. O. Claughton** and *Chapin Brown* for appellants.

*Messrs.* **Jeremiah M. Wilson** and *A. A. Hoehling*, Jr., for appellees.

Mr. Justice **Shiras** delivered the opinion of the court:

It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. *United States* v. *Crosby*, 11 U. S. 7 Cranch, 115 [3: 287]; *Clark* v. *Graham*, 19 U. S. 6 Wheat. 577 [5: 334]; *McGoon* v. *Scales*, 76 U. S. 9 Wall. 23 [19: 545]; *Brine* v. *Hartford F. Ins. Co.* 96 U. S. 627 [24: 858].

Accordingly, in the present case, we are relieved from a consideration of the innumerable cases in which the courts in England and in the several states of this Union have dealt with the origin and application of the rule in *Shelley's Case*, 1 Coke, 88. We have only to do with that famous rule as expounded and applied by the courts of Maryland while the land in question formed part of the territory of that state, and to further inquire whether, since the cession of the lands forming the District of Columbia, there has been any change in the law by legislation of Congress.

We learn from the reported cases that the rule, as established in the jurisprudence of England before the American revolution, was introduced into Maryland as part of the common law, and has been constantly recognized and enforced by the courts of that state. *Horne* v. *Lyeth*, 4 Harr. & J. 435; *Ware* v. *Richardson*, 3 Md. 505 [56 Am. Dec. 762]; *Shreve* v. *Shreve*, 43 Md. 382; *Dickson* v. *Satterfield*, 58 Md. 317; *Halstead* v. *Hall*, 60 Md. 209.

But we also learn from those cases and other Maryland cases that might be cited, that though the rule is recognized as one of property, yet if there are explanatory and qualifying expressions, from which it appears that the import *of the technical language is con-[571 trary to the clear and plain intent of the testator, the former must yield and the latter will prevail.

Thus in the case of *Shreve* v. *Shreve*, 43 Md. 382, where there was a devise to named children of the testator, for and during their natural lives, and on the death of said children, or either of them, to his or her issue lawfully begotten, and their heirs or assigns forever, it was held that the word *issue* used in the clause cited was a word of purchase; and in the opinion it was said: "Again, there are words of limitation superadded to the gift to the issue; it is to them and *their heirs* forever. Now in the well-known case of *Luddington* v. *Kime*, 1 Ld. Raym. 203, the devise was in very nearly the same terms, *viz.*, to A for life without impeachment of waste, and in case he should have any *issue* male, then to such *issue* male and *his heirs* forever, with a limitation over in default of such issue, and the court held the testator intended the word (*issue*) should be *designatio personæ*, and not a word of limitation, '*because he added a further limitation to the issue, viz., and to the heirs of such issue forever.*' The principle deduced from this case is thus stated in 6 Cruise, Dig. 3d Am. ed. 259: 'Where an estate is devised to a person for life, with remainder to his issue, with words of limitation superadded, the word "issue" will in that case be construed to be a word of purchase.'"

The court, in *Shreve* v. *Shreve*, took notice of the fact that the case of *Luddington* v. *Kime* has been doubted, particularly by Powell in his learned work on Devises, but the Maryland court adds:

"But these views [of Powell] do not appear to have been adopted by the most recent English decisions, for in *Golder* v. *Cropp*, 5 Jur. N. S. 562, where a testator devised property to his daughter for life, and after her death to the issue of her body lawfully begotten, to hold to them and their heirs forever as tenants in common, and in default of such issue then over, it was held the daughter took but a life estate. That case was decided by Sir J. Romilly, M. R., and his opinion is thus briefly and emphatically expressed: 'I have always considered that where an estate is given to the *ancestor, and there is a direction that it is [572 afterwards to go to the issue of his body, and the mode in which the issue are to take is specified, with the words added giving them the absolute interest, there the ancestor takes an estate for life and not an estate tail, although there is a devise over in the event of the ancestor not having any issue. No one can doubt that the word "issue" is here used as equivalent to "children." I am of opinion the daughter takes an estate for life, and that her issue take as purchasers an estate in fee simple as tenants in common.'

"So in the still more recent case of *Bradley* v. *Cartwright*, L. R. 2 C. P. 511, it was held that where an estate is given for life and the remainder to the issue is accompanied by words of distribution and by words which would con-



Digitized by Google

vey an estate in fee or in tail to the issue, the estate of the first taker is limited to an estate for life; and that, whether the estate is given in fee to the issue by the usual technical words, heirs of the body, or by implication.

"It may be, as stated by Mr. Powell, that subsequent decisions in England have in effect overruled *Luddington* v. *Kime*, 1 Ld. Raym. 203, and that at the present time the will before us would receive a different construction in the English courts, but we have been referred to no decision in this country, nor are we aware of any, in which that case has been overruled or its authority questioned. It is, with others, cited by Chancellor Kent as authority for the position that where the testator superadds words of explanation, or fresh words of limitation, and a new inheritance is grafted upon the heirs to whom he gives the estate, the case will be withdrawn from the operation of the rule. 4 Kent, Com. 221. It meets an approving reference in the very able opinion of Yeates, J., in *Findlay* v. *Riddle*, 3 Binn. 156 [5 Am. Dec. 355], where there was a devise to A for life, and if he died leaving lawful issue to his heirs as tenants in common and their respective heirs and assigns, and the court held that A took only an estate for life with a contingent remainder to his heirs.

"But what is more important to the decision of this case is the fact that the doctrine of *Lud-*[573]*dington* v. *Kime*, *supra*, and other *similar cases, has been repeatedly recognized and approved by the courts of this state. Thus, in *Horne* v. *Lythe*, 4 Harr. & J. 435, a case which Chancellor Kent cites as containing a learned and accurate exposition of the rule under all its modifications and exceptions, we find an exception to its operation thus stated: 'So where the persons to take cannot take as heirs by the description by reason of a distributive direction incompatible with a course of descent, as were gavelkind lands, were devised to A and the heirs of her body lawfully to be begotten, as well males as females, and to their *heirs and assigns forever*, to be equally divided between them, share and share alike, as tenants in common and not as joint tenants; in this case it was held that the words 'heirs of the body' did not operate as words of limitation because they were corrected or explained by the words which followed, and were irreconcilable with the notion of descent, and *also because there were words of fee ingrafted on the words of limitation*, which showed that the estates given to the children and not the estate of A were to be the groundwork of succession of heirs, or, in other words, that the children of A were to be the *termini* for the succession to take its course from.'

"Again, in *Lyles* v. *Digges*, 6 Harr. & J. 373 [14 Am. Dec. 281], we find approval of *Backhouse* v. *Wells* [1 Eq. Cas. Abr. 184] (another case that Mr. Powell insists has been overruled in England), in reference to which the court says: 'The devise was to one for life, and after his decease to the issue male of his body, and to the heirs male of the bodies of such issue, and the first taker was held to have only an estate for life, the word "issue" not being *ex vi termini* a word of limitation, and the *words of limitation grafted upon it*, as in this case, showing that it was used as a word of purchase and as descriptive of the person who was to take the estate tail.'

"In *Chelton* v. *Henderson*, 9 Gill, 432, the testator devised land to his son for life, and if he should have lawful issue of his body, then such issue, after the son's death, to have the land in fee tail, and if the son died without such issue, then over, and it was held the son took but a life estate. In the opinion prepared by Judge Magruder in that case (which is reported *in a note to *Simpers* v. *Simpers*, [574 15 Md. 191), he says: 'In the case now to be decided there are words superadded to the word "issue" quite sufficient to give them the inheritance, and the law is, that where an estate is devised to a person for life, with remainder to his issue, with words of limitation superadded, the word "issue" will, in that case, be construed to be a word of purchase,' which is the doctrine of *Luddington* v. *Kime*, *supra*, cited from Cruise's Digest. . . .

"After this repeated and recent recognition by our predecessors of this rule of construction derived from *Luddington* v. *Kime*, *supra*, and other like cases in the earlier English reports, we are constrained to hold that it applies to and governs that part of that clause of this will which we have thus far considered, even though we may be of opinion a different construction would be given to it by the courts of England. Having thus determined the word 'issue' is here used as a word of purchase, it is clear it must bear the same construction when used in the immediately following sentence, 'and if any of said children shall die without issue lawfully begotten, I give, devise, and bequeath his or her portion to the surviving child or children and their issue and to the heirs of said issue forever.' In other words, the portion given to each child for life goes, in case he dies without leaving children, in the same way as the original share, that is, to the surviving children for life, and upon their death to their issue in fee."

We have extracted such large portions of the opinion in this case of *Shreve* v. *Shreve*, 43 Md. 382, because it plainly shows that the will before us in the present case would have been construed by the supreme court of the state of Maryland as creating a life estate only in Martha Ann Mitchell and an estate in fee in the heirs of her body begotten. It is true that the words in *Shreve* v. *Shreve* were "*issue* lawfully begotten," but the case of *Horne* v. *Lythe*, 4 Harr. & J. 435, is approved, where the words "the heirs of her body lawfully to be begotten," were similarly construed.

In *Clarke* v. *Smith*, 49 Md. 117, the court, by Alvey, J., stated the rule as follows:

"It is a well-settled rule of construction that technical *words of limitation used in a [575 devise, such as 'heirs' generally, or 'heirs of the body,' shall be allowed their legal effect, unless, from subsequent inconsistent words, it is made perfectly plain that the testator meant otherwise. Or, to use the language of Lord Eldon, in *Jesson* v. *Doe*, *Wright*, 2 Bligh, 1, the words 'heirs of the body' will indeed yield to a particular intent that the estate shall be only for life, and that may be from the effect of superadded words, or any expression showing the particular intent of the testator, but that must be clearly intelligible and unequivocal."



Digitized by Google

Though these decisions were made since the lands in question in this case became part of the District of Columbia, yet their reasoning is based upon the history of the law in Maryland ever since that state became independent, and we are therefore warranted in the conclusion that the law as laid down in the cited cases was the law when the state of Maryland ceded to the United States the territory now embraced in the city of Washington and District of Columbia.

It is not claimed that there has been any legislation by the Congress of the United States which has modified or changed the law in this particular as it was when the lands in question were subject to the law of Maryland.

Nor do we find that there has been any attempt by the courts of the District to lay down a different rule. What is the law of those courts we learn from the opinion of the court of appeals filed in this case, reported in 3 App. D. C. 50, where the doctrine was thus stated:

"It is certainly a well settled principle in the law of real property, indeed as well settled as the rule in *Shelley's Case*, 1 Coke, 88, itself, that where an estate is expressly devised to a person for life, with remainder to the *heirs of his body*, and there are words of explanation annexed to such word 'heirs,' from whence it may be collected that the testator meant to qualify the meaning of the word 'heirs,' and not to use it in a technical sense, but as descriptive of the person or persons to whom he intended to give his estate, after the death of the first devisee, the word 'heirs' will, in such case, operate as a word of purchase."

576] *As this opinion was delivered by a judge who was but recently the chief justice of the court of appeals of Maryland, it may not be out of place to quote what he says respecting the law of that state:

"In the courts of Maryland, where the law of real property is supposed to be the same as that which prevails in this District, except as it may have been changed by positive legislation since the cession by that state, the same principle of construction has been fully recognized and applied in numerous cases. . . . This will clearly appear upon examination of the cases of *Horne* v. *Lyeth*, 4 Harr. & J. 435; *Chelton* v. *Henderson*, 9 Gill, 432; *Shreve* v. *Shreve*, 43 Md. 382; *Fulton* v. *Hurman*, 44 Md. 263; and *Clarke* v. *Smith*, 49 Md. 117."

The case of *Daniel* v. *Whartenby*, 84 U. S. 17 Wall. 639 [21: 661], was cited by the court below, and is discussed in the briefs of the respective counsel. The syllabus of the case is as follows:

"A testator gave his estate, both real and personal, to his son R. T., 'during his natural life, and after his death to his issue, by him lawfully begotten of his body, to such issue, their heirs and assigns forever.' In case R. T. should die without lawful issue, then, in that case, he devised the estate to his own widow and two sisters 'during the natural life of each of them, and to the survivor of them,' and after the death of all of them to J. W., his heirs and assigns forever; with some provisions in case of the death of J. W. during the lifetime of the widow and sisters. *Held*, that the rule in *Shelley's Case*, 1 Coke, 88, did not apply, and that the estate in R. T., the first taker, was not a fee tail, but was an estate for life, with remainder in fee to the issue of his body, contingent upon the birth of such issue, and in default of such issue remainder for life to his widow and two sisters, with remainder over in fee, after their death, to J. W."

This case came up on a writ of error to the circuit court of the United States for the district of Delaware, and it is noticeable that the reasoning of this court did not proceed upon the law as expounded by the courts of that state, but rather upon a general view of the English and American cases. Still, as the judgment of the circuit court was af- [577 firmed, we may well suppose that the conclusion reached in this court was in conformity with the law as applied in the state of Delaware.

The rule extracted from the cases was thus stated by Mr. Justice Swayne:

"In considering it [the rule in *Shelley's Case*, 1 Coke, 88] with reference to the present case a few cardinal principles, as well settled as the rule itself, must be kept in view. In construing wills, where the question of its application arises, the intention of the testator must be fully carried out, so far as it can be done consistently with the rules of law, but no further. The meaning of this is, that the testator has used technical language, which brings the case within the rule, a declaration, however positive, that the rule shall not apply, or that the estate of the ancestor shall not continue beyond the primary express limitation, or that his heirs shall take by purchase and not by descent, will be unavailing to exclude the rule and cannot affect the result. But if there are explanatory and qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield and the latter will prevail."

And, after examining the language used, the conclusion was thus expressed:

"We entertain no doubt that the testator intended to give a life estate only to Richard, and a fee simple to his issue, and that they should be the springhead of a new and independent stream of descent. We find nothing in the law of the case which prevents our giving effect to that intent."

We agree with the court below that the reasoning of the case of *Daniel* v. *Whartenby*, *supra*, if applicable to the present case, would sustain the construction put upon the will of Samuel De Vaughn by the supreme court of the District.

But even if that case be regarded as declaratory only of the law of Delaware, its principles were followed and applied in the subsequent case of *Green* v. *Green*, 90 U. S. 23 Wall. 486 [23: 75], involving the construction of a conveyance of lands situated in the District of Columbia, and where the cases of *Daniel* v. *Whartenby*, 84 U. S. 17 Wall. 639 [21: [578 661], and *Ware* v. *Richardson*, 3 Md. 505 [56 Am. Dec. 762], were both approved.

We therefore think it clear that, under the law as declared in the courts of Maryland and of the District of Columbia, Martha Ann Mitchell took a life estate only, and that her children took an estate in fee.

In the view that we have taken of the case we are not called upon to reinforce the reason-



Digitized by Google

ing of the cases cited, but we shall add a single observation in application of Chancellor Kent's statement of an exception to the rule. 4 Kent, Com. 6th ed. 221. The word "heirs" in order to be a word of limitation, must include all the persons in all generations belonging to the class designated by the law as "heirs." But the devise here was to Martha Ann for life, and at her decease to her heirs begotten of her body and to *their* heirs and assigns—a restricted class of heirs,—and this limitation shows that it was the intention of the testator that Martha Ann's children should become the root of a new succession, and take as purchasers and not as heirs.

*The decree of the court below is affirmed.*

---

## E. ALLGEYER *et al.*, *Plffs. in Err.*, *v.* STATE OF LOUISIANA.

(See S. C. Reporter's ed. 578-592.)

*Right of citizen—right to contract—insurance without the state.*

1. The right of a citizen of a state to send a notification by mail to an insurance company in another state, which is not authorized to do business in the state where he resides, in order that insurance previously provided for by a valid contract made and to be performed outside the state might attach to the property specified in a shipment mentioned in the notice, although the property was then within the state, cannot be prohibited by a state statute, since that right is included in the "liberty" of the citizen which is protected against deprivation without due process of law.
2. The privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, embraces the right to make all proper contracts in relation thereto.
3. The statute No. 66 of La. Laws 1894 is unconstitutional, when construed to prevent an owner of cotton in that state from sending to an insurance company of another state, not authorized to do business in Louisiana, an order by mail for insurance on the cotton to be shipped to a foreign port, in pursuance of a valid contract for such insurance previously made and to be performed in the other state.

[No. 446.]

*Submitted January 6, 1897. Decided March 1, 1897.*

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment in favor of the State of Louisiana, plaintiff, against E. Allgeyer *et al.*, for the recovery of a fine of $1,000 for a violation of the Louisiana statute of 1894, No. 66, to prevent persons from dealing with marine insurance companies that have not complied with such statute. *Reversed*, and case remanded for further proceedings.

See same case below, 48 La. Ann. 104.

Statement by Mr. Justice **Peckham:**

The legislature of Louisiana, in the year 1894, passed an act known as act No. 66 of the Acts of that year. It is entitled "An Act to Prevent Persons, Corporations, or Firms from Dealing with Marine Insurance Companies That Have Not Complied with Law."

The act reads as follows: "*Be it enacted by the General Assembly of the State of Louisiana*, That any person, firm, or corporation who shall fill up, sign, or issue in this state any certificate of insurance under an open marine policy, or who in any manner whatever does any act in this state to effect for himself, or for another, insurance on property then in this state, in any marine insurance company which has not complied in all respects with the laws of this state, shall be subject to a fine of $1,000 for each offense, which shall be sued for in any competent court by the attorney general for the benefit of the charity hospitals in New Orleans and Shreveport."

By reason of the provisions of this act, the state of Louisiana on the 21st of December, 1894, filed its petition in one of the courts of first instance for the parish of Orleans, and alleged, in substance, that the defendants, E. Allgeyer & Co., had violated the statute by mailing in New Orleans a letter of advice or certificate of marine insurance on the 27th of October, 1894, to the Atlantic Mutual Insurance Company of New York, advising that company of the shipment of 100 bales of cotton to foreign ports in accordance with the terms of an open marine policy, etc. The state sought to recover for three violations of the act the sum of $3,000.

The defendants filed an answer, in which, among other things, they averred that the above-named act was unconstitutional in that it deprived them of their property without due process of law, and denied them the equal protection of the laws in violation of the Constitu- [580 tion of the state of Louisiana and also of the Constitution of the United States. They also set up that the business concerning which the defendants were sought to be made liable, and the contracts made in reference to such business, were beyond the jurisdiction of the state of Louisiana and that the defendants were not amenable to any penalties imposed by its laws; that the contracts of insurance made by defendants were made with an insurance company in the state of New York, where the premiums were paid, and where the losses thereunder, if any, were also to be paid; that the contracts were New York contracts, and that under the Constitution of the United States the defendants had the right to do and perform any act or acts within the state of Louisiana which might be necessary and proper for the execution of those contracts, and that in so far as the act No. 66 of the general assembly of the state of Louisiana of the year 1894 might be construed to prevent or interfere with the execution of such contracts, the same was unconstitutional and in violation of the Constitution of both the state of Louisiana and the United States.

The case was tried upon an agreed statement of facts, as follows: The Atlantic Mutual Insurance Company is a corporation created by the laws of the state of New York and domiciled and carrying on business in that state, and the defendants made a contract with that company for an open policy of marine insurance for $200,000, on account of themselves, and to cover cotton in bales purchased and



Digitized by Google

shipped by them on which drafts might be drawn for the purchaser, upon "Whom It Might Concern." By the terms of the policy, among other things, it was stated: "Shipments applicable to this policy, to be reported to this company by mail or telegraph the day purchased, warranted not to cover cotton in charge of carriers on shore or during inland transportation. No risk is to be insured by this policy until a letter signed by ———, and addressed to the president of this company, detailing the name of the vessel, particulars of the shipment, with description of the property and amount to be insured, is deposited in the **581**]postoffice at———, which must be *done while the property is in good safety, and in all cases prior to the departure of the risk from ——; a duplicate of such letter to be sent by the following mail. A new and separate policy to be issued for each risk, the premium on which is to be paid in cash upon the delivery of such policy in New York to E. Allgeyer & Company."

The Atlantic Mutual Insurance Company is engaged in the business of marine insurance, and has appointed no agent in the state of Louisiana, and has not complied with the conditions required by the laws of that state for the doing of business within the same by insurance companies incorporated and domiciled out of the state.

On the 23d of October, 1894, the defendants mailed to that company a communication, stating insurance was wanted by defendants for account of same (the open policy), loss, if any, payable at Paris in French currency, etc., for $3,400 on 100 bales of cotton, which, at the time of the communication, were within the state of Louisiana. The premiums to be paid under the contract of insurance and the loss or losses under the same were payable in the city of New York, the premiums being remitted by the defendants from New Orleans by exchange.

Defendants are exporters of cotton from the port of New Orleans to ports in Great Brita[illegible] and on the continent of Europe; they sell [illegible] ton in New Orleans to purchasers at said [illegible] For the price of every sale of cotton ma[illegible] them they, in accordance with the g[illegible] custom of business, draw a bill of exc[illegible] against the purchaser, attaching to th[illegible] the bill of lading for the cotton and [illegible] on the Atlantic Mutual Insurance C[illegible] for a new and separate policy of i[illegible] spoken of in the open policy, and t[illegible] the said order is as follows:

Attached to draft No. —— on [illegible] E. Allgeyer & Co., New Orleans, [illegible] lantic Mutual Ins. Co., New Yor[illegible]

Marks and numbers, ———.

Please deliver to —— ——— o[illegible] **582**] policy *for $—— on —— per ——— from New Orleans t[illegible]

Respectfully,

(Signed) E. A[illegible]

Pe[illegible]

This bill of exchange, with [illegible] attached, is sometimes negoti[illegible] in the city of New York; so[illegible] negotiated at all, but forw[illegible] collection from the purchas[illegible] The bill of exchange, with bi[illegible]

order for insurance attached, in either case is sent from New Orleans first to New York, where, after its negotiation or before being forwarded from thence for collection, the order for insurance is presented to the Atlantic Mutual Insurance Company. Upon this showing the insurance company in New York issues and delivers to the holder of the exchange and bill of lading when the former had been negotiated, or to the agent of defendant when the exchange has not been negotiated, a new and a separate policy of insurance for the cotton, in accordance with the contract made with the defendants and evidenced by the policy above mentioned and described. This new and separate policy, when received, is attached to the bill of exchange. The exchange cannot be negotiated in New York unless it is accompanied by both the bill of lading and order for insurance, and unless the new and separate policy issued by the company is attached to it the purchaser of the cotton is under no obligation to pay the bill drawn on him for the price of the cotton. The new and separate policy delivered to the holder of the exchange and bill of lading in New York, or to defendants' agent there, as the case may be, is for the benefit of the holder of the latter, or of defendants, according as the exchange has been negotiated or not. The holder of the exchange becomes the owner of the cotton covered by the bill of lading attached and is the owner of the policy of insurance covering the same, in the event of a loss within the terms of the policy.

The business thus described is conducted as above by the general custom and agreement of all parties concerned.

The court of first instance before which the trial was had ordered that plaintiff's de[illegible]and be rej[illegible]ted and that judgment in favor [illegible]e pur- def[illegible]ts be given. An appeal w[illegible]s is its f[illegible] judgment to the supr[illegible]ance com- [illegible]hich, after argumen[illegible] with the laws [illegible]tion, reversed [illegible] within its limits. [illegible] and gav[illegible]id no business within [illegible]or $1 [illegible]tracts were not therein [illegible]

[illegible]rt of Louisiana says that [illegible]ithin that state, the letter [illegible]n act therein done to [illegible] property then in the [illegible]ance company which [illegible] laws, and such act [illegible] the statute. As [illegible]ute is a violation [illegible] Federal Consti- [illegible] defendants of [illegible]f law. The [illegible]ot become [illegible]onsistent [illegible] of the [illegible]mend- [illegible]izen [illegible] of [illegible] is

[illegible]and [illegible] of the [illegible]as taken [illegible]me court of [illegible] before it and [illegible] the judgment of [illegible]e judgment in favor [illegible]00, as for one violation [illegible] the only one which was [illegible] Allgeyer, 48 La. Ann. 104. [illegible]n error ask a review in this [illegible]dgment entered against them by the supreme court of Louisiana.

[illegible] Branch K. Miller for plaintiffs in [illegible]essrs. M. J. Cunningham, Attorney [illegible]neral of Louisiana, and E. Howard Mc[illegible]aleb for defendant in error.

Mr. Justice Peckham delivered the opinion of the court:

There is no doubt of the power of the state to prohibit foreign insurance companies from doing business within its limits. The state can impose such conditions as it pleases upon the doing of any business by those companies within its borders, and unless the conditions complied with the prohibition may be ab- The cases upon this subject are cited [illegible]ion of the court in *Hooper* v. *Cali-* [illegible] S. 648 [39: 297]. [illegible] prohibition in regard to [illegible]ompanies doing business



Digitized by Google

within the state of Louisiana is to be found in article 286 of the Constitution of that state, which reads as follows: "No foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the state upon whom process may be served."

It is not claimed in this suit that the Atlantic Mutual Insurance Company has violated this provision of the Constitution by doing business within the state.

584] *In *State* v. *Williams*, 46 La. Ann. 922, the supreme court of that state held that an open policy of marine insurance, similar in all respects to the one herein described, and made by a foreign insurance company, not doing business within the state and having no agent therein, must be considered as made at the domicil of the company issuing the open policy, and that where in such case the insurance company had no agent in Louisiana it could not be considered as doing an insurance business within the state.

The learned counsel for the state also admits in his brief the fact that the contract (*i. e.*, the open policy) was entered into at New York city.

In the course of the opinion delivered in this case by the supreme court of Louisiana that court said:

"The open policy in this case is conceded to be a New York contract; hence the special insurance effected on the cotton complained of here was a New York contract. . . .

The question presented is the simple proposition whether under the act a party while in the state can insure property in Louisiana in a foreign insurance company, which has not complied with the laws of the state, under an open policy, the special contract or insurance and the open policy being contracts made and entered into beyond the limits of the state. . . . We are not dealing with the contract. If it be legal in New York, it is valid elsewhere. We are concerned only with the fact of its having been entered into by a citizen of Louisiana while within her limits affecting property within her territorial limits. It is the act of the party, and not the contract, which we are to consider. The defendants who made the contract did so while they were in the state, and it had reference to property located within the state. Such a contract is in violation of the laws of the state, and the defendants who made it were within the jurisdiction of the state, and must be necessarily subject to its penalties, unless there is some inhibition in the Federal or state Constitution, or that it violates one of those inalienable rights 585]relating *to persons and property that are inherent, although not expressed in the organic law. It does not forbid the carrying on by the insurance company of its legalized business within the state. It is a means of preventing its doing so without subscribing to certain conditions which are recognized as legitimate and proper. It does not destroy the constitutional right of the citizens of New York to do business within the state of Louisiana or of the citizens of Louisiana from insuring property. It says to the citizens of New York engaged in insurance business that they must, like its own citizens, pay a license and have an authorized agent in the state as prerequisite to their doing said business within its state, and says to its own citizens: You shall not make a contract, while in the state, with any foreign insurance company which has not complied with the laws. You shall not in this manner contravene the public policy of the state in aiding and assisting in the violation of the laws of the state. The sovereignty of the state would be a mockery if it had not the power to compel its citizens to respect its laws. . . . The defendants while in the state undoubtedly insured their property located in the state in a foreign insurance company under an open policy. The instant the letter or communication was mailed or telegraphed the property was insured. The act of insurance was done within the state and the offense denounced by the statute was complete. . . . There is in the statute an apparent interference with the liberty of defendants in restricting their rights to place insurance on property of their own whenever and in what company they desired; but in exercising this liberty they would interfere with the policy of the state, in forbidding insurance companies which have not complied with the laws of the state from doing business within its limits. Individual liberty of action must give way to the greater right of the collective people in the assertion of well-defined policy, designed and intended for the general welfare."

The general contract contained in the open policy, as well *as the special insurance[586 upon each shipment of goods of which notice is given to the insurance company, being contracts made in New York and valid there, the state of Louisiana claims notwithstanding such facts that the defendants have violated the act of 1894, by doing an act in that state to effect for themselves insurance on their property then in that state in a marine insurance company which had not complied in all respects with the laws of that state, and that such violation consisted in the act of mailing a letter or sending a telegram to the insurance company in New York describing the cotton upon which the defendants desired the insurance under the open marine policy to attach. It is claimed on the part of the state that its legislature had the power to provide that such an act should be illegal and to subject the offender to the penalties provided in the statute. It is said by the supreme court that the validity of such a statute has been decided in principle in this court in the case of *Hooper* v. *California*, 155 U. S. 648 [39: 297].

We think the distinction between that case and the one at bar is plain and material. The state of California made it a misdemeanor for a person in that state to procure insurance for a resident of the state from an insurance company not incorporated under its laws, and which had not filed a bond required by those laws relative to insurance. Hooper was a resident of San Francisco, and was the agent of the firm of Johnson & Higgins, who were insurance brokers residing and having their principal place of business in the city of New York, but having also a place of business in the city and county of San Francisco, of which the defendant had charge as their employee and



Digitized by Google

agent. In response to a request from a Mr. Mott, a resident of the state of California, the defendant Hooper procured through his principals, Johnson & Higgins, an insurance upon the steamer Alliance, belonging to said Mott, in the China Mutual Insurance Company, which was a company not then and there incorporated under the laws of California, and not having itself or by its agent filed the bond required by those laws relating to insurance. The policy was delivered by the defendant Hooper 587] to Mott, the insured, at *San Francisco, who thereupon paid Hooper, as agent of Johnson & Higgins, the premium for the insurance. The case states that "all the verbal acts of Mott, the insured, and also of the defendant, and all his acts as agent in procuring said insurance, were done in the city and county of San Francisco." The court held that the whole transaction amounted to procuring insurance within the state of California by Hooper, residing there, and for a resident in the state, from an insurance company not incorporated under its laws and which had not filed the bond required by the laws of the state relative to insurance; that Hooper, the defendant, acted as the agent of his principals in New York city, who were average adjusters and brokers there, and who had a place of business in San Francisco, and that Hooper, as such broker, having applied for the insurance to his principals in New York city, received the policy from them for delivery in San Francisco, and the premium was there paid.

Upon the question as to the place where the contract was made, Mr. Justice White, speaking for the court, said: "It is claimed, however, that, irrespective of this [commerce] clause, the conviction here was illegal, first, because the statute is by its terms invalid, in that it undertakes to forbid the procurement of a contract outside of the state; and, secondly, because the evidence shows that the contract was in fact entered into without the territory of California. The language of the statute is not fairly open to this construction. It punishes 'every person who in this state procures or agrees to procure for a resident of this state any insurance,' etc. The words 'who in this state' cannot be read out of the law in order to nullify it under the Constitution."

In the case before us the contract was made beyond the territory of the state of Louisiana, and the only thing that the facts show was done within that state was the mailing of a letter of notification, as above mentioned, which was done after the principal contract had been made.

The distinction between a contract made within and that made without the state is again referred to by Mr. Justice White in the same 588]case as follows: "It is said that the *right of a citizen to contract for insurance for himself is guaranteed by the 14th Amendment, and that, therefore, he cannot be deprived by the state of the capacity to so contract through an agent. The 14th Amendment, however, does not guarantee the citizen *the right to make within his state, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the state. The proposition that, because a citizen might make such a contract for himself beyond the confines of his state, therefore he might authorize an agent to violate in his behalf the laws of his state, within her own limits, involves a clear non sequitur, and ignores the vital distinction between acts done within and acts done beyond a state's jurisdiction.*"

We do not intend to throw any doubt upon or in the least to shake the authority of *Hooper v. California*, 155 U. S. 648 [39: 297], but the facts of that case and the principle therein decided are totally different from the case before us. In this case the only act which it is claimed was a violation of the statute in question consisted in sending the letter through the mail notifying the company of the property to be covered by the policy already delivered. We have then a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the state of Louisiana, being made and to be performed within the state of New York, where the premiums were to be paid and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the state of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the state. It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent.

It is natural that the state court should have remarked that there is in this "statute an apparent interference with the liberty of defendants in restricting their rights to *place insur-[589 ance on property of their own whenever and in what company they desired." Such interference is not only apparent, but it is real, and we do not think that it is justified for the purpose of upholding what the state says is its policy with regard to foreign insurance companies which had not complied with the laws of the state for doing business within its limits. In this case the company did no business within the state, and the contracts were not therein made.

The supreme court of Louisiana says that the act of writing, within that state, the letter of notification, was an act therein done to effect an insurance on property then in the state, in a marine insurance company which had not complied with its laws, and such act was therefore prohibited by the statute. As so construed we think the statute is a violation of the 14th Amendment of the Federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper,



Digitized by Google

necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

It was said by Mr. Justice Bradley in *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 762 [28: 585, 589], in the course of his concurring opinion in that case, that "the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal that they are endowed by their Creator with certain inalienable 590]rights; and among these are life, *liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." Again, on page 764 [589], the learned justice said: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." And again, on page 765 [590]: "But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him, to a certain extent, of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen." It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word "liberty" as contained in the 14th Amendment.

Again, in *Powell* v. *Pennsylvania*, 127 U. S. 678, 684 [32: 253, 256], Mr. Justice Harlan, in stating the opinion of the court, said: "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the 14th Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law." It was there held, however, that the legislation under consideration in that case did not violate any of the constitutional rights of the plaintiff in error.

The foregoing extracts have been made for the purpose of showing what general definitions have been given in regard to the meaning of the word "liberty" as used in the amendment, but we do not intend to hold that in no such case can the state exercise its police power. When and how far such power may be legitimately exercised with regard to these subjects may be left for determination to each case as it arises.

Has not a citizen of a state, under the provisions of the Federal Constitution above men-591]tioned, a right to contract outside *of the state for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of *Hooper* v. *California*, 155 U. S. 648 [39: 297], and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the state, and as such was a valid and proper contract. The act done within the limits of the state under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the state to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution.

In the privilege of pursuing an ordinary calling or trade and of acquiring, holding, and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the state as contained in the statutes, yet the power does not and cannot extend to prohibiting the citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction; nor can the *state [592 legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the state. The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it. *Milliken* v. *Pratt*, 125 Mass. 374 [28 Am. Rep. 241]; *Tilden* v. *Blair*, 88 U. S. 21 Wall. 241 [22: 632]. The contract in this case was thus made. It was a valid contract, made outside of the state, to be performed outside of the state, although the subject was property temporarily within the state. As the contract was valid in the place where made and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the state, any prohibition of the state statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract which the state had no right or jurisdiction to prevent its



Digitized by Google

citizens from making outside the limits of the state.

The Atlantic Mutual Insurance Company of New York has done no business of insurance within the state of Louisiana and has not subjected itself to any provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the property of its citizens, even if that property were in the state of Louisiana, and correlatively the citizens of Louisiana had the right without the state of entering into contract with an insurance company for the same purpose. Any act of the state legislature which should prevent the entering into such a contract, or the mailing within the state of Louisiana of such a notification as is mentioned in this case, is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, in his 593] right to contract and to *carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the state.

In such a case as the facts here present the policy of the state in forbidding insurance companies which had not complied with the laws of the state from doing business within its limits cannot be so carried out as to prevent the citizen from writing such a letter of notification as was written by the plaintiffs in error in the state of Louisiana, when it is written pursuant to a valid contract made outside the state and with reference to a company which is not doing business within its limits.

For these reasons we think the statute in question (La. Laws 1894, No. 66) was a violation of the Federal Constitution, and afforded no justification for the judgment awarded by that court against the plaintiffs in error. That *judgment must therefore be reversed*, and the case remanded to the supreme court of Louisiana for further proceedings not inconsistent with this opinion.

---

## MARGARET E. WALKER, *Plff. in Err.*, v. NEW MEXICO & SOUTHERN PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 593-606.)

*Right of trial by jury—obstruction of surface water—Federal courts follow state decisions—special findings.*

1. A statute authorizing special findings of fact by the jury, and providing for judgment upon them if they are inconsistent with the general verdict, does not violate the right of trial by jury.
2. An obstruction by a railroad embankment of the ordinary ditches and passageways which surface water will cut in a generally level district in its efforts to reach some flowing stream does not constitute an injury to other landowners, where the common law is recognized as the rule of practice and decision, and there are no special statutory provisions in respect to the matter.
3. Federal courts follow state decisions as to the rights and liabilities respecting surface water as a matter of local law.
4. Special findings that an injury was done by surface water caused by rainfall and cloud burst are not materially contradicted by the answer, "It did run," given to a question whether any of the water did "flow or run over the plaintiff's land except the water which fell from the clouds as rain."

[No. 171.]

*Argued January 26, 1897. Decided March 1, 1897.*

IN ERROR to the Supreme Court of the Territory of New Mexico to review a judgment of that court affirming the judgment of the District Court of the Second Judicial District of that Territory in favor of the defendant, the New Mexico & Southern Pacific Railroad Company, in an action by Margaret E. Walker, plaintiff, to recover damages from an overflow of lands alleged to be caused by wrongful obstructions by the Company of a natural watercourse. *Affirmed.*

See same case below, 34 Pac. 43.

Statement by Mr. Justice **Brewer:**

On November 3, 1886, A. C. Walker commenced this action in the district court of the second judicial district of the territory of New Mexico in and for the county of Socorro, against the railroad company defendant, to recover damages resulting from an overflow of his lands, caused, as charged, by a wrongful obstruction of a natural watercourse. Subsequently, an amended declaration was filed, and after the death of A. C. Walker the action was revived in the name of his administratrix, the present plaintiff in error. After some preliminary proceedings, a trial was had in December, 1892, on which trial the jury returned a general verdict, finding the defendant guilty, and assessing the plaintiff's damages at $9,212.50. At the same time the jury returned, in response to certain questions submitted by the court, special findings of fact. The trial court, overruling all other motions,

---

NOTE.—*As to trial by jury, how affected by 7th Amendment to the Constitution*, see note to New York Sup. Ct. Justices v. United States, Murray, 19: 658.

*Drainage of surface water: general rule; right to drain; injuries thereby; prescriptive right; eavesdrip; municipal control of surface water and liability therefor; surface water in highways; obstruction and drainage of surface water by railroads.*

In regard to drainage of surface water, it is the general rule that the natural flow of surface water from higher on to lower ground does not give a cause of action. Rathke v. Gardner, 134 Mass. 14; Peck v. Goodberlett, 109 N. Y. 180; Sowers v. Lowe (Pa.) 9 Atl. 44; Pettigrew v. Evansville, 25 Wis. 223, 3 Am. Rep. 50; McCormick v. Horan, 81 N. Y. 86, 37 Am. Rep. 479.

The fact that a city lot has been so improved by its owner as to cause the rain water falling upon it to flow upon the adjacent street or alley at the established grade, whence it flows upon a neighboring lot which is below grade, does not give a cause of action to the owner of the latter lot. Phillips v. Waterhouse, 69 Iowa, 199, 58 Am. Rep. 220.

The defendant owned land upon the slope of a hill running down to a mill pond belonging to the plaintiff. He cultivated and fertilized his land in the ordinary way for garden purposes, and the flow of the surface water carried a large amount of solid



Digitized by Google

entered a judgment in favor of the defendant, on the ground that the special findings of fact were inconsistent with and controlled the general verdict; and that upon such findings of fact the defendant was entitled to judgment. The case was thereafter taken to the supreme court of the territory, by which court, on August 26, 1893, the judgment was affirmed [34 Pac. 43], and thereupon the plaintiff sued out this writ of error.

*Messrs.* **Neill B. Field** and *James G. Fitch*, for plaintiff in error:

Even though the waters which caused the injury to the plaintiff in error came from the clouds as rain and were produced by a cloudburst in the Magdalena mountains, this fact would not preclude a recovery by the plaintiff in error unless two other facts are established: First, that cloudbursts in that vicinity were unusual; and, second, that no natural or artificial watercourse, through which these waters were accustomed to find an outlet, had been obstructed by the defendant in error.

The rule which authorizes the owner of land to receive or reject the surface waters accustomed to flow from higher ground is subject to an important qualification which appears to be entirely ignored by counsel for defendant in error in attempting to construe the special findings in this case. That qualification is well expressed to be, where water, owing to the hilly or mountainous condition of the country, accumulates in large quantities from the rain and melting snow, and at regular seasons descends through long gulleys or ravines, and in its flow carves a distinct and well-defined channel which bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial, such stream is considered a watercourse.

*Simmons* v. *Winters*, 21 Or. 35; *Earle* v. *De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *Palmer* v. *Waddell*, 22 Kan. 352, *Rhoads* v. *Davidheiser*, 133 Pa. 226; *Conniff* v. *San Francisco*, 67 Cal. 45; *McClure* v. *Redwing*, 28 Minn. 186; *Howard* v. *Ingersoll*, 54 U. S. 13 How. 381 (14: 189).

Whether or not there was a watercourse obstructed by the embankment of the defendant in error, was a question of fact for the jury.

*Eulrich* v. *Richter*, 87 Wis. 226.

*Messrs.* **Robert Dunlap** and *E. D. Kenna*, for defendant in error:

Under the common law no right of the

---

matter into the plaintiff's mill pond. It was held that the defendant's acts gave the plaintiff no cause of action for an unlawful encroachment upon its mill pond. Middlesex County v. McCue, 149 Mass. 103.

The owner of land bounded upon a stream or watercourse has the right to all the advantages of drainage which the stream reasonably used may give him, and consequently he may drain his land into the stream. Treat v. Bates, 27 Mich. 390; Jenkins v. Wilmington & W. R. Co. 110 N. C. 438; Miller v. Laubach, 47 Pa. 154, 86 Am. Dec. 521; Jackman v. Arlington Mills, 137 Mass. 277.

The owner of lands drained by a watercourse may change and control the natural flow of the surface water therein, and, by ditches and otherwise, accelerate the flow or increase the volume of water which reaches the stream, and if he does this in the reasonable use of his own premises, he exercises only a legal right and incurs no liability to a lower proprietor. Waffle v. New York C. R. Co. 53 N. Y. 11, 13 Am. Rep. 467, Aff'g 58 Barb. 413; McCormick v. Horan, 81 N. Y. 86, 37 Am. Rep. 479.

The owner of land in which there is a mine may pump into a stream which forms the natural drainage of his land water from the mine, although the quantity of water in the stream is thereby increased and its quality so affected as to render it totally unfit for use for domestic purposes by the lower riparian owners. Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, Overruling 86 Pa. 401, 27 Am. Rep. 711.

A landowner cannot concentrate and discharge into the stream the surface water of his lands in quantities beyond the natural capacity of the watercourse, to the damage of the lower riparian owners. Noonan v. Albany, 79 N. Y. 470, 35 Am. Rep. 540; McCormick v. Horan, 81 N. Y. 86, 37 Am. Rep. 479.

In the clearing, improvement, and preparation of land for cultivation, the owner thereof may, in the exercise of good husbandry, drain his soil, although the consequence is that the surface water flows from his land with greater rapidity, and the quantity of water flowing upon the lower land is considerably increased. Hughes v. Anderson, 68 Ala. 280, 44 Am. Rep. 147; Hicks v. Sillinan, 93 Ill. 255; Peck v. Herrington, 109 Ill. 611, 50 Am. Rep. 627, Rev'g 11 Ill. App. 62; Templeton v. Voshloe, 72 Ind. 134, 34 Am. Rep. 150; Vannest v. Fleming, 79 Iowa, 638; Guesnard v. Bird, 33 La. Ann. 796; Middlesex County v. McCue, 149 Mass. 103; Gregory v. Bush, 64 Mich. 37; Osten v. Jerome, 93 Mich. 196; Peck v. Goodberlett, 109 N. Y. 180; Kauffman v. Griesemer, 26 Pa. 411, 67 Am. Dec. 437; Rhoads v. Davidheiser, 133 Pa. 226; Meixell v. Morgan, 149 Pa. 415; Pettigrew v. Evansville, 25 Wis. 223, 3 Am. Rep. 50.

In the interest of good husbandry and tillage and improvement of his farm in good faith, the landowner may fill up sag holes, pools, and basins in his land, so that water will not accumulate or stay in them, although the flow of the water upon the adjacent lands is thereby incidentally increased. Gregory v. Bush, 64 Mich. 37.

But the owner of the higher lands cannot drain the waters in a direction other than that in which they would naturally flow. Hughes v. Anderson, 68 Ala. 280, 44 Am. Rep. 147; Adams v. Walker, 34 Conn. 466, 91 Am. Dec. 742; Anderson v. Henderson, 124 Ill. 164; Dayton v. Drainage Comrs. 128 Ill. 271; Barrow v. Landry, 15 La. Ann. 681, 77 Am. Dec. 199; Hooper v. Wilkinson, 15 La. Ann. 497, 77 Am. Dec. 194; Hogenson v. St. Paul, M. & M. R. Co. 31 Minn. 224; Butler v. Peck, 16 Ohio St. 335, 88 Am. Dec. 452; Torrey v. Scranton, 133 Pa. 173.

Nor can the owner of the upper land collect the waters of his estate into a ditch, or drain and discharge it in a volume on the lower land to its injury. Crabtree v. Baker, 75 Ala. 91, 51 Am. Rep. 424; Springfield & M. R. Co. v. Henry, 44 Ark. 360; Newgass v. St. Louis, A. & T. R. Co. 54 Ark. 140; Durgin v. Neal, 82 Cal. 595; Adams v. Walker, 34 Conn. 466, 91 Am. Dec. 742; Goldsmith v. Elsas, 53 Ga. 186; East St. Louis & C. R. Co. v. Eisentraut, 134 Ill. 96; Reed v. Cheney, 111 Ind. 387; Davis v. Crawfordsville, 119 Ind. 1; Weddell v. Hapner, 124 Ind. 315; De Haven v. Helvie, 126 Ind. 82; Patoka Twp. v. Hopkins, 131 Ind. 142; Livingston v. McDonald, 21 Iowa, 160, 89 Am. Dec. 563; Martin v. Jett, 12 La. 503, 32 Am. Dec. 120; Lattimore v. Davis, 14 La. 161, 33 Am. Dec. 581; Rathke v. Gardner, 134 Mass. 14; Stanchfield v. Newton, 142 Mass. 110; Chapel v. Smith, 80 Mich. 100; Yerex v. Eineder, 86 Mich. 24; Olson v. St. Paul, M. & M. R. Co. 38 Minn. 419; Beach v. Gaylord, 43 Minn. 476; Kelly v. Dunning, 39 N. J. Eq. 482; Soule v. Passaic, 47 N. J. Eq. 28; Miller v.



Digitized by Google

laintiff has been violated, as shown by the pecial findings. At common law the owner f higher lands has no right to have surface ater flow over lower lands in such manner as e nature or situation of the lands may per-it. At common law the owner of any piece f land may improve it or place upon it such ructures or embankments as he may see fit, nd is no more obliged to receive merely sur-ice water from higher lands than he would ave a right to demand that such water should ow unobstructed from the higher lands to his remises. Every landowner has the right to efend against surface water or use the same s he may see fit.

*Hoyt* v. *Hudson*, 27 Wis. 656, 9 Am. Rep. 73; *Gannon* v. *Hargadon*, 10 Allen, 106, 87 Am. Dec. 625; *Kansas City & E. R. Co.* v. *Riley*, 33 Kan. 374; *Abbott* v. *Kansas City, St. L. & C. B. R. Co.* 83 Mo. 271, 53 Am. Rep. 581; *O'Connor* v. *Fond du Lac, A. & P. R. Co.* 52 Wis. 526, 38 Am. Rep. 754; *Johnson* v. *Chicago, St. P. M. & O. R. Co.* 80 Wis. 646, 14 L. R. A. 495.

What are natural watercourses?

"A natural watercourse is a natural stream flowing in a definite bed or channel, with banks and sides, having permanent sources of supply. It is not essential to constitute a watercourse that the flow should be uniform and uninterrupted. The other elements existing, a stream does not lose the character of a natural watercourse because in times of drouth the flow may be diminished or temporarily suspended. It is sufficient if it is usually a stream of running water.

*Morrison* v. *Bucksport & B. R. Co.* 67 Me. 356; *Jeffers* v. *Jeffers*, 107 N. Y. 650; *Hoyt* v. *Hudson*, 27 Wis. 661, 9 Am. Rep. 473; *Shields* v. *Arndt*, 4 N. J. Eq. 247; *Dickinson* v. *Worcester*, 7 Allen, 19, 22; *Fryer* v. *Warne*, 29 Wis. 516; *Gannon* v. *Hargadon*, 10 Allen, 106, 109, 87 Am. Dec. 625; *Bangor* v. *Lansil*, 51 Me. 525; *Turner* v. *Dartmouth*, 13 Allen, 291; *Ashley* v. *Wolcott*, 11 Cush. 195; *Stanchfield* v. *Newton*, 142 Mass. 116; *Bowlsby* v. *Speer*, 31 N. J. L. 352, 86 Am. Dec. 216; *Barkley* v. *Wilcox*, 86 N. Y. 143, 40 Am. Rep. 519; Angell, Watercourses, 5th ed. § 1, 7th ed. § 4.

The rule of the common law undoubtedly is that no action lies for obstructing the flow of surface water.

Washb. Easements, 3d ed. 281, 282; *Benthall* v. *Seifert*, 77 Ind. 302.

This is the rule adopted in most of the states. The contrary rule, which is derived from the

---

Morristown, 47 N. J. Eq. 62; Perkins v. Moorestown & C. Turnp. Co. 48 N. J. Eq. 499; Byrnes v. Cohoes, 67 N. Y. 204; Jutte v. Hughes, 67 N. Y. 267; Noonan v. Albany, 79 N. Y. 470, 35 Am. Rep. 540; Barkley v. Wilcox, 86 N. Y. 148, 40 Am. Rep. 519; Mairs v. Manhattan Real Estate Asso. 89 N. Y. 498; Vogel v. New York, 92 N. Y. 10, 44 Am. Rep. 349; Seifert v. Brooklyn, 101 N. Y. 143, 54 Am. Rep. 664; Bellows v. Sackett, 15 Barb. 96; Foot v. Bronson, 4 Lans. 47; Mitchell v. New York, L. E. & W. R. Co. 36 Hun, 177.

The liability of the upper proprietor for damage caused by collecting surface water into a stream and casting it upon the lower land to its damage, does not depend upon any question of care or negligence. The act itself gives rise to the cause of action. Jutte v. Hughes, 67 N. Y. 267; Mairs v. Manhattan Real Estate Asso. 89 N. Y. 498.

In Mairs v. Manhattan Real Estate Asso. 89 N. Y. 507, the court held that a landowner on whose premises water is wrongfully cast by his neighbor is under no obligation to make the wall of his house impervious to the water.

But to confer a cause of action the unlawful discharge of the water upon the plaintiff's lands must cause appreciable damage. Crohen v. Ewers, 39 Ill. App. 34; Peck v. Goodberlett, 109 N. Y. 192; Jeffers v. Jeffers, 107 N. Y. 650; Rutherford v. Holley, 105 N. Y. 632.

Following the principle that there can be no prescription where there is no adverse user, and that there can be no adverse user without creating a right of action, it is held, in those states which follow the common-law rule as to the obstruction and repulsion of surface waters, that no lapse of time gives a man a right to drain surface water in its natural state upon his neighbor's land. Parks v. Newburyport, 10 Gray, 28; White v. Chapin, 12 Allen, 518; Cassidy v. Old Colony R. Co. 141 Mass. 178; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Delhi v. Youmans, 50 Barb. 316; White v. Sheldon, 35 Hun, 198; Pettigrew v. Evansville, 25 Wis. 227, 3 Am. Rep. 50; Greatrex v. Hayward, 8 Exch. 291.

The owner of a building cannot lawfully discharge the rain water which falls upon his roof upon his neighbor's premises either by collecting it in gutters or eavestrough and then turning it in a body upon the adjoining lands or by permitting it to fall from the eaves of his house in drops. Adams v. Walker, 34 Conn. 466, 91 Am. Dec. 742; Conner v. Woodfill, 126 Ind. 83; Beach v. Gaylord, 43 Minn. 476; Hooten v. Barnard, 137 Mass. 36; Schwab v. Cleveland, 28 Hun, 458; Tanner v. Volentine, 75 Ill 624; Martin v. Simpson, 6 Allen, 102; Shipley v. Fifty Associates, 106 Mass. 198, 8 Am. Rep. 318; Bellows v. Sackett, 15 Barb. 96; Hazeltine v. Edgmand, 35 Kan. 202, 57 Am. Rep. 157; Gould v. McKenna, 86 Pa. 302, 27 Am. Rep. 705.

The right to discharge the water from the eaves upon adjoining lands may be acquired by a continued adverse use, for the prescriptive period, of the adjoining lands for the purpose of receiving such water. Cherry v. Stein, 11 Md. 1; Carbrey v. Willis, 7 Allen, 364, 83 Am. Dec. 688; Norton v. Volentine, 14 Vt. 246; Neale v. Secley, 47 Barb. 314.

No action lies against a city for the injury occasioned to land bounding on a street by the accumulation of water on the surface of the street, which the city has neglected to drain. Flagg v. Worcester, 13 Gray, 602; Russell v. Burlington, 30 Iowa, 262.

If by reason of the change of grade, or alteration of the conformation of the ground by the construction or grading of a street, the flow of surface water is affected, without any negligence on the part of the city in the performance of the work, and flows upon adjoining lots to their injury, the owner has no recourse against the corporation. West Orange v. Field, 37 N. J. Eq. 600, 45 Am. Rep. 670; Miller v. Morristown, 47 N. J. Eq. 62; Gould v. Booth, 66 N. Y. 62; Acker v. New Castle, 48 Hun, 312; Wilson v. New York, 1 Denio, 595; Lynch v. New York, 76 N. Y. 60; Bush v. Portland, 19 Or. 45; Wakefield v. Newell, 12 R. I. 75, 34 Am. Rep. 598; Smith v. Tripp, 13 R. I. 152; Noble v. St. Albans, 56 Vt. 522; Heth v. Fond du Lac, 63 Wis. 228, 53 Am. Rep. 279; Kavanagh v. Brooklyn, 38 Barb. 232; Watson v. Kingston, 114 N. Y. 88.

Liability is not incurred by the corporation if the consequence of raising the grade of a street in accordance with lawful authority be to obstruct the flow of surface water from a lot, and cause it to accumulate thereon. Corcoran v. Benicea, 96 Cal. 1; Morrison v. Bucksport & B. R. Co. 67 Me. 357; Henderson v. Minneapolis, 32 Minn. 319; Follmann v. Mankato, 45 Minn. 457; Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473; Waters v. Bay View, 61 Wis. 642.

A city, too, may prevent surface water from flow-



Digitized by Google

civil law (Mackeldey, Roman Law, § 295), is adopted in some of the states, and is defended as being founded upon the maxim *Sic utere tuo ut alienum non lædas.*

*Swett* v. *Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Bonomi* v. *Backhouse*, 27 L. J. Q. B. N. S. 388.

The doctrine of the common law in respect to drainage of surface water is more in consonance with our ideas of progress and improvement than that of the civil law.

*Lessard* v. *Stram*, 62 Wis. 112, 51 Am. Rep. 715; *Johnson* v. *Chicago, St. P. M. & O. R. Co.* 80 Wis. 645; *Robinson* v. *Shanks*, 118 Ind. 134; *Hill* v. *Cincinnati, W. & M. R. Co.* 109 Ind. 511; *Weis* v. *Madison*, 75 Ind. 257, 30 Am. Rep. 135.

No length of time creates any easement by which the owner of the lower land is precluded from using it as he will, although the natural overflow of surface water may be thereby stopped and set back upon the upper lands.

Angell, Watercourses, § 108*a*; *Parks* v. *Newburyport*, 10 Gray, 28; *Luther* v. *Winnisimmet Co.* 9 Cush. 171; *Pettigrew* v. *Evansville*, 25 Wis. 227, 228.

There could be no adverse user under a claim of right, and the user, to gain by prescription, would have to be such as to expose the party to an action unless he had a grant or permission.

*Felton* v. *Simpson*, 11 Ired. L. 85; *Angus* v. *Dalton*, 17 Am. L. Reg. (N. S.) 646.

Mr. Justice **Brewer** delivered the opinion of the court:

The testimony was not preserved, and the case is submitted to us upon the pleadings, the verdict, the special findings of fact, and [595 the judgment; and on the record as thus presented plaintiff in error rests her claim of reversal upon three propositions: First, that the act of the territorial legislature, authorizing special findings of fact and providing for judgment on the special findings, if inconsistent with the general verdict [N. M. Laws 1889, chap. 45, page 87], is in contravention of the

---

ing on the street from adjoining property without incurring any liability. Keith v. Brockton, 136 Mass. 119; Foster v. St. Louis, 71 Mo. 157, 4 Mo. App. Appx. 564; Hardy v. Brooklyn, 7 Abb. N. C. 403.

If a municipality adopts a plan, although insufficient, and constructs its drains and sewers in conformity thereto, and injury results in consequence of the plan being defective, or of the drains or sewers being deficient in size and inadequate to accommodate all the water which, if the drains were larger, would naturally flow through them, there is no resulting liability. North Vernon v. Voegler, 103 Ind. 316; Atchison v. Challiss, 9 Kan. 603; Thurston v. St. Joseph, 51 Mo. 510, 11 Am. Rep. 463; Child v. Boston, 4 Allen, 51, 81 Am. Dec. 680; Emery v. Lowell, 104 Mass. 16; Mills v. Brooklyn, 32 N. Y. 491; Carr v. Northern Liberties, 35 Pa. 324, 78 Am. Dec. 342; Bear v. Allentown, 148 Pa. 80; Fair v. Philadelphia, 88 Pa. 309, 32 Am. Rep. 455; Collins v. Philadelphia, 93 Pa. 272.

There are decisions which seem to adopt a contrary view, and to hold that a city must exercise due care and skill in the selection of a plan, and must furnish drains and sewers of sufficient capacity to carry off all the water which may reasonably be expected to accumulate. Spangler v. San Francisco, 84 Cal. 17; Dixon v. Baker, 65 Ill. 518, 16 Am. Rep. 591; Aurora v. Love, 93 Ill. 521; Indianapolis v. Huffer, 30 Ind. 235; Weis v. Madison, 75 Ind. 241, 30 Am. Rep. 135; Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86.

And if the municipal authorities, in the construction of sewers and digging of ditches in the improvement of streets, cause a large quantity of rain water, which naturally flowed in another direction, to be directed in such a manner as to flow on abutting premises in destructive quantities, the corporation is liable to the abutting owner in damages, without regard to the efficiency of the plan, and whether the work was done negligently or not. Vale Mills v. Nashua, 63 N. H. 136; West Orange v. Field, 37 N. J. Eq. 600, 45 Am. Rep. 670; Miller v. Morristown, 47 N. J. Eq. 62; Byrnes v. Cohoes, 67 N. Y. 204, Aff'g 5 Hun, 602; Noonan v. Albany, 79 N. Y. 470, 35 Am. Rep. 540; Vogel v. New York, 92 N. Y. 10, 44 Am. Rep. 349; Seifert v. Brooklyn, 101 N. Y. 136, 54 Am. Rep. 664; Bradt v. Albany, 5 Hun, 592; Limerick & C. Turnp. Co.'s Appeal, 80 Pa. 425; Elliott v. Oil City, 129 Pa. 570; Weir v. Plymouth, 148 Pa. 566; Inman v. Tripp, 11 R. I. 520, 23 Am. Rep. 520; Winn v. Rutland, 52 Vt. 481; Gillison v. Charleston, 16 W. Va. 282, 37 Am. Rep. 763; Derinzy v. Ottawa, 15 Ont. 712.

In grading and improving highways, the commissioners are not bound to provide for the drainage of the surface water flowing or brought upon the road by reason of the improvement. Turner v. Dartmouth, 13 Allen, 291; Benjamin v. Wheeler, 8 Gray, 409; Gould v. Booth, 66 N. Y. 62; Acker v. New Castle, 48 Hun, 312; Kennison v. Beverly, 146 Mass. 467.

And the owner of adjoining lands may prevent the flow of surface waters upon his lands by the construction of an embankment or obstacle, a similar right being accorded the commissioners, for the the protection of the highway, subject to liability for unnecessary damage. Bangor v. Lansil, 51 Me. 521; Franklin v. Fisk, 13 Allen, 211, 90 Am. Dec. 184; Limerick & C. Turnp. Co.'s Appeal, 80 Pa. 425; Acker v. New Castle, 48 Hun, 312; Gould v. Booth, 66 N. Y. 62.

A landowner through whose lands a railroad has been constructed, and a portion of whose property has been taken therefor, has, in the common-law states, no cause of action for the obstruction of the flow of surface waters or for their repulsion upon his remaining lands. Morrison v. Bucksport & R. R. Co. 67 Me. 353; Clark v. Hannibal & St. J. R. Co. 36 Mo. 202; Moss v. St. Louis, I. M. & S. R. Co. 85 Mo. 86; O'Connor v. Fond du Lac, A. & P. R. Co. 52 Wis. 526, 38 Am. Rep. 754; Hanlin v. Chicago & N. W. R. Co. 61 Wis. 515; Johnson v. Chicago, St. P. M. & O. R. Co. 80 Wis. 641, 14 L. R. A. 495; Atchison, T. & S. F. R. Co. v. Hammer, 22 Kan. 763, 31 Am. Rep. 216; Kansas City & E. R. Co. v. Riley, 33 Kan. 374; Cairo & V. R. Co. v. Houry, 77 Ind. 364; Hill v. Cincinnati, W. & M. R. Co. 109 Ind. 511; Abbott v. Kansas City, St. J. & C. B. R. Co. 83 Mo. 271, 53 Am. Rep. 581; Jones v. Wabash, St. L. & P. R. Co. 18 Mo. App. 251; Wagner v. Long Island R. Co. 2 Hun, 638; Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co. 3 Hun, 523.

Railroad companies, like individuals, cannot gather the surface waters on their lands in ditches and drains, and discharge them in a body on lower lands to their injury. Chicago & A. R. Co. v. Connors, 25 Ill. App. 561; Chicago & A. R. Co. v. Riley, 25 Ill. App. 569; Curtis v. Eastern R. Co. 14 Allen, 55, 98 Mass. 428; Rathke v. Gardner, 134 Mass. 14; Benson v. Chicago & A. R. Co. 78 Mo. 504; Fremont, E. & M. V. R. Co. v. Marley, 25 Neb. 138; Mitchell v. New York, L. E. & W. R. Co. 36 Hun, 177; Staton v. Norfolk & C. R. Co. 109 N. C. 387; Jenkins v. Wilmington & W. R. Co. 110 N. C. 446; Deigleman v. New York, L. E. & W. R. Co. 34 N. Y. S. R. 4; Gulf, C. & S. F. R. Co. v. Donahoo, 59 Tex. 128.



Digitized by Google

7th Amendment to the Constitution of the United States, which reads:

"In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

Second, that there is no such conflict between the general verdict and the special findings as authorized a judgment contrary to the general verdict; and, third, that if there be any conflict between the special findings and the general verdict the special findings are so inconsistent with each other as to neutralize and destroy themselves.

First, with regard to the constitutional question, the specific objection is thus stated in the brief:

"It is not contended, although the English authorities would appear to warrant the contention, that at the common law the judge might not require the jury to answer special questions, or interrogate the jury as to the grounds upon which their general verdict was found; but it is most earnestly contended that the extent of the power of the judge, if in his opinion the special findings or answers of the jury to interrogatories were inconsistent with the general verdict, was to set aside the general verdict and award a *renire de novo*, while under this statute authority is attempted to be conferred upon the judge to render final judgment upon the special findings."

We deem it unnecessary to consider the contention of defendant in error that the territorial courts are not the courts of the United States, and that the 7th Amendment is not operative in the territories, for by the act of April 7, 1874 [18 Stat. at L. 27, chap. 80], Congress, legislating for all the territories, declared that no party [596] "shall be deprived of the right of trial *by jury in cases cognizable at common law;" and while this may not in terms extend all the provisions of the 7th Amendment to the territories, it does secure all the rights of trial by jury as they existed at common law.

The question is whether this act of the territorial legislature in substance impairs the right of trial by jury. The 7th Amendment, indeed, does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative. So long as this substance of right is preserved the procedure by which this result shall be reached is wholly within the discretion of the legislature, and the courts may not set aside any legislative provision in this respect because the form of action—the mere manner in which questions are submitted—is different from that which obtained at the common law.

Now a general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict. The power of the court to grant a new trial if in its judgment the jury have misinterpreted the instructions as to the rules of law or misapplied them is unquestioned as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact, and no one to-day doubts that such is the legitimate duty and function of the court, notwithstanding the terms of the constitutional guaranty of right of trial by jury. Beyond this, it was not infrequent to ask from the jury a special rather than a general verdict, that is, instead of a verdict for or against the plaintiff or defendant embodying in a single declaration the whole conclusion of the trial, one which found specially upon the various facts in issue, leaving to the court *the [597] subsequent duty of determining upon such facts the relief which the law awarded to the respective parties.

It was also a common practice when no special verdict was demanded and when only a general verdict was returned to interrogate the jury upon special matters of fact. Whether or no a jury was compelled to answer such interrogations, or whether, if it refused or failed to answer, the general verdict would stand or not, may be questioned. *Decises* v. *Clark*, 3 Ad. & El. 506. But the right to propound such interrogatories was undoubted and often recognized. *Walker* v. *Bailey*, 65 Me. 354; *Spurr* v. *Shelburne*, 131 Mass. 429. In the latter case the court said (p. 430): "It is within the discretion of the presiding justice to put inquiries to the jury as to the grounds upon which they found their verdict, and the answers of the foreman, assented to by his fellows, may be made a part of the record, and will have the effect of special findings of the facts stated by him. And no exception lies to the exercise of this discretion. *Dorr* v. *Fenno*, 12 Pick. 521; *Spoor* v. *Spooner*, 12 Met. 281; *Mair* v. *Bassett*, 117 Mass. 356; *Lawler* v. *Earle*, 5 Allen, 22." So that the putting of special interrogatories to a jury and asking for specific responses thereto in addition to a general verdict is not a thing unknown to the common law and has been recognized independently of any statute. Beyond this we cannot shut our eyes to the fact that in many states in the Union, in whose Constitutions is found in the most emphatic language an assertion of the inviolability of trial by jury, are statutes similar to the one enacted by the territorial legislature of New Mexico; that those statutes have been uniformly recognized as valid, and that a large amount of the litigation in the courts is carried through in obedience to the provisions of such statutes. It would certainly startle the profession to be told that such statutes contravene a constitutional requirement of the inviolability of jury trials.

Indeed, the very argument of counsel for plaintiff in error is an admission that up to a certain extent those statutes are undoubtedly valid. That argument is practically that when the specific findings are returned and found to be conflicting *with the general verdict the court [598] is authorized to grant a new trial, but can do no more. But why should the power of the court be thus limited? If the facts as specially



Digitized by Google

found compel a judgment in one way, why should not the court be permitted to apply the law to the facts as thus found? It certainly does so when a special verdict is returned. When a general verdict is returned and the court determines that the jury have either misinterpreted or misapplied the law the only remedy is the award of a new trial, because the constitutional provision forbids it to find the facts. But when the facts are found and it is obvious from the inconsistency between the facts as found and the general verdict that, in the latter, the jury have misinterpreted or misapplied the law, what constitutional mandate requires that all should be set aside and a new inquiry made of another jury? Of what significance is a question as to a specific fact? Of what avail are special interrogatories and special findings thereon if all that is to result therefrom is a new trial, which the court might grant if it were of opinion that the general verdict contained a wrong interpretation or application of the rules of law? Indeed, the very thought and value of special interrogatories is to avoid the necessity of setting aside a verdict and a new trial—to end the controversy so far as the trial court is concerned upon that single response from the jury.

We are clearly of opinion that this territorial statute does not infringe any constitutional provision, and that it is within the power of the legislature of a territory to provide that on a trial of a common-law action the court may, in addition to the general verdict, require specific answers to special interrogatories, and, when a conflict is found between the two, render such judgment as the answers to the special questions compel.

For a full understanding of the second question it is necessary to notice the pleadings. The original declaration—after stating that the Rio Grande river runs in its regular channel about ½ a mile east of the plaintiff's premises, and that the waters from rainfalls pass and flow [599] in their natural *fall from the surrounding and adjacent country over the plaintiff's and other lands in the vicinity and empty into the river, and that by that means the surface water, up to the time of the grievances complained of, had been carried off without injury to the plaintiff or his property—charged that on May 1, 1885, the defendant, in and by the construction of its roadbed, did dam and close up all of the natural and usual outlets and places through which the surface water had been accustomed to make its escape, thereby causing such surface water theretofore flowing to the river as aforesaid to be dammed up and set back upon the premises of the plaintiff and other property owners; that on September 7, 1886, there was a heavy rainfall and the surface water, unable by reason of the obstruction to reach the river, was set back on the premises of the plaintiff, making a lake or pond of waters 3 to 4 feet in depth, and doing great injury to his property. A demurrer to this declaration having been sustained, an amended declaration was filed, which, omitting all references to rainfalls and surface water, charged that the defendant obstructed the natural and artificial watercourses by which the waters from the north and west of the plaintiff's property, and from the Socorro and Magdalena mountains, in their natural flow and fall passed over the lands of the plaintiff and other lands and emptied into the Rio Grande. A demurrer to this declaration having been overruled the plaintiff was directed to file a bill of particulars showing the places and courses of the alleged natural and artificial watercourses, and did so, describing three or four beds or channels through which in a natural fall, as he averred, the waters passed from the Socorro and Magdalena mountains into the Rio Grande.

Now, the contention of the defendant in error is that it is apparent, from the answers given to the special questions, that there were no natural watercourses obstructed by defendant's roadbed, and that the water which did the damage was simply surface water. The second, third, fourth, and fifth are as follows:

"*Q.* 2. Was there a cloudburst in the Magdalena or Socorro *mountains on Sep- [600] tember 8, 1886; and if so, was the water therefrom the water which ran over the plaintiff's land?—*A.* Yes.

"*Q.* 3. Was the water which came down the arroyos from the Magdalena and Socorro mountains on September 8, 1886, surface water?—*A.* Yes.

"*Q.* 4. Was it customary for water to collect and stand on plaintiff's land, and land in the immediate vicinity thereof, in the times of heavy rains or floods?—*A.* No.

"*Q.* 5. How often upon an average in any one year did the water come down the arroyos leading toward the valley in the vicinity of Socorro from the Magdalena and Socorro mountains prior to September 8, 1886?—*A.* According to the rain which fell."

This is very clear. There was a cloudburst in the mountains, and it was the water from that which did the damage. It was simply surface water. And the arroyos through which the water flowed after leaving the mountains were not running streams, natural watercourses, but simply passageways for the rain which fell. Counsel for plaintiff in error, not questioning that the injury done to the property of their client was by surface water, —the large fall which came from the cloudburst in the Socorro or Magdalena mountains on September 8, 1886,—insist that it does not appear that such cloudbursts were unusual, and also that there had been created through the lapse of years distinctive channels by which the waters from the mountains passed down to the river and that the railroad embankment operated to obstruct such channels; that although these channels were not the beds of constantly flowing streams they were wrought by natural processes and through the flowing of water, not continuous but at frequent intervals, until they had become natural outlets for the often accumulating waters in the Socorro and Magdalena mountains. In view of this contention it is well to consider other findings so far as they disclose the character of these waterways. The sixth, eighth, ninth, fourteenth, fifteenth, twenty-second, twenty-third, and twenty-fifth questions and answers may be referred to:

"*Q.* 6. How far is the mouth of the main arroyo which *runs through the western part [601] of the city of Socorro in a northerly direction



Digitized by Google

from the main line of the railroad?—*A.* Three quarters of a mile, more or less.

"*Q.* 8. Does the railroad of the defendant cross any arroyo leading from the Magdalena or Socorro mountains at any place north of the Magdalena branch of the New Mexican Railroad Company at its junction with the main line 1¼ miles?—*A.* Yes.

"*Q.* 9. If you state in answer to the last question that there was such an arroyo, state where it is, its length, breadth, and the height of its banks —*A.* West of the city of Socorro and east of the Catholic graveyard; its banks are about 2 feet, its width about 60 feet, and about 1 mile in length, more or less.

"*Q.* 14. How far from the main line of the railroad, in a westerly direction, are the mouths of the arroyos testified to by the witnesses?—*A.* Three-quarters mile to main arroyo, and ¼ mile to lower arroyo.

"*Q.* 15. What is the character of the land lying between the mouths of the arroyos and the main line of the railroad, is it level or sloping, and for what purposes was it used in 1886?—*A.* It is level now and in 1886 it was an arroyo, and there is no ditch now excepting the company drain.

"*Q.* 22. How far is it from the mouths of the arroyos testified to by the witnesses to the Magdalena and Socorro mountains?—*A.* To the Socorro mountains 4 miles, and to the Magdalena mountains 18 miles.

"*Q.* 23. How far is it from plaintiff's property to the Socorro or Magdalena mountains? —*A.* More or less, the same distance as in the foregoing answer.

"*Q.* 25. Which was constructed first, the railroad company embankment or the houses of plaintiff which were damaged by the water? —*A.* Railroad."

It is obvious not only that it was mere surface water whose flow was obstructed, not only that no natural watercourses were filled up, but also that the channels which were obstructed were not such ravines, gorges, and outlets as in a mountainous district must be left **602**] open to prevent the forming of *lakes and reservoirs therein, but simply the ordinary ditches and passageways which surface water will cut in a generally level district in its effort to reach some flowing stream. It also appears from the answer to the twenty-fifth question that the railroad embankment was constructed before the buildings of the plaintiff. It will be borne in mind that the mountains from which this surface water flowed were from 4 to 18 miles distant, and from the foot of those mountains to the Rio Grande river, naturally, the flowing water had dug channels and ditches through such portions of the soil as afforded the least obstruction to its passage, and such channels and ditches were all that the railroad embankment in any way obstructed.

Does a lower landowner by erecting embankments or otherwise preventing the flow of surface water on to his premises render himself liable to an upper landowner for damages caused by the stopping of such flow? In this respect the civil and common law are different, and the rules of the two laws have been recognized in different states of the Union—some accepting the doctrine of the civil law, that the lower premises are subservient to the higher, and that the latter have a qualified easement in respect to the former, an easement which gives the right to discharge all surface water upon them. The doctrine of the common law, on the other hand, is the reverse, that the lower landowner owes no duty to the upper landowner, that each may appropriate all the surface water that falls upon his own premises, and that the one is under no obligation to receive from the other the flow of any surface water, but may in the ordinary prosecution of his business and in the improvement of his premises by embankments or otherwise prevent any portion of the surface water coming from such upper premises. In *Atchison, T. & S. F. R. Co.* v. *Hammer*, 22 Kan. 763 [31 Am. Rep. 216], it was held that "the simple fact that the owner of one tract of land raises an embankment upon it which prevents the surface water falling and running upon the land of an adjoining owner from running off said land, and causes it to accumulate thereon to its damage, gives to the latter no cause of *action against the former, nor is the rule [**603** changed by the fact that the former is a railroad corporation, and its embankment raised for the purpose of a railroad track, nor by the fact that a culvert could have been made under said embankment sufficient to have afforded an outlet for all such surface water."

In *Gibbs* v. *Williams*, 25 Kan. 214, 216 [37 Am. Rep. 241], it was said: "Now, the ordinary rule concerning surface water is settled and familiar; the lower estate owes no duty to the higher, and the owner of each may use or abandon surface water as he pleases."

In *Kansas City & E. R. Co.* v. *Riley*, 33 Kan. 374, 376, 377, it was said: "The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, is in force in this state in aid of the general statutes. Therefore, the doctrine of the common law, with respect to the obstruction and flow of mere surface water, prevails as a general rule. Under this rule surface water is within the control of the owner of any land upon which it falls or over which it flows. He may use all that comes upon his own, or decline to receive any that falls on his neighbor's land. . . . The doctrine of the common law with respect to the obstruction and flow of mere surface water is not only in force in England, but in Connecticut, Indiana, Massachusetts, Missouri, New Jersey, New Hampshire, New York, Vermont, and Wisconsin. . . . The rule of the civil law seems to be in force in Pennsylvania, Iowa, Illinois, California, Louisiana, and is referred to with approval in Ohio."

In *Hoyt* v. *Hudson*, 27 Wis. 656, 659 [9 Am. Rep. 473], the difference between the civil and the common law was thus stated in a carefully prepared opinion by Chief Justice Dixon: "The doctrine of the civil law is, that the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one, to discharge all waters falling or accumulating upon his land, which is higher, upon or over the land of the servient owner, as in a state of nature; and that such natural flow or passage of the water cannot be interrupted *or prevented by the servient owner to [**604**



Digitized by Google

the detriment or injury of the estate of the dominant or any other proprietor. . . . The doctrine of the common law is, that there exists no such natural easement or servitude in favor of the owner of the superior or higher ground or fields as to mere surface water, or such as falls or accumulates by rain or the melting of snow; and that the proprietor of the inferior or lower tenement or estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back upon or off on to or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion."

It would be useless to cite the many authorities from the different states in which on the one side or the other these doctrines of the civil and the common law are affirmed. The divergency between the two lines of authorities is marked, springing from the difference in the foundation principle upon which the two doctrines rest, the one affirming the absolute control by the owner of his property, the other affirming a servitude, by reason of location, of the one premises to the other. Washburn, in his treatise on Easements and Servitudes, 3d ed. side p. 353 and following, treats at length on these two lines of authorities. So, also, in Angell on Watercourses, 7th ed. § 108 and following, is the matter discussed.

If a case came to this court from one of the states in which the doctrine of the civil law obtains, it would become our duty, having respect to this which is a matter of local law, to follow the decisions of that state. And in like manner we should follow the adverse ruling in a case coming from one of the states in which the common-law rule is recognized. New Mexico is a territory, but in it the legislature has all legislative power except as limited by the Constitution of the United States and the organic act and the laws of Congress appertaining thereto. There it was enacted in 1876 (N. M. Laws 1876, chap. 2, p. 31, § 2), that "in all the courts in this territory the common law as recognized in the United States of America shall be the rule of practice and decision." *Browning* v. *Browning*, 3 N. M. 371. The legisla-
605] ture of *New Mexico having thus adopted the common law as the rule of practice and decision, and there being no special statutory provisions in respect to this matter, it is not to be wondered at that the supreme court of the territory in its opinion in the present case disposed of this question in this single sentence: "If the act of the territorial legislature of 1889 is constitutional, then we can find no error in the action of the court in setting aside the general verdict and entering judgment upon the special findings." Obviously the only question deemed of any moment by that court was the question in respect to the matter of special findings.

It may be proper to notice that the exception suggested by Chief Justice Beasley in *Bowlsby* v. *Speer*, 31 N. J. L. 351, 353 [86 Am. Dec. 216], in these words: "How far it may be necessary to modify this general proposition in cases in which, in a hilly region, from the natural formation of the surface of the ground, large quantities of water, in times of excessive rains or from the melting of heavy snows, are forced to seek a channel through gorges or narrow valleys, will probably require consideration when the facts of the case shall present the question;" and noticed afterwards in *Hoyt* v. *Hudson*, 27 Wis. 656, 659 [9 Am. Rep. 473], and *Palmer* v. *Waddell*, 22 Kan. 352,—has no application to the case before us, for, as appears from the findings, the mountainous district from which these waters flowed was from 4 to 18 miles distant from the place of the embankment and the damage. We must therefore overrule the second contention made by counsel for plaintiff in error.

The third requires little notice. It does not seem as though there were any particular inconsistency between the various special findings. The only one that deserves any notice is that which is suggested by the first question and the answer thereto, as follows:

"*Q.* 1. At the time of the injury complained of did any of the water flow or run over the plaintiff's land, except the water which fell from the clouds as rain?—*A.* It did run."

It is a little difficult to understand exactly what is meant by this. It may be that the jury meant that the water came from the cloudburst as distinguished from an *ordinary rain-[606 fall, or it may be that their purpose was simply to affirm that this water coming down the arroyos did run over the land of the plaintiff. Considering the uncertainty as to the import of this question and answer, and in view of the clear and positive answers to other direct questions, and also in view of the averments in the original declaration, we think it would be going too far to hold that this is to be taken as a finding that there was a natural watercourse whose waters, increased by the rainfall and cloudburst, overflowed their banks and injured the plaintiff's property. These are all the questions in the case, and, finding no error in the record, *the judgment is affirmed.*

---

FREDERICK N. PAULY, Receiver of the California National Bank of San Diego, *Plff. in Err.*,

*v.*

STATE LOAN & TRUST COMPANY.

(See S. C. Reporter's ed. 606-624.)

*Pledgee of stock in a national bank, when liable as a shareholder—relations of the parties.*

1. A mere pledgee of shares of stock in a national bank is not subject to liability as a shareholder under U. S. Rev. Stat. § 5151, where his name appears as "pledgee" both on the certificates of stock and the books of the bank, and there does

---

NOTE.—*As to taxation of shares in national banks and of other corporations,*—see note to Providence Bank v. Billings, 7: 939.

*As to powers and duties of receivers,* see note to Davis v. Gray, 21: 447.

*As to receivers, appointment and powers; receivers' certificates; contracts of receivers; liability for claims and for damages; payment of wages, etc.; lien of receiver's certificates; liability of purchaser at foreclosure sale; suits by receiver; liability of for personal injuries and for taxes,*—see note to Olcott v. Headrick, 35: 851.



Digitized by Google

not appear to have been any intent of the real owner of the shares to escape responsibility.

2. In determining who is liable as the owner of shares of stock in a national bank, the courts will look at the relations of the parties as they actually are, or as by reason of their conduct they must be assumed to be for the protection of creditors; and the object of the statute is not to be defeated by the mere forms of transactions between shareholders and their creditors.

[No. 201.]

*Argued January 29, 1897. Decided March 1, 1897.*

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment affirming the judgment of the Circuit Court of the United States for the Southern District of California in favor of the defendant in an action brought by Frederick N. Pauly, Receiver of the California National Bank of San Diego, to recover the amount of an assessment made on the shareholders of said bank against the State Loan & Trust Company. *Affirmed.*

See same case below, 56 Fed. Rep. 430, 15 U. S. App. 259.

The facts are stated in the opinion.

*Messrs.* **Edward Winslow Paige** and *J. Wade McDonald*, for plaintiff in error:

The defendant was a shareholder within the letter as well as within the intent and purpose of the statutes.

*Pullman* v. *Upton*, 96 U. S. 328 (24: 816); *Germania Nat. Bank* v. *Case*, 99 U. S. 628 (25: 448); *Wheelock* v. *Kost*, 77 Ill. 296; *National Commercial Bank* v. *McDonnell*, 92 Ala. 387; *Gilman* v. *Curtis*, 66 Cal. 116; *Johnson* v. *Laflin*, 103 U. S. 800 (26: 532); *Cecil Nat. Bank* v. *Watsontown Bank*, 105 U. S. 217 (26: 1039); *Easton* v. *German-American Bank*, 127 U. S. 532 (32: 210); *Anderson* v. *Philadelphia Warehouse Co.* 111 U. S. 479 (28: 478); *Richmond* v. *Irons*, 121 U. S. 27 (30: 864); Cook, Stock & Stockholders (3d ed.) § 466.

Affixing the word "pledgee" to its name on the books of the bank, but without giving the name or names of the pledgeors, did not prevent or affect the liability of the defendant to the creditors of the bank.

*Heath* v. *West*, 28 N. H. 108; *Peers* v. *McLaughlin*, 88 Cal. 299.

*Messrs.* **W. P. Gardiner** and *W. A. Harris*, for defendant in error:

By delivery of a pledge as security for the payment of a debt, the pledgee acquires only a lien or special property in the article or things pledged.

Story, Bailm. §§ 287, 307; 18 Am. & Eng. Enc. Law, 590.

Even where in lieu of delivery an apparent transfer of title is made for the purpose merely of security, the general property remains in the pledgeor.

18 Am. & Eng. Enc. Law, 591, note; *Cross* v. *Eureka Lake & Y. Canal Co.* 73 Cal. 302; *Anderson* v. *Philadelphia Warehouse Co.* 111 U. S. 479 (28: 478); *Welles* v. *Larrabee*, 36 Fed. Rep. 866.

A pledgee is a trustee, and as such is by the statute exempted from liability.

Flint, Trusts & Trustees, § 2; Perry, Tr. § 243; *Cross* v. *Eureka Lake & Y. Canal Co.* 73 Cal. 302; *Union Trust Co.* v. *Rigdon*, 93 Ill. 458; *Newton* v. *Fay*, 10 Allen, 507; *Easton* v. *German-American Bank*, 127 U. S. 532 (32: 210); *Hyatt* v. *Argenti*, 3 Cal. 151; *Heyland* v. *Badger*, 35 Cal. 404; *Brewster* v. *Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *Luckett* v. *Townsend*, 3 Tex. 119, 49 Am. Dec. 723; *Wright* v. *Ross*, 36 Cal. 414; *Hoppin* v. *Buffum*, 9 R. I. 513, 11 Am. Rep. 291; *Re Barker*, 6 Wend. 509; *Ex parte Willcocks*, 7 Cow. 402, 17 Am. Dec. 525.

*Messrs. Edward W. Hutchins* and *Henry Wheeler* filed, by leave of court, a brief for Thomas P. Beal, receiver of Maverick National Bank.

*Messrs. George O. Shattuck* and *William A. Munroe* filed, by leave of court, a brief for Essex Savings Bank in No. 866.

Mr. Justice **Harlan** delivered the opinion of the court:

This was an action to recover the amount of an assessment made on the shareholders of a national banking association in the hands of a receiver.

Is the defendant in error, the State Loan & Trust Company, a "shareholder" of the California National Bank of San Diego within the meaning of the statute relating to national *banking associations? That is the sole [608 question presented by the pleadings.

By the Revised Statutes of the United States it is provided—

"Sec. 5139. The capital stock of each association shall be divided into shares of $100 each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

"Sec. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

"Sec. 5152. Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such funds would be, if living and competent to act and hold the stock in his own name."

"Sec. 5210. The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during



Digitized by Google

business hours of each day in which business may be legally transacted. A copy of such list, on the 1st Monday of July of each year, [609] *verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency."

The Comptroller of the Currency appointed the plaintiff in error receiver of the California National Bank of San Diego, California. U. S. Rev. Stat. § 5234. He gave bond as required by law, and thereafter entered upon the discharge of the duties of his trust.

In virtue of the authority conferred upon him by law, the Comptroller made an assessment on the shareholders of the bank for $500,000, to be paid by them on or before the 18th day of June, 1892. The assessment was equally and ratably upon shareholders to the amount of 100 per cent of the par value of the shares of the capital stock of the bank held and owned by them respectively at the time of its failure or suspension, and the receiver was required by an order of the Comptroller to institute suits to enforce against each shareholder his personal liability to that extent.

The receiver gave due notice of the assessment, in writing, to the State Loan & Trust Company—which is a corporation of California, having its principal place of business at the city of Los Angeles in that state—and made demand upon it therefor, but the company did not pay the same or any part thereof.

The facts upon which the claim against the defendant company is based are these: S. G. Havermale and J. W. Collins, owners and holders respectively of certificates numbered 286 and 297 issued to them for one hundred shares, each, of the capital stock of the California National Bank of San Diego, were indebted to the State Loan & Trust Company upon their promissory note for $12,500, besides interest. These certificates having been indorsed by the respective holders by writing their names across the back thereof, were transferred and delivered to the State Loan & Trust Company as collateral security for the payment of the above note, and, so indorsed, were, in the ordinary course of mail, transmitted and surrendered to the California National Bank of San Diego. New certificates, numbered 308 [610]*and 309, respectively, were thereupon issued to the State Loan & Trust Company of Los Angeles, as "pledgee," in lieu of certificates 286 and 297.

Each of the new certificates showed upon its face that it was issued to the "State Loan & Trust Company of Los Angeles, pledgee," and each purported to be for one hundred shares of the capital stock of the California National Bank of San Diego.

The defendant, after receiving certificates 308 and 309, held them "as pledgee, and as collateral security for the payment of said note, and for the unpaid balance of the debt thereby represented."

Otherwise than as just stated, the State Loan & Trust Company of Los Angeles never had, owned, or held any shares of the capital stock of the California National Bank of San Diego, and never was entitled to hold the usual stock certificate as such shareholder to the amount of two hundred shares or to any other amount.

Except as pledgee of the stock represented by certificates 308 and 309, respectively, the name of the State Loan & Trust Company never appeared upon or in the stock or other corporate books of the California National Bank of San Diego as a shareholder. The entries in the books of the bank showed that the new certificates were issued to the State Loan & Trust Company as pledgee, and not otherwise.

A jury having been waived by the parties in writing, the case was tried in the circuit court, and judgment was rendered for the defendant. 56 Fed. Rep. 430. Upon appeal to the circuit court of appeals that judgment was affirmed. 15 U. S. App. 259.

Is one who does not appear upon the official list of the names and residences of the shareholders of a national banking association otherwise than as "pledgee" of a given number of shares of the capital stock of such association —nothing else appearing—liable as a "shareholder" of such association under U. S. Rev. Stat. § 5151, declaring that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, *and engagements of such asso-[611 ciation, to the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares?"

As both sides contend that their respective positions are in harmony with decisions heretofore rendered in this court, it will be necessary to refer to some of the cases cited by counsel.

In *Pullman* v. *Upton*, 96 U. S. 328, 330 [24: 818, 819], which was an action by the assignee in bankruptcy of an insurance company to compel a holder of shares of its stock to pay the balance due thereon, the court said: "The only question remaining is, whether an assignee of corporate stock, who has caused it to be transferred to himself on the books of the company, and holds it as collateral security for a debt due from his assignor, is liable for unpaid balances thereon to the company, or to the creditors of the company, after it has become bankrupt. That the original holders and the transferees of the stock are thus liable we held in *Upton* v. *Tribilcock*, 91 U. S. 45 [23: 203]; *Sanger* v. *Upton*, 91 U. S. 56 [23: 220]; and *Webster* v. *Upton*, 91 U. S. 65 [23: 384]; and the reasons that controlled our judgment in those cases are of equal force in the present. The creditors of the bankrupt company are entitled to the whole capital of the bankrupt, as a fund for the payment of the debts due them. This they cannot have, if the transferee of the shares is not responsible for whatever remains unpaid upon his shares; for by the transfer on the books of the corporation the former owner is discharged. It makes no difference that the legal owner—that is, the one in whose name the stock stands on the books of the corporation—is in fact only, as between himself and his debtor, a holder for security of the debt, or even that he has no beneficial interest therein."

In *Germania Nat. Bank* v. *Case*, 99 U. S. 628, 631, 632 [25: 448-450],—which was an action to make the Germania National Bank of New Orleans liable as a shareholder of another national bank that had become insolvent, —it appeared that Phelps, McCullough, & Co



Digitized by Google

borrowed money from the defendant bank, and to secure the payment of the loan, evidenced by note, pledged one hundred shares of the stock of the Crescent City National Bank, with power on nonpayment of the sum bor-
[612] rowed to *dispose of the stock for cash without recourse to legal proceedings, and to that end to make transfers on the books of the latter corporation. The note not having been paid, the stock was transferred on the books of the Crescent City National Bank to the Germania National Bank. The latter subsequently caused the stock to be transferred, on the books of the former, to one of its clerks, who acquired no beneficial interest in it, and between whom and the officers of his bank it was understood that he would retransfer the stock at their request. This court, observing that notwithstanding the transfer to the clerk the stock remained subject to the bank's control, and that the transfer to him was made to evade the liability of the true owners, said: "It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman* v. *Upton*, 96 U. S. 328 [24: 818], and like decisions abound in the English courts, and in numerous American cases, to some of which we refer: *Adderly* v. *Storm*, 6 Hill, 624; *Rosevelt* v. *Brown*, 11 N. Y. 148; *Holyoke Bank* v. *Burnham*, 11 Cush. 183; *Magruder* v. *Colston*, 44 Md. 349 [22 Am. Rep. 47]; *Crease* v. *Babcock*, 10 Met. 525; *Wheelock* v. *Kost*, 77 Ill. 296; *United States Trust Co.* v. *United States F. Ins. Co.* 18 N. Y. 199; *Hale* v. *Walker*, 31 Iowa, 344 [7 Am. Rep. 137]. For this several reasons are given. One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made: another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder. . . . When, therefore, the stock was transferred to the Germania Bank, though it continued to be held merely as a collateral security, the bank became subject to the liabilities of a stockholder, and the liabil-
[613] ity accrued the instant the *transfer was made." After referring to some of the English cases, the court proceeds: "The American doctrine is even more stringent. Mr. Thompson states it thus and he is supported by the adjudicated cases: 'A transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferrer and the transferee it was out and out.' *Nathan* v. *Whitlock*, 9 Paige, 152; *McClaren* v. *Franciscus*, 43 Mo. 452; *Marcy* v. *Clark*, 17 Mass. 329; *Johnson* v. *Laflin*, 5 Dill. 65, 6 Cent. L. J. 131. The case in hand does not need the application of so rigorous a doctrine. While the evidence establishes that the Crescent City was in a failing condition when the transfer to Waldo was made, and leaves no reasonable doubt that the Germania Bank knew it and made the transfer to escape responsibility, it establishes much more. The transfer was not an out and out transfer. The stock remained the property of the transferrer. Waldo was bound to retransfer it when requested, and all the privileges and possible benefits of ownership continued to belong to the bank. No case holds that such a transfer relieves the transferrer from his liability as a stockholder."

It may be here observed that in *Pullman* v. *Upton*, 96 U. S. 328 [24: 818], the person who sought to escape liability as a shareholder appeared on the books of the insolvent insurance company *as the owner* of the stock; and that in *Germania Nat. Bank* v. *Case*, 99 U. S. 628, 631, 632 [25: 448–450], the Germania National Bank, after the original transfer under the power of attorney executed by its debtor, appeared on the books of the other bank *as the owner* of the stock, and that the liability arising therefrom could not be defeated or avoided by a transfer, however regular in form, to another who acquired no beneficial interest in it, and was to hold the stock simply for its benefit. Nothing appeared upon the stock list, in either case, to indicate that the person or corporation who appeared on such list as a shareholder was not, in fact, the actual owner.

*In *Adams* v. *Johnson* ("*Bowden* v. [614 *Johnson*") 107 U. S. 251, 261 [27: 386, 389], which involved the liability as a shareholder of a national bank of one who became the purchaser and owner of some of its shares, and who in apprehension of the bank's failure, and in order to escape liability, transferred his stock to an irresponsible person, the court said: "The answer sets forth that Johnson became the purchaser and owner of the one hundred and thirty shares in 1869. As such shareholder, he became subject to the individual liability prescribed by the statute. This liability attached to him until, without fraud as against the creditors of the bank, for whose protection the liability was imposed, he should relieve himself from it. He could do so by a bona fide transfer of the stock. But where the transferrer, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any liability to respond for the individual liability imposed by the statute, in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and the transferrer will be held to the same liability to the creditors as before the transfer. He will be still regarded as a shareholder *quoad* the creditors, although he may be able to show that there was a full or a partial consideration for the transfer, as between him and the transferee. The appellees contend that the statute does not admit of such a rule, because it declares that every person becoming a shareholder by transfer succeeds to all the liabilities of the prior holder, and that therefore the lia-



Digitized by Google

bilities of the prior holder, as a stockholder, are extinguished by the transfer. But it was held by this court in *Germania Nat. Bank* v. *Case*, 99 U. S. 628 [25: 448], that a transfer on the books of the bank was not in all cases enough to extinguish liability. The court, in that case, defined as one limit of the right to transfer, that the transfer must be out and out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a person known to be **615**] irresponsible, and *collusively made, with the intent of escaping liability, and defeating the rights given by statute to creditors."

But the case to which our attention has been particularly called is *Anderson* v. *Philadelphia Warehouse Co.* 111 U. S. 479, 483–485 [28: 478–481], in which the question was as to the liability of the Philadelphia Warehouse Company as a shareholder of a national bank that had become insolvent. The facts in that case were these: Blumer & Co. (the senior member of that firm being president of the bank) arranged with the Warehouse Company for a loan or banker's credit, to be secured by collaterals. Kern, a member of the firm, transferred 450 shares of the stock of the bank, standing in his name on the books of the bank, and caused a new certificate to be issued in the name of Henry, as president of the Warehouse Company, and it was taken or sent to that company as further security for the credit extended to Blumer & Co. The fact of this transfer of stock to the name of Henry, as president, having come to the knowledge of the directors and executive committee of the Warehouse Company, they caused a transfer to be made on the books of the bank to one McCloskey, an irresponsible person and a porter in its employment, and a new certificate to be issued in his name, because they deemed it inadvisable to have the stock stand in the name of the company's president, and thus incur the liability imposed upon shareholders of national banks. McCloskey never had possession of the certificate and gave to the Warehouse Company an irrevocable power of attorney for the sale and transfer of the stock. Upon McCloskey's death the stock was transferred on the books of the bank to Ferris, also an irresponsible person and an employee of the Warehouse Company. A new certificate was issued to him, and delivered to the company, Ferris indorsing thereon an irrevocable power of attorney for its transfer. When the bank failed, the stock stood in the name of Ferris, the Warehouse Company holding the certificate. That company never received any dividends on the stock, and never acted as a shareholder, but held the stock as security for the debt due it.

This court in that case recognized it to be **616**] well settled that *one who allows himself to appear on the books of a national bank as an "owner" of its stock is liable to creditors as a shareholder, whether he be, in fact, the absolute owner or only a pledgee, and that, if a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person, for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors,—citing *Germania Nat. Bank* v. *Case*, 99 U. S. 628 [25: 448]; *Adams* v. *Johnson* ("*Bowden* v. *Johnson*"), 107 U. S. 251 [27: 386]. It was further said to be beyond question that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder; "but," the court observed, "it has never, to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered *as owner*."

It appeared, according to the opinion in that case, that there was no evidence of actual fraud or bad faith; that the Warehouse Company never was the owner of the stock in question, and never held itself out as such; that the transfer of Kern and Blumer & Co. was only by way of pledge, and the company was bound to return the stock whenever the debt, for which it was held, was paid; that the company never consented to a transfer of the stock to its name on the books, or to that of its president, and that for seven years before the failure of the bank, and at least five years before its embarrassments were known to the company or the public, the stock, with the assent of Kern, Blumer & Co., and the officers of the bank, stood in the name of McCloskey or Ferris; that during all that time neither the registered holders nor the Warehouse Company claimed dividends or in any way acted as shareholders; that either Kern or Blumer & Co. took the dividends as they were paid, and to all intents and purposes controlled the stock; that there was no concealment on the part of the Warehouse Company, and no effort to deceive; that it had possession of the certificates representing the stock, with full power to control them for all the purposes of its security, but never was or pretended to be anything else than a mere pledgee; that those who examined the list of shareholders *would have[**617** found the name of McCloskey or of Ferris as the registered holder of four hundred and fifty shares; there was nothing on the books of the bank to connect them, or either of them, with the Warehouse Company, and therefore no credit could have been given on account of the apparent liability of the company as a shareholder.

"If," the court said, "inquiries had been made and all the facts ascertained, it would have been found that either Kern or Blumer & Co. were always the real owners of the stock, and that it had been placed in the name of the persons who appeared on the registry, not to shield any owner from liability, but to protect the title of the company as pledgee. Blumer & Co. and the bank were fully advised who McCloskey was, and of his probable responsibility, when they allowed the transfer to be made to him, and they undoubtedly knew who Ferris was when the stock was put in his name after McCloskey's death. The avowed purpose of both transfers was to give the company the control of the stock for the purposes of its security, without making it liable as a registered shareholder. To our minds there was neither fraud nor illegality in this. The company perfected its security as pledgee, without making itself liable as an apparent owner. Kern or Blumer & Co. still remained the owners of the stock, though registered in



Digitized by Google

the name of others and pledged as collateral security for their debt. They consented to the transfer, not to escape liability as shareholders, but to save the company from a liability it was unwilling to assume, and at the same time to perfect the security it required for the credit to be given. As between Blumer & Co. and the Warehouse Company, Blumer & Co. or Kern were the owners of the stock and the company the pledgee. As between the company and the bank or its creditors, the company was a pledgee of the stock and liable only as such. The creditors were put in no worse position by the transfers that were made than they would have been if the stock had remained in the name of Kern or Blumer & Co., who were always the real owners. To our minds the fact that the stock stood registered in the name of Henry, president, from
618] December 27 to January 10, *is, under the circumstances of this case, of no importance. The Warehouse Company promptly declined to allow itself to stand as a registered shareholder, because it was unwilling to incur the liability such a registry would impose. It asked that the transfer might be made to McCloskey. To this the owners of the stock and the bank assented, and from that time the case stood precisely as it would if the transfer had originally been made to McCloskey instead of Henry, president, or if Henry had retransferred to Kern or Blumer & Co., and they had at the request of the company made another transfer to McCloskey. The security of the Warehouse Company was perfected without imposing on the company a shareholder's liability. All this was done in good faith, when the bank was in good credit and paying large dividends, and years before its failure or even its embarrassment. So far as the company was concerned, the transfer was not made to escape an impending calamity, but to avoid incurring a liability it was unwilling to assume, and which it was at perfect liberty to shun."

Another of the cases referred to, although it did not relate to the liability of the shareholders of national banking associations, is *Easton* v. *German-American Bank*, 127 U. S. 532, 536, 537 [32: 210, 212], in which it was said: "Where personal property is pledged, the pledgee acquires the legal title and the possession. In some cases, it is true, it may remain in the apparent possession of the pledgeor, but, if so, it can be only where the pledgeor holds as agent of the pledgee. By virtue of the pledge, the pledgee has the right by law, on the default of the pledgeor, to sell the property pledged in satisfaction of the pledgeor's obligation. As in that transaction the pledgee is the vendor, he cannot also be the vendee. In reference to the pledge and to the pledgeor, he occupies a fiduciary relation, by virtue of which it becomes his duty to exercise his right of sale for the benefit of the pledgeor. He is in the position of a trustee to sell, and is by a familiar maxim of equity forbidden to purchase for his own use at his own sale. The same principle applies with a like result where real estate is conveyed by a debtor directly to a creditor as se-
619] curity for the payment of *an obligation, with a power to sell in case of default. There the creditor is also a trustee to sell, and cannot purchase the property at his own sale for his own use."

It is apparent that the precise question before us was not involved in any of the above cases, although the principles announced in them bear upon the issue here presented.

From those cases the following rules relating to the liability of shareholders of national banking associations may be deduced:

That the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of U. S. Rev. Stat. § 5151;

That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder within the meaning of U. S. Rev. Stat. § 5151, and therefore liable upon the basis prescribed by that section for the contracts, debts, and engagements of the association;

That if the real owner of the shares transfers them to another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply to evade the responsibility imposed by § 5151 on shareholders of national banking associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed;

That if one receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and, being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor—the latter acting in good faith and for the purpose *only of securing the payment of that debt[620 without incurring the responsibility of a shareholder—he, the creditor, will not, although the real owner may, be treated as a shareholder within the meaning of § 5151; and,

That the pledgee of personal property occupies towards the pledgeor somewhat of a fiduciary relation, by virtue of which, he being a trustee to sell, it becomes his duty to exercise his right of sale for the benefit of the pledgeor.

The present case differs from those cited in the important particular that the stock list of the bank gave information to all who examined it that the State Loan & Trust Company was not the real or absolute owner of the shares in question, but held them only as "pledgee;" that there was no "out and out" transfer of the stock, whereby the transferrer, as between him and the transferee, parted with his interest; and that the real ownership remained with the pledgeor, the pledgee acquiring only a lien upon the stock to secure its debt.

In the case of *Finn* v. *Brown*, 142 U. S. 56, 71 [35: 936, 940], the question was as to the liability as a shareholder of a director of a bank who appeared upon its books to be the owner



Digitized by Google

of a given number of shares of stock. The court said: "It appears by the evidence that the bank had a stock register and a book of certificates of shares, and that a list of stockholders and of transfers was kept in one of its books, although it had no regular stock book. The jury would not have been justified in holding the defendant not liable for the assessment on the fifty shares or for the $1,750 dividend. The dividend was undoubtedly fraudulent, and the records of the bank were falsified in showing that the defendant was present at the meeting at which the dividend was declared. It was declared, probably by De Walt himself alone, for the purpose of showing a fictitious prosperity and of concealing from the public and the directors the real condition of the affairs of the bank. The defendant had had no previous connection with a banking business, and was deceived by De Walt. But all this cannot relieve him from liability. The statutes of the United States are explicit as to the necessary ownership of stock in a national bank by a director thereof, and as to his taking [621]*an oath to that effect, and as to the keeping by the cashier of a correct list of the shareholders and of the number of shares each of them holds; and it cannot be held, with any safety to the interests of the public and those who deal with national banks, that a director, who also is vice president who acts as cashier, can shield himself from liability by alleging ignorance of what appears by the books of which he has charge."

Does the statute, in letter or spirit, require that the word "pledgee," appended to the name of the party to whom certificates 308 and 309 were issued, should be entirely ignored? Is the holder of such certificates in no better condition, in respect of liability as a shareholder, than if such list had imported absolute ownership in the transferee? The statute requires that there shall be kept, at all times, in the office where the business of a national banking association is transacted, and subject, during business hours, to the inspection of shareholders and creditors of the association, as well as of officers authorized to assess taxes under state authority, a full and correct list of the names and residences of all the shareholders of the association, and of the number of shares held by each. U. S. Rev. Stat. § 5210. Manifestly, one, if not the principal, object of this requirement was to give creditors of the association, as well as state authorities, information as to the shareholders upon whom, if the association becomes insolvent, will rest the individual liability for its contracts, debts, and engagements. Referring to this provision this court said, in *Waite* v. *Dowley*, 94 U. S. 527, 534, [24: 181, 182], that the act of Congress "was merely designed to furnish to the public dealing with the bank a knowledge of the names of its corporators, and to what extent they might be relied on as giving safety to dealing with the bank." And, let it be observed, the liability upon shareholders is to the extent of the amount of their stock at the par value thereof, "in addition to the amount *invested in* such shares." The word "invested" plainly has reference to those who originally or by subsequent purchase become the real owners of the stock, and cannot refer to those who never invested money in the shares, but only received the certificates of stock, or it may be the legal title thereto, as collateral [622 security for debts or obligations already or to be contracted.

It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out on the books of the association as true owner, may be treated as the owner, and therefore liable to assessment, when the association becomes insolvent and goes into the hands of a receiver. But this is upon the ground that by allowing his name to appear upon the stock list as owner he represents that he is such owner; and he will not be permitted, after the bank fails and when an assessment is made, to assume any other position as against creditors. If, as between creditors and the person assessed, the latter is not held bound by that representation, the list of shareholders required to be kept for the inspection of creditors and others would lose most of its value.

But this rule can have no just application when, as in this case, the creditors were informed by that list that the party to whom certificates were issued was not in fact, and did not assume to be, the owner of the shares represented by them, but was and assumed to be only a pledgee having no general property in the thing pledged, but only a right, upon default, to sell in satisfaction of the pledgeor's obligation. Upon inspecting the stock registry or any list of shareholders or of transfers kept by the bank, creditors will know that they cannot regard a pledgee as the actual owner. If the certificates in question had been extended so as to give the name of the pledgeor, it would not be supposed that, upon any principle of justice, or upon grounds of public policy, the pledgee could have been held to the liability imposed by U. S. Rev. Stat. § 5151, upon shareholders. But the liability being purely statutory, the result ought not to be different because of the circumstance that the name of the pledgeor was omitted from the certificates, since that which did appear in them was sufficient to inform creditors that the State Loan & Trust Company was only a pledgee, and by slight diligence they could have ascertained the name of the pledgeor.

It may be suggested that if the pledgee is not held liable *as a shareholder, in respect of [623 the shares of stock standing in its name as pledgee, then no one is liable to assessment as the owner of such stock. But it is a mistake to suppose that Havermale and Collins ceased to be shareholders for the purposes of the liability imposed by U. S. Rev. Stat. § 5151. They remained, notwithstanding the pledge, the actual owners of the stock, a right which they would have promptly asserted if the pledgee had assumed to be the owners and had sold the stock, appropriating to itself all the proceeds of sale. The object of the statute is not to be defeated by the mere forms of transactions between shareholders and their creditors. The courts will look at the relations of parties as they actually are, or as, by reason of their conduct, they must be assumed to be for the protection of creditors. Congress did



Digitized by Google

not say that those only should be regarded as shareholders, liable for the contracts, debts, and engagements of the banking association, whose names appear on the stock list distinctly as shareholders. A mistake or error in keeping the official list of shareholders would not prevent creditors from holding liable all who were, in fact, the real owners of the stock, and as such had invested money in the shares of the association. As already indicated, those may be treated as shareholders, within the meaning of § 5151, who are the real owners of the stock, or who hold themselves out, or allow themselves to be held out, as owners in such way and under such circumstances as, upon principles of fair dealing, will estop them as against creditors from claiming that they were not, in fact, owners.

It was under this construction of the statute that one was held liable as a shareholder who, in the belief that the bank was about to fail, and whose liability as a shareholder had equitably attached, collusively transferred his stock to an irresponsible person, in order to escape responsibility as a shareholder. This was held to be a fraud upon the statute, and the transferrer was held, as between him and the creditors, as the real owner of the stock, and therefore liable, although the transferee appeared on the stock register as the shareholder. *Adams* v. *Johnson* ("*Bowden* v. *Johnson*") 107 U. S. 251 [27: 386]. Under [624] the same interpretation a corporation was treated as a shareholder who held shares of stock only as collateral security, but who allowed its name to appear and remain on the stock registry of the insolvent national bank association *as owner*, without anything indicating that it held such stock as collateral security. *Germania Nat. Bank* v. *Case*, 99 U. S. 628 [25: 448]. So, in another case, it was held that the transferrers "remained the owners of the stock, though registered in the name of others, and pledged as collateral security for their debt." *Anderson* v. *Philadelphia Warehouse Co.* 111 U. S. 479, 483, 485 [28: 478, 480, 481].

Our conclusion is that the defendant in error cannot be regarded otherwise than as a pledgee of the stock in question, is not a shareholder within the meaning of U. S. Rev. Stat. § 5151, and is not, therefore, subject to the liability imposed upon the shareholders of national banking associations by that section.

This view of the case makes it unnecessary to consider whether the State Loan & Trust Company, being a pledgee of the stock, was a "trustee" within the meaning of § 5152, providing that "persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders."

*The judgment is affirmed.*

CHARLES WADE, *Plff. in Err.*,
*v.*
R. W. LAWDER and Rosa Ringo, Administrators of Birt Ringo, Deceased.

(See S. C. Reporter's ed. 624-628.)

*Federal question—suit on contract concerning a patent.*

1. A suit to rescind a contract for the exchange of an invention for merchandise on the ground of fraud does not present a Federal question, where the utility of the invention was only involved on the question of fraud, and the state court held that plaintiff was not deceived or misled,—a ground broad enough to sustain the decree without reference to a Federal question.

2. Where a suit is brought on a contract of which a patent is the subject-matter, either to enforce such contract or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws.

[No. 173.]

*Argued January 26, 1897. Decided March 1, 1897.*

IN ERROR to the Supreme Court of the State of Missouri to review a decree affirming the decree of the Circuit Court of Audrain County, Missouri, dismissing a suit in equity brought by Charles Wade against Birt Ringo, and continued after his death against R. W. Lawder *et al.*, his administrators. *Dismissed.*

See same case below, 122 Mo. 322.

Statement by Mr. Chief Justice **Fuller:**

This was a bill in equity brought by Charles Wade against Birt Ringo, in the circuit [625] court of Audrain county, Missouri, for the rescission of a contract. After hearing had on pleadings and proofs that court dismissed the bill, whereupon the cause was carried by appeal to the supreme court of Missouri, division No. 1, and the decree affirmed. 122 Mo. 322. Appellant then moved that the case be transferred to the supreme court in banc (under the Constitution of Missouri in that behalf, *Duncan* v. *Missouri*, 152 U. S. 377 [38: 485]), on the ground that the record involved the decision of a Federal question arising under the laws of the United States, namely, "the construction of the patent and specifications of the patent, as they appear in evidence in said cause." This motion was denied and a writ of error from this court was afterwards allowed.

*Messrs.* **John M. Barker** and *Samuel W. Bickley* for plaintiff in error.

*Messrs.* **W. W. Fry** and *George Robertson* for defendants in error.

NOTE.—*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,*—see note to Hamblin v. Western Land Co. 37: 267.

*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution,* see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 554, and Williams v. Norris, 6: 571.



Digitized by Google

Mr. Chief Justice **Fuller** delivered the opinion of the court:

On the 27th of July, 1891, Wade and Ringo entered into the following contract:

"Whereas, B. Ringo, of Mexico, Missouri, has invented a new folding bed known as the Ringo folding bed for which he has made application for a patent from the United States of America in his name, and whereas B. Ringo owns an undivided one-half interest of and in said patent with one J. C. Buckner, of Mexico, Missouri. Now be it known that the undersigned, B. Ringo, has this day sold and does hereby sell and assign to C. Wade, of Mexico, Missouri, all of his said undivided one-half interest in said invention and the letters patent applied for and to be issued to said B. Ringo for and to said Ringo folding bed. And said B. Ringo obligates himself to assign his undivided one-half interest in said letters patent to said C. Wade as soon as the same are issued **626**]by and at the *Patent Office of the United States, in such manner as any additional assignment of the same may be necessary other than this writing to convey to said C. Wade an undivided one-half interest in said invention and letters patent. And the said B. Ringo does hereby further sell and assign to C. Wade my undivided one-half interest in all patents, and all of said Ringo folding beds completed or being constructed at J. H. Heitland's in Quincy, Illinois. For and in consideration of the sale and transfer of the above undivided one-half interest in said invention and letters patent, said C. Wade does hereby sell, transfer, and deliver to said B. Ringo his entire stock of furniture, coffins, fixtures, one furniture wagon, two hearses, and three sets of harness with said wagon and hearses, said stock of furniture being the same now in the building occupied by said C. Wade on Jefferson street, in Mexico, Missouri, which stock of furniture, fixtures, coffins, wagon, and harness, etc., is this day delivered by said C. Wade to said B. Ringo.

"Said B. Ringo further obligates himself to assign, transfer, for no other or further consideration than herein named, any further patent or improvement on said Ringo folding bed or other folding bed that he may obtain letters patent for at any time in the future.

"If said letters patent on this application or other different application should for any cause not be issued to said B. Ringo for said folding bed, then said B. Ringo hereby obligates himself, when it is definitely known that said letters patent will not be issued, if at all, to return to said C. Wade said stock of furniture, fixtures, wagon, hearses, and harness, with the stock of furniture as full, as near as practicable, as it now is and less the wear and tear of said fixtures, wagon, hearses, and harness from use.

"But it is understood if such transfer should for said cause be necessary, said B. Ringo is to retain all proceeds of sales made by him in said furniture business, and said C. Wade to retain proceeds of sales made by him in said furniture business and said C. Wade to retain proceeds of sales of such folding beds as he may make during said time."

The application for letters patent was then **627**]pending and *under an assignment of his interest in the invention by Ringo to Wade, a patent issued September 22, 1891, to Wade, and Buckner, Ringo's co-owner.

The gravamen of the bill was that plaintiff was induced to enter into the contract by certain false and fraudulent representations by defendant as to the utility and value of the invention in question; and also that various matters and things were fraudulently omitted from the contract by the defendant. Any other grounds of complaint indicated are unimportant. It was averred that the bed was worthless, and in a replication plaintiff alleged "that the patent, as set out in defendant's answer as having been issued to C. Wade and J. C. Buckner, at the instance of said Ringo, is void for the reason that the said patent so issued has neither novelty of invention nor utility of purpose." But the utility of the invention was only involved on the question of the falsity of the alleged representations.

The circuit court of Audrain county held upon the evidence that the contract was exactly as both parties desired and intended it to be; that the charges of fraud were not substantiated; that it did not appear that the folding bed was wholly worthless; and that, as plaintiff was experienced in the sale of the article; had every opportunity to test it, and the opinion of friends and of an expert to aid him; had advised and suggested changes and supposed improvements to defendant during the working out of the idea; inspected the models at various times; proposed the trade first himself and again a second time; and at the time of the trade knew or ought to have known far more about folding beds than defendant, who was wholly ignorant of them prior to the time he began work on the invention,—representations as to the utility of the improvement, even if in fact untrue, would not constitute sufficient ground for rescission. In these conclusions the supreme court of the state concurred. 122 Mo. 322.

The general rule is that "where a suit is brought on a contract of which a patent is the subject-matter, either to enforce such contract, or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws." **Dale Tile Mfg. Co.* v. *Hyatt*, 125[628 U. S. 46 [31: 683], and cases cited; *Walter A. Wood Mowing & R. Mach. Co.* v. *Skinner*, 139 U. S. 293 [35: 193]; *Re Ingalls*, 139 U. S. 548 [35: 266]; *Marsh* v. *Nichols*, 140 U. S. 344 [35: 413].

We are unable to discover in this case that plaintiff specially set up and claimed, at the proper time and in the proper way, any right under the laws of the United States, or that any such right was denied him by the decision of the state courts. The controversy was in respect to the rescission of a contract for the exchange of an invention for a stock of merchandise. The decree rested on grounds broad enough to sustain it without reference to any Federal question. Application for letters patent was pending when the contract was entered into, and letters patent were issued so that Wade obtained a half interest therein as provided. The state courts held, for the reasons given, that Wade got what he had bargained for, and was not deceived or misled in the premises. Under these circumstances the writ of error cannot be maintained. U. S. Rev. Stat. § 709.

*Writ dismissed.*



Digitized by Google

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, *Plff. in Err.*,

*v.*

PEOPLE OF THE STATE OF NEW YORK.

(See S. C. Reporter's ed. 628-634.)

*tute forbidding heating of cars by stoves—power of state—U. S. Rev. Stat. § 5258—qual protection of law—due process of law.*

Cars employed in interstate commerce are not exempt, in the absence of national legislation covering the subject, from the operation of a state law forbidding under penalties the heating of passenger cars in that state by stoves or furnaces kept inside the cars or suspended therefrom.

Possible inconveniences cannot affect the question of power in each state to make such reasonable regulations for the safety of passengers on interstate trains as in its judgment is appropriate and effective.

The authority conferred by U. S. Rev. Stat. § 5258, upon railroad companies engaged in commerce among the states does not interfere with the passage by the states of laws having for their object the personal security of passengers while traveling, within their respective limits, from one state to another on cars propelled by steam.

The exclusion of railroads less than 50 miles in length from the operation of a state law prohibiting stoves or furnaces inside of or suspended from passenger cars, on other than mixed trains, does not deny to other railroads the equal protection of the laws.

A railroad is not deprived of property without due process of law by the recovery of penalties against it for violations of a valid state statute prohibiting the heating of passenger cars on other than mixed trains by stoves or furnaces inside of or suspended from the cars, except for temporary use in case of accident or other emergency, where the defendant was before the court.

[No. 128.]

*Argued January 4, 1897. Decided March 1, 1897.*

IN ERROR to the Supreme Court of the State of New York to review a judgment against the New York, New Haven, & Hartford Railroad Company for the amount of penalties imposed for the violation of the New York State Laws of 1887 and 1888, regulating the heating of railroad passenger cars. *Affirmed.*

See same case below, 142 N. Y. 646.

The facts are stated in the opinion.

*Mr.* **John M. Bowers** for plaintiff in error.

*Messrs.* **Theodore E. Hancock,** Attorney General of the State of New York, and **William Henry Dennis** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

A statute of New York passed June 18, 1887, regulating the heating of steam passenger cars and directing guards and guard-posts to be placed on railroad bridges and trestles and the approaches thereto (N. Y. Laws 1887, chap. 616, p. 828), provides: "§ 1. It shall not be lawful for any steam railroad doing business in this state, after the 1st day of May, 1888, to heat its passenger cars, on other than mixed trains, by any stove or furnace kept inside of the car or suspended therefrom, except it may be lawful, in case of accident or other emergency, to temporarily use such stove or furnace with necessary fuel. Provided, that in cars which have been equipped with apparatus to heat by steam, hot water, or hot air from the locomotive, or from a special car, the present stove may be retained, to be used only when the car is standing still. And provided also that this act shall not apply to railroads less than 50 miles in length, nor to the use of stoves, of a pattern and kind to be approved by the railroad commissioners, for cooking purposes in dining cars. § 2. After November 1st, 1887, guard-posts shall be placed in the prolongation of the line of bridge trusses so that in case of derailment the posts and not the bridge trusses shall receive the blow of the derailed locomotive or car. § 3. Any person or corporation violating any of the provisions of this act shall be liable to a penalty of $1,000 and to the further penalty of $100 for each and every day during which such a violation shall continue. § 4. Upon the application of any railroad covered by the provisions of this act, the board of railroad commissioners may approve of any proposed safeguard or device to be used under the provisions of this act, and thereafter the railroad using such safeguard or device so approved shall not be liable to any of the penalties prescribed by this act for a violation thereof in regard to any such safeguard *or de- [630 vice. § 5. The violation of any of the provisions of this act will be deemed a misdemeanor. § 6. This act shall take effect immediately."

A subsequent statute, passed April 27, 1888 (N. Y. Laws 1888, chap. 189, p. 250), so amended the 1st section of the act of 1887 that the heating of passenger cars on other than mixed trains by a stove or furnace kept inside the car or suspended therefrom did not become unlawful until after November 1, 1888. The amendatory act further provided that in special cases the board of railroad commissioners could extend the time for a period not exceeding one year from November 1, 1888, for any steam railroad doing business in New York to heat its passenger cars by stoves or furnaces kept inside the car or suspended therefrom.

The present action was brought to recover penalties imposed for the violation of the above statutes.

The complaint filed in behalf of the People of New York charged the defendant, the New York, New Haven, & Hartford Railroad Company, a corporation of Connecticut, with having, in the operation of its railroad, on the 2d day of November, 1888, and on every subsequent day down to and including December 31, 1888, run trains of passenger cars over its route from the city of New York to Hartford

NOTE.—*As to interstate commerce; regulation of; power of Congress; how far exclusive,*—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

*As to power of Congress to regulate commerce,* see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

*As to what is due process of law,* see note to Pearson v. Yewdall, 24: 436.



Digitized by Google

and from Hartford to that city, and heated said cars, both on through trains and over that part of its road in New York on other than mixed trains, by stoves and furnaces kept within such cars, "as the regular and usual method of heating said cars and in cases other than those of accident and other emergency;" and that the board of railroad commissioners of New York had not extended the time of the defendant to heat its passenger cars by any stove or furnace kept inside its cars.

There was a verdict and judgment against the railroad company for the sum of $7,000 and $479.81 costs, disbursements, and allowance, in all $7,479.81,—that judgment having been affirmed by the court of appeals of New York, 142 N. Y. 646.

It is contended that the above statute of New York is repugnant to § 8 of article 1 of the 631] Constitution of the United *States providing that Congress shall have power to regulate commerce among the several states, and to make all laws necessary and proper to carry such power into execution, and also to the 14th Amendment of the Constitution of the United States, declaring that no state shall deprive anyone of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

As these questions were properly raised in the state court, there is no doubt of our jurisdiction to re-examine the final judgment against the railroad company. U. S. Rev. Stat. § 709.

According to numerous decisions of this court (some of which are cited in the margin†) sustaining the validity of state regulations enacted under the police powers of the state and which incidentally affected commerce among the states and with foreign nations, it was clearly competent for the state of New York, in the absence of national legislation covering the subject, to forbid under penalties the heating of passenger cars in that state by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce. While the laws of the states must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution (*Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 211 [6: 23, 73], the mere grant to Congress of the power to regulate commerce with foreign nations and among the states did not, of itself and without legislation by Congress, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people. The statute in question had for its object to protect all persons traveling in the state of New York on passenger cars moved by the agency of steam against the perils attending a particular *mode of heating [632 such cars. There may be reason to doubt the efficacy of regulations of that kind. But that was a matter for the state to determine. We know from the face of the statute that it has a real, substantial relation to an object as to which the state is competent to legislate, namely, the personal security of those who are passengers on cars used within its limits. Why may not regulations to that end be made applicable, within a state, to the cars of railroad companies engaged in interstate commerce as well as to cars used wholly within such state? Persons traveling on interstate trains are as much entitled, while within a state, to the protection of that state, as those who travel on domestic trains. The statute in question is not directed against interstate commerce. Nor is it within the meaning of the Constitution a regulation of commerce, although it controls, in some degree, the conduct of those engaged in such commerce. So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce and enacted under the power remaining with the state to regulate the relative rights and duties of all persons and corporations within its limits. Until displaced by such national legislation as Congress may rightfully establish under its power to regulate commerce with foreign nations and among the several states, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned.

Counsel for the railroad suggests that a conflict between state regulations in respect of the heating of passenger cars used in interstate commerce would make safe and rapid transportation impossible; that to stop an express train on its way from New York to Boston at the Connecticut line in order that passengers may leave the cars heated as required by New York, and get into other cars heated in a different mode in conformity with the laws of Connecticut, and then at the Massachusetts line to get into cars heated by still another mode as required by the laws of that commonwealth, would be a hardship on travel that could not be endured. These possible inconveniences cannot affect the question of power in each state to make such reasonable *regula- [933 tion for the safety of passengers on interstate trains as in its judgment, all things considered, is appropriate and effective. Inconveniences of this character cannot be avoided so long as each state has plenary authority within its territorial limits to provide for the safety of the public, according to its own views of necessity and public policy, and so long as Congress deems it wise not to establish regulations on the subject that would displace any inconsistent regulations of the states covering the same ground.

Our attention is called to the clause in the act of June 15, 1866 (14 Stat. at L. 66, chap. 124), now a part of U. S. Rev. Stat. § 5258, providing that "every railroad company in the United States whose road is operated by steam, its successors and assigns, be and is hereby authorized to carry upon and over its road, boats,

†Gibbons v. Ogden, 22 U. S. 9 Wheat. 1, 206, 211 [6: 23, 71, 73]; Wilson v. Black Bird Creek Marsh Co. 27 U. S. 2 Pet. 245 [7: 412]; Cooley v. Philadelphia Port Wardens, 53 U. S. 12 How. 299, 320 [13, 996, 1005]; Gilman v. Philadelphia, 70 U. S. 3 Wall. 713 [18: 96]; Sherlock v. Alling, 93 U. S. 99, 104 [23: 819, 821]; Mobile County v. Kimball, 102 U. S. 691 [26: 238]; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678 [27: 442]; Morgan's Louisiana & T. R. & S. S. Co. v. Louisiana Board of Health, 118 U. S. 455, 463 [30: 237, 241]; Huse v. Glover, 119 U. S. 543 [30: 487]; Smith v. Alabama, 124 U. S. 465 [31: 508, 1 Inters. Com. Rep. 804]; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 100 [32: 352, 354, 2 Inters. Com. Rep. 258]; Western U. Teleg. Co. v. James, 162 U. S. 650, 662 [40: 1105, 1109]; Hennington v. Georgia, 163 U. S. 299, 317 [41: 166, 173].



Digitized by Google

idges, and ferries, all passengers, troops, vernment supplies, mails, freight, and prop-y on their way from any state to another ate, and to receive compensation therefor, and connect the roads of other states so as to rm continuous lines for the transportation of e same to the place of destination." We fail perceive that this statute has any bearing on the question now before the court. The thority conferred by it upon railroad com-nies engaged in commerce among the states, hatever may be the extent of such authority, es not interfere in any degree with the pass-e by the states of laws having for their ob-ct the personal security of passengers while aveling, within their respective limits, from ie state to another on cars propelled by steam. But it is contended that the statute is repug-ant to the clause of the 14th Amendment rbidding a state from denying to any person ithin its jurisdiction the equal protection of e laws. This contention is based upon that lause of the statute declaring that it shall not pply to railroads less than 50 miles in length. o doubt the main object of the statute was to rovide for the safety of passengers traveling n what are commonly called trunk or through ines, connecting distant or populous parts of he country, and on which the perils incident to 334] traveling are greater than on *short, local ines. But as suggested in argument, a road nly 50 miles in length would seldom have a sleeping car attached to its trains; and passen-gers traveling on roads of that kind do not have he apprehension ordinarily felt by passengers on trains regularly carrying sleeping cars or having many passenger coaches, on account of the burning of cars in case of their derailment or in case of collision. In any event, there is no such discrimination against companies hav-ing more than 50 miles of road as to justify the contention that there has been a denial to the companies named in the act of the equal protection of the laws. The statute is uniform in its operation upon all railroad companies doing business in the state of the class to which it is made applicable.

One of the assignments of error questions the validity of the statute upon the ground that it deprives the plaintiff in error of its property without due process of law. As the action against the company was instituted and conducted to a conclusion under a valid stat-ute, the defendant being before the court, there is no reason to hold that there was any want of the due process of law required by the 14th Amendment.

*The judgment is affirmed.*

Mr. Justice **Gray** did not sit in this case or take any part in its decision.

## FOURTH STREET NATIONAL BANK of the City of Philadelphia, *Appt.*, v. ROBERT M. YARDLEY, Receiver of the Keystone National Bank.

(See S. C. Reporter's ed. 634-654.)

*Bank check—when transfers the fund—intention of the parties—receiver of bank—estoppel.*

1. While an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet if in the transaction connected with the delivery of the check it was the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of a specified fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers, and parties charged with notice.
2. A fund to the credit of an embarrassed bank, in a bank of another city, though consisting in part of collection items not yet turned into cash, is transferred and appropriated *pro tanto* by a check against this fund given to obtain, as a matter of immediate relief and accommodation from a third bank, a quantity of gold clearing-house certificates which it needs to meet its debtor balance at the clearing house, where it is clear that the certificates were furnished on the faith of this check and representations made as to the fund on which it was drawn.
3. A check drawn generally will be treated as an order for payment out of a specific designated fund, where it is clear that it was the intention and agreement of the parties to the transaction that it should be paid out of that particular fund.

NOTE.—*As to liability of bank upon check*, see note to National Bank of the Republic v. Millard, 19: 897.

*As to certification of checks; liability on*,—see note to Merchants' Nat. Bank v. State Nat. Bank, 19: 1008.

*As to powers and duties of receivers*, see note to Davis v. Gray, 21: 447.

*Checks; presentment and notice; time for presentment; what is reasonable time; delay in presentment and notice; antedated and postdated checks; certified checks; effect of certification; forged checks; damages for wrongful dishonor of checks; checkholder's right to sue the bank for refusal to pay.*

A check is a draft or order upon a bank or banking house purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money, to a certain person therein named, or to him or his order, or to bearer, and payable on demand. 2 Daniel, Neg. Inst. 3d ed. 583.

A check purports to be drawn upon a deposit. Champion v. Gordon, 70 Pa. 476, 10 Am. Rep. 681; Morrison v. Bailey, 5 Ohio St. 13, 64 Am. Dec. 632; Espy v. First Nat. Bank, 85 U. S. 18 Wall. 620 (21: 951); Bowen v. Newell, 8 N. Y. 195; Deener v. Brown, 1 MacArth. 350.

Where the amount stated in marginal figures differs from the words in the body of the check, the latter will govern. Smith v. Smith, 1 R. I. 398, 53 Am. Dec. 652; National Bank v. Second Nat. Bank, 69 Ind. 479, 35 Am. Rep. 236; Corgan v. Frew, 39 Ill. 31, 89 Am. Dec. 286.

The check must be presented to the bank, and payment refused, and notice of presentment and nonpayment given to the drawer, before the holder has a right of action against the drawer. Pollard v. Bowen, 57 Ind. 232; Judd v. Smith, 3 Hun, 190; Jaudon v. Read, 32 How. Pr. 190; Murray v. Judah, 6 Cow. 484; Little v. Phœnix Bank, 2 Hill, 430; Har-



Digitized by Google

4. A receiver of an insolvent bank has no greater rights than the bank itself in a fund against which the bank had given a check which constituted an equitable transfer or appropriation of the fund.

5. An insolvent bank and its receiver are in equity estopped from asserting to the prejudice of another bank that the character and condition of the fund on which the latter bank had accepted a check upon the faith of certain representations were otherwise than they were represented to be.

[No. 147.]

*Argued January 12, 13, 1897. Decided March 1, 1897.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Third Circuit of questions of law in an action brought by the Fourth Street National Bank of Philadelphia, against Robert M. Yardley, receiver of the Keystone National Bank. *First question answered in the affirmative.*

Statement by Mr. Justice White:

By a bill filed in the circuit court of the United States for the eastern district of Pennsylvania, appellant sought to *subject [635 moneys in the hands of the receiver of the Keystone National Bank to the satisfaction of an alleged equitable charge or lien thereon. From a decree dismissing the bill an appeal was taken to the circuit court of appeals for the third circuit. The latter court thereafter certified to this court two questions of law arising upon

---

ker v. Anderson, 21 Wend. 372; Levy v. Peters, 9 Serg. & R. 125, 11 Am. Dec. 679; Flemming v. Denny, 2 Phila. 111; Case v. Morris, 31 Pa. 100; Sherman v. Comstock, 2 McLean, 19.

If, however, the presentment and notice could be of no benefit to the drawer, they may be dispensed with. Judd v. Smith, 3 Hun, 190; Lovett v. Cornwell, 6 Wend. 369; True v. Thomas, 16 Me. 36; Hoyt v. Seeley, 18 Conn. 353; Case v. Mooris, 31 Pa. 100.

When the drawer has no funds, or has withdrawn them from the bank, or has stopped payment of the check, notice of its dishonor is unnecessary. Wirth v. Austin, L. R. 10 C. P. 689; Carew v. Duckworth, L. R. 4 Exch. 313; Conroy v. Warren, 3 Johns. Cas. 259, 2 Am. Dec. 156; Murray v. Judah, 6 Cow. 484; Eichelberger v. Finley, 7 Harr. & J. 381, 16 Am. Dec. 312; True v. Thomas, 16 Me. 36; Franklin v. Vanderpool, 1 Hall. 78; Fitch v. Redding, 4 Sandf. 130; Jacks v. Darrin, 3 E. D. Smith, 557; Purchase v. Mattison, 6 Duer, 587.

Or if the bank becomes insolvent within the time required for presentment. Syracuse, B. & N. Y. R. Co. v. Collins, 3 Lans. 29; Warrensburg Co-Op. Bldg. Asso. v. Zoll, 88 Mo. 94; Bickerdike v. Bollman, 1 T. R. 408; Cory v. Scott, 3 Barn. & Ald. 619.

In Kinyon v. Stanton, 44 Wis. 479, 28 Am. Rep. 601, the holder failed to present the check, and eight days after its date the bank suspended payment. But just before the bank's failure the drawer withdrew his funds. The bank would have paid the check had it been presented for payment at any time up to the day of its failure. Held, that the drawer was liable.

Generally the holder, in order to charge the drawer in case of a dishonor, must present the check for payment within a reasonable time, otherwise the delay is at the peril of the holder. Morrison v. McCartney, 30 Mo. 183; Cork v. Bacon, 45 Wis. 192, 30 Am. Rep. 712; Scott v. Meeker, 20 Hun, 163; Harker v. Anderson, 21 Wend. 372; Daniels v. Kyle, 5 Ga. 245; Montelius v. Charles, 76 Ill. 303; Stevens v. Park, 73 Ill. 387.

What is a reasonable time will depend upon the circumstances, and will in many cases depend upon the time, the mode, and the place of receiving the check, and upon the relations of the parties between whom the question arises. Woodruff v. Plant, 41 Conn. 344; Taylor v. Sip, 30 N. J. L. 284, 290.

If the bank on which the check is drawn be in the same place where the payee receives the check, it should be presented for payment within banking hours on the day it is received, or on the following day. If, in the meantime, the bank fails, the loss will be the drawer's. Simpson v. Pacific Mut. L. Ins. Co. 44 Cal. 139; Veazie Bank v. Winn, 40 Me. 60; Wear v. Lee, 87 Mo. 358; Cawein v. Browinski, 6 Bush, 457, 99 Am. Dec. 684; Schoolfield v. Moon, 9 Heisk. 171; Syracuse, B. & N. Y. R. Co. v. Collins, 3 Lans. 29, 57 N. Y. 641; Smith v. Miller, 6 Robt. 157, 43 N. Y. 171, 3 Am. Rep. 690, 52 N. Y. 545; Kelty v. Second Nat. Bank, 52 Barb. 328; Bickford v. First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436; Moule v. Brown, 4 Bing. N. C. 268; Bailey v. Bodenham, 16 C. B. N. S. 288; Boddington v. Schlencker, 4 Barn. & Ad. 752.

The holder of a check upon a bank located in the town of his residence may present it for payment during business hours the day after it is drawn, and his omission to do so sooner is no defense to the drawer, unless the holder had information of its precarious condition. First Nat. Bank v. Alexander, 84 N. C. 30.

If the bank be not in the same place where the payee received the check, then it must be forwarded by mail on the next secular day after it is received for presentment. If the person to whom it is forwarded presents it for payment on the day after it has reached him by due course of mail, it will be sufficient. Middletown Bank v. Morris, 28 Barb. 616; Smith v. Janes, 20 Wend. 192; Burkhalter v. Second Nat. Bank, 42 N. Y. 538; Griffin v. Kemp, 46 Ind. 172, 176; Himmelmann v. Hotaling, 40 Cal. 111, 6 Am. Rep. 600; Woodruff v. Plant, 41 Conn. 344; Hare v. Henty, 30 L. J. C. P. 302; Werk v. Mad River Valley Bank, 8 Ohio St. 301.

In Cox v. Boone, 8 W. Va. 500, 23 Am. Rep. 627, a party residing about 4 miles from the postoffice received a check at supper time in midwinter, on a Wheeling bank, on account of a debt. The only mail that left the postoffice the next day closed at 7:30 A. M. and left at 8 A. M. Held, that the holder was not required to forward the check by that mail.

A received a small check at a lumber camp, 20 miles from the bank, on Friday. His place of business was 20 miles in an opposite direction, and he deposited the check in a bank there on Monday, on which day the drawee bank failed. Held, that the delay was not unreasonable. Freiberg v. Cody, 55 Mich. 108.

In Rickford v. Ridge, 2 Campb. 537, the plaintiff's bankers of Aylesbury, discounted for defendant on June 13 a check on bankers of London, and sent it to their London agent on the 14th for presentment. The agent received it on the 14th and sent it for presentment on the 15th, when payment was refused. Held, that the check was presented in time.

Whether a presentment is made within a reasonable time is a question of law for the court where there is no dispute about the facts. Mohawk Bank v. Broderick, 10 Wend. 304; Himmelmann v. Hotaling, 40 Cal. 111, 6 Am. Rep. 600.

The holder does not gain an extra day for presentment by depositing the check in bank for collection. It must be forwarded by the bank for presentment within the same time required of the holder. Alexander v. Burchfield, 1 Car. & M. 75; Moule v. Brown, 4 Bing. N. C. 266.

The drawer is not discharged by any laches of the holder in not making due presentment of the check, or in not giving him due notice of its dishonor, un-



Digitized by Google

the facts stated, which facts are set out in the margin hereof.†

637] *The following are the questions propounded:

"First. Do the above-stated facts show an equitable assignment by the Keystone National Bank to the Fourth Street National Bank of $25,000 of the fund, consisting of cash and collection items or drafts as aforesaid, belonging to the Keystone National Bank in the hands of the Tradesmen's National Bank?

"Second. If the stated facts do not show such equitable assignment of the whole $25,000, do they show such equitable assignment of the cash so in the hands of the Tradesmen's National Bank, namely, the sum of $19,725.62?

*Messrs.* **Richard C. Dale** and **Samuel Dickson,** for appellant:

As the right of the assignee is a creature of equity jurisdiction, no particular form of words is necessary to confer it. All that is requisite is that there should be a clear intention, intelligibly expressed, orally or in writing, to make the appropriation, upon an adequate consideration.

*Wright* v. *Wright*, 1 Ves. Sr. 409, 412; *Hinkle* v. *Wanzer*, 58 U. S. 17 How. 353, 368 (15: 178, 178); *Yeates* v. *Groves*, 1 Ves. Jr. 280; *Burn* v. *Carvalho*, 4 Myl. & C. 690.

Assuming that the contract relates to a partic-

† On the 19th day of March, 1891, the said Fourth Street National Bank advanced twenty-five thousand dollars ($25,000) in clearing-house gold certificates to the said Keystone National Bank to enable it to meet its debtor balance in the Philadelphia clearing house under these circumstances: On said date Gideon W. Marsh, the President of the Keystone National Bank, acting on its behalf and by its authority, came to the banking room of the said Fourth Street National Bank, in the city of Philadelphia, and there represented to the officials of that bank that the Keystone National Bank owed a balance at the clearing house which it could not meet, because its funds were in the city of New York, and exhibited to them a memorandum showing a balance to the credit of the Keystone National Bank in the Tradesmen's National Bank of the city of New York of about twenty-seven thousand dollars ($27,000) stating that his bank wished to draw against it and get clearing-house certificates; and he asked the Fourth Street National Bank to accept the draft of the Keystone National Bank for twenty-five thousand dollars ($25,000) against this "reserve account in the New York bank"—that is to say, against the said fund in the Tradesmen's National Bank—and give his bank clearing-house gold certificates therefor. Relying upon these representations of Marsh, and on the faith of his statement, supported by the said memorandum, that the Keystone National Bank had in the Tradesmen's National Bank the specified fund against which it proposed to draw, the Fourth Street National Bank gave Marsh, for the use of the Keystone National Bank, clearing-house gold certificates to the amount of twenty-five thousand dollars ($25,000) and took its draft, of which the following is a copy:

Keystone National Bank. No. 5086.
Philadelphia, March 19, 1891.

Pay to the order of R. H. Rushton, cashier, ($25,000) twenty-five thousand dollars.

John Hayes, Cashier.

To the Tradesmen's National Bank, New York.

R. H. Rushton was the cashier of the Fourth Street National Bank.

The books of the Keystone National Bank show that on the 19th day of March, 1891, it had to its credit in the Tradesmen's National Bank of the city of New York the sum of twenty-six thousand, nine hundred and seven and 32-100 dollars ($26,907.32), and on the same day an entry was made therein charging against that credit the said draft for twenty-five thousand dollars ($25,000) it had given to the Fourth Street National Bank.

The draft for twenty-five thousand dollars ($25,000) was duly forwarded to New York for collection, and was presented for payment to the Tradesmen's National Bank on the morning of March 20, 1891. Payment thereof was refused upon the ground that the drawee had not in hand funds of the drawer sufficient to pay the same. In fact, the Tradesmen's National Bank had in cash and in collection items (drafts) for the Keystone National Bank the sum of twenty-six thousand, nine hundred and seven and 32-100 dollars ($26,907.32) of which eighteen thousand and fifty-six and 21-100 dollars ($18,056.21) were remitted by the latter-named bank to the former on March 19, 1891, and the rest previously. The Tradesmen's National Bank then had in hand cash to the credit of the Keystone National Bank the sum of nineteen thousand, seven hundred and twenty-five and 62-100 dollars ($19,725.62), and had in addition the said collection items to make up the full sum of twenty-six thousand, nine hundred and seven and 32-100 dollars ($26,907.32). Afterwards this money was paid, and the said collection items or drafts were turned over to Robert M. Yardley, the receiver of the Keystone National Bank, and out of the collection items he realized sixty-one hundred dollars ($6,100), and he thus had in his hands from this source when the bill in this case was filed the sum of twenty-five thousand, eight hundred and twenty-five and 62-100 dollars (25,825.62) in cash.

On the 20th day of March, 1891 (some time during the morning), by the order of the Comptroller of the Currency of the United States, the Keystone National Bank was closed, and thereafter Robert M. Yardley was appointed receiver thereof.

less he has suffered some loss or injury thereby,—as, by the intermediate failure of his bank,—and then only *pro tanto*. Bell v. Alexander, 21 Gratt. 1; Stewart v. Smith, 17 Ohio St. 82; Emery v. Hobson, 68 Me. 32; Cork v. Bacon, 45 Wis. 192, 30 Am. Rep. 712; Howes v. Austin, 35 Ill. 396; Stevens v. Park, 73 Ill. 387; Hanshaw v. Root, 60 Ind. 220; Hoyt v. Seeley, 18 Conn. 353; Smith v. Jones, 2 Bush, 103; Harry v. Wood, 2 Miles (Pa.) 327.

In Scott v. Meeker, 20 Hun, 161, the defendant being indebted to the plaintiff on a promissory note, mailed to him his check on a bank for the amount thereof on receipt of which the plaintiff returned the said note to the defendant. On the morning of the day after the check was received it was accidentally burned and destroyed. The defendant on being informed of its destruction promised the plaintiff to pay him, but subsequently refused so to do. Held, that the destruction of the check made it impossible for plaintiff to present it for payment, that defendant was bound by his subsequent promise to pay it, and, having suffered no loss from the omission to present it, he was liable.

In Morrison v. McCartney, 30 Mo. 183, A, on October 2, 1857, drew a check on B, a banker, in favor of C, who on the same day transferred the same for value to D. On October 3, about 2 P. M., the banking house of B suspended payment. On October 6 A, who had previously instituted suits by attachment against B to recover the amount of his deposits, compromised the same and received his deposits. The check was not presented until January 29, 1858, when payment was refused. The check was then duly protested and notice given. Held, in a suit by D, the holder, against the drawer, that the latter was not discharged by the delay.

A verbal agreement between the payee and the drawer of a check, contemporaneous with its execution and delivery, that the former will not present it to the drawee for payment until a certain time, is a sufficient excuse for a delay in presenting it until the time specified. Pollard v. Bowen, 57 Ind. 232; Barclay v. Weaver, 19 Pa. 396, 57 Am. Dec. 661.

The necessity for presentment may be waived by the representations and conduct of the drawer. Woodruff v. Plant, 41 Conn. 344; Compton v. Gilman, 19 W. Va. 312, 316, 42 Am. Rep. 776.



Digitized by Google

ular fund, and is intended to operate as a present and irrevocable transfer, it matters not how it may be expressed.

*Christmas* v. *Gaines* ("*Christmas* v. *Russell*"), 81 U. S. 14 Wall. 69, 84 (20: 762, 764).

It is not essential that the contract should be reduced to writing, as an oral order or agreement is as effectual as a technical deed of conveyance under seal.

*Gurnell* v. *Gardiner*, 9 Jur. N. S. 1220.

A check or draft drawn in the ordinary course of business is not, of itself, an equitable assignment of the fund, or any part thereof, in the hands of the drawee.

*National Bank of the Republic* v. *Millard*, 77 U. S. 10 Wall. 152 (19: 897); *Laclede Bank* v. *Schuler*, 120 U. S. 511 (30: 704); *Florence Min. Co.* v. *Brown*, 124 U. S. 385 (31: 424).

The distinction is clearly stated by Lord Hardwicke in *Row* v. *Dawson*, 1 Ves. Sr. 331, where the draft was drawn upon a fund due to the drawer out of the exchequer, which was deposited with an officer from whom the fund was payable. This was held to be an assignment for a valuable consideration, good as against assignees in bankruptcy.

The right of the drawee to avoid responsibility to those with whom he was in no privity, until acceptance, is an important factor in the development of the law, and especially in the case of banks, where it is unreasonable that they should be subject to action at the suit of any checkholder.

*Mandeville* v. *Welch*, 18 U. S. 5 Wheat. 277, 286 (5: 87, 90).

Here the action is virtually between the original parties. The receiver is the mere representative of the Keystone Bank, and has no better or higher equity than his own to assert.

*National Bank* v. *Kennedy*, 84 U. S. 17 Wall. 19 (21: 554); *Price* v. *Abbott*, 17 Fed. Rep. 506.

In the case of a check, indeed, Chancellor Kent was of opinion that it was an absolute appropriation of so much money in the hands of the banker to the holder of the check, and there it ought to remain until called for.

3 Kent, Com. 7th ed. 104, note, cited in Sharswood's notes to Byles on Bills, p. 14.

And such will be the effect when the check is so worded as to leave no doubt of the drawer's intention to transfer the entire deposit specifically to the payee.

*Kingman* v. *Perkins*, 105 Mass. 111.

So long as both parties are solvent, the drafts are regarded as only commercial instruments drawn and accepted on the credit of the parties; but the diversion of the consignment would

---

Where there have not been due presentment and notice, the burden of proof is upon the holder of the check to show that the drawer has sustained no injury. Little v. Phœnix Bank, 2 Hill, 425; Stevens v. Park, 73 Ill. 387; Ford v. McClung, 5 W. Va. 166; Planters' Bank v. Merritt, 7 Heisk. 177, 193; Syracuse, B. & N. Y. R. Co. v. Collins, 3 Lans. 29.

As between the holder and an indorser, it seems that an unreasonable delay in presentment will discharge an indorser, even though he does not appear to have suffered any injury thereby. Mohawk Bank v. Broderick, 10 Wend. 304, 13 Wend. 133, 27 Am. Dec. 192; Morse, Bkg. 286; Gough v. Staats, 13 Wend. 549; Murray v. Judah, 6 Cow. 484; Veazie Bank v. Winn, 40 Me. 60.

In Mohawk Bank v. Broderick, 10 Wend. 304, a check was received in Schenectady on January 14, drawn on a bank in Albany, a distance of 16 miles from the former place, there being a daily mail between the places, and was not presented until February 6. The check would not have been paid had it been duly presented, as the drawer's account was overdrawn. Held, that the holder had been guilty of laches, and that the indorser was discharged.

In Massachusetts, however, the indorser is only entitled to have such presentment and notice as will save him from loss. Small v. Franklin Min. Co. 99 Mass. 277; Emery v. Hobson, 62 Me. 578, 16 Am. Rep. 513.

It is sufficient presentment and demand to send the check by mail to the bank on which it is drawn. Hare v. Henty, 10 C. B. N. S. 65; Bailey v. Bodenham, 16 C. B. N. S. 288; Morse, Bkg. 281; Indig v. National City Bank, 80 N. Y. 101.

Where a bank receives on deposit a check on another bank, and forwards it to the drawee bank for collection, it will be liable to the depositor for resulting loss. The drawee bank is not a suitable agent for collection. Goodman v. Merchants' Nat. Bank, 14 W. N. C. 531, 16 W. N. C. 513, 109 Pa. 422, 58 Am. Rep. 728; Drovers' Nat. Bank v. Anglo-American Packing & P. Co. 117 Ill. 100, 57 Am. Rep. 855.

Upon presentation, the drawee has a reasonable time to inspect his accounts and ascertain whether he is in funds to meet the demand. Overman v. Hoboken City Bank, 33 N. J. L. 565.

And it has been said that such reasonable time is the space of twenty-four hours. Bellasis v. Hester, 1 Ld. Raym. 280; Northumberland Bank v. McMichael, 106 Pa. 460, 51 Am. Rep. 529; Boyd v. Emmerson, 2 Ad. & El. 184.

If the bank credits a depositor with a check drawn on itself, it becomes liable to him for the amount thereof. Oddie v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160.

But merely entering a credit for the amount in the passbook will not render the bank liable. National Gold Bank & T. Co. v. McDonald, 51 Cal. 64, 21 Am. Rep. 697.

Checks are not payable in the order of priority in which they are given, but in the order of their presentation for payment. The rule is "first come, first served." Bullard v. Randall, 1 Gray, 605, 61 Am. Dec. 438; Laclede Bank v. Schuler, 120 U. S. 511 (30: 704).

A check does not bind the fund in the hands of the bank until it has notice of the check by presentation for payment or otherwise. Laclede Bank v. Schuler, 120 U. S. 511 (30: 704), Rev'g 27 Fed. Rep. 424.

The bank is not obliged to make part payment, if the funds of the drawer in its possession are not sufficient to pay his check in full. Dana v. Third Nat. Bank, 13 Allen, 445, 90 Am. Dec. 216; Coates v. Preston, 105 Ill. 470, 473.

Where a creditor takes a check for a debt, the presumption is that it is only to be regarded as payment if cashed. People v. Baker, 20 Wend. 602; Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690; Small v. Franklin Min. Co. 99 Mass. 277; Taylor v. Wilson, 11 Met. 44, 45 Am. Dec. 180; Heartt v. Rhodes, 66 Ill. 351; Blair v. Wilson, 28 Gratt. 165; Marrett v. Brackett, 60 Me. 527.

A check may be either antedated or postdated. An antedated check is payable immediately. A postdated check, or one which bears a date subsequent to that of its actual issue, is payable on or at any time after the day of its date. Mohawk Bank v. Broderick, 10 Wend. 304, 13 Wend. 133, 27 Am. Dec. 192; Harker v. Anderson, 21 Wend. 372; Godin v. Bank of Commonwealth, 6 Duer, 76; *Re* Brown, 2 Story, 502; Morse, Bkg. 2d ed. 373.

The certification of a check by a bank is equiva-



Digitized by Google

rant the drawee in refusing to accept
*tional Bank of Commerce* v. *Merchants*
*. Bank*, 91 U. S. 92 (23: 208); *Mason* v.
*at.* 1 Dougl. 287); and, on the other hand,
refusal to accept the draft would deprive
drawee of the right to appropriate the con-
ıment, while in the case of bankruptcy or
lvency of both drawer and drawee, the bill
lers could follow specifically the consign-
ıts made for the protection of the original
ties to the bills.
*Ex parte Waring*, 19 Ves. Jr. 345; *Powles* v.
*rgreaves*, 3 DeG. M. & G. 430; *Nesmith* v.
*ım*, 8 Watts & S. 9, 43 Am. Dec. 260.
An equitable assignment of the fund may be
de by means of a bill of exchange.
*lerman Sav. Inst.* v. *Adae*, 8 Fed. Rep. 106.
n *First Nat. Bank* v. *Coates*, 3 McCrary, 9,
. Justice Miller, on the circuit, sustained the
hts of checkholders as against an assignee
the benefit of creditors, holding the checks
be an appropriation and assignment *pro tanto*
the funds upon which they were drawn.
To the same effect are *Gardner* v. *National*
*y Bank*, 39 Ohio St. 600; *Curtis* v. *Auber*, 1
. & W. 525; *Pennock* v. *Coe*, 64 U. S. 23
ow. 117 (16: 436); *Holroyd* v. *Marshall*, 10
L. Cas. 208.

*Mr.* **Silas W. Pettit**, for appellee:

The paper given by the Keystone to the Fourth Street Bank was a check in ordinary form on the Tradesmen's Bank for $25,000, and was represented by Marsh to be drawn against the balances which he alleged the Keystone had with the Tradesmen's Bank upon a deposit account such as banks usually keep between themselves. Under the banking act, Philadelphia national banks can count as part of their reserve, against the amount of their notes in circulation and deposits, the amounts they have to their credit with New York national banks.

U. S. Rev. Stat. §§ 5191, 5195.

The check in question is the same as any check drawn by any depositor upon a bank in which he has a deposit account.

Although many respectable authorities, such as Chancellor Kent, Mr. Byles, and Mr. Morse, have held that the holder of a check drawn against sufficient funds has a right of action against the drawee, the weight of authority is the other way.

The most numerous body of decisions sustains the view that the check is neither a legal nor an equitable assignment as between drawer and payee, nor a sufficient founda-

---

it to an acceptance of a bill for that amount, d binds the bank to hold sufficient funds of the awer to meet the check. Barnes v. Ontario nk, 19 N. Y. 159; Meads v. Merchants' Bank, 25 Y. 146, 82 Am. Dec. 331; Claflin v. Farmers' & C. nk, 25 N. Y. 297; Nolan v. Bank of New York at. Bkg. Asso. 67 Barb. 33; Merchants' Nat. Bank State Nat. Bank, 77 U. S. 10 Wall. 604, 648 (19: 8, 1019); Simpson v. Pacific Mut. L. Ins. Co. 44 d. 139; Helwege v. Hibernia Nat. Bank, 28 La. nn. 520; Stevens v. Corn Exch. Bank, 3 Hun, 151; illets v. Phœnix Bank, 2 Duer, 121, 129; Farmers' M. Bank v. Butchers' & D. Bank, 16 N. Y. 125, Am. Dec. 678; Rounds v. Smith, 42 Ill. 245.

A certificate that a check is "good" operates as an gagement of the bank to pay the debt as its own. eads v. Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 1; Bickford v. First Nat. Bank, 42 Ill. 238, 89 Am. ec. 436.

By certifying a check the bank becomes the prinpal debtor, and the drawer is discharged. Anews v. German Nat. Bank, 9 Heisk. 217, 24 Am. ep. 300; Essex County Nat. Bank v. Bank of Montal, 7 Biss. 193; First Nat. Bank v. Leach, 52 N. Y. 0, 11 Am. Rep. 708; Freund v. Importers' & T. Nat. ank, 12 Hun, 537; First Nat. Bank v. Whitman, 94 . S. 343, 345 (24: 229, 231).

The bank is bound to know the signature of its epositor; and if it pays out money on a forged heck it cannot charge the depositor with the mount, but, as against him, must bear the loss itelf. Price v. Neale, 3 Burr, 1355; Bass v. Clive, 4 laule & S. 13; Smith v. Mercer, 6 Taunt. 76; Bank of ommerce v. Union Bank, 3 N. Y. 230; Laborde v. lanters' Consol. Asso. 4 Rob. (La.) 190, 39 Am. Dec. 7; Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731; ational Park Bank v. Ninth Nat. Bank, 46 N. Y. , 7 Am. Rep. 310; Frank v. Chemical Nat. Bank, 84 . Y. 209, 38 Am. Rep. 501.

The wrongful dishonor by the bank of its depositr's check is a breach of duty, and entitles him to ring an action against the bank for damages. Sayor v. Bushong, 100 Pa. 23, 45 Am. Rep. 353; National dahaiwe Bank v. Peck, 127 Mass. 298, 34 Am. Rep. 8; Fogarties v. State Bank, 12 Rich. L. 518, 78 Am. Dec. 468; Vlets v. Union Nat. Bank, 101 N. Y. 563, 4 Am. Rep. 743; Citizens' Nat. Bank v. Importers' & T. Nat. Bank, 44 Hun, 386; Rolin v. Stewart, 14 C. B. 595; Marzetti v. Williams, 1 Barn. & Ad. 415.

Whether the checkholder may sue the bank upon its refusal to pay the check, although holding sufficient funds of the drawer, is a question upon which there is a conflict of authority.

Many authorities hold that there is no right of action in such case, because there is no privity of contract between the checkholder and the bank until the check is presented and accepted. National Bank of the Republic v. Millard, 77 U. S. 10 Wall. 152 (19: 897); First Nat. Bank v. Whitman, 94 U. S. 343 (24: 229); Seventh Nat. Bank v. Cook, 73 Pa. 483, 13 Am. Rep. 751; Saylor v. Bushong, 100 Pa. 23, 45 Am. Rep. 353; Chapman v. White, 6 N. Y. 412, 57 Am. Dec. 464; Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; Duncan v. Berlin, 60 N. Y. 151; Carr v. National Security Bank, 107 Mass. 45, 9 Am. Rep. 6; Creveling v. Bloomsbury Nat. Bank, 46 N. J. L. 255, 50 Am. Rep. 417; National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50; Case v. Henderson, 23 La. Ann. 49, 8 Am. Rep. 590; National Bank v. Second Nat. Bank, 69 Ind. 479, 35 Am. Rep. 236; Griffin v. Kemp, 46 Ind. 172; Planters' Bank v. Merritt, 7 Heisk. 177; Planters' Bank v. Keesee, 7 Heisk. 200; Colorado Nat. Bank v. Boettcher, 5 Colo. 185, 40 Am. Rep. 142; Mayer v. Chattahoochee Nat. Bank, 51 Ga. 325; Bush v. Foote, 58 Miss. 5, 38 Am. Rep. 310; Merchants' Nat. Bank v. Coates, 79 Mo. 168; Dickinson v. Coates, 79 Mo. 251, 49 Am. Rep. 228; Coates v. Doran, 83 Mo. 337; Hopkinson v. Foster, L. R. 19 Eq. 74; Wharton v. Walker, 4 Barn. & C. 163; Warwick v. Rogers, 5 Man. & G. 374.

Other cases assert a contrary doctrine upon the ground of an implied promise by the bank to the checkholder, arising from the well-known usages of the banking business, and that the checkholder may sue the bank for improperly dishonoring the check. Munn v. Burch, 25 Ill. 35; Brown v. Leckie, 43 Ill. 497, Fourth Nat. Bank v. City Nat. Bank, 68 Ill. 398; Union Nat. Bank v. Oceana County Bank, 80 Ill. 212, 22 Am. Rep. 185; Ridgely Nat. Bank v. Patton, 109 Ill. 479, 485; National Bank of America v. Indiana Bkg. Co. 114 Ill. 483; Roberts v. Corbin, 28 Iowa, 315, 96 Am. Dec. 146; Fogarties v. State Bank, 12 Rich. L. 518, 78 Am. Dec. 468.



Digitized by Google

tion for any action by a holder against the bank.

Morse, Banks & Banking, § 498; *National Bank of the Republic* v. *Millard*, 77 U. S. 10 Wall. 152–157 (19: 897–900).

A check upon the bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder. It is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money, which the holder can enforce against the bank. It does not of itself operate as an equitable assignment.

*Florence Min. Co.* v. *Brown*, 124 U. S. 385 (31: 424); *Hopkinson* v. *Forster*, L. R. 19 Eq. 74; *First Nat. Bank* v. *Whitman*, 94 U. S. 343 (24: 229); *Laclede Bank* v. *Schuler*, 120 U. S. 511, 514 (30: 704, 706); *St. Louis & S. F. R. Co.* v. *Johnston*, 133 U. S. 566–574 (33: 683–686); *Dana* v. *Third Nat. Bank*, 13 Allen, 445–448, 90 Am. Dec. 216.

This case arises between a Pennsylvania and a New York bank, and the rule of this court has been fully adopted by the courts of both those states.

*Saylor* v. *Bushong*, 100 Pa. 23, 45 Am. Rep. 353; *First Nat. Bank* v. *Michael*, 106 Pa. 460; *Ætna Nat. Bank* v. *Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *People* v. *Merchants & M. Bank*, 78 N. Y. 269, 34 Am. Rep. 532; *Risley* v. *Phœnix Bank*, 83 N. Y. 318, 38 Am. Rep. 421.

In many of the states the rule is that the giving of a check does in law operate as an equitable assignment *pro tanto* of the fund against which it is drawn. This is (or formerly was) the law in Missouri; and the cases of checks on banks cited by appellant are not in point here because governed by the law then prevailing in that forum.

*First Nat. Bank* v. *Coates*, 8 McCrary, 9, contains nothing but the enforcement of the Missouri rule in this particular, while in *German Sav. Inst.* v. *Adae*, 8 Fed. Rep. 106, the fund which was the subject of the interpleader did in fact belong to the checkholder before the check was given him.

Even in those states in which the Missouri rule is adopted it is not considered to apply where there is no fund sufficient to pay the check.

Morse, Banks & Banking, § 446; *Coates* v. *Preston*, 105 Ill. 470.

It has been thoroughly established by this court and in the courts of many of the United States, that where the depositor is a bank or banker a check or bill of exchange drawn on it or him is not an equitable assignment in favor of the payee of the check.

A check drawn generally is not considered to be drawn on a particular fund, and, except in those states in which it is considered to be an equitable assignment of the amount mentioned therein, the legal right of the drawer of the check to countermand it and forbid its payment, or to forestall it by drawing other checks and having them presented, is well established; and it is confidently believed that in no case has a holder of a check been permitted to recover, either at law or in equity, against the drawee, except in those states in which he has a right of action against the drawee upon the check itself, irrespective of any other circumstance.

On the one hand, it is held that where the check is drawn against funds in a bank, of course that particular fund is the fund designated in the check, and that the holder of the fund is under an implied promise, arising from the well-known usage of the business, to pay the check upon demand; that the banker when he receives the deposit agrees with the depositor to pay it out on the presentation of his checks in such sums as those checks may call for, and to the person presenting them, and agrees with the whole world that the owner of such check shall, upon presentation, thereby become the owner and entitled to receive the amount called for by the check, provided the drawer shall have funds on deposit to meet it; and that there thus arises a privity of contract upon which the holder of the check may at once sue the banker in case it is dishonored. On the other hand, however, it is held that there is no privity of contract between the banker and holder of the check when it is given; that, obviously, the check is given and accepted on the credit of the drawer alone, and not on that of the drawee, and that the payee or owner of the check has no rights against the bank holding the deposit until presentment and acceptance, and that otherwise great inconvenience would arise in the conduct of the business of banking.

Except for the inconveniences, the first rule would seem to be the logical one, and has in fact been frequently applied by all the courts where a check, or an order equivalent thereto, is given upon an agent or consignee or other depository of money or property belonging to him who gives the check or other order to pay, transfer, or deliver the money or property designated therein, as the cases cited by the appellant abundantly establish. The difficulty of the appellants is not from the want of analogy between the cases they cite and the appeal they prosecute here, but arises because of the rule already referred to, now thoroughly established as law by the decisions of this court and adopted by most of the states in accordance with those decisions. Whatever may be the rule governing equitable assignments of money or property in general, it is now held that a check on a banker is not an assignment of the fund on which it is drawn.

There was not in this case any special circumstance which would take it out of the general rule.

The representation by Marsh that the check was drawn against funds was only the verbal expression of that which is necessarily implied by the giving of the check itself, an implication so strong that it has been held that the drawer of a check drawn on a bank where he has no funds is liable criminally for a false pretense; and the cases are numerous where the vendor of merchandise has been permitted to rescind the sale on the ground of fraud when he has made delivery upon the faith of a check drawn against a bank in which the drawer had not sufficient funds to meet it.

Nor does the fact that the check was entered by the Keystone Bank in its account against the Tradesmen's Bank affect the question. Such entry would almost certainly be found in



Digitized by Google

every case where a check is drawn; and in no case could it have less weight than in the one under consideration, because in this case the bank did not, as a matter of fact, have the balance in the Tradesmen's Bank which its books pretended it had, and such check was in fact an overdraft when made.

Although it is true that Marsh may have supposed or expected that certain funds which he had remitted or intended to remit would arrive in time to meet the check given the Fourth Street Bank, yet, nevertheless, as sufficiently appears from the case stated, such funds as were remitted were not accepted as cash by the Tradesmen's Bank.

The fact that the Fourth Street Bank gave value for the check, and that the check was fraudulently drawn, ought not to alter the case.

The question is not whether the Keystone Bank owes the Fourth Street Bank the $25,000, for that is conceded; but the question is whether the giving of the check conferred upon the Fourth Street Bank any title to the sum then or thereafter to its credit with the Tradesmen's Bank, and whether by virtue of this title it can follow that fund in the hands of the receiver. No such title was conferred, either generally or by reason of the representation, or by reason of the entry of it in the books of the Keystone Bank; and there is certainly nothing in the fraud of Marsh which would alter the rule.

A general fraud does not give the person defrauded a lien on a particular fund. The fraudulent giving of the check on the Park Bank has no more relation to the funds of the bank now in the hands of the receiver than any other part of the fraudulent conduct of the absconding officers.

*Citizens' Nat. Bank* v. *Dowd*, 35 Fed. Rep. 340–342.

The point that the receiver has no rights other than those of the Keystone Bank does not affect the question here.

By U. S. Rev. Stat. § 5242, all transfers by a national bank of deposit to its credit, for its use "or for the use of any of its shareholders or creditors; and all payments of money to them, either made after the commission of an act of insolvency or in contemplation thereof," are declared to be utterly null and void. The Keystone Bank was closed on March 20, 1891, and thereafter any payment on a check theretofore drawn by it was prohibited by law, and the receiver, representing all its creditors, is entitled to all sums on deposit to its credit at the time the bank was closed, for equal distribution among them.

In other cases of insolvency the everyday practice is for the assignee to take over all the bank balances of the assignor in preference to the holders of unpresented checks, who come in only for their dividend thereon out of the general fund. And that this is the usual practice is again shown by the numerous cases in which the right of stoppage *in transitu* has been exercised by the holders of such checks upon the ground of the failure of the consideration for which they had sold their merchandise.

The assignment of an insolvent debtor for the equal benefit of all his creditors, of all his property, confers on those creditors an equity equal to that of the holder of an unpaid check upon his banker.

*Laclede Bank* v. *Schuler*, 120 U. S. 511–515 (30:704–706).

When a customer deposits a check on another bank without any special contract, the property remains in him, and the bank is his agent until it has notice that the correspondent bank has received the money and credited it.

Morse, Banks & Banking, § 586; *Balbach* v. *Frelinghuysen*, 15 Fed. Rep. 675; *Beal* v. *Somerville*, 50 Fed. Rep. 649, 17 L. R. A. 291; *St. Louis & S. F. R. Co.* v. *Johnson*, 133 U. S. 575 (33:686).

It is impossible to designate exactly of what the check can be considered to have been an assignment, equitable or legal, and the case presented shows no "particular fund" to have existed at all; but it presents the ordinary case of a check drawn on a bank partly on funds on deposit and partly on funds to be deposited in the ordinary course of business, presented for payment, and dishonored because the funds to be sent had not in fact been received, or accepted as cash, by the drawee; and in respect to such a case it cannot be said that the check is an assignment of anything, or is other than a mere order to pay, subject to countermand by the assignment or insolvency of the drawer.

Mr. Justice **White** delivered the opinion of the court:

As between a check holder and the bank upon which such check is drawn, it is settled that, unless the check be accepted by the bank, an action cannot be maintained by the holder against the bank. *National Bank of the Republic* v. *Millard*, 77 U. S. 10 Wall. 152 [19: 897]; *First Nat. Bank* v. *Whitman*, 94 U. S. 343 [24: 229].

It is also settled that a check, drawn in the ordinary form does not, as between the maker and payee, constitute an equitable assignment *pro tanto* of an indebtedness owing by the bank upon which the check has been drawn, and that the mere giving and receipt [644 of the check do not entitle the holder to priority over general creditors in a fund received from such bank by an assignee under a general assignment made by the debtor for the benefit of his creditors. *Florence Min. Co.* v. *Brown*, 124 U. S. 385 [31: 424]; *Laclede Bank* v. *Schuler*, 120 U. S. 511 [30: 704].

That the owner of a chose in action or of property in the custody of another may assign a part of such rights, and that an assignment of this nature, if made, will be enforced in equity, is also settled doctrine of this court. *Burke* v. *Child*, 88 U. S. 21 Wall. 441, 447 [22: 623, 624]; *Peugh* v. *Porter*, 112 U. S. 737, 742 [28: 859, 860]. For recent cases maintaining this principle and referring to the present state of the law on the subject in the various states, see *James* v. *Newton*, 142 Mass. 366 [56 Am. Rep. 692]; *National Exch. Bank* v. *McLoon*, 73 Me. 498; and *Lanigan* v. *Bradley & C. Co.* 50 N. J. Eq. 201.

Whilst an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet the authorities establish that if, in the transaction connected with the delivery of the check it was the understanding and agreement of



Digitized by Google

the parties that an advance about to be made should be a charge on and be satisfied out of a specified fund a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers, and parties charged with notice.

This is but an application of the general doctrine of equitable assignments or liens announced by this court in *Ketchum* v. *St. Louis*, 101 U. S. 306 [25: 999], where it was held, citing various authorities and text-writers, that "a party may, by agreement, create a charge or claim in the nature of a lien on real as well as on personal property whereof he is the owner or in possession, which a court of equity will enforce against him, and volunteers or claimants under him with notice of the agreement." It is immaterial, for the purposes of this case, to draw a line of distinction between equitable assignments and equitable liens or charges.

In *Risley* v. *Phœnix Bank*, 83 N. Y. 318 [38 Am. Rep. 421], two counts of a complaint were based upon a check drawn upon the defendant [645] *bank by a depositor, in favor of plaintiff, while the third count based the right to recover upon an alleged oral assignment of a part of an indebtedness owing by the bank to such depositor, to the amount of the check. The check in question was drawn May 20, 1861, by a bank in South Carolina upon a bank in New York. The trial court ruled that the plaintiff was not entitled to recover upon the causes of action founded upon the check and the verbal promise of payment, but that plaintiff was entitled to recover upon the third cause of action if the jury should find the facts to be as therein averred. A judgment upon a verdict in favor of plaintiff was affirmed, it being held (p. 327), to quote the language of the court of appeals in the subsequent case of *Coates* v. *First Nat. Bank*, 91 N. Y. 26, "in substance that when in addition to the check there was an oral agreement between the drawer and payee, by which the former, for a valuable consideration, agreed to assign so much of the indebtedness of the bank to him as was represented by the check, and the check was given to enable the payee to collect and recover the portion of the debt assigned, the agreement operated as an assignment, and was sufficient to vest in the payee a title to that portion of the debt."

In the *Coates Case*, the Emporia Bank interpleaded in an action brought by the assignee in insolvency of the Mastin Bank against Donnell, Lawson, & Co., bankers in New York city, to recover a balance of a deposit account kept by the Mastin Bank with Donnell, Lawson, & Co. The intervener, the Emporia Bank, claimed to be entitled to a part of such balance on the ground of an assignment thereof made to it by the Mastin Bank, under the following circumstances: The Mastin Bank owed the Emporia Bank, and was requested by the latter to transfer on account thereof funds to the credit of the Mastin Bank with Donnell, Lawson, & Co. The Mastin Bank replied it would do so, and at once charged the Emporia Bank, and credited themselves with $5,000, and on the same day, by letter, informed the Emporia Bank that this had been done, and by letter also notified Donnell, Lawson, & Co. to credit the account of the Emporia Bank with the sum named. *The Em- [646 poria Bank also gave the Mastin Bank credit for the amount. The court of appeals said (pp. 27, 28):

"These circumstances in the conduct of both parties establish an agreement, the effect of which, as between the Mastin Bank and the Emporia Bank, was to estop the former from setting up that so much of the credit to which they were before entitled from Donnell, Lawson, & Co. did not belong to the Emporia Bank, and the Emporia Bank from saying that so much of the debt before due from the Mastin Bank to it had not been extinguished. *Allen* v. *Culver*, 3 Denio, 284-292. Written out, the contract indicated by the bank entries and the correspondence is one of assignment of so much of the credit or funds then to its credit with Donnell, Lawson, & Co. to the Emporia Bank, and a discharge of a debt due by it to that bank. The whole was completed the moment the letter of the Mastin Bank to the Emporia Bank was placed in the postoffice. *Graves* v. *American Exch. Bank*, 17 N. Y. 205; *Brogden* v. *Metropolitan R. Co.* L. R. 2 App. Cas. 666, 692; *Harris's Case*, L. R. 7 Ch. App. 596; *Barry* v. *Equitable L. Assur. Soc.* 59 N. Y. 587, 594; *Wayne County Sav. Bank* v. *Low*, 81 N. Y. 566, 37 Am. Rep. 533. . . . As between these parties the credit or funds had ceased to be the property of the Mastin Bank. The Emporia Bank was no longer creditor, because it was paid. The credit, or right to call upon Donnell, Lawson, & Co. for the same amount, was the means of payment."

It was also held (p. 29), upon the authority of *Heath* v. *Hall*, 2 Rose, 271, and *Burn* v. *Carvalho*, 4 Myl. & C. 690, that, as rights of third parties were not involved, it was immaterial to plaintiff's right to recover that the Mastin Bank became insolvent and made a general assignment for the benefit of its creditors, of which Donnell, Lawson, & Co. were notified before receipt by them of the notice from the Mastin Bank to credit the Emporia Bank. The court found (p. 30) that the entries made by the Mastin Bank on its books showed an intention on the part of the Mastin Bank to transfer to the Emporia Bank a specific amount of the deposit with Donnell, Lawson, & Co., and, "taken in connection with the letters *between the parties, [647 and the order and letter of advice sent to Donnell, Lawson, & Co., they are equivalent to an actual transfer of credit or account, and to an assignment therefore, at least in equity, of the fund in the hands of Donnell, Lawson, & Co."

In *Throop Grain Cleaner Co.* v. *Smith*, 110 N. Y. 83, 88, it was again held, to quote from the syllabus in the case, that (p. 83), "while the mere delivery to a third person of a check or draft drawn by a creditor upon his debtor does not effect a legal transfer of the debt, where it appears that the intent was to make such a transfer, it is the duty of the court to carry out the intent." The court, in that case, from a review of the evidence, deduced therefrom, as matter of law, an actual transfer of the debt owing by the parties upon which a check or draft had been drawn.

In the still more recent case of *First Nat. Bank* v. *Clark*, 134 N. Y. 368 [17 L. R. A.



Digitized by Google

580], the doctrine of *Risley* v. *Phenix Bank*, 83 N. Y. 318 [38 Am. Rep. 421], and *Throop Grain Cleaner Co.* v. *Smith*, *supra*, was expressly approved. p. 373. The controversy was between the payee of a check and a private banker upon whom it had been drawn, the defendant denying having been at any time indebted to the maker of the check. In affirming a judgment entered upon a verdict in favor of defendant, the court of appeals held, despite the fact that a check had been given, that the trial judge properly left it to the jury to determine under the particular circumstances whether the alleged debt had been assigned to the plaintiff.

In *First Nat. Bank* v. *Dubuque S. W. R. Co.* 52 Iowa, 378 [35 Am. Rep. 280], the supreme court of Iowa held that a bill of exchange drawn upon a general fund, and not accepted by the drawee, does not operate as an assignment of the fund, but is evidence to be considered with other circumstances in determining the intention of the parties.

In *Harrison* v. *Wright*, 100 Ind. 515 [58 Am. Rep. 805], a similar ruling was made. The supreme court of Indiana there reached the conclusion (p. 538) "that a check in the ordinary form upon the drawer's banker, without words of transfer, and drawn upon no particular designated fund, does not of itself [648] operate *as an appropriation or equitable assignment of a fund in the hands of the drawee, nor does it operate as an assignment of a part of the drawer's chose in action against the drawee."

Among the considerations upon which this holding was based was the following (p. 539):

"Second. In the absence of evidence to the contrary, or a showing of an intention to assign a part of a fund in the hands of the drawee, or a part of the drawer's chose in action against the drawee, it should be presumed that the payee or holder of a check takes it upon the credit of the drawer, of whom he may collect, if payment be refused by the drawee."

In *Gardner* v. *National City Bank*, 39 Ohio St. 601, the controversy was between assignees in insolvency and the owners and payees of a check or draft made by the insolvents. The assignees in insolvency were held to stand in the shoes of the insolvent debtors and to have only their rights in the premises, and it was adjudged that parol evidence that the draft was for the exact amount owing by the drawers, in connection with other facts appearing from the evidence, sufficiently established the intention to transfer the property in the fund and constituted an equitable assignment thereof good as against the general creditors of the insolvent.

In the subsequent case of *Covert* v. *Rhodes*, 48 Ohio St. 66, it was held that where a check had been given for a part of a sum on deposit, which was not presented for payment until after the maker had made a general assignment for the benefit of creditors, the holder acquired no priority over general creditors in the amount to the depositor's credit which had been surrendered to the assignee in insolvency. There were, however, no special circumstances existing in the case to take it out of the operation of the general rule applicable to a check or draft given in the ordinary course of business.

In *Hopkinson* v. *Forster*, L. R. 19 Eq. 74, it was held that a check is not an equitable assignment of the drawer's balance at his bankers, but that circumstances might coexist to create a charge upon the amount owing. Thus, in answering the contention that a letter forwarded by the maker of a check to the payee created a charge on the debt owing, the master of *the rolls observed (p. 75): "You [649] can have no charge in equity without an intent to charge. The letter on which you rely was not written with any intent to charge the fund; it was a mere letter of instructions to the bankers." So, also, in *Shand* v. *Du Buisson*, L. R. 18 Eq. 283, it was held that a bill of exchange drawn for the exact amount of a fund was not an equitable assignment of the fund. It was urged, however (pp. 288 and 289), that the defendant was entitled to the fund, because he "advanced money of his own for the payment of the debt of the debtor, and that upon a contract then entered into, he was entitled to the money, and that the bill of exchange is only evidence of that contract." The vice chancellor, after observing that the claim thus urged "must rest upon evidence," proceeded to consider the evidence adduced, and held it to be insufficient.

In *Thomson* v. *Simpson*, L. R. 5 Ch. 659, it was sought to establish a lien on funds by reason of the purchase of a bill of exchange drawn upon the holder of the fund. Lord Hatherley said: "It is extravagant to say that a man who has an agent employed to pay bills creates a charge on the funds in the agent's hands by the mere drawing of a bill. It is necessary to make out a contract to charge specific funds which were with the agent, or which were on their road thither; for if there was only a personal contract, that would give nothing but a right of action. In the same case, Lord Justice James observed (p. 662) that "when it is attempted to make out, in addition to the written contract contained in a bill of exchange, a collateral parol agreement, it is most important to have clear and satisfactory evidence as to the exact words used."

In the case of *Citizens' Bank* v. *First Nat. Bank*, L. R. 6 H. L. 352, it was attempted to establish a parol contract that certain bills of exchange payable sixty days after sight should be paid out of a specific fund. The House of Lords, however, held that the evidence exhibited merely an ordinary mercantile transaction for the purchase of a bill of exchange, and did not establish that it was intended to specifically appropriate a portion of *a particular fund to the payment of the [650] bills in question. It was, however, clearly recognized that an oral understanding, entered into in a transaction where a bill of exchange was delivered, might constitute an equitable assignment of a fund, for, in commenting upon the averments of certain facts on the subject of an assignment, Lord Chancellor Selborne said (p. 359): "That is the first part of the case, and of course, if proved, it would have been a very clear case of contract for an equitable assignment."

In the light of these principles, we proceed to consider the facts certified, in order to as-



Digitized by Google

certain whether in the transaction connected with the giving of the check in question there was either an express agreement to assign the fund, or to give a lien or charge thereon, or whether, if not express, such agreement is necessarily to be implied from the conduct of the parties, the nature of their dealings and the attendant circumstances. The facts, succinctly stated, are that the Keystone Bank, through its president, solicited the Fourth Street Bank to give to the former $25,000 of gold certificates, for which the Keystone Bank was to give its check against its reserve account in the Tradesmen's National Bank of New York city. At the same time that this request was made the president of the Keystone Bank made the further statement that his bank owed a balance at the clearing house which it could not meet "because its funds were in the city of New York," and exhibited a memorandum showing the amount to its credit with the Tradesmen's Bank to be in the neighborhood of $27,000. In reliance upon such representations and the statements made supported by the memorandum exhibited, the Fourth Street Bank delivered to the Keystone Bank the certificates requested, and there was delivered a check for $25,000 upon the Tradesmen's National Bank of New York. The draft in question was at once forwarded to the city of New York, and was presented for payment at the Tradesmen's Bank on the following morning, when payment was refused. At the time of presentment the Tradesmen's Bank had to the credit of the Keystone Bank $19,725.62 in cash and collection items amounting to $7,-651]181.70, in all $26,907.32. *Of this amount $18,056.21 had been remitted by the Keystone Bank on the day previous.

When we look at the situation of the parties and the character of the transaction disclosed by the facts just referred to, no difficulty is experienced in ascertaining the intent of the parties. Both were banking institutions—banks of deposit. They were located in the same city. They were not correspondents the one with the other, and there was no deposit account kept by the one with the other; indeed, so far as the usual course of commercial transactions was concerned, the banks were strangers. The application, therefore, by the Keystone Bank to the Fourth Street Bank for accommodation under these circumstances precludes the conception that the relation between the parties was purely one of a usual and customary nature.

It cannot be doubted that a mere request for the loan by the Keystone Bank from the Fourth Street Bank would have been so surprising that the contract would not possibly have been made without a statement of the reason which rendered the request necessary. It is equally clear that the mere statement of the situation which caused the request to be made would, in itself, from any standpoint of business prudence, have made it the duty of the Fourth Street Bank to refuse without full security. It follows that the same reason which imperatively required the Keystone Bank to disclose the cause for its request, also rendered it absolutely essential, in order to obtain the loan, that it indicate a specific source or means of payment outside of and beyond its mere general credit. In other words, that it should tender ample security for the loan which it requested. The deduction arises that, as it cannot be reasonably conceived that the loan would have been made without the reference to and assignment of the particular fund from which alone the hope of immediate payment was to be reasonably expected, the parties must have and did intend to create a particular appropriation, charge, or lien on the property upon the faith of which they both dealt. The transaction, therefore, was a proposition to borrow on the one hand, accompanied with the disclosure that security was *necessary and [652 tendering the security, and, on the other hand, an acceptance of such proposal and an advance made on the faith of it. Not to conclude that such was the agreement and contract contemplated and actually entered into by the parties would lead to the impossible and contradictory theory that the minds of the parties could not and would not have met on the subject of the loan unless a prerequisite link to that meeting of minds existed, and yet at the same time to hold that the minds had met without the existence of that prerequisite which was the very essence and necessary foundation of the agreement.

Considered in other respects a like conclusion follows. The Fourth Street Bank, as stated, was under no obligation to grant the request of the Keystone Bank; it was to derive no pecuniary advantage whatever from the proposed transaction; it was not in any sense for the convenience of the Fourth Street Bank that the contract was made, and the bank clearly contemplated an immediate reimbursement, if it delivered the certificates asked for. Had the transaction been an ordinary one, that of a time or even demand loan made with a person in good credit in the line of his business, and not, as it was, an extraordinary transaction, we might well presuppose that it was the expectation of the Fourth Street Bank that the borrower should merely have on hand with the Tradesmen's Bank when the check was presented a sufficient amount to pay it.

But the Keystone Bank, in disclosing its hazardous situation and indicating the specific fund dedicated to the payment of the solicited accommodation, did not represent that it expected to further check against the Tradesmen's Bank before the check which it proposed to give might be presented. The statements made clearly implied to the contrary, exhibiting as they did the embarrassment of the borrowing bank, arising from the need of available cash to meet its clearings, and proposing a transaction by which the Fourth Street Bank would obtain from a bank, but a few hours distant, the prompt and certain payment of its advance.

As stated, this was manifestly not an ordinary mercantile transaction, but one of an extraordinary character, and when *we [653 consider the situation and conduct of the parties, the disclosures made at the time of the contract, and weigh the probabilities of the case, it is impossible to infer otherwise than that it was intended that the particular fund in the Tradesmen's Bank should be not only the source from which payment of the check to be given should be made, but that the fund should be



Digitized by Google

nsferred and appropriated *pro tanto* for that irpose. It is of course true that the method lopted to evidence the appropriation was a eck drawn generally upon the Tradesmen's nk, but, as already stated, the authorities e clear that when it is established that it was e intention and agreement of the parties to transaction that a check drawn generally ould be paid out of a particular fund, such eck, as between the parties, will be treated though an order for payment out of a spefic, designated amount.

It is not material, as affecting the rights of ie Fourth Street Bank in the fund, that the im with the Tradesmen's Bank was not exusively a cash indebtedness, but in fact consted partly of cash then owing and of money r drafts in the course of transmission to or ollection by the New York bank. The reeiver took no greater rights in the property of he insolvent bank which came into his possesion than that which the insolvent bank possessed. *Scott* v. *Armstrong*, 146 U. S. 499, 507 36: 1059, 1062].

As the Fourth Street Bank contracted and parted with its money on the faith of the repesentations of the Keystone Bank that there was to its credit, in the Tradesmen's Bank, a specific sum, and the fund which came into the hands of its voluntary assignee is the fund as to which the representations were made, the Keystone Bank and its assignee are in equity estopped from asserting, to the prejudice of the Fourth Street Bank, that the character and condition of the fund was otherwise than it was represented to be.

In answer to the suggestion, made in the argument at bar, that possibly the collection items may not have belonged to the Keystone Bank, but may have been the property of others for whom the bank merely held them for collection account, it suffices to say there is no in-

**654**] timation to this end in the facts *stated. It is consequently unnecessary to determine any question as to priority of payment out of the fund, except that presented by the conflict between the Fourth Street Bank and the assignee in insolvency representing the general creditors of the Keystone Bank.

*The first question propounded will therefore be answered in the affirmative, thus rendering it unnecessary to pass upon the second question certified*, and it is so ordered.

Mr. Justice **Gray**, Mr. Justice **Brewer**, and Mr. Justice **Peckham** dissent.

---

JAMES H. WALKER *et al.*, *Appts.*,
*v.*
ANNA L. BROWN, Administratrix, *et al.*

(See S. C. Reporter's ed. 654-675.)

*Lien on bonds—estoppel—diverting lien—interest on mortgage.*

1. An equitable lien on bonds to secure a claim against a third person is created by a letter from the owner of the bonds to a creditor, stating that he has loaned the bonds to the debtor, with the understanding that any indebtedness that may be owing to such creditor at any time shall be paid before the return of the bonds or the value thereof to the owner, and that they or their value are at the risk of the debtor's business so far as any claim the creditor may have against such debtor is concerned.
2. One who asserts as claims against a debtor notes indorsed by him and drafts drawn by him from the discounting of which payments on behalf of the debtor were made, and who seeks to absorb the debtor's assets on this theory, is thereby prevented from claiming, as against other creditors, that such payments were made by himself.
3. A person who has loaned bonds to a debtor and agreed with another creditor that they should not be returned or the value thereof until any claim the latter might have against the debtor should be paid, cannot affect the lien on the bonds for the latter's claim against the debtor, by a debt of his own for contribution to the assets of the debtor.
4. A claim of 10 per cent interest on a mortgage executed in a state where such interest is allowed cannot be allowed when the debt for which the mortgage was given is included in a general account upon which the suit is founded, and which, as taken from the creditor's books given in evidence, shows a charge of 6 per cent only, computed to a short time before the suit was commenced.

[No. 193.]

*Submitted January 13, 1896. Decided March 1, 1897.*

ON WRIT OF CERTIORARI to the Circuit Court of Appeals for the Eighth Circuit to review a decree affirming the decree of the Circuit Court of the United States for the Southern District of Iowa, Central Division, dismissing a suit in equity brought by James H. Walker *et al.*, against Anna L. Brown, administratrix, *et al.*, to establish an equitable lien on certain bonds and for a sale of the same and the application of the proceeds to the payment of a debt due to the complainants, etc. *Reversed*, and case remanded for further proceedings.

See same case below, 58 Fed. Rep. 23, 27 U. S. App. 291.

The facts are stated in the opinion.

*Mr.* **Henry S. Robbins**, for appellants;

The letter of Brown created an equitable lien in favor of appellants, to enforce which the circuit court had jurisdiction in chancery. 3 Pom. Eq. Jur. § 1235; *Ex parte Wills*, 1 Ves. Jr. 162; *Wylie* v. *Coxe*, 56 U. S. 15 How. 416 (14: 753); *Fletcher* v. *Morey*, 2 Story, 555; *Kirksey* v. *Means*, 42 Ala. 426; *Read* v. *Gaillard*, 2 Desauss. Eq. 552; *Arnold* v. *Morris*, 7 Daly, 498; *Union Trust Co.* v. *Trumbull*, 137 Ill. 146.

The evidence shows appellants entitled upon the facts to the relief prayed.

*Stevens* v. *Ludlum*, 46 Minn. 160, 13 L. R. A. 270; *Wright* v. *Phillips*, 56 Ala. 69.

NOTE.—*Equitable lien, what is; when arises from express contract; identification of property; assignment of chose in action arising from implied contracts; equitable assignments; equitable mortgages; lien by creditors on capital stock; enforcement of equitable liens; assignment of mortgage by transfer of debt; assignment of mortgage without transfer of debt.*

An equitable lien is a right not recognized at law, to have a fund or specific property, or its proceeds,



Digitized by Google

*Mr.* **N. T. Guernsey,** for appellees:

The letter of September 21, 1889, did not create a lien upon the bonds in question in favor of the appellants.

*Christmas* v. *Gaines* ("*Christmas* v. *Russell*"), 81 U. S. 14 Wall. 69 (20: 762); *Burke* v. *Child*, 88 U. S. 21 Wall. 441 (22: 623); *Meyer* v. *Delaware R. Const. Co.* ("*Removal Cases*"), 100 U. S. 457-477 (25: 593-601).

The sale of the stock of Lloyd & Company subject to the apnellants' chattel mortgage operated as a satisfaction of appellants' debt, and is a complete defense upon the merits.

2 Pom. Eq. Jur. § 590; Jones, Chattel Mortgages, § 790; Jones, Mortgages, § 865; *Biggins* v. *Brockman*, 63 Ill. 316; *Mines* v. *Moore*, 41 Ill. 278; *Merritt* v. *Niles*, 25 Ill. 282; *Weiner* v. *Heintz*, 17 Ill. 259.

Mr. Justice **White** delivered the opinion of the court:

The complainants, who are appellants here, all citizens of the state of Illinois, members of the firm of J. H. Walker & Company, established in the city of Chicago, filed their bill in the circuit court of the United States for the southern district of Iowa, central division, against Anna L. Brown, widow of Talmadge E. Brown, as administratrix of her deceased husband's estate, and against Willis S. Brown and Edward L. Marsh, coadministrators, all of whom were alleged to be citizens of the state of Iowa and to have been duly appointed as aforesaid by the district court of Polk county, Iowa.

Omitting reference to matters which have become irrelevant to the controversy in its final aspect, the bill substantially averred that Talmadge E. Brown, being desirous of assisting an Iowa corporation known as the Lloyd Mercantile Company, delivered to said company $15,000 bonds of the city of Memphis worth their face value. That between May and July, 1889, Walker & Company sold to the Lloyd Mercantile Company merchandise to a considerable amount, on the price of which there remained due on the 1st of August, 1889, $1,524.78. That on or about that date the corporation was dissolved and a firm composed of J. Collins Lloyd and Copeley Lloyd was formed under the name of J. C. Lloyd & Company, for the purpose of continuing the business of the Mercantile Company, the new business to be carried on at Ellensburg, state of Washington; and that the firm assumed the debts and liabilities of the Lloyd Mercantile Company. It was further alleged that the

---

applied in whole or in part to the payment of a particular debt or class of debts. 14 Cent. L. J. 42; Gladstone v. Birley, 2 Meriv. 404; *Ex parte* Foster, 2 Story, 131, 145; Brace v. Marlborough, 2 P. Wms. 492.

"It is simply a right of special nature over the thing, which constitutes a charge or encumbrance upon the thing, so that the very thing itself may be proceeded against in an equitable action, and either sold or sequestered under a judicial decree, and its proceeds in the one case, or its rents and profits in the other, applied upon the demand of the creditor in whose favor the lien exists." 3 Pomeroy, Eq. Jur. § 1233.

The great difference between the equitable and common-law lien is that the former is not conditioned upon the possession of the thing sought to be charged, while in the latter this is absolutely essential. Donald v. Hewitt, 33 Ala. 534, 547, 73 Am. Dec. 431; Peck v. Jenness, 48 U. S. 7 How. 612, 622 (12: 841, 845); Cotesworth v. Stephens, 4 Hare, 185.

There are some liens which are recognized both at law and in equity,—as, the lien of an attorney for his fees and disbursements. Stewart v. Flowers, 44 Miss. 513, 7 Am. Rep. 707.

Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identifed, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security,—creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers, or encumbrancers with notice. 3 Pomeroy, Eq. Jur. § 1235; Husted v. Ingraham, 75 N. Y. 251, 257; Mitchell v. Winslow, 2 Story, 631; Hale v. Omaha Nat. Bank, 49 N. Y. 626, 64 N. Y. 550; Pinch v. Anthony, 8 Allen, 536; Payne v. Wilson, 74 N. Y. 348; Bank of Muskingum v. Carpenter, 7 Ohio, 21, 28 Am. Dec. 616; Daggett v. Rankin, 31 Cal. 321; Monticello Hydraulic Co. v. Loughry, 72 Ind. 562; Kirksey v. Means, 42 Ala. 426; *Ex parte* Willis, 1 Ves. Jr. 162, 2 Cox, Eq. 233; *Ex parte* Matthews, 2 Ves. Sr. 272; Brown v. Heathcote, 1 Atk. 160; Wellesley v. Wellesley, 4 Myl. & C. 561.

If the transaction resolve itself into a security, whatever may be its form, it is in equity a mortgage (lien). *Per* Story, J., in Flagg v. Mann, 2 Sumn. 486, 533.

An agreement indorsed on the back of a note, that certain land was to be held as a security for its payment, was decreed to be an equitable lien against the property. Peckham v. Haddock, 36 Ill. 38; Chadwick v. Clapp, 69 Ill. 119; Blackburn v. Tweedie, 60 Mo. 505.

An agreement that an attorney shall be compensated out of a fund to be recovered creates a lien thereon. Williams v. Ingersoll, 23 Hun, 284; Stanton v. Embry, 93 U. S. 548 (23: 983); Fairbanks v. Sargent, 39 Hun, 588; Brown v. New York, 11 Hun, 21; Wylie v. Coxe, 56 U. S. 15 How. 415 (14: 753).

Upon receiving a grant of land the grantee agreed to support and maintain the grantor, pledging the produce of the land for that purpose, and the whole fee if the former should prove insufficient. Held, to be an equitable lien on the land. Chase v. Peck, 21 N. Y. 581; Gilson v. Gilson, 2 Allen, 115; Kirksey v. Means, 42 Ala. 426.

In the last case one half of a cotton crop was pledged to the payment of a certain note. Held, to be a lien on cotton.

A clause in a lease reciting, "and the said lessor is to have a lien on the same (furniture, etc.) for the faithful performance of this obligation," creates an equitable lien for rent due. Whiting v. Eichelberger, 16 Iowa, 422. Other illustrations: Russell v. Hadduck, 3 Ill. 232, 44 Am. Dec. 698; Roundell v. Breary, 2 Vern. 482; Dow v. Ker, 1 Speers, Eq. 413; Maulden v. Armistead, 16 Ala. 500.

The property intended to be charged must be clearly identified or described. Mundy v. Munson, 40 Hun, 304; Drake v. Taylor, 6 Blatchf. 14.

It is indispensable to a lien created by an equitable assignment, that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it. Wright v. Ellison, 68 U. S. 1 Wall. 16 (17: 555); Morton v. Naylor, 1 Hill, 583; Hoyt v. Story, 3 Barb. 262; Payne v. Wilson, 74 N. Y. 348; Grinnell v. Suydam, 3 Sandf. 132; Burn v. Carvalho, 4 Myl. & C. 690; Watson v. Wellington, 1 Russ. & M. 602.

By an indenture executed by a debtor of the one part, and certain scheduled creditors of the other



Digitized by Google

firm just formed proposed to buy from Walker & Company a considerable amount of merchandise on credit, but that Walker & Compa-
656] ny *declined to give this asked-for credit unless Brown would agree that the 15,000 of Memphis bonds, lent by him to the Lloyd Mercantile Company, should not be withdrawn by Brown from the assets of the new firm, or be returned to Brown as long as there remained a debt due to Walker & Company by Lloyd & Company on account of the purchase of goods. That thereupon Brown entered into a written agreement to the effect stated, and that on the faith of this written agreement the firm of Walker & Company had not pressed the collection of the old debt, and had sold Lloyd & Company merchandise on credit to the value of $12,891.61, which, added to the sum previously due and assumed by Lloyd & Company, made the debt due to Walker & Company $13,916.39, the whole of which sum the bill averred to be due at the time of the commencement of the suit. The bill charged that the intent of the parties and the legal result of the agreement made by Brown was to cause the 15,000 Memphis bonds or their value to become a security for this debt of Walker & Company, and that thereby there was created an equitable lien on the bonds to the amount of the debt in favor of Walker & Company.

It was further alleged that on the 25th day of December, 1889, the firm of Lloyd & Company became wholly insolvent, and so remained up to the time of the filing of the bill. That after the making of the agreement by Brown, in order to escape the effect of the contract, Brown induced Lloyd & Company to return to him (Brown) the Memphis bonds, and that from the time of such return neither the said bonds nor the value thereof formed part of the assets of Lloyd & Company. That Walker & Company did not know of the return of the bonds until after the credit had been extended to Lloyd & Company. It was alleged that complainants did not know the true condition of the estate of Brown, or whether the Memphis bonds were yet among its assets, and that a discovery and accounting were necessary in order to enable them to reach the property upon which the lien was asserted to exist or the proceeds thereof in the hands of the administrators.

The relief prayed was that if on discovery it be found that *the Memphis bonds or any[657
portion thereof were a part of the assets of the estate of Brown, an equitable lien be recog-

---

part, the debtor covenanted that he would pay the respective debts on a given day, and in the event of nonpayment by that time "he hereby engages to sell so much of his estate as shall be found necessary for that purpose." Held, that this was a mere personal undertaking on the part of the covenantor, and that, even if it were not it would give the creditors no specific lien on his lands. Berrington v. Evans, 3 Younge & C. 384.

A mere promise by a debtor to pay a debt out of a particular fund due him, as soon as he receives it, will not operate to give his creditor a lien upon that fund. Ford v. Garner, 15 Ind. 298; Rodick v. Gandell, 1 DeG. M. & G. 763; Burn v. Carvalho, 4 Myl. & C. 690; Wright v. Ellison, 68 U. S. 1 Wall. 16 (17: 555); Williams v. Ingersoll, 89 N. Y. 508; Burke v. Child, 88 U. S. 21 Wall. 441 (22: 623); Christmas v. Gaines ("Christmas v. Russell"), 81 U. S. 14 Wall. 69 (20: 762); Dillon v. Barnard, 88 U. S. 21 Wall. 430 (22: 673); Rogers v. Hosack, 18 Wend. 319.

Nor will a promise to pay a certain debt out of the proceeds of the sale of certain property (cattle) be a sufficient appropriation to create a lien thereon. Cook v. Black, 54 Iowa, 693.

If the rents and profits of land are assigned as security for a debt, equity will hold this to be a lien. *Ex parte* Wills, 1 Ves. Jr. 162, 2 Cox, Eq. 233; Smith v. Patton, 12 W. Va. 541; Jackson v. Green, 4 Johns. 186.

The same is true of a contract for the purchase of land. Fessler's Appeal, 75 Pa. 483; Fitzhugh v. Smith, 62 Ill. 486; Purdy v. Bullard, 41 Cal. 444.

Other cases illustrating the sufficiency of the appropriation may be seen in Read v. Gaillard, 2 Desauss. Eq. 552; Taylor v. Gibbs, 3 B. Mon. 316; Michigan State Bank v. Gardner, 15 Gray, 362; Gibson v. Stone, 43 Barb. 291; Shaver v. Western U. Teleg. Co. 57 N. Y. 459; Weymouth v. Boyer, 1 Ves. Jr. 416; Rodick v. Gandell, 12 Beav. 325, 1 De G. M. & G. 766.

Where a part of chose in action is assigned, the assignee acquires a valid lien in equity upon the debt, if the debtor consent to the assignment. Row v. Dawson, 2 White & T. Lead. Cas. in Eq. 796.

Some authorities hold that the debtor's assent is essential to the validity of this lien, although it is denied by others. Mandeville v. Welch, 18 U. S. 5 Wheat. 277 (5: 87); Love v. Fairfield, 13 Mo. 301, 53 Am. Dec. 148; Burnett v. Crandell, 63 Mo. 410; Field v. New York, 6 N. Y. 179, 57 Am. Dec. 435; Cook v. Genesee Mut. Ins. Co. 8 How. Pr. 514; Watson v. Wellington, 1 Russ. & M. 602.

As a general rule, a right in a thing assigned, in the nature of an equitable lien upon that thing, becomes vested in the assignee, wherever there has been a valid equitable assignment of the property to which the lien attaches. Jones, Liens, § 43; Burn v. Carvalho, 4 Myl. & C. 690; Fitzgerald v. Stewart, 2 Sim. 333, 2 Russ. & M. 457; Lett v. Morris, 4 Sim. 607; Malcolm v. Scott, 3 Hare, 39; Crowfoot v. Gurney, 2 Moore & S. 473; Row v. Dawson, 1 Ves. Sr. 332; Yeates v. Groves, 1 Ves. Jr. 280; Burke v. Child, 88 U. S. 21 Wall. 441 (22: 623); Field v. New York, 6 N. Y. 179, 57 Am. Dec. 435; Richardson v. Rust, 9 Paige, 243; Powell v. Jones, 72 Ala. 392; Stanton v. Embry, 93 U. S. 548 (23: 983); Dowell v. Cardwell, 4 Sawy. 217.

It is a general doctrine of equity that where a party for a consideration agrees to give certain security for the payment of a debt, the property, whether real or personal, will be considered as pledged for the satisfaction of such debt, the reason of this being that equity often treats as having been done that which ought to be done. Husted v. Ingraham, 75 N. Y. 251, 257; Read v. Gaillard, 2 Desauss. Eq. 552; Wellesley v. Wellesley, 4 Myl. & C. 561; Lyde v. Mynn, 4 Sim. 505; Seymour v. Canandaigua & N. F. R. Co. 25 Barb. 284; Lanning v. Tompkins, 45 Barb. 308; Craig v. Leslie, 16 U. S. 3 Wheat. 563 (4: 460); Haverly v. Becker, 4 N. Y. 169.

In equity a contract to transfer property, given for valuable consideration, provided it is capable of being the subject of a decree for specific performance, passes it at once, and the vendor becomes a trustee for the vendee. This rule applies to personal property as well as to real estate. Holroyd v. Marshall, 10 H. L. Cas. 191, 208.

Payment of encumbrances under an explicit verbal agreement that the encumbered property shall be conveyed to the person paying them may be ground for subrogating him to the rights of the encumbrancers to the extent of the payment, but subject to such rights as may have arisen meanwhile. Kelly v. Kelly, 54 Mich. 30.

An insurance clause in a mortgage whereby the mortgagor covenants to keep the property insured for the mortgagee's benefit, gives the latter a lien on the insurance money in preference to other



Digitized by Google

nized thereon, and the bonds be ordered to be sold and the proceeds applied, as far as necessary, to the payment of the debt due by Lloyd & Company to the complainants. That if the Memphis bonds had been sold or exchanged by Brown for other properties, which could be traced to the hands of the administrators, that a like lien might be adjudged thereon. That if the bonds, or any part thereof, did not form a part of the estate of Brown in the hands of his administrators, the complainants might be adjudged to be creditors of the estate for the amount of the value of the bonds to the extent necessary to pay their debt, and that the administrators be ordered to pay this sum in due course of administration, and be ordered to render, under the supervision of the court, an account of all properties received by them as administrators and of all their acts and doings as such. There was a prayer for an injunction restraining the disposing or encumbering of the Memphis bonds referred to or the proceeds thereof in the hands of the administrators. In addition to this claim there was an averment as to a debt due by Brown's estate for $560.14, asserted to have been expended in an endeavor to collect the debt due by Lloyd & Company, and for which it was alleged Brown had agreed to be responsible.

The answer, in so far as it relates to the matters above stated, averred that about February, 1889, the Lloyd Mercantile Company, being in need of money, induced Brown, the deceased, to loan fifteen $1,000 bonds of the city of Memphis, to be used as collateral security for a loan which the company was then about to make; that the company received the bonds and used them by pledging them to secure the debt, all of which facts were known to the complainants. That this transaction with the company was the only one the deceased had with it on the subject of the Memphis bonds. The answer specifically denied that the bonds of the city of Memphis thus loaned to the Mercantile Company were at any time an asset of said company, and also expressly denied that the bonds were ever loaned to the Mercantile Company or to Lloyd & Company, its suc-[658 cessor, for any other than the express purpose above stated, that is, to be used as collateral back of the particular loan referred to; denying all knowledge of the existence of the alleged debt in favor of Walker & Company, it was averred that no other contract or agreement on the subject of the bonds was made by Brown with Walker & Company, except such contract as might result from the terms of a letter on the subject of the Memphis bonds, dated Chicago, December 21, 1889, written by Brown

creditors. Thomas v. VonKapff, 6 Gill & J. 372; Vernon v. Smith, 5 Barn. & Ald. 1; Cromwell v. Brooklyn F. Ins. Co. 44 N. Y. 42, 4 Am. Rep. 641; Norwich F. Ins. Co. v. Boomer, 52 Ill. 442, 4 Am. Rep. 618; Miller v. Aldrich, 31 Mich. 408; Providence County Bank v. Benson, 24 Pick. 204; Ames v. Richardson, 29 Minn. 330; *Re* Sands Ale Brew. Co. 3 Biss. 175, 2 Am. Lead. Cas. in Eq. 832, 834; Wheeler v. Factors' & Traders' Ins. Co. 101 U. S. 439 (25: 1055).

The fact that the policy by its terms is not assignable except by insurer's consent is immaterial. Cromwell v. Brooklyn F. Ins. Co. 44 N. Y. 42, 4 Am. Rep. 641.

Unless there is a covenant to insure, the mere facts that the mortgagor insures and the mortgagees have a lien on the property, do not give the latter a lien on the insurance money. Jones, Mortgages, 4th ed. § 401; Ames v. Richardson, 29 Minn. 330, 333; Carter v. Rockett, 8 Paige, 437; Nichols v. Baxter, 5 R. I. 491; Powles v. Innes, 11 Mees. & W. 10; Wilson v. Hill, 3 Met. 66; Columbia Ins. Co. v. Lawrence, 35 U. S. 10 Pet. 507 (9: 512); McDonald v. Black, 20 Ohio, 185, 55 Am. Dec. 448; Vandegraff v. Medlock, 3 Port. (Ala.) 389, 29 Am. Dec. 256; Herkimer v. Rice, 27 N. Y. 168; Harvey v. Cherry, 76 N. Y. 441.

An obligation for money, wherein the obligor covenants to keep certain property insured for the obligee's benefit, and not to create other liens thereon, is not an agreement which, when broken, will give the obligee an equitable lien on the premises for the amount of the debt, in the absence of any intention to create such lien. Knott v. Shepherdstown Mfg. Co. 30 W. Va. 790.

Creditors of corporations have a lien on its capital stock, whether paid in or not, to secure all debts owing them by the corporation. Sanger v. Upton, 91 U. S. 56 (23: 220); Sawyer v. Hoag, 84 U. S. 17 Wall. 610 (21: 731); Bartlett v. Drew, 57 N. Y. 587; Hastings v. Drew, 76 N. Y. 9; Clapp v. Peterson, 104 Ill. 26; Heman v. Britton, 88 Mo. 549; Gill v. Balis, 72 Mo. 424.

As equity has brought into existence liens unknown to the common law, it can enforce them by whatever means they will be rendered more efficacious in doing justice to the parties interested. Fletcher v. Morey, 2 Story, 555; Ridgely v. Iglehart, 3 Bland, Ch. 540; Vallette v. Whitewater Valley Canal Co. 4 McLean, 192.

Equity will interpose to remove legal impediments out of the way of judgment creditors, and thus assist in the enforcement of a lien which arose at law but cannot be effectively carried out there. Smith v. Hurst, 10 Hare, 30; Carver v. Peck, 131 Mass. 291; McDermutt v. Strong, 4 Johns. Ch. 687; Wiggin v. Heywood, 118 Mass. 514; Husted v. Ingraham, 75 N. Y. 251; Hovey v. Elliot, 21 Jones & S. 331; Hale v. Omaha Nat. Bank, 49 N. Y. 626.

In equity a transfer of the debt, bond, or obligation without any formal assignment, delivery, or mention of the mortgage, operates to pass the mortgage, in the absence of an agreement to the contrary. Batesville Inst. v. Kauffman, 85 U. S. 18 Wall. 151 (21: 775); Center v. Planters' & M. Bank, 22 Ala. 743; Hurt v. Wilson, 38 Cal. 263; Fassett v. Mulock, 5 Colo. 466; Mapps v. Sharpe, 32 Ill. 13; Edgerton v. Young, 43 Ill. 464; White v. Sutherland, 64 Ill. 181; Miller v. Larned, 103 Ill. 562; Vandercook v. Baker, 48 Iowa, 199; Kurtz v. Sponable, 6 Kan. 395; Waller v. Tate, 4 B. Mon. 529; Perot v. Levasseur, 21 La. Ann. 529; Morris v. Bacon, 123 Mass. 58, 25 Am. Rep. 17; Barnes v. Boardman, 149 Mass. 114, 3 L. R. A. 785; Green v. Hart, 1 Johns. 580; Runyan v. Mersereau, 11 Johns. 534, 6 Am. Dec. 393; Jackson v. Blodget, 5 Cow. 202.

When a mortgage is given to secure a note payable to bearer, the interest of the mortgagee in the land will pass, by the mere delivery of the note, as an incident to the debt. Southerin v. Mendum, 5 N. H. 420; O'Neal v. Seixas, 85 Ala. 80.

But an assignment of a mortgage without a transfer of the debt in courts of equity, as in courts of law, carries no beneficial interest in the mortgage to the assignee.

Peters v. Jamestown Bridge Co. 5 Cal. 334, 63 Am. Dec. 134; Hamilton v. Lubukee, 51 Ill. 415, 99 Am. Dec. 562; Pope v. Jacobus, 10 Iowa, 262; Wood v. Sands, 4 G. Greene, 214; Johnson v. Candage, 31 Me. 28; Bailey v. Gould, Walk. Ch. (Mich.) 478; Smith v. Moore, 11 N. H. 55; Ellison v. Daniels, 11 N. H. 274; Rigney v. Lovejoy, 13 N. H. 247; Merritt v. Bartholick, 36 N. Y. 44.



Digitized by Google

> Walker & Company, which letter was set ut in the answer.

After denying that the credit given to Walker & Company was extended to Lloyd & Company on the faith of the bonds, and after charging that the bonds were, at the time of the writing of the letter, held as collateral back of a loan of the Union National Bank of Chicago, and that no equitable lien thereon resulted rom the writing of the letter by Brown, the nswer, in addition, averred that after the writing of the letter, to wit, some time during he month of November, 1889, the bank, in whose hands the Memphis bonds of Brown ad been deposited as collateral for Lloyd & Company's debt, pressed for payment of the principal obligation and threatened in default to sell the bonds. That Brown thereupon, in order to prevent the sale of his bonds, paid the debt with his own funds and withdrew the bonds, and that thus he had been discharged of his obligations under the terms of the letter referred to, if any obligation thereby arose. That no part of the money which made this payment was that of Lloyd & Company, or was taken from the assets of the firm, but the payment was made wholly and exclusively with the money of Brown in order to prevent the sale of his bonds. It was also charged in the answer that if any debt existed in favor of Walker & Company it was extinguished, this being predicated on a recital of the following facts: That on the failure of J. C. Lloyd & Company in December, 1889, Walker & Company had taken a chattel mortgage on the stock of goods of the firm at Ellensburg, Washington, to secure the payment of their debt, and had entered with other creditors having a like [659] mortgage into *possession of the stock of goods, which largely exceeded the value of the mortgages resting upon it. That thereafter creditors of Lloyd & Company had levied upon the stock and had actually disturbed, or threatened to disturb, the possession of the mortgagees. That the mortgagees then acquired the rights of certain of these creditors who had levied upon the stock, and had then, under process issued in the name of the creditors, sold and bought in the equity of the creditors in the stock, and subsequently, without any foreclosure of their mortgages, taken entire charge of the stock and disposed of it at private sale. These facts, the bill averred, had, under the laws of Washington, operated to extinguish the claim of the mortgage creditors.

The answer moreover admitted that at the time of Brown's death "there were fifteen $1,000 bonds of the city of Memphis in his possession as his property, and that the same passed with his other estate into the hands of his administrators as part of his said estate. But this respondent avers that the bonds were, prior to the death of Brown, given by him as a gift to his wife, Anna L. Brown, who now holds and owns the same." Replication to the answer was filed on the 5th of March, 1892.

The issues as to the main controversy presented by these pleadings were therefore clearly as follows: An assertion on the part of complainants that they had extended credit upon their old debt due by the Lloyd Mercantile Company and assumed by Lloyd & Company, and had given further credit to the new firm of Lloyd & Company, by selling merchandise to it on the faith of an agreement by Brown that his Memphis bonds should be a security for the debt, and that this agreement was evidenced by a written contract on the part of Brown, the result of which was to create an equitable lien upon the bonds or the value thereof, that Brown had unlawfully withdrawn the bonds, and that the lien was therefore operative upon the bonds in his possession or upon their proceeds if he had disposed of them, and if the proceeds could be traced to his estate, and if not that the estate was liable for the debt. A denial on the part of the defendants that *there was any contract but the let- [660 ter above referred to, the terms of which it was asserted did not give rise to a lien upon the bonds or their value, which was followed by the allegation that all Brown's obligations under the contract, if any arose from it, had been extinguished by his being compelled to pay, in order to prevent the sale of the bonds, solely from his own money the debt for which the bonds were pledged, the further defense being an assertion that the claim of Walker & Company against Lloyd & Company was extinguished in consequence of the acts in relation to the mortgage subsequently taken, is referred to in the answer.

In support of these various issues both parties took testimony, under commissions, the last deposition having been opened on October 18, 1892. When all the testimony had been taken and its result was known to the parties, on November 14, 1892, the complainants by leave of court amended their bill by averments charging that the Memphis bonds referred to were in the possession of Mrs. Anna L. Brown, she having received them as a gift from Talmadge E. Brown, and praying the recognition of an equitable lien on the bonds in her hands. The defendants amended their answer by additional averments concerning the conduct of Walker & Company in relation to the mortgage taken to secure their debt. The amended answer besides averred that "the said T. E. Brown, deceased, contributed in value to the said J. C. Lloyd & Company and their funds and assets the full sum or value of fifteen thousand ($15,000) dollars, being the actual value of the Memphis bonds loaned to said J. C. Lloyd & Company; and that the estate of T. E. Brown through these defendants likewise contributed more largely in amount than the value of said Memphis bonds to the assets and to the payment of the indebtedness of J. C. Lloyd & Company." The result of these amendments was that the complainants, finding the bonds in the possession of Mrs. Brown under a gift from her husband, elected to proceed against her for the enforcement of the equitable lien which they asserted, and the defendants added a new ground to their original defense by asserting, not that the bonds had been returned to Brown *in consequence[661 of the payment by him of the debt for which they had been pledged, but that Brown and his estate had contributed more than the value of the bonds to the payment of the debts of Lloyd & Company. The circuit court, finding that the contract between Walker & Company and Brown created no equitable lien on the bonds, but only an ordinary contract relation, con-



Digitized by Google

cluded that the remedy of the complainants was not within the cognizance of a court of equity, and therefore dismissed the bill reserving the right of Walker & Company to seek relief against the estate of Brown in an action at law. 58 Fed. Rep. 23. The circuit court of appeals for the eighth circuit, to which court the case was taken on appeal, rested its decree of affirmance upon substantially the same grounds. 27 U. S. App. 291. A writ of certiorari was allowed and the record has been brought here for review.

The following facts are established by the proof:

In 1888 J. C. Lloyd and Copeley Lloyd were engaged in business at Des Moines, Iowa. T. E. Brown was also a resident of Des Moines and a man of large fortune. His adopted or foster daughter was the wife of J. C. Lloyd. In February, 1889, J. C. Lloyd and Copeley Lloyd organized a corporation under the laws of Iowa, called the Lloyd Mercantile Company, and this company, either with the stock of goods purchased in its own name after its organization or with a stock which had been purchased previously by J. C. and Copeley Lloyd and by them transferred to the corporation, commenced business in March, 1889, at Tacoma, Washington territory. In May, 1889, part of the stock of merchandise of the company was moved to Ellensburg, Washington territory, where a store was opened in the name of the corporation, and the remainder of the stock was taken to Davenport, in the same territory, where a branch store was also opened. Between July and the 1st of August, 1889, J. C. Lloyd and Copeley Lloyd issued a circular, announcing the formation of a commercial firm under the name of J. C. Lloyd & Company, which, it was stated, had assumed all the debts of the Lloyd Mercantile Company. In the autumn of 1888, preceding the formation of the Mercantile Company, the Lloyds bought from the firm of Clement, Bain, & Company [662] *merchandise to the extent of $50,000, part of which was paid for in money and the balance evidenced by notes. In February, 1889, there were outstanding and unpaid notes, thus given for the purchase price of the merchandise bought from Clement, Bain, & Company, to the amount of $15,000. Upon these notes T. E. Brown was the indorser or surety. The makers of the notes being unable to pay them, Brown handed to Lloyd fifteen bonds of the denomination of $1,000 each of the city of Memphis for the express and only purpose of enabling Lloyd to use the bonds as collateral security for a loan to be procured with which to pay the outstanding notes upon which he (Brown) was surety. Lloyd called upon the firm of James H. Walker & Company of Chicago to assist him in obtaining this loan. Mason, a confidential employee, managing the credits of Walker & Company, co-operated with Lloyd in his effort to borrow money on the security of the bonds of Brown. The Union National Bank of Chicago, whose president was a member of the firm of Walker & Company, lent Lloyd the money, and the fifteen Memphis bonds were pledged as collateral for this loan. Subsequently, from May to July, 1889, Walker & Company sold and shipped to the Lloyd Mercantile Company a very considerable amount of merchandise, and at the time of the dissolution of the corporation and the formation of the firm the Lloyd Mercantile Company owed Walker & Company a balance of account to the extent of $1,524.78. During the course of these dealings the note which had been given by Lloyd to the Union Bank, supported by the Memphis bonds as collateral, reached maturity and through the friendly co-operation of Walker & Company the bank which held it, at the request of Lloyd, extended the term for its payment. After the formation of the partnership of Lloyd & Company, Lloyd desired to purchase on credit a large amount of goods from Walker & Company, and furnished, on being called upon, a statement of the condition of the firm. This statement indicated the solvency of the firm, but contained no mention of a claim in favor of Brown resulting from the Memphis bond transaction. Upon inquiry being addressed by Mason to Lloyd on the subject, *he declared that he had not included in his statement a debt in favor of Brown growing out of the lending of the Memphis bonds, because it was a mere friendly arrangement between himself and Brown, and "he did not regard it exactly as a debt." Mason thereupon made a memorandum on the bottom of the statement as follows: "In addition to above liability, owe Mr. T. E. Brown, Des Moines, Iowa, $15,000, payable at our convenience. This is in the city of Memphis, Tennessee, bonds, now hypothecated Union National Bank for loan equal in amount." Mason thereupon informed Lloyd "that those bonds or the proceeds of those bonds were not to be returned or paid to Mr. Brown until our debt is paid," and Lloyd requested Mason to dictate such a letter as he might wish Brown to sign and it would be signed. Mason then dictated a letter, which is the one referred to in the bill of complaint as evidencing the contract, and which, as already stated, was set out in full in the answer: [663]

Chicago, Sept. 21, 1889.

Messrs. James H. Walker & Co., Chicago, Ill.

Gentlemen: I beg to advise you that the loan of fifteen thousand dollars, Memphis bonds, made by me to Mr. J. C. Lloyd for the use of Messrs. Lloyd & Co., Ellensburgh, Wash. Terr., is with the understanding that any indebtedness that they may be owing you at any time shall be paid before the return to me of these bonds, or the value thereof, and that these bonds, or the value thereof, are at the risk of the business of Lloyd & Co., so far as any claim you may have against said Lloyd & Co. is concerned.

Yours truly,

T. E. BROWN.

Pending the sending of this letter by Lloyd to Brown, and its return to Walker & Company, with the signature of Brown affixed to it, the goods which had been ordered by Lloyd were prepared for shipment, but were retained and were only shipped on the receipt of the letter. Subsequently in December, 1889, Lloyd & Co. became insolvent, and the debt to Walker & Co., amounting to $13,916.39, remains unpaid.

*The questions which first require solu- [664] tion are, Did the agreement embodied in the letter create an equitable lien, in favor of Walker &



Digitized by Google

Company upon the bonds of Brown pledged to the Union National Bank, and if so, were they returned to Brown under such circumstances as to cause the lien, if any existed, to be operative against the bonds in the hands of Mrs. Brown, who holds them under a gift from Brown, and therefore subject to such lien, if any, attached to them in the hands of Brown? Before considering the contract itself, and the issue of fact which arises, it is necessary to fix the legal principles by which the question of equitable lien is to be determined. It is clear that if the express intention of the parties was to create an equitable lien upon the bonds or the value thereof, or if such intention arises by a necessary implication from the terms of the agreement construed with reference to the situation of the parties at the time of the contract, and by the attendant circumstances, such equitable lien will be enforced by a court of equity against the bonds in the hands of Brown or against third persons who are volunteers or have notice. It is well settled, said the court, in *Pinch* v. *Anthony*, 8 Allen, 536, "that a party may by express agreement create a charge or claim in the nature of a lien on real as well as on personal estate of which he is the owner or possessor, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons, who are either volunteers, or who take the estate on which the lien is agreed to be given, with notice of the stipulation." The subject was very fully reviewed with reference to the English and American authorities in *Ketchum* v. *St. Louis*, 101 U. S. 306 [25: 999], where the language just cited was approved and that ruling was considered and reaffirmed, during this term, in *Fourth Street Nat. Bank* v. *Yardley*, 165 U. S. 634 [*ante*, 855]. Pomeroy in his work on Equity Jurisprudence (vol. 3, ¶ 1235), condenses and states the general result of the authorities on the subject, as follows:

"The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make **665**] *some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice. . . . The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, equity regards as done that which ought to be done."

The words of the contract, embodied in the letter, are as follows: "I beg to advise you that the loan of $15,000, Memphis bonds, made by me for the use of Messrs. Lloyd & Company, Ellensburg, is with the understanding that any indebtedness that they may be owing to you at any time shall be paid before the return to me of these bonds, or the value thereof, and that these bonds, or the value thereof, are at the risk of the business of Lloyd & Company, so far as any claim you may have against said Lloyd & Company is concerned." This language certainly designates the bonds or the value thereof as a security for the debt to Walker & Company. It says that the bonds belonging to Brown shall not be returned to him so long as the debt to Walker is unpaid. It thus provides for the keeping in the hands of Lloyd & Company of the bonds until the debt of Walker is discharged. Having stipulated for retaining the bonds as long as Walker's debt existed, the agreement proceeds to dedicate the property thus retained exclusively to the payment of Walker's debt, for it says, not that the property so held shall become an asset of the firm, not that it shall be liable to the general creditors of Lloyd & Company, but that the bonds or the value thereof are to remain at the risk of the business of Lloyd & Company *so far as any claim that you* (*Walker & Company*) *may have*. To construe the contract as making the bonds a mere general asset of the firm would not only eliminate the words "in so *far as you (Walker & Company)[**666** are concerned," but would operate an injustice to Brown by presupposing that he had given up his property for the general purposes of the firm of Lloyd & Company, when, on the contrary, in express language, the contract provides that only one creditor of Lloyd & Company, to wit, Walker & Company, should exercise recourse on the bonds. To dedicate property to a particular purpose, to provide that a specified creditor and that creditor alone, shall be authorized to seek payment of his debt from the property or its value, is unmistakably to create an equitable lien.

Nor does the fact that the letter provides that these bonds or the value thereof shall be "at the risk of the business of Lloyd & Company" change the manifest significance of the contract, for these words are followed by the qualifying language "so far as any claim you may have against Lloyd & Company is concerned." The bonds were at the risk of the business in a twofold sense, *viz.*, the debt of Walker and the sum for which they were pledged. Manifestly, the dedication of Brown's bonds to the particular and special payment of Walker's debt, a debt due by the business of Lloyd & Company, left the bonds as a necessary consequence of the equitable lien which the contract created at the risk of the business, that is to say, if the business did not pay the debt which it owed to Walker & Company, the bonds or their value were submitted to the risk of such nonpayment, and therefore subject to the equitable lien, if the risk of the business made it necessary for Walker & Company to exercise the lien which the contract gave that firm. The contention that the words "at the risk of the business" indicate that the parties to the contract did not intend a lien on the bonds, since that provision submitted the bonds to the entire risk of the business of Lloyd & Company for every purpose, and therefore authorized that firm, if they recovered possession of them, to use them for any other debt which they might owe, or to sell them and apply the proceeds to their business generally, is unsound, since it entirely overlooks the express averment of the answer



Digitized by Google

that the bonds were lent by Brown to Lloyd & Company for one purpose alone, that is, to be [667] used *as collateral for a particular debt and none other. The existence of this debt at the time the letter was written is also averred in the answer, and this fact additionally elucidates, not only the meaning of the words "at the risk of the business," but also the stipulation that the bonds "or their value" should be at such risk. The loan for which the bonds had been placed as security was a debt of Lloyd & Company. The ability of Lloyd & Company to pay this debt was a risk upon which the coming back of the bonds into the possession of Lloyd & Company depended. The contract considering the possibility of the payment of the debt by Lloyd & Company, and the arising therefore of the right of that firm to retake possession of the bonds, stipulates for their nonreturn in that event to Brown. On the other hand, considering that the firm of Lloyd & Company might be unable to pay the debt, and therefore fail to recover possession of the bonds, the contract provides that the claim in favor of Brown for the value of his bonds, lost by the failure of the firm to pay the debt for which they were pledged, should not be preferred against the assets of Lloyd & Company to the detriment of Walker's claim. Now, the restriction placed on Brown as to the nonexercise of his claim for the value in consequence of the risk to which the bonds were subjected from the outstanding pledge cannot destroy the express provision against the return of the bonds to Brown in the event that the risk of the business did not prevent their coming back into the possession of Lloyd & Company.

Equally without force is the assertion that, inasmuch as the face value of the bonds was $15,000, and the debt for which they were then pledged was $15,000, therefore the parties could not have contemplated the coming back of the bonds into the possession of Lloyd & Company and their return to Brown. This argument, if accepted, would read out of the contract its express language providing against the return to Brown in the contingency stated. Of course, the lien in favor of Walker & Company was subordinate to the prior and outstanding claim resulting from the pledge; but the obvious purpose of the contract, while consid- [668] ering that fact, was to *give to Walker & Company the benefit of the bonds as a security for their claim in the event Lloyd & Company discharged the debt for which they were pledged, from their assets, and thereby became entitled to the possession of the bonds. This construction of the contract and of the rights of the parties under it was that entertained when the answer was filed and before the proof had been taken, since the answer expressly asserts that the pledged debt had not been paid by Lloyd & Company, but was made solely from the assets of Brown in order to prevent the sale of the bonds, and therefore his obligation under the contract had been discharged. The subsequent amendment to the answer, which gave a different view of the contract, was made after the coming in of the proof, which demonstrated the fact, as we shall hereafter see, to be that the payment of the debt had not been made by Brown, but by Lloyd & Company. If there be ambiguity in the contract resort may be had to the situation of the parties and the circumstances under which it was entered into for the purpose, not of changing the writing, but of furnishing light by which to ascertain its actual significance. *Runkle* v. *Burnham*, 153 U. S. 224 [38: 697].

Resorting to these means, the purpose of the parties to create a lien upon the bonds or their value is clearly manifest. At the time the contract was entered into, the bonds were held as collateral security for a loan obtained by Lloyd to pay off a debt, for which Brown was bound, contracted for the purchase price of merchandise. The proof conclusively sustains the averments of the answer that the bonds had been given by Brown, not for the general purpose of the business of Lloyd & Company, but exclusively to enable that firm to pay this particular debt. This refutes the theory that the bonds were in the hands of Lloyd & Company for every purpose, and suggests the intention of the parties that on the payment of the old debt by Lloyd & Company for the purchase of goods, for which the bonds were pledged, they should occupy the same relation to the new debt for the same purpose which was about to be created. Nor is there force in the argument that the statement made by Mason to Lloyd & *Company preceding the writing of the [669] letter conclusively shows that Walker & Company did not contemplate a lien upon the bonds, and therefore that the letter embodying the contract which they exacted before giving the credit must be held not to have given rise to the lien. This suggestion is predicated upon the fact that in the conversation the words "or proceeds" of the bonds were used by Mason. But the contract contains no such words; it stipulates against the return of the bonds to Brown, and against the use by Brown of his claim against the assets for the value of the bonds. The use by Mason of the word "proceeds" cannot be held to obliterate the written contract, and if resort is to be had to the attendant circumstances, it must be so had, not to a particular word used in a conversation, but the whole of the situation must be considered. If this is done, it becomes clear that as Walker & Company were familiar with the transaction by which the bonds had been delivered to Lloyd & Company by Brown for the purpose of being used as collateral for a particular debt, which was confirmed by the statement made to them by Lloyd at the time of the transaction, we cannot presume that they treated with Lloyd as having other power over the bonds than the limited purpose for which Brown had loaned them. From these considerations we conclude that the contract provided for a lien upon the bonds to secure Walker's debt subordinate to the then outstanding lien resulting from the existing pledge, and stipulated against a return of the bonds in the event of the payment of the debt by Lloyd & Company, and imposed upon Brown the obligation not to assert *quoad* the debt of Walker & Company, a claim against the assets of Lloyd & Company for the value in the event the risk of the business, the outstanding pledge, prevented the return of the bonds to the possession of Lloyd & Company.

The question then arises, Were the bonds



Digitized by Google

absorbed by the risk of the business, or were they, on the contrary, returned to Brown in violation of the contract and subject to the equitable lien which the contract created to secure the payment of the debt due Walker & Company? Shortly after the making of the contract, that is, on October 26 and 29, 1889, [670] *two payments, one for $7,300, and the other for $2,700, were made on account of the debt due the Union National Bank for which the bonds were held as collateral. When these two payments, aggregating $10,000, were made, ten of the Memphis bonds were delivered by the bank to Lloyd and by him returned to Brown. Subsequently, on December 17, 1889, the balance of the debt, $5,000, was paid to the bank, and the remainder of the bonds were also returned to Brown. As to the source whence the money wherewith the payment of October 26 of $7,300 was made, the testimony of Lloyd is, to speak mildly, of an evasive character. The proof, however, conclusively establishes that this payment was made as follows: Lloyd and Brown called at the Polk County Savings Bank of Des Moines, Iowa, and a loan was asked, in the name of Lloyd, for $7,500, and a ninety-day note for that amount was drawn by Lloyd to the order of the bank. This note after being indorsed by Brown was discounted by the savings bank, the bank giving for the net amount of the discount a draft on New York, which was used to make the payment to the Union National Bank. The payment of October 29 of $2,700 is, by the uncontradicted testimony, shown to have been made solely from the assets of Lloyd & Company. The payment on December 17 of the $5,000 was made in this way. Brown drew two drafts for $2,500 each on Lloyd & Company at Ellensburg to the order of the Iowa National Bank of Des Moines, and these drafts were discounted by that bank and the proceeds put to Brown's credit in account. He then purchased a draft to the order of the Union National Bank for $5,000, giving his check on his own bank account in payment of the draft. The draft so purchased was used for the payment of the balance due the Union National Bank, by which final payment the release of the remainder of the bonds was accomplished. The two drafts drawn by Brown on Lloyd & Company were forwarded by the Iowa bank to Ellensburg for collection. One of them was paid in full from the assets of Lloyd & Company before their failure, the other remained unpaid at the date of their failure, and was treated by Brown as a liability of the firm, and was used for the purpose of absorb-[671] ing *its assets in the manner to be hereafter stated. On the drawing of these drafts Brown credited Lloyd & Company in account with the amount thereof, and against this credit he debited Lloyd & Company with the $5,000, which he paid for account of Lloyd for the final payment on the note due the Union National Bank.

Near the middle of December, 1889, Brown was in Ellensburg, and on the 26th of December, at the instigation of Brown, a chattel mortgage upon the stock of goods of J. C. Lloyd & Company was executed in favor of the Iowa National Bank of Des Moines for $17,500, and on the same day a mortgage second in rank, also at the instigation and request of Brown, was executed by the firm in favor of the Polk County Savings Bank for $7,500. Included in the amount of the debt secured by the mortgage to the Polk County Savings Bank were the notes for $7,500 given by Lloyd and indorsed by Brown, from the proceeds of which the first payment of $7,300 was made. Included in the debt of the Iowa National Bank, for which the mortgage was given, was the draft for $2,500, which, as has been already stated, was not paid at that date by Lloyd & Company. The balance of the debt in favor of the Iowa National Bank represented renewal notes of Lloyd indorsed by Brown, which were held by the Iowa National Bank, the original notes having been prior in date to the formation of Lloyd & Company.

The proof leaves no doubt that the execution of these mortgages was brought about by Brown, who thus sought to secure the stock of goods of Lloyd & Company for the purpose of paying the debts for which he asserted himself to be indirectly liable. Indeed, as to the mortgage taken in favor of the Iowa National Bank the unchallenged proof is that Brown acted in procuring the mortgage without reference to or instructions from the bank, but solely in his own interest. Having thus obtained the two mortgages upon the stock of goods, he proceeded, by way of procuring a mortgage on real estate of Lloyd, of assignments of a leasehold held by him or his firm, assignment of a mortgage claim existing in favor of Lloyd & Company, and by receipt of $7,600 in cash procured by *Lloyd by mortgage upon real [672] estate, to make himself master of the situation so as to apply practically all the property of Lloyd & Company and Lloyd individually to the payment of debts claimed to be due him by Lloyd & Company, including those debts for which he was contingently liable. Having thus secured to the utmost all his claims against Lloyd & Company by treating the debts upon which he was contingently liable as the debts of Lloyd & Company, a chattel mortgage inferior in rank to those taken in the name of others, was executed in favor of Walker & Company for a part of the debt due them, and they were advised by telegram of the fact. The failure of Lloyd & Company at once followed these occurrences. Attachments were sued out by many general creditors and the business was wrecked. Without going into details as to the result of the mortgages and attachments, it suffices to say that nothing was paid on account of Walker & Company's debt.

The contention that $9,800 of the money paid on account of the debt of the Union National Bank for $15,000 must be considered as solely made by Brown is without merit. This claim is based on the fact that the notes for $7,500 which were discounted by the Polk County Savings Bank, and from which discount the money was derived to make the payment of $7,300, were indorsed by Brown, and upon the further fact that one of the two drafts of $2,500 each which were drawn upon Lloyd & Company to make up the $5,000, and which was discounted by the Iowa National Bank, was drawn by Brown. The notes and the draft were primarily obligations of Lloyd & Company. The



Digitized by Google

contract between Brown and Walker & Company from which the lien on the bonds arose forbade the return of the bonds, and besides stipulated, in the event of their being lost by the risk of the business, that the claim for their value, in favor of Brown as against Lloyd & Company, should not be urged until the payment of the debt of Walker & Company. It would be against the most elementary rules of good conscience and of fair dealing to allow Brown to treat the payment of the debt as having been made by Lloyd & Company, and therefore to enforce against the *assets of that firm the entire claim, to the detriment of Walker & Company, and at the same time to allow Brown to defeat the lien on the bonds upon the contrary hypothesis that the entire payment had been made by him, Brown, not by Lloyd & Company. No court of conscience can permit Brown to speculate on his chances of securing himself for all his claims by defeating the lien of Walker & Company on the one hand, and then on the other to allow him to assume a conflicting attitude in order to destroy the lien. Having asserted the claims as debts of Lloyd & Company, having sought to absorb the assets on this theory, Brown is concluded by his conduct.

673]

The claim set up in the amended answer, that because Brown had other debts of Lloyd & Company which are unpaid, therefore he had contributed to the amount of $15,000 to the assets of Lloyd & Company, and thus performed his contract, is as wanting in equity as the contention which we have just considered. It is far from clear from the record whether these asserted debts have not really been paid or secured, but if they have not the stipulation of the contract which forbade the return of the bonds was for the benefit of Walker & Company, not for that of all the creditors of Lloyd & Company. Having dedicated the bonds belonging to him to the payment of the debt, Brown cannot be heard to make an exception in favor of claims held by himself, if any such then existed or thereafter arose, so as to destroy the security created by him in favor of Walker & Company, and upon the faith of which they contracted. If there were debts due Brown by Lloyd & Company they were as completely excluded from interfering with the lien of Walker & Company upon the bonds as if they had been held by third persons.

The contention that the debt of Walker & Company was extinguished from the fact that after having accepted the mortgage security for a part of their debt, they united with other mortgage creditors in buying the rights of certain attaching creditors, and thereafter sold the stock of goods without foreclosure, is fully answered by the statement that there is no proof whatever of any agreement that the taking of *security should extinguish the original claim, and the proof is also clear that the acts of Walker as to the purchase of the rights of the attaching creditors and the subsequent dealings with the property were upon the express understanding with Brown that these transactions should in no way impair the rights of Walker & Company under the contract which we have considered.

674]

The asserted right of Walker & Company to enforce against the estate of Brown a claim for $560.14, averred to have been expended in an effort to collect the debt due by Lloyd & Company upon an alleged agreement of Brown to repay the same, was not pressed at the hearing, and we do not therefore determine whether the sum was really due, and whether, if due, it is enforceable in a court of equity.

There was a claim made in the discussion at bar that the interest on the portion of the debt due Walker & Company, which was embraced within the mortgage executed in Washington, bears 10 per cent interest, and therefore should be allowed at that rate. But this claim overlooks the fact that the bill is founded upon the general account due Walker & Company, and not upon the mortgage executed in Washington, which represented only a part of the debt. Besides, the account due by Lloyd & Company to Walker & Company, taken from the books of the latter firm, was offered in evidence on the trial, and there is therein made only a charge of 6 per cent interest, computed to a short time before the filing of the bill. This is conclusive against the claim of interest at the rate of 10 per cent. There is also a reference in the record to several interest coupons collected on the Memphis bonds by Brown prior to his death and subsequent to the unlawful return of the bonds to him, but the averments of the bill taken in connection with the amendment electing to assert the lien against the bonds in the hands of Mrs. Brown, as they were when received from her husband, precludes any questions which might otherwise arise on this subject.

As the Memphis bonds are admittedly in the hands of Mrs. Brown as a gift from her husband, the enforcement of the *lien thereon presents no question as to the jurisdiction of a court of equity over the estate of a decedent.

675]

It follows from the foregoing that the court below erred in refusing to recognize the claim of the complainants and to enforce in their favor a lien on the Memphis bonds in the hands of Mrs. Brown, and for the errors in these particulars *the decree must be reversed*, and the case remanded to the trial court for further proceedings not inconsistent with this opinion.

---

## UNITED STATES, *Appt.*,
*v.*
## SANTA FÉ.

(See S. C. Reporter's ed. 675-717.)

*Spanish law—right of Spanish town to land—land designated—inchoate claim—right of city of Santa Fé to land.*

1. The Spanish law did not, *proprio vigore*, confer upon every Spanish villa or town a grant of 4 square leagues of land to be measured from the center of the plaza of such town.
2. The right of a Spanish town to hold land for public purposes was required to be evidenced by a grant from the viceroy or governor, and such grant when made required confirmation by the Crown.
3. Under the law of Spain it was necessary that the proper authorities should particularly designate the land to be acquired by towns or pueblos.



Digitized by Google

before a vested right or title to the use thereof could arise.

4. An inchoate claim which could not have been asserted as an absolute right against the government of either Spain or Mexico, and which was subject to the uncontrolled discretion of Congress, is clearly not within the purview of the act of March 3, 1891, creating the court of private land claims (26 Stat. at L. 854, chap. 534), and therefore is beyond the reach of judicial cognizance.

5. The city of Santa Fé is not entitled to a tract of 4 square leagues of land in trust for the use of its inhabitants, in the absence of any evidence of a grant or that it has ever possessed the land or that any lotholder in the city claims to own or hold by virtue of any title derived under the supposed right of the city, while there is evidence that in 1715 the city petitioned for and obtained a grant of a tract of swamp land situated within the boundaries of the 4 square leagues which are claimed.

[No. 208.]

*Argued January 7, 8, 1896. Decided March 1, 1897.*

APPEAL from a decree of the Court of Private Land Claims confirming to lotholders in the city of Santa Fé the lots held by them in severalty, and confirming to the city in trust for its inhabitants a tract of 4 square leagues. *Reversed*, and cause remanded with instructions to dismiss the suit.

The facts are stated in the opinion.

*Messrs.* **J. M. Dickinson,** Assistant Attorney General, and **Matthew G. Reynolds,** Special Assistant to the Attorney General, for the appellant.

*Messrs.* **William H. Pope** and **T. B. Catron** for appellee.

Mr. Justice **White** delivered the opinion of the court:

676] *This case comes on appeal taken by the United States from a decree of the court of private land claims confirming to the lotholders in privity with the city of Santa Fé the lots held by them in severalty in that city, and confirming to the city itself in trust for the use of its inhabitants a tract of 4 square leagues claimed by the city, except mines of gold, silver, and quicksilver, and property appropriated, used, occupied, possessed, or owned by the United States.

It is conceded or shown that prior to 1680 there existed a Spanish town known as La Villa de Santa Fé which was the seat of government of the Spanish province of New Mexico, and that there was also prior to that date the official mechanism required by the Spanish law to direct the affairs of a Spanish villa or town. The origin of the town or villa is obscure, but the record indicates that as early as 1543 the settlement was made by deserters from the Spanish military force under Coronado, who refused to accompany their commander on his return to Mexico, and settled at Santa Fé. In 1680 the Spaniards were driven out by an Indian insurrection and Santa Fé was destroyed, the Spaniards retreating to Paso del Norte, where they remained until 1692, when Diego de Vargas reconquered the country. In 1693 de Vargas re-established Santa Fé. From that time to the American occupation—although the record does not fix the precise character of the municipal government—there is no doubt that there was a settlement on the site of the old villa of Santa Fé, and that it was also the capital of the province. In 1851 Santa Fé was incorporated and its boundaries defined by act of the territorial legislature of New Mexico. N. M. Laws 1851–'52, Kearney's Code, 112. The municipal charter granted in 1851 was shortly thereafter repealed, and the probate judge of the county became, by operation of law, the custodian of the records of the corporation, and was a trustee to wind up its affairs. N. M. Laws 1851-'52, Kearney's Code, 272. No municipal body existed from this time until the year 1891, when Santa Fé was again organized pursuant to the laws of New Mexico.

Under the 8th section of the act approved July 22, 1854 (10 Stat. at L. 308, chap. 103) *the[677 probate judge of the county of Santa Fé presented to the surveyor general of New Mexico a claim on behalf of the city for 4 square leagues of land. This claim was substantially based upon the averment that as the city of Santa Fé was in existence during the whole period of Spanish sovereignty over New Mexico, it was certain that "under the Spanish laws, usages, and customs the inhabitants thereof were, as a community, entitled to receive, and your petitioners believe and claim did in fact receive, a grant from the Crown for at least 4 square leagues of land and commons which they now claim:" As the legal authority for this asserted right of the city, reference was made to specified provisions of the law of Spain, and the prayer of the petition was "that said land be surveyed, and that a patent therefor be issued by the United States to the probate judge for the time being of said county of Santa Fé, in trust for the use and benefit of the landholders and inhabitants within said tract, and for the city of Santa Fé until the same be by law incorporated under charter, and thereby become the rightful custodian of the patent for said tract of land." The surveyor general reported for confirmation to Congress the claim thus made (H. of R. Ex. Doc. 239, 43d Cong. 1st sess.), and the recommendation not having been acted upon, this suit was commenced by the city of Santa Fé, under the provisions of the act of March 3, 1891, creating the court of private land claims. 26 Stat. at L. 854, chap. 539.

The petition originally filed on behalf of the city, after setting out the existence of the Spanish villa known as La Villa de Santa Fé, substantially averred that the municipality of Santa Fé occupied the situs of the Spanish villa and possessed jurisdiction over the same territory, and therefore was, in law, the successor to all the rights enjoyed by the Spanish villa. It alleged that, prior to the Indian insurrection in 1680, the villa had received a pueblo grant of 4 square leagues of land, the central point of which was in the center of the plaza of the city of Santa Fé; that the grant was made by the King of Spain; that juridical possession was given thereunder, and that such facts were evidenced by a valid testimonio; that *the archives and records of the villa were[678 destroyed in the Indian insurrection of 1680, and, therefore, the title could not be produced.



Digitized by Google

The fact was also averred that the claim had been submitted to the surveyor general, and had been by him recommended favorably to Congress. The prayer was for a confirmation of the grant to the city "in trust for the use and benefit of the inhabitants thereof, and of such grantees and assignees of parts of the said lands as have derived, or may hereafter acquire by due assignments, allotments and titles in severalty to said parts respectively." The defendant demurred on the ground that the petition stated no cause of action, and also because it failed to disclose the fact that there were many adverse claimants, under Spanish grants, to the land sued for, and that such claimants were necessary parties defendant.

Appearances were thereafter filed by seventeen persons, alleging that they were the holders of Spanish titles to land within the area claimed, and that their interests were, therefore, adverse to those of the city. Thereupon an amended petition was filed by the city, which in its caption mentions as defendants not only the orignal defendant, the United States, but the seventeen persons who had made appearance as having adverse interests. This amended petition substantially reiterated the averments of the original petition as to the foundation and existence of the villa of Santa Fé, but omitted the allegations on the subject of an express grant to La Villa de Santa Fé, the delivery of juridical possession thereunder, and the issuance of a testimonio. The allegation on these subjects was that, prior to the insurrection in 1680, "La Villa de Santa Fé was entitled to, and had under the laws of the kingdom of Spain in force in that territory at that time, a municipal or pueblo grant, conceding to and vesting in said Spanish town or villa a certain tract of land containing 4 square Spanish leagues." The positive averment in the original petition as to the destruction during the insurrection of 1680 of the evidence showing the existence of an express grant was replaced by a qualified averment that "all the muniments of title of such municipal grant, *if any such existed*, were utterly destroyed by the hostile Indians engaged in such insurrection."

679] *The amended petition also averred that within the boundaries of the grant claimed there "are now living about seven thousand people, and about fifteen hundred heads of families nearly all of whom own, occupy, and have improved lands which they claim to hold under the said grant to the Villa de Santa Fé, and there is erected thereon buildings and improvements in public and private ownership, claiming under said grant to the value of several millions of dollars, and that none of said claimants and occupants are in any sense adverse claimants to your petitioner. And your petitioner further shows that there are claimed to be certain private land grants to individuals named as defendants in this proceeding, of tracts of land within the exterior line of said 4 square leagues granted to your petitioner as aforesaid. But your petitioner avers that if any such exist each and all of them are junior in date, subordinate, and subject to the said municipal grant to your petitioner's predecessor as a town and villa, and whether the said private land grants are claimed adversely to your petitioner or not, your petitioner is not advised, but it states that all of said private land grants have been filed before this court for adjudication and have already been set for hearing in this court for the same date as this case, and that all of said claimants have subjected themselves to this court, with their alleged private land grants for its determination and decision, when the matter of their interests as against those of your petitioner can be fully and finally determined."

The answer of the United States denied the alleged facts as to the foundation and organization of La Villa de Santa Fé; denied that the plaintiff, a municipal corporation existing under the laws of New Mexico, was the successor or entitled to assert the rights, if any, of the Spanish villa; it also denied that the Spanish villa had received title to or was by operation of the Spanish law entitled to claim the 4 square leagues of land; averred that title to a large portion of the land embraced within the 4 square leagues was claimed under Spanish grants by others than the plaintiff, the validity of which claims was not, however, admitted, and that other portions of the 4 square leagues were in control, occupancy, *and [680 possession of the United States for a military post, known as Fort Marcy, for a building known as the "Federal building," and for an establishment known as the Indian Industrial School, and that another portion was in possession of the territorial executive officers under the authority of the United States.

The persons holding conflicting grants, who were made defendants, also filed answers specially denying the making of the Spanish grant to La Villa de Santa Fé, or the right of that villa to a grant of 4 square leagues by operation of the Spanish law. It moreover specially denied that the heads of families, residents, or other persons who occupy or own house lots or lands in the city of Santa Fé, claim to hold the same under the alleged grant of the villa of Santa Fé, whether express or implied, and specially denied that the holders of lots in the city of Santa Fé were not adverse to the claim asserted by the city to the 4 square leagues. It moreover alleged the various grants, eighteen in number, alleged to have been made by the Spanish authorities to the respective parties, averred their conflict with the asserted rights of the city, and prayed that as such claims had been filed and had been previously presented to the court, that they be considered and approved, and that the claim of the city be rejected. The issues made up by these pleadings were tried. In the opening of the trial the counsel for the plaintiff made the following statement:

"After consultation with most of the counsel for the city, the disposition seems to be to respect the claims of the United States, either under its original disposition or under its purchases from private individuals. There is no disposition to deny the right of the United States to those properties which it has occupied since the change of sovereignty; we are willing to concede that to the United States attorney. I desire to make a statement to the court as to what our evidence is to be, and as to how we are claiming we are entitled to the grant under which we claim to represent here. Our claim is analogous to the claim made in the city of San Francisco case, and is analogous to the



Digitized by Google

n which is known as the Brownsville, as, claim. If the court please, we claim grant on, not so much as to the existence of 1]papers of title, or documentary *evidence, through operation of law, as was claimed and l in the case of the town of Albuquerque, ch this court has already decided, and as held in San Francisco and town of Brownse, Texas. The case of the city of San ncisco was decided by the Supreme Court he United States after the city of San Fran-o produced evidence sufficient to show that ras a corporation under the Mexican and anish governments; that as such corpora- it possessed an ayuntamiento and other officials which belonged to it; and on this dence the court presumed and said it was itled to 4 square leagues. It was so held the town of Brownsville, and was so decided this honorable court in the town of Alquerque against the United States, case . 8. In our case we expect to show that we d an existence in the year 1680, and that as back, at least, as 1704 we had a corporate istence, and that as having such corporate istence, and having duly constituted officials, ayuntamiento and alcalde of that corpora-on, that this court will presume that we are itled to 4 square leagues of land, to be meas-red from the center of the plaza of this wn. In regard to these adverse claims pre-nted here, I do not just now desire to call e attention of the court to what we think is e law fixing their rights. I will, however, y that we will combat the idea that the gov-rnors of this territory had any power to make rants within the exterior boundaries of the anta Fé grant; whether they have been made do not pretend to admit, and we will combat e idea that they were made through lawful uthority by the persons granting them."

The proof established the settlement and or-anization of the city of Santa Fé in accord-nce with the facts already stated. The vari-us grants referred to in the answer of the everal defendants were offered in evidence nd testimony adduced tending to show that hey covered territory embraced within the laim to the 4 leagues, and were, therefore, ad-erse to the claims of the city.

There was no evidence whatever introduced 382]showing that *La Villa de Santa Fé, in any f its forms of organizations under the Spanish overnment, or that the city of Santa Fé it-elf, had ever possessed the 4 square leagues o which it asserted title, or that any lotholder n the city claimed to own or hold by virtue of ny title derived under the supposed right of the city. Indeed, there was an entire absence f any proof showing that any right by pos-session or otherwise within the area claimed was held under or by virtue of the implied grant of 4 square leagues, upon which the city relied. On the contrary, there was proof that in 1715 the city of Santa Fé petitioned for a grant of a tract of swamp land situated within the boundaries of the 4 square leagues, to which it now asserts title by operation of law, and that this prayer was granted.

The judgment of the court, which allowed the claim of the city, with the reservations and conditions stated in the opening of this opinion, rejected the claims of the defendants who appeared and asserted the various adverse Spanish grants, so far at least as they were in conflict with the claim of the city to which we have referred. As, however, the United States has alone appealed from the decree in favor of the city, we are concerned on this appeal only with the issues which arise between the United States and the city of Santa Fé.

The fundamental question in the case is, Did the Spanish law, *proprio vigore*, confer upon every Spanish villa or town a grant of 4 square leagues of land to be measured from the center of the plaza of such town? The claim that the law of Spain conferred such right is based on certain provisions of that law applicable to the possessions of that government on this continent, and which are to be found in a compilation promulgated in 1680, and known as the "Recopilacion de las Indias."

The compilation itself is thus described by Schmidt in his treatise on the Civil Laws of Spain and Mexico, who says (p. 94):

"The method adopted in this Code is the same as that pursued in the Nueva Recopilacion of the Laws of Spain. It is divided into nine books, comprising two hundred and eighteen *titles, which contain six thous-[683 and four hundred and forty-seven different legal enactments, all of which, derived from the orders, decrees, and regulations of different sovereigns, and often temporary in their character, are dignified with the title of laws. Hence, there is found united in this compilation many laws on the same subject, in which the preceding law is only repeated, others in which it is modified, and still others in which it is abrogated, either in whole or in part. The veneration of the compilers for laws which once had received the royal sanction seems to have been so great that they did not consider themselves at liberty to omit them. This mode of proceeding has swelled this Code to its present dimensions, when, if a more rational method had been adopted, it could readily have been compressed into one third of the space it actually occupies."

The reliance of the city of Santa Fé is—first, on the text of the Spanish law; second, on the contention that if there be ambiguity in the text, the right of the city to the 4 square leagues results from a construction given to the Spanish law in proceedings with reference to the claim of the city of San Francisco to a grant of land and from acts of Congress in relation to such claim; and, third, upon the contention that the interpretation of the Spanish law upon which the city bases its right is sanctioned by previous adjudications of this court. We will examine these propositions in the order stated.

First. *The Spanish law relied upon.*

The only provisions of the Recopilacion, to which we are referred as sustaining the claim of the city, are laws 6, 7, and 10 of title 5, book 4, which are found in 2 White, New Recopilacion, pp. 44 and 45. They read as follows:

Law 6. "If the situation of the land be adapted to the founding of any town to be peopled by Spaniards, with a council of ordinary alcaldes and regidores; and, if there be persons who will contract for their settlement, the agreement shall be made upon the following conditions: That, within the prescribed



Digitized by Google

time, it shall comprise at least thirty heads of families, each of whom to possess a house, ten [684] breeding cows, four *steers, or two steers and two young bullocks, a breeding mare, a breeding sow, twenty breeding ewes from Castile, and six hens, and a cock; he shall, moreover, appoint a priest to administer the sacraments, who, the first time shall be of his choice, and afterwards, according to our royal patronage; he shall provide the church with ornaments and articles necessary for divine worship; and he shall give bonds to perform the same within said period of time; and if he fail in fulfilling his agreement, he will lose all that he may have built, worked, or repaired, which shall be applied to our royal patrimony, and incur the forfeiture of 1,000 ounces of gold to our chamber (camera); and if he should fulfil his obligations, there shall be granted to him 4 square leagues of territory, either in a square or lengthwise, according to the quality of the land, in such a manner that, when located and surveyed, the 4 leagues shall be in a quadrangle, and so that the boundaries of said territory be at least 5 leagues distant from any city, town, or village, inhabited by Spaniards and previously settled, and that it cause no prejudice to any Indian tribe, nor to any private individual."

Law 7. "If anyone should propose to contract for a settlement, in the prescribed form, to consist of more or less than thirty heads of families, provided it be not below ten, he shall receive a grant of a proportionate quantity of land, and upon the same conditions."

Law 10. "Whenever particular individuals shall unite for the purpose of forming new settlements, and among them there shall be a sufficient number of married men for that purpose, license may be granted to them, provided there be not less than ten married men, together with an extent of territory proportioned to what is stipulated; and we empower them to elect, annually, from among themselves, ordinary alcaldes and officers of the council."

Law 6 as we have quoted it from White's work varies from the translation of Reynolds in his work on Mexican Law, the latter version, instead of saying that the land "shall be granted," being, that it "may be given." No importance, however, is to be attached to this [685] difference, since it is evident *from either translation of the law, as a whole, that it was optional and not obligatory on the representative of the King to enter into the contracts which the law authorized to be made. It is apparent also from the text of these laws that they provided solely for the allotment of lands for the purpose of a settlement to be made under contract, and on the performance of certain conditions; in other words, that these laws delegated authority to contract for certain specific quantities of land to accomplish the particular results which the laws contemplated. The effect of law 7 was to forbid contracts for the establishment of towns unless the settlement was to be made by ten persons, and to vary the amount of land to be granted according as the number of heads of families might exceed ten and be less than thirty, which latter is treated by law 6 as being normally required for a contract settlement. Looking at the text of the laws, it is difficult to understand upon what theory the claim is advanced that every Spanish town, whether settled under contract or not, was entitled to 4 square leagues. It cannot be denied that this quantity of land was not the right of every town settled under contract, since the amount varied with the number of heads of families with whom the contract was made and who were to constitute the settlement.

The argument, however, is pressed that law 10 embraces all towns not settled under contract, since it says "whenever particular individuals shall unite for the purpose of forming new settlements." From this expression is deduced the proposition that as the provisions for contract related to settlements of towns made by a particular contractor, therefore they were inapplicable to settlements made by individuals united for that purpose, in which latter case it is claimed the right to the land arose, not by virtue of a contract, but by operation of law. Granting for argument's sake the correctness of the contention, it fails to justify the claim of the city, because law 10 does not specify the quantity of land to be enjoyed by a settlement made by individuals uniting for the purpose of settling a new town; but simply says that they shall have an extent of territory "proportioned to what is stipulated." *This reference to what is stipulated [686] must either be to the requirements of laws 6 and 7, or to some other regulation on the subject. If it relates to laws 6 and 7, then it would necessarily subject individuals uniting to form a settlement to the terms of laws 6 and 7, and therefore render it necessary that the right to land should arise from contract. Indeed, the argument in favor of the claim of the city logically leads to the inconsistent position that laws 6 and 7 are read into law 10 for the purpose of the quantity of land to be granted, and are read out of that law in so far as the prerequisite necessity of a contract is concerned.

But reference to the ordinances of Philip II. (promulgated more than one hundred years prior to the Recopilacion), in which law 10 was found, makes its meaning perfectly clear, and demonstrates that the construction now sought to be given law 10 has no other foundation than the confusion in compiling the Recopilacion, of which we have made mention in citing the language contained in the treatise of Schmidt on the subject. Thus, in the ordinance of Philip, law 6 of title 5, book 4, of the Recopilacion was numbered as ordinances 88 and 89. Following those ordinances down to 99 inclusive are various provisions regulating contract settlements. Then comes ordinance 100, which is now law 7 above referred to. The next ordinance (101) is identical with law 10. Ordinances 102 and 103 (now law 20, book 4, title 7; law 9, book 4, title 5, and law 21, book 4, title 7, of the Recopilacion) read as follows:

Law 20, book 4, title 7:

"A contract having been made under the authority of a colony, a governor, an alcalde mayor, a mayor, a town, or village, the council, and those who made the same in the Indies, shall not be satisfied with having accepted and made the contract, but shall continue to control it and direct how it shall be carried into



Digitized by Google

ect, and shall keep a record of all that is
ng done."
Law 9, book 4, title 5:
"In contracts for new settlements made by
government, or whoever shall be thereto
thorized in the Indies, with cities adelantado,
37] superior alcalde or corrigidor, *the per-
entering into the agreement shall do so like-
se with each individual who may enlist to
n the settlement; and he will bind himself
grant building lots in the new settlement,
gether with pastures and lands for cultiva-
n in a number of peonias and caballerias
oportionate to the quantity of land which
ch settler shall obligate himself to improve;
ovided it shall not exceed, nor shall he grant
ore to each than five peonias or three caba-
rias, according to the express distinction, dif-
rence, and measurement prescribed in the
ws of the title concerning the distribution of
nds, lots, and waters."
Law 21, book 4, title 7:
"We direct that the governor and the magis-
rate of the town newly settled, *ex officio*, or on
etition of a party, shall require the fulfilment
f the contract with due diligence and care by
ll of those who may be bound to make new
ettlements, and the council and the corpora-
ion attorneys shall appear by petition against
uch settlers as have not fulfilled their con-
racts within the term agreed upon, in order
hat they be compelled, with all rigor of law,
o carry out that which was stipulated, and
hat the judges shall proceed against those who
may be absent, and that they be arrested and
brought to the settlements, and that requisi-
tion be made for those who may be in other
jurisdictions, and all judges shall grant them
under penalty of our displeasure."

This retrospect at once demonstrates that the rights acquired under law 10 depended upon contract and could only arise therefrom, since that law was but one provision of a system providing for grants under contract alone. To illustrate, reviewing the provisions in the order in which they stood before their confused compilation in the Recopilacion, ordinances 88 and 89 (law 6) and ordinance 100 (law 7) provided for contracts with an individual for founding a town, for the quantity of land to be contracted for, and prescribed regulations for the new settlement. Ordinance 101 (law 10) provided for individuals uniting for the purpose of a settlement. Ordinance 102 (law 20, book 4, title 7), also in this latter case, treated a contract with such united individuals or col-
688]ony *as a necessary prerequisite, and the subsequent provisions ordain rules for the government of these settlements and the enforcement of the obligations arising under the contracts.

Various provisions in the Recopilacion moreover clearly establish that the power to make contracts for settlements whether with one contracting person or with a community of individuals, was not unrestrained, and was subject to exception.

Thus law 6, book 4, title 7, provided as follows (2 White, New Recop. p. 46):

"No tract of land for new settlements shall be granted or taken by agreement in any seaport, nor in any part which might at any time be prejudicial to our royal Crown or to the republic, our will being that they be reserved to us."

The same law is thus translated in the appendix to the brief for the government:

"Land and term for a new settlement shall not be granted or taken under contract in seaports, nor at any place where at any time damage may result to our royal Crown or the community, because it is our will that they be reserved for us."

The object of these provisions was clearly not only to prevent contracts as to seaport settlements, but also such contracts as to places where it might be prejudicial to make grants of land, although there might be general authority to that end.

It may well also be implied from the provisions in the Recopilacion that the right of a town to hold land for public purposes was required to be evidenced by a grant from the viceroy or governor, and that such grant when made required confirmation by the Crown. Thus, law 1, title 13, book 4, of the Recopilacion (2 White, New Recop. p. 55), is as follows:

"The viceroys and governors, being thereto authorized, shall lay out for each town or village which shall be newly founded and peopled, the lands and lots which they may want, and the same shall be granted to them as reservations (propios) without prejudice to third persons. They shall transmit to us information of what they shall have laid out, that we may order the same to be confirmed."

*Whilst it may be that the necessity [689 for confirmation was dispensed with at some date, much later than the establishment of Santa Fé, there is no question that this provision was in force at the time when it is claimed that the settlement came into existence as a Spanish town.

The theory, then, of the vesting by operation of law in every Spanish town at the time of its organization, of a title to 4 square leagues of land, finds no support in the text of the Spanish laws, and is repugnant to their general tenor, as it is in direct conflict with mandatory provisions of that law exacting a grant and its confirmation. Of course, the existence of power to make contracts for settlements in particular cases cannot be held to have deprived the proper authorities of the right to make grants in other cases where a general power to that effect was possessed. There are various texts of the Recopilacion showing not only that the Spanish Crown itself by its supreme authority contemplated the making of gifts of land to individuals, but also that such gifts were expected to be made for the purpose of the settlement of towns where there was originally no contract therefor, either with colonies or with a particular contractor. To avoid prolixity as far as possible, we do not quote the text of the laws on this subject, contenting ourselves with establishing the existence of the power by showing some instances where it was undoubtedly exercised. The petition for and grant made to Santa Fé itself of the tract of swamp land, to which we have called attention, is one of such instances. We find in the record the petition of one Juan Lucero de Godoy, dated El Paso, January 15, 1693, addressed to the governor and captain general,



Digitized by Google

and reciting, in substance, that, prior to the insurrection of 1680, he had taken up his residence in Santa Fé and received a grant of land, and praying for a regrant of the land, part of which was situated within the area of 4 square leagues to which the city now asserts title. There is also a recognition of the exercise of this power referred to in *Chouteau* v. *Eckhart*, 43 U. S. 2 How. 344 [11: 293], where it appears that the village of St. Charles applied for an enlargement of its commons, and that the Spanish governor replied that the intendant of the
690] province *must make such grant, but that he would provisionally allow the town to occupy the land prayed for. So, in *Lewis* v. *San Antonio*, 7 Tex. 288, it was shown that there had been an express grant, and that the boundaries had been duly marked and laid out covering 6 square leagues. But the concession that there was a power in the Spanish Crown or its authorized officers to make grants of land, when considered by them to be proper, would not justify a holding that the authorities must have deemed it imperative to make a grant of a definite quantity to every town when established, no matter under what circumstances it was founded. To so conclude would amount to saying that it was the duty of the United States after the cession by Mexico of the territory covered by the treaty, to presume, because the Spanish officials had the power to make grants, that they had actually exercised it in favor of every town and every individual within the territory ceded. If we were to make so preposterous an assumption the task would yet remain of determining how much land it would be presupposed had been given because the power to give existed in each case, a duty impossible of performance.

If, however, it were conceded, in plain violation of the letter of the Spanish law, that every town was entitled to a grant of land by operation of law, the quantity to which the town would be entitled would remain wholly undefined and undetermined, and would have, if allowed by inference, to be created by an arbitrary exercise of judicial power. Plainly, from the provisions of the Recopilacion, the quantity varied with the condition of the respective settlements, and to imply a grant of land to the extent of 4 square leagues in every case would be to suppose that every settlement was alike, whilst the law itself contemplated that they would be different and subject to different allowances. This consequence is shown by a statement in the treatise of Hall on Mexican Law, where it is said, p. 51, § 117:

"Limits of Pueblos.—There never existed any general law fixing 4 square leagues as the extent of pueblos or towns. That extent of land was assigned to pueblos founded by contractors for Spaniards, by law 6, title 5, book
691] 4, of the *Laws of the Indies. Those formed by the government, independent of contractors, were only limited by the discretion of the governors of the provinces and viceroys, subject to approval or disapproval of the King. There are numerous pueblos in Mexico which have less and many that have more than 4 square leagues."

And in § 118 the same author declares that the jurists of Mexico are unacquainted with any such provision of Spanish jurisprudence as that 4 square leagues should be the superfice of pueblos.

These facts as to the condition of things in Mexico are in accord with the claims to land made against the United States under the law of Spain by villages and towns in Florida and Missouri, to which we shall hereafter take occasion to refer more particularly.

As the right which the city asserts is devoid of every element of proof tending to show a possession coupled with claim of title, but rests upon the mere assumption of a right asserted to have arisen by operation of law hundreds of years ago, of course there is no room for the application of a presumption of an actual grant, within the doctrine declared in *United States* v. *Chaves*, 159 U. S. 452 [40: 215]. Even did the case present a claim of express grant, proof of the existence of which rested on presumptions arising from acts of possession, etc., there are many circumstances attending the history of Santa Fé and the nature of its establishment, which we have heretofore recited, which would strongly tend to rebut the presumption. The town was, it would seem, originally a colony of deserters from the Spanish army which was located in the midst of the native Indians; it became afterwards the capital seat of the province and a fortified town, and was presumably, in its permanent creation, the outcome and development of the success of the Spanish arms, rather than of the exercise of the power to induce settlements by contracts with individuals or otherwise. It is impossible, on the theory of the petitioner, to explain the petition presented by the city to the Spanish governor, in 1715, for a concession of a tract of swamp land situated within the 4 square leagues now claimed, *for, if the right to the en- [692
tire 4 square leagues then existed, it was complete. At the time of this petition, if the claim here advanced had any foundation or was deemed by anyone to exist, such fact would of course have been then known and have rendered the petition for the grant of the swamp wholly unnecessary.

We now proceed to examine the next proposition advanced to support the claim of the city of Santa Fé, which is as follows:

Second. *Whatever, as an original question, may be the correct interpretation of the Spanish law, the right of every town to 4 square leagues of land under that law is no longer a subject of controversy, but is concluded in favor of such right by the report of the board of land commissioners, which passed upon the claim of San Francisco, by the decision of the circuit court of the United States on the same subject, by the persuasive force of certain decisions of the supreme court of California, referring to the title of San Francisco, and finally by the action of Congress on the subject.*

The history of the San Francisco claim, however, does not justify the contention thus urged. The pueblo of San Francisco, in the first place, was not a Spanish but a Mexican town, and its claimed rights were asserted to have been obtained from the supreme government of Mexico. Thus, as stated in the report of the board of land commissioners, the petition alleged (Dwinelle, Colonial History of California, Appx. p. 121) "that in pursuance of



Digitized by Google

the laws, usages, and customs of the government of Mexico and an act of the departmental legislature of California of the 9th of November, 1833 (1834), and proceedings in pursuance thereof, the pueblo of San Francisco was duly created and constituted a municipal corporation, with a municipal government, and with all the rights, properties, and privilege of pueblos under the then existing laws, during the said year 1833 (1834); and that there was then and there, by the supreme government of Mexico, in the manner by law prescribed, ceded and granted to the said pueblo for town lands and for common lands, all and singular the premises described in their said petition."

**693**] *It may be conceded *arguendo* that there was in force at the time the pueblo of San Francisco was established laws of the government of Mexico and regulations based thereon expanding the law of Spain so as to entitle a newly established pueblo to have measured off and assigned to it by officers of the government 4 square leagues of land, without in any way implying that such right existed under early Spanish laws. The necessity for action by Congress in the case of San Francisco was produced by various causes, such as grants made by the officials of the pueblo while San Francisco was part of the territory of Mexico, and grants which purported to have been made after the occupation of the town by the forces of the United States by persons claiming to be the lawful successors of such Mexican officials. For these reasons, there was great confusion and uncertainty in the titles to land in the city. By the act of March 3, 1851 (9 Stat. at L. 631, chap. 41), Congress created a board of land commissioners to determine claims to land in California asserted "by virtue of any 'right' or 'title' derived from the Spanish or Mexican government." Section 14 of that act permitted the claims of lotholders in a city to be presented in the name of such city, *and authorized the presumption of a grant to a city which was shown to have been in existence on a date named.* The section is found in full in the margin. †

**694**] *The city of San Francisco was incorporated in 1850, with municipal boundaries of less extent than 4 square leagues. It, however, presented to the board a claim for confirmation of title to a 4 square league tract. In December, 1854, the claim of the city was confirmed by the board to only a certain portion of the 4 square leagues claimed. The opinion of the majority of the commissioners is contained in the appendix to Dwinelle's History, pp. 121 to 147. The opinion makes clear the fact that the decree of confirmation was based upon the following conclusions, to wit:

"1st. That a pueblo or town was established under the authority of the Mexican government in California, on the cite of the present city of San Francisco, and embracing the greater portion of the present corporate limits of said city.

"2d. That the town so established continued and was in existence as a municipal corporation on the 7th day of July, 1846.

"3d. That at or about the time of its establishment certain lands were laid off and assigned in accordance with the laws, usages, and customs of the Mexican nation, for the use of the town and its inhabitants, and the boundaries of said lands determined and fixed by the proper officers appointed for that purpose by the territorial government.

"4th. That the boundaries so established are those described in the communication from Governor Figueroa to M. G. Vallego, dated November 4, 1834, a copy of which is filed in the case, marked Ex. No. 18, to the deposition of said Vallego." Dwinelle, Colonial History of California, Appx. 147.

After the foregoing finding of facts, the board summed up the law in the following language:

"These conclusions bring the case, in our opinion, clearly within the operation of the presumption raised in favor of a grant to the town by the 14th section of the act of the 3d of March, 1851, and entitled the petitioner to a confirmation of the land contained within the boundaries described in the document above mentioned."

Whilst the ultimate finding of the board was thus rested upon the authority to presume a grant conferred by Congress *and upon [**695** the Mexican law and regulations and conduct of Spanish and Mexican officials, which were limited to particular localities, and which have no application to the Spanish law as it appears in the Recopilacion, its opinion yet contained a copious historical review of the Spanish and Mexican law on the subject of grants to towns. From the fact that both the early Spanish law and the Mexican law were considered, and growing out of some forms of expression contained in the opinion, it has sometimes been said, with inaccuracy, that the opinion sanctioned the proposition that every Spanish town, considering the Spanish law to which reference has been made, was entitled to a grant of 4 square leagues.

The want of foundation for this often reiterated misconception of the finding of the board of commissioners will be at once shown by a brief consideration of the instructions and documents, apart from the text of the Recopilacion itself, upon which the board acted. They were five in number, as follows.

(1) Instructions, etc., of Don Antonio Bucareli y Ursne, dated Mexico, August 17, 1773. Dwinelle, Appx. p. 2; 1 Rockwell, 444.

(2) Regulations of Don Felipe de Neve, approved by the King in October 1, 1781. Dwinelle, Appx. p. 8; Rockwell, 445.

---

†Sec. 14. And be it further enacted, That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town, or village existed on the 7th day of July, 1846; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city or town, or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said 7th July, 1846, being duly proved, shall be prima facie evidence of a grant to such corporation, or to the individual under whom the said lotholders claim: and where any city, town, or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town, or village.



Digitized by Google

(3) Instructions made for the establishment of the new town of Pitic, dated Chihuahua, November 14, 1789. Dwinelle, Appx. p. 11.

(4) Decree of Don Pedro de Nerva, dated Chihuahua, March (October) 22, 1791 (Dwinelle, Appx. p. 17; 1 Rockwell, 451); and

(5) Opinion of the assessor or legal adviser of that comandancia, dated in 1785.

Document No. 1 makes no reference to a designation or granting of lands for the use of pueblos.

No. 2—to wit, Regulations of 1781 for the government of the Province of California—referred to the existence of the new establishments of the presidios and the respective ports of San Diego, Monterey, and San Francisco, and the founding and building of the pueblo of [696] San José, and prescribes certain *regulations for carrying into effect the expected establishment of proposed new settlements. These regulations rested undoubtedly on the laws of the Indies, but make material additions and modifications thereto. Section 4 provides that conformably to the provisions of the laws of the kingdom competent common lands shall be "designated" for the pueblos, but there is no statement as to the law governing the quantity of land to be marked out. The regulations, however, were specially approved by the King of Spain.

No. 3—the Plan of Pitic—commences with the following statement:

"Instructions approved by His Majesty, and made for the establishing of the new town of Pitic, in the province of Sonora, ordered to be adopted by the other new projected settlements (poblaciones) and by those that may be established in the district of this general 'comandancia.'"

The second section of the instruction reads as follows:

"2d. In conformity with the decree of the law 6th, title 5th, of the same book 4th, relative to the towns of Spaniards that may be founded by agreement or contract, and first in relation to those which for want of contractors shall be erected by private settlers (pobladores) who may establish themselves and agree to found them, there may be granted to the town in question 4 leagues of bounds or territory in a square or in length (*que se fundaren y concordaren enformarlas se podra a la de que se exara quatro leguas determino o territorio en quadro o prolongado*), as shall be adapted to the better location of the land that shall be selected or marked out so that its true boundaries shall be known, wherein there can be no inconvenience, and inasmuch as it is distant more than 5 leagues from any other town, city, or village of Spaniards, there shall not result injury to any private individual, nor to any 'pueblo' of Indians, on account of that (the village) 'de los Seris' remaining within the demarcation as part or suburb of the new settlement, subject to its jurisdiction, and with the advantage of enjoying as neighbors the same benefits, public and common, that the settlers may have, and of which at present those same natives are wanting, owing to their indolence, [697] *their default of application, and of intelligence reserving to them the faculty of choosing their 'alcaldes and regidores,' with the jurisdiction, economy, and other circumstances prescribed by the laws 15 and 16, title 5, book 6."

It is obvious from the most casual examination of this section that it not only does not support the theory that under the Recopilacion the right to 4 square leagues was granted to each and every settlement, but, on the contrary, that its plain purpose was simply to grant the discretionary power to allot 4 square leagues to settlements not under contract, and to exempt such grants from many requirements of the Recopilacion, such as that as to the number of residents and the conditions to be performed on the part of the founder of the settlement. In other words, this decree, which was approved by the King of Spain, was substantially an act of new and supplementary legislation, adding to the provisions of the Recopilacion, and conferring rights not covered by its text. The fact of the making of this decree conveying the authority to give 4 square leagues in cases where there was no contract demonstrates, of course, that the power thus given was not deemed theretofore to have existed by the specific terms of laws specially applicable to town settlements. For how can it be supposed that a solemn order would have been required from the King to sanction the doing of that which the law already expressly permitted. It is to be observed, also, that the delegation of power to make a grant of 4 square leagues in cases of noncontract does not import the significance that by operation of law such a grant was made in every case. The language is, there "may be" granted to the town in question, not that there "shall be" granted in every case, or that the governor "shall be" obliged to do so.

No. 4—the Decree of Pedro de Nerva, under date of October 22, 1791,—refers to an opinion of an official styled the assessor of the comandancia general. The portion of the decree having pertinency here reads as follows:

"And considering the extent of 4 common leagues measured from the centre of the presidio square, *viz.*, 2 leagues *in every direc- [698] tion, to be sufficient for the new pueblos to be formed under the protection of said presidios (*que van formandose a su abrigo*), I have likewise determined, in order to avoid doubts and disputes in the future, that said captains restrict themselves henceforward to the quantity of house lots and lands within the 4 leagues already mentioned, without exceeding in any manner said limits, leaving free and open the exclusive jurisdiction belonging to the intendentes of the royal hacienda, respecting the sale, composition, and distribution of the remainder of the land in the respective districts."

The language of this decree, instead of confirming the theory that every town was entitled to 4 square leagues under the law of Spain, on the contrary, would seem to indicate that de Nerva considered that the extent of the boundaries of the new pueblos should be subject to his uncontrolled discretion. Indeed, in *Welch* v. *Sullivan*, 8 Cal. 195, this decree was interpreted as largely extending the limits of pueblos beyond 4 square leagues.

No. 5—the opinion of one Galindo Nevara—is printed on pages 10 and 11 of the appendix to Dwinelle's work, and is treated as the opin-



Digitized by Google

don cited in de Nerva's decree of October 22, 1791. It was addressed to the honorable commandant general, and is dated October 27, 1785. It considers the question of the right to make requested allotments of lands for cattle ranches, and in the course of the document the writer observes that such allotments should not be made within the boundaries assigned to pueblos, which in conformity to law 6, title 5, lib. c. 4, of the Recopilacion, must be 4 leagues of land in a square or oblong body according to the nature of the ground. This cannot be the opinion to which de Nerva referred in 1791, for the one to which he alludes related to the authority which was possessed over the distribution of lands of a presidio. Nor can this mere opinion, if authentic, be considered as conclusive, or even as persuasively determining the meaning of law 6, since it cannot be reconciled with the subsequent decree of 1791, declaring that, "in order to avoid doubts and disputes in the future," it was necessary to specify the precise quantity of [699] land to constitute the limits of *the pueblos to be subsequently established. The inference to be deduced from all these documents supports the theory that under the Spanish laws, as found in the Recopilacion, all towns were not entitled by operation of law to 4 square leagues, but that at a late date the Spanish officials had adopted the theory that 4 square leagues was the normal quantity which might be designated as the limits of new pueblos to be thereafter created.

Whether from these amendments or supplements to the Spanish law it was correctly held that a fixed quantity of land passed to every new pueblo by effect of law, is not relevant to the matter now under consideration, as the rights of Santa Fé, if any, arose long prior to the period to which these documents relate, and depend upon the Spanish law and that law exclusively. It would seem, however, from the statement of Hall, already quoted, *supra*, that the implication that every new Mexican town was entitled to 4 square leagues was a misconception. This review has been made in order, at the outset, to remove the erroneous conception which has been so often reiterated, as to the right of towns, by mere operation of law, under the Spanish law, to 4 square leagues. It is really unnecessary, however, to analyze the opinion of the board of land commissioners for the purpose of showing that no recognition of a right, by operation of law, to 4 square leagues was contained in it, for the reason that it is obvious that the decision of the board confirming only a portion of the claim of the city of San Francisco was a rejection of the 4 square league theory. That San Francisco so interpreted the decree is manifested by the fact that it was not accepted by that city as final, but an appeal was taken to the district court, to which court also the United States appealed. Moreover, the action of Congress in confirming, in 1864, under certain conditions, a limited right in favor of San Francisco, and its final action, in 1866, in confirming the right of that city to 4 square leagues, with many important reservations, and upon conditions wholly incompatible with the existence, in that city, of a primordial right to 4 square leagues, amounted to a refusal by Congress to recognize the theory that every *town was entitled to 4 square leagues. [700] On the contrary, those acts were tantamount to an assertion by Congress of its undoubted right to control the disposition of the land so far as it deemed best to do so. Acts July 1, 1864 (13 Stat. at L. 338, chap. 194, § 5), and March 8, 1866 (14 Stat. at L. 4, chap. 13).

In passing, we also observe that the same reasons which cause it to be unnecessary to examine, in detail, the opinion of the board of land commissioners, also renders it unessential to analyze and determine the persuasive effect of the cases subsequently decided by the supreme court of California, cited in argument by the city, *viz.*, *Welch* v. *Sullivan*, 8 Cal. 168, and *Hart* v. *Burnett*, 15 Cal. 530. The issue which those cases presented was the nature of the title of San Francisco, on the conceded premise that it possessed a title of some kind. This question was solved by a full reference to the Spanish and Mexican law, much in the same manner as the board of land commissioners had previously done.

An appeal was taken from the decision of the board of land commissioners to the district court of the United States. We quote, as to subsequent steps in the controversy, from the opinion in *San Francisco* v. *LeRoy*, 138 U. S. 666 [84: 1099]:

"In April, 1851, the charter of San Francisco was repealed and a new charter adopted. Pending the appeal of the pueblo claim in the United States district court, the Van Ness ordinance, above mentioned, was passed by the common council of the city, by which the city relinquished and granted all its right and claim to land within its corporate limits as defined by its charter of 1851, with certain exceptions, to parties in the actual possession thereof by themselves or tenants on or before the 1st of January, 1855; provided such possession was continued up to the time of the introduction of the ordinance into the common council, which was in June, 1855, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process; and it declared that for the purposes contemplated by the ordinance persons should be deemed possessors who held titles to land within those limits by virtue of a grant made by an ayuntamiento, town council, alcalde, or justice of the peace of the former pueblo *before the 7th of [701] July, 1846, or by virtue of a grant subsequently made by the authorities, within certain limits of the city previous to its incorporation by the state, provided the grant, or a material portion of it, had been recorded in a proper book of records in the control of the recorder of the county previous to April 3, 1851. The city, among other things, reserved from the grant all the lots which it then occupied or had set apart for public squares, streets, and sites for schoolhouses, city hall, and other buildings belonging to the corporation, but what lots or parcels were thus occupied or set apart does not appear. Subsequently, in March, 1858, the legislature of the state ratified and confirmed this ordinance (Cal. Stat. 1858, chap. 66, p. 52), and by the 5th section of the act of Congress to expedite the settlement of titles to lands in the state of California, the right and title of the United States to the lands claimed



Digitized by Google

within the corporate limits of the charter of 1851 were relinquished and granted to the city and its successors for the uses and purposes specified in that ordinance. 13 Stat. at L. 333, chap. 194, § 5."

But that the relinquishment thus referred to was not considered by Congress as equivalent to a recognition of an absolute title in the city of San Francisco, but was deemed to be an act of grace and grant on the part of Congress, is shown by the fact that the 5th section contained, in addition to the relinquishment referred to in the foregoing quotation, the following provision: "There being excepted from this relinquishment and grant all sites or other parcels of lands which have been, or now are, occupied by the United States for military, naval, or other public uses, or such other sites or parcels as may hereafter be designated by the President of the United States, within one year after the rendition to the General Land Office by the surveyor general, of an approved plat of the exterior limits of San Francisco, as recognized in this section, in connection with the lines of the public surveys." It was also further provided: "that the relinquishment and grant by this act shall in no manner interfere with or prejudice any bona fide claims of 702]others whether asserted *adversely under rights derived from Spain, Mexico, or the laws of the United States, nor preclude a judicial examination and adjustment thereof."

This act of Congress transferred the appeal which had been taken to the district court from the decision of the board of land commissioners from that court to the circuit court of the United States. The latter court, in its opinion rendered on the hearing of the appeal (*San Francisco* v. *United States*, 4 Sawy. 561, 573), accepted as admitted "the existence of an organized pueblo at the present site of the city of San Francisco upon the acquisition of the country by the United States on the 7th of July, 1846; the possession by that pueblo of proprietary rights in certain lands and the succession to such proprietary rights by the city of San Francisco." It was also assumed to be conceded (pp. 561–574): "That the lands appertaining to the pueblo were subject, until by grant from the proper authorities they were vested in private proprietorship, to appropriation to public uses by the former government and, since the acquisition of the country, by the United States." The circuit court, contrary to the holding of the board, found that the limits of the pueblo had never been measured or marked off, and considered the question as to the extent of lands in which a pueblo acquired an interest under Mexican laws, and determined it to be 4 square leagues. But although the opinion referred to the Spanish law, the conclusion as to the right of San Francisco was based upon Mexican laws, customs, and usages, and the reasoning of the opinion was in accord with that of the board of land commissioners, to which we have already referred. The claim of the city was confirmed "in trust, for the benefit of the lot-holders under grants from the pueblo, town, or city of San Francisco, or other competent authority, and as to any residue in trust for the use and benefit of the inhabitants of the city." There was excepted, however, from the confirmation such parcels of land within the 4 square leagues, "as have been heretofore reserved or dedicated to public uses by the United States; and also such parcels of land as have been by grants from lawful authority vested in private proprietorship, *and [703 have been finally confirmed to parties claiming under said grants, by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals, in proceedings now pending therein for that purpose." p. 577.

That this decision was in conflict with the claim of the city that under the Mexican law it was entitled, as a matter of right, to 4 square leagues, is shown by the finding of the court that whatever was the right in the city it was so inchoate that up to the time of confirmation by the United States all the ungranted land within the area claimed was subject to such dedication for public purposes as the United States saw fit to make. That is, that the whole ungranted land covered by the claim was substantially public domain at the entire disposition of the United States for public purposes. That this decision was not in accord with the asserted claims of the city of San Francisco, is also again shown by the fact that appeals were taken therefrom to this court by both the city and the United States. Pending these appeals, Congress passed an act to quiet titles to the land within the city limits, which was approved March 8, 1866. 14 Stat. at L. 4, chap. 13. At that time the limits of the city were conterminous with those of the county, and embraced the whole of the 4 square leagues to which the city asserted rights. The act of 1864, it must be remembered, merely released the right and title of the United States to the lands within the then corporate limits of the city of San Francisco, as defined in the charter of April 15, 1851, which was much less than the 4 square leagues.

By the act of 1866 the United States relinquished and granted to the city all the land embraced in the decree of the circuit court subject to the reservations and exceptions designated in this decree, and upon the following further conditions and trusts, *viz.*:

"That all the said land, not heretofore granted to said city, shall be disposed of and conveyed by said city to parties in the bona fide actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon *such terms and [704 conditions as the legislature of the state of California may prescribe, except such parcels thereof as may be reserved and set aside by ordinance of said city for public uses."

The act, moreover, provided that such relinquishment and grant should not interfere with or prejudice any valid adverse right or claim, if such exist, to said land or any part thereof, whether derived from Spain, Mexico, or the United States, or preclude a judicial examination thereof.

It will thus be seen that the act of 1866 again asserted the power of Congress over the entire subject by materially modifying the decree of the circuit court of the United States, inasmuch as it placed restrictions on the power of disposition of the lands, and practically imposed a trust, not only upon the city of San



Digitized by Google

rancisco, but upon the legislature of the state f California. In consequence of the passage f this act, the appeals of both the city and the nited States which were pending in this ourt were withdrawn. *Townsend* v. *Greely*, 2 U. S. 5 Wall. 326 [18: 547]; *San Francisco* . *LeRoy*, 138 U. S. 667 [34: 1100].

Subsequent to the passage of the act of Congress, an act was passed by the legislature of California known as the "San Francisco Outside Land Bill," but it was vetoed by the governor of California, because in his opinion it was in conflict with the act of Congress of March 8, 1866 Dwinelle, Colonial History of California, Appx. p. 352.

We are now brought to consider the last proposition advanced by the city, which is—

Third. *That the interpretation of the Spanish law upon which the city bases its right is sanctioned by previous adjudications of this court.*

The decisions relied upon are, *Townsend* v. *Greeley*, *supra*; *Grisar* v. *McDowell*, 73 U. S. 6 Wall. 363 [18: 863]; *Brownsville* v. *Cavazos*, 100 U. S. 138 [25: 574]; and *San Francisco* v. *LeRoy*, 138 U. S. 664 [34: 1099].

An examination, however, of these cases will show that they cannot be held to sustain the proposition.

*Townsend* v. *Greeley* came to this court on error to a judgment of the supreme court of California, affirming a judgment in favor of Greeley, who had acquired a title to land within 705] *the limits confirmed to San Francisco by the board of land commissioners, under an ordinance of the city. The defendant claimed title under a sale on execution upon a judgment recovered against the city. The rights of both parties, therefore, depended upon the existence of a title in the city, and the only question at issue between them was which had derived the paramount right from the city, the defendant disputing the possession which plaintiff claimed had been in his grantors. Under this state of the record it was, of course, absolutely impossible for the question to arise whether or not there was title in the city to the land in dispute, or the extent of land which the title of the city, whatever it was, covered. The sole question presented in this court was whether the lower court had committed error in rejecting certain proffered evidence, and the determination of this question involved the ascertainment of whether the title which was in the city was of such a character as could be seized and sold under execution. In deciding this question the opinion, while referring to the facts out of which the controversy arose, contains the statement (p. 336 [549]) that the laws and ordinances of Spain for the settlement and government of her colonies on this continent "provided for the assignment to the pueblos or towns, when once established and officially recognized, for their use and the use of their inhabitants, of 4 square leagues of land." But this language was not material to the question before the court, and was not, therefore, a decision settling the matter.

The decision in *Grisar* v. *McDowell*, *supra*, was in fact a denial of any right in San Francisco by operation of law, Spanish or Mexican, to 4 square leagues of land. The case involved a controversy between one holding a title under San Francisco and an officer of the United States in possession of a military reservation within the 4 square leagues. The court simply decided that, conceding some right or interest or claim in the city to land, it was subject to appropriation by the government for public uses. In a general reference to the claims of the city, there are *dicta* to the effect that by the laws of Spain a pueblo acquired some rights in 4 square leagues *of land, but the decision [706 did not necessarily determine that question, as it was not before the court.

In *Brownsville* v. *Cavazos*, 100 U. S. 138 [25: 574], the question at issue was the title to land of Brownsville derived under Mexican laws. The action was ejectment by the city of Brownsville as the successor of the United States of the Mexican town of Matamoras, claiming title to a tract of land, to obtain title to which the city of Matamoras had instituted proceedings in expropriation or condemnation. The decision was that the city of Matamoras had never acquired title to the land because compensation had not been made, and that Brownsville consequently possessed no title. It is obvious that in the determination of that question the rights of pueblos, under Spanish laws, were not involved. It follows, therefore, that the reiteration, in the course of the opinion in that case, of the *dicta* found in the previous cases on the subject of the rights of pueblos under Spanish law cannot be treated as authoritative on that question.

In *San Francisco* v. *LeRoy*, 138 U. S. 664 [34: 1099], the object of the bill filed was to quiet the title of complainant as against the city of San Francisco to certain lands within the city limits. There was no controversy as to the extent of land in which a Spanish pueblo acquired some right by its establishment, nor was the question considered by the court. In reciting the history of the litigation over the San Francisco claim to 4 square leagues, the learned justice who delivered the opinion of the court did not directly refer to the rights acquired under Spanish laws, but contented himself with an allusion to the rights which a Mexican pueblo acquired in lands by operation of Mexican laws.

In passing from this brief review of the decisions of this court relied on by the city of Santa Fé, we note the reference to the case of *Lewis* v. *San Antonio*, 7 Tex. 288. In that case the court found that there had been an express grant of 6 square leagues to the predecessor of the town of San Antonio, and refuted the attempt to destroy the express grant on the ground that as, by operation of law, towns were entitled to 4 leagues, the express grant of 6 was void, by saying that no law *had been [707 referred to supporting such an assertion. The implication from this adjudication refutes rather than supports the claim here contended for.

But, in concluding the consideration of the foregoing contentions advanced by the city of Santa Fé, and which are shown by the review which we have made to be without merit, we will now demonstrate that the right to recover the land here claimed is without foundation on other and distinct grounds.

It cannot be doubted that under the law of Spain it was necessary that the proper authorities should particularly designate the land to



Digitized by Google

be acquired by towns or pueblos, before a vested right or title to the use thereof could arise. Thus by law 7, book 4, title 7, of the Recopilacion which regulated the mode of distribution of a tract granted by agreement to a founder of a settlement, it was provided as follows (2 White, New Recop. p. 46):

"The tract or territory granted by agreement to the founder of a settlement shall be distributed in the following manner: They shall, in the first place, lay out what shall be necessary for the site of the town and sufficient liberties (exidos), and abundant pasture for the cattle to be owned by the inhabitants, and as much besides for that which shall belong to the town (propios). The balance of the tract shall then be divided into four parts; one to be selected by the person obligated to form the settlement, and the remaining three parts to be divided in equal portions among the settlers."

Law 11 of the same book and title provides also (2 White, New Recop. p. 46):

"The lots shall be distributed among the settlers by lot, beginning with those adjoining the main square, and the remainder shall be reserved to us, to give, as rewards, to new settlers, or otherwise, *according to our will;* and we command that a plan of the settlement be always made out."

And law 12 of the same book and title declares (2 White, New Recop, p. 47):

"We command that no houses be erected within the distance of 800 paces from the walls [708] or breastworks of the town, *this being necessary for the good of our service and for the safety and defense of the towns as provided with regard to castles and fortresses."

And it is well to notice at this point that Santa Fé was a fortified town; it possessed a castle, and not only the land upon which it was erected but a considerable extent of land surrounding it was in any view a part of the public domain, and passed as such to the United States. *Mitchel* v. *United States*, 40 U. S. 15 Pet. 52, 89, 91 [10: 658, 671, 672].

The Spanish understanding of the prerequisite designation is well illustrated by the following passages from Elizondo's Practica Universal Forense.

At vol. 3, p. 109, he says:

"The Kings, the fountains of jurisdictions, are the owners of all the terminos situated in their kingdom, and as such can donate them, divide or restrict them, or give any new form to the enjoyment thereof, and hence it is that the pueblos cannot alienate their terminos and pastos without precedent royal license and authority."

And at vol. 5, p. 226, he says:

"There is nothing whatever designated by law as belonging to towns, other than that which by royal privilege, custom, or contract between man and man, is granted to them, so that although there be assigned to the towns at the time of their constitution a territorio and pertinencias, which may be common to all the residents, without each one having the right to use them separately, it is a prerogative reserved to the princes to divide the terminos of the provinces and towns, assigning to these the use and enjoyment, but the domain remaining in the sovereigns themselves."

Considering this subject, this court, speaking through Mr. Justice Field in *Grisar* v. *McDowell*, 73 U. S. 6 Wall. 373 [18: 865], said:

"These laws provided for the assignment to the pueblos, for their use and the use of their inhabitants, of land not exceeding in extent 4 square leagues. Such assignment was to be made by the public authorities of the government upon the original establishment of the pueblo, or afterwards upon the petition of its officers or inhabitants; and the land was to be measured *off in a square or prolonged [709] form, according to the nature and condition of the country. All lands within the general limits stated, which had previously become private property or were required for public purposes, were reserved and excepted from the assignment. Until the lands were thus definitely assigned and measured off, the right or claim of the pueblo was an imperfect one. It was a right which the government might refuse to recognize at all, or might recognize in a qualified form; it might be burdened with conditions and it might be restricted to less limits than the 4 square leagues, which was the usual quantity assigned."

Moreover, the general theory of the Spanish law on the subject indicates that, even after a formal designation, the control of the outlying lands, to which a town might have been considered entitled, was in the King, as the source and fountain of title, and could be disposed of at will by him or by his duly authorized representative, as long as such lands were not affected by individual and private rights. This is shown by the quotation from Elizondo, already made. The provisions of law 14, title 12, book 4, of the Recopilacion (2 White, New Recop. p. 52), which is reproduced in the margin, illustrates the absolute control thus exercised by the King of Spain over the subject.†

*The existence of this power of control [710] and disposition as to municipal lands in the supreme Spanish authority finds a further and cogent exemplification in the decree of the

†Law 14, title 12, book 4, of Recopilacion.

Whereas we have fully inherited the dominion of the Indies; and, whereas, the waste lands and soil which were not granted by the Kings nor predecessors, or by ourselves, in our name, belong to our patrimony and royal Crown, it is expedient that all the land which is held without just and true titles be restored as belonging to us, *in order that we may retain, before all things, all the lands which may appear to us and to our viceroys, audiences, and governors to be necessary for public squares, liberties (exidos), reservations (propios), pastures, and commons, to be granted to the villages and councils already settled, with due regard as well to their present condition as to their future state and to the increase they may receive*, and after distributing among the Indians whatever they may justly want to cultivate, sow, and raise cattle, confirming to them what they now hold, and granting what they may want besides, all the remaining land may be reserved to us, clear of any encumbrance, for the purpose of being given as rewards or disposed of according to our pleasure: For all this we order and command the viceroys, presidents, and pretorial audiences, whenever they shall think fit, to appoint a sufficient time for the owners of lands to exhibit before them and the ministers of their audiences, whom they shall appoint for that purpose, the title to lands, estates, huts, and caballerias, who, after confirming the possession of such as hold the same by virtue of good and legal titles, or by a just prescription, shall restore to us the remainder, to be disposed of according to our pleasure.



Digitized by Google

ortes of January 4, 1813, referred to by Hall his Mexican Law, p. 45. A like power, it to be inferred, is now asserted to be lodged in d has actually been exercised by the general overnment of Mexico. The Constitution of exico of February 5, 1857, which went into fect September 16 of the same year, prohib ed the acquisition or administration of real operty by civil or ecclesiastical corporations ithout any other exception than the buildings tended immediately or directly for the serve or purpose of the institutions, and hence ose the necessity for the abolition of municiil commons (exidos) in order to comply with is constitutional provision. In discussing e subject, Orozco, a Mexican writer, in his Legislation and Jurisprudence on Public ands" (vol. 2, p. 1107), after pointing out the istinction between pueblo sites (fundo) and e ejidos or commons of a pueblo, says:

"The municipal commons (ejidos), as has een seen, were excluded by the laws abolishng mortmain; but, in view of the aforesaid onstitutional precept, it was logical to infer hat the municipal commons (ejidos) passed to he control of the Federal treasury, as sucessor by subrogation of the property of corporations, and with so much the more reason, ince, recalling the origin of the municipal commons (ejidos) as soon as their existence became impossible, nothing is more natural and consequential than that those lands should revert to the domain of him who granted them for the common use of the residents of the settlements."

After reciting the fact that in order to "reconcile respect for the supreme law with the interest 711 of these pueblos," *the general law, after fixing the limits of the pueblos and dedicating to public uses the cemeteries and other public places therein, directed that the remainder of the land should be distributed among the fathers or heads of families, the author adds:

"In this way it has been carried into effect, titles signed by the president of the republic in favor of those residents of the pueblos being issued gratis by the department of public works, all of which proves that the Federal government and not the common councils, nor any other authority is that which, as competent in the matter, graciously grants the disposable part of the ancient municipal commons (ejidos)."

It was doubtless a consideration of this state of the Spanish law and the unquestioned power lodged in the King of Spain to exercise unlimited authority over the lands assigned to a town and undisposed of and not the subject of private grant (to all of which rights the United States succeeded as successor of the King of Spain and the government of Mexico), which caused Congress, in enacting the laws of 1864 and 1866, to carve out of the claim of San Francisco such land for public purposes as it saw fit, to authorize further reservations to be made within a period of one year, and to subject the lands relinquished to specific trusts imposed not alone upon the municipality of San Francisco, but also upon the general assembly of California. The power thus asserted by the act was not new, but conformed to and accorded with the practice of the government from the beginning. Thus, in 1812, Congress, by an act approved June 13 of that year (2 Stat. at L. 748, chap. 99), for the settlement of claims to land in the territory of Missouri (where rights under the laws of Spain existed), provided, by § 1, for the survey of the boundaries of towns and for the confirmation to individuals of such lots therein covered by actual possession, and for the confirmation of such commons to the towns as had been actually possessed and used by the town. So far as all the other commons, not so actually possessed, were concerned, and the lots within the town not possessed and claimed by individuals, the absolute right to dispose of the same was asserted by Congress, and a portion *thereof [712 was dedicated by that body to public uses. The 1st section is reproduced in the margin;† and the 2d section, accomplishing the results just indicated, reads as follows:

"Sec. 2. And be it further enacted, That all town or village lots, out lots, or common-field lots, included in such surveys, which are not rightfully owned or claimed by any private individuals, or held as commons belonging to such towns or villages, or that the President of the United States may not think proper to reserve for military purposes, shall be and the same are hereby reserved for the support of schools in the respective towns and villages aforesaid: *Provided*, That the whole quantity of land contained in the lots reserved for the support of schools in any one town or village shall not exceed one twentieth part of the whole lands included in the general survey of such town or village."

*The same course was adopted by Con-[713 gress in the act of February 8, 1827 (4 Stat. at L. 202, chap. 9), providing for the settlement and confirmation of claims to lands in the former Spanish domain of East Florida. The 3d section of that act, confirming to the city of St. Augustine certain lands, is as follows:

"Sec. 3. And be it further enacted, That the commons in the city of St. Augustine be,

†Section 1 of Act of June 13, 1812 (2 Stat. at L. 748).

"That the rights, titles, and claims to town or village lots, out lots, common-field lots, and commons, in, adjoining, and belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, St. Ferdinand, Village a Robert, Carondelet, St. Genevieve, New Madrid, New Bourbon, Little Prairie, and Arkansas, in the territory of Missouri, which lots have been inhabited, cultivated, or possessed, prior to the 20th day of December, 1803, shall be and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto: *Provided*, That nothing herein contained shall be construed to affect the rights of any persons claiming the same lands or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to land in the said territory. And it shall be the duty of the principal deputy surveyor for the said territory as soon as may be, to survey, or cause to be surveyed and marked (where the same has not already been done according to law), the out-boundary lines of the said several towns or villages so as to include the out lots, common-field lots, and commons, thereto respectively belonging. And he shall make out plats of the surveys, which he shall transmit to the surveyor general, who shall forward copies of the said plats to the Commissioner of the General Land Office, and to the recorder of land titles; the expenses of surveying the said out-boundary lines shall be paid by the United States out of any moneys appropriated for surveying the public lands; *Provided*, that the whole expense shall not exceed $3 for every mile that shall be actually surveyed and marked."



Digitized by Google

and the same are hereby, confirmed to the corporation of said city, to the same extent that they were used, claimed, and enjoyed under the Spanish government. And the parochial church and burying ground in possession of the Roman Catholic congregation are confirmed to them, and the old Episcopal Church lot is hereby relinquished and confirmed to the Incorporated Episcopal Church of St. Augustine: *Provided* always, That the grants in this section specified shall forever inure to the purposes for which they are confirmed, and shall not be alienated without the consent of Congress."

So, also, it may well be supposed that it was upon this aspect of the imperfect nature of right in land claimed by towns in territory formerly owned by Spain and Mexico, and the long-established construction of such rights evidenced by the foregoing acts of Congress, which caused this court, speaking through Mr. Justice Field, in *Grisar* v. *McDowell*, 73 U. S. 6 Wall. 373 [18: 866], to say:

"Even after the assignment the interest acquired by the pueblo was far from being an indefeasible estate such as is known to our laws. The purposes to be accomplished by the creation of pueblos did not require their possession of the fee. The interest . . . amounted to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes. And this limited right of disposition and use was in all particulars subject to the control of the government of the country."

How completely this language applies to the case here presented is demonstrated when it is [714] considered that there is no proof *of a single act of ownership by the city, either in its own right or by anybody else claiming to hold under it, and that it is asserted in the brief of the counsel for the government and not denied that practically every foot of the area of 4 square leagues now claimed by the city is covered by grants made by the governors of the province of New Mexico to others. Whether these grants be valid or not of course is not before us for consideration.

An inchoate claim, which could not have been asserted as an absolute right against the government of either Spain or Mexico, and which was subject to the uncontrolled discretion of Congress, is clearly not within the purview of the act of March 3, 1891, creating the court of private land claims (26 Stat. at L. 854, chap. 539), and therefore is beyond the reach of judicial cognizance.

The duty of protecting imperfect rights of property under treaties such as those by which territory was ceded by Mexico to the United States in 1848 and 1853, in existence at the time of such cessions, rests upon the political and not the judicial department of the government. *Les Bois* v. *Bramell*, 45 U. S. 4 How. 449, 461 [11: 1051, 1056]; *Ainsa* v. *United States*, 161 U. S. 222 [40: 678]. To the extent only that Congress has vested them with authority to determine and protect such rights can courts exercise jurisdiction. Where, therefore, a tribunal of limited jurisdiction is created by Congress to determine such rights of property, a party seeking relief must present for adjudication a case clearly within the act or relief cannot be given. *United States* v. *Clarke*, 33 U. S. 8 Pet. 436, 444 [8: 1001, 1004].

Section 18 of the act provides that all the proceedings and rights theretofore referred to in the act shall be conducted and decided subject to certain provisions therein enumerated and to the other provisions of the act. Among the provisions contained in § 13 is the following:

"First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the states of the Republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition *of the territory by the United States, [715] the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect."

By § 7 of the act the court was also required, in reaching a conclusion as to the validity of the claim, to be guided by the laws of nations, the stipulations of the treaties concluded between the United States and the republic of Mexico of February 2, 1848, and December 30, 1853.

Although § 6 of the act also authorized the adjudication by the court of private land claims of all claims which the United States "are bound to recognize and confirm by the treaties of cession of said country by Mexico to the United States, which at the date of the passage of this act have not been confirmed by act of Congress or otherwise finally decided upon by lawful authority, and which are not already complete and perfect," the meaning of the words "complete and perfect" is to be derived by considering the context and not by segregating them from the previous part of the sentence exacting that the claim must be one which the United States was bound to recognize and confirm by virtue of the treaty. These words are moreover controlled by the mandatory requirements of § 13.

Indeed, the controlling nature of the provisions of § 13 of the act of 1891 was considered and settled by this court in *Ainsa* v. *United States*, 161 U. S. 208 [40: 673], where, speaking by Mr. Chief Justice Fuller, it was said:

"Under the act of March 3, 1891, it must appear, in order to the confirmation of a grant by the court of private land claims, not only that the title was lawfully and regularly derived, but that, if the grant were not complete and perfect, the claimant could *by right* and not by grace, have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States."

Although the act of 1891, in § 11, authorized a town *presenting a claim for a grant to [716] represent the claims of lotholders to lots within the town, this provision does not override the general requirements of the statute as to the nature of the claim to title which the court is au-



Digitized by Google

thorized to confirm. The difference between the act of 1891 and the California act of 1851, hitherto referred to, accentuates the intention of Congress to confine the authority conferred by the later act to narrower limits than those fixed by the act of 1851. The act of 1851 authorized the adjudication of claims to land by virtue of any "right" or "title" derived from the Spanish government, and conferred the power in express language on the board and court to *presume and grant in favor of a town*. The act of 1891 not only entirely omits authority to invoke this presumption, but, as we have seen, excludes by express terms any claim, the completion of which depended upon the mere grace or favor of the government of Spain or Mexico, and of the United States as the successor to the rights of those governments.

Nor do certain expressions contained in the opinion in *San Francisco* v. *Le Roy*, 138 U. S. 656 [34: 1096], and *Knight* v. *United Land Asso.* 142 U. S. 161 [35: 974], when properly understood, conflict with the foregoing conclusions. Those cases dealt with the rights of San Francisco after they were recognized by Congress, and to the extent only of that recognition. The language referred to, therefore, simply amounted to saying that as Congress had to a certain extent recognized the claim of San Francisco, to the limit of this recognition, and no further, the rights of that city would be treated as relating back and originating from the nature of the claim presented, and which in part through the grace of Congress had been allowed. In the case at bar we are not concerned with considering or determining to what period of time or source of right the claim would relate if it were found to be within the reach of the provisions of the act of 1891.

The petition is framed upon the theory merely of a right to 4 square leagues, vested in the city by operation of law, and as the record contains no proof whatever as to the possessory claims of lotholders in the city of Santa Fé, or as to the *actual possession [717 enjoyed by that city of public places, these latter rights, if any, as well as the asserted title of the city to the swamp tract to which reference has been made in the course of his opinion, are not to be controlled by the rejection now made of the pretensions of the city to a title to the 4 square leagues tract asserted to have been acquired by operation of Spanish laws.

*The decree below is reversed and the cause remanded with instructions to dismiss the petition*

Mr. Justice **Brewer** concurs in the result.



Digitized by Google

Digitized by Google

# CLXV UNITED STATES.

**165 U. S. 1-27, 41 L. 611, ST. LOUIS, ETC., RY. v. MATHEWS.**

**Torts.**— History of law regarding liability for fire originating on one's premises and spreading elsewhere reviewed, p. 5.

**Railroads.**— State law making railroad absolutely liable for fire communicated by its locomotives is valid, p. 27.

Approved in State v. Broadbelt, 89 Md. 581, 73 Am. St. Rep. 207, 43 Atl. 773, 45 L. R. A. 436, upholding act prescribing sanitary regulations for milk dealers in cities; State v. Call, 121 N. C. 647, 28 S. E. 518, upholding law requiring examination and license of physicians; Broadfoot v. Fayetteville, 121 N. C. 422, 61 Am. St. Rep. 671, 28 S. E. 516, 39 L. R. A. 246, upholding act subjecting resident owners of stock found at large to higher fine than non-resident owners; Waters, etc., Oil Co. v. State, 19 Tex. Civ. App. 14, 44 S. W. 942, 943, generally.

The following have been upheld upon authority of principal case: Jones v. Brim, 165 U. S. 182, 41 L. 678, 17 S. Ct. 283, Utah law rendering one driving stock on hill liable for damage from rocks dislodged; St. Louis, etc., Ry. v. Paul, 173 U. S. 409, 19 S. Ct. 421, Arkansas act protecting wrongfully-discharged railway employees; Atchison, etc., R. R. v. Matthews, 174 U. S. 102, 19 S. Ct. 611, act including attorneys' fees in judgments for railroad's liability for fires; State v. Broadbelt, 89 Md. 579, 73 Am. St. Rep. 206, 43 Atl. 773, 45 L. R. A. 436, law prescribing sanitary regulations for city milkmen does not deny equal protection; Lumbermen's Mut. Ins. Co. v. Kansas City, etc., R. R., 149 Mo. 173, 50 S. W. 283, like statute; Waters, etc., Oil Co. v. State, 19 Tex. Civ. App. 12, 13, 44 S. W. 941, 942, law prohibiting combinations restraining trade; Hartford Ins. Co. v. Chicago, etc., Ry., 175 U. S. 101, 20 S. Ct. 37, arguendo. See 62 Am. St. Rep. 171, note.

Distinguished in Gulf, etc., Ry. v. Ellis, 165 U. S. 155, 41 L. 668, 17 S. Ct. 257, Texas law imposing attorneys' fees on railroad defendants is invalid; Continental Trust Co. v. Toledo, etc., R. R., 89 Fed. 639, Ohio act of 1894, relating to railroads' liability for fires, does not eliminate negligence as essential element of liability.

**Railroads.**— Statute giving railroad insurable interest in property for whose destruction it is absolutely liable is valid, p. 27.

Cited in dissenting opinion in Atchison, etc., R. R. v. Matthews, 174 U. S. 122, 19 S. Ct. 619, majority upholding Kansas provision including attorneys' fees in judgments under like act. Cited in



Digitized by Google

Waters, etc., Oil Co. v. State, 19 Tex. Civ. App. 20, 44 S. W. 946, arguendo.

Statute making railroad absolutely liable for fire is not penal, p. 27.

Approved in Hancock v. Norfolk, etc., Ry., 124 N. C. 227, 32 S. E. 680, upholding act making railroads liable for injuries to employees from fellow servant's negligence; Waters, etc., Oil Co. v. State, 19 Tex. Civ. App. 17, 44 S. W. 944, arguendo.

165 U. S. 27, 41 L. 621, MISSOURI PAC. RY. v. SIMMONS.

Adjudged in conformity with preceding case, q. v., supra.

165 U. S. 28-36, 41 L. 621, WARNER VALLEY STOCK CO. v. SMITH.

**Mandamus.**— Petition for writ against government abates by resignation, p. 31.

Approved in Smith v. Raynolds, 166 U. S. 717, 41 L. 1186, 17 S. Ct. 998, dismissed on authority of principal case; United States v. Butterworth, 169 U. S. 604, 42 L. 874, 18 S. Ct. 442, suit to compel commissioner to issue patent abates on his death; People v. Morton, 156 N. Y. 147, 66 Am. St. Rep. 554, 50 N. E. 794, 41 L. R. A. 235, mandamus cannot be sustained against board after resignation of members and failure to bring in successors; Dent v. Board of Commrs., 45 W. Va. 759, 32 S. E. 253, mandamus cannot issue to officer in official capacity after term ended.

**Mandamus.**— Demand upon defendant is condition precedent to application for mandamus, p. 32.

**Mandamus.**— Costs fall upon defendant upon award of peremptory mandamus, p. 32.

**Mandamus** may be directed to municipality in corporate capacity, p. 33.

**Public lands.**— Phrase "under direction of secretary" is intended as general expression of secretary's power, p. 34.

Approved generally in Michigan Land, etc., Co. v. Rust, 168 U. S. 594, 42 L. 593, 18 S. Ct. 210.

165 U. S. 36-57, 41 L. 624, AGNEW v. UNITED STATES.

**Criminal law.**— Plea in abatement for irregularities in impanelling grand jury must be exact, p. 44.

**Criminal law.**— Accused cannot complain of non-prejudicial irregularity in impanelling grand jury, p. 44.

Approved in Gardes v. United States, 87 Fed. 180, reading part of indictment and explaining rest to jury is not error; Gallot v. United States, 87 Fed. 451, reading but one of several like counts to jury is not error.

**Criminal law.**— Objection to competency of grand jury must be made at first opportunity, p. 44.

Digitized by Google

**Appeal.**— Record must show that jury acted on permission to take notes, alleged as error, p. 45.

**Evidence.**— Inquiry as to commercial rating is not relevant where point of inquiry was defendant's financial condition or witness' knowledge of it, p. 46.

**Evidence.**— Where inquiry is as to defendant's knowledge of his solvency, opinions of others are irrelevant, p. 49.

**Criminal law.**— One is deemed to intend natural and probable result of unlawful acts, p. 50.

Approved in Stearns v. Lawrence, 83 Fed. 746, 54 U. S. App. 548, and Railroad & Tel. Cos. v. Board of Equalizers, 85 Fed. 305, both applying presumption.

**Criminal law.**— Burden of proof continues with prosecution; but accused must rebut prima facie case made, p. 50.

Approved in Spurr v. United States, 87 Fed. 705, 59 U. S. App. 677, sustaining instruction that banker is presumed cognizant of condition of accounts.

**Criminal law.**— Court need not accept counsel's language in framing instructions nor repeat those already given, p. 51.

**Criminal law.**— Instructions tending to mislead jury should be refused, p. 52.

Approved in Spurr v. United States, 87 Fed. 706, 59 U. S. App. 679, instructions singling out particular circumstances rightly refused as misleading.

**Banks.**— Charge as to what constitutes false entry, under § 5209, R. S., held proper, p. 52.

Approved in Peters v. United States, 94 Fed. 134, indictment, charging procurement of false entries by clerks under defendant's control, is good.

**Criminal law.**— Guilty intent is determinable from facts and circumstances at time of act, p. 57.

165 U. S. 58–107, 41 L. 632, SCOTT v. DONALD.

**States.**— Suit for injuries done under color of office is not against State, p. 70.

Under authority of principal case following have been held not suits against State: Tindal v. Wesley, 167 U. S. 220, 42 L. 143, 17 S. Ct. 776, against individuals, to recover possession of land, defendant asserting possession under State authority; Smyth v. Ames, 169 U. S. 519, 42 L. 839, 18 S. Ct. 423, against State officers, to prevent enforcement of unconstitutional enactment; Mutual L. Ins. Co. v. Boyle, 82 Fed. 711, suit to compel superintendent of insurance to issue certificate is not against State; Scottish, etc., Ins. Co. v. Herriott, 109 Iowa, 610, 77 Am. St. Rep. 550, 80 N. W. 666, by foreign insurance company against State treasurer to recover taxes.

Distinguished in Fitts v. McGhee, 172 U. S. 529, 19 S. Ct. 274,

Digitized by Google

against State officers, to enjoin enforcement of law reducing tolls; Ball v. Rutland R. R., 93 Fed. 518, stockholder's suit to enjoin State attorney from proceeding under statute.

Supreme Court will decide all questions in case from Circuit Court where constitutionality of State law is involved, p. 71.

Approved in Holt v. Indiana Mfg. Co., 80 Fed. 4, 46 U. S. App. 717, appeal of suit between co-citizens to enjoin State tax on patent rights must be to Supreme Court direct; Illinois Cent. R. R. v. Adams, 93 Fed. 856, suit involving construction of Constitution is not within appellate jurisdiction of Circuit Court of Appeals.

Damages are compensation allowed by law for injury; exemplary damages are allowable where motive is evil, p. 86.

Approved in Times Pub. Co. v. Carlisle, 94 Fed. 769, whether or not exemplary damages should be allowed for libel is question for jury; Cowen v. Winters, 96 Fed. 935, affirming S. C., 90 Fed. 103, allowing exemplary damages where railroad repudiated ticket and ejected passenger.

Damages.— Exemplary damages are allowable for intentional, malicious and repeated interference with constitutional rights, p. 89.

Courts.— Where declaration claims jurisdictional amount, fact that recovery is less does not oust jurisdiction, p. 89.

Approved in Stillwell, etc., Co. v. Williamston Oil, etc., Co., 80 Fed. 70, court has jurisdiction, although defendant sets up payment reducing sum below jurisdictional amount, questions of law being disputed.

Commerce.— South Carolina dispensary act interferes with interstate commerce and cannot be sustained as inspection law, p. 99.

Approved in Moore v. Bahr, 82 Fed. 21, dealer, citizen of another State, may store liquor in South Carolina for purposes of sale; dissenting opinions in Rhodes v. Iowa, 170 U. S. 433, 42 L. 1099, 18 S. Ct. 672, arguendo; State v. Chastian, 49 S. C. 180, 27 S. E. 7, majority upholding provision rendering keeping unstamped liquor illegal; State v. Holleyman, 55 S. C. 228, 229, 31 S. E. 367, 45 L. R. A. 572, 573, majority upholding prohibition of handling liquor in night-time by owners. Cited, arguendo, in Vance v. W. A. Vandercook Co., 170 U. S. 441, 443, 42 L. 1102, 18 S. Ct. 675, 676 (see dissenting opinion in 170 U. S. 459, 467, 42 L. 1108, 1111, 18 S. Ct. 682, 685).

Distinguished in Vance v. W. A. Vandercook Co., 170 U. S. 452, 453, 42 L. 1105, 1106, 18 S. Ct. 679, 680 (see dissenting opinion in 170 U. S. 464, 42 L. 1110, 18 S. Ct. 684), reversing S. C., 80 Fed. 793, upholding South Carolina dispensary law of 1897, except as depriving non-residents of right to import; State v. Harbourne, 70 Conn. 492, 66 Am. St. Rep. 131, 40 Atl. 182, 40 L. R. A. 610, upholding prohibition of business of transmitting bets to race-tracks with-

Digitized by Google

out State; Plumb v. Christie, 103 Ga. 699, 30 S. E. 764, 42 L. R. A. 187, upholding dispensary act of 1897, applying to certain counties; State v. Holleyman, 55 S. C. 220, 31 S. E. 364, 45 L. R. A. 569 (see dissenting opinion in 55 S. C. 235, 31 S. E. 369, 45 L. R. A. 575), affirming conviction of defendant purchasing liquor in another State for own use and carrying it into State.

Commerce.— Act of 1890, subjecting imported liquors to State police power, contemplates equality of treatment, p. 100.

Approved in United States v. Hopkins, 82 Fed. 540, Kansas City Live-Stock Exchange is an illegal combination restraining trade; dissenting opinion in Vance v. W. A. Vandercook Co., 170 U. S. 460, 42 L. 1108, 18 S. Ct. 682, majority reversing S. C., 80 Fed. 790, and holding since act of 1890 receiver of intoxicants from another State cannot sell in defiance of State law.

Distinguished in following cases upholding respective laws: Schollenberger v. Pennsylvania, 171 U. S. 12, 18 S. Ct. 701, upholding Pennsylvania statute prohibiting sale of oleomargarine as to original imported packages; State v. Holleyman, 55 S. C. 222, 223, 224, 31 S. E. 365, 45 L. R. A. 570, 571, to prohibit handling and hauling in night-time of intoxicants by owners thereof is within police powers; St. Louis, etc., Ry. v. Smith, 20 Tex. Civ. App. 460, 49 S. W. 631, law excluding diseased cattle from other States.

Commerce.— Act of 1890 did not contemplate State law allowing only State functionaries to import liquors, p. 100.

Approved in Vance v. W. A. Vandercook Co., 170 U. S. 448, 42 L. 1104, 18 S. Ct. 678, dispensary act of 1897 is unconstitutional so far as it compels resident, purchasing for own use, to communicate through State chemist; State v. Holleyman, 55 S. C. 219, 31 S. E. 363, 45 L. R. A. 569, collecting cases on liquor laws as interfering with commerce.

Damages for injuries, under invalid act, cannot be affected by passage of later valid act, p. 101.

Monopoly created by South Carolina dispensary law is not such in the odious sense, per Brown, J., dissenting, p. 104.

Approved in Guy v. Commissioners, 122 N. C. 474, 29 S. E. 772, upholding dispensary law.

Miscellaneous.— Cited in Scott v. Donald, 165 U. S. 117, 41 L. 655 (see 17 S. Ct. 265), referring to dissenting opinion.

165 U. S. 107–117, 41 L. 648, SCOTT v. DONALD.

States.— Suit for injuries done under color of office is not against State, p. 113.

Circuit Court will restrain State officer from executing statute which would impair constitutional rights, p. 114.

Approved in Nashville, etc., Ry. v. McConnell, 82 Fed. 80, restraining ticket brokers from buying and reselling tickets to be used in violation of contracts.

Digitized by Google

**Courts.**— Plaintiff need not postpone application to Circuit Court in equity until injured to extent of $2,000, p. 115.

Approved in Nashville, etc., Ry. v. McConnell, 82 Fed. 74, jurisdictional amount in suit for injunction is determined by value of right to be protected.

**Injunction** will not be granted upon mere conjecture that there may be numerous others in like case with plaintiff, p. 115.

**Equity.**— Interest, to admit parties or allow court to dispense with some, must be in subject-matter, p. 116.

Approved in Pillsbury, etc., Flour-Mills Co. v. Eagle, 86 Fed. 629, 41 L. R. A. 174, one person being entitled to relief from fraudulent competition, others with common interest may join; Liverpool, etc., Ins. Co. v. Clunie, 88 Fed. 167, equity may, in single suit, determine rights of many parties arising from common cause.

**Injunction** cannot affect parties not parties to suit and not represented by parties, p. 117.

Miscellaneous.— Vance v. W. A. Vandercook Co., 170 U. S. 441, 42 L. 1102, 18 S. Ct. 675, wrongly citing case to rules laid down by preceding case.

165 U. S. 118–144, 41 L. 655, MISSOURI v. IOWA.

**States.**— Report of commissioners appointed to define boundary line between Missouri and Iowa confirmed, p. 118.

Not cited.

165 U. S. 144–150, 41 L. 664, HUSSMAN v. DURHAM.

**Supreme Court** may review State decision denying validity of equitable title obtained through land office, p. 147.

**Taxation.**— Land is subject to taxation when complete equitable title has passed from United States, p. 147.

**Taxation.**— Mere certificate of location does not render land subject to State taxation, p. 147.

**Taxation.**— Under Iowa tax law, there is no privity between holder of fee and claimant under tax title, p. 147.

Cited in 55 Am. St. Rep. 506, note.

**Public lands.**— Title by relation extends no further back than to inception of equitable right, p. 148.

Approved in Carter v. Ruddy, 166 U. S. 495, 41 L. 1091, 17 S. Ct. 641, certificate will not support ejectment; Evans v. Durango, etc., Coal Co., 80 Fed. 439, 49 U. S. App. 332, patent will not be held to relate to initial step where patentee's complaint shows rights acquired thereby lost through laches.

**Taxation.**— Purchaser at tax sale buys at his peril, p. 150.

Approved in Textor v. Shipley, 86 Md. 438, 38 Atl. 933, purchaser at tax sale acquires new title under grant from sovereign, extinguishing prior incumbrances.

Digitized by Google

165 U. S. 150–168, 41 L. 666, GULF, ETC., RY. v. ELLIS.

**Constitutional law.**— Statute requiring railroads to pay costs to parties recovering against them denies equal protection, p. 157.

Approved in Railroad & Tel. Cos. v. Board of Equalizers, 85 Fed. 317, assessment of railroad and telegraph property at full value is discriminatory, other property being assessed at lower rate; Los Angeles Gold Min. Co. v. Campbell, 13 Colo. App. 7, 56 Pac. 248, mechanics' lien act of 1893, providing for attorneys' fees, is unconstitutional; Morris v. Imperial Ins. Co., 106 Ga. 471, 32 S. E. 599, reversing for instruction that defense was frivolous and authorizing jury to assess attorneys' fees; Fidelity, etc., Ins. Co. v. Allibone, 90 Tex. 662, 40 S. W. 399, arguendo. See 62 Am. St. Rep. 174, note.

Following distinguishing cases uphold respective laws: St. Louis, etc., Ry. v. Paul, 173 U. S. 409, 19 S. Ct. 421, Arkansas act protecting wrongfully-discharged railway employees; Atchison, etc., R. R. v. Matthews, 174 U. S. 99, 19 S. Ct. 610 (see dissenting opinion in 174 U. S. 107, 111, 113, 124, 19 S. Ct. 614, 615, 616, 620), Kansas statute making railroads liable in damages and attorneys' fees for fires from locomotives; Skinner v. Garnett Gold Min. Co., 96 Fed. 743, California law requiring monthly payment of corporation employees; St. Louis, etc., Ry. v. Paul, 64 Ark. 94, 62 Am. St. Rep. 163, 40 S. W. 709, 37 L. R. A. 508, act compelling railroads to pay employees at time of discharge is not illegal discrimination; Baltimore, etc., Ry. v. Tripp, 175 Ill. 255, 51 N. E. 833, act making setting of fire by locomotive prima facie proof of company's negligence; State v. Broadbelt, 89 Md. 581, 73 Am. St. Rep. 207, 43 Atl. 773, 45 L. R. A. 436, act prescribing sanitary regulations for milk dealers in cities; Waters, etc., Oil Co. v. State, 19 Tex. Civ. App. 18, 44 S. W. 944, law prohibiting combinations in restraint of trade. Departed from in Atchison, etc., R. R. v. Matthews, 58 Kan. 450, 49 Pac. 603, Chicago, etc., Ry. v. Spring Hill Cemetery Assn., — Kan. App. —, 57 Pac. 253, and Clark v. Ellithorpe, 7 Kan. App. 342, 51 Pac. 941, all upholding like statute; Shawnee Fire Ins. Co. v. Bayha, 8 Kan. App. 175, 55 Pac. 476, upholding provision for attorneys' fees in actions on insurance policies; Atchison, etc., Ry. v. Campbell, 8 Kan. App. 663, 56 Pac. 509, upholding act including attorneys' fees in sum recoverable from railroads violating stock-shipping act.

**Constitution.**— Corporations are persons within fourteenth amendment, p. 154.

Reaffirmed in Smyth v. Ames, 169 U. S. 522, 42 L. 840, 18 S. Ct. 424, Arkansas v. Kansas, etc., Coal Co., 96 Fed. 368, Luman v. Hitchens Bros. Co., 90 Md. 24, 26, 44 Atl. 1053, and Railroad v. Harris, 99 Tenn. 705, 43 S. W. 120.

Approved in Harbison v. Knoxville Iron Co., 103 Tenn. 429, 53 S. W. 957, and Dayton Coal, etc., Co. v. Barton, 103 Tenn. 611, 53

Digitized by Google

S. W. 971, upholding act requiring persons paying employees in store checks to redeem same in hands of bona fide purchasers.

**Constitutional law.**— Fourteenth amendment was not designed to restrain State's power of classification, p. 155.

Approved in Magoun v. Illinois Trust, etc., Bank, 170 U. S. 296, 42 L. 1044, 18 S. Ct. 599, upholding Illinois inheritance tax law of 1895; British, etc., Assur. Co. v. Bradford, 60 Kan. 86, 55 Pac. 336, upholding law allowing recovery of attorneys' fees in suits on fire policies; Gelsthorpe v. Furnell, 20 Mont. 308, 51 Pac. 269, 39 L. R. A. 174, upholding inheritance tax law exempting estates of less than certain sum.

**Constitutional law.**— Classification for imposition of duties arising out of particular business is valid, p. 158.

Under authority hereof following have been upheld: Atchison, etc., R. R. v. Matthews, 174 U. S. 102, 19 S. Ct. 611, act including attorneys' fees in judgments for railroad's liability for fires; Skinner v. Garnett Gold Min. Co., 96 Fed. 745, California act requiring corporations to pay employees at least monthly and creating lien; St. Louis, etc., Ry. v. Paul, 64 Ark. 95, 62 Am. St. Rep. 164, 40 S. W. 709, 37 L. R. A. 508, act compelling railroads to pay employees on day of discharge; Pittsburgh, etc., Ry. v. Montgomery, 152 Ind. 12, 71 Am. St. Rep. 310, 49 N. E. 586, act rendering railroads liable for injuries to employees through fellow servants; Railroad v. Harris, 99 Tenn. 706, 43 S. W. 120, act imposing privilege tax on railroads not paying ad valorem tax, although there are but two.

**Constitutional law.**— Police power does not embrace statute to compel payment of indebtedness, p. 158.

Cited in 62 Am. St. Rep. 173, note.

**Constitution.**— Classification, to escape equality clause of fourteenth amendment, must be based on reasonable ground, p. 165.

Following approving cases hold respective laws invalid: Fraser v. McConway, etc., Co., 82 Fed. 260, and Juniata Limestone Co. v. Fagley, 187 Pa. St. 197, 67 Am. St. Rep. 580. 40 Atl. 977, 42 L. R. A. 443, act regulating and taxing employment of aliens; In re Day, 181 Ill. 80, 54 N. E. 647, act providing for admission to practice of law students who begin studying before certain date; Luman v. Hitchens Bros. Co., 90 Md. 27, 44 Atl. 1054, act prohibiting railroad and mining companies in certain counties from engaging in store business; Wanser v. Hoos, 60 N. J. L. 526, 64 Am. St. Rep. 603, 38 Atl. 450, law classifying cities according to population for purpose of elections; People v. Hawkins, 157 N. Y. 16, 68 Am. St. Rep. 747, 51 N. E. 261, 42 L. R. A. 497, law prohibiting sale of convict-made goods without so marking them, as to those from other States; State v. Hoyt, 71 Vt. 64, 42 Atl. 975, statute imposing fine for peddling without license which applies only to domestic goods. Cited in Hinds v. Wilcox, 22 Mont. 18, 55 Pac. 359, and

Digitized by Google

Foley v. Hoboken, 61 N. J. L. 483, 38 Atl. 835, arguendo. See also 62 Am. St. Rep. 175, note.

Following distinguishing cases uphold following laws: Magoun v. Illinois Trust, etc., Bank, 170 U. S. 294, 42 L. 1043, 18 S. Ct. 599, Illinois inheritance tax law of 1895; Nicol v. Ames, 173 U. S. 521, 19 S. Ct. 527, tax on sales at exchanges; Atchison, etc., R. R. v. Matthews, 174 U. S. 97, 19 S. Ct. 610 (see dissenting opinion in 174 U. S. 123, 19 S. Ct. 620), Kansas act, including attorneys' fees in damages, recoverable from railroads for fires communicated.

165 U. S. 168–174, 41 L. 673, CLARKE v. McDADE.

Courts.— General statement, in so-called specification of error from State court, cannot raise Federal question, p. 172.

Not cited.

165 U. S. 174–180, 41 L. 675, UNITED STATES v. BARNETTE.

Army and navy.— Officer assigned to duty on school ship is entitled to sea pay, p. 180.

Not cited.

165 U. S. 180–184, 41 L. 677, JONES v. BRIM.

Constitutional law.— Fourteenth amendment does not limit subjects of State's police power, p. 182.

Approved in Hawker v. New York, 170 U. S. 198, 42 L. 1006, 18 S. Ct. 577, upholding New York law prohibiting practice of medicine by one convicted of felony; State v. Broadbelt, 89 Md. 583, 73 Am. St. Rep. 209, 43 Atl. 774, 45 L. R. A. 437, upholding act prescribing sanitary regulation for milk dealers in cities; Railroad v. Harris, 99 Tenn. 706, 43 S. W. 120, upholding act imposing privilege tax on railroads not paying ad valorem tax.

Highways.— Establishment, maintenance and control of public highways is within police powers of State, p. 182.

Approved in Davis v. Massachusetts, 167 U. S. 47, 42 L. 72, 17 S. Ct. 733, upholding ordinance prohibiting public speaking on public grounds without permit; Lake Shore, etc., Ry. v. Ohio, 173 U. S. 303, 19 S. Ct. 472, upholding Ohio requirement that trains stop at towns of certain size; Atchison, etc., R. R. v. Matthews, 174 U. S. 105, 19 S. Ct. 613, upholding act including attorneys' fees in judgments for railroads' liability for fires.

Animals.— Statute holding drovers liable for damage to highways by herds is within police power, p. 184.

165 U. S. 184–188, 41 L. 679, ADDINGTON v. UNITED STATES.

Appeal.— Ruling on motion for new trial is not reviewable, p. 185.

Homicide.— Accused cannot assign as error charge as to distinction between murder and manslaughter favoring him, p. 186.



Digitized by Google

**Homicide.**— Charge that if accused reasonably believed that only escape lay in killing his assailant, he was justified, is not error, p. 187.

Approved in Andersen v. United States, 170 U. S. 508, 42 L. 1125, 18 S. Ct. 696, plea of self-defense cannot avail where accused brought on difficulty for purpose of killing.

165 U. S. 188–194, 41 L. 680, EGAN v. HART.

**Courts.**— On error to State court in chancery, as at law, Supreme Court is concluded by findings, p. 189.

Approved in Chicago, etc., R. R. v. Chicago, 166 U. S. 246, 41 L. 988. 17 S. Ct. 588, trial court's rulings on law alone are reviewable on error; Hedrick v. Atchison, etc., R. R., 167 U. S. 677, 42 L. 322, 17 S. Ct. 924, State court's findings are conclusive; Turner v. New York, 168 U. S. 95, 42 L. 394, 18 S. Ct. 40, question of inference from evidence is not reviewable on error to State court; Nobles v. Georgia, 168 U. S. 405, 42 L. 518, 18 S. Ct. 90, noticing findings and following conclusions involving statutory construction; Backus v. Fort Street, etc., Depot Co., 169 U. S. 565, 42 L. 858, 18 S. Ct. 449, generally; dissenting opinion in Rhodes v. Iowa, 170 U. S. 437, 42 L. 1100, 18 S. Ct. 673, arguendo.

**Courts.**— On error to State Supreme Court record is examinable to determine questions decided, p. 189.

Approved in Thompson v. Maxwell Land-Grant Co., 168 U. S. 456, 42 L. 541, 18 S. Ct. 123, State court's opinion may be examined where statute or practice makes it part of record; Castillo v. McConnico, 168 U. S. 677, 42 L. 624, 18 S. Ct. 231, reaffirming rule.

**Supreme Court** will not review State decision on ground broad enough to eliminate Federal question, p. 191.

Approved in Castillo v. McConnico, 168 U. S. 679, 42 L. 624, 18 S. Ct. 231, reaffirming rule; Milburn Gin, etc., Co. v. German Bank, 173 U. S. 701, 19 S. Ct. 878, dismissed on authority of principal case.

165 U. S. 194–255, 41 L. 683, ADAMS EXPRESS CO. v. OHIO STATE AUDITOR.

**Federal courts** will ordinarily follow State court's construction of State Constitution and laws, p. 219.

Approved in Long Island Water Supply v. Brooklyn, 166 U. S. 688, 41 L. 1166, 17 S. Ct. 719, State decisions are final on matters of procedure; Merchants' Bank v. Pennsylvania, 167 U. S. 463, 42 L. 237, 17 S. Ct. 830, Pennsylvania decision that act taxing national banks does not violate State Constitution, is binding; New York v. Roberts, 171 U. S. 665, 19 S. Ct. 61, arguendo.

Distinguished in Central Trust Co. v. Citizens' St. Ry., 82 Fed. 13, State court's construction of statute is not binding where controversy is about contract depending therein.

Digitized by Google

**Commerce.**— Property engaged in interstate commerce is not exempt from State taxation, p. 220.

Approved in American, etc., Transit Co. v. Hall, 174 U. S. 76, 19 S. Ct. 602, affirming S. C., 24 Colo. 300, 65 Am. St. Rep. 228, 51 Pac. 425, refrigerator transit company is taxable for average number of cars used in State; Union, etc., Transit Co. v. Lynch, 18 Utah, 394, 55 Pac. 643, upholding tax on cars of foreign corporations used in Utah; dissenting opinion in Henderson Bridge Co. v. Kentucky, 166 U. S. 160, 41 L. 957, 17 S. Ct. 536, majority upholding tax on interstate bridge, computed on unit rule.

**Commerce.**— Such property within State may be taxed on basis of proportion it bears to whole, p. 220.

Approved in American, etc., Transit Co. v. Hall, 174 U. S. 75, 19 S. Ct. 601, upholding tax on average number of cars habitually employed in State; Taylor v. Louisville, etc., R. R., 88 Fed. 361, 60 U. S. App. 188, in assessing railroad property market value of stocks and bonds may be considered; McRae v. Bowers Dredging Co., 90 Fed. 362, dredgers are taxable in State of location irrespective of foreign ownership; dissenting opinion in Adams Express Co. v. Kentucky, 166 U. S. 184, 41 L. 965, 17 S. Ct. 532, majority upholding Kentucky tax on unit rule.

**Commerce.**— Express company's property within State is subject to taxation, p. 221.

Approved in Wells, Fargo & Co. v. Crawford Co., 63 Ark. 588, 40 S. W. 713, approving unit rule in taxing express companies. See 62 Am. St. Rep. 475, note.

**Commerce.**— Tax based on proportion of returns of capital stock, property and gross receipts is valid, p. 226.

Approved in American Express Co. v. Indiana, 165 U. S. 256, 41 L. 708, 17 S. Ct. 991, sustaining like Indiana law; Henderson Bridge Co. v. Kentucky, 166 U. S. 154, 41 L. 955, 17 S. Ct. 534, upholding like Kentucky tax on interstate bridge; Adams Express Co. v. Kentucky, 166 U. S. 180, 41 L. 964, 17 S. Ct. 530, upholding like Kentucky taxation scheme; Adams Express Co. v. Ohio, 166 U. S. 217, 41 L. 976, 17 S. Ct. 605, reaffirming decision on rehearing; Pingree v. Auditor-General, 120 Mich. 105, 78 N. W. 1028, 44 L. R. A. 685, Michigan telephone and telegraph tax (1881) is not specific tax applicable to education fund.

**Taxation** according to unit rule is not taking of property without due process of law, p. 226.

Approved in Yazoo, etc., R. R. v. Adams, 77 Miss. 779, 25 So. 358, provision for assessment of railroad property for back taxes by commissioners is valid; dissenting opinion in Adams Exp. Co. v. Kentucky, 166 U. S. 183, 41 L. 965, 17 S. Ct 532, majority upholding Kentucky tax on unit rule.

Digitized by Google

**Taxation.**— Property of corporation taxed according to unit rule has situs in State for taxation, p. 226.

Approved in Union, etc., Transit Co. v. Lynch, 18 Utah, 392, 55 Pac. 642, foreign cars habitually used in State, have situs there for taxation.

Distinguished in Liverpool, etc., Ins. Co. v. Board of Assessors, 51 La. Ann. 1034, 72 Am. St. Rep. 489, 25 So. 972, 45 L. R. A. 527, debts due non-residents are not taxable.

Corporation is deemed to hold property for purposes of its business, and it must show contrary, p. 227.

Approved in Adams Exp. Co. v. Ohio, 166 U. S. 223, 41 L. 978, 17 S. Ct. 607, corporation failing to show exemption cannot complain if State treats all its property as taxable.

**Judgment.**— Findings of fact by special tribunal cannot be overthrown by evidence merely going to show contrary, p. 229.

Approved in Yazoo, etc., R. R. v. Adams, 77 Miss. 778, 25 So. 357, railroad commissioner's decision, assessing railroad for back taxes, is collaterally unimpeachable except for fraud.

Distinguished in The W. F. Babcock, 85 Fed. 982, 57 U. S. App. 54, seaman's arrest and detention in foreign port for desertion, raises no presumption of consular investigation.

165 U. S. 255-256, 41 L. 707, AMERICAN EXPRESS CO. v. INDIANA.

**Commerce.**— Adjudged in conformity with Adams Exp. Co. v. Ohio, supra, q. v.

Followed in State v. Ohio Oil Co., 150 Ind. 28, 49 N. E. 811. See 62 Am. St. Rep. 475, note.

165 U. S. 257-264, 41 L. 708, ROSENCRANS v. UNITED STATES.

**Federal court's jurisdiction is co-extensive with district regardless of places of holding court, p. 260.**

Approved in Barrett v. United States, 169 U. S. 221, 42 L. 724, 18 S. Ct. 329, grand jury, sitting at either place in district, may indict for offense committed in district.

**Statutes.**— Express legislation upon given subject can be overthrown only by subsequent legislation equally express, p. 262.

**Post-office.**— Indictment for destroying draft need not describe it; description may be stated as unknown, p. 257.

165 U. S. 264-273, 41 L. 710, THE VALENCIA.

**Maritime lien does not arise in absence of agreement, express or implied, where credit is given owner, p. 271.**

Approved in The Havana, 92 Fed. 1008, 63 U. S. App. 651, presumption is against extension of maritime lien for repairs made on order of managing owner.

Digitized by Google

Distinguished in The Ella, 84 Fed. 477, 478, 479, 480, 491, lien for supplies in foreign port, on owner's order, will be recognized where common understanding exists between repairer and owner; The Iris, 88 Fed. 909, circumstances of case and usages of port determine whether credit is to vessel or owner.

Maritime lien.— Supplies furnished charterer create no lien, in absence of agreement, express or implied, p. 271.

Approved in The Burton, 84 Fed. 1000, burden is on libellants to show that person with whom they dealt was acting by owner's authority.

Maritime liens.— One put upon inquiry as to charterer's liability for supplies cannot acquire lien, p. 272.

Approved in The Tillie A., 84 Fed. 685, knowledge that towed boats had been chartered, should put libellant on inquiry; The Burton, 84 Fed. 999, duty of reasonable inquiry is upon libellants; The H. C. Grady, 87 Fed. 238, possession under agreement for sale confers no authority on vendee to create liens for supplies; The Algonquin, 88 Fed. 319, denying lien for supplies furnished on order of master appointed by equitable owner, vendor retaining title; The Mary A. Tryon, 93 Fed. 221, denying lien for towage, under contract with charterer, tower knowing of charter; Atkins v. Lewis, 168 Mass. 536, 47 N. E. 508, denying one furnishing supplies at instance of part owner, recovery from co-owner.

Distinguished in The Iris, 88 Fed. 906, owner is not personally liable for repairs made in reliance on ownership of one clothed by him with apparent ownership.

165 U. S. 273-274, 41 L. 714, PIM v. ST. LOUIS.

Supreme Court cannot review State decision where Federal right was not set up until petition for rehearing, p. 274.

Approved in Zadig v. Baldwin, 166 U. S. 488, 41 L. 1088, 17 S. Ct. 640, and Ross v. King, 172 U. S. 641, 19 S. Ct. 879, reaffirming rule; Miller v. Cornwall R. R., 168 U. S. 134, 42 L. 411, 18 S. Ct. 35, suggestion, on reargument, of appearance of Federal question on record, comes too late; Vaughn v. Wabash R. R., 145 Mo. 61, 46 S. W. 954, constitutional protection, not claimed on trial, cannot be claimed on appeal.

165 U. S. 275-308, 41 L. 715, ROBERTSON v. BALDWIN.

Courts.— Congress may authorize justices of peace to issue warrants for arrest of deserting seamen, p. 279.

Approved in In re Iasigi, 79 Fed. 755, State magistrates may commit consul and hold pending extradition.

Courts.— Congress may authorize State officers to perform duties merely incidental to judicial power, p. 279.

Seamen.— Constitutional prohibition against involuntary servitude does not apply to seamen's contract, p. 280.

Digitized by Google

**Seaman's** contract is exceptional and may properly involve surrender of personal liberty to certain extent, p. 282.

**Seamen.**— Law regarding deserting seamen reviewed, p. 283.

Approved in The W. F. Babcock, 85 Fed. 980, 57 U. S. App. 51, charges for arrest and detention of deserting seamen and wages of substitutes are deductible from wages; Lafourche Packet Co. v. Henderson, 94 Fed. 875, seaman does not assume risk from patently-defective appliances of ship; dissenting opinion in Hopkins v. Oxley Stave Co., 83 Fed. 930, 49 U. S. App. 737, majority holding combination to boycott unlawful.

165 U. S. 304–310, 41 L. 725, WESTERN UNION TEL. CO. v. INDIANA.

**Courts.**— State courts determine whether penalty on delinquency is properly included in judgment for taxes, p. 307.

**Taxation.**— Law providing for adding penalty of 50 per cent. to judgment for taxes against telegraph company is valid, p. 307.

Cited in note in 62 Am. St. Rep. 175.

**Taxation.**— Law may provide different rule for enforcement of collection, according to use of property, p. 309.

Approved in Atchison, etc., R. R. v. Matthews, 174 U. S. 105, 19 S. Ct. 613, sustaining Kansas law including attorney's fees in damages recoverable from railroads for fire from locomotives.

**Taxation.**— Amount of penalty for non-payment is within discretion of legislature, p. 310.

165 U. S. 311–315, 41 L. 727, PRICE v. UNITED STATES.

**Post-office.**— Indictment charging mailing of obscene matter willfully, and with knowledge of obscenity, is sufficient, p. 315.

Approved in Timmons v. United States, 85 Fed. 207, 54 U. S. App. 588, indictment describing letter as "obscene, lewd and lascivious" is sufficient, without adding "of indecent character." See note in 58 Am. St. Rep. 598.

**Post-office.**— Detective may testify that he corresponded with accused for purpose of obtaining evidence against him, p. 315.

165 U. S. 316–322, 41 L. 729, UNITED STATES v. GORHAM.

**Indian** depredation claims may be enforced when tribe cannot be identified and such fact is stated, p. 319.

**Court of Claims** may determine as to appearance by administrator where claimant dies pending suit, p. 322.

Not cited.

165 U. S. 323–330, 41 L. 732, GRAVES v. UNITED STATES.

**Bank** officer, making entries in good faith, pursuant to arrangement between depositors and managers, for credit, is not guilty of making false entries, p. 329.

Digitized by Google

Miscellaneous.— Cited in United States v. Tubbs, 94 Fed. 361, but not in point.

165 U. S. 330–339, 41 L. 734, DISTRICT OF COLUMBIA v. JOHNSON.

District of Columbia.— Interest is allowable under act of February 13, 1895, regarding claims, only from date of passage, p. 338.

Set-off.— Act legalizing illegal transactions extinguishes counterclaim of which they were basis, p. 339.

Cited in In re Hall, 167 U. S. 39, 42 L. 69, 17 S. Ct. 723, referring to principal case for facts.

165 U. S. 340–341, 41 L. 738, DISTRICT OF COLUMBIA v. HALL.

Adjudged in conformity with District of Columbia v. Johnson, supra, q. v.

Reaffirmed in In re Hall, 167 U. S. 39, 42 L. 69, 17 S. Ct. 723.

165 U. S. 341–342, 41 L. 738, DISTRICT OF COLUMBIA v. DICKSON.

Adjudged in conformity with District of Columbia v. Johnson, supra, q. v.

165 U. S. 342–358, 41 L. 739, HOPKINS v. GRIMSHAW.

Witnesses.— Notwithstanding act of July 2, 1864, wife, not party, nor interested in suit, cannot testify as to conversation with husband, p. 351.

Witnesses.— Conversation between husband and wife, in presence of daughter, cannot be testified to by surviving spouse, p. 351.

Trust cannot be predicated on declaration that party intended getting money from third person to buy land, p. 352.

Charities.— Conveyance may be in trust to unincorporated society for indefinite period, p. 352.

Approved in Lackland v. Walker, 151 Mo. 246, 52 S. W. 424, devise for botanical garden is a charitable devise, and is not defeated by failure to use for garden.

Charities.— Trustees take legal estate in fee, although deed does not run to heirs and assigns, p. 352.

Charities.— Trust clearly restricted to certain society for burial-ground, ends when land ceases to be so used and society is dissolved, p. 353.

Distinguished in Long v. Moore, 19 Tex. Civ. App. 365, 48 S. W. 44, absolute warranty deed, with declaration that it is for purpose of academy, passes title in fee.

Charities.— Where charitable use fails there is resulting trust to grantor and heirs, p. 355.

Digitized by Google

**Distinguished in Packard v. Old Colony R. R., 168 Mass. 99, 46 N. E. 435, land deeded for cemetery does not revert upon dissolution of association.**

**Charities.**— Rule against perpetuities does not apply to trust resulting upon failure of express trust, p. 356.

**Trust.**— Resulting trust is enforceable only in equity, p. 358.

**Partition.**— Where plaintiff's title appears to be purely equitable, bill may be maintained for partition, p. 358.

**Equity may administer complete relief where it has acquired jurisdiction on any ground, p. 358.**

165 U. S. 359–362, 41 L. 745, ROBINSON v. CALDWELL.

**Courts.**— Judiciary act of 1891 does not give both Supreme and Circuit Court of Appeals jurisdiction on merits, p. 362.

Cited in Rodgers v. Pitt, 96 Fed. 677, generally.

165 U. S. 363–364, 41 L. 746, OAKES v. MASE.

**Railroads.**— Engineer of one train and conductor of another on same road are fellow servants, p. 364.

Following held fellow servants on authority of principal case: New England R. R. v. Conroy, 175 U. S. 340, 21 S. Ct. 91, freight conductor and brakeman; Bowes v. Hopkins, 84 Fed. 769, 56 U. S. App. 221, yardmaster and switchman; Norfolk, etc., R. R. v. Houchins, 95 Va. 409, 64 Am. St. Rep. 801, 28 S. E. 582, conductor and brakeman.

Distinguished in Johnson v. Southern Ry., 122 N. C. 958, 29 S. E. 786, section master, with right to discharge, is vice-principal as to hand.

Federal courts will follow State Supreme Court's construction of State Constitution and laws, p. 364.

Approved in Indianapolis v. Navin, 151 Ind. 158, 51 N. E. 81, 41 L. R. A. 344, State constitutionality of statutes is for determination of State court, irrespective of Federal decisions.

165 U. S. 365–369, 41 L. 747, LAKE SHORE, ETC., RY. v. OHIO.

**Navigable waters.**— States may bridge and improve navigable streams within jurisdiction in absence of congressional act, p. 366.

Approved in East Hoquiam Boom, etc., Co. v. Neeson, 20 Wash. 147, 54 Pac. 1002, upholding law authorizing boom companies to handle logs.

**Navigable waters.**— Act of September 19, 1890, did not deprive States of powers regarding navigable waters, p. 369.

Cited in United States v. Moline, 82 Fed. 597, upholding act authorizing secretary to order alteration of bridges obstructing navigation; Lane v. Smith, 71 Conn. 70, 41 Atl. 20, arguendo.

Digitized by Google

165 U. S. 370–373, 41 L. 749, BURLINGTON GAS-LIGHT CO. v. BURLINGTON, ETC., RY.

Eminent domain.— Manner of improvement of land is determinable by public alone; abutter cannot enjoin, p. 372.

Not cited.

165 U. S. 373–379, 41 L. 750, DAVIS v. UNITED STATES.

Criminal law.— Where plaintiff in error does not appear in capital case, court will examine record, p. 375.

Evidence.— Expert having given own opinion, should not be allowed to testify as to that of others, p. 377.

Homicide.— Sanity must be established beyond reasonable doubt where question is raised by evidence, p. 378.

Homicide.— Charge defining term "insanity" held correct, p. 378.

Approved in Ritter v. Mutual L. Ins. Co., 169 U. S. 149, 42 L. 696, 18 S. Ct. 303, affirming instruction, if insured understood consequences to flow from contemplated suicide, he was sane.

Homicide.— Court need not instruct as to manslaughter where there is no evidence to reduce offense, p. 379.

165 U. S. 379–385, 41 L. 754, GERMANIA IRON CO. v. UNITED STATES.

Equity has jurisdiction to relieve against mistakes or inadvertence of agents in executing deeds, p. 383.

Public lands.— Court will not annul patent for irregularity where patentee is equitably entitled to land, p. 384.

Approved in Duluth, etc., R. R. v. Roy, 173 U. S. 590, 19 S. Ct. 550, patent obtained by inadvertence, to injury of person previously initiating application, will be vacated.

165 U. S. 386–394, 41 L. 757, DEWEESE v. REINHARD.

Public lands.— Where lands certified to State are not open to selection, patent is attackable collaterally, p. 389.

Injunction will not issue to restrain action at law in which defense set up is available, p. 389.

Public lands.— Patent issued by mistake to wrong party cannot be challenged by mere intruder, p. 392.

Approved in Illinois Steel Co. v. Budzisz, 82 Fed. 161, validity of patents issued in 1838 cannot now be questioned by United States or otherwise.

165 U. S. 394–413, 41 L. 760, GLOVER v. PATTEN.

Infant may affirm and sue upon contract made for her benefit by guardian, p. 401.

Executor represents creditors in suit by children to establish rights as creditors against mother's estate, p. 402.

Digitized by Google

**Executors.**— Children as executors of mother, who held in trust for them, may sue in equity to enforce indebtedness, p. 404.

**Limitations.**— Maryland statute, in force in District of Columbia, does not apply to executor's claim against estate, p. 405.

**Parent**, being indebted to child, and making advancement, is deemed to do so in satisfaction, p. 406.

**Witnesses.**— Statement by deceased to counsel, respecting will, are not privileged, in suit between devisees, p. 406.

Distinguished in Butler v. Fayerweather, 91 Fed. 460, 63 U. S. App. 125 (reversing S. C., 90 Fed. 15), following New York rule making instructions to attorney employed to draw will, privileged. See note in 66 Am. St. Rep. 229.

**Wills.**— Legacy equal to amount of debt will be presumed intended to extinguish debt, p. 411.

165 U. S. 413–442, 41 L. 770, ATLANTIC, ETC., R. R. v. MINGUS.

**Public lands.**— If estate be granted on condition subsequent, no express words of forfeiture are necessary, p. 428.

**Statutes** conferring rights on private individuals are to be construed in favor of government, p. 429.

**Public lands.**— Government's right to enter, on breach of condition subsequent, is exercised by legislation, p. 431.

Cited in Northern Pac. Ry. v. Dudley, 85 Fed. 86, failure to complete road in contract time estops railroad from complaining of restoration of land to public domain; Iron Mountain R. R. v. Memphis, 96 Fed. 127, mode of assuming forfeited grant is subject to legislative power.

**Public lands.**— Practice of forfeiting by legislative act is not to be exercised arbitrarily, p. 434.

**Public lands** set apart for Indians did not pass under grant to Atlantic and Pacific, p. 435.

165 U. S. 443–462, 41 L. 782, IN RE CHETWOOD.

**Supreme Court** determines question of jurisdiction, form of writs, citation, service and parties, or writ of error, p. 457.

**National bank receiver** is officer of United States, and possession is not that of court, p. 458.

Approved in Auten v. United States Nat. Bank, 174 U. S. 141, 19 S. Ct. 634, receiver is officer of United States, and action against him arises under its laws; Snohomish Co. v. Puget Sound Nat. Bank, 81 Fed. 520, assets of national bank are not brought into Federal court's custody by appointment of receiver; Follett v. Tillinghast, 82 Fed. 241, national bank receiver cannot remove action against him to recover under $2,000; Gilbert v. McNulta, 96 Fed. 84, 85, national bank receiver may be sued in Federal court on contract made on behalf of estate: People's State Bank v. Fran-

Digitized by Google

cis, 8 N. Dak. 374, 79 N. W. 855, receiver stands in place of bank and is chargeable with its knowledge.

Courts.— State court's jurisdiction of suit by national bank receiver is not ousted by discharge, p. 459.

Courts.— Where jurisdiction and right to sue have attached, right is not affected by suit in another court, p. 460.

Approved in Cœur D'Alene Ry., etc., Co. v. Spalding, 93 Fed. 282, § 720, R. S., applies to and prohibits injunctions directed to parties in proceedings in State courts.

Distinguished in Brochon v. Wilson, 91 Fed. 619, 63 U. S. App. 529, statute dissolving executions levied within ten days prior to assignment applies to executions on Federal judgments.

Courts.— Custody of court having jurisdiction cannot be disturbed by process of another of concurrent jurisdiction, p. 460.

Approved in In re Johnson, 167 U. S. 125, 42 L. 104, 17 S. Ct. 737, reaffirming rule; In re Foley, 80 Fed. 951, denying removal of proceedings to administer, estate being in State court's custody; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 186, fact that vessel is not within district when libel is filed does not defeat jurisdiction; Southern Loan, etc., Co. v. Benbow, 96 Fed. 520, State court's actual custody of bankrupt's property will not be disturbed by Bankruptcy Court.

Certiorari may be allowed when necessary to correct excess of jurisdiction and further ends of justice, p. 462.

Distinguished in In re Tampa, etc., R. R., 168 U. S. 587, 42 L. 590, 18 S. Ct. 179, refusing certiorari, plain and adequate remedy by appeal existing; Travis Co. v. King Iron Bridge, etc., Co., 92 Fed. 693, Circuit Court of Appeals cannot issue certiorari as original process.

Appeal.— Judgments for contempt are not reviewable on error or appeal in Supreme Court, p. 642.

Distinguished in Tinsley v. Anderson, 171 U. S. 105, 18 S. Ct. 807, appellate jurisdiction from State courts extends to contempt proceedings.

165 U. S. 463–482, 41 L. 789, UNITED STATES v. WINONA, ETC., R. R.

Public land.— Title of bona fide purchaser from fraudulent patentee cannot be disturbed by government, p. 479.

Cited in Norton v. Evans, 82 Fed. 807, 49 U. S. App. 674, arguendo.

Public lands.— Act of March 3, 1887, confirmed title to bona fide purchasers of lands certified to railroad, p. 481.

Approved in United States v. Southern Pac. R. R., 86 Fed. 963, act of 1896 conferred bona fide purchaser's title, although patent issued after commencement of suit to forfeit grants; Southern Pac. R. R. v. United States, 168 U. S. 66, 42 L. 383, 18 S. Ct. 34, affirm-

Digitized by Google

ing S. C., 88 Fed. 836, act of 1896 protects purchaser holding under contract, who has made part payment; United States v. Flint, etc., Ry., 95 Fed. 555, case on all fours; Adams v. Henderson, 168 U. S. 582, 42 L. 588, 18 S. Ct. 182, arguendo.

165 U. S. 482–483, 41 L. 797, UNITED STATES v. UNION PAC. RY.

Adjudged in conformity with preceding case, q. v.

165 U. S. 483–486, 41 L. 798, WINONA, ETC., R. R. v. UNITED STATES.

Public lands.— Purchaser with notice of claims of one in possession is not protected by act of 1887, p. 486.

Cited in Southern Pac. R. R. v. United States, 168 U. S. 66, 42 L. 383, 18 S. Ct. 34, and United States v. Coos Bay Wagon-Road Co., 89 Fed. 153, reaffirming rule.

165 U. S. 486–504, 41 L. 799, DUNLOP v. UNITED STATES.

Indictment cannot be made demurrable by addition of bill of particulars, p. 491.

Post-office.— Application for order to file matter alleged to be indecent is addressed to discretion of court, p. 491.

Post-office.— It is not error to admit advertisements of proprietorship of newspaper, p. 492.

Post-office department officers may testify as to customs of office and duties of employees, p. 494.

Post-office.— Proof that paper was mailed to party raises presumption that he received it, p. 495.

Post-office.— Proof that papers of certain edition were received raises presumption they were mailed on date with others, p. 496.

Not cited.

165 U. S. 504–517, 41 L. 805, UNITED STATES v. McMILLAN.

Courts of territory are not, strictly speaking, courts of United States, p. 510.

Clerk of District Court must account for fees received from private parties in civil actions and from territory on account of territorial business, p. 513.

Clerk of District Court of territory need not account for fees in naturalization proceedings, p. 517.

Not cited.

165 U. S. 518–526, 41 L. 810, SMITH v. VULCAN IRON WORKS.

Courts.— On appeal to Circuit Court of Appeals from Circuit Court from order granting injunction in patent case, former may decide case on merits, p. 525.

Approved in In re Tampa, etc., R. R., 168 U. S. 588, 42 L. 591, 18 S. Ct. 179, appeal lies to Circuit Court of Appeals, carrying up

Digitized by Google

entire order appointing receiver and granting injunction; Reaves v. Oliver, 168 U. S. 705, 42 L. 1212, 18 S. Ct. 945, following principal case; Kirwan v. Murphy, 170 U. S. 209, 42 L. 1011, 18 S. Ct. 594, Circuit Court of Appeals' affirmance of order granting preliminary injunction is not appealable; Western Wheel-Scraper Co. v. Drinnen, 79 Fed. 821, pending appeal from decree restraining infringement, trial court cannot allow amendment of answer; United States Rubber Co. v. American Oak-Leather Co., 82 Fed. 250, 53 U. S. App. 448, propriety of receiver's appointment considered on appeal from order granting injunction; Carson v. Combe, 86 Fed. 210, 52 U. S. App. 635, deciding question of injunction on merits, but leaving jurisdictional question until final decree below; Stover Mfg. Co. v. Mast, 89 Fed. 336, 60 U. S. App. 331, Circuit Court of Appeals reviewing preliminary injunction granted under prior decision of Circuit Court of Appeals of another district may look into merits of patent; Texas, etc., Mfg. Assn. v. Storrow, 92 Fed. 9, 10, appeal from order appointing receiver carries up entire order and merits; Rubens v. Wheatfield, 93 Fed. 681, review on appeal to Circuit Court of Appeals from order granting interlocutory injunction should go to merits; In re Potts, 166 U. S. 267, 41 L. 995, 17 S. Ct. 521, arguendo.

Distinguished in Highland Ave. R. R. v. Equipment Co., 168 U. S. 630, 42 L. 606, 18 S. Ct. 241, interlocutory order appointing receiver is not appealable to Circuit Court of Appeals; American Trust, etc., Bank v. Farmers' Loan, etc., Co., 81 Fed. 926, 53 U. S. App. 398, dismissing appeal from order denying motion to restrain prosecution of foreclosure pending determination of cross-bill.

Appeal.— Merits considered in reversing interlocutory decree cannot be reconsidered later in appellate court or below, p. 525.

165 U. S. 526–537, 41 L. 813. IN RE KOLLOCK.

Internal revenue act of 1886, authorizing commissioner to regulate brands on oleomargarine, involved no unconstitutional delegation of power, p. 536.

Cited in Wilkins v. United States, 96 Fed. 840, regulations of executive department under congressional authority will be judicially noticed; Davis v. Massachusetts, 167 U. S. 48, 42 L. 72, 17 S. Ct. 733, arguendo.

165 U. S. 538, 41 L. 817. IN RE McCAULLY.

Adjudged in conformity with In re Kollock, supra, q. v.

165 U. S. 538–553, 41 L. 817. McCORMICK v. MARKET BANK.

Supreme Court may review State decision for national bank where both parties relied on § 5136, R. S., p. 546.

Distinguished in Seeberger v. McCormick, 175 U. S. 278, 20 S. Ct. 129, contention of Federal question does not render State judgment, based on principles of general law, reviewable.

Digitized by Google

National bank's unauthorized lease is void and will support action only for benefit received, p. 553.

Approved in California Bank v. Kennedy, 167 U. S. 367, 368, 371, 42 L. 200, 201, 17 S. Ct. 833, 834, want of authority to purchase stock of other corporations may be set up by national bank to escape stockholder's liability; City R. R. v. N. A. Trust Co., 173 U. S. 112, 19 S. Ct. 346, Federal rule is that corporation cannot be estopped from pleading ultra vires to act beyond its power; Concord First Nat. Bank v. Hawkins, 174 U. S. 371, 19 S. Ct. 742, one national bank is not liable to receiver of another for assessment on latter's stock purchased by former; De La Vergne Co. v. German Sav. Inst., 175 U. S. 59, 20 S. Ct. 25, statutory prohibition is good defense to action on corporation's contract to purchase competitor's stock; Burrows v. Niblack, 84 Fed. 113, 53 U. S. App. 717, national bank may sue to recover money paid in purchase of its own stock, re-tender unnecessary; East St. Louis, etc., Ry. v. Jarvis, 92 Fed. 744, action cannot be maintained on illegal lease of competing line; Bowen v. Needles Nat. Bank, 94 Fed. 930, national bank's contract to cash drafts of non-depositor being one of guaranty and ultra vires, no action lies on drafts; Seeberger v. McCormick, 178 Ill. 407, 53 N. E. 341, directors and stockholders are not liable as partners on lease executed by national bank before authorization to do business; Louisville, etc., Ry. v. Louisville Trust Co., 174 U. S. 576, 19 S. Ct. 826, and Columbia Nat. Bank v. Mathews, 85 Fed. 939, 56 U. S. App. 649, arguendo.

165 U. S. 553–566, 41 L. 823, SWAIM v. UNITED STATES.

Army.— Sentence of court-martial proceeding regularly within jurisdiction is not reviewable by civil courts, p. 555.

Army.— President may convene general court-martial, even where commander of accused officer is not accuser, p. 558.

Army.— It is presumed that president's detail of inferior officers for court-martial was necessary, p. 560.

Approved in In re Chapman, 166 U. S. 671, 41 L. 1159, 17 S. Ct. 681, action of senate to compel witness to testify is not attackable collaterally.

Army.— President's action, in twice returning proceedings and insisting on more severe sentence, was authorized, p. 565.

Army officer suspended from duty is not entitled to emoluments or allowance, p. 566.

165 U. S. 566–578, 41 L. 827, DE VAUGHN v. HUTCHINSON.

Property.— Lex rei sitæ governs disposition of realty, p. 570.

Approved in Deck v. Whitman, 96 Fed. 884, Federal court, in foreclosure suit, should follow State statute relating to remedy for enforcing mortgage contract.

District of Columbia adopted Maryland rules governing conveyance and descent, p. 575.

Digitized by Google

Approved in Morris v. United States, 174 U. S. 240, 19 S. Ct. 667, Maryland decisions, giving statutes construction different from time of cession, do not control.

Will devising to one for his natural life and after death to heirs of his body and their heirs, gives devisee only life estate, p. 578.

Approved in Granger v. Granger, 147 Ind. 113, "heirs of his body by him begotten," if there be any such surviving, limits heirs to children.

165 U. S. 578–593, 41 L. 832, ALLGEYER v. LOUISIANA.

Corporations.— State may impose any conditions on doing of business by insurance companies, p. 583.

Constitution.— State law imposing fine for transacting business of insurance is unconstitutional as applied to contract executed out of State with foreign corporation, p. 589.

Approved in Eastern Bldg., etc., Assn. v. Bedford, 88 Fed. 14, New York corporation, not complying with Tennessee laws, may recover loans negotiated by latter and approved at New York; People v. Hawkins, 157 N. Y. 16, 51 N. E. 261, 68 Am. St. Rep. 747, 42 L. R. A. 497, annulling New York convict labor goods law.

Distinguished in Fred. Miller Brew. Co. v. Stevens, 102 Iowa, 67, 71 N. W. 188, bond of agent of foreign brewer, selling in Iowa, is unenforceable in Iowa; Commonwealth v. Roswell, 173 Mass. 122, 53 N. E. 138, upholding insurance agents license law.

Constitutional law.— Right to follow any of common occupations of life is inalienable, p. 589.

Approved in State v. Maryland, etc., Inst., 87 Md. 660, 41 Atl. 129, private school may refuse colored pupils.

Constitutional law.— Term "liberty," as used in fourteenth amendment, defined, p. 589.

Approved in Holden v. Hardy, 169 U. S. 391, 42 L. 790, 18 S. Ct. 387, upholding Utah law limiting working hours of minors; Addyston Pipe, etc., Co. v. United States, 175 U. S. 228, 20 S. Ct. 103, liberty includes right to enter into contracts; American, etc., Wire Co. v. Wire Drawers, etc., Union, 90 Fed. 613, strikers may be, at suit of employer, enjoined from interfering with his employees; United States v. Sweeney, 95 Fed. 450, punishing violation of injunction against interference by strikers; United States v. Joint Traffic Assn., 171 U. S. 572, 19 S. Ct. 32, and Hopkins v. United States, 171 U. S. 603, 19 S. Ct. 49, generally.

Constitutional law.— Limits of police power must be determined in each case as it arises, p. 590.

Approved in In re Morgan, 26 Colo. 436, 77 Am. St. Rep. 287, 58 Pac. 1079, act limiting working hours of underground miners is unconstitutional.

Constitution.— Privilege to pursue calling and acquire property involves right to contract with reference thereto, p. 591.

Digitized by Google

Approved in Dayton, etc., Co. v. Barton, 103 Tenn. 611, 53 S. W. 971, and Harbison v. Knoxville Iron Co., 103 Tenn. 430, 53 S. W. 967, both upholding law requiring redemption of store orders in cash.

Constitutional law.— Police power cannot prohibit making contracts outside of State, performable outside, p. 591.

Approved in Eastern Bldg., etc., Assn. v. Bedford, 88 Fed. 10, 16, foreign corporation's non-compliance with statutory regulations will not defeat recovery of loan secured by mortgage within State.

Contracts.— That person may be within State does not prevent his making contract outside, p. 592.

Approved in Eastern Bldg., etc., Assn. v. Bedford, 88 Fed. 12, 15, sustaining foreclosure on lands in Tennessee, mortgaged to secure loan consummated in New York.

165 U. S. 593–606, 41 L. 837, WALKER v. NEW MEXICO, ETC., R. R.

Trial.— Territorial legislature may provide for specific answers to special interrogatories in addition to general verdict, p. 598.

Approved in Providence Gold-Min. Co. v. Burke, — Ariz. —, 57 Pac. 643, verdict of three-fourths of jury in statutory action to determine rights of adverse claimants for patent is valid.

Federal courts will follow decisions as to rights in surface water, p. 604.

Courts.— Territorial legislature having adopted common law Federal courts are bound thereby, p. 604.

Jury.— Act of April 7, 1874, secures to inhabitants of territories common-law rights of trial by jury, p. 595.

Jury.— Seventh amendment aims merely to preserve substance of right, p. 596.

Approved in American Pub. Co. v. Fisher, 166 U. S. 467, 41 L. 1081, 17 S. Ct. 619, Utah territorial statute, permitting three-fourths verdict in civil cases, is invalid.

165 U. S. 606–624, 41 L. 844, PAULY v. STATE LOAN, ETC., TRUST CO.

Banks.— Real owner of national bank shares may be treated as shareholder within § 5151, R. S., p. 619.

Approved in Sykes v. Holloway, 81 Fed. 438, receiver cannot set aside transfer to irresponsible person; Wallace v. Hood, 89 Fed. 15, 16, and Scott v. Latimer, 89 Fed. 853, 60 U. S. App. 738, fact that original subscription was fraudulently obtained will not avert liability of shareholder; Houghton v. Hubbell, 91 Fed. 455, 63 U. S. App. 33, affirming S. C., 86 Fed. 551, real owner of shares, standing in agent's name, may be assessed thereon.

Distinguished in Robinson v. Southern Nat. Bank, 94 Fed. 966, pledgee selling national bank stock, under terms of pledge, pur-

Digitized by Google

chasing same but not having it transferred, is not liable for assessment.

**Banks.**— Pledgee of national bank shares may be treated as shareholder where bank records imply ownership, p. 619.

Approved in Stuart v. Hayden, 169 U. S. 7, 42 L. 641, 18 S. Ct. 276, national bank stockholder cannot escape liability by transferring stock, knowing bank to be insolvent; Scott v. Latimer, 89 Fed. 852, 60 U. S. App. 736 (see dissenting opinion in 89 Fed. 857, 858, 60 U. S. App. 744, 745), shareholder cannot escape liability by alleging fraud in obtaining subscription, he having received dividends. See 68 Am. St. Rep. 546, note.

Distinguished in Stufflebeam v. De Lashmutt, 83 Fed. 450, 451, one fraudulently induced to purchase stock of insolvent national bank is, if diligent, not liable thereon.

**Banks.**— Real owner transferring shares on national bank's books to evade liability, he may be treated as owner, p. 619.

Approved in Hubbell v. Houghton, 91 Fed. 454, 63 U. S. App. 32, affirming S. C., 86 Fed. 552, receiver may proceed against real owner directly, although shares stand in agent's name; dissenting opinion in Scott v. Latimer, 89 Fed. 859, 60 U. S. App. 747, majority holding party, having long acted as stockholder, cannot escape liability on ground that subscription was secured fraudulently. See 68 Am. St. Rep. 542, note.

**Banks.**— Pledgee in good faith, exercising power to transfer merely to secure debt, will not be treated as shareholder, p. 619.

Approved in Harmon v. National Park Bank, 172 U. S. 644, 19 S. Ct. 877, affirming S. C., 79 Fed. 893, 51 U. S. App. 152, pledgee corporation receiving new certificate in name of employee is not liable as shareholder; Baker v. Old Nat. Bank, 86 Fed. 1008, registry in its name will not estop bank from showing that it held as pledgee.

Pledgee is bound to exercise right of sale for benefit of pledgor, p. 620.

**Banks.**— Pledgee of national bank shares, appearing as such on books, is not liable as shareholder, p. 622.

Approved in Lucas v. Coe, 86 Fed. 974, minor's trustee is not personally liable for assessments against stock owned by minor, but standing in his name; Baker v. Old Nat. Bank, 86 Fed. 1007, pledgee of national bank is not liable as shareholder except by estoppel; Robinson v. Southern Nat. Bank, 94 Fed. 967, pledgee purchasing pledged stock is not liable for assessment, same not being transferred on books; May v. Genesee Co. Sav. Bank, 120 Mich. 334, 79 N. W. 631, bank holding stock as security is not assessable thereon, although in form absolute owner. See 68 Am. St. Rep. 544, note.



Digitized by Google

165 U. S. 624-628, 41 L. 851, WADE v. LAWDER.

Courts — Patents.— Suit to enforce or annul contract respecting patent is cognizable in State court, p. 627.

Approved in Pratt v. Paris Gas-L., etc., Co., 168 U. S. 260, 42 L. 460, 18 S. Ct. 64, action on agreement for use of invention; Holt v. Indiana Mfg. Co., 80 Fed. 3, 46 U. S. App. 717, suit to enjoin collection of State tax on patent rights; Hoyt v. Bates, 81 Fed. 645, suit to compel assignment of fraudulently-procured copyright; Harrison v. Morton, 171 U. S. 47, 18 S. Ct. 745, arguendo.

Distinguished in Pacific Contracting Co. v. Union Paving, etc., Co., 80 Fed. 738, Federal court has jurisdiction to inquire as to existence of license where one party denies same.

165 U. S. 628-634, 41 L. 853, NEW YORK, ETC., R. R. v. NEW YORK.

Commerce.— State may, in absence of congressional act, prohibit heating of passenger cars by stoves, p. 631.

Approved in Missouri, etc., Ry. v. Haber, 169 U. S. 633, 42 L. 885, 18 S. Ct. 496, upholding Kansas statute relative to bringing into State cattle liable to communicate Texas fever; Lake Shore, etc., Ry. v. Ohio, 173 U. S. 299, 19 S. Ct. 471, upholding Ohio statute compelling trains to stop at towns of certain size; Smith v. State, 100 Tenn. 503, 46 S. W. 569, 41 L. R. A. 434, provision for separation of blacks and whites on trains is within State police power.

Commerce.— Mere grant of commerce power to Congress did not impair State's police power, p. 631.

Approved in Gladson v. Minnesota, 166 U. S. 430, 41 L. 1066, 17 S. Ct. 628, statute compelling trains to stop at all county seats; Chicago, etc., Ry. v. Solan, 169 U. S. 138, 42 L. 692, 18 S. Ct. 291, act providing that no contract shall exempt railroad from carrier's liability; Richmond, etc., R. R. v. Tobacco Co., 169 U. S. 316, 42 L. 761, 18 S. Ct. 337, Virginia law rendering carrier liable for goods received for transmission beyond own line; Lake Shore, etc., Ry. v. Ohio, 173 U. S. 298, 19 S. Ct. 470, upholding Ohio law regulating stoppage of trains; Railroad v. Harris, 99 Tenn. 706, 43 S. W. 120, upholding law imposing privilege tax on railroads not paying ad valorem tax; Smith v. State, 100 Tenn. 511, 46 S. W. 571, 41 L. R. A. 436, upholding law providing for equal separate accommodations for whites and negroes on trains; Waters, etc., Oil Co. v. State, 19 Tex. Civ. App. 14, 44 S. W. 942, upholding laws of 1889-1895 prohibiting combinations restraining trade; dissenting opinion in Missouri, etc., Ry. v. Haber, 169 U. S. 642, 42 L. 888, 18 S. Ct. 499, majority upholding act prohibiting importation of diseased cattle.

Distinguished in North Bloomfield, etc., Min. Co. v. United States, 88 Fed. 675, 59 U. S. App. 395, act regulating hydraulic mining in California is within congressional power to protect navigation.

Digitized by Google

**Constitution.**— Act regulating heating of cars on roads more than fifty miles long does not deny equal protection, p. 633.

Approved generally in Missouri, etc., Ry. v. Haber, 169 U. S. 627, 42 L. 883, 18 S. Ct. 498.

165 U. S. 634–654, 41 L. 855, FOURTH STREET BANK v. YARDLEY.

**Banks.**— Holder of unaccepted check cannot sue bank, p. 643.

Approved in State v. Bank of Commerce, 49 La. Ann. 1078, 22 So. 214, reaffirming rule; House v. Kountze, 17 Tex. Civ. App. 406, 43 S. W. 563, holder of unaccepted check cannot maintain action against drawee.

**Banks.**— Check does not operate as equitable assignment, and does not entitle holder to any priority, p. 643.

Approved in Sunderlin v. Mecosta Sav. Bank, 116 Mich. 284, 74 N. W. 479, sending by one bank to another in payment of collection of draft on third, is not equitable assignment.

**Assignment.**— Equity will enforce assignment of part of right in chose in action, p. 644.

Approved in Walker v. Brown, 165 U. S. 664, 41 L. 871, 17 S. Ct. 457, defining equitable liens and method of creating same; Clark v. Sigua Iron Co., 81 Fed. 312, 39 U. S. App. 753, reaffirming rule; Oppenheimer v. First Nat. Bank, 20 Mont. 196, 50 Pac. 420, parol assignment, credited on books of parties, is good as against garnishment; Pittsburgh, etc., Ry. v. Volkert, 58 Ohio St. 371, 50 N. E. 926, assignment of one-half of judgment as attorney's fee conveys property right enforceable in equity; Johnson v. Gordon, 102 Ga. 364, 30 S. E. 512, generally.

**Banks.**— Receiver of insolvent bank takes only rights of bank in property coming into his possession, p. 653.

**Banks.**— Holder will be preferred as against persons charged with notice that check was charge on particular fund, p. 653.

Approved in National Union Bank v. Earle, 93 Fed. 331, check drawn by debtor bank on third bank in favor of creditor, paid through clearing-house, constituted appropriation.

Distinguished in Seyfried v. Stoll, 56 N. J. Eq. 189, 38 Atl. 956, order of A. on B., to pay C. $1,000 for materials furnished B.'s building, is not an equitable assignment.

Bank is estopped to deny character of fund where its representations have induced another bank to part with money, p. 653.

165 U. S. 654–675, 41 L. 865, WALKER v. BROWN.

**Lien.**— Every express written agreement, indicating intention to charge particular fund, creates equitable lien, p. 665.

Approved in Burdon Sugar-Ref. Co. v. Payne, 167 U. S. 147, 42 L. 112, 17 S. Ct. 758, construing contract for handling of sugar crop;

Digitized by Google

Walker v. Brown, 86 Fed. 367, defendant in remanded case may not amend answer to deny fact affirmatively passed on by Supreme Court; Nevada Nickel Syndicate v. National Nickel Co., 96 Fed. 151, and Johnson v. Gordon, 102 Ga. 364, 30 S. E. 512, both reaffirming rule.

Evidence.— Ambiguity in contract may be explained by parol evidence of circumstances, p. 668.

Approved in First Nat. Bank v. Woodrum, 86 Fed. 1003, reaffirming rule; Walker v. Brown, 86 Fed. 368, 369, arguendo.

Miscellaneous.—Cited in Brown v. Walker, 84 Fed. 533, and Brown v. Howard, 92 Fed. 538, cited incidentally, further litigation, same parties.

165 U. S. 675–717, 41 L. 874, UNITED STATES v. SANTA FE.

Public lands.— Spanish law did not, proprio vigore, grant to town four square leagues measurable from center of plaza, p. 689.

Approved in United States v. Sandoval, 167 U. S. 293, 42 L. 173, 17 S. Ct. 874, a like case; Cessna v. United States, 169 U. S. 178, 42 L. 707, 18 S. Ct. 319, ayuntamento of El Paso had no power to make grant outside its four square leagues; United States v. Pena, 175 U. S. 506, 20 S. Ct. 167, grant in question was one in severalty; Bergere v. United States, 168 U. S. 85, 42 L. 389, 18 S. Ct. 12, Hayes v. United States, 170 U. S. 654, 42 L. 1181, 18 S. Ct. 742, and Holladay v. San Francisco, 124 Cal. 356, 57 Pac. 148, arguendo.

Public lands.— After establishment of Santa Fé, Spanish officers adopted theory that four square leagues was nominal limit of new pueblos, p. 699.

Cited in United States v. Sandoval, 167 U. S. 295, 42 L. 174, 17 S. Ct. 874, and Holladay v. San Francisco, 124 Cal. 358, 57 Pac. 149, arguendo.

165 U. S. 719, 41 L. 1184, ULMAN v. BALTIMORE.

Cited in Bauman v. Ross, 167 U. S. 590, 42 L. 288, 17 S. Ct. 962, and Rolph v. Fargo, 7 N. Dak. 669, 76 N. W. 251, 42 L. R. A. 657.

Digitized by Google

# CASES

ARGUED AND DECIDED

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

IN

OCTOBER TERM, 1896.

---

Vol. 166.

Digitized by Google

Digitized by Google

# REFERENCE TABLE

OF SUCH CASES

# DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1896,

AND REPORTED HEREIN,

## VOL. 166,

AS ALSO APPEAR IN

## OFFICIAL REPORTER'S EDITION.

| Rep. U. S. | Title. | Here in. |
|---|---|---|
| -2 | The Three Friends - - | |
| | ("United States v. The Three | |
| | Friends") - - - | 897 |
| -5 | " " " | 898 |
| | " " " | 913 |
| -52 | " " " | 914 |
| -54 | " " " | 915 |
| -58 | " " " | 916 |
| -60 | " " " | 917 |
| -64 | " " " | 918 |
| -67 | " " " | 919 |
| -70 | " " " | 920 |
| -72 | " " " | 921 |
| -75 | " " " | 922 |
| -78 | " " " | 923 |
| -81 | " " " | 924 |
| -83 | " " " | 925 |
| 83 | Barber v. Pittsburg, Ft. W. & | |
| | C. R. Co. - - - - | 925 |
| -86 | " " " | 926 |
| -88 | " " " | 927 |
| -98 | " " " | 932 |
| -101 | " " " | 933 |
| -104 | " " " | 934 |
| -107 | " " " | 935 |
| -109 | " " " | 936 |
| 110 | The Conqueror - - - | 937 |
| -112 | " " - - - - | 938 |
| -114 | " " - - - - | 939 |
| -115 | " " - - - - | 940 |
| -117 | " " - - - - | 941 |
| -120 | " " - - - - | 942 |
| -123 | " " - - - - | 943 |
| -125 | " " - - - - | 944 |
| -128 | " " - - - - | 945 |
| -131 | " " - - - - | 946 |
| -134 | " " - - - - | 947 |
| -136 | " " - - - - | 948 |
| -137 | *Re* Alix - - - - - | 948 |
| -138 | " " - - - - - | 949 |
| -140 | Allen v. Georgia - - - | 949 |
| -142 | " " - - - | 950 |
| -145 | Grand Lodge, F. & A. Masons v. | |
| | New Orleans - - - | 951 |
| -148 | " " " | 952 |
| -150 | " " " | 953 |
| 150 | Henderson Bridge Co. v. Ken- | |
| | tucky - - - - - | 953 |
| -154 | " " " | 954 |
| -157 | " " " | 955 |

| Off. Rep. 166 U. S. | Title. | Here in. |
|---|---|---|
| 157-160 | Henderson Bridge Co. v. Ken- | |
| | tucky - - - - - | 956 |
| 160-163 | " " " | 957 |
| 163-166 | " " " | 958 |
| 166-169 | " " " | 959 |
| 169-170 | " " " | 960 |
| 171 | Adams Express Co. v. Kentucky | 960 |
| 172-174 | " " " | 961 |
| 174-177 | " " " | 962 |
| 177-180 | " " " | 963 |
| 180-183 | " " " | 964 |
| 183-185 | " " " | 965 |
| 185 | Adams Express Co. v. Ohio State | |
| | Auditor - - - - | 965 |
| 186-189 | " " " | 966 |
| 189-192 | " " " | 967 |
| 192-195 | " " " | 968 |
| 195-198 | " " " | 969 |
| 198-200 | " " " | 970 |
| 200-203 | " " " | 971 |
| 203-206 | " " " | 972 |
| 206-209 | " " " | 973 |
| 209-212 | " " " | 974 |
| 212-215 | " " " | 975 |
| 215-218 | " " " | 976 |
| 219-221 | " " " | 977 |
| 221-224 | " " " | 978 |
| 224-225 | " " " | 979 |
| 226 | Chicago, B. & Q. R. Co. v. Chicago | 979 |
| 228-231 | " " " | 982 |
| 231-234 | " " " | 983 |
| 234-236 | " " " | 984 |
| 236-239 | " " " | 985 |
| 239-242 | " " " | 986 |
| 242-245 | " " " | 987 |
| 245-248 | " " " | 988 |
| 248-251 | " " " | 989 |
| 251-254 | " " " | 990 |
| 254-256 | " " " | 991 |
| 256-260 | " " " | 992 |
| 260-262 | " " " | 993 |
| 262-263 | " " " | 994 |
| 258 | Chicago, B. & Q. R. Co. v. Chicago | 994 |
| 263-264 | *Re* Potts - - - - - | 994 |
| 264-267 | " " - - - - - | 995 |
| 267-268 | " " - - - - | 996 |
| 269-270 | Gibson v. United States - | 996 |
| 270 | " " " - | 997 |
| 270 271 | " " " - | 998 |
| 271-272 | " " " - | 1000 |



Digitized by Google

| Off. Rep. 166 U. S. | Title. | Herein. |
|---|---|---|
| 272–273 | Gibson *v.* United States | 1001 |
| 273–276 | " " " | 1002 |
| 276–277 | Nelson *v.* Flint | 1002 |
| 277–280 | " " | 1003 |
| 280–282 | Panama R. Co. *v.* Napier Shipping Co. | 1004 |
| 282–285 | " " " | 1005 |
| 285–288 | " " " | 1006 |
| 288–290 | " " " | 1007 |
| 290 | United States *v.* Trans-Missouri Freight Asso. | 1007 |
| 291–294 | " " " | 1011 |
| 294–297 | " " " | 1012 |
| 297–300 | " " " | 1013 |
| 300–303 | " " " | 1014 |
| 303–305 | " " " | 1015 |
| 306–309 | " " " | 1016 |
| 309–312 | " " " | 1017 |
| 312–315 | " " " | 1018 |
| 315–318 | " " " | 1019 |
| 318–321 | " " " | 1020 |
| 321–324 | " " " | 1021 |
| 324–326 | " " " | 1022 |
| 326–329 | " " " | 1023 |
| 329–332 | " " " | 1024 |
| 332–335 | " " " | 1025 |
| 335–338 | " " " | 1026 |
| 338–341 | " " " | 1027 |
| 341–344 | " " " | 1028 |
| 344–347 | " " " | 1029 |
| 347–350 | " " " | 1030 |
| 350–353 | " " " | 1031 |
| 353–355 | " " " | 1032 |
| 355–358 | " " " | 1033 |
| 358–361 | " " " | 1034 |
| 361–364 | " " " | 1035 |
| 364–367 | " " " | 1036 |
| 367–370 | " " " | 1037 |
| 370–373 | " " " | 1038 |
| 373–374 | " " " | 1039 |
| 375–376 | The Majestic | 1039 |
| 376–378 | " " | 1040 |
| 378–380 | " " | 1041 |
| 380–383 | " " | 1042 |
| 383–386 | " " | 1043 |
| 386–388 | " " | 1044 |
| 388–389 | St. Louis *v.* Western U. Teleg. Co. | 1044 |
| 389–391 | " " " | 1045 |
| 391 | Iasigi *v.* Van de Carr | 1045 |
| 392 | " " | 1046 |
| 392–393 | " " | 1047 |
| 393–394 | " " | 1048 |
| 394–395 | " " | 1049 |
| 395–396 | Hooe *v.* Jamieson | 1049 |
| 396–399 | " " | 1050 |
| 399 | Hooe *v.* Werner | 1051 |
| 399–401 | Martin *v.* Atchison, T. & S. F. R. Co. | 1051 |
| 401–404 | " " " | 1052 |
| 404 | " " " | 1053 |
| 404 | The Umbria | 1053 |
| 405 | " " | 1054 |
| 405–406 | " " | 1055 |
| 406–408 | " " | 1056 |
| 408–409 | " " | 1057 |
| 409–411 | " " | 1058 |
| 411–414 | " " | 1059 |
| 414–417 | " " | 1060 |
| 417–420 | " " | 1061 |
| 420–422 | " " | 1062 |
| 422–423 | " " | 1063 |

| Off. Rep. 166 U. S. | Title. | Herein. |
|---|---|---|
| 424–425 | Hunt *v.* United States | 1063 |
| 425–427 | " " " | 1064 |
| 427 | Gladson *v.* Minnesota | 1064 |
| 427–430 | " " | 1065 |
| 430–432 | " " | 1066 |
| 432–433 | *Re* Hien | 1066 |
| 433–436 | " " | 1067 |
| 436–439 | " " | 1068 |
| 439 | " " | 1069 |
| 440–441 | Aberdeen Bank *v.* Chehalis County ("First Nat. Bank of Aberdeen *v.* Chehalis County") | 1069 |
| 441–442 | " " " | 1070 |
| 443–445 | " " " | 1072 |
| 445–448 | " " " | 1073 |
| 448–451 | " " " | 1074 |
| 451–454 | " " " | 1075 |
| 454–457 | " " " | 1076 |
| 457–460 | " " " | 1077 |
| 460–462 | " " " | 1078 |
| 463–464 | Bank of Commerce *v.* Seattle; Seattle Bank *v.* Seattle; Puget Sound Bank *v.* Seattle; Washington Bank *v.* King County | 1078 |
| 464 | American Pub. Co. *v.* Fisher | 1079 |
| 465–466 | " " " | 1080 |
| 466–468 | " " " | 1081 |
| 468–469 | United States *v.* American Tobacco Co. | 1081 |
| 469–472 | " " " | 1082 |
| 472–475 | " " " | 1084 |
| 475–478 | " " " | 1085 |
| 478–480 | " " " | 1086 |
| 481 | *Re* Eckart | 1086 |
| 481–483 | " " | 1087 |
| 484–485 | " " | 1087 |
| 485–486 | Zadig *v.* Baldwin | 1087 |
| 486–488 | " " | 1088 |
| 489 | Electric Co. *v.* Dow | 1088 |
| 489–491 | " " " | 1089 |
| 491–493 | " " " | 1090 |
| 493–494 | Carter *v.* Ruddy | 1090 |
| 494–497 | " " | 1091 |
| 497–500 | " " | 1092 |
| 500–501 | " " | 1093 |
| 501–502 | Allen *v.* Culp | 1093 |
| 502–504 | " " | 1094 |
| 504–506 | " " | 1095 |
| 506 | Forsyth *v.* Hammond | 1095 |
| 507–509 | " " | 1096 |
| 509–512 | " " | 1097 |
| 512–515 | " " | 1098 |
| 515–517 | " " | 1099 |
| 517–520 | " " | 1100 |
| 520 | " " | 1101 |
| 521–523 | Washington & G. R. Co. *v.* Hickey | 1101 |
| 523–536 | " " " | 1102 |
| 526–529 | " " " | 1103 |
| 529–532 | " " " | 1104 |
| 532 | " " " | 1105 |
| 533–534 | Manson *v.* Duncanson | 1106 |
| 534–537 | " " | 1107 |
| 537–540 | " " | 1108 |
| 540–543 | " " | 1109 |
| 543–546 | " " | 1110 |
| 546–548 | " " | 1111 |
| 548 | *Re* Lennon | 1111 |
| 549–550 | " " | 1112 |





Digitized by Google

| Off. Rep. 166 U. S. | Title. | Here in. |
|---|---|---|
| 550–553 | *Re* Lennon | 1112 |
| 553–556 | " " | 1113 |
| 556–557 | " " | 1114 |
| 557 | City R. Co. *v.* Citizens' Street R. Co. | 1114 |
| 558–561 | " " " | 1115 |
| 561–564 | " " " | 1116 |
| 564–567 | " " " | 1117 |
| 567–570 | " " " | 1118 |
| 570–571 | " " " | 1119 |
| 571 | Moses *v.* United States | 1119 |
| 572–574 | " " " | 1120 |
| 574–577 | " " " | 1121 |
| 577–580 | " " " | 1122 |
| 580–583 | " " " | 1123 |
| 583–586 | " " " | 1124 |
| 586–589 | " " " | 1125 |
| 589–591 | " " " | 1126 |
| 591–594 | " " " | 1127 |
| 594–597 | " " " | 1128 |
| 597–600 | " " " | 1129 |
| 600 | " " " | 1130 |
| 601–603 | United States *v.* Greathouse | 1130 |
| 603–606 | " " " | 1131 |
| 606 | " " " | 1132 |
| 606–607 | Texas & P. R. Co. *v.* Cody | 1132 |
| 607–608 | " " " | 1133 |
| 608–611 | " " " | 1134 |
| 611–614 | " " " | 1135 |
| 614–616 | " " " | 1136 |
| 617 | Texas & P. R. Co. *v.* Barrett | 1136 |
| 617–618 | " " " | 1138 |
| 618–620 | " " " | 1139 |
| 620 | Northern P. R. Co. *v.* Sanders | 1139 |
| 622–624 | " " " | 1140 |
| 624–627 | " " " | 1141 |
| 627–630 | " " " | 1142 |
| 630–633 | " " " | 1143 |
| 633–636 | " " " | 1144 |
| 636–637 | " " " | 1145 |
| 637–638 | Whitney *v.* Fox | 1145 |
| 638–641 | " " | 1146 |
| 641–644 | " " | 1147 |
| 644–647 | Whitney *v.* Fox | 1148 |
| 647–648 | " " | 1149 |
| 648 | Wood *v.* Fox | 1149 |
| 648 | Oxley Stave Co. *v.* Butler County | 1149 |
| 649–652 | " " " | 1150 |
| 652–655 | " " " | 1151 |
| 655–658 | " " " | 1152 |
| 658–660 | " " " | 1153 |
| 661–662 | *Re* Chapman | 1154 |
| 662–663 | " " | 1155 |
| 664–666 | " " | 1157 |
| 666–669 | " " | 1158 |
| 669–672 | " " | 1159 |
| 672 | " " | 1160 |
| 673–674 | Baltimore *v.* Baltimore Trust & G. Co. | 1160 |
| 674–677 | " " " | 1161 |
| 677–680 | " " " | 1162 |
| 680–683 | " " " | 1163 |
| 683–685 | " " " | 1164 |
| 685–687 | Long Island Water Supply Co. *v.* Brooklyn | 1165 |
| 687–690 | " " " | 1166 |
| 690–693 | " " " | 1167 |
| 693–696 | " " " | 1168 |
| 696–697 | " " " | 1169 |
| 698–699 | Sentel *v.* New Orleans & C. R. Co. | 1169 |
| 699–701 | " " " | 1170 |
| 701–704 | " " " | 1171 |
| 704–706 | " " " | 1172 |
| 707 | Springville *v.* Thomas<br>Salt Lake City Brewing Co. *v.* Fred W. Wolf Co.<br>Salt Lake City *v.* Tucker | 1172 |
| 707–709 | " " " | 1173 |
| 709 | Louisville & N. R. Co. *v.* Louisville | 1173 |
| 709–712 | " " " | 1174 |
| 712–715 | " " " | 1175 |
| 715–716 | " " " | 1176 |
| 717 | Memorandum Cases | 1177 |
| 722 | " " | 1188 |




Digitized by Google

Digitized by Google

# THE DECISIONS

OF THE

# Supreme Court of the United States

AT

## OCTOBER TERM, 1896.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

UNITED STATES, *Petitioner*,
v.
THE THREE FRIENDS, Her Engines, etc. Napoleon B. Broward and Montcalm Broward, *Claimants*.

(See S. C. Reporter's ed. 1-63.)

*Decree, when final—writ of certiorari—forfeiture of a vessel—insurgent body of people—judicial notice of conflict of arms—release of vessel on bond.*

1. A decree ordering the dismissal of a libel if not amended within ten days is final for the purpose of an appeal by the libellant within that time, as the appeal is an election to waive the right to amend.
2. A writ of certiorari to the circuit court of appeals pending action by that court may be issued by this court under the judiciary act of March 3, 1891, § 6, if the court is of opinion that the circumstances justify the allowance of the writ, although it is a power not ordinarily to be exercised.
3. Forfeiture of a vessel under U. S. Rev. Stat. § 5283, on the ground that it was fitted out to cruise or commit hostilities against a foreign prince or state, does not depend upon the conviction of a person or persons for doing the criminal acts.
4. Any insurgent or insurrectionary body of people acting together, undertaking and conducting hostilities, although its belligerency has not been recognized, is included in the terms "colony, district, or people" as used in U. S. Rev. Stat. § 5283, making it an offense to fit out a vessel to be employed "in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace."
5. Proclamations and messages by the President are sufficient to give the court judicial information of the existence of an actual conflict of arms in Cuba in resistance of the authority of the government of Spain, although acknowledgment of the insurgents as belligerents by the political department has not taken place.
6. The release on bond of a vessel charged with liability to forfeiture under U. S. Rev. Stat. § 5283, before answer or hearing and against the objection of the United States, when this may result in a hostile expedition against a friendly power, should not be allowed; and if such an order of release is improvidently made, the vessel should be recalled.

[No. 701.]

*Argued February 15, 1897. Decided March 1, 1897.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit to bring up from said court a suit in admiralty against the steamer Three Friends which was seized by the collector of customs for the district of St. Johns, Florida, as forfeited to the United States under U. S. Rev. Stat. § 5283, and to review a decree of the District Court of the United States for the Southern District of Florida, dismissing said suit. *Reversed*, and cause remanded to the District Court with directions to resume custody of the vessel and for further proceedings.

Statement by Mr. Chief Justice **Fuller**:

The steamer Three Friends was seized November 7, 1896, by the collector of customs for the district of St. Johns, Florida, as forfeited to the United States under U. S. Rev. Stat. § 5283, and, thereupon, November 12, was libeled on behalf of the United States in the district court for the southern district of Florida.

NOTE.—*As to what is "final decree" or judgment of state or other court from which appeal lies*, see note to Gibbons v. Ogden, 5: 302.

*As to certiorari in United States courts*, see note to Clark v. Hackett, 17: 69.

*As to prize taken in violation of neutrality; salvage for neutral vessels; capture*,—see note to The Star, 4: 338.

*As to what places the jurisdiction of admiralty is confined to*, see note to Allen v. Newberry, 16: 110.

*As to high seas, meaning of*, see note to United States v. Wiltberger, 5: 37.

*As to seizure of vessels; illegal and lawful*,—see note to The Apollon, 6: 111.



Digitized by Google

The first two paragraphs of the libel alleged the seizure and detention of the vessel, and the libel then continued:

"Third. That the said steamboat or steam vessel, the 'Three Friends,' was on, to wit, on the 23d day of May, A. D. 1896, furnished, fitted out, and armed, with intent that she should be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the King of Spain, in the island of Cuba, to cruise 3]*and commit hostilities against the subjects, citizens, and property of the King of Spain, in the island of Cuba, with whom the United States are and were at that date at peace.

"Fourth. That the said steamboat or steam vessel, 'Three Friends,' on, to wit, on the 23d day of May, A. D. 1896, whereof one Napoleon B. Broward was then and there master, and within the said southern district of Florida, was then and there fitted out, furnished, and armed, with intent that said vessel, the said 'Three Friends,' should be employed in the service of a certain people, to wit, the insurgents in the island of Cuba, otherwise called the Cuban revolutionists, to cruise and commit hostilities against the subjects, property, and people of the King of Spain, in the said island of Cuba, with whom the United States are and were then at peace.

"Fifth. That the said steamboat or steam vessel 'Three Friends,' on, to wit, on the 23d day of May, A. D. 1896, and whereof one N. B. Broward was then and there master, within the navigable waters of the United States, and within the southern district of Florida and the jurisdiction of this court, was then and there, by certain persons to the attorneys of the said United States unknown, furnished, fitted out, and armed, being loaded with supplies and arms and munitions of war, and it, the said steam vessel 'Three Friends,' being then and there furnished, fitted out, and armed with one certain gun or guns, the exact number to the said attorneys of the United States unknown, and with munitions of war thereof, with the intent, then and there, to be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the King of Spain in the island of Cuba, and with the intent to cruise and commit hostilities against the subjects, citizens, and property of the King of Spain, in the said island of Cuba, and who, on the said date and day last aforesaid, and being so furnished, fitted out, and armed as aforesaid, then and there aforesaid, from the navigable waters of the United States, to wit, from the St. Johns river, within the southern district of Florida, and within the jurisdiction of this court aforesaid, proceeded upon a voyage to the island of Cuba aforesaid, with the intent 4]*aforesaid, contrary to the form of the statute in such case made and provided. And that by force and virtue of the acts of Congress in such case made and provided, the same steamboat or steam vessel, her tackle, engines, machinery, apparel, and furniture became and are forfeited to the use of the said United States.

"Sixth. And the said attorneys say that by reason of all and singular the premises aforesaid, and that by force of the statute in such case made and provided, the aforesaid and described steamboat or steam vessel 'Three Friends,' her tackle, machinery, apparel, and furniture, became and are forfeited to the use of the said United States."

And concluded with a prayer for process and monition and the condemnation of the vessel as forfeited. Attachment and monition having issued as prayed, Napoleon B. Broward and Montcalm Broward, master and owners, intervened as claimants; applied for an appraisement of the vessel and her release on stipulation; and filed the following exceptions to the libel:

"1. Section 5283, for an alleged violation of which the said vessel is sought to be forfeited, makes such forfeiture dependent upon the conviction of a person for doing the act or acts denounced in the first sentence of said section, and as a consequence of conviction of such person; whereas the allegations in said libel do not show what persons had been guilty of the acts therein denounced as unlawful.

"2. The said libel does not show the 'Three Friends' was fitted out and armed, attempted to be fitted out and armed, or procured to be fitted out and armed in violation of said section.

"3. The said libel does not show the said vessel was so fitted out and armed, or so attempted to be fitted out and armed, or so procured to be fitted out and armed or furnished, with the intent that said vessel should be employed in the service of a foreign prince, or state, or of a colony, district, or people with whom the United States are at peace.

"4. The said libel does not show by whom said vessel was so fitted out.

"5. Said libel does not show in the service of what foreign *prince, or state, or colony, or [5 district, or body politic the said vessel was so fitted out.

"6. The said libel does not show that said vessel was so armed or fitted out or furnished with the intent that such vessel should be employed in the service of any body politic recognized by or known to the United States as a body politic."

The vessel was appraised at $4,000 and a bond on stipulation given for $10,000, upon which she was directed to be released. The cause came on to be heard upon the exceptions to the libel, and on January 18 the following decree was entered:

"This cause coming on to be heard upon exceptions to the libel, and having been fully heard and considered, it is ordered that said second, third, fifth, and sixth exceptions be sustained, and that the libellant have permission to amend said libel, and in event said libel is not so amended within ten days the same stand dismissed and the bond herein filed be canceled."

From this decree the United States, on January 23, prayed an appeal to the United States circuit court of appeals for the fifth circuit, which was allowed and duly prosecuted.

The following errors were assigned:

"First. For that the court over the objection of the libellants allowed the said steam vessel 'Three Friends' to be released from custody upon the giving of bond.

"Second. For that the court erred in sustaining the 2d, 3d, 5th, and 6th exceptions of



Digitized by Google

laimants to the libel of information of the ants.

'hird. For that the court erred in entering cree dismissing the libel of information n."

1 February 1 application was made to this t for a writ of certiorari to bring up the e from said circuit court of appeals, and, ng been granted and sent down, the record returned accordingly.

esrs. Judson Harmon, Attorney Gen- and Edward B. Whitney, Assistant rney General, for the petitioner, the ted States:

his case brings up the question whether the ds "colony, district, or people" in U. S. . Stat. § 5283, include insurrectionary ies like the present "Republic of Cuba," ose belligerency, technically speaking, has yet been recognized by the executive de- tment of our government.

That such bodies are so included was held Attorney General Hoar in an opinion upon former Cuban insurrection (13 Ops. Atty. n. 177), and up to a recent date this construc- n has been acquiesced in.

*United States* v. *The Mary N. Hogan*, 18 d. Rep. 529; *United States* v. *214 Boxes of ms*, 20 Fed. Rep. 50; *The City of Mexico*, 28 d. Rep. 148.

This opinion was referred to with approval this court in the recent case of *Wiborg* v. *nited States*, 163 U. S. 632, 647 (41: 289, 294). he first decision to the contrary is the one hich is now brought here for review; but it in line with a series of *dicta* commencing ith that of Judge Brown in *The Carondelet*, Fed. Rep. 799.

Judge Brown's opinion was consistent with is prior opinion in *The Ambrose Light*, 25 Fed. ep. 408, in which he held, on the one hand, at cruisers of unrecognized insurgents were irates, and, on the other, that very slight ex- cutive recognition is sufficient to give them e full standing of belligerents.

If, however, the word "colony" or "district" s the more accurate definition of the Cuban nsurrectionary body, the libel is still sufficient, or it describes the insurrection sufficiently o enable the court to perceive what is meant hrough its judicial knowledge, derived from he President's proclamations and messages. The variance would be merely in the statement of a legal conclusion, and the liberal rules of admiralty pleading would sustain the libel.

*The Palmyra*, 25 U. S. 12 Wheat. 1, 12, 18 (6: 531, 534, 535); *Meissner* v. *Brun* ("*The Gazelle*") 128 U. S. 474, 487 (32: 496, 500); *The Caroline* v. *United States*, 11 U. S. 7 Cranch, 496, 500 (3: 417, 418); *The Edward*, 14 U. S. 1 Wheat. 261 (4: 86); *The Emily & Caroline*, 22 U. S. 9 Wheat. 381, 386 (6: 116, 117); *United States* v. *The Watchful*, 78 U. S. 6 Wall. 91 (18: 763); Benedict, Adm. § 483.

The internal evidence of the statute is opposed to the theory that a recognition of belligerency is essential to its operation.

The following propositions seem to be clearly established:

(1) That a recognition of belligerency is not always accomplished by a recognition of the fact that actual hostilities are in progress.

(2) That the existence of a civil war, in the ordinary sense of that term, may be made known by what is sometimes called a recognition of insurgency.

(3) That to justify a recognition of belligerency there must be something more than the mere existence of a civil war—the nation which gives the recognition must be impelled to do so for the protection of its own rights or those of its citizens.

(4) That the recognition of an insurgent body as a belligerent, in the technical sense of the purchase, makes that insurgent body a state for all purposes of the war.

Lawrence, International Law, §§ 162, 163; Dana's Wheaton, International Law, § 23, note, quoted in part in Snow's Cases on International Law, 24; Hall, International Law, 4th ed. 32; 1 Whart. International Law Dig. 2d ed. 509, 520.

When insurrectionists endeavoring to separate themselves from the mother country become a state for the purposes of the war, then their belligerency is recognized.

There may be a recognition of the fact of actual warfare without a recognition of belligerency in the technical sense.

The consequences of a recognition of the belligerency of an insurgent body—while it neither increases nor diminishes the duty of noninterference—are very serious. The neutral nation must abandon further claims for reparation on account of damages suffered by its citizens through the hostilities. Its merchantmen must submit to the rights of blockade, visitation, search, and seizure of contraband articles on the high seas.

Hence a recognition of belligerency should never be given except when it becomes necessary on the grounds above stated, or in the rare instances when armed intervention is justifiable.

Such a recognition can often be forced by either party to the warfare by establishing an effective blockade.

It is forced by an insurgent body when it enters into maritime operations and maintains the right to search neutral vessels for contraband of war. The neutral is thus forced either to recognize the vessels of the insurgents as belligerents or to pursue them as pirates, for if they molest third parties they must be one or the other, whatever the true definition of piracy may be.

*United States* v. *The Malek Adhel*, 43 U. S. 2 How. 210 (11: 239); *The Ambrose Light*, 25 Fed. Rep. 408, and authorities cited, also Dr. Wharton's criticism thereon in 33 Alb. L. J. 125, 130, and authorities cited; Lawrence, International Law, § 122; Dana's Wheaton, International Law, § 124, note; 1 Ops. Atty. Gen. 252.

When insurgents have no maritime force, and the war is not in contiguous territory, a recognition of belligerency harms them as well as the neutral; for it gives to their enemy rights of search on the high seas which they themselves are unable to utilize. Thus if we should be forced to recognize the present hostilities in Cuba as a civil war, technically speaking, the shipment of arms, ammunition, and other contraband goods to the insurgents would become much more difficult.

Hence recognitions of belligerency by a neu-



Digitized by Google

tral nation are comparatively rare. Recognitions of the fact that hostilities are in progress are, however, quite common. To such recognitions Dr. Wharton has applied the convenient phrase "recognition of insurgency."

3 Whart. International Law Dig. 2d ed. 351; Criticism of *The Ambrose Light Case*, 33 Alb. L. J. 126.

The existence of a recognized state of belligerency is not an express requirement of the statute. Section 5283 does not even use the word "war."

If § 5283 were intended to apply only to hostilities officially recognized, it would not contain the words "the subjects, citizens, or property of." War is waged against a state, not against its subjects, citizens, or property.

There could be no object in discriminating between recognized and unrecognized belligerents.

The duty of the United States not to interfere between the contending parties in a foreign civil war is not altered in any respect by a recognition of belligerency.

Had acknowledged belligerency been the test intended, the wording of the act of 1794 would have been sufficient.

The words "colony," "district," and "people" are not apt if parties recognized as belligerent are the only ones intended to be referred to. A belligerent is not recognized as a colony, as a district, or as a people, but as a prince or as a state.

It is true that "a people" is a phrase often used as equivalent to "a state." This cannot be its use in the present statute, because it was introduced as an amendment to a law which already contained the word "state." The new word is not to be interpreted as mere surplusage, but is to be given some separate force if possible.

*Washington Market Co.* v. *Hoffman*, 101 U. S. 112, 115, 116 (25: 782–784); *Opinion of Justices*, 22 Pick. 571, 573.

This principle was applied to the British foreign enlistment act in *Atty. Gen.* v. *Sillem*, 2 Hurlst. & C. 431, 572, quoting Lord Coke in *Bonham's Case*, Rep. pt. 8, 117*a*.

Assuming, then, that the word is not used as the equivalent of a state or a nation, it must be used in the alternative sense of a body of men less than a nation who are bound together by ties of blood, neighborship, common enterprise, or otherwise. To this use of the word it is not necessary that there should be a recognition of belligerency or even actual hostilities pending.

Any body of individuals claiming the right to be independent, and struggling to achieve their independence, is commonly called a people from the moment when the struggle becomes important enough to atract the attention of the world.

The words "with whom the United States are at peace" are not material to this question. The United States are at peace with all mankind except those with whom they are at war.

There being nothing in the statute to indicate that the intention was to make belligerency a test or condition, we cannot import it arbitrarily by way of narrowing a penal statute. The neutrality act is a remedial law, to be construed reasonably.

*Wiborg* v. *United States*, 163 U. S. 632, 650 (41: 289, 295).

The history of the statute is opposed to the idea that a recognition of belligerency is essential to its operation.

At the time of the act of 1817, the Latin-American world was nearly all at war, but the contesting bodies were divided into various classes, as follows:

(*a*) The leading Spanish-American colonies whose position as belligerents was in doubt—Whether or not the belligerency of the South American revolutionists had been recognized in Madison's administration depends upon the question, How much formality is necessary in a recognition of belligerency? Is it only recognized by the President or Secretary of State in a formal document declaring the fact to the world or communicating it to Congress? Or is it recognized also whenever the President or one of the cabinet officers, in an ordinary official letter of instruction, or in transmitting information to a Congressional committee, uses the term "belligerent" or "civil war?" This cannot be. Were it so, then on the same principle President Monroe would have been held to acknowledge the independence of the South American governments as early as January, 1819.

17 U. S. 4 Wheat. Appx. 41 (4: 692); *The Conserva*, 88 Fed. Rep. 437.

The same view was maintained by Henry Clay in the debates upon the act of 1818 (Annals of Congress, March 18, 1818, p. 1415).

President Monroe took the contrary view in his message of December 2, 1817, and used language which not only amounted to a present recognition of the colonies as belligerents, but imported that they had been so recognized at "every stage of the conflict."

Judge Brown, of New York, has taken a similar position in *The Ambrose Light*, 25 Fed. Rep. 443–447, but has been ably answered by Dr. Wharton in the Albany Law Journal.

It must be remembered that the legislators of 1816-17, who passed the act under consideration, had not the benefit of Monroe's message, and their meaning must be construed in view of the information then available. President Madison had most carefully abstained from any language which would import a formal recognition of belligerency.

Monroe's letter of January 10, 1817, to Forsyth was only an informal communication for the benefit of a Congressional committee, and, like the two papers last referred to, was not of a sufficiently formal character to work so great a change in the nation's interests and those of our citizens as is effected by a recognition of belligerent rights, technically speaking.

Mr. Wheaton, in the appendix to the fourth volume of his reports, placed the earliest recognition at November 17, 1818.

The states whose belligerency was recognized by Monroe in 1817 were doubtless those whose independence was recognized in 1822, namely New Granada and Venezuela (afterwards united as Colombia), Buenos Ayres (officially known as the United Provinces of South America), and Chile, the successful revolts of Peru and Mexico having been later



Digitized by Google

than 1817. That the recognition of belligerency did not apply to all the minor insurgencies has been expressly ruled by this court in *The Nueva Anna*, 19 U. S. 6 Wheat. 193 (5: 239).

(*b*) Certain Spanish or Portuguese districts whose belligerency had not then been and never was recognized. One of these is Paraguay. This may have attracted no attention, as our people did not come into contact with it, though probably informed of its existence.

4 Am. State Papers, *Foreign Relations*, pp. 219, 222, 225, 250, 265, 278, 339.

Second only to Buenos Ayres, however, if not first of all the powers of Latin America in capacity to make trouble, was the now forgotten but then world-famous, General Artigas, who held sway, with various ebbs and flows of fortune, on the east bank of the La Plata river, in the old Spanish intendency of Banda Oriental, called by him the Oriental Republic, and now known as the independent Rupublic of Uruguay. Any recognition of his claims would have given offense, not only to Spain, but to Portugal, and even to Buenos Ayres, for all three laid claim to his territory, and with all three he was at war. His main city, Montevideo, was generally in Portuguese control. Yet cruisers under the "Artigan flag," and claiming to be commissioned by Artigas, were on all the seas. They did the main injury complained of by the Portuguese government. H. R. Ex. Doc. No. 58, 32d Cong. 1st Sess. pp. 193 200; *The Gran Para*, 20 U. S. 7 Wheat. 471 (5: 501). Notices of his proceedings are to be found in 4 American State Papers, *Foreign Relations*, at pp. 178, 174, 218, 219, 221, 225, 250, 268, 274, 288, 289. and in argument of counsel (476–481 [502, 503]). His country had been claimed by both Spain and Portugal. Portugal had surrendered it in 1778, but renewed the claim when the South American revolutions broke out. It was the Portuguese who finally conquered Artigas, and the country was then for a time annexed to Brazil. In 1817 and 1818 the Artigas revolt seems generally to have been regarded as directed against Portugal rather than Spain, but Monroe's recognition of belligerency in December, 1817, applied only to "the contest between Spain and the colonies."

This was pointed out by Attorney General Wirt in his letter of November 6, 1818, to the district attorney at Baltimore.

1 Ops. Atty. Gen. 249.

As late as 1822, after Artigas had been conquered by the Portuguese, his nonrecognition as a belligerent was still familiarly used to illustrate arguments.

*The Arrogante Barcelones*, 20 U. S. 7 Wheat. 509 (5:510).

(*c*) Hayti. This unfortunate island had long been free from the sovereignty of France, but its independence had not been recognized by us, and was not so recognized prior to 1862, because it was under negro domination. At that time it was divided between two negro chieftains who were engaged in a bloody contest, but whose belligerency had not been recognized. As stated by Attorney General Wirt: "Our government had never acknowledged those sovereignties, not even by the recognition of a civil war between themselves or their mother countries." Henry Clay said that "we had not recognized the war as a civil war, etc., or in any manner so regarded it as that a case arising under it in our courts could be viewed in the same light as a case occurring in the existing conflict in South America."

Annals of Congress, March 18, 1818, p. 1425.

(*d*) Amelia Island and Galveston. These places were the rendezvous of privateers (Aury their best-known leader), claiming the right to fly the Venezuelan, Artigan, and other revolutionary flags. 1 Whart. International Law Dig. § 50*a*. They were practically pirates.

(2) The law as settled and understood at the time of the act of 1817. The act of 1794, in its corresponding provision, applied only to cruises and hostilities in the service of a foreign "prince or state." These words had been construed in one case only. *Hoyt* v. *Gelston*, 13 Johns. 141, 561, decided in the courts of the state of New York in 1816, then pending in this court on writ of error, but as yet unargued.

Counsel argued that their governments were *de facto* sovereignties (pp. 145, 146). The courts unanimously held that such a sovereignty could not be recognized as a prince or state by them prior to its recognition by the government.

In *The Estrella*, 17 U. S. 4 Wheat. 298, 310 (4:574,577), in discussing the same statute, the court were of opinion that the belligerent colony of Venezuela was within its terms.

*Gelston* v. *Hoyt*, 16 U. S. 3 Wheat. 278 (4:389); *The Carondelet*, 37 Fed. Rep. 799.

The history of the act, therefore, tends to show that it was intended to cover at least the case of every revolutionary body, recognized or unrecognized, which made bona fide claim to rights of sovereignty.

Chief Justice Marshall afterwards said that the act of 1817 "adapts the previous laws to the actual situation of the world."

*The Gran Para*, 20 U. S. 7 Wheat. 471, 489 (5:501, 505).

The act of 1794 was understood as covering the case of a state recognized as belligerent only, and hence that the later acts were understood as including something more, is indicated by contemporaneous references, so far as any can be found.

*La Nereyda*, 21 U. S. 8 Wheat. 108 (5:574); *La Conception*, 19 U. S. 6 Wheat. 235 (5:249); *The Gran Para*, 20 U. S. 7 Wheat. 471 (5:501); *The Irresistible*, 20 U. S. 7 Wheat. 551 (5:520); *The Monte Allegre*, 20 U. S. 7 Wheat. 520 (5:513); *The Antelope*, 23 U. S. 10 Wheat. 66 (6:268); *The Nueva Anna*, 19 U. S. 6 Wheat. 193 (5:239).

John Forsyth, who had had charge in the House of Representatives of the acts of 1817 and 1818 was Secretary of State at the time of the revolution in Texas. He evidently then regarded the operation of these acts as in no wise dependent upon a recognition of belligerency.

In his circular instruction to district attorneys on November 4, 1835, he says (H. R. Doc. No. 256, 24th Cong. 1st Sess. p. 36): "You are therefore earnestly enjoined, should the contest begin, to be attentive to all movements of a hostile character which may be contemplated or attempted within your district, and to prosecute without discrimination



Digitized by Google

all violations of those laws of the United States which have been enacted for the purpose of preserving peace and fulfilling the obligations of treaties with foreign powers."

On February 24, 1836, Secretary Forsyth instructed the district attorney at Nashville to prosecute for the offense of enlisting troops to aid the insurgents.

H. R. Doc. No. 256, 24th Cong. 1st Sess. p. 37.

(6) Subsequent legislation. In 1837 an insurrection broke out in Canada. Belligerency of the insurgents was never recognized. Van Buren, in his annual message in 1838, shows clearly that he regards them in the same light in which the present Cuban insurrectionists have been regarded. A neutrality act was passed, however, and the words "colony, district, or people" were regarded as sufficient for the case (Act of March 10, 1838, chap. 31, §§ 1, 2, 5). The act expired in two years by its own limitation (§ 9).

If any executive recognition is necessary to put the statute in operation, that recognition had been given when the libel was filed.

When a vessel belonging to citizens of the United States commits hostilities upon the high seas against a friendly power, her act is prima facie piratical. She is forfeit, and her owners, officers, and crew are liable to be hanged.

*The Ambrose Light*, 25 Fed. Rep. 408, and authorities cited; Lawrence, International Law, § 122; Dana's Wheaton, International Law, § 124, note.

If the act is done in the interests of a colony, district, or people struggling for independence, then it is freed from this imputation, and the punishment is under a different and milder law. How is this fact to be established? It is matter of judicial notice, not proof. It is not in its nature susceptible of proof by witnesses —and, besides, from motives of policy the Judiciary looks to the Executive for information.

As the present insurrection is for independence it is not necessary to inquire whether the pursuit of this object is a prerequisite to the operation of the statute. This does not appear to be required, and the statute seems equally applicable to revolts for the control of an already established state, like the recent Chilean war, or for civil rights, like our Revolution before July 4, 1776, the Buenos Ayres revolution before 1816, and the recent proposed revolt in Johannesburg.

The bond or stipulation for the release of the vessel is not authorized by law, and she should be ordered back into the custody of the marshal.

Instances of review of interlocutory proceedings at law and in equity are found in *Buckingham* v. *McLean*, 54 U. S. 13 How. 151 (14: 91); *Milwaukee & M. R. Co.* v. *Soutter*, 69 U. S. 2 Wall. 510, 521 (17: 900, 904); *Meyer* v. *Delaware Const. Co.* ("*Removal Cases*") 100 U. S. 457, 475 (25: 593, 600); *Worden* v. *Searles*, 121 U. S. 14, 26 (30: 853, 858).

The interlocutory order by which a bond of $10,000 was substituted for the vessel as defendant in the case bears directly upon the merits. If allowed to stand it prevents a full recovery of the value of the vessel, no matter how inadequate the bond may turn out to be.

*The Wild Ranger*, 2 New Rep. 402; *United States* v. *The Haytian Republic* ("*The Haytian Republic*") 154 U. S. 118 (38: 930); *The Oregon*, 158 U. S. 186 (39: 943).

That such an order is reviewable in the appellate court when it is not discretionary, is clearly implied in *The Wanata* v. *Avery*, 95 U. S. 600, 611 (24: 461, 464), and seems to be recognized in *United States* v. *Ames*, 99 U. S. 35, 39–42 (25: 295, 299, 300). A similar interlocutory question was considered on the merits in *Place* v. *Norwich & N. Y. Transp. Co.* ("*The City of Norwich*") 118 U. S. 468 (30: 134), and four justices were for reversal.

The district judge had no authority to release the vessel by any form of procedure.

*The Alligator*, 1 Gall. 145; *The Struggle*, 1 Gall. 476; *United States* v. *Ames*, 99 U. S. 35 (25: 295).

Even if it were proper to release the vessel under any circumstances, no case for such release was here presented.

*The Mary N. Hogan*, 17 Fed. Rep. 813.

*Mr.* **W. Hallett Phillips**, for respondents:

After exceptions had been filed by claimants and owners the libellant amended the libel by the allegation, that the vessel was fitted out, etc., within the jurisdiction with intent that she should be employed "in the service of a certain people then engaged in armed resistance to the government of the King of Spain." It was also alleged that the vessel was to be employed by a certain people, to wit, the insurgents in the island of Cuba, otherwise called the Cuban revolutionists.

Exceptions were filed to the libel on the ground that it failed to show that The Three Friends was fitted, etc., with the intent that said vessel should be employed in the service of a foreign prince or state, or of a colony, district, or people with whom the United States had peace.

It did not show in the service of what foreign prince or state or colony or district or body politic the said vessel was so fitted out.

It failed to show that said vessel was armed or fitted out or furnished with intent to be employed in the service of any body politic recognized by or known to the United States as a body politic.

These exceptions were sustained, and it was ordered that libellants have permission to amend the libel, and if not so amended within ten days, the same stand dismissed.

Afterwards, the libellants having amended the libel by the insertion of the words "in the service of a certain people," to wit, "certain people then engaged in armed resistance to the government of the King of Spain" in the land of Cuba, the court held that the objections had not been overcome and that the amendment was not material, "as it appears clearly that the word "people" is used in an individual and personal sense and not as an organized and recognized political power in any way corresponding to a state, prince, colony, or district."

The writ of certiorari has been awarded to bring the case here from the circuit court of appeals.

The ground upon which the district court based its decision was that the statute proceeded under was not violated, because U. S.



Digitized by Google

ev. Stat. § 5283, which embraces the 3d section of the act of April 20, 1818, and 1st section of act March 3, 1817, when it mentions he word "people" means "one of the denominations applied by the act of Congress to a foreign power."

*United States* v. *Quincy*, 31 U. S. 6 Pet. 445 : 458).

That the word "people," the only term which is pretended covers the case, is only applicable to a foreign power or belligerent, is demonstrated by a reference to particular provisions f the act of 1817, carried into the act of 1818.

The word any "people" must be used in the ense of any "power" because the statute refers to the "citizens or property of any people with whom the United States are at peace," nd there is a similar use of the word in each of the succeding sections.

Thus § 4, act 1817, now U. S. Rev. Stat. § 5286, which applies to the augmentation of force of any ship of war or armed vessel within the United States "in the service of any foreign prince or state or of any colony, district, or people, or belonging to the subjects or citizens of any such prince, state, colony, district, or people." 13 Stat. at L. 370.

The term "any people" necessarily signifies in this connection a political entity, and not simply an unorganized number of individuals or persons.

The expressions "prince," "state," or "people," had a definite legal meaning at the time they were enacted in the legislation under review. Similar terms had been used in maritime policies of insurance and other instruments, from time immemorial, all the world over, and were well understood and defined.

2 Dane, Abr. 113.

In the authoritative work, Marshall on Insurance (1810), the author says that under these words, which are nearly the same in the policies of all the maritime countries, the insurers are liable for all losses occasioned by arrests or detention of the ship or goods insured by the authority of any prince "or public body claiming to exercise sovereign power under what pretense soever." Vol. 1, chap. 12, § 5. In the same section the author observes that the word "people" in the policy means a people or nation, not a mob. By the word "people" in the policy is not to be understood any promiscuous or lawless rabble that may be guilty of attacking or detaining the ship; it means a people—that is, a nation in its collective and political capacity.

Park, Marine Ins. 2d Am. ed. 78; *Nesbitt* v. *Lushington*, 4 T. R. 783.

Lord Kenyon said the word "people" meant the ruling power of the country. Mr. Justice Buller said it meant the supreme power of the country, whatever that might be; that the word "people" did not apply to individuals, but the words "kings, princes, and people, of what nation, condition, or quality soever," applied to "nations" in their collective capacity.

In *Mauran* v. *Alliance Ins. Co.* 73 U. S. 6 Wall. 12 (18: 842), this court confirms such construction, and discusses its bearing upon our neutrality acts.

The case is of importance on account of the principles involved, and the decision was the result of great argument, participated in by Messrs. Cushing, R. H. Dana, Jr., and Horace Gray, Jr., now a member of this court, who appeared for the plaintiff in error.

The defendant in error was represented by Messrs. Curtis and Storrow.

The immediate question was, whether a seizure of a vessel by the so called Confederate states constituted a capture within the meaning of the policy.

Chancellor Kent was quoted to the effect that the stipulation of indemnity against takings at sea, arrests, restraints, and detainments of all kings, princes, and people, refers only to the acts of government for government purposes, whether right or wrong.

3 Kent, Com. 6th ed. 302, note *d*.

Reference was made to the South American conflicts: "From the time the revolt had reached the dimensions of a civil war, the government had recognized the war and conceded equal belligerent rights to the respective parties."

Other illustrations were made of governments *de facto*, which, for certain purposes, are recognized as if they were *de jure* and regularly constructed nationalities. The court, in the case of *Nesbitt* v. *Lushington*, 4 T. R. 783, fitly described the character of the government contemplated in the clause respecting the restraints, etc., of kings, princes, or people, *viz.*, "the ruling power of the country, the supreme power, the power of the country, whatever it might be,—not necessarily a lawful power or government, or one that had been adopted into the family of nations."

The court concluded that the so-called Confederate government, being in the possession of the supreme power of the district of country over which its jurisdiction extended, was a government *de facto*, which could make a capture within the meaning of the policy.

*Mauran* v. *Alliance Ins. Co.* 73 U. S. 6 Wall. 12 (18: 842).

No reason exists why the word "people" should have one sense when used in a maritime policy, but a different sense as used in the statute. The one insures protection against the acts of such a "people," while the other prohibits acts done in its service.

It is an historical fact, that the change in the wording of the act of 1817 from that of 1794 was for the purpose of embracing movements instigated for the benefit of the South American provinces, then recognized belligerents.

In the case of *The Santissima Trinidad*, Chief Justice Marshall, on circuit, remarked as follows: "However serious may be the doubt, whether a section of a nation struggling for its independence may come within the prohibitions of the act (1794), there can be no doubt that such a people come within the more ample provisions of the law of nations. Whether Buenos Ayres be a state or not, if she is in a condition to make war and to claim the character and rights of a belligerent, she is bound to respect the laws of war; and the government which concedes her those rights is bound to maintain its own neutrality, unless it means to become a party to the war, as entirely as if she were an acknowledged state. She has no more right to recruit her navy within the United States than Spain would have, and this government is as much bound to restrain



Digitized by Google

her from using our strength in the war as to restrain her enemy." 1 Brock. 488, 20 U. S. 7 Wheat. 283 (5: 454).

The meaning of the words "foreign prince or state" was announced in *Gelston* v. *Hoyt*, 16 U. S. 3 Wheat. 323 (4: 400).

In that case the evidence was that the ship was fitted out and armed with intent that she should be employed in the service of that part of the island of San Domingo which was then under the government of Petion, to commit hostilities upon the subjects of that part of the island of San Domingo which was then under the government of Christophe.

The court held that neither of these allegations could be supported, inasmuch as the government of the United States has never recognized either of these governments as "a foreign prince or state."

*The Gran Para*, 20 U. S. 7 Wheat. 489 (5:505).

In *United States* v. *Quincy*, 31 U. S. 6 Pet. 467 (8: 466), the indictment charged that the defendant was concerned in fitting out the ship with the intent that she should be employed in the service of a foreign people—that is to say, in the service of the United Provinces of Rio de la Plata. The court said: "The word 'people' as here used is merely descriptive of the power in whose service the vessel was intended to be employed, and it is one of the denominations applied by the act of Congress to a foreign power. The words are in 'the service of any foreign prince or state, or of any colony, district, or people.'"

In *United States* v. *Palmer*, 16 U. S. 3 Wheat. 610 (4: 471), the circuit court of the United States for the first circuit, consisting of Judges Story and Davis, divided in opinion upon certain questions, which they certified here, arising under the neutrality laws and the laws for the punishment of piracy. Some of these were as follows:

"5th. Whether any revolted colony, district, or people which have thrown off their allegiance to their mother country, but have never been acknowledged by the United States as a sovereign or independent nation or power, have authority to issue commissions to make captures on the high seas of the persons, property, and vessels of the subjects of the mother country who retain their allegiance.

"6th. Whether an act which would be deemed a robbery on the high seas, if done without a lawful commission, is protected from being considered as a robbery on the high seas when the same act is done under a commission or the color of a commission for any foreign colony, district, or people which have revolted from their native allegiance, and have declared themselves independent and sovereign, and have assumed to exercise the powers and authorities of an independent and sovereign government, but have never been acknowledged or recognized as an independent or sovereign government or nation by the United States or by any other foreign state, prince, or sovereignty.

"10th. Whether any colony, district, or people who have revolted from their native allegiance and have assumed upon themselves the exercise of independent and sovereign power can be deemed in any court in the United States an independent or sovereign nation or government until they have been acknowledged as such by the government of the United States; and whether such acknowledgment can be proved in a court of the United States otherwise than by some act or statute or resolution of the Congress of the United States, or by some public proclamation or other public act of the executive authority of the United States directly containing or announcing such acknowledgment, or by publicly receiving and acknowledging an ambassador or other public minister from such colony, district, or people, and whether such acknowledgment can be proved by mere inference from the private acts or private instructions of the Executive of the United States, when no public acknowledgment has ever been made, and whether the courts of the United States are bound judicially to take notice of the existing relations of the United States as to foreign states and sovereignties, their colonies and dependencies.

"11th. Whether, in case of a civil war between a mother country and its colony, the subjects of the different parties are to be deemed, in respect to neutral nations, as enemies to each other, entitled to the rights of war."

Chief Justice Marshall, March 14, 1818, delivering the opinion of the court, observed:

"The first four questions relate to the construction of the 8th section of the 'Act for the Punishment of Certain Crimes against the United States.' The remaining seven questions respect the rights of a colony or other portion of an established empire which has proclaimed itself an independent nation and is asserting and maintaining its claim to independence by arms."

Both in this observation and in the question certified the word "people" is construed in the sense for which we are contending, and no better definition of it can be made than that given by the Chief Justice. It applies to a foreign power or "the rights of part of a foreign empire which asserts and is contending for its independence."

No less significance is to be attached to this expression because the case finally went off on the question of the construction of the piracy acts. It marks the meaning of the act by one who was a master of exposition.

The chief justice observes further that the rights of a colony or other portion of an established empire, and the conduct "which must be observed by the courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult. . . . They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as, to their own judgment, shall appear wise; to whom are intrusted all its foreign relations, than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other; may observe absolute neutrality; may recognize the new state absolutely; or may make a limited recognition of it. . . . It may be said generally, that if the government remains neutral and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war



Digitized by Google

authorizes and which the new government may direct against its enemy. To decide otherwise would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arraign the nation to which the court belongs against that party."

He concluded that persons or vessels employed in the service of "a self-declared government" acknowledged to be maintaining its separate existence by war must be permitted to prove the fact of their being actually employed in such service by the same testimony which would be sufficient to prove that such vessel or person was employed in the service of an acknowledged state.

"Any colony, district, or people" refer to a self-declared government or unrecognized state or portion of an established empire asserting its claim to independence by arms.

*United States* v. *Palmer*, 16 U. S. 3 Wheat. 610 (4: 471).

That the provision we have been considering only applies to recognized public war and the duty of neutrality as towards foreign powers and belligerents clearly appears when we examine the history of this legislation, executive and legislative.

On December 26, 1816, the South American wars then raging, President Madison communicated to Congress the following message:

"It is found that the existing laws have not the efficacy necessary to prevent violations of the obligations of the United States as a nation at peace *toward belligerent parties*, and other unlawful acts on the high seas, by armed vessels equipped within the waters of the United States. With a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States, I recommend to the consideration of Congress the expediency of such further legislative provisions as may be requisite for detaining vessels actually equipped or in a course of equipment with a warlike force within the jurisdiction of the United States or, as the case may be, for obtaining from the owners or commanders of such vessels adequate securities against the abuse of their armaments, with the exceptions in such provisions proper for the cases of merchant vessels furnished with the defensive armaments usual on distant and dangerous expeditions, and of a private commerce in military stores permitted by our laws and which the law of nations does not require the United States to prohibit."

Annals of Congress, 14th Cong. 2d Sess. 1816–17, p. 1079.

On January 1, 1817, Mr. Forsyth, the chairman of the committee on foreign relations, afterwards Secretary of State, addressed a letter to Mr. Monroe, then Secretary of State, as follows: "I am instructed by the committee on foreign relations to inquire what information has been given to the Department of State of violations or intended violations of the *neutral obligations* of the United States to *foreign powers* by the arming and equipment of vessels of war in our ports; what prosecutions have been commenced under the existing laws to prevent the commission of such offenses; what persons prosecuted have been discharged, in consequence of the defects of the laws now in force, and the particular provisions that have been found insufficient or for the want of which persons deserving punishment have escaped."

Annals of Congress, 14th Cong. 2d Sess. 1816–17, p. 1080.

This letter was written in order to obtain the information requisite for the framing of the proper amendments to existing law, in pursuance to the President's message, which had been referred to the committee.

From the passages underscored it is seen that the mind of Congress and of the Executive was solely directed to prevent violation of the obligations of the United States as a neutral towards "belligerent parties,' as mentioned in the message of the President, or "foreign powers," as mentioned in the letter of Mr. Forsyth.

The Secretary of State on January 10, 1817, communicated documents bearing on the inquiry of the committee on foreign relations. Among these was a communication from the district attorney of Louisiana giving "an enumeration of the cases in which individuals have been prosecuted for infringing or attempting to infringe our neutrality in aid of the government of New Spain, and in which vessels have been seized and libeled under the act of the 5th of June, 1794."

Annals of Congress, 14th Cong. 2d Sess. 1816–17, p. 1082.

On January 14, 1817, Mr. Forsyth, from the committee on foreign relations, reported a bill defining our neutral obligations as to fitting out of cruisers more fully than had been done in the previous act of 1794, but which still retained the words "prince or state."

*Id.* p. 477.

The debate in the House on the bill for enforcing neutrality was extensive, and exhibits the clear understanding of Congress that the amendments were for the purpose of preventing aid to the South American provinces, then recognized belligerents, and that the provision as to fitting out of vessels was intended solely to prevent such aid in this country to foreign powers at war as would violate our neutral obligations.

It was developed that strong pressure had been brought to bear upon our government to strengthen the neutrality law in order to prevent the South American colonies from obtaining necessary aid here, and preventive measures were suggested by the Spanish minister.

The only objections to the bill were founded on the allegation that it went too far in the enforcement of our neutral obligations towards belligerents. It was, indeed, contended by Mr. Randolph that the doctrine of neutrality had no application to the case, because one party was not recognized by this government as independent.

He was answered by Mr. Clay, who said: Whenever a war exists, whether between two independent states or between parts of a common empire, he knew of but two relations in which other powers could stand towards the belligerents. The one was that of neutrality and the other that of a belligerent. He hoped the gentleman from Virginia did not mean to contend (what would seem to be a consequence of his opinion) that we were a party to the war and an ally of Old Spain against her colonies.



Digitized by Google

Being then in a state of neutrality respecting the contest and bound to maintain it, the question was whether the provisions of the bill were necessary to the performance of that duty. Gentlemen have contended that this bill ought to be considered as intended merely to enforce our own laws—as a municipal regulation having no relation to the war now existing. It was impossible to deceive ourselves as to the true character of the measure. Bestow on it what denomination you please, disguise it as you may, it is a law, and will be understood by the whole world as a law to discountenance any aid being given to the South American colonies in a state of revolution against the parent country.

Annals of Congress, 14th Cong. 2d Sess. 1816–17, pp. 741, 742.

In answer to Mr. Clay, Mr. Calhoun expressed, in common with other gentlemen, his good wishes for the cause of the South American colonies against the mother country, but that such wishes would never influence him to permit a violation of our neutral obligations.

He alluded to the nature of the contest existing in the Spanish provinces, acknowledged that its analogy to our own situation in 1776 enlisted our sympathies, but all that could be expected of us by patriots was that we, being neutral, should do nothing to weaken their efforts or injure their cause.

On a later occasion he remarked that the law of 1794 had contemplated a war between two independent powers, not one between a mother country and its colonies; and if the defect of that law could not preserve our neutral character in the war now existing in the South he was willing to adopt the remedy.

Annals of Congress, pp. 747, 752.

Mr. Lowndes said: "The law of 1794 applying only to the case of war between two independent states, it ought, no doubt, to be extended to comprehend the contest referred to between Spain and her colonies, and not, when prosecutions are carried up to court for breaches of the law, deny that redress we profess to give. It appeared to him by some inadvertence, however, the committee had not gone far enough in amending the act of 1794, if it be amended so as to apply to governments not acknowledged to be independent," etc.

Annals of Congress, p. 755.

The bill, as it passed the House, contained the words "colony, district, or people" in addition to the words "prince or state."

Annals of Congress, p. 768.

In this form it was adopted by the Senate and became a law, with an amendment not here material.

Annals of Congress, p. 205.

The court will notice that the act of March 3, 1817 (3 Stat. at L. 370), is entitled "An Act More Effectually to Preserve the Neutral Relations of the United States." This act deals entirely with the fitting out or employment of armed cruisers of war.

Those amendments were urged upon our government by Spain as necessary, in order to include the South American wars, "for the purpose of putting a stop to the armaments making in different parts of the Union, in violation of the law of nations and of the treaty existing between his Catholic Majesty and this Republic."

Chevalier de Onis, Spanish Minister, to the Secretary of State, February 28, 1817.

Soon after the bill became the law of 1817, as early as March 15, 1817, the Secretary of State wrote to the Spanish minister, and by direction of the President inclosed a copy of the act "by which the President trusts that the Spanish government will perceive a new proof on the part of the United States of a desire to cultivate friendly dispositions towards Spain."

4 American State Papers, *Foreign Relations*, pp. 188, 189; 3 Whart. International Law Dig. p. 570, § 396.

The declarations of the Executive show that from the beginning of the South American revolutions they had been recognized as belligerents by this country.

President Monroe, in 1817, sent a message to Congress in which he said: "Through every stage of the conflict the United States have maintained an impartial neutrality, giving aid to neither of the parties in men, money, ships, or munitions of war. They have regarded the contest, not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal having as to neutral powers equal rights."

In 1856 Mr. Gorostiza, the Mexican minister, complained to our government that the Texans were being treated as belligerents, although he said the Texan movement "had not yet arrived at the point which those of the Spanish-Americans had attained when the United States allowed them the same right."

He cites the principles announced by Mr. Monroe, in his message of March 8, 1822, in which he says: "The United States has acknowledged the rights to which they (the Spanish provinces) were entitled by the law of nations, and as belligerents, so soon as their movement had assumed such a steady and consistent form as to render their ultimate success probable, and from that period they had been permitted to enter with their vessels of war into the ports of these United States," etc.

From this the minister inferred that until such movement had acquired such a steady and consistent form as to render probable the ultimate success of the said provinces in their struggle against Spain, the United States neither acknowledged their possession of any rights as belligerents nor admitted their vessels in the American ports. He concludes there was a great interval between the commencement of the movement and the period at which it could have acquired the steadiness and consistency deemed requisite.

Message of the President, H. R. Doc. No. 105, 24th Cong. 2d Sess. p. 136.

In answer to this communication the Secretary of State declined, in the name of the President, to allow the seizure of the Texan vessel or otherwise molest her. He said that such course "was in accordance with the principles in practice which have been invariably observed by this government from the first breaking out of the revolution among the Spanish provinces on this continent to the present time."

"It is obvious," he says, "that the exclusion



Digitized by Google

of the vessel of the one party from the ports of the United States and the admission of those of the other would be inconsistent with an impartial neutrality, and yet the President, in the same message from which Mr. Gorostiza has quoted, states that "through the whole of this contest the United States have remained neutral, and have fulfilled with the utmost impartiality all the obligations incident to that character." In a previous message of December 7, 1819, he observes: "In the civil war existing between Spain and the Spanish provinces in this hemisphere the greatest care has been taken to enforce the laws intended to preserve an impartial neutrality. Our ports have continued to be equally open to both parties and on the same conditions." This language plainly refers to the whole of the contest and the President is not to be understood in his subsequent message, to which Mr. Gorostiza has referred, as intending to say that the vessels of either party were only permitted to enter the ports of the United States from the period when the success of such party appeared to be probable. The construction which Mr. Gorostiza has given to the particular passage he has cited is not only contradicted by other passages from the messages of the same executive officer, but still more strongly, if possible, by the uniform acts of this government in that and similar cases. It is a well-known fact that the vessels of the South American provinces were admitted into the ports of the United States under their own or other flags from the commencement of the revolution, and it is equally true that throughout the various civil contests that have taken place at different periods among the states that sprung from that revolution the vessels of each of the contending parties have been alike permitted to enter the ports of this country. It has been held necessary, as a preliminary to the extension of the rights of hospitality to either, that the chances of the war should be balanced, and the probability of eventual success determined. For this purpose it has been deemed sufficient that the party had declared its independence and at the time was actually maintaining it. . . . The exclusion of the vessels of Texas while those of Mexico are admitted is not deemed compatible with the strict neutrality which it is the desire and the determination of this government to observe in respect to the present contest between those countries."

H. R. Doc. No. 105, 24th Cong. 2d Sess. 141, Sept. 30, 1836; 1 Whart. International Law Dig. p. 509, § 69.

The declarations of the department charged with our foreign relations state the historical fact upon which the legislation now under review is largely dependent, and which was the inspiration for its enactment.

Such was the actual condition of the foreign relations of this country when the neutrality act was amended, in 1817, as to armed cruisers, by inserting words which would cover every form of recognized war then being waged by colonies or dependencies for independence. Every such contest was covered and described either by the words "a prince, a state, a colony, a district, or a people," each of these expressions being used to designate some *de facto* power or belligerent. Between such contestants our government declared it would enforce neutrality and would allow neither to fit out war vessels in our ports.

It is not strange that Congress should not have contemplated an enforcement of a neutrality provision except in a case where there were belligerents. It could not suppose that ships of war would be fitted out in our ports when there was no recognized war, or that our government would support a fiction by refusing to recognize a state of war and yet enforce measures only applicable to such a state.

It was natural to assume that if a civil war should ever break out on the American continent the United States would recognize it as such and place both parties on an equal level as regards the enforcement of neutrality.

In *The Santissima Trinidad*, 20 U. S. 7 Wheat. 337 (5: 468), the policy of the United States is thus declared:

"The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war."

The enforcement of neutrality, in so far as we have been considering it, has been in accordance with these views.

In the case of Texas, its belligerency was recognized from the time the Declaration of Independence was announced, which was contemporaneous with the outbreak of the revolution.

That the provision regarding arming and fitting out cruisers in our ports, as originally enacted in 1794, had in view only restrictions of neutrality, and applied to belligerent powers alone cannot be doubted.

This provision was directed against the practices of Genet, acting on behalf of the French government, in the wars then raging in Europe. Its origin is clearly traced: "The practice of commissioning, equipping, and manning vessels in our ports to cruise on any of the belligerent parties is equally and entirely disapproved, and the government will take effectual measures to prevent a repetition of it."

3 Jefferson's Works, 105; 4 Jefferson's Works, 34.

The keynote to this legislation is found in President Washington's message, December 3, 1793, in which he says: "The original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military services, offensive or defensive, is deemed unlawful."

Mr. Wharton treats the provision under the head of "Issuing of belligerent cruisers," and the proposition which he announces as the result of the legislation is that the United States is "bound to restrain fitting out and sailing of armed cruisers of belligerents."

3 Whart. International Law Dig. p. 551, § 896.

In an opinion delivered in 1841, Mr. Legare declares "the object of the act of 1818 (same in act of 1817) was to prevent all equipping of vessels of war in our ports for a foreign power actually engaged in hostilities with a nation with which the United States are at peace, knowing the purpose for which they are to be employed.

3 Ops. Atty. Gen. 738.

But reliance is placed, as we understand,



Digitized by Google

upon the proclamations of the President during the present disturbances in Cuba as making the "insurrection sufficiently notorious and extensive to have received the attention of the government of this country for nearly two years past, although the insurgents have not received any recognition of belligerency."

These proclamations do not lend countenance to the present position of the government, for they do not recognize a public war existing in Cuba, much less a government or new power asserting its sovereignty.

The first proclamation of President Cleveland, June 12, 1895, mentions that "the island of Cuba is now the seat of serious civil disturbances, accompanied by armed resistance to the authority of the established government of Spain."

Citizens of the United States are enjoined from taking part in such "disturbances."

The second proclamation, July 27, 1896, mentions that "civil disturbances and armed resistance to the established government of Spain continue to prevail in said island of Cuba."

This proclamation is solely concerned with the enforcement of U. S. Rev. Stat. § 5286, regulating military expeditions, and refers to the decision of this court in the case of *Wiborg* v. *United States*, 163 U. S. 632 (41: 289).

"Civil disturbances" which may proceed from brigandage or factions can hardly be deemed the equivalent of a public war, or to constitute those participating in them "a people," in view of the construction placed upon this expression in the judicial and political declarations of this country.

If the argument of appellant is correct, there results a condition opposed to the very conception of neutrality, for the courts would be obliged to say that those causing civil disturbance constitute "a people" for the purpose of punishment under the act, and yet would be obliged to deny them their standing as such under the neutrality laws, because the political departments of the government have not recognized their belligerency or political existence.

Spain would obtain all the advantages to neutrality without incurring any of its obligations; it would be the enforcement of a simulated neutrality, a neutrality in name only, as it would be entirely in her favor.

It would enable Spain to proceed against those opposing her in Cuba as engaged in civil commotion only, while calling upon this nation to assist her by enforcing a neutrality provision applying to public war waged by a belligerent.

This expression, "any people," cannot be disassociated from the terms which precede it —any foreign prince or state or any colony or district.

In the language of Lord Kenyon in *Nesbitt* v. *Lushington*, 4 T. R. 783, "the meaning of the word 'people' may be discovered here by the accompanying words, *noscitur a sociis*. It means, the 'ruling power of the country.'"

It would be strange in the light of history, if all the other terms refer to the people in their collective and political capacity, a body politic or assuming to be a body politic, while this expression, "a people," may be construed to refer in another sense to persons in their individual capacity.

The court can hardly treat the expressions in the President's message as a political declaration of the existence of a colony, a district, or a people at war with Spain, and how can the insurgents be declared by the court to constitute "a people" without such declaration.

If the proclamations can be resorted to by courts as evidence of a status possessed by the insurgents, for one purpose, they must be equally available as establishing such status for all purposes of neutrality. It would not be fair to hold that these documents contain a sufficient declaration of the existence of "a people" for the purpose of punishing those who act here in their service, but not sufficient to constitute "a people" entitled to the rights of neutrality under our laws. The court will not close its eyes and open them again to suit the pleasure of the government for the time being.

The government places much reliance upon the opinion of Attorney General Hoar as to the construction of the neutrality clause in question.

This opinion is thus stated by Mr. Wharton: "The neutrality act of 1818 is not restricted in its operation to cases of war between two nations or where both parties to a contest have been recognized as belligerents—that is, as having a sufficiently organized political existence to enable them to carry on war. It would extend to the fitting out and arming of vessels for a revolted colony whose belligerency had not been recognized, but it should not be applied to the fitting out, etc., of vessels for the parent state for use against a revolted colony whose independence had not in any manner been recognized by our government."

3 Whart. International Law Dig. p. 628, § 402.

The question before the Attorney General was different from the one now presented to the court.

The point submitted was whether proceedings could be taken under the act against Spanish vessels fitted out in this country, on the ground that they were procured to be fitted out and armed with intent that they should be employed in the service of Spain, a foreign state, with intent to cruise or commit hostilities against the subjects, citizens, or property of a "colony" district, or people, with whom the United States were at peace, namely, a "colony, district, or people" claiming to be the Republic of Cuba. It was held that in the absence of any political recognition of such a state the courts must conform to the action of the government.

It was further held that Spain could not be said to commit hostilities against any party by procuring armed vessels for the purpose of enforcing its own recognized authority within its own dominions.

Here is an admission that the hostilities were not against "a people."

The attention of the attorney general was called to the fact that libels had been filed to procure the condemnation of vessels on the ground that they were being fitted out and armed with intent to be employed in the service of a "colony, district, or people," *viz.*, the "colony, district, or people of Cuba," and it was argued that as the government in those libels had asserted that Cuba was a "colony, district, or people" capable of committing hostilities against Spain, the law equally applied



Digitized by Google

) an armament procured or fitted out by Spain or the purpose of hostilities against Cuba.

This proposition the Attorney General decied.

We do not feel called upon to enter the question of the soundness of the opinion.

In the present case there is no allegation hat Cuba as a "colony, district, or people" as arisen against Spain.

The case before the Attorney General involved the assertion of a pretended government, claiming to be the Republic of Cuba, and therefore might well be said to come within the act as a "colony, district, or people."

The argument of inconvenience is made.

It is said that if under the present condition of affairs proceedings cannot be had against vessels under § 5283, there is no penalty provided by law. This argument, as remarked in the court below, was as applicable under the original act of 1794 as it is now, under the act of 1818, re-enacted in U. S. Rev. Stat. § 5283.

Under the first act it was held, as we have seen, that the words "foreign prince or state" did not embrace sections of an empire not recognized by the United States.

In order to cover such cases, Congress resorted to additional legislation.

It was not supposed that the courts by any argument *ab inconvenienti* could so stretch the act as to cover such cases.

The result, as we have shown, was the act of 1817, which added words to cover sections of an empire which had separated, or were endeavoring to separate, from the mother country.

There are ample provisions of municipal law to punish those who set on foot enterprises for the purpose of committing hostilities against a power with which we are at peace.

Section 6 of the act of 1818 (3 Stat at L. 448), re-enacted in U. S. Rev. Stat. § 5286, prohibits military enterprises to be carried on "thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace."

This section provides fully for offenses against the peace of a foreign state, including enlistments.

It applies as well in times of peace as in times of war. There is no requirement that the expedition or enterprise should be in the service of any government or "people."

It is only necessary that it should be directed against the territory or dominions of a "people."

This use of the words "any people" conclusively shows that in the sense of Congress it meant a power exercising or asserting dominion, and is therefore of great significance in the argument.

Under this clause no forfeiture is provided.

For any offenses committed at sea amounting to piracy under our laws, those laws provide ample penalties.

But if at any time Spain should think it necessary for this country to enforce its law regarding the fitting out of belligerent cruisers, the remedy is in her own hands; she has but to recognize a state of war.

The act of April 20, 1818 (3 Stat. at L. 448), is entitled "An Act in Addition to the Act for the Punishment of Certain Crimes against the United States and to Repeal the Acts Therein Mentioned."

This act contains the provisions regarding military enterprises and other operations directed against foreign powers.

It embraces criminal legislation of a purely domestic character, and also re-enacts the former laws affecting our neutral relations.

*Wiborg* v. *United States*, 163 U. S. 632 (41: 289), involved the construction of what constituted an expedition or enterprise under U. S. Rev. Stat. § 5286. This question has no immediate bearing on the case now under consideration.

No argument can properly be made on the ground that the United States has any duties to perform other than those specified in its legislation, or that citizens can be proceeded against criminally except as there provided.

This has always been determined by our government.

Neither the United States nor Spain admits there exists a state of belligerency, and in its absence there cannot exist any obligations of neutrality.

In preparing the foreign enlistment act of 1819, taken from our act, Parliament added to the language of our statute, "or part of any province, or people or of any person exercising or assuming to exercise any powers of government in or over any foreign state, colony, province or parts of any province, or people." 59 Geo. III, chap. 59, p. 7.

This additional language was undoubtedly inserted in view of the pronounced object of the language of the amendatory acts of 1817 and 1818, as applying only to an empire or sections of an empire, and in view also of the construction of the word "people" by our decisions and in the light of the English case of *Nesbitt* v. *Lushington*, 4 T. R. 783, defining the meaning of the same expression.

So entirely sufficient was the provision regarding hostile expeditions supposed to be that it was not until 1870 that Parliament, in view of the Alabama controversy, passed an act covering the fitting out of belligerent cruisers.

If we examine the modern judicial precedents in this country in which the point has been debated, we will not find any opposition to the construction for which we contend, but much to support it.

They are fully set forth in the opinion of the court below, and need not be here largely discussed.

In *Wiborg* v. *United States*, this court, speaking through Mr. Chief Justice Fuller, says:

"Section 5283 deals with fitting out and arming vessels in this country in favor of one foreign power as against another foreign power with which we are at peace." 163 U S. 632 (41: 289).

In the case of *The Itata*, 56 Fed. Rep. 505, 15 U. S. App. 1, in some respects similar to the present controversy, the district court of the United States for the district of California, in an opinion, said as follows: "Prior to the passage of the act of April 20, 1818, the Supreme Court of the United States, in the case of *Gelston* v. *Hoyt*, 16 U. S. 3 Wheat. 246 (4: 381), speaking through Mr. Justice Story, held that § 3 of the act of 1794, prohibiting the



Digitized by Google

fitting out any ship, etc., for the service of any foreign prince or state, to cruise against the subjects, etc., of any foreign prince or state with which the United States were at peace, did not apply to any new government unless it had been recognized by the United States or by the government of the country to which such new country belonged, and that a plea which set up a forfeiture under that act, in fitting out a ship to cruise against such new state, must aver such recognition, or it is bad. Congress, in passing the subsequent act of April 20, 1818, by which the provision referred to of the act of 1794 was, in substance, re-enacted, must be presumed to have known the construction that had been theretofore put by the Supreme Court upon the words 'prince or state' in the act of 1794, and with that knowledge in passing the act of 1818 inserted in the same clause the words 'colony, district, or people.' This was done according to Dana's Wheaton, International Law, § 439, note 215, and Wharton, International Law Dig. 561, upon the suggestion of the Spanish minister that the South American provinces then in revolt and not recognized as independent, might not be included in the word 'state.' But in every one of these instances the United States had acknowledged the existence of a state of war and, as a consequence, the belligerent rights of the provinces."

*United States* v. *Trumbull*, 48 Fed. Rep. 99.

At October term, 1892, the government filed an elaborate brief in support of a petition for a certiorari to bring up this decision, but it was denied without prejudice to a renewal.

After the refusal of the motion the circuit court of appeals for the seventh circuit affirmed the decree of the district court.

*The Itata*, 56 Fed. Rep. 505, 15 U. S. App. 1.

No further attempt was made by the government to obtain a review of either of these decisions.

President Harrison was of opinion that the matter was a proper one to call to the attention of the legislature. In his message, December 9, 1891, he said: "A trial in the district court of the United States for the southern district of California has recently resulted in a decision holding, among other things, that, inasmuch as the congressional party had not been recognized as a belligerent, the acts done in its interest could not be a violation of our neutrality laws. From this judgment the United States has appealed, not that the condemnation of the vessel is a matter of importance, but that we may know what the present state of our law is, for, if this construction of the statute is correct, there is obvious necessity for revision and amendment."

There have been several cases decided in the district courts involving the condemnation of vessels where the question as to the application of the statute was not raised or discussed by the court.

*United States* v. *The Mary N. Hogan*, Brown, Justice, 18 Fed Rep. 528; *United States* v. *214 Boxes of Arms*, 20 Fed. Rep. 50; *The City of Mexico*, 28 Fed Rep. 148.

The same judge who decided the first case also decided that of *The Carondelet*, 37 Fed. Rep. 800.

There the question was much discussed, and although the libel was dismissed on a different ground, the judge leaves no doubt as to his views. The question was whether a vessel entering the service of the faction under Hippolyte, in Hayti, which had not been recognized, could be said "to enter the service of a foreign prince or state, or of a colony, district, or people, unless our government had recognized Hippolyte's faction as at least constituting a belligerent, which it does not appear to have done."

The judge remarked that the statute was a highly criminal and penal one; that it was not to be enlarged by construction beyond the fair import of its terms.

In *United States* v. *Hart*, the same judge said: "Section 5283 deals with armed cruisers, designed to commit hostilities in favor of one foreign power as against another foreign power with which we are at peace." 74 Fed. Rep. 724.

In the case of *The Conserva*, 38 Fed. Rep. 432, Judge Benedict held that the language of U. S. Rev. Stat. § 5283, as to the commission of hostilities against the subjects, citizens, or property of a foreign prince or people, did not include factions engaged in insurrection who were not recognized by the United States as belligerents.

The question was whether the section applied as neither Hippolyte nor Legitime, who were struggling for supremacy in Hayti, had been recognized by our government as belligerent powers.

"In the absence of proof of that fact, the fitting out of a vessel with intent to enter the service of one to commit hostilities against the other is not brought within the scope of the statute."

The Attorney General states the case as bringing up the question "whether the words colony, district, or people include insurrectionary bodies like the present Republic of Cuba, whose belligerency, technically speaking, has not yet been recognized by the executive department of our government."

We deny that any such question is presented by the record or can arise even if resort is had to the various official documents relied on as supplying the omissions of the libel. No such body as the "Republic of Cuba" is anywhere referred to, and the statement of the Attorney General is the first announcement of the existence of a Republic of Cuba yet made by any responsible officer of the government.

This suggestion, unsupported by the record, is designedly made for the purpose of creating the belief that somewhere it has been stated that "certain people" or "insurgents," as stated in the libel, constituted or claimed to constitute the "Republic of Cuba."

If such was the fact a different question would be presented from that now before the court—the case of a government, or community claiming to be a government, whether right or wrong.

In such a case argument might be admissible in support of the position that such a body or government might properly be deemed "a people."

As to the reference to "the recognition of belligerency, technically speaking," repeated throughout the brief, we are unable to understand what is meant.



Digitized by Google

Belligerency is simply a state of war, and ust be recognized as such or not recognized all.

If it is not recognized it is because the neu- al power does not care to do so or because the ovement has not attained the proportions of ar.

Nor can there be any mistake as to the mean- g of neutrality, which is inseparable from a lligerency to which the neutral is not a party.

Neutrality is a status clearly defined in law, id can only arise where there is war recog- ized as such.

It is simply creating confusion to speak bout "a recognition of insurgency" as distin- uished from a recognition of belligerency.

The words "insurgents" or "revolutionists" ave no legal meaning; when they are recog- ized by a neutral government such recogni- on amounts to an admission of their belliger- ncy or independence.

But so important is it to the case of the gov- rnment that they should show an organized ommunity or power corresponding to the vords "a people" that, after referring to the present Republic of Cuba," whose existence or the first time is here avowed, reference is fterwards made to the "Cuban insurrectionary ody." Here again we have an effort to supply he defective statements of the record so as to how a governmental organization or political ntity.

As to such a "body" it is said that if the allegations of the libel are not sufficient, which state that the persons or insurgents constituted "a people," the decree should be reversed, because such body might have been described in the libel as a "colony" or "district." The answer to this is that no such question is now presented. There was no such allegation in the libel nor was the court below requested to allow any such amendment.

All the court here now can do is to decide whether, on the record presented and the charge in the libel, the court below was justified in sustaining the exceptions.

The case is one of quasi-criminal nature, involving the forfeiture of property as a punishment for a criminal offense.

In such a case the rules of orderly procedure and adherence to law must be firmly pursued.

It is said that the history of the act tends to show "that it was intended to cover every revolutionary body, recognized or unrecognized, which made bona fide claims to rights of sovereignty."

But where is it shown in this record that there exists "a revolutionary body claiming the rights of sovereignty?"

Reference is made to the act of March 10, 1838, chap. 31, which expired in two years. This is mentioned as a "neutrality act," and it is said that the words "colony, district, or people," were regarded as sufficient for the case.

The fact is that the act was one of domestic legislation and not at all one of neutrality. It was aimed at certain crimes and disturbances of the peace, then threatening on the Canadian border. The words "colony, district, or people," are only used when it is provided that the disturbance by our citizens of the peace of such countries should constitute a crime entailing certain forfeitures.

*Mr.* **A. W. Cockrell,** for respondent:

The statute is penal, and the government, in enforcing it, cannot eliminate a single fact or circumstance, required by the statute to make out the forfeiture therein denounced.

If it be that the libel may dispense with the allegation required to be proved of a single act therein prescribed, it may dispense with another.

What constitutes the elements making up the offense condemning the vessel to forfeiture it is for the legislature to determine.

The court possesses no dispensing power.

Now, of what acts, or facts, circumstances, and conduct is forfeiture predicated?

Certainly not of the mere act of arming, etc., a vessel. The act of arming, etc., a vessel, is punishable only when that act of arming, etc., done as therein provided, is accompanied by the intent, imputed to the person or persons therein specified, of doing the thing therein provided against. Is it not idle to say that the vessel may be forfeited, under this statute, for the acts or doings, therein specified, disassociated from the intent therein imputed to the persons therein specified? If it be that the acts and doings therein specified must be accompanied with the intent therein specified before persons can be punished thereunder, it follows the vessel cannot be condemned to forfeiture otherwise than upon allegations and proof showing those acts and doings and allegations and proof showing the intent, therein denounced, with which they were committed.

Under any other construction, a vessel may be condemned to forfeiture upon allegations and proof short of those required to punish the offending persons. Whereas, the plain, imperative, unambiguous language of the statute is "and every such vessel," etc.; that is, a vessel in respect of which these acts and doings have been committed; a vessel in respect of the arming of which this intent existed; and, equally and alike, a vessel in respect of which the intent of the offending persons therein denounced has been ascertained by their conviction thereof.

Condemnation to forfeiture is not, by the lawmaking power, predicated of any other vessel than such vessel. Forfeiture is denounced against a vessel so fitted out and armed, with the intent therein specified by the offending persons so fitting her out; and of which acts and doings, with such intent, the offending persons have been convicted; and forfeiture is denounced against no other than "such" vessel.

In seeking, under this libel, to make a case of forfeiture independently of and without reference to the ascertained guilt of the offending persons, the government insists that the vessel identified by the statute as such vessel means the vessel so fitted out and armed with the intent denounced, but not a vessel in respect of whose fitting out and arming offending persons have been convicted; because, speaking through the learned district attorney, it said, and was logically forced to say, the vessel may be liable to condemnation, under this statute, and the offending persons acquitted.



Digitized by Google

In support of this unnatural, forced construction, reliance is had on *The Ambrose Light*, 25 Fed. Rep. 415.

This was a proceeding *in rem*, a prize case. It was held that "the condemnation of a vessel as piratical does not imply a criminal liability of her officers and crew."

So far from being a case of prize, the proceeding against The Three Friends is based on one and the same section which makes the criminal intent of the offending persons an essential ingredient of their conviction, and an essential ingredient of the forfeiture of the vessel.

And so it is, while "as regards acts that constitute undoubted piracy, there may be valid personal defense of the officers and crew," as suggested by Marshall, Ch. J., in *United States* v. *Klintock*, 18 U. S. 5 Wheat. 144, 149 (5: 55, 56), there can be, under U. S. Rev. Stat. § 5283, no forfeiture of the vessel divorced from the criminal intent of the offending persons.

Nor does the case of *The Palmyra*, 25 U. S. 12 Wheat. 1 (6: 531), in its reasoning or conclusion furnish support to the contention of the government, that the vessel may be condemned, and the offending persons acquitted, under U. S. Rev. Stat. § 5283. This was a case of seizure under the piracy act of March 3, 1819, continued in force by the act of May 15, 1820.

Recurring to the statute, construed in the *Palmyra Case*, and contrasting it with U. S. Rev. Stat. § 5283, it is obvious the reasoning employed by Story, Justice, is wholly inapplicable to the language and intent of Congress in enacting U. S. Rev. Stat. § 5283. The one denounces an act of piratical aggression done or attempted, and forfeiture is pronounced upon the guilty thing—the instrument of this act of piratical aggression thus done or attempted. The other concerns itself solely with a criminal intent on the part of the offending persons; no act of hostile aggression, done or attempted, is made a constituent of the offense denounced. In the *Palmyra Case*, it was held that whether a previous conviction of the offending person was a necessary basis for the proceeding *in rem*, under the statute then applied, is "of a far more important and difficult nature." The doctrine announced, that the proceeding *in rem* was wholly independent of the proceeding *in personam*, was adjudged to be "deduced from a fair interpretation of the legislative intention apparent upon its enactment." And, inasmuch as there was "no act of Congress which provides for the personal punishment of offenders, who commit the piratical aggression . . . 'within the meaning of those acts,' the construction contended for, going as it did 'wholly to defeat their operation and violate their plain import,' was held to be 'utterly inadmissible.' And, the necessary conclusion reached by this reasoning was that 'no personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature.'"

In the case of *The Meteor*, 17 Fed. Cas. 181, Betts, District Judge, held, upon an elaborate review of the authorities, that prior conviction of the offender need not precede a condemnation of the vessel. It is submitted his reasoning, applied as it was to the section discussed, upon a consideration of the authorities cited, will not bear the test of a close analysis on; the contrary, it conducts us to the opposite conclusion.

In each of the cases cited, the proceeding was *in rem* and the forfeiture denounced was predicated upon acts, not upon intent; in each, the condemnation of the vessel was based upon the act done by the vessel as the guilty instrument, irrespective of the claimant's intent. That there are many cases in which the ship becomes forfeited by the acts of the master, and that the owner impliedly submits to involve his vessel in whatever unlawful or wanton acts may be committed by those in charge of her, is not only conceded but affirmed. But this responsibility is enforced, and the ship is regarded as the guilty instrument or thing to which the forfeiture attaches, "from the necessity of the case as the only adequate means of suppressing the offense or wrong, or insuring indemnity to the injured party" as affirmed by Mr. Justice Story, in *United States* v. *The Malek Adhel*, 43 U. S. 2 How. 210 (11: 239), quoted by Judge Betts.

Under the statute upon which this libel is based no wrong doing in which the vessel is made the guilty instrument is required to consummate the forfeiture. The guilty intent of the offending person is attached by the mandate of the statute to the vessel, and forfeiture is denounced because of this guilty intent. The original act (act of June 5, 1794, chap. 50, § 3), lends strong support to the contention of claimants. In the structure of the section as originally passed, the language condemning the vessel to forfeiture, following upon the ascertained guilt of the offending person, was not separated from such ascertainment by the intervention of a semicolon.

In the case of *Gelston* v. *Hoyt* it was argued in this court, in March, 1817, by Mr. Hoffman and Mr. D. B. Ogden for defendant in error (16 U. S. 3 Wheat. 296 (4: 394), that "by every just rule of construction the proceeding by indictment against the offender and his conviction must precede the suit *in rem* and the forfeiture of the vessel. The phraseology of the act is different from all other statutes. By those statutes, the revenue officers have power to seize and proceed *in rem* against the thing as forfeited, independent of any criminal proceedings against the offending individuals. By this act the forfeiture of the thing is made to depend upon the conviction of the person, and the President alone has power to seize, and that only as a precautionary measure, to prevent an intended violation of the laws." The case stood over for reargument, and was reargued February 23, and decided February 27, 1818.

And the act in its present form was enacted April 20, thereafter. And although the argument of these gentlemen prevailed on other propositions hereinafter discussed, and the court was not required to pass upon this special contention, it could not have escaped the attention of the Congress when in April, 1818, this statute was subjected to revision. If, in this revision, Congress had purposed to authorize a seizure and forfeiture of the thing, independent of any criminal proceedings against offending individuals, it was its duty to have recast



Digitized by Google

the phraseology of the statute and put it in harmony with other statutes empowering revenue officers to seize and proceed *in rem* against the thing seized for forfeiture.

The libel excepted to not only fails to allege that the necessary criminal intent of the offending persons has been in any wise ascertained; it does not even show who the offending persons are.

The language of the statute clearly shows that the act of arming must be accompanied with the specific intent therein denounced, to consummate the offense. It follows the specific intent must be laid in the identical persons, and none other, so fitting out the vessel.

Can it be tolerated that a libel setting up the existence of this essential fact, the specific intent denounced, apprises the owners of the vessel, whose property is sought to be condemned, of the nature, essence, and identity of the offense charged, when it alleges that the government is not informed of the names of the persons so fitting out the vessel?

Is it not apparent, under any possible interpretation of the statute, that the identity of the persons, for whose intent in doing the acts denounced the vessel is sought to be forfeited, is an essential of the offense charged? Can the government establish the specific intent required without proving its existence, at the time of fitting out, etc., in the mind of the identical person so fitting out?

Can it establish the identity of such persons without charging it as a part of the libel?

In no system of pleading is it permissible to supplement paucity of allegations by fullness of proof.

But the libel excepted to in the pending case does not even allege this primary, fundamental fact, without which "no forfeiture could be incurred."

The word "people," as used in this statute, was defined in *United States* v. *Quincy*, 31 U. S. 6 Pet. 445 (8: 458), to be merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of Congress to a foreign power.

It follows that the word "colony," and the word "district," each is also descriptive of the power in whose service the vessel is to be employed; each is also one of the denominations applied by the act of Congress to a foreign power. It is equally clear that the added words, "colony, district, or people," do not mean a part of a colony, a part of a district, or a part of a people or many people. They mean a colony, district, or people, constituting a body politic, that is charged with recognized political power, a foreign power.

That it had been attempted to import into U. S. Rev. Stat. § 5283, the effect given to § 7 of the foreign enlistment act (59 Geo. III.) in the numerous cases, and the discussions thereof arising thereunder, could not, it is presumed, have escaped the attention of the supreme court; the *Itata Case* had been before it on application for a writ of certiorari; nor was this court unaware of the recommendations of President Harrison to Congress based on the decision of the *Itata Case;* nor was it unaware that the Congress had failed to respond to those recommendations, when in May, 1896, in *Wiborg* v. *United States*, 163 U.S. 632 (41: 289), it analyzed the statutes grouped under title 67, *Neutrality Laws*, and interpreted their effect as a system.

It is apparent this court, in the *Wiborg Case*, brought in opposition and contrast the eleven sections from 5281 to 5291, for the purpose of defining and ascribing to each its appropriate functions in the statutory system thereby enacted, and declared that " § 5283, deals with fitting out and arming vessels in this country in favor of one foreign power against another foreign power with which we are at peace."

The court, after this analysis of the sections commented on, proceeds to set forth in terms § 5286, under which Wiborg was indicted. And in the analysis of this section the court makes it apparent, from its terms as contrasted with § 5283, theretofore quoted also at length, that § 5286, while its general purpose "was undoubtedly designed to secure neutrality in wars between two other nations, or between two contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency."

That this language applies to § 5286 and not to § 5283 is obvious, not only from the context, but also because § 5286 was the only section under consideration. Its meaning and application of the facts under consideration were to be ascertained by reference to the statutory system as a whole; and the court demonstrated that, though this section was placed under title 67, headed *Neutrality*, and though it did tend to secure neutrality in wars between foreign powers or recognized belligerencies, its operation was not necessarily dependent on such a recognized state or status of belligerency. And the court enforces this reasoning by reference to its language, following as it does the recommendations of President Washington.

*Mr.* **Calderon Carlisle,** as *amicus curiæ*, filed a brief, by permission of the court.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

It is objected that the decree was not final, but inasmuch as the libel was ordered to stand dismissed if not amended within ten days, the prosecution of the appeal within that time was an election to waive the right to amend and the decree of dismissal took effect immediately.

In admiralty cases, among others enumerated, the decree of the circuit court of appeals is made final in that court by the terms of § 6 of the judiciary act of March 3, 1891, but this court may require any such case, by certiorari or otherwise, to be certified "for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court," that is, as if it had been brought directly from the district or the circuit court. 26 Stat. at L. 826, chap. 517, § 6.

Accordingly the writ of certiorari may be issued in such cases to the circuit court of appeals, pending action by that court, and, al-



Digitized by Google

though this is a power not ordinarily to be exercised (*American Const. Co.* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 385 [37: 486, 492]), we were of opinion that the circumstances justified the allowance of the writ in this instance, and the case is properly before us.

We agree with the district judge that the contention that forfeiture under U. S. Rev. Stat. § 5283, depends upon the conviction of a person or persons for doing the acts denounced is untenable. This suit is a civil suit *in rem* for the condemnation of the vessel only, and is not a criminal prosecution. The two proceedings are wholly independent and pursued in differ-[50] ent *courts, and the result in each might be different. Indeed, forfeiture might be decreed if the proof showed the prohibited acts were committed though lacking as to the identity of the particular person by whom they were committed. *The Palmyra*, 25 U. S. 12 Wheat. 1 [6: 531]; *The Ambrose Light*, 25 Fed. Rep. 408; *The Meteor*, 17 Fed. Cas. 178.

*The Palmyra* was a case of a libel of information against the vessel to forfeit her for a piratical aggression, under certain acts of Congress which made no provision for the personal punishment of the offenders, but it was held that, even if such provision had been made, conviction would not have been necessary to the enforcement of forfeiture. And Mr. Justice Story, delivering the opinion, said:

"It is well known that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the Crown. The forfeiture did not, strictly speaking, attach *in rem;* but it was a part, or at least a consequence, of the judgment or conviction. It is plain, from this statement, that no right to the goods and chattels of the felon could be acquired by the Crown by the mere commission of the offense; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the Crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not devested until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute, *in rem*, cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this whether the offense be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the admiralty. Many cases exist where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each [51] other. But the practice has been, *and so this court understands the law to be, that the proceeding *in rem* stands independent of and wholly unaffected by any criminal proceeding *in personam.*" And see *United States* v. *The Malek Adhel*, 43 U. S. 2 How. 210 [11: 239]; *United States* v. *The Little Charles*, 1 Brock. 347.

The libel alleged that the vessel was "furnished, fitted out, and armed, with intent that she should be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the King of Spain, in the island of Cuba, to cruise and commit hostilities against the subjects, citizens, and property of the King of Spain, in the island of Cuba, with whom the United States are and were at that date at peace."

The learned district judge held that this was insufficient under U. S. Rev. Stat. § 5283, because it was not alleged "that said vessel had been fitted out with intent that she be employed in the service of a foreign prince or state, or of any colony, district, or people recognized as such by the political power of the United States."

In *Wiborg* v. *United States*, 163 U. S. 632 [41: 289], which was an indictment under § 5286, we referred to the eleven sections from 5281 to 5291, inclusive, which constitute Title LXVII. of the Revised Statutes, and said: "The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency," and the consideration of the present case arising under § 5283 confirms us in the view thus expressed.

It is true that in giving a *résumé* of the sections, we referred to § 5283 as dealing "with fitting out and arming vessels in this country in favor of one foreign power as against another foreign power with which we are at peace," but that was matter of general description, and the entire scope of the section was not required to be indicated.

The title is headed "Neutrality," and usually called by way of convenience the "neutrality act," as the term "foreign enlistment act" is applied to the analogous British statute, but this does not operate as a restriction.

*Neutrality, strictly speaking, consists in [52] abstinence from any participation in a public, private, or civil war, and in impartiality of conduct toward both parties, but the maintenance unbroken of peaceful relations between two powers when the domestic peace of one of them is disturbed is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency. And, as mere matter of municipal administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith towards friendly nations requires their prevention.

Hence, as Mr. Attorney General Hoar pointed out (13 Ops. Atty. Gen. 178), though the principal object of the act was "to secure the performance of the duty of the United States, under the law of nations, as a neutral nation in respect of foreign powers," the act is nevertheless an act "to punish certain offenses against the United States by fines, imprisonment, and forfeitures, and the act itself defines the precise nature of those offenses."

These sections were brought forward from the act of April 20, 1818 (3 Stat. at L. 447, chap. 89), entitled "An Act in Addition to the 'Act for the Punishment of Certain Crimes



Digitized by Google

against the United States,' and to Repeal the Acts therein Mentioned," which was derived from the act of June 5, 1794 (1 Stat. at L. 381, chap. 50), entitled "An Act in Addition to the 'Act for the Punishment of Certain Crimes against the United States,'" and the act of March 3, 1817 (3 Stat. at L. 370, chap. 58), entitled "An Act more Effectually to Preserve the Neutral Relations of the United States."

The piracy act of March 3, 1819 (3 Stat. at L. 510, chap. 77; U. S. Rev. Stat. §§ 4293-4296, 5368) supplemented the acts of 1817 and 1818.

The act of 1794, which has been generally recognized as the first instance of municipal legislation in support of the obligations of neutrality, and a remarkable advance in the development of international law, was recommended to Congress by President Washington in his annual address on December, 3, 1793; was drawn by Hamilton; and passed the Senate by [53] the casting vote of Vice President Adams. Ann. 3d Cong. 11, 67. Its enactment grew out of the proceedings of the then French Minister, which called for President Washington's proclamation of neutrality in the spring of 1793. And though the law of nations had been declared by Chief Justice Jay, in his charge to the grand jury at Richmond, May 22, 1793 (Whart. St. Tr. 49, 56), and by Mr. Justice Wilson, Mr. Justice Iredell, and Judge Peters, on the trial of Henfield in July of that year (Whart. St. Tr. 66, 84), to be capable of being enforced in the courts of the United States criminally, as well as civilly, without further legislation, yet it was deemed advisable to pass the act in view of controversy over that position, and, moreover, in order to provide a comprehensive code in prevention of acts by individuals within our jurisdiction inconsistent with our own authority, as well as hostile to friendly powers.

Section 5288 of the Revised Statutes is as follows:

"Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming, of any vessel with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than $10,000, and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States."

By referring to § 3 of the act of June 5, 1794, § 1 of the act of 1817, and § 3 of the act of 1818,* which are given in the margin, † it [54] will be seen that the words "or of any colony, district, or people" were inserted in the original law by the act of 1817, carried forward by the act of 1818, and so into § 5283.

The immediate occasion of the passage of the act of March 3, 1817, appears to have been a communication, under date of December 20, 1816, from the Portuguese minister to Mr. Monroe, then Secretary of State, informing

†Act of June 5, 1794: "Sec. 3. That if any person shall within any of the ports, harbors, bays, rivers, or other waters of the United States, fit out and arm or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any other foreign prince or state to cruise or commit hostilities upon the subjects, citizens, or property of any other foreign prince or state with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid, every such person so offending shall upon conviction be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so as the fine to be imposed shall in no case be more than $5,000 and the term of imprisonment shall not exceed three years, and every such ship or vessel with her tackle, apparel, and furniture together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof shall be forfeited, one half to the use of any person who shall give information of the offense, and the other half to the use of the United States."

Act of March 3, 1817: "That if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming, of any such ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people to cruise or commit hostilities, or to aid or co-operate in any warlike measure whatever, against the subjects, citizens, or property, of any prince or state, or of any colony, district, or people with whom the United States are at peace, every such person so offending shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so as the fine to be imposed shall in no case be more than $10,000, and the term of imprisonment shall not exceed ten years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited, one half to the use of any person who shall give information, and the other half to the use of the United States."

Act of April 20, 1818: "Sec. 3. That if any person shall, within the limit of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming, of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than $10,000, and imprisonment not more than three years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States."



Digitized by Google

him of the fitting out of privateers at Baltimore to act against Portugal, in case it should turn out that that government was at war with the "self-styled government of Buenos Ayres," and soliciting "the proposition to Congress of such provisions of law as will prevent such attempts for the future." On December 26, 1816, President Madison sent a special message to Congress, in which he referred to the 55] inefficacy of existing laws "to *prevent violations of the obligations of the United States as a nation at peace towards belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States," and, "with a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States," recommended further legislative provisions. This message was transmitted to the minister December 27, and he was promptly officially informed of the passage of the act in the succeeding month of March. *Geneva Arbitration Case*, United States, 138. In Mr. Dana's elaborate note to § 439 of his edition of Wheaton, it is said that the words "colony, district, or people," were inserted on the suggestion of the Spanish minister that the South American provinces in revolt and not recognized as independent might 56]not be included in *the word "state." Under the circumstances this act was entitled as "to Preserve the Neutral Relations of the United States," while the title of the act of 1794 described it as "in addition" to the crimes act of April 30, 1790 (1 Stat. at L. 112, chap. 9), and the act of 1818 was entitled in the same way. But there is nothing in all this to indicate that the words "colony, district, or people" had reference solely to communities whose belligerency had been recognized, and the history of the times, an interesting review of which has been furnished us by the industry of counsel, does not sustain the view that insurgent districts or bodies, unrecognized as belligerents, were not intended to be embraced. On the contrary, the reasonable conclusion is that the insertion of the words "district or people," should be attributed to the intention to include such bodies, as, for instance, the so-called Oriental Republic of Artigas, and the governments of Petion and Christophe, whose attitude had been passed on by the courts of New York more than a year before in *Hoyt* v. *Gelston*, 13 Johns. 141, 561, which was then pending in this court on writ of error. There was no reason why they should not have been included, and it is to the extended enumeration as covering revolutionary bodies laying claims to rights of sovereignty, whether recognized or unrecognized, that Chief Justice Marshall manifestly referred in saying, in *The Gran Para*, 20 U. S. 7 Wheat. 471, 489 [5: 501, 505], that the act of 1817 "adapts the previous laws to the actual situation of the world." At all events, Congress imposed no limitation on the words "colony, district, or people," by requiring political recognition.

Of course a political community whose independence has been recognized is a "state" under the act; and, if a body embarked in a revolutionary political movement, whose independence has not been, but whose belligerency has been, recognized, is also embraced by that term, then the words "colony, district, or people," instead of being limited to a political community which has been recognized as a belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise and carrying on hostilities against the parent country, in the effort to achieve *independence, although[57 recognition of belligerency has not been accorded.

And as, agreeably to the principles of international law and the reason of the thing, the recognition of belligerency, while not conferring all the rights of an independent state, concedes to the government recognized the rights, and imposes upon it the obligations, of an independent state in matters relating to the war being waged, no adequate ground is perceived for holding that acts in aid of such a government are not in aid of a state in the sense of the statute.

Contemporaneous decisions are not to the contrary, though they throw no special light upon the precise question.

*Gelston* v. *Hoyt*, 16 U. S. 3 Wheat. 246 [4: 381], decided at February term, 1818 (and below January and February, 1816), was an action of trespass against the collector and surveyor of the port of New York for seizing the ship American Eagle, her tackle, apparel, etc. The seizure was made July 10, 1810, by order of President Madison under § 3 of the act of 1794, corresponding to § 5283. The ship was intended for the service of Petion against Christophe, who had divided the island of Hayti between them and were engaged in a bloody contest, but whose belligerency had not been recognized. It was held that the service of "any foreign prince or state" imported a prince or state which had been recognized by the government, and as there was no recognition in any manner, the question whether the recognition of the belligerency of a *de facto* sovereignty would bring it within those words did not arise.

The case of *The Estrella*, 17 U. S. 4 Wheat. 298 [4: 574], involved the capture of a Venezuelan privateer on April 24, 1817. There was a recapture by an American vessel, and the prize thus came before the court at New Orleans for adjudication. The privateer was found to have a regular commission from Bolivar, issued as early as 1816, but it had violated § 2 of the act of 1794, which is the same as § 2 of the act of 1818, omitting the words "colony, district, or people" (and is now § 5282 of the United States Revised Statutes), by enlisting men at New Orleans, provided Venezuela was a *state within the meaning of that act. [58 The decision proceeded on the ground that Venezuela was to be so regarded on the theory that recognition of belligerency made the belligerent to that intent a state.

In *The Nueva Anna*, 19 U. S. 6 Wheat. 193 [5: 239], the record of a prize court at "Galveztown," constituted under the authority of the "Mexican Republic," was offered in proof, and this court refused to recognize the belligerent right claimed, because our government had not acknowledged "the existence of any Mexican Republic or state at war with Spain;" and in *The Gran Para*, 20 U. S. 7 Wheat. 471 [5: 501], Chief Justice Marshall referred to



Digitized by Google

ıos Ayres as a state within the meaning of ıct of 1794.

ven if the word "state" as previously em-ed admitted of a less liberal signification, should the meaning of the words "colony, ict, or people" be confined only to parties gnized as belligerent? Neither of these ds is used as equivalent to the word "state," they were added to enlarge the scope of a ute which already contained that word. statute does not say *foreign* colony, dis-t, or people, nor was it necessary, for the rence is to that which is part of the ninion of a foreign prince or state, though ng in hostility to such prince or state. Nor the words apt if confined to a belligerent. argued by counsel for the government, an urgent colony under the act is the same be-e as after the recognition of belligerency, as own by the instance of the colonies of enos Ayres and Paraguay, the belligerency one having been recognized but not of the ver, while the statute was plainly applicable both. Nor is district an appropriate desig-tion of a recognized power *de facto*, since ch a power would represent, not the territory tually held, but the territory covered by the im of sovereignty. And the word "people," nen not used as the equivalent of state or na-on, must apply to a body of persons less than state or nation, and this meaning would be tisfied by considering it as applicable to any nsolidated political body.

In *United States* v. *Quincy*, 31 U. S. 6 Pet. 5, 467 [8: 458, 466], an indictment under the 1 section of the act of 1818, the court disposed f the following, among other points, thus: "The 9] *last instruction or opinion asked on the art of the defendant was: That according to ıe evidence in the cause, the United Provinces f Rio de la Plata is, and was at the time of he offense alleged in the indictment, a govern-ıent acknowledged by the United States, and hus was a *state* and not a *people* within the neaning of the act of Congress under which he defendant is indicted; the word 'people' in hat act being intended to describe communi-ies under an existing government not recog-ıized by the United States; and that the indict-nent therefore cannot be supported on this evidence. "The indictment charges that the lefendant was concerned in fitting out the Bolivar with intent that she should be employed in the service of a foreign *people;* that is to say, in the service of the United Provinces of Rio de la Plata. It was in evidence that the United Provinces of Rio de la Plata had been regu-larly acknowledged as an independent nation by the executive department of the government of the United States before the year 1827. And therefore it is argued that the word 'peo-ple' is not properly applicable to that nation or power. The objection is one purely technical, and we think not well founded. The word 'people,' as here used, is merely descriptive of the power in whose service the vessel was in-tended to be employed; and it is one of the denominations applied by the act of Congress to a foreign power. The words are, 'in the service of any foreign prince or state, or of any colony, district, or *people*.' The application of the word 'people' is rendered sufficiently cer-tain by what follows under the videlicet, 'that is to say, the United Provinces of Rio de la Plata.' This particularizes that which by the word 'people' is left too general. The descrip-tions are no way repugnant or inconsistent with each other, and may well stand together. That which comes under the videlicet only serves to explain what is doubtful and obscure in the word 'people.'"

All that was decided was that any obscurity in the word "people" as applied to a recog-nized government was cured by the videlicet.

**Nesbitt* v. *Lushington*, 4 T. R. 783, was [60 an action on a policy of insurance in the usual form, and among the perils insured against were "pirates, rovers, thieves," and "arrestes, restraints, and detainments of all kings, princes, and people, of what nation, condition, or qual-ity soever." The vessel with a cargo of corn was driven into a port and was seized by a mob who assumed the government of her and forced the captain to sell the corn at a low price. It was ruled that this was a loss by pirates, and the maxim, *Noscitur a sociis*, was applied by Lord Kenyon and Mr. Justice Bul-ler. Mr. Justice Buller said: " 'People' means 'the supreme power;' 'the power of the coun-try,' whatever it may be. This appears clear from another part of the policy; for where the underwriters insure against the wrongful acts of individuals, they describe them by the names of 'pirates, rogues, thieves;' then hav-ing stated all the individual persons against whose acts they engage, they mention other risks, those occasioned by the acts of 'kings, princes, and *people* of what nation, condition, or quality soever.' Those words therefore must apply to 'nations' in their collective capacity."

As remarked in the brief of Messrs. Richard H. Dana, Jr., and Horace Gray, Jr., filed by Mr. Cushing in *Mauran* v. *Alliance Ins. Co.* 73 U. S. 6 Wall. 1 [18: 836], the words were "doubtless originally inserted with the view of enumerating all possible forms of gov-ernment, monarchical, aristocratical, and dem-ocratic."

The British foreign enlistment act (59 Geo. III. chap. 69) was bottomed on the act of 1818, and the 7th section, the opening portion of which is given below,† corresponded to the

†"That if any person, within any part of the United Kingdom, or in any part of His Majesty's dominions beyond the seas, shall, without the leave and license of His Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit out, or arm, or attempt or endeavor to equip, fur-nish, fit out, or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, fur-nishing, fitting out, or arming of any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, state, or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province or people, as a transport or storeship, or with intent to cruise or commit hostilities against any prince, state, or potentate, or against the sub-jects or citizens of any prince, state, or potentate, or against the persons exercising or assuming to exercise the powers of government in any colony, province, or part of any province or country, or against the inhabitants of any foreign colony, prov-ince, or part of any province or country, with whom His Majesty shall not then be at war; or shall, within the United Kingdom, or any of His Majesty's dominions, or in any settlement, colony, territory, island, or place belonging or subject to His Majesty, issue or deliver any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid," etc.



Digitized by Google

61]3d *section of that act. Its terms were, however, considerably broader and left less to construction. But we think the words "colony, district, or people" must be treated as equally comprehensive in their bearing here.

In the case of *The Salvador*, L. R. 3 P. C. 218, the Salvador had been seized under warrant of the governor of the Bahama islands and proceeded against in the vice admiralty court there for breach of that section, and was, upon the hearing of the cause, ordered to be restored, the court not being satisfied that the vessel was engaged, within the meaning of the section, in aiding parties in insurrection against a foreign government, as such parties did not assume to exercise the powers of government over any portion of the territory of such government. This decision was overruled on appeal by the judicial committee of the privy council, and Lord Cairns, delivering the opinion, said: "It is to be observed that this part of the section is in the alternative. The ship may be employed in the service of a foreign prince, state, or potentate, or foreign state, colony, province, or part of any province or people; that is to say, if you find any consolidated body in the foreign state, whether it be the potentate, who has the absolute dominion, or the government, or a part of the province or of the people, or the whole of the province or the people acting for themselves, that is sufficient. But by way of alternative it is suggested that there may be a case where, although you cannot say that the province, or the people, or a part of the province or people are employing the ship, there yet may be some 62]person or persons who may *be exercising, or assuming to exercise, powers of government in the foreign colony or state, drawing the whole of the material aid for the hostile proceedings from abroad; and therefore, by way of alternative, it is stated to be sufficient, if you find the ship prepared or acting in the service of 'any person or persons exercising, or assuming to exercise, any powers of government in or over any foreign state, colony, province, or part of any province or people;' but that alternative need not be resorted to if you find the ship is fitted out and armed for the purpose of being 'employed in the service of any foreign state or people, or part of any province or people.' . . .

"It may be (it is not necessary to decide whether it is or not) that you could not state who were the person or persons, or that there were any person or persons exercising, or assuming to exercise, powers of government in Cuba, in opposition to the Spanish authorities. That may be so: their lordships express no opinion upon that subject, but they will assume that there might be a difficulty in bringing the case within that second alternative of the section; but their lordships are clearly of opinion that there is no difficulty in bringing the case under the first alternative of the section, because their lordships find these propositions established beyond all doubt,—there was an insurrection in the island of Cuba; there were insurgents who had formed themselves into a body of people acting together, undertaking and conducting hostilities; these insurgents, beyond all doubt, formed part of the province or people of Cuba; and beyond all doubt the ship in question was to be employed, and was employed, in connection with and in the service of this body of insurgents."

We regard these observations as entirely apposite, and while the word "people" may mean the entire body of the inhabitants of a state, or the state or nation collectively in its political capacity, or the ruling power of the country, its meaning in this branch of the section, taken in connection with the words "colony" and "district," covers in our judgment any insurgent or insurrectionary "body of people acting together, undertaking and conducting hostilities," although *its belliger-[63 ency has not been recognized. Nor is this view otherwise than confirmed by the use made of the same words in the succeeding part of the sentence, for they are there employed in another connection, that is, in relation to the cruising, or the commission of hostilities, "against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace;" and, as thus used, are affected by obviously different considerations. If the necessity of recognition in respect of the objects of hostilities, by sea or land, were conceded, that would not involve the concession of such necessity in respect of those for whose service the vessel is fitted out.

Any other conclusion rests on the unreasonable assumption that the act is to remain ineffectual unless the government incurs the restraints and liabilities incident to an acknowledgment of belligerency. On the one hand, pecuniary demands, reprisals, or even war, may be the consequence of failure in the performance of obligations towards a friendly power, while, on the other, the recognition of belligerency involves the rights of blockade, visitation, search and seizure of contraband articles on the high seas and abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare.

No intention to circumscribe the means of avoiding the one by imposing as a condition the acceptance of the contingencies of the other can be imputed.

Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interests of the recognizing power; and in the instance of maritime operations, recognition may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates. *The Ambrose Light*, 25 Fed. Rep. 408; 3 Whart. International Law Dig. § 381, and authorities cited.

But it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed.

The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition *of the [64 existence of war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time, and since this forfeiture is alleged to have been incurred.

On June 12, 1895, a formal proclamation



Digitized by Google

was issued by the President and countersigned by the Secretary of State, informing the people of the United States that the island of Cuba was "the seat of serious civil disturbances, accompanied by armed resistance to the authority of the established government of Spain, a power with which the United States are and desire to remain on terms of peace and amity;" declaring that "the laws of the United States prohibit their citizens, as well as all others being within and subject to their jurisdiction, from taking part in such disturbances adversely to such established government, by accepting or exercising commissions for warlike service against it, by enlistment or procuring others to enlist for such service, by fitting out or arming or procuring to be fitted out and armed ships of war for such service, by augmenting the force of any ship of war engaged in such service and arriving in a port of the United States, and by setting on foot or providing or preparing the means for military enterprises to be carried on from the United States against the territory of such government;" and admonishing all such citizens and other persons to abstain from any violation of these laws.

In his annual message of December 2, 1895, the President said: "Cuba is again gravely disturbed. An insurrection, in some respects more active than the last preceding revolt, which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing even some populations on the coast. Besides deranging the commercial exchanges of the island, of which our country takes the predominant share, this flagrant condition of hostilities, by arousing sentimental sympathy and inciting adventurous support among our people, has entailed earnest effort [65] on the part of this *government to enforce obedience to our neutrality laws and to prevent the territory of the United States from being abused as a vantage ground from which to aid those in arms against Spanish sovereignty.

"Whatever may be the traditional sympathy of our countrymen as individuals with a people who seem to be struggling for larger autonomy and greater freedom, deepened as such sympathy naturally must be in behalf of our neighbors, yet the plain duty of their government is to observe in good faith the recognized obligations of international relationship. The performance of this duty should not be made more difficult by a disregard on the part of our citizens of the obligations growing out of their allegiance to their country, which should restrain them from violating as individuals the neutrality which the nation of which they are members is bound to observe in its relations to friendly sovereign states. Though neither the warmth of our people's sympathy with the Cuban insurgents, nor our loss and material damage consequent upon the futile endeavors thus far made to restore peace and order, nor any shock our humane sensibilities may have received from the cruelties which appear to especially characterize this sanguinary and fiercely conducted war, have in the least shaken the determination of the government to honestly fulfil every international obligation, yet it is to be earnestly hoped, on every ground, that the devastation of armed conflict may speedily be stayed and order and quiet restored to the distracted island, bringing in their train the activity and thrift of peaceful pursuits."

July 27, 1896, a further proclamation was promulgated, and in the annual message of December 7, 1896, the President called attention to the fact that "the insurrection in Cuba still continues with all its perplexities," and gave an extended review of the situation.

We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place; *and it [66 cannot be doubted that, this being so, the act in question is applicable.

We see no justification for importing into U. S. Rev. Stat. § 5283, words which it does not contain and which would make its operation depend upon the recognition of belligerency; and while the libel might have been drawn with somewhat greater precision, we are of opinion that it should not have been dismissed.

This conclusion brings us to consider whether the vessel ought to have been released on bond and stipulation.

It is provided by U.S. Rev. Stat. § 938, that—

"Upon the prayer of any claimant to the court, that any vessel, goods, wares, or merchandise, seized and prosecuted under any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, or any part thereof, should be delivered to him, the court shall appoint three proper persons to appraise such property, who shall be sworn in open court, or before a commissioner appointed, etc. . . . If, on the return of the appraisement, the claimant, with one or more sureties, to be approved by the court, shall execute a bond to the United States, . . . the court shall, by rule, order such vessel, goods, wares, or merchandise to be delivered to such claimant."

Section 939 provides for the sale of vessels "condemned by virtue of any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, and for which bond shall not have been given by the claimant. . . ."

Section 940 authorizes the judges to do in vacation everything that they could do in term time in regard to bonding and sales, and to "exercise every other incidental power necessary to the complete execution of the authority herein granted."

Section 941 provides:

"When a warrant of arrest or other process *in rem* is issued in any cause of admiralty jurisdiction, except the cases of seizure for forfeiture under any law of the United States, the marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving *from the [67 claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge, etc."



Digitized by Google

By § 917 this court may prescribe rules of practice in admiralty "in any manner not inconsistent with any law of the United States."

Rule 10, as thus prescribed, provides for the sale of perishable articles or their delivery upon security to "abide by and pay the money awarded by the final decree."

Rule 11 is as follows:

"In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement, to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court or otherwise disposed of, as it may deem most for the benefit of all concerned."

In *The Mary N. Hogan*, 17 Fed. Rep. 818, Judge Brown, of the southern district of New York refused to deliver the vessel on stipulation, and, referring to rule 11, said that it was not in form imperative in all cases, but left to the court a discretion which might be rightly exercised under peculiar circumstances; and that the rule clearly should not be applied where the object of the suit was, "not the enforcement of any money demand, nor to secure any payment of damages, but to take possession of and forfeit the vessel herself in order to prevent her departure upon an unlawful expedition in violation of the neutrality laws of the United States." And he added: "It is clearly not the intention of § 5283, in imposing a forfeiture, to accept the value of the vessel as the price of a hostile expedition against a friendly power, which might entail a hundredfold greater liabilities on the part of the government. No unnecessary interpretation of the rules should be adopted which would permit that result; and yet 68]*such might be the result, and even the expected result, of a release of the vessel on bond. The plain intent of § 5283 is effectually to prevent any such expedition altogether, through the seizure and forfeiture of the vessel herself. The government is therefore entitled to retain her in custody, and rule 11 cannot be properly applied to such a case."

In *The Alligator*, 1 Gall. 145 (decided in 1812), Mr. Justice Story referred to an invariable practice in all proper cases of seizure, to take bonds for the property whenever application was made by the claimant for the purpose, but that was a case where the claimant had been allowed to give bond without objection and was attempting to avoid payment by alleging its irregularity; and in *The Struggle*, 1 Gall. 476 (1813), the same eminent judge, in making a similar ruling, said "that where the claimant voluntarily accepts delivery on bail, it is an estoppel of his right to contest the validity of the security."

But in U. S. Rev. Stat. § 941, the exception was introduced of "cases of seizure for forfeiture under any law of the United States." And it seems obvious that the release on bond of a vessel charged with liability to forfeiture under U. S. Rev. Stat. § 5283, before answer or hearing, and against the objection of the United States, could not have been contemplated. However, as this application was not based upon absolute right, but addressed to the sound discretion of the court, it is enough to hold that, under the circumstances of this case, the vessel should not have been released as it was, and should be recalled on the ground that the order of release was improvidently made. *United States* v. *Ames*, 99 U. S. 35, 41, 43 [25: 299, 300]. If the vessel is held without probable cause her owners can recover demurrage, and, moreover, vessels so situated are frequently allowed to pursue their ordinary avocations while in custody pending suit, under proper supervision, and in order to prevent hardship.

*The decree must be reversed*, and the cause remanded to the district court with directions to resume custody of the vessel and proceed with the case in conformity with this opinion. Ordered accordingly.

*Mr. Justice **Harlan** dissenting: [69

I am unable to concur in the views expressed by the court in the opinion just delivered. In my judgment a very strained construction has been put on the statute† under which this case arises—one not justified by its words, or by any facts disclosed by the record, or by any facts of a public character of which we may take judicial cognizance. It seems to me that the better construction is that given by the learned judge of the district court. I concur in the general views expressed in his able and satisfactory opinion, which is given below. That opinion so clearly and forcibly states the reasons in support of the conclusion reached by me that I am relieved of the labor of preparing one, which I would be glad to do if the pressure in respect of other business in the court did not render that course impracticable.

The present case has been made to depend largely upon the language of public documents issued by the executive branch of the government. If the defects in the libel can be supplied in that way, reference should be made to the last annual message and accompanying documents sent by President Cleveland to the Congress of the United States. In that message the President said that the so-called Cuban government had given up all attempt to exercise its functions, and that it was "confessedly (what there is the best reason for *supposing[70

†"Sec. 5283. Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming, of any vessel with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than $10,000, and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer and the other half to the use of the United States."



Digitized by Google

it always to have been in fact) a government merely on paper." And in his report to the President, under date of December 7, 1896, the Secretary of State said: "So far as our information shows, there is not only no effective local government by the insurgents in the territories they overrun, but there is not even a tangible pretense to establish administration anywhere. Their organization, confined to the shifting exigencies of the military operations of the hour, is nomadic, without definite centers, and lacking the most elementary features of municipal government. There nowhere appears the nucleus of statehood. The machinery for exercising the legitimate rights and powers of sovereignty and responding to the obligations which *de facto* sovereignty entails in the face of equal rights of other states is conspicuously lacking. It is not possible to discern a homogeneous political entity, possessing and exercising the functions of administration, and capable, if left to itself, of maintaining orderly government in its own territory and sustaining normal relations with the external family of governments."

It does not seem to me that the persons thus described as having no government except one on paper, with no power of administration, and entirely nomadic, constitute a colony, district, or "people" within the meaning of the statute. In my opinion, the words "of any colony, district, or people" should be interpreted as applying only to a colony, district or people that have "subjects, citizens, or property." I cannot agree that the persons described by the President and Secretary of State can be properly regarded as constituting a colony, district, or people, having subjects, citizens, or property. It cannot be that the words "any colony, district, or people," where they first appear in § 5283, have any different meaning from the same words in a subsequent clause, "the subjects, citizens, or property . . . of any colony, district, or people, with whom the United States are at peace." The United States cannot properly be said to be "at peace," or not "at peace," with insurgents, who have no government, except "on paper," no power of administration, and are merely nomads.

71] ***Locke,** District Judge: "This vessel has been libeled for forfeiture under the provisions of § 5283 of the Revised Statutes of the United States.

"The libel alleges that said steam vessel was on the 23d day of May, A. D. 1896, furnished, fitted, and armed 'with intent that she should be employed by certain insurgents or persons in the island of Cuba to cruise or commit hostilities against the subjects, citizens, or property of the said island of Cuba and against the King of Spain, and the subjects, citizens, and property of the said King of Spain in the island of Cuba, with whom the United States are and were at that date at peace.'

"To this there have been exceptions filed upon two grounds:

"1st. That forfeiture under this section depends upon the conviction of a person or persons for doing the acts denounced; and

"2d. That the libel does not show that the vessel was armed or fitted out with the intention that she should be employed in the service of a foreign prince or state, or of any colony, district, or people recognized or known to the United States as a body politic.

"The first objection raised by these exceptions is easily disposed of by the language of the Supreme Court in the case of *The Palmyra*, 25 U. S. 12 Wheat. 1 [6: 531], where, after elaborate argument, it is said:

" 'Many cases exist where the forfeiture for acts done attaches solely *in rem* and there is no accompanying penalty *in personam;* many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understands the law to be, that the proceeding *in rem* stands independent of and wholly unaffected by any criminal proceeding *in personam.* . . . In the judgment of this court no personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature.'

*"The other question raised by the exceptions [72 is more difficult and requires a construction of the clause of § 5283, 'with intent that such vessel should be employed in the service of any foreign prince or state, or of any colony, district, or people,' and more particularly the significance of the words 'colony, district, or people,' and a determination whether the requirements of the law are satisfied by the allegations of the libel that the vessel was intended to be employed 'in the service of certain insurgents or persons in the island of Cuba, and whether the statute admits a construction which would make a vessel liable to forfeiture when fitted out for the intended employment of any one or more persons not recognized as a political power by the Executive of our nation.

"The section under which this libel has been filed was originally the 3d section of the act of June 5, 1794 (1 Stat. at L. 281, chap. 50), and the language at that time only contained the provision that the vessel should be fitted out with intent that said vessel should be employed in the service of any foreign prince or state to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state with whom the United States might be at peace.

"While that was the language of the act, the question came before the Supreme Court in the case of *Gelston* v. *Hoyt*, 16 U. S. 3 Wheat. 328 [4: 402], and, in speaking of a plea considered necessary for a defense to a suit for damages for a seizure under this statute, it was held that such plea was bad 'because it does not aver the governments of Petion and Christophe are foreign states which have been duly recognized as such by the government of the United States.'

"In this case there was no distinction made between the party in whose service the vessel was to be employed and the one against whom hostilities were intended, and the language of the court would fully justify the conclusion they should both have been recognized, either as princes or states.

"Subsequently, as is stated by Mr. Wharton in his work on International Law, upon the outbreak of war between the South American



Digitized by Google

73]colonies and Spain, upon a special *message of the President to Congress upon the subject, the words 'or of any colony, district, or people were added to the description of both parties contemplated—both that one into whose employment the vessel was to enter and that one against whom the hostilities were contemplated.

"Has the addition of these words changed the character of the party intending to employ such vessel from that of a political power duly recognized as such, as is declared by the court in *Gelston* v. *Hoyt*, to that of a collection of individuals without any recognized political position? This question has been before the courts frequently, and several times been examined and commented upon, but in no case which I have been able to find has it been so presented, unconnected with questions of fact, that there has been a ruling upon it so that it can be considered as final and conclusive.

"Beyond question the courts are bound by the actions of the political branch of the government in the recognition of the political character and relations of foreign nations, and of the conditions of peace or war.

"The act of 1794, as well as its modification, that act of 1818, used the same language in describing the power or party in whose behalf or into whose service the vessel was intended to enter as was used in describing the political power against which it is intended that hostilities should be committed; and as far as the language itself goes it is impossible to say that in using the words in one clause of the sentence the political character and power was intended, while in another clause of the same sentence words used in exactly the same connection and with apparently the same force and meaning were intended to represent, not the political power, but the individuals of a certain colony, district, or people.

"It is contended that although the original act of 1794 required the construction given it in *Gelston* v. *Hoyt*, that each party should be one duly recognized by the United States, yet the modification of 1818 so changed it that it should be held to apply to any persons, regardless of their political character, for whose service a vessel might be intended.

"It is understood that this modification was 74]brought about *by the special message of President Madison of December 26, 1816. The question presented by this message is clearly set forth in the language used. He says: 'It is found that the existing laws have not the efficacy necessary to prevent violations of the United States as a nation at peace towards belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States.'

"In further explanation of the condition of affairs which called for this modification of this statute may be considered the letter of Mr. Monroe, Secretary of State, to Mr. Forsythe, January 10, 1817, in which he speaks of vessels going out as merchant vessels and hoisting the flag of some of the belligerents and cruised under it, of other vessels armed and equipped in our ports hoisting such flags after getting out to sea, and of vessels having taken on board citizens of the United States, who, upon the arrival at neutral points, have assumed the character of officers and soldiers in the service of some of the parties in the contest then prevailing. All of this correspondence shows that the effort at that time was to enforce neutrality between recognized and belligerent parties. That the parties then in contest were recognized as belligerents and a neutrality was sought to be preserved is clearly shown by the first annual message of President Monroe in 1817. He says: 'Through every stage of the conflict the United States have maintained an impartial neutrality, giving aid to neither of the parties in men, money, ships, or munitions of war. They have regarded the contest, not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal, having as to neutral powers equal rights. Our ports have been opened to both, and any articles . . . that either was permitted to take have been equally free to the other.'

"It is considered that this shows what was in contemplation at the time of the enactment of the law of 1818, and that what was intended was to prevent the fitting out of vessels to be employed in the service of a colony, district, or people, which had been recognized as belligerents, but which had not been recognized as an independent state, or which was not represented in the political world by a prince.

*"There appears to be nothing in the rem-[75 edy demanded at that time, or in the language used, to show that the words so added were intended to represent or be construed as referring to the individual people of any colony, district, or people, or any number of them, however designated, except as in their collective representative political capacity, any more than there is to show that the term 'state' in the original was intended to refer to the individual people of the state.

"The language of the foreign enlistment act of Great Britain (59 Geo. III. chap. 69, § 7) leaves no question as to the intention of Parliament in that legislation, as it added to the words of our statute the words, 'or part of any province or people or of any person exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or parts of any province or people.'

"In order to give the statute under which this libel is brought the force contended for by the libellant, it is necessary to eliminate from the provision that makes it necessary to declare how the vessel is to be employed the entire clause 'in the service of any foreign prince or state, or of any colony, district, or people,' or to read into it the language found in the act of Great Britain or its equivalent. That it was the general understanding at the time of the passage of the original act that it was considered to apply only to duly recognized nations is shown by the fact that, in the case of the *United States* v. *Guinet*, 2 U. S. 2 Dall. 321 [1: 398], under this same section—the first case brought under it—the indictment alleged fully in terms that both the state of the Republic of France, in whose service the vessel was to be employed, and the King of Great Britain were a state and a prince with whom the United States was at peace.

"In the case of *United States* v. *Quincy*, 31 U. S. 6 Pet. 445 [8: 458], the Supreme Court says that the word 'people' was used in this



Digitized by Google

ute as simply descriptive of the power in ose service the vessel was intended to be ployed, and is one of the denominations ap- ed by the acts of Congress to a foreign ver.

"In the case of *The Meteor*, 17 Fed. Cas. 178, ere the original libel alleged that the vessel 5] was fitted out *with the intent that she uld be employed in the service of certain per- s to commit hostilities against the govern- nt of Spain, it was considered necessary to end it by alleging that she was intended to employed by the government of Chili; and in t case there was presented a certificate of the cretary of State, under seal, of the fact of the r existing between Spain and Chili, and that ey were both nations with whom the United ates were at peace.

"In addition to the declaration of the Su- eme Court in the cases of *Gelston* v. *Hoyt*, U. S. 3 Wheat. 328 [4: 402], and *United ates* v. *Quincy*, *supra*, this question has been cidentally under examination in several cases the lower courts. In the case of *The Caron- let*, 37 Fed. Rep. 800, Judge Brown says: ection 5283 is designed in general to secure ir neutrality between foreign belligerent owers. But there can be no obligation of eutrality except towards some recognized ate or power, *de jure* or *de facto*. Neutrality resupposes, at least, two belligerents, and, as spects any recognition of belligerency,—*i. e.*, f belligerent rights,—the judiciary must fol- ow the executive. To fall within the statute, ie vessel must be intended to be employed in ie service of one foreign prince, state, colony, istrict, or people to cruise or commit hostilities gainst the subjects, citizens, or property of nother with which the United States are at eace. The United States can hardly be said o be at peace, in the sense of the statute, with faction which they are unwilling to recognize s a government; nor could the cruising or ommitting of hostilities against such a mere action well be said to be committing hos- ilities against the subjects, citizens, or prop- rty of a district or people within the meaning f the statute. So, on the other hand, a vessel n entering the service of the opposite faction f Hippolyte, could hardly be said to enter the ervice of a foreign prince or state, or of a olony, district, or people, unless our govern- nent had recognized Hippolyte's faction as at east constituting a belligerent, which it does ot appear to have done.'

"In the case of *The Conserva*, 38 Fed. Rep. 131, a case in which it was alleged the vessel was to be used in a contest between Legitime and Hippolyte, Judge Benedict says: 'The libel 77]*in this case charges certain acts to have been done in connection with the vessel, with the intention that the vessel be employed in the service of certain rebels in a state of insur- rection against the organized and recognized government of the Republic of Hayti, to cruise and commit hostilities against the subjects, citi- zens, or property of the Republic of Hayti, with whom the United States are at peace. A violation of the neutrality which the United States is obliged to maintain between the rebels mentioned and the government of the Republic of Hayti is the gravamen of the charge. But the evidence fails to show a state of facts from which the court concluded that the United States was ever under any obligations of neu- trality to the rebels mentioned, or is now under any obligations of neutrality to the government of the Republic of Hayti.'

"In the case of *United States* v. *Trumbull*, 48 Fed. Rep. 99, Judge Ross carefully re- views the different authorities, examines the question and clearly indicates how he would have decided the question had it been neces- sary for the purposes of deciding the case be- fore. He says: 'Does § 5283 of the Revised Statutes apply to any people whom it is op- tional with the United States to treat as pirates? That section is found in the chapter headed 'Neutrality,' and it was carried into the Re- vised Statutes, and was originally enacted in furtherance of the obligations of the nations as a neutral. The very idea of neutrality im- ports that the neutral will treat each contend- ing party alike; and it will accord no right or privilege to one that it withholds from the other, and will withhold none from one that it accords to the other.'

"In speaking of the case of *United States* v. *Quincy*, 31 U. S. 6 Pet. 445 [8: 458], in which it was said that the word 'people' was one of the denominations applied by the act of Congress to a foreign power,' he says: 'This can hardly mean an association of peo- ple in no way recognized by the United States or by the government against which they are rebelling, whose rebellion has not attained the dignity of war, and who may, at the option of the United States, be treated by them as pirates.'

"In the case of *United States* v. *The Itata*, 56 Fed. Rep. 505, on appeal before the circuit court of appeals, the question *was fully[78 and carefully considered in an elaborate opin- ion, and although not found necessary to de- cide the question in this case, as the case was disposed of upon other grounds, it is consid- ered to be apparent how the question would have been decided had it been necessary. The force of the word 'people,' as used in this stat- ute, is carefully examined, as well as all other questions, and it is considered that the force of the conclusion which must necessarily re- sult from such investigations cannot be avoided.

"In the case of *United States* v. *Hart*, 74 Fed. Rep. 724, Judge Brown expresses his view of this section by saying: 'Section 5283 deals with armed cruisers, designed to commit hostilities in favor of one foreign power as against another foreign power with which we are at peace.'

"The same language is used by the court in the case of *Wiborg* v. *United States*, 163 U. S. 632 [41: 289], but it is contended in be- half of the libellant that this language was modified by the subsequent declaration made in the same case, that the operation of this statute is not necessarily dependent on the ex- istence of such state of belligerency. In using the latter language it would seem that the court had the entire statute under contempla- tion, and more particularly U. S. Rev. Stat. § 5286, the 6th section of the original act, which plainly does not depend upon a state of belligerency or neutrality. This was the section then under consideration, as the im- mediate context and following sentence show,



Digitized by Google

and was the section upon which the suit was based; and it cannot be considered that this language was intended to apply to another section, the consideration of which was in no way called in question.

"With this understanding of the language in this case, in that case, every judicial decision, remark, or ruling, where the question has been under consideration or examination, appears to be in favor of the position taken by the claimants in the exceptions.

In the case of *United States* v. *The Mary N. Hogan*, 18 Fed. Rep. 529, and in the cases of the intended charge of that vessel, boxes of arms and ammunition (*United States* v. *214 Boxes of Arms*, 20 Fed. Rep. 50), it does not appear that this question was raised by the claim-
79] ant or considered by *the learned judge; and his language in the subsequent case of *The Carondelet*, where it was raised and discussed, may be accepted as presumptive proof of what his decision would have been, had it been so considered.

"The same is true of the case of *The City of Mexico*, 28 Fed. Rep. 148, decided by me in this court. In that case the defense was upon entirely different grounds, and the force of the portion of the statute contended for, the necessity that there should be an intent not only that the vessel should intend to commit hostilities, but that for such purposes she should be employed in the service of some political power, was entirely lost sight of and eliminated from the consideration of the case.

"The only expression authoritatively given which I have been able to find opposed to the view of the claimant in his exceptions is that of a portion of the letter of the honorable Attorney General to the Secretary of State, of December 16, 1869 (13 Ops. Atty. Gen. 177), and cited in the case of *Wiborg* v. *United States*, 163 U. S. 632 [41: 289]. I do not consider that I should be doing myself justice to pass that by unnoticed, as it has raised more questions in my mind and called for and compelled more thought and consideration than anything else connected with the case; but I feel compelled to reach a different conclusion than is there expressed.

"The general purpose and intent of that letter was to declare that the insurrection in Cuba was not a fitting opportunity to enforce the provisions of this law, inasmuch as we owed no duty to such insurgents to protect them from hostilities, or rather that any contest between Spain and such insurgents could not be considered as hostilities, but incidentally it was stated that a condition of belligerency was not necessary for the operation of this statute.

"It could not be considered that we owed such insurgents no such duty because we were not at peace with them, but because we had never recognized them as a colony, district, or people.

"The force and effect of the letter was that the Cuban insurgents had not been recognized
80] as a colony, district, *or people, and therefore this section did not apply. If they had not been then so recognized or were not entitled to be so recognized, how can they now be so recognized or described as to come within terms of the statute in question?

"It is considered that the argument used in such letter to show that the statute should be held applicable to cases where there was no condition of belligerency and but one political power recognized, would have been fully as applicable under the old law, when the case of *Gelston* v. *Hoyt*, 16 U. S. 3 Wheat. 328 [4: 402], decided to the contrary.

"The fact that a vessel was fitted out to be employed in the service of a prince would not necessarily imply that such prince was a political power recognized by the United States any more than would the terms a 'colony, district, or people,' under the act of 1818. But the Supreme Court clearly held in that case that it must be alleged that such prince or state has been recognized as such by the United States. The same argument used therein would call for the application of this statute for the forfeiting of any vessel fitted out to be employed by any person, individual, corporation, or firm, for the purpose of committing hostilities against a state at peace, which would plainly not come within the provisions of the statute, however much it might be considered international policy or proper national conduct.

"It is impossible in my view of the construction required by the language used to properly apply the term 'a people', used in the connection in which it is found, to any persons few in number and occupying a small territory with no recognized political organization, although they might procure the fitting out and arming of a vessel. I fail to find any ground for giving this statute, a criminal one as it is, any but its ordinary application. The question presented is clear and distinct, Are 'certain insurgents or persons in the island of Cuba' properly described by either of the terms a 'colony,' a district, or a people, and if so, which? The inconveniences which might arise from the political branch of our government recognizing such insurgents as a colony, district, or people having political existence and as belligerents cannot be considered in determining whether they are entitled to such description.

*"This statute is a criminal and penal [81
one, and is not to be enlarged beyond what the language clearly expresses as being intended. It is not the privilege of courts to construe such statutes according to the emergency of the occasion, or according to temporary questions of policy, but according to the principles considered to have been established by a line of judicial decisions.

"It is contended that if the principles embodied in the exceptions are declared to be the law, there can be no law for the prevention of the fitting out of armed and hostile vessels to stir up insurrections and commit hostilities against nations with which we are at peace, and that such conclusion would make the parties engaged in any such expedition liable to prosecution as pirates.

"To the first of these points it is considered that § 5286 is, as has been constantly held, intended to prevent any such expeditions, regardless of the character of the parties in whose behalf they were organized, the only distinction being that in that case it is necessary to bring a criminal suit and prove overt acts, while under this portion of this section the intent is the gravamen of the charge and the prosecution is



Digitized by Google

ainst the vessel, regardless of the persons gaged in the fitting out or the ignorance or ocence of the owners.

"This is not a case that can be or should be termined upon questions of public policy, d whether any parties subject themselves to osecution for piracy or not should have no ight in its consideration. If they should be subject they would have the benefit of the cessity of proving piratical acts rather than entions.

"It is certainly considered to be true that y such parties would be considered as pirates Spain, and would be treated as such if und in any acts of hostility regardless of y recognition this nation might give them considering them as having any political aracter as a people.

"Without attempting further argument, but gretting that the pressing duties of a very isy term of jury trials have prevented a fuller id more complete expression of my views, it my conclusion that the line of judicial deci-
82] sions demands *that a construction should e put upon the section in question which would old that it was the intention of Congress in ich enactment to prevent recognized political owers from having vessels prepared for their ervice in the United States, but that it was ot the intention to extend such prohibition o vessels fitted out to be employed by indiiduals or private parties, however they might e designated, for piratical or other hostilities here no protection could be obtained by a ommission from a recognized government. n such case they would be held liable under he section which provides for the fitting out f a military expedition, or if they were guilty f any piratical acts upon the high seas they would become liable under the laws for the unishment of such acts. It is considered that it the time of the Amendment of 1818 this construction had been declared, and the language f the amendment was in no way intended to change such construction, but was only intended to apply to the new designation of political powers, the existence of which had been recognized as belligerents if not as independents, and who were entitled to the right of neutrals; that the libel herein does not state such a case as is contemplated by the statute, in that it does not allege that said vessel had been fitted out with intent that she be employed in the service of any foreign prince or state, or of any colony, district, or people recognized as such by the political power of the United States, and unless it can be so amended should be dismissed, and it is so ordered.

. . . . . .

"Since writing the foregoing, the libel herein has been amended by inserting in place of 'by certain insurgents or persons in the island of Cuba,' the words 'in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the King of Spain in the island of Cuba,' but it is considered that the objection to the libel in sustaining the exceptions has not been overcome, but that although the language has been somewhat changed, the substance has not been amended in the material part, inasmuch as it appears clearly that the word 'people' is used in an individual and personal sense, and not as an organized and *recognized political [83
power in any way corresponding to a state, prince, colony, or district, and can in no way change my conclusion heretofore expressed, and the libel must be dismissed."

---

SAMUEL WHITEHILL BARBER *et al.*, *Plffs. in Err.*,

*v.*

PITTSBURG, FORT WAYNE, & CHICAGO RAILWAY COMPANY and the Pennsylvania Company.

(See S. C. Reporter's ed. 83-109.)

*Decision in ejectment—settled law of the state—state construction of devise—estate tail—perpetuities—devise to heirs—evidence.*

1. The decision of a state court in a former action of ejectment is not conclusive as an adjudication of the rights of the parties in a Federal court, or a bar to a second action of ejectment, when a single verdict and judgment in ejectment are not conclusive under the laws and in the courts of the state.
2. The question whether the opinion of the supreme court of a state as to the effect of a devise is conclusive evidence of the law of the state in a court of the United States depends upon the further question whether the opinion is declaratory of the settled law of the state as to the effect of such devises, or is a decision upon the construction of this particular devise.
3. The decision of a state court that a devise over to the heirs of a certain person in case of the death of a first devisee unmarried or without offspring by her husband is substitutionary and can take effect only at the time of testator's death, and not afterwards, is not conclusive in a Federal court when it is not based on any settled rule of property in the state.
4. By a settled rule of property in Pennsylvania, a devise to a girl with a provision that in the event of her dying unmarried or without offspring by her husband the property is to be sold and the proceeds divided equally among the heirs of a certain person, gives her an estate tail, unless this conclusion is controlled by other words in the will, or by the facts.
5. A power to sell upon the expiration of an estate tail, and to divide the proceeds among persons then ascertainable, is not within the rule against perpetuities.
6. A devise to the "heirs" of a living person named in the will describes the persons intended with sufficient certainty, although, strictly speaking, no one is the heir of a living person, and means the heirs apparent or those who would be his heirs were he dead when the devise takes effect.

---

NOTE.—*That state laws and decisions govern United States courts as to title and transfer of real estate by grant or devise*, see notes to Elmendorf v. Taylor, 6: 290, and Jackson, St. John, v. Chew, 6: 583.

*As to precedent and subsequent conditions in wills and deeds*, see note to Taylor v. Mason, 6: 101.

*At common law, devise of lands generally, without words of perpetuity or limitation, confers a life estate only, unless there is manifest intention to give the fee; rule followed in United States unless changed by statute*,—see note to King v. Ackerman, 17: 292.

*As to interpretation of wills; intention of testator to govern*,—see note to Pray v. Belt, 7: 309.



Digitized by Google

7. The legal construction of the terms of a will executed and attested as required by law cannot be affected by testimony as to the testator's state of health at the time of publishing the will, or as to his length of life afterwards.

[No. 431.]

*Submitted May 7, 1896. Decided March 1, 1897.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Third Circuit desiring instruction of this court upon certain questions of law as to the construction of a will in an action of ejectment brought by Samuel Whitehill Barber *et al.*, against the Pittsburg, Fort Wayne, & Chicago Railway Company *et al.* *Questions answered.*

See same case below, 69 Fed. Rep. 501; same case in state court, 165 Pa. 645.

Statement by Mr. Justice **Gray**:

This was a certificate from the circuit court of appeals for the third circuit of questions on which it desired the instruction of this court, and, as originally made, was (omitting the words printed in brackets below) as follows:

"This was an action of ejectment, and comes before this court on a writ of error to the United States circuit court for the western district of Pennsylvania, which entered judgment for the defendants.

"First. The parties to the action both claimed title to the land in controversy under the will of James S. Stevenson, deceased, dated March 11, 1831, which is in the words following, to wit:

I, James S. Stevenson, of the city of Pittsburg, in the state of Pennsylvania, aged fifty years on the 12th day of January, 1831, reflecting on the certainty of death, and desirous of making a distribution of my property in the event of my decease, do hereby declare this writing to be my last will and testament, made this twelfth day of March in the year of our Lord one thousand, eight hundred and thirty-one.

I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69, and 70, in the city of Pittsburg, in their full extent, bounded by Penn street, Wayne street, the Allegheny river, and by lot 71. Said Aman-

85] da Stephens *is now five years old (born April 7, 1826). ——— Stephens and ———, his wife, the parents of Amanda's mother, live near Connellsville, in Fayette county, Pennsylvania.

In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be divided equally among the heirs of John Barber, of Columbia, Pennsylvania.

I give and bequeath to John Barber, of Columbia, and to his heirs, the lots in the city of Pittsburg, numbered 71 and 72, bounded by Penn street, by lot 70, by the Allegheny river, and by lot 73.

I give and bequeath to Mary Livingston's children the lot 74 in the city of Pittsburg. And to her unmarried sister, Eliza Stevenson, I give and bequeath the lot 73 in the city of Pittsburg, and in the event of her death the lot to go to her sister's children. Mary Livingston and Eliza Stevenson are daughters of the late Colonel S. Stevenson, son of Robert Stevenson, of York county, Pennsylvania.

I give and bequeath to the sons of James Stevenson, formerly of York county, but who died in Lycoming county in 1810 or 1811, the brick and other buildings with the ground on which they are erected, situated at the corner of Wood and Fifth streets, Pittsburg. These sons are Stephen, Manning, Reuben, Samuel, and I. Stevenson.

All the remainder of my property to be sold, and, after paying my debts, to be divided into sixteen shares, and to be disposed of as follows: To Amanda Stephens, one share; to Mary Livingston, one share; to Eliza Stevenson, one share; to Stephen Stevenson, within named, one share; to James Wright, of Columbia, or his heirs, two shares; to John Barber, of Columbia, two shares; to Ann Elliott, formerly Ann West, now wife of Rev. Mr. Elliott, of Washington county, one share; to Jane E. Thecker, niece of the late Rev. Mr. Kerr, one sixteenth (or one share); to the heirs of John Barber, of Columbia, two shares; to the heirs of James Wright, of Columbia, two shares; to Charles Avery, J. M. Snowden, and John Thaw, to be divided equally, two shares.

I hereby constitute and appoint the said Charles Avery, *J. M. Snowden, and John[86 Thaw, and John Barber, the executors of this my will.

Signed at Pittsburg this 11th day of March, 1831. Jas. S. Stevenson.

Witness:
Geo. Ogden,
J. S. Craft.

"Second. That on October 16, 1831, when confined to his room by sickness [and after a dangerous illness for two weeks preceding his death], the testator [though he had theretofore signed his will] first published [the same] *his will* in the presence of witnesses, whom he called to attest it, and a few hours thereafter died; and this will, on October 18, 1831, was duly probated [which facts as to the time and circumstances of publication were not found by the special verdict, on which judgment was entered in the ejectment suit in the state courts of Pennsylvania].

"Third. That the said Amanda Stephens, then a child of five years of age, survived the testator, and in 1847 intermarried with Samuel Haight; that in 1848 she and her husband executed a deed, intended to bar a supposed estate tail in the land covered by the devise, which, upon the assumption that she had taken an estate tail, would have been sufficient for that purpose; that she had children by her said husband, who, as well as her husband, died in her lifetime, and that she died [never having married again], on September 21, 1891. [But she and her husband in their lifetime, and after said steps to bar the entail, conveyed in fee simple to the defendants and others the property here in dispute].

"Fourth. That, at the date of the death of the testator, John Barber was alive, married, and had children, some of whom are plaintiffs in this action.

"Fifth. That on March 20, 1893, S. Duffield Mitchell, administrator *de bonis non cum testamento annexo* of James S. Stevenson, deceased,



Digitized by Google

ought an action of ejectment against these defendants in the court of common pleas in and r Allegheny county, Pennsylvania, to recov- 7 ]er the land here in controversy, *in which tion a verdict was rendered under the direc- on of the court for the defendants, on which dgment was entered accordingly; that on rit of error to the supreme court of the state is judgment was affirmed.

"Sixth. That on February 2, 1895, a second tion of ejectment for the same land was rought by the plaintiffs in this suit in the circuit court of the United States for the western istrict of Pennsylvania, in which a verdict nder the direction of the court was rendered or the defendants, on which judgment was entered accordingly; to which judgment a writ f error was sued out from the circuit court of ppeals of the third circuit, being the writ of rror upon which the questions now to be submitted have arisen.

"The said court of appeals, desiring the instruction of the Supreme Court of the United States for its proper decision of the following questions or propositions of law, respectfully certifies the same:

"First. Is the decision of the supreme court of Pennsylvania, before referred to, conclusive? If not, then,

"Second. What estate did Amanda Stephens take under the devise?"

At the suggestion of both parties, and by order of the circuit court of appeals, the certificate was afterwards amended by inserting the words above printed in brackets in the 2d and 3d paragraphs thereof; by striking out those in italics in the 2d paragraph; by adding to the 5th paragraph copies of the opinions delivered, in the action therein described, by Judge Ewing in the court of common pleas of Allegheny county, not reported, and therefore (omitting the preliminary statement of facts) printed in the margin,† and by the supreme court of Pennsylvania, as reported *in 165 Pa. 645; [88 and by adding to the 6th paragraph a copy of the opinion of the circuit court of the United States in the present case, as reported in 69 Fed. Rep. 501.

*Messrs.* **John S. Ferguson, S. Duffield Mitchell,** and *William T. Barber,* for plaintiffs in error:

What is the true and legal meaning of the words "dying without offspring by her husband?" Legally, if not defined by other parts of the will, we take offspring to mean descendants, however remote.

*Thompson* v. *Beasley,* 3 Drew. 7; *Young* v. *Davies,* 2 Drew. & S. 167; *Allen* v. *Markle,* 36 Pa. 117.

But there are general rules, well established, which govern this case. That the words, "dying without issue," or "without legitimate issue," standing alone and uncontrolled by other parts of the will, "import an indefinite failure of issue, is well established and in all the departures from fundamental rules" it has not been shaken in this state, *Eichelberger* v. *Barnitz,* 9 Watts, 447, being the leading case, affirmed in *Middleswarth* v. *Backmore,* 74 Pa. 414, and in all subsequent cases when the question has been raised. Prima facie, then, on the settled rule of interpretation, this phrase in the will imports an indefinite failure of issue.

The intention of the testator must govern, and if from reading the whole will it is apparent that the testator meant, and has potentially said, that the devise over is to take effect in case the first taker dies leaving no issue living at the time of her death, it is a definite failure of issue.

*Middleswarth* v. *Blackmore,* 74 Pa. 414.

If an indefinite failure of issue was intended, the fact as to Amanda having had offspring or her having survived them is immaterial.

It has never been held that § 34 of the judi-

† "The testator evidently intended to dispose of all his property. The devise to Amanda Stephens, followed by the limitations over, or without them, created a fee, whether in fail or contingent. The circumstances, the age of the devisee, and the will leave us in no doubt that the contingency of Amanda's death did not mean her death before the testator.

"What is the true and legal meaning of the words 'dying without offspring by her husband?' Legally, if not defined by other parts of the will, we take offspring to mean descendants, however remote. Thompson v. Beasley, 3 Drew. 7; Young v. Davies, 2 Drew. & S. 167; Allen v. Markle, 36 Pa. 117. Webster defines it 'That which is produced, especially a child or children; descendants, however remote from the stock.' The Century Dictionary says, 'Progeny; descendants, however remote from the stock; issue; a collective term applied to several or all descendants.' True, it may be confined to children, as in Lister v. Tidd, 29 Beav. 618, in a division of money at death of widow. In the present case, we interpret the phrase 'dying without offspring by her husband' to have the same legal effect and force as the words 'dying without legitimate issue' or 'heirs of her body.' They are words of limitation, not of purchase.

"Does the will of James S. Stevenson refer to a definite or an indefinite failure of issue or offspring of Amanda Stephens?

"To undertake to cite, and still more to reconcile, the numerous decisions on this general question would not only be confusing and interminable, but to any clear-headed lawyer it is impossible. The decisions are irreconciliable.

"But there are general rules, well established, which govern this case. That the words 'dying without issue,' or 'without legitimate issue,' standing alone and uncontrolled by other parts of the will, 'import an indefinite failure of issue is well established, and in all the departures from fundamental rules' it has not been shaken in this state; Eichelberger v. Barnitz, 9 Watts, 447, being the leading case, affirmed in Middlesworth v. Blackmore, 74 Pa. 414, and in all subsequent cases when the question has been raised. Prima facie, then, on the settled rule of interpretation, this phrase in the will imports an indefinite failure of issue.

"Another canon of interpretation is properly invoked by the plaintiff, to wit, that the intention of the testator must govern; and if, from reading the whole will, it is apparent that the testator meant, and has potentially said, that the devise over is to take effect in case the first taker dies leaving no issue living at the time of her death, it is a definite failure of issue.

"Middlesworth v. Blackmore, 74 Pa. 414, was a case of this kind, where each of several provisions of the will pointed distinctly to a distribution at the death of Jonathan without issue living at his death, and all these provisions taken together showed clearly and conclusively that that was the intention of the testator.

"Is this such a will? Counsel for plaintiffs have made a very ingenious argument in the affirmative, and, while the case is not free from doubt, they have failed to convince us that the intention of the testator was different from the ordinary legal import of the terms used in the devise.

"The arguments mainly are that it must be presumed that he intended the event to occur, if at all, in the lifetime of his executors named, who would then sell the property and divide the proceeds; also that testator in the devise uses the words 'in the event of' Amanda dying, etc., and that he uses these words in the preamble of his



Digitized by Google

cfary act of 1879, chap. 20, applies, or was intended to apply, to questions of a more general nature, not dependent upon local statutes or local usages of a fixed and permanent operation; for example, to the construction of ordinary contracts or other written instruments.

*Swift* v. *Tyson*, 41 U. S. 16 Pet. 1, 18 (10: 865, 871).

The Federal court is not bound to follow a local court's construction of a will.

*Lane* v. *Vick*, 44 U. S. 3 How. 464 (11:681); *Vick* v. *Vicksburg*, 1 How. (Miss.) 379, 3 Am. Dec. 167; *Brooklyn City & N. R. Co.* v. *National Bank of the Republic*, 102 U. S. 14 (26: 61); *Jackson, St. John*, v. *Chew*, 25 U. S. 12 Wheat. 153 (6: 583); *Thompson* v. *Perrine*, 103 U. S. 817 (26: 617); *Foxcroft* v. *Mallett*, 45 U. S. 4 How. 353 (11: 1008); *Carroll County Supers.* v. *Smith*, 111 U. S. 556 (28: 517); *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 206 (17: 525); *Folsom* v. *Township 96*, 159 U. S. 611 (40: 278).

It is true that the courts have established the rule that where the primary devise is in express fee simple and the gift over upon death without children, or issue, the substitutionary construction is to be applied. This rule is established by precedent merely, and does not rest upon the reason of those cases, where the gift over is upon the death merely of the first taker; the rule applies only where the context is silent, and the tendency is to lay hold of slight circumstances in the will to vary the construction and effectuate the language according to its natural import.

*Vanderzee* v. *Slingerland*, 108 N. Y. 47, 57 Am. Rep. 701; *Jessup* v. *Smuck*, 16 Pa. 327; *Caldwell* v. *Skilton*, 18 Pa. 152.

In this will the context is not silent. The testator directs that if Amanda die unmarried and without offspring the lots shall be sold.

3 Jarman, Wills, Rand. & T.'s ed. 1881, 709.

*Mitchell* v. *Pittsburg, Ft. W. & C. R. Co.* 165 Pa. 645, is unsound in its reasoning, and is against all authority upon the subject.

The general rule is that where the context is silent the words referring to the death of the prior legatee, in connection with some collateral event, apply to the contingency happening as well after as before the death of the testator.

*Beck* v. *Ennis*, 54 Hun, 126; *Fulton* v. *Fulton*, 2 Grant, Cas. 28; *Morrison* v. *Truby*, 145 Pa. 540.

The rule is thus stated in Hawkins, Wills, 258:

"Where real or personal estate is given with words of limitation implying the absolute ownership, but there follow alternative gifts over in the event of the first taker dying with and without issue or children, which exhaust all contingencies, so that, if unrestricted in point of time, their combined effect is to reduce the interest of the first taker to a life estate only, a ground is presented for restricting the gifts over to the period of distribution, in order to avoid an inconsistency with the prior absolute gift."

A limitation over of the estate upon the death of the first taker has in every instance been held to be fatal to the application of such presumptive construction.

*Miller* v. *Lynn*, 7 Pa. 443; *Wood* v. *Hills*, 19 Pa. 513; *McCullough* v. *Gilmore*, 11 Pa. 370; *Burkart* v. *Bucher*, 2 Binn. 455; *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388; *Re New York, L. & W. R. Co.* 105 N. Y. 89, 96, 59 Am. Rep. 478; *Washbon* v. *Cope*, 67 Hun, 272; *Coles* v. *Ayres*, 156 Pa. 197.

*Mitchell* v. *Pittsburg, Ft. W. & C. R. Co.* 165 Pa. 645, cannot control on the doctrine of *res judicata*, even though the suit be between substantially the same parties for the same land in controversy, because by statute in Pennsylvania the judgment in the first ejectment is not a bar to a second action of ejectment.

*Gibson* v. *Lyon*, 115 U. S. 439 (29: 440).

The judicial expositor should place himself as fully as possible in the situation of the person whose language he has to interpret.

*Swift* v. *Duffield*, 5 Serg. & R. 39; *Wells* v. *Ritter*, 3 Whart. 208.

The testator's intention was that Amanda should become the root of a new stock, which should have inheritable blood. If such stock should survive, her title to the lots would become absolute; if there was a failure of such stock at any time, the lots were given over to the heirs of John Barber. Such failure having occurred the executory devise to the Barber heirs became good and operative.

*Booker* v. *Booker*, 5 Humph. 505; *Hall* v. *Chaffee*, 14 N. H. 215; *Findlay* v. *Riddle*, 3 Binn. 139; *Taylor* v. *Taylor*, 63 Pa. 481, 3 Am. Rep. 565; *Eby* v. *Eby*, 5 Pa. 461; *Middlesworth* v. *Blackmore*, 74 Pa. 414; *Patterson* v. *Ellis*, 11 Wend. 259; *Seibert* v. *Butz*, 9 Watts, 490; *Re Miller's Estate*, 145 Pa. 561; *Porter* v. *Bradley*, 3 T. R. 143; *Abbott* v. *Essex Co.* 59 U. S. 18 How. 202 (15: 352).

The principle that a power of sale, to be exercised at the death of the first taker without issue, imports a definite failure of issue has become firmly established as a rule of property in Pennsylvania.

*Fahrney* v. *Holsinger*, 65 Pa. 388; *Snyder's Appeal*, 95 Pa. 174; *Mitchell* v. *Pittsburg, Ft. W. & C. R. Co.* 165 Pa. 645.

The term "heirs" was not used in its strict sense, but as meaning the children of the ancestor named.

*James* v. *Richardson*, Vent. 334; *Heard* v. *Horton*, 1 Denio, 165, 43 Am. Dec. 659; *Goodright* v. *White*, 2 W. Bl. 1010.

---

will, 'in the event of my dying,' and in the 2d [6th] paragraph of the will, 'in the event of her (Eliza Stevenson's) death'—in these two other cases referring to what is to be done immediately upon the death—that he, in declaring what was to be done in the contingency of Amanda's death, must have intended at and immediately after her death. It may be he did so intend; but we start with the presumption, the legal rule of interpretation, against it, and in our opinion it is not overcome by the other clauses.

"The legatees of the proceeds of the property, if sold, were not necessarily in being, or known to testator; it is to 'the heirs of John Barber;' the same words he uses in another part of the will, 'John Barber and his heirs,' evidently in the latter not meaning children.

"If an indefinite failure of issue was intended, the fact as to Amanda having had offspring, or her having survived them, is immaterial.

"We are of the opinion that the will of James S. Stevenson devised an estate tail in the property in question to Amanda Stephens, which having been duly barred and the title conveyed to the defendants, they have a good title to the property, and the plaintiff has no title thereto."



Digitized by Google

Words importing a failure of issue are restrained to such failure at the death, in regard to real estate, in every case in which a dying without issue is combined with an event personal to the individual, as the event of his dying without issue and unmarried.

3 Jarman, Wills, Rand. & T.'s ed. 1881, 809; *Downing* v. *Wherrin*, 19 N. H. 9, 49 Am. Dec. 139; *Wilson* v. *Bailey*, 3 Bro. P. C. 195; *Doe, Johnson*, v. *Johnson*, 8 Exch. 81; *Eichelberger* v. *Barnitz*, 9 Watts, 447; *Rapp* v. *Rapp*, 6 Pa. 45; *Deihl* v. *King*, 6 Serg. & R. 29, 9 Am. Dec. 407; *Kelso* v. *Dickey*, 7 Watts & S. 279.

Every word is to have its effect, and is to be taken according to its natural and common import, and the courts are bound to carry the will into effect, provided it is consistent with the rules of law.

*McCullough* v. *Fenton*, 65 Pa. 418.

Where the devise over was to take effect in case the testator's son should not live to attain twenty-one, or, in case he should live to attain such age, but should afterwards die without lawful issue, and the son attained twenty-one, it was held that he took a fee with an executory devise over in the event of his dying without issue living at his death.

*Glover* v. *Monckton*, 3 Bing. 18.

A definite failure of issue is contemplated by a devise over, at, or upon death without issue.

*Doe. King*, v. *Frost*, 3 Barn. & Ald. 546; *Ex parte Davies*, 2 Sim. N. S. 114; *Parker* v. *Birks*, 1 Kay & J. 156; *Coltsmann* v. *Coltsmann*, L. R. 3 H. L. 121.

"Then" is here used as an adverb of time, and not as a particle of reference.

*Hauer* v. *Shitz*, 3 Yeates, 205; *Deihl* v. *King*, 6 Serg. & R. 29, 9 Am. Dec. 407; *Snyder's Appeal*, 95 Pa. 174; *Re Miller's Estate*, 145 Pa. 561; *Gormley's Appeal*, 154 Pa. 378.

Plaintiffs in error must recover, in whichever aspect the primary devise to Amanda be viewed, whether it be held to give a fee or a life estate.

*Taylor* v. *Taylor*, 63 Pa. 481, 3 Am. Rep. 565.

*Messrs.* **Johns McCleave, D. T. Watson,** *William Scott*, and *George B. Gordon*, for defendants in error:

The decision of the supreme court of Pennsylvania, holding that under the long settled rule of property in Pennsylvania, the heirs of John Barber had no title to the property in dispute, is conclusive in the Federal courts.

The proper construction of this will, under the law of Pennsylvania has been decided by the highest court of the state in the case of *Mitchell* v. *Pittsburg, Ft. W. & C. R. Co.* 165 Pa. 645.

The court held that, under the first clause of the will above quoted, Amanda took an absolute estate, and that the limitation over in the second clause of the devise was substitutionary in character, to take effect only upon Amanda dying in the lifetime of the testator. And inasmuch as she survived the testator any operation of the substitutionary clause forever became impossible.

The circuit court below held that because a single verdict and judgment in ejectment in Pennsylvania is not conclusive upon the parties, this decision of the supreme court of the state, construing the will, is not conclusive in a second action in the Federal courts, yet this decision of the supreme court of the state, declaring the law of this will, we respectfully submit is conclusive. In a second ejectment brought in the lower courts of the state this decision of the supreme court would be absolutely binding upon the proper legal interpretation of the will. It is true that, upon a second appeal to the supreme court, that court might overrule its previous decision, as it might overrule any former decision, but yet, so long as the decision remained, it would give the law of the state absolutely binding upon the parties and upon all subordinate tribunals in the state and upon the judges of the supreme court. Undoubtedly, it was the law of the state, the law of this particular will, at the time this case was presented to the circuit court below, and must so remain the law until overruled by the supreme court of the state.

That the construction of a will, given by the highest court of the state, will be accepted by the Federal courts, was held by this court in *Henderson* v. *Griffin*, 30 U. S. 5 Pet. 151 (8: 79).

In *Suydam* v. *Williamson*, 65 U. S. 24 How. 427 (16: 742), the defendant in ejectment claimed title under a purchaser at a sale of the property had under decree of foreclosure of a mortgage by the court of chancery in New York. The plaintiff claimed under a devise in the will of an ancestor in the title, by which devise a certain trust had been created. The title depended upon the validity of the foreclosure proceedings as against the terms of the trust created by the will. The court of appeals of New York had decided in favor of the title under the foreclosure in *Cochran* v. *Van Surlay*, 20 Wend. 365. Subsequent to this decision of the state court several suits involving the same question were brought to this court. *Williamson* v. *Berry*, 49 U. S. 8 How. 495 (12: 1170); *Williams* v. *Irish Presby. Congregation*, 49 U. S. 8 How. 565 (12: 1200), and *Williamson* v. *Ball*, 49 U. S. 8 How. 566 (12: 1200). In each of these cases this court decided contrary to the said decision, and supported the title under the trust in the will as against the title claimed under the foreclosure. Subsequent to the decisions of this court in 8 How. the court of appeals in New York rendered a decision upon the same title, adhering to its previous decision in *Cochran* v. *Van Surlay*, holding that, as between the judgments of their own courts and those of the courts of the United States, their own are binding where there is a conflict except in cases arising under the Constitution and laws of the United States, when the judgments of the Supreme Court of the United States are controlling authorities. The question presented to this court in the case cited in 24 How. was whether they should adhere to their own opinion as expressed in the cases in 8 How. or acknowledge the authority of the courts of New York to decide the validity of the title. Upon this question this court yielded to the courts of the state, abandoning their previous determination.

*Beauregard* v. *New Orleans*, 59 U. S. 18 How. 497 (15: 469); *Miles* v. *Caldwell*, 69 U. S. 2 Wall. 43 (17: 758); *Daly* v. *James*, 21 U. S. 8 Wheat. 495 (5: 670); *Jackson, St. John*, v.



Digitized by Google

*Chew*, 25 U. S. 12 Wheat. 158 (6: 583); *Lane* v. *Vick*, 44 U. S. 3 How. 464 (11: 681).

In the case of *Swift* v. *Tyson*, 41 U. S. 16 Pet. 1 (10: 865), the meaning of the word "laws" of the several states in the 34th section of the judiciary act was considered, and it was there held as follows: "In all the various cases which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the 34th section limited its application to state laws strictly local," that is to say, to the positive statutes of the state and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character.

But in this case we have the decision of the highest court of Pennsylvania directly upon the question as to the right and title of the respective litigants herein to the real estate situated in the state of Pennsylvania and wholly subject to its jurisdiction.

Publication is not necessary to the validity of a will in Pennsylvania. Unquestionably, under the law of Pennsylvania, this paper would have been the testator's will had witnesses never subscribed it and had it never been published by the testator himself.

*Rossetter* v. *Simmons*, 6 Serg. & R. 452; *Carson's Appeal*, 59 Pa. 493; *Frew* v. *Clark*, 80 Pa. 170.

In our case there is no ambiguity about persons or property intended. There is no ambiguity arising whatever in circumstances extrinsic to the will.

*King* v. *Ackerman*, 67 U. S. 2 Black, 408 (17: 292).

The Supreme Court at the argument of the case, suspended its rules, and specially allowed the appellant twice the length of time permitted for oral argument by those rules. If the appellant failed, as he now alleges, to argue the point in his case it was surely not the fault of the court.

*Cross* v. *Allen*, 141 U. S. 538 (35: 849).

It is a settled rule of property in Pennsylvania construing wills that the happening of the event on a limitation over as in Mr. Stevenson's will is restricted to the lifetime of the testator. Admittedly the event on which John Barber's heirs would take did not happen in Mr. Stevenson's lifetime.

The decision of the supreme court of the state, confirming the title of the defendant under this will, was made in application of the Pennsylvania rule of property, which in *Stevenson* v. *Fox*, 125 Pa. 568, was stated and approved by the supreme court of the state in the following language: "In a devise to A in fee, followed by a proviso that if A should die without leaving issue surviving him then to B, the testator meant the death of A within the period of the testator's own life, with the result that A, surviving the testator, takes a fee without any other condition or limitation, and that B takes nothing."

The rule was announced in the jurisprudence of Pennsylvania in the case of *Caldwell* v. *Skilton*, 13 Pa. 152.

So we have a clear ruling that the clause of the will: "Or if said child shall die without issue born alive," must be held to mean, dying without issue born alive during the lifetime of the testator.

The rule as thus announced for the construction of such provisions remains to this day the law of Pennsylvania, and is thoroughly imbedded in our jurisprudence as a rule of property upon which hundreds of titles depend. Applying this rule to our will, undoubtedly, the testator, when he uses the words: "In the event of Amanda dying . . . without offspring by her husband," intended such death as happening before his own; the gift is immediate; there is no precedent particular interest created. The gift over is made to depend upon an actual contingency and there is nothing in the will to show the contingency of dying without offspring by her husband was meant to operate without limit during the life of the first taker, and such being the case, in the language of the court, it is, as in the other instance (death uncoupled with any circumstances making it really contingent), restricted to death of testator.

This rule has been followed ever since, both as to devise of real estate and bequests of personal property, there being no distinction in Pennsylvania between realty and personalty in this respect.

*Re Biddle's Estate*, 28 Pa. 59; *Schoonmaker* v. *Stockton*, 37 Pa. 461; *Shutt* v. *Rambo*, 57 Pa. 149; *Karker's Appeal*, 60 Pa. 141; *Fahrney* v. *Holsinger*, 65 Pa. 388; *Mickley's Appeal*, 92 Pa. 514; *Fitzwater's Appeal*, 94 P. 141; *Stevenson* v. *Fox*, 125 Pa. 568; *McCormack* v. *McElligott*, 127 Pa. 380; *King* v. *Frick*, 135 Pa. 575; *Morrison* v. *Truby*, 145 Pa. 540; *Coles* v. *Ayres*, 156 Pa. 197.

These decisions unite in defining the settled rule of property in Pennsylvania to be that, where the devise and the limitation over are, as in Mr. Stevenson's will, the happening of the condition is restricted to the lifetime of the testator and John Barber's heirs took no title because the condition subject to which Amanda took did not happen in testator's lifetime.

For the Federal courts to reverse that rule, and adopt another rule of property for Pennsylvania, would be to depart from their settled policy of following the rules of property in each state, and would establish two rules for the same title—one good only in the state court, and one good only in the Federal courts. The title would, in the end, depend on where the citizen lived who held it.

This question was directly considered by the supreme court of Pennsylvania in the case of *Mickley's Appeal*, 92 Pa. 514.

Chief Justice Sharswood, delivering the opinion of the court, after referring to the argument of appellant's counsel, said:

"He is sustained by some English cases which are not of authority with us. . . . It is very clearly settled, both in England and in this state, that if a bequest be made to a person absolute in the first instance, and it is provided that in the event of death, or death without issue, another legatee or legatees shall be substituted to the share of legacy thus given, it shall be construed to mean death or death without issue before the testator."

If the question as to the nature and extent of the title which Amanda Stephens took under



Digitized by Google

e will of Mr. Stevenson is open in the Fed-al courts for original investigation, then we sert that she took a fee simple absolute.

If the devise be construed a fee tail, it was rred and became a fee simple.

If the devise be construed a fee with limita-on over, the fee because absolute, because the event upon which the limitation must appen was under the rule of property in ennsylvania restricted in time to the lifetime the testator, and admittedly it did not so appen. (b) The conditions, upon the non-erformance of which the estate was to go over, ere performed by Amanda. She did not die nmarried—she married and had offspring by er husband—and therefore the estate did not o to John Barber's heirs.

The estate is a fee tail.

The word "offspring," in its proper and atural sense, extends to any degree of lineal lescendants, and has the same meaning as issue. 17 Am. & Eng. Enc. Law, 178; *Young* v. *Davies*, 2 Drew. & S. 167; *Thompson* v. *Beasley*, 3 Drew. Ch. 7; *Allen* v. *Markel*, 36 Pa. 117; *Denn, Webb*, v. *Puckey*, 5 T. R. 306; *Vaughan* v. *Dickes*, 20 Pa. 509.

So in our case, as Amanda could not have awful issue without marriage, we may disencumber the sentence of the marriage condition as was done in *Vaughan* v. *Dickes*, and following cases; and so disencumbering it the sentence would read: "In event of Amanda dying without lawful issue, then these lots are to be sold, etc."

So reading the will we have the ordinary case of a limitation over after an indefinite failure of issue, void as an executory devise; good as a vested remainder, subject to be barred by fine, or common recovery, and now, under our statutes, by deed executed and acknowledged in accordance therewith, which the verdict in this case has found to have been done. This has been the unmolested construction of such clauses in Pennsylvania, certainly ever since the case of *Eichelberger* v. *Barnitz*, 9 Watts, 447.

In *Eichelberger* v. *Barnitz* the devise was as follows: "And further my will is, because my son Henry has not yet married, that if he should die without leaving any living issue, that then his full share fall or go in equal shares to my other three children, Adam, Anna Mary, and Susanna."

The question then before the court was as to the estate which the son Henry took under this devise. The court, in the consideration of this question, then declared the law as to the proper construction of such clauses, which has remained the rule of property in Pennsylvania ever since.

*Hackney* v. *Tracy*, 137 Pa. 53; *Taylor* v. *Taylor*, 63 Pa. 483, 3 Am. Rep. 565.

The second matter found by the plaintiff's counsel to rebut the established meaning which the law has placed upon such clauses is the direction to divide the proceeds on such sale among living persons.

Here again the language of the will is unfortunate for their contention. The direction is: "Then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John Barber."

At the time the will took effect John Barber was living and had certain children living. The testator, however, in the clause does not direct the division among the children of John Barber, but amongst his heirs, and as there can be no heir of a living person the legal meaning of the phrase certainly contemplated a division only after John Barber's death, and then among his heirs whomsoever they might be. That he used the word "heirs" in its proper meaning is manifest from the next succeeding clause of the will, wherein he devised an estate in fee to John Barber as follows: "I give and bequeath to John Barber, of Columbia, and his heirs, the lots," etc.

Clearly in this clause he did not mean "children" by the word "heirs," but intended to give, as he did give, by appropriate language, an estate in fee simple. The word "heirs" in the one clause has precisely the same meaning as in the other. There is no direction, therefore, in our will to divide the proceeds among living persons, but the direction is to divide them among "heirs" of a living person, thereby clearly manifesting that he only contemplated such division as a remote possibility, or, at least, after the death of John Barber, and not during his lifetime.

In *Taylor* v. *Taylor*, 63 Pa. 483, 3 Am. Rep. 565, the determining point found was that the testator had used the word "issue" as synonymous with "children," and therefore, it was in in that case a word of purchase and not of limitation.

The meaning of the word "issue" having thus been found to be children, of course, it was fatal to an estate tail by implication; the case then fell within the well-established rule aptly illustrated by *Hill* v. *Hill*, 74 Pa. 173, 15 Am. Rep. 545.

A limitation over to persons named and in being at time of testator's death or of the making of the will is a common feature in many of the cases where the estate created has been adjudged a fee tail in the first taker.

In *Eichelberger* v. *Barnitz*, 9 Watts, 447, the leading case in Pennsylvania, the limitation over was to other children of the testator by name, all living at the death of the devisor.

In *Hackney* v. *Tracy*, 137 Pa. 53, the limitation over was to a named sister of the testator living at the time of his death; and it was expressly said by the court that this circumstance was not sufficient to show that the testator intended a definite failure of issue.

*Lapsley* v. *Lapsley*, 9 Pa. 180; *Allen* v. *Henderson*, 49 Pa. 333; *Cochran* v. *Cochran*, 127 Pa. 486.

The absolute answer to these first two suggestions of the plaintiffs in error is found in the decision in *Criley* v. *Chamberlain*, 80 Pa. 161; *Wynn* v. *Story*, 38 Pa. 166.

The third matter found by the plaintiffs by which to rebut the definition of the law, is in combining the contingency of death, unmarried, with death without offspring, if married.

The cases in Pennsylvania, however, have settled this contention against the plaintiffs.

*Vaughan* v. *Dickes*, 20 Pa. 509; *Matlack* v. *Roberts*, 54 Pa. 146.

The fourth cause for finding that the testator has used language to rebut the definition of the law is supposed to lie in the use by the testator of the expression "in the event of," and



Digitized by Google

the word "then;" and it is supposed that these expressions mark the death of Amanda as the time at which the failure of issue shall be fixed.

The expression, "in the event of Amanda dying unmarried, or if married, dying without offspring," etc., certainly means, and can only mean, that if Amanda should die unmarried, or if married, should die without issue, or, upon Amanda dying unmarried, or if married, dying without issue, etc.

The words "in the event of" were clearly used to express the contingency referred to. There can be no doubt or ambiguity as to the meaning of this expression. Nor can the use of the word "then" have the effect contended for and it has never been given such effect in any of the cases cited.

*Robinson's Estate*, 149 Pa. 418.

In all such cases "then" is not considered an adverb of time, but a mere particle of reference connecting the result to follow upon the happening of the contingency previously expressed, and is the equivalent of "in that event," or "if that happens."

11 Am. & Eng. Enc. Law, 908; *Lawrence* v. *Lawrence*, 105 Pa. 335; *Reinoehl* v. *Shirk*, 119 Pa. 108.

The rule in *Eichelberger* v. *Barnitz* has been applied in a multitude of cases in Pennsylvania in the construction of devises similar to the one now before us.

*Hoff's Estate*, 147 Pa. 636; *Ray* v. *Alexander*, 146 Pa. 242; *Hackney* v. *Tracy*, 137 Pa. 53; *Cochran* v. *Cochran*, 127 Pa. 486; *Bassett* v. *Hawk*, 118 Pa. 94; *Carroll* v. *Burns*, 108 Pa. 886; *Stone* v. *McMullen*, 10 W. N. C. 541; *Lawrence* v. *Lawrence*, 105 Pa. 335; *Ogden's Appeal*, 70 Pa. 501; *Gast* v. *Baer*, 62 Pa. 35; *Matlack* v. *Roberts*, 54 Pa. 148; *Criley* v. *Chamberlain*, 30 Pa. 161; *Vaughan* v. *Dickes*, 20 Pa. 509; *Lapsley* v. *Lapsley*, 9 Pa. 130.

Many more cases might be added to those cited, but reference to these will be sufficient to illustrate the application of the rule of *Eichelberger* v. *Barnitz*, 9 Watts, 447, in the construction of clauses, in many of them, of the identical force and effect of the clause in controversy here. By the rule of property established by these decisions, we contend there can be no doubt that if Amanda Stephens did not take a fee absolute, she at least took a fee tail, under the will of James Stevenson which has been properly barred under the statutes.

Under the will Amanda took on testator's death an absolute estate in fee simple.

The supreme court of Pennsylvania, in a well-reasoned opinion, held that Amanda took an absolute estate; that this absolute estate was not limited, but a clause substitutionary in character was inserted, which, in the event of "Amanda dying unmarried, or if married, dying without offspring by her husband, then those lots are to be sold and the proceeds to be divided equally among the heirs of John Barber."

That the dying without issue (which is what the clause means) the testator intended should take place in his lifetime, and as it did not the estate became absolute in Amanda on testator's death.

That this will admits of this construction that opinion proves. It is so well written and reasoned that no words of ours will add to it, and even if this court should hold that it is not conclusive it is at least entitled to peculiar weight.

*Bucher* v. *Cheshire R. Co.* 125 U. S. 584 (31: 799).

As was said in *Burgess* v. *Seligman*, 107 U. S. 34 (27: 365), "for the sake of harmony, and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt."

*Jackson, St. John*, v. *Chew*, 25 U. S. 12 Wheat. 154 (6: 584).

The plaintiffs contend that John Barber's heirs have an estate in fee simple in the land in controversy, and that you should so answer the question certified as to lead to that result.

Right in their pathway they have the decision of three courts against them:

The common pleas court of Allegheny county, where the lands are situated.

The supreme court of Pennsylvania.

The circuit court of the United States for the western district of Pennsylvania, both judges sitting.

The general intent of the testator is to be gathered from his entire will, and when this general intent is determined it influences the construction of particular phrases and words

The argument that by the word "offspring" the testator meant children is not supported by one single case in Pennsylvania. All the cases are against it.

It is asserted that courts "anxiously seize" upon every circumstance to make the failure of issue definite. This is not so in Pennsylvania.

*Criley* v. *Chamberlain*, 30 Pa. 164.

Mr. Justice **Gray** delivered the opinion of the court:

The real question between the parties, upon which the decision of this case must turn, is what estate Amanda Stephens took under the will of James S. Stevenson, by which he devised to her certain lots of land in Pittsburg, and further provided as follows: "In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then *these lots are to be sold, and the proceeds [98 to be divided equally among the heirs of John Barber."

The testator duly published his will on October 16, 1831, and died on the same day, being fifty years old. At that date, John Barber was alive and married, and had children, some of whom are plaintiffs in this action of ejectment. Amanda Stephens, then a child of five years of age, and so described in the will, survived the testator, and afterwards married. She and her husband executed a deed of the land, intended and sufficient to bar an estate tail therein; and afterwards conveyed the land in fee simple to the defendants and others.

The testator died, and his will took effect, before the passage of the statute of Pennsylvania of April 8, 1833, chap. 128, § 9, providing that "all devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear by a devise over, or by words of limitation or other-



Digitized by Google

e in the will, that the testator intended to ise a less estate;" and long before the stat- of April 27, 1855, chap. 387, § 1, providing t "whenever hereafter, by any gift, convey- e, or devise, an estate in fee tail would be ated according to the existing laws of this te, it shall be taken and construed to be an ate in fee simple, and as such shall be in- itable and freely alienable." Pa. Laws 2-'33, p. 249; Pa. Laws 1855, p. 368; Pur- n's Dig. 12th ed. p. 2103, § 11; Purdon's g. 12th ed. p. 810, § 8.

A former action of ejectment was brought the administrator with the will annexed of e testator against these defendants in the urt of common pleas of Allegheny county, the state of Pennsylvania, which directed a rdict and rendered judgment for the de- ndants, on the ground that Amanda Stephens ok an estate tail, which had been duly irred, and the title conveyed to the defend- its.

Upon a writ of error that judgment was af- rmed in the supreme court of Pennsylvania, n the ground that the devise over to the heirs John Barber was an alternative and substi- itionary devise, dependent upon the contin- ency of Amanda's dying without offspring in [99] the lifetime of the *testator, and this con- ngency not having happened, that she took n absolute estate in fee simple. 165 Pa. 645.

This second action of ejectment was after- ards brought in the circuit court of the nited States, which directed a verdict and endered judgment for the defendants, on the round that Amanda, if she did not take a fee, ook at least an estate tail. 69 Fed. Rep. 501.

To reverse this judgment, the plaintiff sued ut a writ of error from the circuit court of ppeals, which has certified to this court these wo questions:

"First. Is the decision of the supreme court f Pennsylvania, before referred to, conclu- ive? If not, then,

"Second. What estate did Amanda Stephens ake under the devise?"

The first question, in the terms in which it s expressed, and taken by itself, is somewhat difficult to answer.

The decision of the supreme court of Penn- sylvania, in the former action of ejectment, is certainly not conclusive as an adjudication of the rights of the parties, inasmuch as a single verdict and judgment in ejectment, not being conclusive under the laws and in the courts of the state, is not conclusive in the courts of the United States, and is no bar to the second ac- tion of ejectment. *Equator Min. & Smelt. Co.* v. *Hall*, 106 U. S. 86 [27: 114]; *Britton* v. *Thornton*, 112 U. S. 526 [28: 816]; *Gibson* v. *Lyon*, 115 U. S. 439 [29: 440]; *Smale* v. *Mitchell*, 143 U. S. 99 [36: 90].

The question whether the opinion of the supreme court of the state in the former action is conclusive evidence of the law of Pennsyl- vania in a court of the United States, depends upon the further question whether the opinion is declaratory of the settled law of Pennsylva- nia as to the effect of such devises, or is a de- cision upon the construction of this particular devise.

When the construction of certain words in deeds or wills of real estate has become a set- tled rule of property in a state, that con- struction is to be followed by the courts of the United States in determining the title to land within the state, whether between the same or between other parties. *Jackson, St. John,* v. *Chew*, 25 U. S. 12 Wheat. 153, 167 [6: 583, 588]; *Henderson* v. *Griffin*, 30 U. S. 5 Pet. *151 [100] [8: 79]; *Suydam* v. *Williamson*, 65 U. S. 24 How. 427 [16: 742]; *Burgess* v. *Seligman*, 107 U. S. 20, 33 [27: 359, 365].

But a single decision of the highest courts of a state upon the construction of the words of a particular devise is not conclusive evi- dence of the law of the state, in a case in a court of the United States, involving the con- struction of the same or like words, between other parties, or even between the same parties or their privies, unless presented under such circumstances as to be an adjudication of their rights. *Lane* v. *Vick*, 44 U. S. 3 How. 464 [11: 681]; *Vick* v. *Vicksburg*, 1 How. (Mich.) 379; *Homer* v. *Brown*, 57 U. S. 16 How. 354 [14: 970]; *Brown* v. *Lawrence*, 3 Cush. 390; *Gibson* v. *Lyon*, 115 U. S. 439, 446 [29: 440, 442].

It becomes important, therefore, that the opinion of the supreme court of Pennsylva- nia in the former action of ejectment should be carefully examined and compared with the previous judgments of that court.

In that opinion, delivered by Chief Justice Sterrett, the principal grounds of the decision were stated as follows:

"Although the devise to Amanda Stephens was made before the act of 1833, and without words of inheritance, yet, when read in con- nection with the introductory clause of James S. Stevenson's will, there is a plain intent, man- ifested in the first instance, to give her an ab- solute estate. In *McCullough* v. *Gilmore*, 11 Pa. 370, where substantially the same expres- sion was used, this court said: 'These words, and the like of them, are generally carried down into the *corpus* of the will, to show that the testator meant to dispose of his whole in- terest in a particular devise, unless words are used which plainly indicate an intent to limit it.' Numerous cases to the same effect are cited in *Schriver* v. *Meyer*, 19 Pa. 87 [57 Am. Dec. 634]. The first taker is always the favor- ite object of testator's bounty, and as such entitled to the benefit of every implication. There are no words used in the 2d paragraph of the will, containing the devise to Amanda, which indicate any intent to limit her estate. Had the will stopped there, the devise would unquestionably have been absolute. The fol- lowing paragraph was not intended to operate by way of limitation, *but was manifest- [101] ly substitutionary in its character. The thought would very naturally occur to testator to make an alternative devise for the contingency of Amanda's dying without issue (*Biddle's Estate*, 28 Pa. 59), and this was in effect what was done. 'In the event,' said testator, 'of Amanda dying unmarried, or, if married, dying with- out offspring by her husband, then these lots are to be sold, and the proceeds to be divided equally among the heirs of John Barber.' The word 'offspring' here used is but a syno- nym for 'issue;' and 'issue' cannot be lawful without marriage. The devise is, then, in the first instance, to Amanda; and, in the event



Digitized by Google

of her dying without issue, over to alternate beneficiaries. Dying without issue was thus made the contingency upon which the substituted beneficiaries could take. *Coles* v. *Ayres*, 156 Pa. 197. But death when? Where, as here, there is nothing to indicate an adverse intent, additional limitations dependent on no other contingency than is implied from the language 'if any of them die,' or 'in case of death,' or the like, cannot be referred to in the event whenever it may happen—for that would be to give a forced construction to the words—but must be construed as referring to death in association with some additional circumstance which makes it actually contingent. That circumstance is said to be naturally in regard to the time of happening, and that time where, as here, the gift is immediate, is necessarily the death of the testator, there being no other period to which the death can refer. *Caldwell* v. *Skilton*, 13 Pa. 152." 185 Pa. 649, 650.

The first statement, that by the devise in the 2d paragraph of the will, read in connection with the introductory clause, there was a plain intent manifested, in the first instance, to give Amanda an absolute estate, was in accord with the settled law of Pennsylvania in *Schriver* v. *Meyer* (1852) 19 Pa. 87, 90, 91 [57 Am. Dec. 634], and cases there cited. And the statement that the word "offspring," in the next paragraph, was used as a synonym for "issue," was in accord with a judgment of that court delivered in 1859 by Mr. Justice Strong (afterwards of this court), as well as with the English 102]*decisions. *Allen* v. *Markle*, 36 Pa. 117; *Thompson* v. *Beasley*, 3 Drew. 7; *Young* v. *Davies*, 2 Drew. & S. 167.

Whether the conclusion, that the devise over to John Barber's heirs was substitutionary, and could take effect only at the time of the testator's death, and not afterwards, was in accord with the law of Pennsylvania as declared in previous decisions, is a question requiring more consideration.

Chief Justice Sterrett's propositions as to the meaning of the words "in case of death;" or the like, are taken almost *verbatim*, from the opinion of Mr. Justice Bell, in *Caldwell* v. *Skilton* (1850) 13 Pa. 152, to which he refers. In that case the testator devised real estate to his wife during her life or widowhood, and at her decease or marriage, to his children in equal shares in fee, and in case of the death of any child, his share to go to his issue, or if he should "die without issue born alive," to the testator's surviving children; the decision was that the devise over to the children, upon the death or marriage of the widow, must take effect upon her death, or upon the testator's death if he survived her, and, therefore, the devise over of the share of each child must take effect at the same time; and in the opinion, immediately after the propositions above referred to, Mr. Justice Bell added: "But as a testator is not supposed to anticipate himself surviving the object of his bounty, this construction is only made from necessity, and gives way where the contingency of the death of the first beneficiaries may be referred to some other time." 13 Pa. 156.

There is indeed a line of cases in that court, in which a devise over, after a devise in fee, has been held to be substitutionary, when expressed by such words as if the first taker die "without children;" (*Biddle's Estate* (1857) 28 Pa. 59; *McCormick* v. *McElligott* (1889) 127 Pa. 230, or "without leaving issue living at the time of his death)," *Mickley's Appeal* (1880) 92 Pa. 514; *Stevenson* v. *Fox* (1889) 125 Pa. 568, *King* v. *Frick* (1890) 135 Pa. 575; *Morrison* v. *Truby* (1891) 145 Pa. 540, or "intestate and without issue." *Karker's Appeal* (1869) 60 Pa. 141; *Coles* v. *Ayres* (1893) 156 Pa. 197. In none of *these cases, however, was the [103 devise so expressed that it could be construed as creating an estate tail.

Two other cases were cited at the bar, as favoring the substitutionary rule, in one of which "die unmarried or without issue" (*Schoonmaker* v. *Stockton* (1860) 37 Pa. 461), and in the other "die without heirs" (*Shutt* v. *Rambo* (1868) 57 Pa. 149), were held to mean "die in the lifetime of the testator." But in each of them, not only the first devise was to a child of the testator in fee, and the limitation over was to the testator's other children, but the whole scope of the will was thought to show that he could not have meant an indefinite failure of issue. And in the second case, Chief Justice Thompson said: "But giving the words of the 24th clause all that could possibly be claimed for them, to wit, an implication of a limitation to issue by the words 'die without heirs,' equivalent to 'dying without issue', as in *Eichelberger* v. *Barnitz*, 9 Watts, 447, and kindred cases, the devise to Emma Rambo, the plaintiff below, would be a fee tail, which by the act of April 27, 1855, would be turned into a fee simple, the will bearing date May 27, 1857. That the word 'heirs' meant 'issue' must be inferred, in the presence of the fact that her brothers and sisters were living and would be her heirs. It must therefore have been 'issue' that was meant by the words. In either view of the case, the plaintiff below was vested with the fee simple of the property in question." 57 Pa. 151.

Where a testator specifically devised lands to his daughters in fee, and provided that should she "die in her minority, and without lawful issue then living, the lands hereby devised shall revert to and become part of the residue of my estate," the substitutionary rule was not applied, either by the supreme court of Pennsylvania, or by this court; but both courts held that the daughter, having survived the testator, took an estate in fee, subject to be devested by her afterwards dying under age and without issue. *Britton* v. *Thornton* (1878) 25 Pitts. L. J. 158, and (1884) 112 U. S. 526 [28:816].

A careful examination of the adjudged cases in Pennsylvania irresistibly compels us to the conclusion that there is *no settled rule[104 of property in that state, by which the words of the devise to Amanda Stephens, "and in the event of Amanda dying unmarried, or if married, dying without offspring by her husband," should be construed as restricted to her death in the testator's lifetime, making the devise over substitutionary, and to take effect only upon her death within that time.

The result is, that the decision of the supreme court of Pennsylvania upon the construction of the will of James S. Stevenson



Digitized by Google

not conclusive; and that the first question tified to this court by the circuit court of peals must be answered in the negative.

This brings us to the second question, which "What estate did Amanda Stephens take der the devise?"

In *Eichelberger* v. *Barnitz*, 9 Watts, 447, delled in 1840, the court, speaking by Mr. istice Serjeant, said: "The principle has w become a settled rule of property, in reion to lands, that if a devise be made to one in e, and if he die without issue, or on failure of sue, or for want of issue, or without leaving sue, then over to another in fee, the estate of e first taker is a fee tail, which, if he have is- ie, passes to them *ad infinitum* by descent as nants in tail." And this rule was applied to devise in which the contingency was expressed the words "my will is, because my son Hen- y is not yet married, that if he should die without leaving any lawful issue, that then his full hare shall fall or go in equal shares to my oth- r three children." 9 Watts, 450, 451.

In *Middleswarth* v. *Blackmore* (1873) 74 Pa. 114, 419, the court, speaking by Mr. Justice Mercur, and referring to *Eichelberger* v. *Barnitz*, above cited, and other cases, recognized and affirmed that "as a general rule, and standing alone, the language, 'die without leaving any legitimate issue,'" must be understood to mean issue indefinitely; that the estate created would, in such case, have been one in tail;" and denied such effect to those words, only because of the general scope of the particular will, and of the land being thereby charged with the payment of certain sums to persons living, and required, in case of the happening of the 105] contingency *named, to be sold by the testator's executors, and the proceeds, after paying those sums, to be distributed among his grandchildren.

Again, in *Lawrence* v. *Lawrence* (1884) 105 Pa. 335, a devise of land to the testator's two nephews, "and their heirs, as tenants in common," but if one of them "should die without leaving lawful issue," his share to go to the other, "his heirs and assigns forever," was held to create an estate tail in the nephews; and Mr. Justice Trunkey, in delivering judgment, said that it had not been doubted, since the decision in *Eichelberger* v. *Barnitz*, 9 Watts, 447, that the rule in Pennsylvania is that "the established interpretation of words of limitation on failure of issue, whether the terms be 'if he die without issue,' 'if he die without having issue,' 'if he have no issue,' or 'if he die before he has any issue,' in the absence of all words making a different intent apparent, is, that they import a general indefinite failure of issue, and not a failure at the first taker's death." 105 Pa. 339.

In *Reinoehl* v. *Shirk* (1888) 119 Pa. 108, the testator devised real estate to two children of his deceased son in fee, and if either should "die without leaving lawful issue," his share to go to the survivor, and "if both of the said children should die without leaving lawful issue," the real estate devised to them to go to the testator's other children; and directed that under no circumstances should his son's divorced wife have any part of the testator's estate. The court, speaking by Mr. Justice Sterrett, held that the children of the son took an estate tail; and said that since *Eichelberger* v. *Barnitz*, 9 Watts, 447, it had undoubtedly been the rule in Pennsylvania that, standing alone, the words "die without leaving issue," or other expressions of the same import, mean a general indefinite failure of issue, and not a failure at the death of the first taker.

In *Hackney* v. *Tracy* (1890) 137 Pa. 53, a testator, who made his will in 1854 and died in 1864, devised real estate to his daughter Elizabeth, "but in case my daughter Elizabeth should die without issue, then in that case all her interest that she might or could have in the same to descend to my daughter *Mary;"[106 and it was held, in an opinion delivered by Mr. Justice Green, reviewing the previous cases, that the devise over was upon an indefinite failure of issue of Elizabeth, and that she took an estate tail, enlarged by the act of 1855 into a fee simple.

Like decisions were made in 1892 in two cases, in one of which the devise was to a daughter in fee simple, "provided, nevertheless, that in case she should die without leaving lawful issue, then it is my will that the property above devised to her shall be equally divided amongst the children of my brother" (*Ray* v. *Alexander*, 146 Pa. 242); and in the other the testator, after devising to his wife an estate for life, provided that "in case either of my daughters shall die without issue, either before or after the decease of my wife, then the amount of their share or shares in the residue of the estate shall revert back to the remainder of my children, share and share alike;" and "the share or shares that such of my daughters as may be without issue before or after the death of my wife may be entitled to" should be invested, and the income paid to them; "and after her death the residue of the estate is to be divided, share and share alike, amongst those of my heirs that are then living." *Hoff's Estate*, 147 Pa. 636.

In view of this series of adjudications of the highest court of the state, extending over more than half a century, we cannot but accede to the opinion expressed by Judge Atcheson, with the concurrence of Judge Buffington, in the circuit court of the United States, in the case at bar, that "it is firmly established by an unbroken line of authorities, that a devise over to named living persons, upon the failure of the issue of the first taker, does not import a definite failure of issue;" and that "to hold at this late day that such a devise over imports a definite failure of issue would shake a multitude of titles." 69 Fed. Rep. 504, 505.

It has also long been regarded as established law in Pennsylvania, that such words as "in case of his death unmarried or without issue," in this connection, are equivalent to simply "dying without issue," unless there is something else in the case to warrant and require a different construction of the *will. [107 *Vaughan* v. *Dickes* (1853) 20 Pa. 509, 513; *Matlack* v. *Roberts* (1867) 54 Pa. 148, 150; *McCullough* v. *Fenton* (1870) 65 Pa. 418, 426.

The result of the foregoing considerations is that, by a settled rule of property in Pennsylvania, the devise to Amanda Stephens, with a devise over "in the event of Amanda dying unmarried, or, if married, without offspring by her husband," gave her an estate tail, unless



Digitized by Google

this conclusion is controlled by other words in the will, or by the facts stated in the certificate of the circuit court of appeals.

Indeed, the reasoning of Chief Justice Sterrett upon the construction of the clause "in the event of Amanda dying unmarried, or, if married, dying without offspring by her husband," would seem to point to the same conclusion. That reasoning, in his own words, above quoted, is that "the word 'offspring' here used is but a synonym for 'issue;'" that "'issue' cannot be lawful without marriage;" that "the devise is, then, in the event of her dying without issue, over to" the heirs of John Barber; and that "dying without issue was thus made the contingency upon which" those heirs could take. 165 Pa. 649. Assuming the correctness of that inference, namely, that the contingency described was simply "dying without issue," these words would import an indefinite failure of issue, according to the long line of authorities above cited, beginning with the judgment delivered by Mr. Justice Serjeant in *Eichelberger* v. *Barnitz*, 9 Watts, 447, and including the judgment delivered by Mr. Justice Sterrett in *Reinoehl* v. *Shirk*, 119 Pa. 108; and would be inconsistent with the conclusion of the court that the devise over to the heirs of John Barber must take effect, if at all, upon the death of the testator.

The supreme court of Pennsylvania considered that conclusion to be strengthened by two special considerations: First, "That, in the absence of a fixed period, the power of sale was intended to be exercised at a near rather than a remote period after the testator's death," because, as said in *Wilkinson* v. *Buist*, 124 Pa. 253, 261, "a power of sale without limit would doubtless be bad, under the rule against perpetuities." Second, "That testator had in view
**108** ]living *persons as substituted beneficiaries—the gift over is to the 'heirs,' and therefore the children, of John Barber, who was living—and the natural inference is he intended them to take as such." 165 Pa. 650, 651.

But there does not appear to this court to be anything in the will indicating that the time, either of executing the power of sale of this land, or of ascertaining the persons who are to take the proceeds of its sale, must be upon or soon after the death of the testator.

The words "in the event of Amanda dying unmarried, or, if married, dying without offspring by her husband," which, as has been seen, import of themselves an indefinite failure of issue, and therefore an estate tail in Amanda, are followed by the words "then these lots are to be sold, and the proceeds to be divided equally among the heirs of John Barber."

There is no direction that the sale of these lots shall be made by the executors; the sale is to be made upon the expiration of the estate tail; and a power to sell upon the expiration of an estate tail, and to divide the proceeds among persons then ascertainable, is not within the rule against perpetuities. *Cresson* v. *Perree*, 70 Pa. 446, 449; *Heasman* v. *Pearse*, L. R. 7 Ch. 275; Gray, Perpetuities, §§ 447, 490.

The persons who are to take under the limitation over are described as "the heirs of John Barber." Although, strictly speaking, no one is the heir of a living person, yet a devise to the "heirs" of a person named (who is a living person, and is so recognized in the will) describes with sufficient certainty the persons intended, and shows that the word is not used in the strict sense, but as meaning the heirs apparent of that person, or the persons who would be his heirs were he dead when the devise takes effect. *Darbison* v. *Beaumont*, 1 P. Wms. 229, Fortescue, 18; *Goodright* v. *White*, 2 W. Bl. 1010; *Heard* v. *Horton*, 1 Denio, 165 [43 Am. Dec. 659]. That this testator used the word in this meaning is confirmed by the clause in which he directs the residue of his estate to be sold and divided into sixteen shares, of which he gives two shares to "John Barber," and two other shares "to the heirs *of John Barber." But the [**109** word "heirs" is not limited, in its own meaning, or by anything in this will, to children; and applies either to John Barber's children, or to his more remote descendants, whichever may be his heirs if he be dead, or his heirs apparent if he be living, when the devise in question takes effect.

The facts added, by way of amendment, to the 2d paragraph of the certificate of the circuit court of appeals are wholly immaterial. Evidence of extrinsic circumstances, such as the testator's relation to persons, or the amount and condition of his estate, may be admitted to explain ambiguities of description in the will, but never to control the construction or extent of devises therein contained. As said by this court, speaking by Mr. Justice Grier: "A court may look beyond the face of the will where there is an ambiguity as to the person or property to which it is applicable, but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised." *King* v. *Ackerman*, 67 U. S. 2 Black, 408, 418 [17: 292, 298]. See also *Wilkins* v. *Allen*, 59 U. S. 18 How. 385 [15: 396]. To allow the legal construction of the terms of a will, executed and attested as required by law, to be affected by testimony to the testator's state of health at the time of publishing his will, or to his length of life afterwards, would be open in the highest degree to the confusion and uncertainty resulting from permitting the meaning of written instruments to be altered by parol evidence.

For the reasons above stated, this court is of opinion that the answer to the second question certified by the circuit court of appeals must be that Amanda Stephens took an estate tail under the devise to her. Ordered accordingly.



Digitized by Google

## [O] THE CONQUEROR.

(See S. C. Reporter's ed. 110-136.)

*rtiorari—when issued—duty on vessel—damages for seizure—question for jury—demurrage—judicial notice—estimates of value—finding, when not disturbed.*

The fact that the mandate of the circuit court of appeals to the district court affirming the decree of that court has gone down does not preclude a writ of certiorari from this court to review the decision of the circuit court of appeals.

An application for a certiorari to review a decree of the circuit court of appeals entered after the adjournment of this court for the term is made with reasonable promptness if during the next term of the court and within a year after the original decree.

A foreign-built vessel designed only for pleasure, and purchased by a native-born American citizen, is not subject to duty under the act of October 1, 1890.

A collector of a port is not protected by a certificate of probable cause from a judgment for damages for seizure and detention of a vessel on an invalid claim for duties, since such a seizure is not within U. S. Rev. Stat. § 970, which applies to a seizure for a penalty or forfeiture, but the case more properly falls within § 989, providing that execution shall not issue against the collector, but the judgment be paid from the treasury.

5. Testimony as to value of the use of a yacht by witnesses duly qualified to testify in relation to the subject of inquiry, even if uncontradicted, will not prevent the jury from exercising their independent judgment.

6. The mere fact that a vessel designed for pleasure is detained does not entitle the owner to demurrage. There must be a pecuniary loss, or at least a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purposes of pleasure.

7. The court may properly take judicial notice of the fact that the yachting season in our northern waters practically comes to an end before the 1st of November.

8. Estimates of the value of the use of a pleasure yacht, made by friendly witnesses, with no practical illustrations to support them, without any showing that the vessel was earning profits or belonged to a class of vessels for which there is a steady demand in the market, are insufficient to be made the basis of a judicial award for damages by its detention.

9. A finding as to the amount of necessary expenses of caring for a vessel, incurred by the owner while it was in the nominal possession of the collector of a port under seizure for duties, although the amount seems large, will not be disturbed when it has been affirmed by the district court and the court of appeals.

[No. 98.]

*Argued January 6, 7, 1897. Decided March 8, 1897.*

ON WRIT OF CERTIORARI to the Circuit Court of Appeals for the Second Circuit to review a decree of the Circuit Court of Appeals affirming the decree of the United States District Court for the Southern District of New York, in a suit in admiralty brought by Fred-

---

NOTE.—*As to certiorari in United States courts*, see note to Clark v. Hackett, 17: 69.

*As to lien of United States for duties*, see note to United States v. 850 Chests of Tea, 6: 702.

*As to action to recover back duties paid under protest: protest, how made, and its effect*,—see note to Greely v. Thompson, 13: 397.

*As to seizure of vessels; illegal and lawful*,—see note to The Apollon, 6: 111.

*Demurrage; what is; when accrues; delay by act of master, or consignee; express contract for demurrage; usage; delay in discharging cargo; implied contract; lay-days; amount of damages.*

It is usual in charter parties to insert an agreement that a specified number of days shall be allowed for loading and unloading, or for one of those operations, and that it shall be lawful for the freighter to detain the vessel for these purposes a further specified time on payment of a daily sum. Abbott, Ship. 308. A contract to the same effect is often inserted in the bill of lading, where goods are sent in a general ship. Yeats v. Pim, Holt, N. P. 95. This delay and the payment agreed upon are called demurrage. Cross v. Beard, 26 N. Y. 85.

Although demurrage, properly so called, is only payable when it has been stipulated, yet, if a vessel is improperly detained, the owner may have a special action for the damage. Abbott, Ship. 304; Horn v. Bensusan, 9 Car. & P. 709; Kell v. Anderson, 10 Mees. & W. 498; Evans v. Forster, 1 Barn. & Ad. 118; Clendaniel v. Tuckerman, 17 Barb. 184.

One who purchases goods arriving in bond is not liable for demurrage of the vessel for detention occurring before the seller obtains a legal permit for the delivery. Gillespie v. Durand, 3 E. D. Smith, 531.

It is the duty of the charterers to restore the ship at the end of the period allowed for demurrage; but they are not responsible for an unreasonable delay by the master. Robbins v. Codman, 4 E. D. Smith, 315.

If the charter requires the unlading to be according to the custom of the port the consignees who accept a delivery are liable for delay caused by them not warranted by the custom. Morse v. Pesant, 3 Abb. App. Dec. 321, 2 Keyes, 16, Aff'g 7 Bosw. 199.

Consignees of a cargo of grain have no right to detain the vessel until they can effect a sale, instead of providing a place of storage, and they are liable to the carrier for the damages caused by such detention, if it arises from their misconduct or neglect. Huntley v. Dows, 55 Barb. 310.

Damages in the nature of demurrage, in the absence of express agreement, are not recoverable against the owner of cargo for detention resulting from waiting turn to load or unload, this not being the consequence of his act. Fisher v. Abeel, 66 Barb. 381.

An improper detention of a vessel, however occurring, whether it be for time lost in making the necessary repairs occasioned by a collision or as the result of a breach of contract, express or implied, is considered as demurrage, and damages may be recovered in an action brought *eo nomine*. The Apollon, 22 U. S. 9 Wheat. 373 (6: 615); Williamson v. Barrett, 54 U. S. 13 How. 101 (14: 68); Sprague v. West, Abb. Adm. 548; The M. S. Bacon v. Erie & W. Transp. Co. 3 Fed. Rep. 344.

As between the parties to the contract, the rule is that when the time is expressly ascertained and limited, the shipper or charterer will be liable for any default that may occur in its performance, although it be not attributable to any fault or omission on his part. Randall v. Lynch, 2 Campb. 352; Williams v. Theobald, 15 Fed. Rep. 468.

Proof that delay was not occasioned by the fault



Digitized by Google

erick W. Vanderbilt to recover possession of the steam yacht Conqueror, alleged to be illegally detained by the collector of customs for the district of New York, for the restitution of said steam yacht, and a subsequent decree for damages for the detention of the yacht. *Reversed*, and case remanded to the district court for further proceedings.

See same case below, 49 Fed. Rep. 99.

Statement by Mr. Justice **Brown**:

This was a libel by Frederick W. Vanderbilt to recover possession of the steam yacht Conqueror, of which he was the owner, and which was alleged to be illegally detained by J. Sloat Fassett, then collector of customs for the district of New York.

The material facts of the case are as follows: In May, 1891, Vanderbilt, who is a native-born American citizen, purchased of one Bailey, of Kingston-upon-Hull, England, the yacht Conqueror, a foreign-built vessel, for the sum of £15,500, or about $75,000. The bill of sale was certified by the United States consul at Liverpool, and the yacht was delivered to Vanderbilt at Hull. The vessel was designed for pleasure only, and has never been put to any other use. After a cruise to Norway, Mr. Vanderbilt returned with her to England, and in June was elected a member of the "Royal Mersey Yacht Club" of Liverpool, thereby, it seems, obtaining the right to fly the blue ensign of Her Majesty's fleet. He never did, however, fly a British flag, but always carried the ensign of the New York Yacht Club, and her enrolment in the Liverpool Yacht Club seems to have been with the intent of claiming a special privilege of exemption from tonnage tax under U. S. Rev. *Stat. § 4216, accorded to [112 yachts belonging to foreign yacht clubs.

Shortly after this, the yacht crossed the ocean, and arrived at New York about July 6, 1891, where she was duly entered as a vessel with the collector of the port, and paid the light money levied upon her by the collector as a vessel, pursuant to U. S. Rev. Stat. § 4225. She also received from the deputy collector a certificate to her bill of sale, describing her, stating that she had been sold by Bailey to Vanderbilt, and that the latter was a citizen of the United States. This entitled her to protection as an American vessel, but did not authorize her to engage in commerce. After cruising for some time about the coast, on August 27, 1891, in obedience to instructions from the Treasury Department, founded upon an opinion of the solicitor of the Treasury that the yacht should be regarded as a dutiable importation, the collector took forcible possession of her, and held her until dispossessed by the marshal under authority of the district court. On October 1, Mr. Fassett went out of office, and was succeeded by Francis Hendricks, to whom the possession passed.

Meanwhile, on September 1, Mr. Vanderbilt filed his present libel for possession of the yacht, alleging his citizenship; the fact that the vessel was designed, intended, and constructed as a pleasure yacht only; its purchase by the libellant, as well as other facts hereinbefore set forth, and prayed for process against the vessel, and for a decree awarding him posses-

---

of the shipper is no excuse if he has by his contract stipulated that the work should be done. Holyoke v. Depew, 2 Ben. 340.

Apparent hardship is no mitigation. Leer v. Yates, 3 Taunt. 386.

Frost, prohibition of a foreign government, customhouse regulations, unlawful seizure, and crowded state of the docks are causes, accidents, or misfortunes which must ordinarily fall on the charterer. Barret v. Dutton, 4 Campb. 333; Barker v. Hodgson, 3 Maule & S. 267; Hill v. Idle, 4 Campb. 327; Bessey v. Evans, 4 Campb. 131.

But if the obligation be concurrent and dependent, and neither is ready and able to perform his own part of the contract, neither has any remedy in damages against the other. The loss must remain where it falls. Ford v. Cotesworth, L. R. 4 Q. B. 127; The Sparton, 25 Fed. Rep. 53.

The liability of the parties may of course be changed by special terms inserted in the contract. Oglesby v. Yglesias, 27 L. J. Q. B. 356; Pederson v. Lotinga, 28 L. T. 267.

A provision in the charter party exempting the charterer from liability "unless by default of the charterer" will relieve him from liability for delay if it occur from causes over which he had no control. The Mary E. Tabor, 1 Ben. 105; Thacher v. Boston Gaslight Co. 2 Low. Dec. 361.

But the rule is otherwise if it be shown that the vessel, her owners, or their agents were the wilful or even innocent cause of the delay in question. Seegur v. Duthie, 1 Asp. Mar. L. Cas. 3; Barret v. Dutton, 4 Campb. 333.

A refusal on the part of the master to deliver in the proper manner exonerates the freighter. Benson v. Blunt, 1 Q. B. 870.

When no specific time for discharge or manner of effecting the same is stipulated for, demurrage cannot be recovered if the manner of unloading be that customarily employed at the port of discharge. The Elida, 31 Fed. Rep. 420.

Under a bill of lading stipulating for demurrage after a certain time, none will be payable for days lost by the fault or negligence of the master or his subordinates. Hall v. Eastwick, 1 Low. Dec. 456.

A vessel is not entitled to demurrage for time lost in waiting to avail herself of a consignee's special facilities for unloading. McLaughlin v. Albany & R. Iron & S. Co. 8 Fed. Rep. 447.

Nor for time lost in consequence of the seizure and detention of the vessel by the local authorities, if the seizure be occasioned by the wrongful act of her master. Elwell v. Skiddy, 8 Hun, 73.

When the bill of lading contains a stipulation for demurrage, either expressly or by reference to the charter party, acceptance of the goods is evidence of an agreement on the part of the consignee to pay both freight and demurrage. Young v. Moeller, 5 El. & Bl. 755; Scaife v. Tobin, 3 Barn. & Ad. 683.

Delivery of the bill of lading is a delivery of the cargo, and creates a privity between the parties. The Mary Ann Guest, Olcott, 498; Conard v. Atlantic Ins. Co. 26 U. S. 1 Pet. 445 (7:215); Griffith v. Ingledew, 6 Serg. & R. 429, 9 Am. Dec. 444.

In order to charge a consignee, as such, or the indorsee of a bill of lading, with any other obligation than the payment of freight, plain words must be used. Chappell v. Comfort, 31 L. J. C. P. 58; Gray v. Carr, L. R. 6 Q. B. 522; Russell v. Niemann, 33 L. J. C. P. 358.

If the words used in the bill of lading be "paying for said goods as per charter party," there will be no express contract for demurrage as against the consignee. 112 Sticks of Timber, 8 Ben. 214; Groom v. Woodruff, 19 Fed. Rep. 144. But the rule is otherwise if the words used be "freight and other conditions as per charter party." Strater v. Kidd, 4 Asp.



Digitized by Google

on and condemning Fassett in damages and sts. Process having been issued against the ssel, the execution thereof by the marshal as restricted by the customs officials, and it as not till an *alias* and *pluries* process had een issued that the marshal succeeded in btaining exclusive and undisputed control f her. Fassett then applied to this court for writ of prohibition, which was denied. *Ex arte Fassett*, 142 U. S. 479 [35: 1087].

Answers having been filed by Mr. Fassett, as ate collector, and personally, and by Mr. Hendricks, as collector, praying for the dismissal f the libel and for a decree of restitution of be yacht to the collector, the cause came on for a 113] hearing in the district court, and resulted n a decree of restitution (*The Conqueror*, 49 Fed. Rep. 99), a reference to a commissioner for an assessment of damages, and a subsequent decree for damages in the sum of $15,000 as demurrage for detention of the yacht from August 27, to February 3, and for other items sufficient to make up a total decree of $21,742.34.

Upon appeal to the circuit court of appeals this decree was affirmed without an opinion, whereupon appellant applied for and was granted the present writ of certiorari.

*Mr.* **Edward B. Whitney**, Assistant Attorney General, for appellant.

*Messrs.* **Elihu Root**, *Samuel B. Clarke*, and *Bronson Winthrop* for appellee.

**Mr.** Justice **Brown** delivered the opinion of the court:

Two questions are involved in the merits of this case: *First*, whether this vessel was taxable under the tariff laws; *second*, whether the award of damages was justified by the law and the testimony.

1. A preliminary objection is made, however, by the appellee that the case is not properly before the court, because the mandate is not here, and because the case was in the district court and was brought here by a writ addressed to a court which had lost jurisdiction of it before the writ had issued.

The fact that the mandate of the circuit court of appeals to the district court, affirming the decree of that court, had gone down, is immaterial. The transcript of the record is still in the court of appeals, and if a writ of certiorari can be issued at all after a final disposition of the case in that court, it could not be defeated by the issue of a mandate to the court below. That certiorari can issue, and, indeed, is ordinarily only issued, after a final decree in the court of appeals, was settled by this court in *American Const. Co.* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 384 [37: 486, 491], although it may be issued before, if this court be of opinion that the facts [114 of the case require an earlier interposition. *United States* v. *The Three Friends*, 166 U. S. 1 [*ante*, 897].

The only question worthy of consideration in this connection is whether the writ of certiorari should not have been applied for more promptly. The decree sought to be reviewed was entered June 6, 1893; the petition for certiorari was not filed until April 16, 1894. The act does not fix the time within which

---

Mar. L. Cas. 34; Smith v. Sieveking, 4 El. & Bl. 945; Wegener v. Smith, 24 L. J. C. P. 25.

The liability to pay demurrage or damages for detention under a bill of lading is presumably upon the person who made the contract, that is generally upon the shipper. Cawthron v. Trickett, 33 L. J. C. P. 182.

But delivery of the bill of lading or a delivery of the cargo creates a privity between the parties. Scotson v. Pegg, 30 L. J. Exch. 225; The Mary Ann Guest, Olcott. 498.

A consignee accepting goods under a bill of lading wherein there is an express promise to pay demurrage is bound by its terms, and can only be excused by default on the part of the vessel, her owners, or agents. Carver, Carriage by Sea, 636, 637.

But if it be intended to make shippers or consignees who are strangers to the contract or charter party under which the vessel itself is hired liable for not discharging, and to compel them to pay demurrage in accordance with its terms, there must be a clear and unambiguous reference to these terms in the bill of lading. Wegener v. Smith, 24 L. J. C. P. 25; Gray v. Carr, L. R. 6 Q. B. 523; Porteus v. Watney, L. R. 3 Q. B. Div. 534; Chappell v. Comfort, 31 L. J. C. P. 58.

Whether a consignee *qua* consignee could be held liable under such circumstances for demurrage incurred before sailing, is doubtful. Smith v. Sieveking, 24 L. J. Q. B. N. S. 257.

When no express contract for demurrage exists the consignee or his assignee is not liable for demurrage even after the receipt of the goods. Gage v. Morse, 12 Allen, 410, 90 Am. Dec. 155; Young v. Moeller, 5 El. & Bl. 755.

Delivery of the cargo is a sufficient consideration to bind the promise to pay demurrage, even though the receiver be only acting as an agent. Benson v. Hippius, 4 Bing. 455; Scotson v. Pegg, 30 L. J. Exch. 225.

The consignee and indorsee of the bill of lading, who is the owner of the goods and bills of lading, and who accepts the goods under the bill of lading, is bound by its terms. If he accepts the goods under the bill of lading he is presumed to pay the stipulated demurrage. He cannot by his subcontracts with others shift his responsibility to those who do not act directly under the bill of lading Neilsen v. Jesup, 30 Fed. Rep. 138.

The vessel is not bound to look beyond the owner and holder of the bill of lading because he has a right to control the delivery and acceptance of the goods under it. The Thames v. Seaman ("The Thames"), 81 U. S. 14 Wall. 98, 107 (20: 804, 806).

When the consignee is the freighter he is liable for unnecessary detention occuring at the port of discharge, even though no express contract exists therefor. Sprague v. West, Abb. Adm. 548; Donaldson v. McDowell, Holmes, 292; The M. S. Bacon v. Erie & W. Transp. Co. 3 Fed. Rep. 344; The Hyperion, 7 Am. L. Rev. 457.

Or if he be the owner of the goods, though the freight be paid by the shipper. Crawford v. Mellor, 1 Fed. Rep. 638.

But in the absence of any provision for demurrage the obligation of the consignee, *qua* consignee, is that of customary and reasonable diligence, and no liability can be imposed upon him without proof of negligence on his part. Henley v. Brooklyn Ice Co. 14 Blatchf. 522.

The charterer who stipulates for despatch in discharging, takes all the risk of being able to effect such a discharge, and if he is obliged to detain the ship unduly he must pay demurrage. Sleeper v. Puig, 17 Blatchf. 36.

A covenant to load with "usual despatch" excludes every delay on the part of the shipper, beyond the ordinary time for bringing the cargo to the place of loading. Kearon v. Pearson, 7 Hurlst. & N. 386.



Digitized by Google

application for a certiorari must be made. As the decree was entered June 6, immediately after this court had adjourned for the term, and as the application must be made to the court while in session, no fault is imputable to the government in not making the application before the opening of the next term in October; and while we think such application should be made with reasonable promptness, as it was made during the term and within a year after the original decree, we think it was within the time. We do not think the party complaining is limited to the six months allowed by § 11 of the court of appeals act for suing out a writ of error from the court of appeals to review the judgment of the district or circuit court; and it would seem that he is, by analogy, entitled to the year within which, by § 6, an appeal shall be taken or writ of error sued out from this court to review judgments or decrees of the court of appeals in cases where the losing party is entitled to such review.

2. Was the Conqueror dutiable under the tariff act of October 1, 1890 (26 Stat. at L. 567)? This act requires duties to be levied upon all "articles" imported from foreign countries and mentioned in schedules therein contained, none of which schedules mention ships or vessels *eo nomine*. An abstract furnished us of the corresponding clauses in all the principal tariff acts from 1789 to the present date shows that duties are laid either upon "articles," as in the present act, or upon "goods, wares, and merchandise"—words which have a similar meaning. Indeed, the words "articles" and "goods, wares, and merchandise" seem to be used indiscriminately, and without any apparent purpose of distinguishing between them. While a vessel is an article of personal property, and may be *termed "goods, wares, and mer- [115 chandise," as distinguished from real estate, it is not within either class, as the words are ordinarily used. In all this class of cases, the meaning of the words as used in the particular statute must be gathered from the context and from the evident purpose of the act. Thus, in *Palmer's Shipbuilding & Iron Co.* v. *Chaytor*, L. R. 4 Q. B. 209, it was held that a ship was not an "article" within the meaning of an act forbidding the employment of children to labor in the manufacture of articles, or parts of articles; but that an iron plate was an article of metal, even though used in shipbuilding, and the shaping of the plate was part of the manufacture.

Vessels certainly have not been treated as dutiable articles, but rather as the vehicles of such articles, and though foreign built and foreign owned, are never charged with duties when entering our ports, though every article upon them, that is not a part of the vessel or of its equipment or provisions, is subject to duty, unless expressly exempted by law. If this yacht had been brought here by a foreigner, it is not insisted that she would have been subject to duty. Indeed, she might be navigated between our ports for an unlimited time, provided only that she did not carry passengers or goods for hire. If she be dutiable at all, it must then be because she was bought by an American citizen. But why should this make her dutiable? She is not imported or taken into the country in the ordinary sense in which that term is used with reference to other articles, does not become commingled with the general mass of property, and is employed pre-

"Quick despatch in discharging" excludes all delays save the time employed in unloading and delivering cargo, unless occasioned by natural causes beyond the control of the contracting parties. Davis v. Wallace, 3 Cliff. 128.

"Customary despatch" includes usages of the port, such as working hours, the order in which vessels must come to the wharf, and the observance of holidays; but it does not include any delay which is purely voluntary on the part of the merchant, although such delay be usual in his trade. Lindsay v. Cusimano, 10 Fed. Rep. 308, 12 Fed. Rep. 508.

An agreement for "despatch in discharging" or for quick despatch, supersedes any custom of the port. Thacher v. The Boston Gaslight Co. 2 Low. Dec. 361; Keen v. Audenried, 5 Ben. 535; Davis v. Wallace, 3 Cliff. 128.

If by the terms of the contract the cargo is to be unloaded at the average rate of not less than 100 tons per day, the period in which the discharge is to be completed is as definitely fixed as if the specific number of days had been written therein. Williams v. Theobald, 15 Fed. Rep. 472; Sanguinetti v. Pacific Steam Nav. Co. L. R. 2 Q. B. Div. 238.

When there is no special contract, the usage of the port in respect to the reception and delivery of cargo is frequently a matter of material consideration. Bliven v. New England Screw Co. 64 U. S. 23 How. 431 (16: 513).

Proof of usage is admitted either to interpret the meaning of the language of the contract, or to ascertain its nature and effect, in the absence of express stipulation, if the meaning be equivocal or obscure. The Reeside, 2 Sumn. 569.

To render a usage or custom of trade valid and binding, it must be known, uniform, certain, reasonable, and not contrary to law. Lindsay v. Cusimano, 12 Fed. Rep. 504.

No custom of the port will be permitted to override an express stipulation limiting the time of discharge. Fish v. 150 Tons of Brown Stone, 20 Fed. Rep. 202.

When it does not appear that parties to a contract have agreed upon the meaning of the particular word in it, the custom of trade will determine it. Bullock v. Finley, 28 Fed. Rep. 514.

If a usage is general, both parties are presumed to know it and to contract in reference to it; if it is special, and confined to a particular business, or has reference to a particular port only, there is no such presumption. Isackson v. Williams, 26 Fed. Rep. 642.

Any difficulty that may arise in bringing the cargo to the port of shipment is outside of the charter party, and cannot be a matter of excuse in estimating whether the proper despatch has been used, unless it be covered by an express stipulation. Adams v. Royal Mail Steam Packet Co. 28 L. J. C. P. 83; Kearon v. Pearson, 31 L. J. Exch. 1; Elliott v. Lord, 48 L. T. 542; Fenwick v. Schmalz, L. R. 3 C. P. 313.

If A agrees to have a vessel loaded for B at the wharf of a railroad company, where it is customary to load vessels in turn, and this is done, causing some delay however, A is not answerable for demurrage, if it be shown that he has no personal control over the loading, and that this was understood at the time that the contract was entered into. The Schmidt, 27 Fed. Rep. 671.

When the time for loading or discharging is not fixed beforehand, either definitely or by reference to any ordinary practice or despatch, the law implies a contract that both merchant and shipowner shall use reasonable despatch in performing their respective undertakings. Ford v. Cotesworth, L. R. 4 Q. B. 127; The William Marshall, 29 Fed. Rep.



Digitized by Google

ely as she might be legally employed by her eign owners, or by an American citizen sing her from such owner. Other articles dutiable, not because they have been purased, but because they are actually imported d become the subject of sale and commerce thin the country. But if a yacht be dutiable ien purchased, and only when purchased by American citizen, we apply a test of dutiility that we apply to no other article, mely, the test of ownership.

Not only is there no mention of vessels *eo mine*, in the tariff acts, but there is no general 16]description under which they *could be inuded except as manufactures of iron or wood. at it is only by straining the word far beyond ordinary import, that we are able to apply e word "manufacture" to a seagoing, schoonrigged, screw steamship, 182½ feet long, near25 feet wide, and of 372 tons' burden. The rm "manufacture" is as inapplicable to such vessel as it would be to a block of brick or one, erected in the heart of a great city. A ip is doubtless constructed of manufactured ticles which, if imported separately, would the subject of duty, but which put together the form of a ship are taken out of the class "manufactures," and become a vehicle for the nportation of other articles. Considering ie hundreds of foreign vessels which enter ie ports of the United States every day, it is ncredible that, if Congress had intended to nclude them in the tariff acts, it would not ave made mention of them in terms more definite than that of "manufactures."

While there has been no direct adjudication upon the question of the taxability of foreign vessels under the tariff laws, it was held in *United States* v. *A Chain Cable*, 2 Sumn. 362, hat a chain cable was not taxable, which was purchased at Liverpool by the master of the ship Marathon to supply the place of a hempen cable which had become unseaworthy before the arrival of the ship at Liverpool, if the cable were purchased bona fide with the intention of using it for that ship, and not to sell as merchandise. It was said by Mr. Justice Story that the words "goods, wares, and merchandise," used in the tariff act, included only such as were designed for sale, or to be applied to some use or object distinct from their bona fide appropriation to the use of the ship in which they are imported. And in *The Gertrude*, 2 Ware, 181, 3 Story, 68, it was held that the tackle, apparel, and furniture of a foreign vessel, wrecked upon our coast, and landed and sold separately from the hull, were not goods, wares, and merchandise imported into the United States within the meaning of the revenue laws. The opinion was delivered by Judge Ware, briefly affirmed on appeal to the circuit court by Mr Justice Story, and the case put upon the ground that the rigging and apparel of the ship are a part of the ship, and therefore not *merchandise in any other sense [117 of the word than that in which the ship herself is. "If," said he, "we look through the whole of the numerous acts of Congress laying duties on merchandise imported, as well as those regulating the collection of the same, we shall find they uniformly contemplate the cargo; they refer to articles having the quality of merchandise in the ordinary and most popular sense of the word. They refer also to goods intended to be introduced into the country for sale and consumption, or for the general purposes of commerce."

While neither of these cases is directly in point, each of them would probably have been differently decided if the court had been of opinion that a foreign vessel arriving in this country and sold here, were the subject of duty.

The fact that, in a particular case, such as

---

28; The M. S. Bacon v. Erie & W. Transp. Co. 3 Fed. Rep. 344.

There can be no recovery against the consignee or consignor for delays occasioned without fault on their part. The Z. L. Adams, 26 Fed. Rep. 655; Fish v. 150 Tons of Brown Stone, 20 Fed. Rep. 203; Paquette v. A Cargo of Lumber, 23 Fed. Rep. 301; Gronn v. Woodruff, 19 Fed. Rep. 143; Crawford v. Mellor, 1 Fed. Rep. 648; The Schmidt, 27 Fed. Rep. 171; Wall v. 95,000 Feet of Lumber, 26 Fed. Rep. 716; Wordin v. Bemis, 32 Conn. 268; The Glover, 1 Brown, Adm. 166.

The shipowner has a lien upon the cargo for demurrage, although there be no stipulation therefor in the bill of lading. Hawgood v. 1,310 Tons of Coal, 21 Fed. Rep. 681.

If the ship is ready at the proper place and does not get her turn, the merchant is liable for the detention caused thereby. Cross v. Beard, 26 N. Y. 49; Henley v. Brooklyn Ice Co. 8 Ben. 471, 14 Blatchf. 522; Finney v. Grand Trunk R. Co. 14 Fed. Rep. 171; Cain v. Church, 29 Fed. Rep. 328.

The consignee cannot enforce upon the vessel a substituted mode of discharge, involving increased cost, expense, or delay. The Dictator, 30 Fed. Rep. 537; The Favorite, 27 Fed. Rep. 474; McLaughlin v. Albany & R. Iron & S. Co. 8 Fed. Rep. 447.

The lay days allowed by contract for discharging are to be reckoned from the time of the vessel's arrival at the usual place of discharge, and not at the entrance to the port. Gronstadt v. Witthoff, 15 Fed. Rep. 265; Kell v. Anderson, 10 Mees. & W. 498; M'Intosh v. Sinclair, 11 Ir. C. L. 456.

In cases of collision there is no settled rule as to the measure of allowance for delay; but a fair market value may be charged for the time that the vessel is detained, and in the absence of a market value, the value to the owner in the business in which she was engaged at the time of the collision. The Rhode Island, 2 Blatchf. 114; Blanchard v. Ely, 21 Wend. 342, 34 Am. Dec. 250; The Stromless, 1 Low. Dec. 153; The Mayflower, 1 Brown, Adm. 380; Williamson v. Barrett, 54 U. S. 13 How. 101 (14: 68); The Aleppo, 7 Ben. 128.

The general rule is, that the compensation allowed as damages in collision cases includes a reasonable allowance for demurrage for unavoidable detention during repairs. Williamson v. Barrett, *supra;* The Baltimore v. Rowland ("The Baltimore") 75 U. S. 8 Wall. 377 (19: 463); Wetmore v. The Granite State ("The Granite State") 70 U. S. 3 Wall. 310 (18: 179); The Ocean Queen, 5 Blatchf. 493; The Thomas Kiley, 3 Ben. 228.

A charterer of a vessel is not liable for demurrage because of delay caused by the absence of the master from the vessel. Whitman v. Vanderbilt, 38 U. S. App. 698, 75 Fed. Rep. 422.

A buyer of goods under an executory contract, who is also the consignee thereof in a bill of lading containing no provision for demurrage, is not rendered liable to damages by way of demurrage by accepting the goods after an abatement of the price by the seller because of the inferior quality of the goods. Conkling v. Brooklyn Lumber Co. 10 App. Div. 404.



Digitized by Google

that of the Geneva (20 Stat. at L. 473), Congress may have seen fit to impose duties as a condition to the granting of an American registry to a foreign-built steamboat, is fully met by a very large number of similar cases, in which no such requirement is made. In the following, taken from a single volume (28 Stat. at L.) it appears that foreign-built vessels were admitted to registry or nationalized without any such requirement: The El Callao (The Oneida), p. 43; the Goldsworthy, p. 216; the Astoria, p. 217; the Oceano, p. 219; the S. Cteri, p. 277; the Skudesnaes, p. 508; the Claribel and Athos, p. 625; the Empress, p. 626; the Linda and Archer, p. 626; the James H. Hamlen, p. 643. Doubtless an examination would reveal an equally large number in other volumes. In fact the case of the Geneva seems to have been wholly exceptional. As bearing upon this, by the act of December 23, 1852 (10 Stat. at L. 149, chap. 4), reproduced in U. S. Rev. Stat. § 4136, the Secretary of the Treasury is authorized to "issue a register or enrolment for any vessel built in a foreign country, whenever such vessel shall be wrecked in the United States, and shall be purchased and repaired by a citizen of the United States, if it shall be proved to the satisfaction of the Secretary that the repairs put upon such vessel are equal to three fourths of the cost of the vessel when so repaired."

We do not undertake to say that the same rule applies to canoes, small boats, launches, [118] and other undocumented vessels, *which are not used, or are not capable of being used, as a means of transportation on water, as the word "vessel" is defined in U. S. Rev. Stat. § 3. While these vessels have a limited capacity for transportation, they are ordinarily used for purposes of pleasure, and are not considered of sufficient importance to require them to be entered at the customhouse, or to be entitled to the special protection of the flag. They are treated like other similar vehicles used upon land, and there are reasons for saying that these boats, which do not ordinarily come of themselves into the country, but are imported or brought upon the decks of other vessels, are mere manufactures or other "articles," and are within the description of the tariff acts.

But the decisive objection to the taxability of vessels as imports is found in the fact that, from the foundation of the government, vessels have been treated as *sui generis*, and subject to an entirely different set of laws and regulations from those applied to imported articles. By the very first act passed by Congress in 1789, subsequent to an act for administering oaths to its own members, a duty was laid upon "goods, wares, and merchandise" imported into the United States, in which no mention whatever is made of ships or vessels; but by the next act, entitled "An Act Imposing Duties on Tonnage," a duty was imposed "on all ships or vessels entered in the United States" at the rate of 6 cents per ton upon all such as were built within the United States, and belonged to American citizens; of 30 cents per ton upon all such as should thereafter be built within the United States, belonging to subjects of foreign powers, and of 50 cents per ton upon all other ships or vessels, with a proviso that no American ship or vessel employed in the coasting trade or fisheries should pay tonnage more than once in any year. This distinction between "goods, wares, and merchandise," and "ships or vessels," has been maintained ever since, although the amount of such duties has been repeatedly and sometimes radically changed. At the time of the arrival of the Conqueror, tonnage duties were imposed under the act of June 26, 1884, as amended by § 11 of the act of June 19, 1886, with a proviso that the *President of the United States [119] might suspend the collection of them in certain specified cases. In addition thereto there was, by U. S. Rev. Stat. § 4225, a duty of 50 cents per ton, denominated "light money," levied and collected on all vessels not of the United States which might enter the ports of the United States; although, by § 4226, there was a provision that this tax should not be imposed upon any unregistered vessel "owned by citizens of the United States, and carrying a sea letter, or other regular document, issued from a customhouse of the United States, proving the vessel to be American property." It would seem that, under this section and in virtue of the collector's certificate to her bill of sale, stating that her owner was an American citizen, the Conqueror would not thereafter be subject to the payment of light money. *The Miranda*, 1 U. S. App. 228.

There is no provision of law preventing foreign-built vessels from being purchased, owned, and navigated by citizens of the United States, although they are not entitled to registry, or to enrolment and license as American vessels, because not built in the United States. U. S. Rev. Stat. §§ 4132, 4311, 4312.

The privilege, however, of owning foreign vessels is usually of comparatively little value, since in order to carry on a foreign trade, the coasting trade, or the fisheries, they must be entitled either to registry, or to enrolment and license, a privilege, as above stated, not granted to foreign-built vessels, though owned by American citizens. U. S. Rev. Stat. §§ 2497, 4131, 4311; *Murray* v. *United States* ("*The Merritt*"), 84 U. S. 17 Wall. 582 [21: 682].

The privilege, then, of owning foreign-built vessels, and of navigating them under the protection of the American flag, is practically confined to vessels used for the purposes of pleasure, which is probably the reason why the question presented in this case has never arisen before, since the only way in which foreign-built vessels can be made available as American vessels for purposes of trade and commerce, is by a special act of Congress permitting them to be registered or enrolled as American vessels.

A special provision is made for yachts by U. S. Rev. Stat. § 4214, as amended by the act of March 3, 1883 (22 Stat. at L. 566, chap. 133), *under which "the Secretary of the Treas- [120] ury may cause yachts used and employed exclusively as pleasure vessels, or designed as models of naval architecture, . . . to be licensed on terms which will authorize them to proceed from port to port of the United States, and by sea to foreign ports, without entering or clearing at the customhouse." By § 4216, "yachts belonging to a regularly organized yacht club of any foreign nation which shall extend like



Digitized by Google

privileges to the yachts of the United States, shall have the privilege of entering or leaving any port of the United States without entering or clearing at the customhouse thereof, or paying tonnage tax." It was probably under this section, and for the purpose of exempting her from payment of a tonnage tax, that Mr. Vanderbilt had the Conqueror enrolled as a member of the Royal Mersey Yacht Club, although it may be open to question whether this section was not intended as a mere reciprocity of courtesy, or has any application to foreign-built yachts belonging to American citizens. Certainly no such question can arise since the passage of the act of January 25, 1897,—not yet officially published,—by the 1st section of which U. S. Rev. Stat. § 4216, is re-enacted, with a proviso "that the privileges of this section shall not extend to any yacht built outside of the United States, and owned, chartered, or used by a citizen of the United States, unless such ownership or charter was acquired prior to the passage of this act." By the 2d section of the same act it is further provided that the previous act of June 19, 1886, exempting yachts from tonnage taxes, is repealed, "so far as the same exempts any yacht built outside of the United States, and owned, chartered, or used by a citizen of the United States."

It is worthy of notice in this connection that this act, which was evidently passed with reference to this case or this class of cases, and for the express purpose of subjecting foreign-built yachts hereafter purchased or chartered by American citizens to tonnage fees, makes no mention whatever of duties. It is scarcely possible that, if Congress had chosen to impose duties upon such yachts, or had supposed them subject to duty as imported articles, it would have also discriminated against them by requiring them to pay tonnage fees. In [121] this, the *latest expression of the legislative will, Congress seems to have recognized the theory, which we have already gathered from the prior course of legislation, that vessels should be treated as a class by themselves, and not within the general scope of the tariff acts.

In view of the elaborate opinion of the district judge upon this branch of the case it is unnecessary to extend this discussion farther. We think that the liability of ships and vessels to tonnage dues and to light money, except where a certain class of vessels is specially exempted, shows that it was not the intention of Congress to treat them as dutiable articles. So far as the court below awarded restitution of the vessel to the libellant, its decree was right and will be affirmed.

3. The question of damages remains to be considered. Upon the rendition of the decree, the court granted the usual certificate that the collector acted "therein under direction of the Secretary of the Treasury, and there was probable cause for said acts done by him." The certificate was made upon application of the collector, and was not opposed by the libellant, who, however, reserved the right to move to vacate the same in case the judgment was not paid out of the Treasury within a reasonable time. This certificate was granted pursuant to U. S. Rev. Stat. § 970, which provides that "when, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: *Provided*, That the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent."

This section is claimed by the government to afford the collector complete immunity against any judgment for damages. Its language, broadly construed, might justify this position, although the fact that the certificate is only authorized *when judgment is ren- [122] dered for the *claimant* would indicate that it was properly applicable only in cases where proceedings against the vessel were instituted, upon information filed by the United States, for a fine or forfeiture incurred by the vessel itself. This construction is also supported by the final words of the section, declaring that neither the person who made the seizure, nor the prosecutor, shall be liable to suit or judgment on account of such suit or prosecution, and that the vessel shall be forthwith returned to the *claimant*. The word "claimant" in all admiralty proceedings *in rem* is used to denote the person who makes claim to the property seized as the owner thereof, and by virtue of such ownership, or other interest therein, is admitted to defend the suit. General Admiralty Rule, 26. In a broader sense, however, it might be used to designate the owner of property, whether prosecuting or defending his right to such property, though this does not agree with the ordinary legal meaning of the word "claimant."

But if it were conceded that the statute be somewhat ambiguous, we are authorized to refer to the original statutes, from which the section was taken, and to ascertain from their language and context to what class of cases the provision was intended to apply. *United States* v. *Bowen*, 100 U. S. 508 [25: 631]; *Meyer* v. *Western Car Co.* 102 U. S. 1, 11 [26: 59, 60]; *United States* v. *Lacher*, 134 U. S. 624 [33: 1080]. The protection of the collector by a certificate of probable cause appears first in the act of July 31, 1789, § 36 (1 Stat. at L. 47, chap. 5), to regulate the collection of duties upon the tonnage of ships, and upon goods, wares, and merchandise imported. The act is not a tariff act imposing duties and tonnage, but is one for the administration of the tariff laws and the collection of duties. By this act the country was divided into collection districts, ports of entry and delivery established, the duties of the collector and other customs officers defined, the obligations of vessels arriving with cargoes laid down, and the method of collecting such duties prescribed with certain penalties for the nonperformance of its provisions. By § 36 "all penalties accruing by any breach of *this act* shall be sued for and recovered with *costs [123] of suit, in the name of the United States, . . . by the collector of the district, . . . and such collector shall be, and hereby is, author-



Digitized by Google

ized and directed to sue for and prosecute the same to effect." The section then provides for the manner of prosecuting for a forfeiture, how *claim* shall be made for the property seized, and under what circumstances it shall be delivered to the *claimant*. The section terminates with a provision for a certificate of probable cause, if judgment shall be given for the *claimant or claimants*. Through this entire section the word "claimant" is obviously used in its technical sense, to stand for the owner of the property seized for a penalty or forfeiture, under previous sections of the act. Indeed, the act is so clear in this particular that scarcely any room is left for any other construction. This act was not repealed by the act of August 4, 1790 (1 Stat. at L. 145, chap. 35), to provide more effectually for the collection of the duties on goods imported and upon tonnage. The later act is practically a re-enactment of the former, with many amendments and enlargements of its scope, and in § 67, § 36 of the prior act is repeated, with the same provision for a certificate of probable cause. The act of 1790, however, was repealed March 2, 1799 (1 Stat. at L. 627, chap. 22), by a further act "to regulate the collection of duties on imports and tonnage," wherein the whole subject was again reconsidered, and a new act, still further amending and enlarging the prior ones adopted. Section 89 of this act again repeated the provision for a certificate of probable cause. These acts limited the granting of such certificates to seizures made for fines or forfeitures under the provisions of the particular act. Subsequently, however, other acts were passed authorizing seizures of vessels and goods for other offenses; but in none of these acts was protection given to the officer making the seizure with probable cause. Act of Dec. 31, 1792 (1 Stat. at L. 289, § 4); Act of Sept. 1, 1789 (1 Stat. at L. 63, chap. 11, § 29); Act of June 5, 1794 (1 Stat. at L. 381, chap. 50); Act of April 18, 1806 (2 Stat. at L. 379, chap. 29). To extend to the collector the protection of a certificate of probable cause, where forfeitures were
124] incurred under these acts, *a short act was passed on February 24, 1807 (2 Stat. at L. 422, chap. 19), permitting the courts to grant such certificate, wherever a seizure was made by any collector or other officer, under *any* act of Congress authorizing such seizure. This act was substantially re-enacted in U. S. Rev. Stat. § 970.

We think this legislation, however, was intended to be confined to cases where the collector makes a seizure, followed by a suit or prosecution in the name of the United States for a penalty or forfeiture arising from an illegal act of the persons in charge of the vessel, and was not intended to be applied where a vessel is simply detained under § 2964 for a nonpayment of duties. As was observed in *Re Fassett*, 142 U. S. 485 [35: 1090]: "Section 2964 provides that in all cases of failure or neglect to pay the duties within the period allowed by law to the importer to make entry thereof, the merchandise shall be taken possession of by the collector and deposited in the public stores, there to be kept, subject at all times to the order of the importer, on payment of the proper duties and expenses. Section 2973 provides that, if the merchandise shall remain in public store beyond one year, without payment of the duties and charges thereon, it is then to be appraised and sold by the collector at public auction, and the proceeds, after deducting for storage and other charges and expenses, including duties, are to be paid over to the importer." Of course, the yacht Conqueror was not such an article as could have been deposited in public stores within the language of the section, but if it had been subject to duty at all, the collector could not be considered in default for having detained her in the manner he did for its payment. His seizure, however, is not such a one as is contemplated by the above statutes concerning certificates of probable cause.

The case, instead of being covered by U. S. Rev. Stat. § 970, seems more properly to fall within the provisions of § 989, by which "when a recovery is had in any suit or proceeding against a collector . . . for any act done by him . . . in the performance of his official duty, and the court certifies that there was probable cause, . . . or that he acted under the directions of the Secretary of the Treasury, . . . no execution shall issue against such collector *or other officer, but the amount so[125 recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury." Upon the whole, we are of opinion that the collector was not protected by the certificate of probable cause from a judgment for damages.

4. The main question in this case turns upon the proper measure of damages. In the amount of $21,742.24, awarded by the final decree of the district court, was included the sum of $15,000, "for loss of use of boat while detained by the respondent, from August 27, 1891, to February 3, 1892, at $100 per day." This is the principal item of damage to which objection is made in this court.

That the loss of profits or of the use of a vessel pending repairs, or other detention, arising from a collision, or other maritime tort, and commonly spoken of as demurrage, is a proper element of damage, is too well settled both in England and America to be open to question. It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proved with reasonable certainty. In one of the earliest English cases upon this subject (*The Clarence*, 3 W. Rob. Adm. 283), it was said by Dr. Lushington that "in order to entitle a party to be indemnified for what is termed in this court a consequential loss, being for the detention of his vessel, two things are absolutely necessary—actual loss, and reasonable proof of the amount. . . . It does not follow, as a matter of necessity, that anything is due for the detention of a vessel while under repair. Under some circumstances, undoubtedly, such a consequence will follow, as, for example, where a fishing voyage is lost, or where the vessel would have been beneficially employed." To same effect are *The Black Prince*, Vern. & L. 568; *The City of Peking*, L. R. 15 App. Cas. 438; *The Argentino*, L. R. 14 App. Cas. 519.

The first case in which demurrage was allowed by this court for the detention of a ship under a libel for tortious seizure was that of



Digitized by Google

*The Apollon*, 22 U. S. 9 Wheat. 362 [6: 111], which was a suit brought by the master of a [126] French ship against the *collector of St. Mary's for damages occasioned by an illegal seizure of the ship and cargo while lying within the territories of the King of Spain. In this case demurrage was allowed at the rate of $40 per day, although the court had expressed its opinion that the probable profits of a voyage, either upon the ship or cargo, could not furnish any just basis for the compensation of damages, the court observing that "every other method of adjusting compensation," than that of demurrage, "would be merely speculative, and liable to the greatest uncertainties."

*Smith* v. *Condry*, 42 U. S. 1 How. 28 [11: 35], was a common-law case, wherein a vessel, laden with a cargo of salt, received injury by a collision in the port of Liverpool. Upon the trial, plaintiffs offered to prove that if the ship had been able to sail upon her voyage upon the day named, she would in due course have arrived in Georgetown in time for the sale of her cargo in the fishing season of the Potomac river, when there was a great demand for salt; but, owing to the delay, she did not arrive until the season was over, and thereby lost 10 cents per bushel upon the value of the salt. The court, acting upon the analogy of insurance cases, held that this testimony was properly refused admission. It is quite obvious, however, that this was not a case where damages were claimed for the use of the vessel pending her repairs, but for the loss of anticipated profits pending the sale of her cargo, and therefore falling within the rule stated in *The Apollon*, *supra*, that profits upon the sale of the cargo are excluded. There is no conflict between this case and that of *Williamson* v. *Barrett*, 54 U. S. 13 How. 101 [14: 68], wherein the court held, upon the authority of *The Gazelle*, 2 W. Rob. Adm. 279, that the plaintiffs were entitled to recover for the use of their boat, by which "we understand what she would have produced to the plaintiffs by the hiring or chartering of her to run upon the river in the business in which she had been usually engaged;" in other words, the market price of the hire of the vessel. This ruling has been repeatedly affirmed in this court (*The Potomac* v. *Cannon*, 105 U. S. 630 [26: 1194]; in England (*The Betsey Caines*, 2 Hagg. Adm. 28; *The Inflexible*, Swab. Adm. 200; *The Star of* [127] *India*, 1 Prob. *Div. 466; *The City of Buenos Ayres*, 1 Asp. Mar. L. Cas. 169); and in France (Sibille, De l'Abordage, § 411; De Fresquet, Des Abordages, pp. 48, 49, Caumont, Dict. Mar. tit. *Abordage*, § 224).

The difficulty is in determining when the vessel has lost profits and the amount thereof. The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market. Obviously, however, this criterion cannot be often applied, as it is only in the larger ports that there can be said to be a market price for the use of vessels, particularly if there be any peculiarity in their construction which limits their employment to a single purpose.

In the absence of such market value, the value of her use to her owner in the business in which she was engaged at the time of the collision is a proper basis for estimating damages for detention, and the books of the owner showing her earnings about the time of her collision are competent evidence of her probable earnings during the time of her detention. *The Mayflower*, Brown, Adm. 376; *The Transit*, 4 Ben. 138; *The Emilie*, 4 Ben. 235.

The mere opinion of witnesses, unfortified by any *data*, as to what the earnings would probably have been, is usually regarded as too uncertain and conjectural to form a proper basis for estimation, though in a few cases they seem to have been received. The damages must not be merely speculative, and something else must be shown than the simple fact that the vessel was laid up for repairs. Thus, if a vessel employed upon the lakes should receive damages by collision, occurring just before the close of navigation, and she were repaired during the winter, no demurrage could be allowed, since no vessel upon the lakes can earn freight during the winter. *The Thomas Kiley*, 3 Ben. 228.

In *The R. L. Maybey*, 4 Blatchf. 439, it was said by Mr. Justice Nelson upon the subject of damages that "a good deal of the testimony was general, and turned upon mere opinion as to the probability of employment in the towing business and the amount of the earnings, if employed. This *kind of proof is too specula- [128] tive and contingent to be the foundation of any rule of damages. It is at best but conjecture." On appeal to this court the decree was affirmed (*Sturgis* v. *Clough*, 68 U. S. 1 Wall. 269 [17: 581]), Mr. Justice Grier observing that "the charge for demurrage allowed by him [the commissioner] was not justified by the evidence, although there was testimony to support it, such as can always be obtained when friendly experts are called to give opinions. Besides, the libellant withheld the best evidence of the profits made by his boat, which would be found in his own books, showing the receipts and expenditures before the collision." The testimony is not set forth in the report of the case, but on referring to the original record we find that it was much stronger in favor of an allowance of demurrage than the testimony in this case. Five witnesses were sworn by the libellant, who testified that there was a demand in the port of New York for the services of steam tug boats, such as the injured vessel was, and that the value of such a boat was about $100 per day. Four witnesses testifying for the claimant did not deny that there was a demand for such vessels, but put the value of her services at a much lower sum. So in the case of *The Isaac Newton*, 4 Blatchf. 21, Mr. Justice Nelson rejected the allowance for demurrage founded simply upon the evidence of the master and the mate, as a matter of opinion, treating the allowance as conjectural and speculative.

In *The Cayuga*, 2 Ben. 125, a ferry boat, injured by a collision, was withdrawn for repairs, her place being supplied by a boat taken from another ferry belonging to the libellants, whose place was in turn supplied by a spare boat. It was not shown that the injured boat could have been chartered for any sum for the time she was laid up, but proof was given as to the value of her use, based upon her receipts while running on the ferry. It was held that a judgment as to her charter value, given by men hav-



Digitized by Google

ing experience upon the ferries, founded upon their knowledge of the business, was a proper basis for the allowance of demurrage. This case was affirmed by the circuit court (7 Blatchf. 129] 385), and also *upon further appeal by this court. (81 U. S. 14 Wall. 270 [20: 828]).

Of same purport is *The Favorita* v. *Union Ferry Co.* 85 U. S. 18 Wall. 598 [21: 856].

There are two cases reported in which demurrage was allowed for the detention of a yacht. In one of these (*The Walter W. Pharo*, 1 Low. Dec. 437) the total allowance was but $80; and in the other (*The Lagonda*, 44 Fed. Rep. 367) the yacht had been detained eight days while undergoing repairs, and was allowed by the commissioner $48 as interest upon $36,000, the cost of the yacht. Upon exceptions by the libellant, the court held that the testimony seemed to justify the conclusion that the yacht could have been chartered by her owner for a season of three months for the sum of $6,000; that under such a charter the vessel would have earned for her owner in eight days the sum of $552, and gave a decree for that sum.

Upon the other hand, however, in the recent case of *The Emerald* [1896] P. D. 192, decided by the English court of appeals, the question was whether demurrage could be allowed for detention pending the repairs of a vessel (the Greta Holme) used by a body of public trustees for the purpose of dredging and raising wrecks in Liverpool harbor. The court held unanimously that demurrage could not be allowed to the board of trustees, because the vessel was not a source of profit to them. In delivering the opinion Lord Esher observed: "It has been pointed out, and I think quite fairly, that you cannot recover by way of damages on account of something which you call profit, but of which profit there is no evidence. . . . Then they talk of letting her go to Preston, and that the Preston people would have given £100 a week, probably. It is all imagination. . . . The dredger is not kept for the purpose of being let to anyone else. . . . To say that at some indefinite and future time they could have let her if they had not wanted her is too remote for anybody to act upon in giving them compensation for the loss of the dredger by way of damages. It seems to me that the damages were too shadowy and too remote to be the proper subject-matter of damages in the collision." Lord Justice A. L. Smith said: "It is to be remarked that during all the 130] *time that the dredger was sunk and under repairs the harbor board have not, in fact, lost one penny. . . . I agree with the report of the registrar and merchants upon this point. They say that 'the harbor or conservancy board are clearly not in the position of a trading company which is entitled to claim for loss of profit, and although their dredging operations were no doubt delayed by the disabling of this dredger, it does not appear to us that the plaintiffs have sustained any tangible pecuniary loss.'" Lord Justice Rigby said: "The board attempted to show that in some circumstances they might let this dredger, but the evidence failed to fix any definite time when the board would no longer require to use her. It seems to me that the suggested damage which might be occasioned to the Mersey docks and harbor board was mere speculation."

In the case under consideration, the only evidence of loss of profits was that of three witnesses, one of whom, Samuel Holmes, a steamboat broker, swore that the reasonable value of the use of the yacht was $3,000 per month. He gave the only instance of such a charter within his knowledge—the charter of a boat of this size about three or four years before, for about $9,000 for a winter trip to the West Indies. "The circumstances were a little different than this though." What those circumstances were, what was the character of the yacht, and how long the duration of the charter, were not stated, and the illustration is of trifling value. The next witness, Hughes, a yacht broker, stated simply that the Conqueror was worth $100 per day, fortifying his testimony by no fact whatever. The last witness, Thomas Manning, also a yacht broker, stated the value of the Conqueror from August 27 to February 3 to be about $20,000 for the boat itself without the crew; stating that there was more or less demand for those large boats, but a great difficulty in getting them. Whether the demand at that time was more or less than the average was not stated, nor are any facts given in support of his testimony. The expression is wholly indefinite and unsatisfactory.

Perhaps if this testimony were taken literally, without reading between the lines, considering other facts appearing *in the record, or [131 bringing to bear upon it other considerations which are matters of common knowledge, it might justify the construction placed upon it by the court below, that the libellant had been deprived of the services of a vessel which might possibly have been leased at $100 per day. But this is not the proper view to be taken of this testimony. While there are doubtless authorities holding that a jury (and in this class of cases the court acts as a jury) has no right arbitrarily to ignore or discredit the testimony of unimpeached witnesses so far as they testify to facts, and that a wilful disregard of such testimony will be ground for a new trial, no such obligation attaches to witnesses who testify merely to their opinion; and the jury may deal with it as they please, giving it credence or not as their own experience or general knowledge of the subject may dictate. Indeed, the courts of New Hampshire at one time, and until the rule was changed by the legislature, went so far as to exclude the opinions of witnesses upon questions of value altogether, and irrespective of any question as to their qualifications. *Rochester* v. *Chester*, 3 N. H. 349; *Peterborough* v. *Jaffrey*, 6 N. H. 462; *Beard* v. *Kirk*, 11 N. H. 397; *Robertson* v. *Stark*, 15 N. H. 109; *Low* v. *Connecticut & P. R. R. Co.* 45 N. H. 370.

The better opinion, however, is that testimony as to value may be improperly received from the mouths of witnesses, who are duly qualified to testify in relation to the subject of inquiry, although the jury, even if such testimony be uncontradicted, may exercise their independent judgment. In *Forsyth* v. *Doolittle*, 120 U. S. 73 [30: 586], which was an action to recover compensation for services rendered by plaintiffs in effecting the sale of certain lands in Indiana, and in various legal proceedings concerning the title, the following instruction to the jury was held to be correct:



Digitized by Google

"You are not bound by the estimate which these witnesses have put upon these services. They are proper to be considered by you, as part of the proof bearing upon the question of value, as the testimony of men experienced in such matters, and whose judgment may aid yours. But it is your duty, after all, to settle and determine this question of value from all the testimony in the case, and to award the 132]plaintiffs *such amount, by your verdict, as the proof satisfies you is a reasonable compensation for the services which, from the proof, you find plaintiff rendered, after deducting the amount the plaintiffs have already received for such services."

The proper rule upon the subject is nowhere better stated than by Mr. Justice Field in delivering the opinion of the court in *Head* v. *Hargrave*, 105 U. S. 45 [26: 1028], which is also an action for professional services as attorneys: "It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not differ in principle from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may—and to act intelligently they must—judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry. . . . Other persons besides professional men have knowledge of the value of professional services; and while great weight should always be given to the opinions of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge; they should control only as they are found to be reasonable."

133]*In short, as stated by a recent writer upon expert testimony, the ultimate weight to be given to the testimony of experts is a question to be determined by the jury; and there is no rule of law which requires them to surrender their judgment, or to give a controlling influence to the opinion of scientific witnesses. Rogers, Expert Testimony, § 207; *St. Louis* v. *Ranken*, 95 Mo. 189; *City of Kansas* v. *Butterfield*, 89 Mo. 648; *Atchison, T. & S. F. R. Co.* v. *Thul*, 32 Kan. 255; *Brehm* v. *Great Western R. Co.* 34 Barb. 256, 272; *Williams* v. *State*, 50 Ark. 511, 520; *Humphries* v. *Johnson*, 20 Ind. 190; *Goodwin* v. *State*, 96 Ind. 550; *United States* v. *McGlue*, 1 Curt. C. C. 1, 9; *United States* v. *Molloy*, 31 Fed. Rep. 19.

Without imputing to the witnesses, who were sworn in this case upon the subject of damages, any design to mislead the court, we are bound to say that their testimony falls far short of establishing such a case of loss of profits as entitles the libellant to recover this large sum for the detention of his yacht. It is not the mere fact that a vessel is detained that entitles the owner to demurrage. There must be a pecuniary loss, or at least a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purposes of pleasure, or, as was said by Doctor Lushington in *The Clarence*, 3 W. Rob. Adm. 286: "There must be actual loss and reasonable proof of the amount." In other words, there must be a loss of profits in its commercial sense. In all the cases in which we have allowed demurrage the vessel has been engaged, or was capable of being engaged in a profitable commerce, and the amount allowed was determined either by the charter value of such vessel, or by her actual earnings at about the time of the collision. The Conqueror, however, did not belong to the class of vessels which are engaged in commercial pursuits, or are ordinarily let to hire. There is doubtless a class of pleasure boats that are let for excursions, and become a source of pecuniary profit to their owners; but the Conqueror did not belong to that class. She was purchased by her owner for his personal pleasure, and there is not an atom of testimony tending to show that he *bought her for hire, or[134 would have leased her if he had been able to do so, even for the large sum of $100 per day fixed as her value.

Again, the court may properly take judicial notice of the fact that the yachting season in our northern waters practically comes to an end before the 1st of November, and, as the Conqueror was seized on August 27, during more than one half the time for which demurrage was allowed she probably would have been laid up at her wharf. It is true there was a possibility that her owner might have desired her for use in a winter's cruise to tropical waters; but there was not the slightest evidence of that, and the contingency of her being so used was too remote to justify an allowance upon that basis.

The amount of demurrage allowed, too, was so great as, if not to shock the conscience, at least to induce the belief that it must have been estimated by witnesses who were most friendly to the owner. The yacht cost originally $75,000. The proposition that her use for a little more than five months, during the autumn and winter, should be worth to her owner $15,000 over and above all her expenses, for which a separate allowance was made, is putting a strain upon our credulity which we find ourselves quite unable to bear. The truth is, that estimates of value made by friendly witnesses, with no practical illustrations to support them, are, as observed by the various courts through which the case of *Sturgis* v. *Clough*, 68 U. S. 1 Wall. 269 [17: 580], passed, too unsafe, as a rule, to be made the basis of a judicial award, unless it be shown with much



Digitized by Google

greater certainty than it is in this case, either that the vessel was earning profits, or that she belonged to a class of vessels for which there was a steady demand in the market. We think the testimony upon the subject of demurrage in this case should have been held to be insufficient.

5. The other items of damage, going to make up the aggregate amount awarded, included about $4,500 for the wages and provisions of the crew, and also for wharfage, towage, night watchman, and extra expenses in heating the vessel,—all of which are claimed to be unau-
135 ]thorized, in view of the *fact that by U. S. Rev. Stat. § 829, the marshal is allowed, "for the necessary expenses of keeping boats, vessels or other property attached or libeled in admiralty, not exceeding $2.50 a day." While it is entirely true that the marshal is thus limited, it does not follow that the libellant may not incur a larger expense if, in his opinion, it is necessary for the proper protection of the vessel, subject to the contingency of paying for it himself, if he be unsuccessful. It is easy to understand that an expensive yacht, like this, would require a much larger outlay than $2.50 per day to provide her with safe accommodations and to maintain her in good condition and repair. The finding of the commissioner in this connection was "that the collector took possession of the yacht on the 27th of August, 1891, by placing only one person on board of her; that from this time till the end of September, the collector, through this one representative, remained on board, claiming possession of the yacht; that during all this time she lay in the stream off Stapleton, where it was necessary to have a crew on board to keep her safely, 'as no ship could be secure in any stream,' under such circumstances, without such protection; that he considered that 'while the vessel was in that position' that it was necessary to keep the crew to 'take care of' her, and at no time did he employ any more men then was necessary for that purpose." "That on the 29th of September the collector, at the request of the libellant, ordered the vessel placed in the Erie Basin, and the marshal took partial possession, the collector having resisted and his representative still remaining on board. The vessel having been thus removed from the stream where she had been at anchor, the captain testifies that he took steps immediately to get rid of the crew, and that they were discharged as fast as he could do so consistently while preparing the vessel for being laid up. There is nothing to contradict this testimony, and it seems to me that the captain pursued a reasonable, as well as judicious, course, one consistent with his duty to take proper care of the vessel. As soon as the marshal, under further process of the court, got exclusive possession of the yacht, on the 8th of October, he put only one man
136 ]*aboard of her to represent him, and employed the captain and four men to take care of the vessel, besides a night watchman. The marshal's possession being a legal possession, he had the right to take this course, and I do not find anything in the testimony, or in the circumstances of the case, to warrant the conclusion that the expenses of keeping such a vessel while in the collector's or the marshal's possession were extravagant."

Whether these charges were proper or not was a matter for the courts below to determine in the exercise of their best judgment, and, as the commissioner found that they were, and both the district court and the court of appeals affirmed his action in that regard, we are not disposed to disturb their finding, although the amount seems large.

*The decree of the Court of Appeals must be reversed,* and the case remanded to the district court for further proceedings in conformity to this opinion.

---

## *Ex parte* GUSTAVE ALIX, *Petitioner.*

(See S. C. Reporter's ed. 136-138.)

*Writ of prohibition.*

Issues of fact on which the question of jurisdiction depends, raised by a petition of intervention and an answer thereto, are not sufficient ground for a writ of prohibition against enforcing or proceeding further in orders or decrees previously made in the suit.

[No. 15, Original.]

*Argued March 1, 1897. Decided March 15, 1897.*

PETITION or suggestion for a writ of prohibition to the Judge of the District Court for the District of New Jersey to restrain him from enforcing orders or decrees made in a suit brought by John L. Mills in said district court against the steamer Allegheny and her cargo to recover salvage. *Writ denied.*

The facts are stated in the opinion.

*Messrs.* **Horace L. Cheyney** and *John F. Lewis* for petitioner.

*Mr.* **Curtis Tilton** for respondent.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

*John L. Mills filed his libel in the dis-[
137 trict court of the United States for the district of New Jersey on the 14th day of September, A. D. 1896, against the steamer Allegheny and her cargo to recover salvage, and such proceedings were thereafter had thereon as resulted in a decree in favor of the libellant, December 2, 1896. An order for the sale of the steamer and cargo was entered December 15; a motion to vacate this order was made on behalf of Gustave Alix, master of the Belgian steamer Caucase, which was denied December 21; the sale took place December 22, and was confirmed December 30, 1896.

On December 26, 1896, Alix filed a petition of intervention in said cause, alleging that he had filed a libel in admiralty against the Allegheny October 22, 1894, in the district court of the United States for the district of Delaware; that the steamer had been attached by the marshal of that district in December of that year; and that the district court for the district of New Jersey had no jurisdiction.

All the material allegations of the petition of intervention were denied by the answer thereto, and issues of fact were raised on which the question of jurisdiction depended.



Digitized by Google

Thereupon, on January 11, 1897, a petition suggestion was filed by Alix in this court, seking the issue of a writ of prohibition to the idge of the district court for the district of ew Jersey to restrain him from enforcing any f the orders or decrees by him theretofore ade in the suit of said Mills, or proceeding rther therein. A rule to show cause was anted, to which return has been duly made.

The settled rules in reference to the writ of rohibition were thus laid down in *Re Rice*, 55 U. S. 396, 402 [39: 198, 201]: "Where it ppears that the court whose action is sought o be prohibited has clearly no jurisdiction of he cause originally, or of some collateral mat- er arising therein, a party who has objected to he jurisdiction at the outset and has no other emedy is entitled to a writ of prohibition as a natter of right. But where there is another egal remedy by appeal or otherwise, or where he question of the jurisdiction of the court is loubtful, or depends on facts which are not [138] made *matter of record, or where the ap- lication is made by a stranger, the granting or efusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case as gone to sentence, and the want of jurisdic- ion does not appear upon the face of the pro- eedings. *Smith* v. *Whitney*, 116 U. S. 167, 173 [29: 601, 603]; *Ex parte Cooper*, 143 U. S. 472, 495 [36: 232, 239]."

Tested by these rules, we are clear that a proper case is not made for awarding the writ of prohibition.

*Writ denied.*

---

THOMAS ALLEN, *Plff. in Err.*,
*v.*
STATE OF GEORGIA.

(See S. C. Reporter's ed. 138-142.)

*Due process of law.*

The dismissal by a state court of a writ of error taken by the accused from a conviction, because he has escaped and is a fugitive from justice, is not a denial of due process of law within the meaning of the Federal Constitution.

[No. 641.]

*Submitted January 19, 1897. Decided March 15, 1897.*

IN ERROR to the Supreme Court of the State of Georgia to review an order of that court dismissing a writ of error sued out to reverse the conviction of Thomas Allen for murder. *Affirmed.*

Statement by Mr. Justice **Brown**:

This was a writ of error to review an order of the supreme court of the state of Georgia dismissing a writ of error from that court which had been sued out to reverse the conviction of the plaintiff in error for the murder of one Charles Carr.

After defendant had been convicted and sentenced to death by the superior court of Bibb county, he made a motion for a new trial which was overruled, whereupon he sued out a writ of error from the supreme court of the state, which was assigned for hearing upon the 4th day of March, 1895. The case having been called upon that day, it was made to appear to the court by affidavits that Allen, after his conviction and *sentence, had escaped [139] from jail, and was at that time a fugitive from justice. Upon this showing, the court ordered that the writ of error be dismissed, unless he should within sixty days surrender himself to custody, or should be recaptured within that time, so as to be subject to the jurisdiction of the court, and should furnish evidence thereof by filing the same in the clerk's office.

On May 6—which was more than sixty days thereafter—the court made a further order, in which, after stating that the plaintiff in error had not surrendered himself to custody, and furnished evidence thereof as required, and that he had not been rearrested since his escape from jail, it was ordered that the writ of error be finally dismissed.

This judgment was, on July 13, 1895, made the judgment of the superior court of Bibb county. Afterwards Allen, having been recaptured, was, on the 25th of April, 1896, resentenced to death by the superior court, and thereupon made application to one of the justices of this court for a writ of error, which was duly granted—plaintiff assigning as error that the dismissing of his writ of error by the supreme court of the state of Georgia was a denial of due process of law.

*Messrs.* **W. C. Glenn** and *Dan'l W. Rountree* for plaintiff in error.

*Messrs.* **J. M. Terrell** and **John R. Cooper** for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

The plaintiff in error claims that the order of the supreme court of the state of Georgia, dismissing his writ of error to the superior court of Bibb county because he had escaped from jail and was a fugitive from justice, was a denial of due process of law within the meaning of the Federal Constitution.

It appeared from the record that, after the writ of error had been finally dismissed on May 6, 1895, Allen was subsequently recaptured, and, upon April 25, 1896, was resentenced to death by the court in which he had been convicted. While the *precise question here [140] involved has never before been presented to this court, we have repeatedly held that we would not hear and determine moot cases, or cases in which there was not at the time a bona fide controversy pending. In a similar case from the supreme court of Nebraska (*Bohanan* v. *Nebraska*, 125 U. S. 692 [31: 854]), wherein it appeared that, pending the writ of error from this court, the plaintiff in error had escaped, and was no longer within the control of the court below, it was ordered that the submission of the cause be set aside, and unless the plaintiff were brought within the jurisdiction of the court below on or before the last day of the term, the cause should be thereafter left off the docket until directions to the contrary. A like order under similar circumstances was

NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.



Digitized by Google

made in *Smith* v. *United States*, 94 U. S. 97 [24: 32].

In civil cases it has been the universal practice to dismiss the case whenever it becomes apparent that there was no real dispute remaining between the plaintiff and the defendant, or that the case had been settled or otherwise disposed of by agreement of the parties, and there was no actual controversy pending. *Lord* v. *Veazie*, 49 U. S. 8 How. 251 [12: 1067]; *Gaines* v. *Hennen*, 65 U. S. 24 How. 553, 628 [16: 770, 795]; *Chamberlain* v. *Cleveland*, 66 U. S. 1 Black, 419 [17: 93]; *American Wood Paper Co.* v. *Heft*, 75 U. S. 8 Wall. 333 [19: 378]; *Dakota County* v. *Glidden*, 113 U. S. 222 [28: 981]; *Little* v. *Bowers*, 134 U. S. 547 [33: 1016]; *California* v. *San Pablo & T. R. Co.* 149 U. S. 308 [37: 747].

We know at present of no reason why the same course may not be taken in criminal cases if the laws of the state or the practice of its courts authorize it. To justify any interference upon our part, it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty, or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the supreme court of a state has acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must 141 ]have been *deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference.

We cannot say that the dismissal of a writ of error is not justified by the abandonment of his case by the plaintiff in the writ. By escaping from legal custody he has, by the laws of most, if not all, of the states, committed a distinct criminal offense; and it seems but a light punishment for such offense to hold that he has thereby abandoned his right to prosecute a writ of error, sued out to review his conviction. Otherwise he is put in a position of saying to the court: "Sustain my writ and I will surrender myself, and take my chances upon a second trial; deny me a new trial and I will leave the state, or forever remain in hiding." We consider this as practically a declaration of the terms upon which he is willing to surrender, and a contempt of its authority, to which no court is bound to submit. It is much more becoming to its dignity that the court should prescribe the conditions upon which an escaped convict should be permitted to appear and prosecute his writ, than that the latter should dictate the terms upon which he will consent to surrender himself to its custody.

The course pursued in this case is approved by the ruling of many courts in different states, and notably in the case of *Com.* v. *Andrews*, 97 Mass. 543, where the defendant escaped during the pendency of his case in the supreme court. It was held that, not being present in person, he could not be heard by attorney; that if a new trial was ordered, he was not there to answer further, and that if the exceptions were overruled, a sentence could not be pronounced or executed upon him. "So far as the defendant had any right to be heard under the Constitution, he must be deemed to have waived it by escaping from custody and the failing to appear and prosecute his exceptions in person, according to the order of court under which he was committed." In *Sherman* v. *Com.* 14 Gratt. 677, upon a similar state of facts, the court ordered that the writ of error be dismissed, unless the defendant should appear before a certain day. This judgment was afterwards approved *in *Leftwich* v. *Com.* 20 [142 Gratt. 723. In the case of *People* v. *Genet*, 59 N. Y. 80 [17 Am. Rep. 315], the defendant escaped pending the settlement of a bill of exceptions, and, the court declining to proceed with the settlement of the proposed bill, the case was carried before the court of appeals and the action of the court of oyer and terminer affirmed.

See also *People* v. *Redinger*, 55 Cal. 290 [36 Am. Rep. 32]; *Wilson* v. *Com.* 10 Bush, 526 [19 Am. Rep. 76]; *Gresham* v. *State*, 1 Tex. App. 458; *McGowan* v. *People*, 104 Ill. 100 [44 Am. Rep. 87]; *Warwick* v. *State*, 73 Ala. 486 [49 Am. Rep. 59]; *State* v. *Conners*, 20 W. Va. 1; *State* v. *Wright*, 33 La. Ann. 1017 [36 Am. Rep. 274]; *Woodson* v. *State*, 19 Fla. 549; *Sargent* v. *State*, 96 Ind. 63; *Moore* v. *State*, 44 Tex. 595; *State* v. *Craighead*, 44 La. Ann. 968; *Zardenta* v. *State* (Tex.) 28 S. W. 684; *Gatliff* v. *State* (Tex.) 28 S. W. 466.

The course pursued in this case has also received the approval of the supreme court of the state of Georgia in several prior cases. *Madden* v. *State*, 70 Ga. 883; *Osborn* v. *State*, 70 Ga. 731; *Gentry* v. *State*, 91 Ga. 669.

The Constitution of the state of Georgia, art. 6, § 2, ¶ 6, requires the supreme court to dispose of every case at the first term, unless prevented by providential causes; and, by § 4271 of the Code, this enactment is repeated, with a further provision that no continuance shall be allowed except for providential cause. Indeed, it is admitted that it would be useless to ask the supreme court of the state of Georgia to reinstate this case, or to grant to the plaintiff in error any relief whatever, because, under the rules and decisions of that court, and under the statutes of the state of Georgia as construed by that court, such relief would be denied. Whether the court should give the plaintiff sixty days, or until the last day of the term, to appear and surrender himself to custody, was a matter for the court to determine, and even if there were error in that particular, it would not constitute a denial of due process of law.

*The order of the Supreme Court dismissing the writ of error must therefore be affirmed.*



Digitized by Google

143] GRAND LODGE OF THE STATE OF LOUISIANA, *Plff. in Err.*,
*v.*
CITY OF NEW ORLEANS.

(See S. C. Reporter's ed. 143-150.)

*Contract exempting from taxation—Grand Lodge of Masons.*

The same necessity for a consideration exists for the purpose of a contract exempting property from taxation that there would be if it were a contract between private parties.

The exemption from taxation of the hall of the Grand Lodge "so long as it is occupied as a Grand Lodge of the F. & A. Masons," made by the Louisiana act of 1855, which was passed after the property was acquired, under pledges that the total revenue should be applied to specified charitable purposes, does not constitute a contract which can be protected against the provision of the state Constitution of 1879 exempting the property of charitable institutions only when "not used or leased for purposes of private or corporate profit or income."

[No. 111.]

*Argued January 19, 1897. Decided March 15, 1897.*

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment of that court affirming the judgment of the Civil District Court for the Parish of Orleans in favor of the city of New Orleans for certain city taxes against the Grand Lodge of the State of Louisiana. *Affirmed.*

See same case below, 46 La. Ann. 717.

Statement by Mr. Justice **Brown**:

This was a petition originally filed in the civil district court for the parish of Orleans by the Grand Lodge of the F. & A. Masons of the state of Louisiana, to enjoin the city of New Orleans from proceeding to sell, for the taxes of 1888, 1889, and 1890, certain property owned by the petitioner, and claimed to be exempt from taxation.

The petition set forth that the Grand Lodge was incorporated by a perpetual charter, granted by the legislature in 1816; that petitioner was the owner of a lot of ground, with buildings and improvements thereon, at the corner of St. Charles and Perdido streets, known as the hall of the Grand Lodge, etc., which property it had purchased in 1853 by a notarial act, in which was incorporated a resolution of the Grand Lodge, which, in substance, devoted the entire net revenues of such property "to the relief of worthy distressed members of the order, their wives, children, and families, and as a permanent charitable fund;" that such resolution was in strict accord with the objects of the institution, of which the Grand Lodge is the superintending body or organization, "the principles of which are charity and universal benevolence," and "to the end thereof, that charitable institutions *may be promoted," the act of incorpora- [144 tion was enacted; that further to promote this object the legislature, by an act approved March 15, 1855, exempted said hall from city and parish taxation, so long as it was occupied by the Grand Lodge of F. & A. Masons, which exemption was claimed to have become a contract between the state and the Grand Lodge so long as the property was owned and occupied by it. The petitioner alleged that the principles and objects of Free Masonry are still unchanged, and that the net revenues arising from the property have not been diverted; that the city now claims that the property is subject to taxation, and threatens to enforce the collection of the taxes.

The answer of the city was simply a general denial.

Upon the trial it appeared that the Grand Lodge was incorporated by act of March 18, 1816, with full power and authority to take, hold, and enjoy real and personal property, etc.; that the hall was erected in the year 1845 for a commercial exchange, and was purchased by the Grand Lodge for a hall in 1853; that on March 15, 1855, the general assembly enacted that the building, whose location and name were given in the act, should be exempt from state and parish taxation so long as it was occupied as the Grand Lodge of the F. & A. Masons. It further appeared that the objects proposed by the institution were charity and universal benevolence; that contributions were exacted from each member of the order for the ordinary expenses of the lodge and as a fund for the purposes of charity, to be distributed as occasion required, and that from 1853 to the present time the whole of the revenue, except that used for insurance, repairs, and current expenses, has been exclusively devoted to charitable purposes, as stated in the charter and act of sale. These revenues averaged over $3,000 per year.

It further appeared that in 1879 a new Constitution was adopted by the state, of which article 207 was as follows: "The following property shall be exempt from taxation and no other, *viz.*: All public property, places of religious worship or burial, all charitable institutions; . . . *provided*, the *property [145 so exempted be not used or leased for purposes of private or corporate profit or income."

Upon the hearing in the district court, the property was held to be exempt from taxation, and an injunction granted. The city appealed to the supreme court, which reversed the decree of the district court and dissolved the injunction. Upon a rehearing, the decree was amended by recognizing the exemption of that part of the property occupied by the grand and subordinate lodges of Masons, and in other respects the demand was rejected, and the case remanded to the court below with directions to hear evidence and ascertain what property was thus occupied, and what property was rented or used for private or corporate profit or income, and to pass upon and

NOTE.—*As to exemption from taxation; whether a contract or not; not implied,*—see note to Tucker v. Ferguson, 22: 805.

*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

*As to when taxes illegally assessed can be recovered back*, see note to Erskine v. Van Arsdale, 21: 63.

*As to power of states to tax*, see note to Dobbins v. Erie County Comrs. 10: 1022.

*As to sale of lands for taxes; strict compliance with statute necessary,*—see note to Williams v. Peyton, 4: 518.



Digitized by Google

decide the relative values of that part of the property thus occupied by said Masons to that leased or used as aforesaid, that is, "from the assessed value of the property, *viz.*, $60,000, must be deducted the value of the property exempted aforesaid."

The case having been remanded and reheard in the district court, a new judgment was rendered in favor of the city for the city taxes of 1888, on an assessment of $20,000; of the year 1889, on an assessment of $10,000; and for the year 1890, on an assessment of $6,200. The case was then appealed and reheard in the supreme court, and the judgment of the district court affirmed. Whereupon petitioner sued out this writ of error.

*Messrs.* **Charles F. Buck** and *J. Q. A. Fellows* for plaintiff in error.

*Messrs.* **Samuel L. Gilmore,** City Attorney, and *W. B. Sommerville,* Assistant City Attorney, for defendant in error.

*Messrs. M. J. Cunningham,* Attorney General for Louisiana, *F. C. Zacharie,* and *Alexander Porter Morse* filed a brief for the tax collectors and board of assessors of the parish of Orleans.

Mr. Justice **Brown** delivered the opinion of the court:

146] *The only question in this case is whether the act of 1855, exempting the hall of the Grand Lodge from state and parish taxation, "so long as it is occupied as a Grand Lodge of the F. & A. Masons," constitutes a contract between the state and the complainant, or was a mere continuing gratuity which the legislature was at liberty to terminate or withdraw at any time, and which the state did subsequently withdraw by the adoption of a Constitution, which secured the exemption of the property of "all charitable institutions; . . . *provided*, the property so exempted be not used or leased for the purposes of private or corporate profit or income." It appeared in this case that, during the years in which the assessments complained of were made, a part of the ground floor of the exempted property was rented for stores; that some of the rooms were rented for other like purposes, and that from these sources a large amount of corporate income had been realized, although that income was devoted to charitable purposes.

If the act of 1855 be regarded as a contract within the case of *Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 518 [4: 629], then it is clear that the exemption from taxation was valid, and beyond the power of the legislature to abrogate. *Piqua Branch of State Bank* v. *Knoop*, 57 U. S. 16 How. 369 [14: 977]; *New Jersey* v. *Wilson*, 11 U. S. 7 Cranch, 164 [3: 303]; *Gordon* v. *Appeal Tax Court*, 44 U. S. 3 How. 133 [11: 529]; *Dodge* v. *Woolsey*, 59 U. S. 18 How. 331 [15: 401]; *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black, 436 [17: 173]; *McGehee* v. *Mathias*, 71 U. S. 4 Wall. 143 [18: 314]; *Wilmington & W. R. Co.* v. *Reid*, 80 U. S. 13 Wall. 264 [20: 563]; *Humphrey* v. *Pegues*, 83 U. S. 16 Wall. 244 [21: 326]; *Farrington* v. *Tennessee*, 95 U. S. 679 [24: 558]; *New Jersey* v. *Yard*, 95 U. S. 104 [24: 352].

To make such a contract, however, there is the same necessity for a consideration that there would be if it were a contract between private parties. If the law be a mere offer of a bounty, it may be withdrawn at any time, notwithstanding the recipients of such bounty may have incurred expense upon the faith of such offer. Thus the legislature of the state of Michigan, desiring to encourage the manufacture of salt, which had been recently discovered in the Saginaw Valley, in 1859, offered exemption from taxation and a bounty of 10 cents per bushel to all individuals, companies, or corporations formed *for the purpose [147 of boring for and manufacturing salt. It was held in *Salt Mfg. Co.* v. *East Saginaw*, 80 U. S. 13 Wall. 373 [20: 611], that, if the salt company plaintiff had been incorporated by a special charter, containing the provision that its property should be exempt from taxation, and that charter had been accepted and acted upon, it would have constituted a contract; but that this was a bounty offered to *all* corporations and individuals who should manufacture salt, and there was no pledge that it should not be repealed at any time; that as long as it remained a law, every individual or corporation was at liberty to avail himself or itself of its advantages, by complying with its terms, and doing the things which it promised to reward; but was also at liberty at any time to abandon such a course; that it was a matter purely voluntary upon both sides—giving to one party the power to abandon the manufacture of salt, and to the other to repeal the exemption from taxation and the bounty of 10 cents per bushel. The consequence of a different decision in this case might easily have become disastrous, since the arguments which were urged upon this court at that time would have been equally forceful at any time thereafter, and the state might have found itself bound by a perpetual pledge to pay 10 cents upon every bushel of salt thereafter manufactured by the companies, which had embarked in the enterprise under the encouragement of the bounty. A like ruling was made in *Welch* v. *Cook*, 97 U. S. 541 [24: 1112], in which an act of the legislature of the District of Columbia, exempting from general taxation for ten years such real and personal property as might be employed within the District for manufacturing purposes, did not create an irrepealable contract with the owners of such property, but merely conferred a bounty, liable at any time to be withdrawn.

Complainant, while admitting the soundness of this proposition, claims that the requisite consideration existed in the deed by which the property was acquired, wherein the Grand Lodge solemnly declared and proclaimed said purchase to be made for the purpose and object of creating a fund for charitable purposes, in the relief of worthy distressed members *of the [148 order, their wives, children, and families; and solemnly pledged itself that as soon as the said property should be paid for, the whole of the revenue which might be derived from it, after deducting necessary and unavoidable expenses on its account, should be devoted to those objects.

This consideration, however, was not one upon the faith of which the legislature granted the exemption, since the deed had already been in existence for two years, and the property had been purchased under the resolution of the



Digitized by Google

dge, adopted January 27, 1853, to the same fect as the above recital in the deed. While ubscriptions for the purchase of the property ay have been obtained upon the faith of this solution, it cannot be said to have constituted consideration for the exemption. The alleged ontract for exemption was not contained in e charter—as in other cases where such exmption has been sustained—since the lodge ad already pledged its revenues to charitable urposes; and when the act was passed it gave o additional pledge, and promised nothing which it had not already promised and was ound in honor to perform. If additional ubscriptions were obtained upon the faith of be act, the subscribers were bound to take noice of the fact that the legislature was at librty to repeal the act at any time, or, that the people might, in the exercise of their sovereign power, nullify it by an amendment to the Constitution.

In *Home of the Friendless* v. *Rouse*, 75 U. S. 8 Wall. 430 [19: 495], relied upon by the plaintiff in error, the exemption was contained in the original charter of the Home for the Friendless, which purported in its preamble to be granted for the purposes of encouraging the undertaking, and enabling the parties engaged therein more fully and effectually to accomplish their laudable purpose. The exemption was offered, not in view of a consideration which had already passed, but for the purpose of inducing the incorporators to accept the charter and to carry out the enterprise.

So, in *St. Anna's Asylum* v. *New Orleans*, 105 U. S. 362 [26: 1128], the institution was incorporated under an act of the general assembly, which declared that all the property belong-
149 ]ing to the institution *should be exempted from all taxation. The question turned upon the exemption of certain property which was devised to it twenty years after it was incorporated, the revenues of which were applied to enable it to carry on its work; but it was held that the contract applied not only to property in existence when the charter was granted, nor only to that which was in existence when the Constitution of 1868 was adopted, but to all which might afterwards be acquired in the due fulfilment of the purposes of the institution.

We are of opinion that the act in question in this case was one which the legislature might properly enact as a matter of public policy, and in aid of a beneficent purpose; but that it was a mere gratuity or bounty which it was competent at any time to terminate, and that this was done by Const. 1879, art. 207. The case is practically upon all fours with that of *Christ Church* v. *Philadelphia County*, 65 U. S. 24 How. 300 [16: 602], in which the legislature of Pennsylvania enacted that "the real property, including ground rents, *now belonging and payable* to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes. Eighteen years thereafter, the legislature enacted that all property belonging to any association, then exempt from taxation, other than that in actual use and occupation of such association, should thereafter be subject to taxation. It was held that this last law was not in violation of the Constitution of the United States; that the former act of 1833 was a mere privilege existing *bene placitum*, and might be revoked at the pleasure of the sovereign. It would seem from this case that the hospital had been incorporated long before the act containing the exemption was passed, as that act recited that the hospital "had for many years afforded an asylum for numerous poor and distressed widows," and that the exemption was granted on account of its means being curtailed by decay of the buildings, and the increased burden of taxation. So in *Tucker* v. *Ferguson*, 89 U. S. 22 Wall. 527 [22: 805]. And in *West Wisconsin R. Co.* v. *Trempealeau County Supers.* 93 U. S. 595 [23: 814], it was held that an act of the legislature exempting property of all railroads *from taxation was not a contract [150 to exempt, unless there were a consideration for the act; that the promise of a gratuity, spontaneously made, may be kept, changed, or recalled at pleasure, and that this rule applied to the agreements of states, made without consideration, as well as to those of persons. See also *Newton* v. *Mahoning County Comrs.* 100 U. S. 548, 561 [25: 710, 712], and *People, Cunningham*, v. *Roper*, 85 N. Y. 629, wherein a law, providing that persons who had served seven years in the militia and had been honorably discharged, were entitled to perpetual immunity from taxation to the extent of $500 each, was held to be repealable at any time by the legislature.

The act of 1855, now in question, clearly falls within the latter class of gratuities or bounties, which are subject to the will of the legislature, and may be withdrawn at any time.

*The decree of the court below was therefore right and will be affirmed.*

---

## HENDERSON BRIDGE COMPANY, *Plff. in Err.*,
*v.*
## COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 150-170.)

*State tax on bridge company—post road—estimate for taxation.*

1. A state tax on the intangible property of a company chartered by that state and maintaining a bridge over a river on the state boundary is not an unconstitutional burden on interstate commerce, when the business carried on over the bridge is done by other persons and corporations which pay the bridge company tolls for the privilege of using the bridge.
2. The fact that a bridge over a navigable river between two states is made a post road by an act of Congress which also regulates the height of the bridge and the width of the spans does not interfere with the right of the state to impose taxes upon the bridge company.
3. The value of the intangible property of a bridge company which maintains a bridge over a river

NOTE.—*As to power of Congress to regulate commerce*, see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

*As to tonnage tax*, see note to Inman Steamship Co. v. Tinker, 24: 118.

*As to interstate commerce; regulation of; power of Congress; how far exclusive*,—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.



Digitized by Google

between two states is properly estimated for the purpose of taxation in the state which granted the franchise of the company, by estimating the total value of the entire property of the corporation in both states, and deducting therefrom the tangible property in the state named as well as the value of all the property, tangible and intangible, in the other state, although certain privileges are granted to the corporation by the other state and an act of Congress regulating the height and width of the spans of the bridge declares it a post road.

[No. 462.]

*Argued December 11, 14, 1896. Decided March 15, 1897.*

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment of that court affirming the judgment of the State Circuit Court in favor of the plaintiff, the Commonwealth of Kentucky, against the Henderson Bridge Company for the amount of taxes levied against that company on an assessment of its intangible property made by the Kentucky board of valuation and assessment. *Affirmed.*

See same case below, 31 S. W. 486.

The facts are stated in the opinion.

*Messrs.* **James P. Helm** and *Helm Bruce* for plaintiff in error.

*Mr.* **William J. Hendrick** for defendant in error.

152] Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was an action brought by the commonwealth of Kentucky against the Henderson Bridge Company to recover the sum of $3,675.91, taxes levied against that company on an assessment made of its intangible property by the Kentucky Board of Valuation and Assessment for the year 1893.

The Henderson Bridge Company is a corporation created by the commonwealth of Kentucky for the purpose of erecting and operating a railroad bridge, with its approaches, over the Ohio river between the city of Henderson, in Kentucky, and the Indiana shore.

The record does not show that it was also incorporated under any law of Indiana, but the company alleged that, being incorporated by the laws of Kentucky, it was granted certain powers and privileges under the laws of Indiana; though it was not denied that the company actually constructed and now owned and operated the bridge and approaches under its Kentucky charter. It was, moreover, averred that the company built its bridge under and in accordance with the act of Congress of December 17, 1872 (17 Stat. at L. 398, chap. 4), entitled "An Act to Authorize the Construction of Bridges across the Ohio River, and to Prescribe the Dimensions of the Same," which provided that any such bridge should be recognized as a post route; and the act supplementary to that act approved February 14, 1883 (22 Stat. at L. 414, chap. 44).

It appeared that the bridge company owned 9.46 miles of railroad and .65 of a mile of siding, making its railroad connections in Indiana, which property was assessed for taxation in that state, at $627,660; that the length of the bridge in the two states, measured by feet, was one third in Indiana and two thirds in Kentucky; that the tangible property of the company was assessed in Henderson county, Kentucky, at $649,735 54; that the capital stock of the company was $1,000,000, and that it had issued bonds to the amount of $2,000,000.

From the evidence before them, the board of valuation *and assessment placed the val-[153 ue of the company's entire property at $2,900,000, and deducted therefrom $627,660 for the tangible property assessed in Indiana, which left $2,272,340, of which two thirds, or $1,514,893, was held to be the entire value of the property in Kentucky. From this, $649,735.54, the value of the tangible property in Henderson county was deducted, and the remainder, $865,157.46, was fixed by the board as the value of the company's franchise.

The company's stock was worth not less than $90 per share on the market, and the bonds took precedence of the stock. The evidence showed a large amount of assets and the receipt of a large income. From the total value $1,385,107 was deducted for the tangible and intangible property in Indiana, and the taxes in Kentucky were levied on $1,514,893 of tangible and intangible property in that state.

The tax on the tangible property amounted to $2,762.08, and this, as we understand it, was paid by the company. The tax on the intangible property was $3,675.91, which the company refused to pay, whereupon this action was brought for its recovery.

The state circuit court rendered judgment in favor of the commonwealth for $595, which was reversed by the court of appeals, which held the commonwealth entitled to recover the full amount. 31 S.W. 486. The cause having been remanded, and judgment entered accordingly, by the circuit court, and affirmed by the court of appeals, this writ of error was sued out.

The company was chartered by the state of Kentucky to build and operate a bridge, and the state could properly include the franchises it had granted in the valuation of the company's property for taxation. *Central P. R. Co.* v. *California*, 162 U. S. 91 [40: 903]. The regulation of tolls for transportation over the bridge considered in *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204 [38: 962, 4 Inters. Com. Rep. 649], presented an entirely different question.

Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried *on by the persons and corporations [154 which paid the bridge company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted. This very question was decided in *New York, L. E. & W. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 439 [39: 1043, 1045], where it was said: "It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an inter-



Digitized by Google

ference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance." The only franchises treated here as the subject of taxation were those granted by the state of Kentucky. So far as the state of Indiana could be said to have conferred any franchise upon the company, it was a franchise that inhered in that portion of the structure that was within the state of Indiana, the value of which was not included in the tax complained of.

The acts of Congress conferred no right or franchise on the company to erect the bridge or collect tolls for its use. They merely regulated the height of bridges over that river and the width of their spans, in order that they might not interfere with its navigation. The declaration that such bridges should be regarded as post roads did not interfere with the right of the state to impose taxes, as was decided in *Postal Teleg. Cable Co.* v. *Charleston*, 153 U. S. 692, 700 [38: 871, 875, 4 Inters. Com. Rep. 637]. The contrary view would withdraw from the taxing power of the states nearly all the railroads and stage routes throughout the country.

The tax in controversy was nothing more than a tax on the intangible property of the company in Kentucky, and was sustained as such by the court of appeals, as consistent with the provisions of the Constitution of Kentucky in reference to taxation.

And for the reasons given, and on the authorities cited in *Sanford* v. *Poe* ("*Adams Exp. Co.* v. *Ohio State Auditors*"), 165 U. S. 155] 194 [*ante*, 683], we are unable *to conclude that the method of taxation prescribed by the statute of Kentucky and followed in making this assessment is in violation of the Constitution of the United States.

*Judgment affirmed.*

Mr. Justice **White** dissenting:

A fuller statement of the facts than is given in the opinion of the court seems to me necessary in order to make clear the reasons for my dissent.

The plaintiff in error, the Henderson Bridge Company, owns and operates a bridge across the Ohio river from Henderson, Kentucky, to the Indiana shore. This bridge is largely occupied by railroad tracks, used, necessarily, solely for interstate commerce. On the Kentucky side there is an approach, and one also on the Indiana side, consisting of an embankment and a siding about 9 miles in length. The corporation was chartered by the state of Kentucky. The general laws of the state of Indiana provide for the recognition of any corporation "created by the laws of another state for constructing a bridge across any river or stream forming in whole or in part the boundary between such other state and this state." It directs also the filing of a copy of the charter in Indiana and subjects the charter of the corporation to the exercise by the state of Indiana of the power to repeal, alter, or amend. The bridge in question was also authorized by act of Congress and was established as a post route. 17 Stat. at L. 398, as amended by 22 Stat. at L. 414. Whether the operation of the Indiana legislation was to make the bridge company an Indiana corporation, need not be considered. It is certain, however, from the facts just stated, that the bridge company possessed, first, a franchise to exist as a corporation from the state of Kentucky, and under this franchise to build and operate the bridge to the Indiana line—that is, two thirds of its length; second, that it also possessed a franchise or right from the state of Indiana, whether *a corporation under [156 the Indiana laws or not, to build and operate the bridge and its approaches in so far as these structures were to be located in that state; third, a franchise or right derived from the United States to operate the bridge for purposes of interstate commerce and as a post route. None of these franchises were incompatible, the one with the other, and all were of such a nature as to be of value to the corporation.

The laws of the state of Kentucky under which the tax in question was levied are set out *in extenso* in the opinion of the court in *Adams Exp. Co.* v. *Kentucky*, this day decided, 166 U. S. 171 [*post*, 960], and I therefore content myself with a brief statement thereof. The sections referred to are as numbered and contained in Barbour & Carroll's compilation of the Kentucky statutes in force in 1894.

Section 4019 fixes the rate of taxation and the various purposes for which taxes may be imposed. Section 4020 defines the general subjects of taxation, that is to say, the objects upon which the rate of taxation provided in the previous section are to be levied. This latter section provides that "all real and personal estate within this state, and all personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the property be in or out of this state, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation unless the same be exempt," etc.

It is manifest that this section clearly designates the objects of taxation to be as follows: (a) all real and personal estate within this state; (b) all personal estate of persons residing within the state; (c) all the property of corporations organized under the law of the state, whether such property be in or out of the state, including the intangible property of such corporations, which property, that is, the intangible property, whether situated in or out of the state, shall be considered and estimated in fixing the value of the corporate franchises.

The statutes of Kentucky provide, as a general rule, for the assessment by the local or county officials of all real and *personal [157 property of individuals or corporations in the county where the property is situated or the corporation established. The franchise tax embraced in the last of the foregoing enumerations is not assessed by the local authorities, but by a board of valuation and assessment, composed of the state auditor, treasurer, and secretary of state, for it is said in § 4077: "The auditor, treasurer, and secretary of state are hereby constituted a board of valuation and assessment for fixing the value of said *franchises*," and a subsequent sentence makes the state auditor the chairman of the board. Section 4078 compels a return to this board show-



Digitized by Google

ing the amount of capital stock, preferred and common; the number of shares; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within the next twelve months before the day on which the statement is required to be made; the amount of surplus and undivided profit, the value of all assets, the total amount of principal indebtedness, the amount of gross or net earnings or income, including interest on investments and income from all sources for twelve months; the amount and kind of tangible property in the state, and where situated, "assessed or liable to assessment in the state," and the fair cash value thereof estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor may require. Section 4079 provides, if the corporation have a line or lines extending beyond the limits of the state, the statement must also show the length of the entire line owned, leased, or controlled in the state, and the entire line of the same company elsewhere. If the corporation be organized under the laws of any other state, or under the laws of Kentucky, but conducts its business in Kentucky as well as in other states, the statement is required to show the gross or net income or earnings received in the state and out of the state on business done in the state and the entire gross receipts of the company in the state and elsewhere during twelve months.

From the *data* thus obliged to be furnished to the board, the act (§ 4079) commands that the assessment of the franchises of the corpora-
158] tion created by the state of *Kentucky shall be made as follows (I quote): "Provided, that said board from said statement and from such other evidence as it may have, if such corporation, company, or association be organized under the laws of this state, shall fix the value of the capital stock of the corporation, company, or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this state or in the counties where situated. *The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.*" The following section (4080) fixes the rule for the ascertainment of the value of the capital stock by which the amount of the tax on franchises is to be arrived at, by making it the duty of the board to "*take the proportion which the gross receipts in this state within twelve months . . . bears to the entire gross receipts of the company,*" and declaring that "*the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this state, shall be the correct value of the corporate franchise of such corporation . . . for taxation in this state.*"

The bridge company was assessed by the local county officials on the bridge and other tangible property the sum of six hundred and forty-nine thousand, seven hundred and thirty-five dollars and fifty-four cents ($649,735.54). The board of valuation assessed the company for the franchise tax, under the laws above stated, in the sum of eight hundred and sixty-five thousand, one hundred and fifty-seven dollars and forty-six cents ($865,157.46). The constitutionality of this latter assessment and the tax levied thereupon is the issue involved.

The first question which arises is, Was the tax levied on the franchise of the corporation? In solving this question it will serve only to confuse and delude the reason if the method which has been pursued in argument is now followed, that is, of calling the levy a franchise tax in one breath and then in the next dropping that designation, and not only denominating the tax, but treating it as solely a tax on intangible property. *If the words "in-[159 tangible property" be synonymous with "franchise," there is no reason for shifting the name by which the object taxed is designated. If, on the contrary, intangible property and franchise are two different objects, then to call the tax first by one and then by the other name gives rise, not only to inaccuracy, but to misapprehension.

That the tax is on the franchise is to me so obvious, so clear, that I fail to see how there can be doubt or question on the subject. The law under which the tax is levied, in language which nothing can obscure, designates it as a franchise tax and only a franchise tax. Can this be denied? Let the query be answered by briefly considering the law section by section. Section 4020 says "shall be considered and estimated in fixing the value of the corporate franchises as hereinafter provided." Section 4077, the one which creates the board of valuation, declares "are hereby constituted a board of valuation and assessment, for fixing the value of said franchises." Section 4078 says "in order to determine the value of the franchises mentioned;" section 4079, that the information required of the taxpayer is for "determining the value of the franchises to be taxed." Section 4080 is no less explicit: "Shall be the correct value of the corporate franchise of such corporation, company, or association for taxation in this state."

But clear as is the statute in its every line, the pleadings of the state, by which this suit was commenced, are, if possible, more so. The declaration, after reciting the levy of the assessment by the board and stating the total amount, adds that it is the sum "which said board of valuation and assessment fixed *as the value of the franchise of said defendant company.*" The language of the statute and the averment of the petition are, moreover, supported by the opinion of the highest court of the state of Kentucky, from which this case comes to this court, wherein it is announced that the tax is on the franchise. I shall quote from the opinion hereafter.

The tax being, then, a tax on franchises, the question is—

First, *Is it exclusively on the franchise to exist as a corporation granted by the laws of Kentucky?* or, second, *Is it also *a tax on the* [160 *franchise enjoyed by the corporation from the United States, and likewise on the one accorded to the corporation by the state of Indiana, and in addition is the tax a burden laid directly by the state upon the interstate commerce business carried on by the corporation?* If it is solely on the first of these objects of taxation of course it was within the power of the state to assess and levy it. *Central P. R. Co.* v. *California*,



Digitized by Google

82 U. S. 91 [40: 903]. On the other hand, if the tax is levied on all or either of the subject-matters of taxation embraced in the second numeration, it violates the Constitution. *California* v. *Central P. R. Co.* 127 U. S. 2 [32: 50, 2 Inters. Com. Rep. 153], and authorities ited and referred to in the dissenting opinion a *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194 [*ante*, 683].

The difference between the levy exclusively n the franchise to exist as a corporation ranted by a state, and the attempt by such tate to tax franchises granted by the United States or another state, or to lay a burden on nterstate commerce, is well illustrated in *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326 [30: 1200, 1 Inters. Com. Rep. 308]. There a tax had been laid by the state of Pennsylvania upon the gross receipts of a domestic corporation of the state under authority of a statute which embraced certain classes of corporations, both foreign and domestic. Answering the argument that the vessels and franchises of the corporation were two kinds of personal property, and that the tax was really upon the franchises of the company, and that each kind of property was taxed without regard to the fact that it was involved in and devoted to the pursuit of interstate and foreign commerce, the court, speaking through Mr. Justice Bradley, said (p. 342 [1203]):

"The second ground on which the decision referred to was based was that the tax was upon the franchise of the corporation granted to it by the state. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other states doing business in Pennsylvania. If intended as a tax on the franchise of doing business—which, in this case, is the 161 ]business of transportation in carrying *on interstate and foreign commerce—it would clearly be unconstitutional."

The issue then is, Was this franchise tax levied solely upon the franchise granted by the state of Kentucky to exist as a corporation, or was it upon all the franchises of the company and upon all its interstate commerce business? It cannot be that the Kentucky law contemplated that the assessment which it ordained, should be only on the franchise to exist as a corporation derived from that state, since the statute commands that the tax shall be laid upon all corporations doing business in the state, whether or not they hold a franchise to be a corporation from the state of Kentucky. This is shown to be the fact on the very face of the statutes, and this test was made decisive by this court as shown in the foregoing citation from the opinion in *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania*, *supra*.

Let me turn to the particular provisions of the statute and ascertain upon what it commands the tax to be levied. Section 4020, in enumerating the objects of taxation which shall be assessed as part of the franchise, provides for all intangible property to be thus included in the franchise, *whether the property be in or out of the state*. Can it be said when the law in mandatory terms directs the inclusion in the franchise to be assessed of property whether in or out of the state, that it means that only the franchise granted by the state to a corporation to exist as such shall be assessed? Examine the other sections of the law, 4077, 4078, 4079, 4080, and it is apparent that they also provide that the board *shall* consider the entire value of the corporate property, everything that it owns, in ascertaining the value of the franchise, which is the thing to be taxed. Now, when the law says that in taxing the franchise the board shall include therein all the intangible property of the corporation, whether within or without the state, and, moreover, in subsequent provisions imposes on the board the duty, not simply of considering all the property in and out of the state, but imperatively says that the assessment of the franchise shall contain all this property, it seems to me that it is impossible with reason to say *that the assessment which the law re-[162 quired was one only on the franchise to exist as a corporation granted by the state, and was not levied on the value of the franchise made up by assessing every right which the corporation possessed, whether in or out of the state, or whether conferred by the United States or the state of Indiana.

That the board by which the assessment was made considered it to include everything in and out of the state and every right possessed by the corporation, is made also clear by the testimony of the state auditor, who was president of the board of valuation. The corporation had a capital stock, the par value of which was one million (1,000,000) dollars; it had besides outstanding bonds to the amount of two million (2,000,000) dollars. The president of the board stated—and his testimony is all there is on the subject in the record—that the total value was fixed, as follows:

| | |
|---|---|
| One million (1,000,000) dollars of capital stock, which was valued at ninety (90) dollars per share | $900,000 00 |
| Two million (2,000,000) dollars of bonds, valued at par | 2,000,000 00 |
| Total | $2,900,000 00 |

As by the statute the value of the taxable franchise was to be ascertained by taking the sum determined to be the worth of the capital stock, as that term was employed in the statute, less the amount of property otherwise taxed, which was to be deducted, it follows that the franchise was embraced in the amount of this total. As the franchise was included in the total, it also results, as the part is contained in the whole, that the elements which entered into and formed a part of the total were, therefore, elements of value entering into and forming part of the taxable franchise.

Now, by what process of calculation does the president of the board declare that the sum of two million, nine hundred thousand (2,900,000) dollars was reached? I quote the testimony:

| | | |
|---|---|---|
| "They say their gross earnings or income amounted to | | [163 $209,072 21 |
| Income from all other sources | | 8,000 00 |
| "Total | | $217,072 21 |
| "Less interest on bonds.. | $120,000 00 | |
| Less sinking fund | 21,000 00 | |
| | | 141,000 00 |
| "Balance | | $76,072 21 |



Digitized by Google

"So that you see here the corporation paying $120,000 interest on two millions of bonds, putting $21,000 into a sinking fund, and with a net profit upon the operation of the bridge of $76,072.21, which was over 7 per cent on one million of stock."

Thus the president of the board declares that the total sum out of which the taxable value of the franchise was to be ascertained was fixed at nearly $2,000,000 above the par value of the stock of the company, because the gross (not the net) earnings of the company derived from its entire interstate commerce business—its business done in Indiana as well as in Kentucky—were all treated as one. The further result of the testimony is, that because by so considering these gross earnings they established that the company realized a sum which would pay 6 per cent upon its bonds and 7 per cent upon the par of its capital stock, therefore the gross amount, in which the franchise was included, was fixed at two million, nine hundred thousand (2,900,000) dollars.

In passing it is worthy of remark that the record contains no explanation of how it could have been found that the gross earnings could have produced the result stated, in view of the fact that none of the operating expenses of the corporation were taken into consideration, and that no allowance was even made for the payment of the sum of the tax which the board proceeded to assess. Can it be said in face of the fact that the assessing officer declares that although in making up the total amount every right possessed by the corporation and all the results of its interstate business were made the 164]basis of the valuation, *yet that the sum so made up embraced only the mere right of the corporation to exist as such, granted by Kentucky, and did not include the rights enjoyed by the corporation under the law of the United States and the law of Indiana, and also all its gross interstate commerce earnings?

But the testimony of the president of the board as to the method of calculation by which the ultimate taxable value of the franchise was fixed at eight hundred and sixty-five thousand, one hundred and fifty-seven dollars and forty-six cents ($865,157.46) is an additional demonstration that the sum of all the gross earnings from interstate commerce, and indeed everything that the corporation earned, was included in this amount. How was this taxable value of the franchise fixed?

| | | |
|---|---|---|
| The total valuation was | | $2,900,000 00 |
| There was deducted the following assessment on the 9 miles of railroad in Indiana | $627,660 00 | |
| Actual value of bridge estimated in Kentucky | 649,735 54 | |
| Actual value of bridge estimated in Indiana | 757,447 00 | |
| Total | | 2,034,842 54 |
| Balance | | $865,157 46 |

That is to say, the president of the board testifies that after having used the whole gross earnings of the company from interstate commerce, from business done in Indiana under the franchise held by that state, and also under that held by the United States, in order thereby to swell the original amount, yet when the deductions came to be made nothing was subtracted in consequence of having included in the original amount the results of the United States franchise, those of the Indiana franchise, and those arising from the entire interstate commerce business of the corporation. As it is, in my opinion, a demonstration that these things were included in the gross amount, and as it is also a demonstration that *none of [165 them were deducted, it follows that the taxable value of the franchise was almost wholly made up of these items. It cannot, I submit, be said that where a thing is included to make up an amount and is not subsequently deducted therefrom, that it does not continue to be a part of the amount into which it originally entered. The statement of the president of the assessing board is the only testimony on the subject contained in the record. In view of the fact that he unquestionably establishes that the assessment was really on the gross receipts, I submit it leaves no room whatever for conjecture or presumption that the assessment must have been levied upon some other object of taxation.

This court has held repeatedly that a state cannot tax the gross earnings of a corporation, even though created by it, derived from interstate commerce, as the levy of such tax would be a burden on that commerce, and therefore an interference with the exclusive power of Congress over that subject. It being beyond dispute, therefore, that the sum of taxation in this case was fixed almost exclusively by the gross earnings from interstate commerce, who, may I ask, can point out the distinction between taxing the gross earnings derived from interstate commerce and taxing a valuation based on such earnings? The elementary principle so often applied by the court, that a tax which may not be imposed directly cannot be levied indirectly, is decisive. Indeed, even the application of that familiar rule is unnecessary, since the method pursued in this case is an exact and literal equivalent of a tax levied directly upon the gross earnings from interstate commerce itself.

The language of the court of appeals of Kentucky, whose judgment is now here for review, leaves no doubt as to how it understood the case and what it interpreted the tax to be. The opinion, in referring to the use of the words "capital stock" as a measure or instrument for the purposes of the valuation of the franchise, says (p. 491): "By this term 'capital stock' the legislature meant to include the entire property, real and personal, tangible and intangible, assets on hand, and its franchises as well; and that, when so embraced *and[166 construed and valued as an entirety," the net balance obtained by deducting the tangible property already assessed would constitute the "value of the franchise to be taxed under § 4077." And, again, in another portion of the opinion, after reviewing the figures showing the value of the "property and the franchises of the company" (mark the use of the plural), the court said (p. 491): "So that the large earning capacity of this property, based on its tangible value only, authorizes us to assume that it lies in its franchise, which is the right to charge tolls on every locomotive, freight and passenger car, ton of freight, and passenger that passes over its road." Also (on



Digitized by Google

p. 492), the court quotes from § 929 of Morawetz on Corporations, among other remarks of the author, the following: "'On the other hand, franchises clearly have a value if the word "value" is used to signify the advantage derived from their possession; or, in other words, their utility. The value of a franchise, using the word "value" in this sense, would not be measured by the cost or difficulty of obtaining the franchise, or by its exclusive character, but by the benefit derived from its possession.'" The Kentucky court adds: "Thus, the value of the franchise in this case aptly illustrates the meaning of the author."

When the opinion of the court of last resort of the state, as announced in this very case, asserts that the tax is, beyond doubt, a levy upon all the property of the company in and out of the state, *that it is a tax upon the value of the exercise of the privilege of using the bridge, of charging for the running of locomotives across the bridge, and of doing the business of interstate commerce in any form*, I cannot bring my mind to the conclusion that the tax is only levied on the mere franchise to exist as a corporation conferred by the state of Kentucky.

It was doubtless the construction given by the Kentucky court to the statute which has caused the opinion of this court now announced to maintain the proposition that the traffic over the bridge which crosses the river between Kentucky and Indiana, and over which, in the nature of things, there can be, I think, nothing but interstate commerce, is not such commerce. Serious as I conceive to be **167** ] the violation of the *Constitution which results from recognizing the right of a state to tax gross earnings derived from interstate commerce, the premise upon which the court thus rests its opinion, to my mind, is a yet more evident violation of the Constitution, and is more pregnant with dangerous results to our institutions.

I consider it a new and startling doctrine to say that a bridge which is situated in two states, with the sanction of the law of both, which has been made a post route by act of Congress, is not an instrument of interstate commerce, and that the traffic which goes over such bridge is not such commerce, and that the receipts derived from or charges resulting from such business are not receipts derived from interstate commerce business. Pushed to its legitimate conclusion, this premise deprives the interstate commerce clause of the Constitution of its entire efficacy, and is, I think, in direct conflict with the Constitution as interpreted by this court from the foundation of the government. I need go no further to demonstrate this than to refer to the recent decision of this court in *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204 [38: 962, 4 Inters. Com. Rep. 649], where the validity of an act of the legislature of Kentucky regulating the rate of tolls to be charged for traffic over a bridge between Covington, Kentucky, and Cincinnati, Ohio, was considered. In the course of the opinion this court, speaking through Mr. Justice Brown, said (p. 217 [968]):

"This case involves the right of one state to fix charges for the transportation of persons and property over a bridge connecting it with another state, without the assent of Congress or such other state, and thus involving the further inquiries, first, whether such traffic across the river is interstate commerce; and, second, whether a bridge can be considered an instrument of such commerce."

Both these questions were answered in the affirmative on the authority of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 [29: 158, 1 Inters. Com. Rep. 382], and *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557 [30: 244, 1 Inters. Com. Rep. 31]. These cases were held to be directly in point. The first denied the right of the state to impose a tax upon the franchise of a ferry company operating between the states of Pennsylvania and New Jersey, while the second *denied to the [**168** state of Illinois the power of regulating the rates of railway charges between Illinois and New York. Where, may I ask, can the line of distinction be drawn between the *Covington Bridge Case* and this? The bridge in the former case was one between Kentucky and Ohio over the Ohio river, the bridge here is over the same river between Kentucky and Indiana. Certainly, it cannot be said that there is something peculiar to the state of Indiana which causes the bridge between that state and Kentucky not to be an instrument of interstate commerce, and the traffic over it not to be interstate commerce, when the contrary is the case as to a bridge between Kentucky and Ohio.

The contention that although the traffic over the bridge may be interstate commerce and the receipts from said traffic be interstate commerce receipts, yet the tolls paid to the bridge company are not receipts from interstate commerce business transacted by the bridge company, is a mere distinction without a difference. What, may I again ask, is the toll paid to the company for the use of the bridge but the result of a contract entered into for the purpose of carrying on interstate commerce. In the *Covington Bridge Case* the sole question was as to the right of the state of Kentucky to regulate the amount of tolls to be received by the bridge company. The right of the state was denied on the ground that the tolls were a matter of interstate commerce, that is, that the business of operating the bridge and charging for the use thereof was interstate commerce and not subject to state control. In that case, then, the tolls were adjudged to be receipts from interstate commerce; in the case at bar, they are declared not so to be. The far-reaching consequence of this asserted distinction is well calculated to arouse solicitude for the future. A large portion of the interstate commerce business of the country is carried on by freight lines. These lines arrange with the railways for transportation, pay them a charge or toll, and upon this basis afford the public increased business facilities. Under the supposed distinction all this interstate commerce traffic ceases to be such, and the whole of the gross receipts become taxable in every state through which the *business [**169** passes. The freight lines do not transport the merchandise; the railways do; therefore the receipts of the freight lines as to such lines are not interstate commerce receipts. This illustration is but one of the many which at once



Digitized by Google

suggest themselves. All the express business, the sleeping-car business, the tank lines and manifold other forms of interstate commerce, will be stricken down if the rule now applied to the tolls of an interstate bridge be enforced as to other means of interstate commerce.

Where, also, I submit, does a distinction exist between this case and the case of the ferry between Pennsylvania and New Jersey, considered in the *Gloucester Ferry Case*, or the attempt of the state of Illinois to regulate freight charges between that state and New York, embraced in the *Wabash Case, supra*? Manifestly, there is an irreconcilable conflict between the decision in this case and the rulings of the court in the cases just cited. It follows that in order to maintain the tax in the case at bar the decisions referred to must be, and are, as I conceive, substantially overruled by the opinion now announced.

Nor can I see the slightest relevancy to the issues in this cause of the decision in *New York, L. E. & W. R. Co.* v. *Pennsylvania*, 158 U. S. 431 [39: 1043]. In that case, the court considered a statute of Pennsylvania which authorized the imposition of a tax upon the gross receipts of companies for tolls and transportation derived from railroads, etc., *situated within the state*. The Erie company held and operated several branch lines *lying wholly within the state of Pennsylvania*, and permitted other railroad companies to use such branch lines or portions thereof, and the taxes there in question were laid upon the tolls so received by the Erie company from its lessees. Such receipts, of course, were merely the income derived from property lying wholly within the state of Pennsylvania.

Obviously, the mere fact that corporations who practically rented property wholly in Pennsylvania and paid rent charges thereon, did business outside of the state, could not exempt the landlord (the Erie company) from paying taxes on the rentals so received from its tenants 170] for property wholly in *Pennsylvania. Is there any ground for contending here that the Henderson bridge is wholly in Kentucky, when the fact is that it is both in Kentucky and Indiana, and that no business can be done over it which is not necessarily business done in both states and between both states? That there was no intention in the *Erie Case* to question the settled doctrine as to the want of power in a state to tax interstate commerce, or the gross receipts derived therefrom, is conclusively shown by the express language of the opinion, where it was declared (p. 437 [1045]) that it was needless to review the previous decisions of this court, holding that a tax laid upon gross receipts derived from interstate commerce put a burden upon commerce among the states and was void, because the proposition the decisions were quoted to sustain was regarded as thoroughly established. So, likewise, at page 438 [1045], an extract was made from the decision in *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688, 695 [39: 311, 315, 5 Inters. Com. Rep. 1], and the doctrine there declared was approved, to wit, that a tax, by whatever name imposed, was valid where the amount of the tax was made dependent in fact on the value of the property of the taxpayer situated within the jurisdiction of the state imposing the tax.

How can it in reason be said that a case which proceeded solely upon the ground that the rentals which were taxed were the fruits of property which lay wholly within the state of Pennsylvania is authority supporting the proposition now maintained that the state of Kentucky has the right to tax the gross receipts derived from business not done wholly within the state, but consisting of tolls and charges derived from the operation of a bridge situated between that state and the state of Indiana, and which tolls and charges this court has recently declared in the *Covington Bridge Case, supra*, constitute receipts from interstate commerce business?

I am authorized to state that Mr. Justice **Field**, Mr. Justice **Harlan**, and Mr. Justice **Brown** concur in this dissent.

---

## ADAMS EXPRESS COMPANY, [171

*Appts.*,

*v.*

## KENTUCKY.†

(See S. C. Reporter's ed. 171–185.)

*Franchise—taxation of interstate express company—rule of uniformity—intangible property.*

1. The word "franchise" as used in Ky. Stat. 1894, § 4077, providing for taxes on the franchise of every "corporation, company, or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service," is not employed in a technical sense, but, construing this section with §§ 4078–4081, it is plain that the legislature intended that the entire property, tangible and intangible, of all foreign and domestic corporations and all foreign and domestic companies possessing no franchise should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible property thus ascertained be taxed under these provisions.

2. Estimating the property of an interstate express company as an entirety, and, after deducting the value of all tangible property, assessing its intangible property within the state on the basis of the mileage of its lines within and without the state, are not in violation of the commerce

†The full title of this case on the docket is Levi C. Weir, President of the Adams Express Company, Appellant, v. L. C. Norman, Auditor of Public Accounts for the Commonwealth of Kentucky.

NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

*As to power of states to tax*, see note to Dobbins v. Erie County Comrs. 10: 1022.

*That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations*,—see note to Providence Bank v. Billings, 7: 939.

*As to exemption from taxation; whether a contract or not; not implied*,—see note to Tucker v. Ferguson, 22: 805.

*As to when an injunction to restrain the collection of a tax will be granted*, see note to Dows v. Chicago, 20: 65.

*As to when taxes illegally assessed can be recovered back*, see note to Erskine v. Van Arsdale, 21: 63.



Digitized by Google

clause or the 14th Amendment of the Federal Constitution.

2. The rule of uniformity is not violated or any unlawful discrimination made between individual taxpayers and corporations, companies, and associations by the fact that the intangible property of such corporations, companies, and associations is taxed by Ky. Stat. 1894, § 4077, by a somewhat different mode from that of individual taxpayers.

4. The taxation of intangible property which has not been taxed as tangible property is not in violation of Ky. Const. § 172, requiring all nonexempt property to be assessed at its fair cash value, or § 174, requiring it to be taxed in proportion to its value, and that corporate property shall pay the same rate of taxation paid by individual property.

[No. 586.]

*Argued December 11, 14, 1896. Decided March 15, 1897.*

APPEAL from a decree of the Circuit Court of the United States for the District of Kentucky sustaining a demurrer and dismissing a suit in equity brought by the Adams Express Company, plaintiff, against L. C. Norman, auditor of public accounts of Kentucky, to enjoin the collection, etc., of taxes against said company, under the Kentucky act of November 11, 1892 (Ky. Stat. 1894, p. 1291). *Affirmed.*

Statement by Mr. Chief Justice Fuller:

This was a bill filed in the circuit court of the United States for the district of Kentucky on behalf of the Adams Express Company to enjoin the collection and certification of taxes against it for the year 1895 under an act of Kentucky of November 11, 1892, entitled "An Act Relating to Revenue and Taxation," carried forward as chapter 108 of the compilation of the Kentucky Statutes of 1894, page 1291. The case comes to this court on appeal from a decree of the circuit court sustaining a demurrer and dismissing the bill as amended. The decree proceeded on the grounds stated by Judge Barr in the opinion of the court in *Western U. Teleg. Co.* v. *Norman*, 77 Fed. Rep. 18.

The bill charged the statute of Kentucky, under which the tax complained of was levied, to be in contravention of the Constitution of the United States, and also of §§ 171, 172, and 174 of the Constitution of Kentucky. Similar averments to those considered in *Adams Exp. Co.* v. *Ohio State Auditor*"), 165 U. S. 194 [*ante*, 688], appear in this bill, and need not be repeated at length. It is stated that the Adams Express Company had no property in the state of Kentucky in the year 1895, except certain horses, wagons, harness, trucks, safes, office fixtures, and other appliances, located at different points in the state, and that all of said property, including the moneys and credits of the company within the state, were duly returned and assessed for state, county, municipal, and other purposes; that the said cash value of the same was $86,614.58, and that the taxes thereon were duly paid; and that the tax complained of is an assessment for state, county, municipal and other purposes on the further sum of $1,463,040.

Sections 171, 172, 174, and 181 of the Constitution are as follows:

"Sec. 171. The general assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to *defray [173 the estimated expenses of the commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"Sec. 172. All property not exempted from taxation by this Constitution shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any wilful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished as may be provided by law."

"Sec. 174. All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses, or franchises."

"Sec. 181. The general assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The general assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations, and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities, and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations, and professions."

Sections 190 to 208 refer to corporations, the latter section reading: "The word 'corporation' as used in this Constitution shall embrace joint stock companies and associations."

Chapter 108 of the Compilation of 1894 is divided into articles as well as sections, and may be referred to by way of *convenience. [174 There are some slight differences from the act of 1892, not material to be noted. The 1st article contains the general provisions relating to the assessment and collection of taxes "upon all property."

Sections 4019 and 4020 are as follows:

"Sec. 4019 An annual tax of 42½ cents upon each $100 of value of all property directed to be assessed for taxation, as hereinafter provided, shall be paid by the owner, person, or corporation assessed. The aggregate amount of tax realized by all assessments shall be for the following purposes: Fifteen (15) cents for the ordinary expenses of the government; five (5) cents for the use of the sinking fund; twenty-two (22) cents for the support of the common schools, and ½ of 1 cent for the Agricultural and Mechanical College, as now



Digitized by Google

provided by law, by an act entitled, 'An Act for the Benefit of the Agricultural and Mechanical College,' approved April 29, 1880, including the necessary traveling expenses of all pupils of the state entitled to free tuition in said college, and who continue students for the period of ten months, unless unavoidably prevented.

"Sec. 4020. All real and personal estate within this state, and all personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the property be in or out of this state, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

Article 2 relates to the assessment of property by the assessors, to whom every person in the commonwealth must give in a list of all his property under oath.

Section 4058 provides for schedules with interrogatories to be propounded to each person, "with affidavit thereto attached, to be signed and sworn to by the person whose property is assessed." The schedules contain a long list of [175] items, including all forms of tangible and intangible, real, personal, and mixed property, the enumeration being exceedingly minute. The first eleven items relate to bonds; notes secured by mortgage; other notes; accounts; cash on hand; cash on deposit in bank; cash on deposit with other corporations; cash on deposit with individuals; all other credits or money at interest; stock in joint-stock companies or associations; stock in foreign corporations.

The third article covers the assessment of corporations; corporations generally; banks and trust companies; building and loan associations; turnpikes.

Sections 4077, 4078, 4079, 4080, 4081, 4082, and 4091 are as follows:

"Sec. 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street-railway company, express company, electric-light company, electric-power company, telegraph company, press-despatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair company, and every other like company, corporation, or association, also every other corporation, company, or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town, and taxing district where its franchises may be exercised. The auditor, treasurer, and secretary of state are hereby constituted a board of valuation and assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in § 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchises, and how apportioned where more than one jurisdiction is entitled to a share of such tax shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be *imposed on them by this act. [176] The auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require.

"Sec. 4078. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies, and associations mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by § 4092 of this article, shall annually, between the 15th day of September and the 1st day of October, make and deliver to the auditor of public accounts of this state a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, *viz.*: the name and principal place of business of the corporation, company, or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the 15th day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in this state, and where situated, assessed, or liable to assessment in this state, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor may require.

"Sec. 4079. Where the line or lines of any such corporation, company, or association extend beyond the limits of the state or county, the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, loaned, leased, or controlled in this state, and in each county, incorporated *city, town, or taxing district, and [177] the entire line operated, controlled, leased, or owned elsewhere. If the corporation, company, or association be organized under the laws of any other state or government, or organized and incorporated in this state, but operating and conducting its business in other states as well as in this state, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross net income or earnings received in this state and out of this state, on business done in this state, and the entire gross receipts of the corporation, company, or association in this state and elsewhere during the twelve months next before the 15th day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or



Digitized by Google

l not afford any valuable information in ermining the value of the franchises to be ed, the said board may excuse the officer from swering such questions: *Provided*, That said ard, from said statement, and from such ier evidence as it may have, if such corpo- ion, company, or association be organized der the laws of this state, shall fix the value the capital stock of the corporation, com- ny, or association, as provided in the next ceeding section, and from the amount thus ed shall deduct the assessed value of all ngible property assessed in this state, or in e counties where situated. The remainder us found shall be the value of its corporate anchise subject to taxation as aforesaid.

"Sec. 4080. If the corporation, company, or sociation be organized under the laws of any her state or government, except as provided the next section, the board shall fix the alue of the capital stock as hereinbefore pro- ided, and will determine from the amount of ie gross receipts of such corporation, com- any, or association in this state and elsewhere, ie proportion which the gross receipts in this tate, within twelve months next before the 5th day of September of the year in which ie assessment was made, bear to the entire gross eceipts of the company, the same proportion f the value of the entire capital stock, less the [178] assessed value of the tangible *property ssessed or liable to assessment in this state, hall be the correct value of the corporate ranchise of such corporation, company, or ssociation for taxation in this state.

"Sec. 4081. If the corporation organized nder the laws of this state or of some other tate or government be a railroad, telegraph, elephone, express, sleeping, dining, palace, or hair car company, the lines of which extend beyond the limits of this state, the said board will fix the value of the capital stock as herein- before provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased or controlled in this state bears to the total length of the lines owned, leased, or controlled in this state and elsewhere, shall be considered in fixing the value of the corporate franchise of such corpo- ration liable for taxation in this state; and such corporate franchise shall be liable to tax- ation in each county, incorporated city, town, or district through or into which such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town, or district bears to the whole length of lines in the state, less the value of any tangible property assessed, or liable to assessment, in any such county, city, town, or taxing district.

Sec. 4082. Whenever any persons or asso- ciation of persons not being a corporation nor having capital stock, shall, in this state, engage in the business of any of the corporations mentioned in the 1st section of this article, then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein, shall be deemed and treated as the capital stock of such person or association of persons for the purposes of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation."

"Sec. 4091. All taxes assessed against any corporation, company, or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to said corporation, com- pany, or association by the auditor; and every such corporation, company, *or associa- [179] tion failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of 10 per cent on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of 10 per cent per annum; any such corporation, company, or association failing to pay its taxes, penalty, and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined $50 for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin circuit court shall have jurisdiction."

The 4th article relates to the assessment and payment of taxes by railroads; the 5th to dis- tilled spirits; the 6th, 7th, 8th, and 9th articles to the board of supervisors and the collection of taxes and the revenue.

Articles 10 to 12 relate to license taxes, special taxes, privileged taxes, and the like; and articles 13, 14, and 15 prescribe certain duties for designated officers touching the col- lection of the revenue. Article 15 provides for a state board of equalization to equalize the assessments returned to them from each county.

*Messrs.* **Lawrence Maxwell**, Jr., *Clar- ence A. Seward*, *Frank H. Platt*, and *James C. Carter* for appellant.

*Mr.* **William J. Hendrick** for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Section 4077 of the Compilation of the Ken- tucky Statutes of 1894 provides that each of the enumerated companies or corporations, "every other like company, corporation, or as- sociation;" and also "every other corporation, company, or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or per- forming any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise *to the state, and [180] a local tax thereon to the county, incorporated city, town, and taxing district, where its fran- chise may be exercised;" and in the succeeding sections the words "franchise," "franchises," and "corporate franchise" are used. But taking the whole act together, and in view of the pro- visions of §§ 4078–4081, we agree with the cir- cuit court that it is evident that the word "franchise" was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangi- ble, of all foreign and domestic corporations, and all foreign and domestic companies pos- sessing no franchise, should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible prop- erty thus ascertained be taxed under these pro- visions; and as to railroad, telegraph, tele- phone, express, sleeping car, etc., companies, whose lines extend beyond the limits of the state, that their intangible property should be



Digitized by Google

assessed on the basis of the mileage of their lines within and without the state.

But from the valuation on the mileage basis the value of all tangible property is deducted before the taxation is applied.

So far as the commerce clause and the 14th Amendment of the Federal Constitution are concerned, this scheme of taxation is not in contravention thereof, as already determined in *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194 [*ante*, 688], and cases cited.

And considered as a property tax, as in our opinion the prescribed exaction must be held to be, we regard it as in harmony with the provisions of the Constitution of the commonwealth of Kentucky. The property, tangible and intangible, owned by corporations, is subjected to like taxation, and so the tangible and intangible property of individuals associated together in companies, and while the provisions of §§ 4077 and 4078 do not apply to all individual taxpayers, yet reference to § 4020 and the schedule which must be returned by each taxpayer, as required by § 4058, demonstrates that individual taxpayers are also subjected to taxation on all their intangible property, whatever they may be, as well as on all their tangible [181] property. As pointed out by the circuit court, the mode of the assessment of the intangible property of companies, corporations, and associations mentioned in § 4077 and that of individual taxpayers is different, and the intangible property of such corporations, companies, and associations may in some respects differ from the intangible property belonging to individual taxpayers, but there is nothing in the statute which exempts any intangible property owned by any corporation, company, or individual taxpayer from taxation, or discriminates between them.

Section 174 of the Constitution of Kentucky provides that "all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses, or franchises."

But this does not prevent intangible property from being taxed, and the tax mentioned in § 4077 is not an additional tax upon the same property, but on intangible property which has not been taxed as tangible property.

We concur with the views of the circuit court that neither § 172 of the Constitution nor any other section confines "the levy of an ad valorem tax to tangible property; but as decided by the Kentucky court of appeals in *Levi* v. *Louisville*, 97 Ky. 394, 28 L. R. A. 480, it does require the levy of an ad valorem tax upon personal property as well as real estate, and this case decides that a license tax which is not a property tax cannot be substituted for an ad valorem tax upon personal property engaged in certain commercial pursuits in the city of Louisville. It does not decide that § 171 of the Constitution, which declares that taxation shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, applies to taxation based upon income, license, or franchise. If there is any intimation upon the subject in this case, it is that taxation which is based upon income, license, or franchise may be classified by the legislature; and as to licenses, they may be levied upon some employments and occupations and not upon others. If, however, we are correct in our construction of the Kentucky statutes, there is no ground for contending that there is a want of uniformity in the levy of the taxes against the defendant, even though § 171, requiring uniformity of taxation upon all property subject to taxation, applies to taxation based upon income, license, or franchise, and is given its broadest possible construction."

The act received consideration in *Henderson Bridge Co.* v. *Com.* (Ky.) 81 S. W. 486, and the court of appeals of Kentucky, speaking through Grace, J., said:

"Thus we see what a varied meaning this term 'capital stock' may have. So that it becomes necessary to examine and see what was the object and meaning of the legislature when using this term in the clause before quoted from § 4079 of our statutes. In this examination it becomes important to notice those clauses of the Constitution in reference to revenue and taxation, and see what was contemplated and enjoined by that instrument in reference to taxation. Section 172 provides: 'That all property not exempt from taxation, by this Constitution, shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale.' . . . Section 174 provides: 'That all property, whether owned by natural persons or by corporations, shall be taxed in proportion to its value, unless exempted by this Constitution, and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses, or franchises.' Thus it is manifest that what the Constitution intended to be taxed was property,—all property; and, as to corporations, not only all tangible property, but that it intended to leave the legislature of the state free to tax the franchise of corporations if it so desired; that the property of a corporation should be taxed as the property of an individual. It will be observed that in these several sections quoted 'capital stock,' 'stock,' and 'shares of stock' are not mentioned as being appropriate terms to designate the subjects of taxation, but it says [183] 'property,' 'all property,' etc., so that there might be no confusion as to what that instrument intended. Neither is there any reason to suspect that the legislature did not understand the language and meaning of the Constitution when it came to frame the revenue laws of the state under it now under consideration. Neither is there reason to suspect that it did not intend and endeavor in good faith to carry into effect the intent and meaning of the Constitution. So that we may safely interpret all words and phrases (of doubtful and uncertain meaning) in accordance with and so as to effectuate and carry out that intent."

The statute thus construed cannot be over-



Digitized by Google

rown for failure to conform to the requirements of §§ 171, 172, and 174 of the state Constitution.

*Decree affirmed.*

**Mr. Justice White**, with whom concur **Mr. Justice Field**, Mr. Justice **Harlan**, and **Mr. Justice Brown**, dissenting:

In its ultimate analysis the legal principles by which this case should, in our opinion, be controlled, are those which were by us deemed decisive in *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194 [*ante*, 683]. It follows that the reasons for our dissent stated in that case are pertinent to this, and we reiterate them as expressing the grounds for our dissent from the conclusions reached by the court in this case. The facts here, however, so pointedly exemplified the force of the reasons for our dissent in *Adams Exp. Co.* v. *Ohio State Auditor*, that we briefly state them. The actual value of all the tangible property owned by the express company in Kentucky was $36,614.53. This property was assessed by the local authorities for that amount and the taxes duly paid. In addition, the value of the franchise was assessed at $1,463,040, a disproportion enormously in excess of the amount imposed by the state of Ohio, great as was that disproportion. The operation of the tax is additionally illustrated by a further fact. The tax imposed in Ohio and held to be valid in *Adams Exp. Co.* v. *Ohio State Auditor*, considered with ref-

184] erence to the routes traveled *by the agents of the express company, was at the rate of $250 per mile, whilst in this case the tax levied is at the rate of $764 per mile.

Although the fundamental legal principles which, in our opinion, should have controlled *Adams Exp. Co.* v. *Ohio State Auditor*, are the same in this case, there are yet material differences between the Kentucky and the Ohio statutes, which we think should take this case out of the ruling in the former case, even conceding that case to have been correctly decided. The tax here levied is a franchise tax. This is fully demonstrated by the dissenting opinion in *Henderson Bridge Co.* v. *Kentucky*, this day decided (166 U. S. 150 [*ante*, 953]). The levy here sought to be sustained, then, is a franchise tax, assessed on a joint-stock company which has no franchise, for the bill alleges that the express company is a partnership and the demurrer concedes it. Under this state of law and fact, therefore, the effect of holding the tax now in question valid is to decide that a franchise can be taxed, when there is no franchise on which to levy the tax. This can only be escaped by contending that the right of the express company to do interstate commerce business in Kentucky resulted from the assent of the state, and therefore the doing of such business was equivalent to accepting a franchise from the state. But to announce this proposition would overthrow the settled rule so necessary for the perpetuity of our institutions and the free intercourse between the states, that the right to transact interstate commerce business by a person or corporation is protected by the Constitution of the United States, and does not depend upon the mere grace of one of the states of the Union.

In addition to the clear distinctions, already noted, between *Adams Exp Co.* v. *Ohio State Auditor* and this case, there are others resulting from the difference between the Ohio and the Kentucky statutes. The Ohio statute considered in *Adams Exp. Co.* v. *Ohio State Auditor*, purported only to tax the tangible property within the state, but empowered the assessing board to consider its value as augmented by the use to which such property might be put. In other words, the Ohio law, as construed by the supreme court of the state, taxed only tangible *property within the state enhanced in [185 value by intangible elements outside the state. We considered, in dissenting in the Ohio case, that this was a mere disguise, a distinction without a difference, but the court held otherwise. In this case, by the law in question, the mask is thrown off, and what we conceive to be logically the thin disguise under which the courts of Ohio supported its statute is not asserted to exist, but the Kentucky statute, in unambiguous and unmistakable language, imposes the imperative duty upon the assessing board to assess property both in and out of the state. That is to say, it leaves nothing to implication or to evasion, but declares in plain English that property in and out of the state shall be assessed.

---

## ADAMS EXPRESS COMPANY
*v.*
## OHIO STATE AUDITOR.

(See S. C. Reporter's ed. 185-225.)

*Taxation of intangible property of express company—value—situs of intangible property—franchise to do.*

1. The intangible property of an express company is liable to state taxation, and such taxation is not upon the privilege of doing its business, nor an interference with interstate commerce.
2. Whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation.
3. The situs of the intangible property of an express company engaged in interstate business is not, for the purpose of taxation, simply where its home office is, but such property is distributed wherever its tangible property is located and its work is done.
4. The franchise to do is an independent franchise, or, rather, a combination of franchises embracing all things which a corporation is given power to do; and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be, and constitutes a substantive matter of taxation in every state in which such franchises are exercised in connection with tangible property.

[No. 337.]

*Submitted March 1, 1897. Decided March 15, 1897.*

---

NOTE.—*As to power of Congress to regulate commerce*, see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

*As to tonnage tax*, see note to Inman S. S. Co. v. Tinker, 24: 118.

*As to interstate commerce; regulation of; power of Congress; how far exclusive*,—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

*As to power of Congress to control commerce; state statute, when valid as being a regulation of commerce; drummers; vessels; railways; telegraph companies; state tax on commerce, when invalid*,—see note to Harmon v. Chicago, 37: 216.



Digitized by Google

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit. On petition for rehearing of ten cases, Nos. 337–340, 398–400, 469–471, known as the Ohio and Indiana Express Tax Cases. *Petition for rehearing denied.*

See same case, 165 U. S. 194, [*ante*, 683].

The facts are stated in the opinion.

*Messrs.* **James C. Carter** and **Lawrence Maxwell**, Jr., in support of petition.

The petition was as follows:—

To the Supreme Court of the United States:

Your petitioners, the appellants in the above-entitled causes, respectfully pray for an order directing a reargument of the said causes upon the following grounds:

First. The total insufficiency of the argument offered by the counsel for the appellants, due to a failure on their part to anticipate the grounds which have really led to the decision of the court.

Second. The extreme importance and far-reaching effect of the decision which has been announced, as bearing upon some of the most fundamental principles of constitutional law.

Third. Its momentous practical importance as affecting existing interests, making it wholly impossible for the appellants to continue the express business of the country under the system of taxation sanctioned by the decis-[187] ion, in view of *the natural tendencies of the different states to compel contributions from that business,— tendencies against which the law affords the most meager, if any protection.

Fourth. The entire novelty of the questions discussed and of the points necessarily determined by the judgment.

Fifth. The fact that under the circumstances such failure on the part of counsel is not without reasonable excuse.

Sixth. That the appellants believe and are so advised by their counsel, that a further consideration of the cases and a consideration of reasons which have not heretofore, in consequence of the failure aforesaid, been stated, will lead this Honorable Court to a decision in favor of the appellants.

Seventh. We beg finally to suggest that upon the question whether the Nichols law denies the appellants the equal protection of the laws, this court has erroneously assumed that the taxing laws of Ohio classify property of different sorts for purposes of valuation.

And your petitioners respectfully ask for an attentive consideration of the paper annexed hereto, in which an attempt is made to more fully state and to support the grounds above mentioned, with such brevity, however, as the nature of this petition and the rule of the court requires, and they further pray that the above-entitled cases be set down for reargument before the court upon some day by it to be appointed.

And as in duty bound will ever pray.

James C. Carter,
Lawrence Maxwell, Jr.,
Counsel for Appellants.

We certify that, in our opinion, the foregoing petition for rehearing is well founded.

James C. Carter,
Lawrence Maxwell, Jr.,
Counsel for Appellants.

GROUNDS UPON WHICH THE REARGUMENT IS ASKED:—

First. The total insufficiency of the argument heretofore offered by counsel for the appellants, due to a failure on their *part to[188] anticipate, in any adequate degree, the grounds which have really led to the decision of the court.

It is important in the first] place that the precise substance and effect of the decision should be stated.

A review of the decisions of this court prior to the argument of the present cases and referred to in the opinion of the court just pronounced as being, in point of authority, the foundation of the decision is appended hereto in an appendix.

From this review it is believed that the following is a fair and just statement of the propositions actually determined by those decisions.

1. They rightly assume two principles as incontrovertible; first, that, so far as concerns the taxation of property, a state cannot tax, as against nonresidents, any property except such as has an actual situs within its limits; second, that no state can tax or burden in any form the business of interstate commerce.

2. That where a state assumes only to tax property actually situated within its limits, it does not violate either of the above principles, if, in ascertaining the value, it adopts the ordinary method of assessment; or, where the ordinary method is not practicable, some other fair and reasonable method.

3. That in the case of railroad and telegraph companies, the ordinary method is not applicable, and the method of taking into view the value of the whole, in order to ascertain the value of the part, is fair and reasonable, at least so far as to justify an apportionment of value according to mileage.

The step now taken by the present decision is to evolve a new general proposition, not declared or distinctly discussed in any of the prior cases, that where there is what is called a unity of use between several pieces of property not united together by any physical tie, some of the pieces situated within and some without the state, the value of the parts within may be determined by the value of the whole, even though the part within is physically separable, and is, as separated, an ordinary thing, having an ordinary market value based upon its capability of similar uses in a multitude of different businesses, differing in nothing, so far as the ascertainment *of value is concerned,[189] from the thousand other classes of chattels which form the usual subjects of taxation.

No precise explanation is given of just what this unity of use, which involves such momentous consequences, may be; but it is held that the property of express companies is of that character.

This doctrine of the effect upon taxation of a unity of use was not discussed in the prior cases, and was not touched by appellants' counsel in the argument of these cases. The excuse for this omission will hereafter be given. But the argument which they thought abundantly sufficient to defeat the assessments consisted in pointing out that the property taxed



Digitized by Google

is, both physically and in respect of ownership, capable of separation without altering identity, or any of its properties, or its alue, as ordinarily understood, and would remain, after separation, an ordinary subject of xation, and that to tax it as it was taxed under the Ohio law was in effect to tax property itside of the state, and also the business of terstate commerce. This argument, which ems not to be disputed, must be regarded as ndering the validity of the taxation at least oubtful. The weighty dissent fairly entitles to be so considered.

The additional arguments and illustrations hich they might have adduced, but did not, re as follows:

1. The unity which makes the property so axable is said in the opinion of the court to be ependent, not upon physical connection or nity of ownership, but to be sufficiently constituted by unity of use.

But suppose the Adams Express Company hould, in Ohio, hire all its horses, wagons, tc., as it easily might without materially affecting its business, and for the ordinary rates. The same unity of use would continue. Would he owner, (the horses, wagons, etc., being worth $42,065) be properly assessed for taxation at $533,095.80, although he had no interest in the express business? If not, is there really any unity of use which justifies these assessments?

2. Again, let it be supposed that the company reduces the amount of its horses, wagons, etc., [190] to one half, not by hiring *from others, but by substituting human carriers, which it easily might do without substantially affecting its receipts. This would not alter the proportions of mileage, or gross receipts, and therefore, although the amount of the property purporting to be valued were reduced one half, the valuation would be the same. And, supposing it hired all its horses, wagons, etc., except one horse and wagon, owning no other personal property than that, the valuation would still be unaffected.

3. If, however, it should hire all and own no personal property whatever, it would then be wholly relieved, for the assessors would be left without a subject for assessment. That is to say we have a scheme of assessing the value of the personal property owned by express companies in Ohio wholly unaffected by the amount which is owned.

4. Perhaps it may be suggested that the assessment would, in the case of hiring by the express companies, stand as an assessment, not of the property, but of its use. But under this law, certainly, nothing can be assessed except the value of the property, and that against its owner. Let it be supposed, however, that this were otherwise, or that the law were changed so as to tax the use. Would the owners of the horses and wagons still be justly taxable on them, and on what amount? Or, would this property be exempt from further taxation? There would seem to be no just reason for not taxing it against the real owner, and on the full value; and in that case we would have a horse assessed at its true value, $150 to the owner, and at about $4,000 to the user.

5. And yet, in the case last mentioned, consistent reasoning requires that the owner should be exempt, for if the plant really be united it is inseparable, and if it remains in the unity for purposes of taxation, it cannot at the same time be out of it for the same purpose.

It may, indeed, be suggested that the case would be one, after all, only of double taxation, and that this, however flagitious, is not a subject of criticism in a Federal court. But we beg to refer to the opinion of Mr. Justice Brewer, in *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439 [38: 1041, 4 Inters. Com. Rep. 677], repeatedly approved, and so recently as in the case of *Western U. [191 *Teleg. Co.* v. *Taggart*, 163 U. S. 1 [41: 49], that it is only fair, reasonable, ordinary, necessary taxation which is, in such cases, a defense against the charge of violating both the fundamental principles above referred to, which principles are committed to the care of the Supreme Court.

6. But what shall be said of the pretense by Ohio that the different parts of the plant are an inseparable unity when she herself asserts that they are not, and in this same law actually separates them for the purpose of taxation? If all the property of the company composes, as is said, this united inseparable plant, then, certainly, the real estate in Ohio is part of it and an inseparable part; but that state finds no difficulty in separating it, and imposes on the company an entirely separate assessment of $58,000 and upwards, on this account.

The real estate of the companies in Ohio is there assessed like that of other owners. The law requires this assessed value to be included in the return made by the companies to the board of assessors, and adopts it and taxes accordingly and separately. It thus assumes and declares that the value of this property, although as much a part of the unity as any other, does not depend for its value, as it plainly does not, upon the use to which it is put, but upon the same elements which determine the value of all other lands and buildings in the state.

7. The principal idea which underlies the opinion of the court and is made to defend these extraordinary assessments is that the value of property is dependent upon the use to which it is put. We earnestly request the court to reconsider this proposition. It is an expression which has several times been employed to support the doctrine declared in the railroad and telegraph cases, and in the sense there intended is entirely just. In cases where the ordinary and nearly universal methods of ascertaining value cannot be employed, where the thing to be valued has no market value, where it cannot be indefinitely produced, where there is no supply and demand, there is a necessity of resorting to other considerations, and the productiveness of the property, in other words, the value of the use of it, is a natural, ordinary, and proper *inquiry; [192 for if the thing were to be sold just as it is, that would be the inquiry of the intending purchaser. But this method is the creature of necessity, and should be carefully limited to that necessity. Can it be thought for a moment that this proposition should be made general and the value of property generally be held to be determined by the use to which it is



Digitized by Google

put, and not at all by the fact that it is a common subject of sale in the market, and has a distinct and certain market value? What would be said of a system of taxation of ordinary property wholly within a state, which should direct or permit an assessing board to displace the ordinary tests of value, namely, what the things are bought and sold for, and inquire, in each instance, into the profits which the owners made who used them, and then impute those profits to the particular thing, making houses and lands, horses and cattle, and all other chattels bear every variety of value? Such a system would be in violation of fundamental notions of right, and would make fairness and equality in taxation impossible. It would not be taxation, but arbitrary exaction. And yet this would be justified if the proposition under notice were sound.

If this is not sound as a general proposition, is it sound in any cases, and why is it sound in them? It is sound in cases where there is no better method, and sound because necessary.

We have referred to the opinion of the court in *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439 [38: 1041, 4 Inters. Com. Rep. 677], drawn up by Mr. Justice Brewer, as laying down the true reason (necessity) for the assessment of part of a railroad lying within a state, by a reference to the value of the whole. In that opinion there are, indeed, expressions to the effect that the value of all property is determined by its use, as if this were true as a broad and general proposition. p. 445 [1046]. But did Mr. Justice Brewer really mean this? Did he mean that this was the ordinary test? Did he mean that where the common judgment of men, based upon all the elements of value, the uses to which the property may be put, supply and demand, etc., had established a value (for this is what is ordinarily meant by value) that judgment should be disregarded, and an assess-[193] ing *board be permitted to establish another value based on use alone, or did he mean that in those cases where common judgment had never had occasion to fix a value, and never had done it, and where consequently a value so fixed was not available, an assessing board was obliged to have recourse to the original elements of value and make up, as best it could, a judgment? We have only to recur to the other parts of the opinion to see that the latter meaning was all that he intended.

8. What, then, is the precise error, as we humbly conceive it to be, in the decision? It finds that in the railroad and telegraph cases there was declared to be property actually situated within the state and therefore taxable there. The problem, as declared by the court, was to ascertain its cash value. There was no market value. The subject of taxation was not one capable of indefinite production, and not subject to the operation of supply and demand. To separate it from the use to which it was put would be to destroy it, and it would have no value, except as a ruin, for its materials. But yet it had a cash value which a purchaser would give for it, and this in the purchaser's mind would depend on the use to which it was put. Now in those cases the use to which the thing was put was in inseparable unison with other things, together constituting a whole, as much as a dwelling house which happened to rest on both sides of a state line, and the value of the whole was the material thing to be determined.

What the prior decisions established is that where the value of a thing proper to be taxed cannot be ascertained by ordinary methods, its use may be referred to, and where its use is in inseparable combination with a whole of which it forms a part, the value of the whole may be referred to. What the court now apparently construes that decision to be, is that wherever the use of a thing in one state is in combination with other things outside of the state as a whole, its value for taxation may be determined by a reference to the value of the whole, notwithstanding there is no difficulty in physical separation or in separation of ownership, and notwithstanding that the part within the state has the same full and perfect value after separation which it possessed before *combination. As to railroads and tele-[194] graphs the parts within one state cannot be sold, delivered, and taken away by a purchaser without destroying the value. Let it be imagined that this could be done, and that the price were easily ascertainable, can it be thought that the method of assessment adopted in respect to them would have been sanctioned? It was the impossibility of this which was the ground and the sole ground of the decisions.

9. There is manifest from the face of the opinion an impression on the part of the court that there are equity and justice in the methods sanctioned, and that the express companies are seeking to avoid just contributions. This is most unfortunate. It should not be assumed where the question is alone as to the constitutionality of methods, for the records cannot contain the facts upon which such an assumption can either be justified or repelled. The opinion contains this statement: "Considered as distinct subjects of taxation a horse is indeed a horse; a wagon, a wagon; a safe, a safe; a pouch, a pouch; but how is it that $23,430 worth of horses, wagons, safes, and pouches produce $275,446 in a single year; or, $28,438 worth $350,519? The answer is obvious." It is not intended, we assume, by this language to impute to the appellants an assertion of the fact implied by those interrogatories. They mean that in the opinion of the court the horses, wagons, etc, sought to be taxed, are the real sources from which the large sums mentioned are derived; or that they may be justly so regarded for the purpose of taxation. But ought not this to be reconsidered and retracted? Some agency in producing these sums (for they are gross receipts) will, of course, be allowed to the physical labor of a large number of people, mere laborers, who must be paid out of the receipts; something more to the skill and superior talents of principals and subordinates who could earn, in various callings, large salaries, and some of them very large, and who must also be paid out of the receipts; something more to an accumulated fund derived from past profits which furnishes the public with an assurance of responsibility; something more to those habits of patronage, commonly called goodwill; and a great deal to the *services performed by the railroad com-[195] panies; for it is a matter of common knowledge that the express companies are required to pay



Digitized by Google

early one half of their gross receipts to the railroad companies for transportation. If fair and just-minded men should deliberately estimate in the best possible manner the proportion to be awarded to each of these sources, would the amount properly to be ascribed to these horses, wagons, etc., be one particle more than is represented by their actual value as set forth in the returns? Certainly there is nothing perceived in these records which enables the court to say that there is, and the appellants assert most confidently that there is not.

There is evidently an impression that the contracts which express companies have with the railroads are sources of large profits. If this were the fact it is not perceived how it would affect the value of horses and wagons used by the companies; but the impression is erroneous. Railroad companies are as exacting as other persons in the compensation they demand for their facilities, and just as exacting towards express companies as towards others.

But why is it that all these receipts are imputed to the horses and other personal property? If one piece of property can be selected, and the entire receipts be imputed to that, why cannot another piece be as well taken? Why cannot the real estate in Ohio be taken and the personal property be dropped, just as well as to take the personal and leave out of view the real estate? The real estate in the case of both the Adams and the American Company is of more than twice the value of its personalty, and yet that is not supposed, in the opinion, to contribute anything to the receipts.

10. It is said in the opinion that the appellants' returns of their property "did not take into account contracts for transportation and accompanying facilities." We are not advised whether the court means to suggest that such contracts constitute property which is subject to taxation by the states in which the railroads are situated.

(a) We submit in the first place that the statutes do not undertake to assess the railroad [196] contracts of express companies *as property. They do not require the express companies to return such contracts to the assessing board or direct the board to estimate their value. The supreme court of Indiana has so construed the statute of that state (Indiana Record, 59) and its construction is binding upon this court.

There is nothing in the opinion of the supreme court of Ohio to indicate that it regards the railroad contracts of the express companies as property to be taxed under the Nichols law. On the contrary in *Adams Exp. Co.* v. *State* (Ohio) 44 N. E. 506, 508, they say:

"What is known as the 'Nichols law,' held constitutional in *State, Poe,* v. *Jones*, 51 Ohio St. 492, imposes a tax upon property only, and does not impose any tax for the privilege of exercising a franchise in this state."

(b) We submit that the express companies' railroad contracts are not property. They do not create in the express companies any interest or estate in the railroads. They simply reduce to writing, for the purposes of convenience and certainty, the details of the service to be rendered by the railroads and the compensation to be paid therefor. The only property involved is the railroad, which belongs, not to the express companies, but to the railroad company, and which is taxed as such against the railroad company, and that, too, upon the basis of its value as affected by its earnings from express companies and other patrons.

The railroad facilities are no doubt valuable to the express companies; indeed, they are as essential to the conduct of the express business as they are to the conduct of business generally. But that does not make them property.

In *Exchange Bank* v. *Hines*, 3 Ohio St. 1, the supreme court of Ohio held that the franchise of a bank was not property subject to taxation under the Constitution of Ohio. The court, speaking by Bartley, Ch. J., said:

"Does a corporate franchise, in sober truth and reality, possess the essential qualities of property? It is said that the corporate franchise of a bank, conferring a peculiar legal capacity, and the high function of making and circulating paper money, is valuable—indeed, a thing of great value. *But value is not [197 the distinguishing attribute of property. The right of suffrage is esteemed valuable; a public office, with its emoluments, is valuable; a license to keep a tavern, as formerly granted in this state, or a license to carry on any special business which is prohibited without a special grant of authority from the government, may be valuable; and a right to either of these things may be asserted and maintained in a court of justice yet neither of them possess the essential qualities which constitute property. Our right to the free use and enjoyment of things which are in common, such as air, light, water, etc., is valuable; and our right to the free use of the public highways, and to many of the privileges and advantages derived from the government may be valuable, and may be maintained by legal process. Yet none of these things come within the denomination of property. Those things which constitute the subject-matter of private property, are such as the owner may exercise exclusive dominion over in the use, enjoyment, and disposal of them, without any control or diminution, save only by the laws of the land. 1 Wend. Bl. Com. 138. It is a fundamental principle, that 'property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person, without any valuable consideration in return, or even of throwing them away, which is usually called relinquishing them.' Rutherford, Inst. 20 Puffendorf, bk. 7, chap. 9. It is said that capability of alienation or disposal, either by sale, devise, or abandonment, is an essential incident to property. 2 Kent, Com. 317." 3 Ohio St. 7, 8.

In *Ex parte Gilchrist*, L. R. 17 Q. B. Div. 521, it was held that a power of appointment under a deed or will is not the "property" of the donee. Fry, L. J., said: "No two ideas can well be more distinct the one from the other than those of 'property' and 'power.' This is a 'power,' and nothing but a 'power.' A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is *immaterial; the general nature [198 of the power does not make it property. The



Digitized by Google

power of a person to appoint an estate to himself is, in my judgment, no more his 'property' than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognizes are they 'property.' In one sense, no doubt, they may be called the 'property' of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not 'property' within the meaning of that word as used in law. Not only in law but in equity the distinction between 'power' and 'property' is perfectly familiar, and I am almost ashamed to deal with such an elementary proposition."

(c) It has been said several times in opinions delivered in this court that it is not within the power of a state to levy a tax against a person engaged in interstate commerce for the privilege of constructing or using instrumentality of interstate commerce. *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 445, 446 [38: 1046, 4 Inters. Com. Rep. 677]. In *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688, 696 [39: 311, 315, 5 Inters. Com. Rep. 1], Mr. Chief Justice Fuller said:

"Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce."

The express companies must use the railroads. For convenience they must reduce to writing the terms under which the railroads perform services for them. But the states can hardly be permitted to tax express companies for the privilege of employing railroads to render service in interstate commerce, or tax as property contracts which create in the express companies no interest or estate in property. But it is not necessary to enlarge upon this point for the reason that, according to the decision itself, the contract can only be reached as being an inseparable part of the whole plant of the company, of which the horses, wagons, **199** etc., are another *inseparable part. If the notion of a unity falls, there can of course be no ground upon which the contracts can be made to add anything to the value of the property assessed in Ohio. Account might just as well be taken of any other part of the property of the company as of the contracts referred to. If the notion of unity is not maintainable, it follows necessarily that any attempt to add to the valuation of the horses and wagons by a reference to anything except the intrinsic value of those articles themselves must fail.

11. It must certainly be admitted that a part of an assumed unity cannot be valued by a reference to the value of the whole as determined by its productive use, unless the whole could be properly so assessed. It must therefore follow that a state in taxing properties wholly within its limits may properly tax things united in use as a whole, by reference to the supposed productiveness of the whole. Would it be endurable to tax farms, cattle, hay, tools, and all as a unity, by a reference to productiveness, instead of by the ordinary method? And is an express company more of a unity than ordinary farms?

12. Mr. Justice Brewer declared, in the opinion so often referred to by us, that if a taxable thing were situated within the limits of a state and had a cash value, the fact that such value was in part derived from the circumstance that it was an instrumentality of interstate commerce was immaterial; and he might with equal truth have added that if its value were, in part, derived from its use in inseparable connection with other property actually situated outside of the state, that circumstance would be immaterial. In both instances it is the value only of property actually situated within the state which is taxed.

But let it be supposed that there are multitudes of the same things, situated in the same state, all equally capable of being used as the same instrumentalities, and all having an ascertained ordinary value, can an assessing board disregard this value and recur to the original elements which are supposed to make value, or to one of them, namely, use, and declare another value, twenty or a hundred times greater? If it can, *we are out of the **[200** domain of law, and without a defense against injustice and oppression.

The main defense against unlimited oppression in the name of taxation lies wholly in the rule which limits assessors to ordinary value. Even with that rule much oppression is possible, for in many instances just men do not agree as to the value when the ordinary rule is applied. But when the rule is discarded there is scarcely a limit to the possible abuse. It must be laid aside in some instances, but necessity alone should be held sufficient to justify it.

13. True, indeed, use is one of the elements which gives property its value, for, unless a thing is useful, it has no value; but it is not the actual use, but the capabilities of use, which constitute the effectual element. The value of horses in Ohio, aside from the effect of supply and demand, comes from the fact that they are capable of use for many different purposes. If they were capable of use for but one purpose the demand would be infinitely smaller and the value less. The value of horses in Ohio is affected, therefore, by their capability of use in the express business, and every horse in Ohio is equally capable of this use, and their market value is based in part on that fact. Are the horses actually employed in this use any more capable of it than others?

The part situated in Ohio of a long line of railroad is capable of no other use, and there are no other like pieces of property situated in that state and capable of being applied to a multitude of other uses, which can be substituted in place of the piece actually used. If the case were otherwise such pieces of railroad would have a market value in Ohio. In that case could such market value be set aside and the roundabout and complicated method of ascertaining the value of the whole line, involving, in effect, taxation of property situated outside of the state, and burdening interstate commerce, be substituted in order to reach another and an artificial value?

If the only use of horses, wagons, etc., in



Digitized by Google

)hio, was in the express business, and they ad no other value except that dependent upon uch use, then the authority of the railroad :01] cases *might more justly be invoked, nd the rules there sanctioned applied.

14. If we were to put the doctrine of the )hio scheme in its scientific form it would be s follows:

It is true that the Ohio law authorizes the assessment only of the horses, wagons, etc., of he express companies; yet it identifies these by n intellectual fiction with an indivisible part of what is imagined by another intellectual fiction s the "profit-producing plant" of the express ompanies; and therefore the value of that indivisible part is properly ascertained by refernce to the value of the whole.

But we beg the attention of the court to the naxim that intellectual fictions are to be reorted to only for the purposes of justice, convenience, certainty, and order in the law. Here they are resorted to, we must not say for the intentional purpose, but certainly with the necessary effect of bringing about the very opposite results, which is substantially the same thing.

And we beg further to say that if the state of Ohio is authorized, for the purposes of taxation, to identify by an intellectual conception the horses, wagons, etc., with an indivisible part of an imagined thing, it must be for the reason that such indivisible part of an imagined thing might itself have been directly subjected to taxation. Can this be possible?

But in the case of railroads and telegraphs no intellectual fictions are employed. The parts in one state are real indivisible parts of real wholes.

15. The rules approved in the railroad and telegraph cases are based upon necessity.

The decision in these cases takes a rule founded on necessity and follows it and extends it, as a new point of departure, just as if it were founded on principle, and applies it where no necessity exists.

We respectfully ask the court to consider the certain error which results from such a method. A rule adopted from necessity is confessedly susceptible of no other defense, and therefore wrong. If it were defensible upon other grounds, it would be put upon such grounds, and necessity would not be resorted to. Hence, 202] rules founded on necessity are never *to be extended. If other cases of necessity arise, that necessity will dictate its own rules.

Let us illustrate: The electric power works in which many millions have been invested at Niagara Falls may largely furnish their power by wires through Canada and Pennsylvania. Those states will have the right to tax the property situated in their respective limits. There will be no market or ordinary value to it, consequently the value must be ascertained by reference to other things. The rule of mileage will plainly not be applicable, nor that of gross receipts. Necessity will force the adoption of the best practicable method.

16. The sleeping-car case stands upon necessity, but of a very different sort from that of the railroad and telegraph cases. The difficulty was occasioned by the circumstance that the cars were constantly moving from state to state; they had a physical situs in one as much as in another; but the whole could not be said to have a situs in any one. Some method of ascertaining the number and value of the cars in Pennsylvania was necessary. The method adopted was assailed on the ground that capital stock was not taxable. This objection was not good, for capital stock was held not to be taxed, but the cars only. If the method had been attacked on the true grounds it would have been perceived that there was a better way. The method adopted was thought to be effectual to determine the average number and value of cars used in Pennsylvania, and this seems not to have been contested by the Pullman Company. The better way would have been that suggested by Mr. Justice Matthews in *Marye* v. *Baltimore & O. R. Co.* 127 U. S. 117, 123 [32: 94, 96], cited and approved by the court in the Pullman cases, to wit, to ascertain and appraise the average number of cars habitually used in the state.

If the horses, wagons, etc., of the express companies were constantly on the move from one state to another, the decision in the Pullman case would have defended, not indeed the methods actually adopted in the express cases, but some method which would answer the necessities thus presented.

*17. Taxation is administrative busi- [203 ness, and the system must be workable; but the method sanctioned by the decision is wholly unworkable. It is wholly repugnant to all other parts of our systems of taxation, and would compel a revolution in them; and the oppression and injustice which would follow would be unendurable.

(a) What is to be the effect on the ordinary methods of assessment in the various states? If various prices of property used in connection in different states are to be taxed as part of a unity in some of the states, it must be in all, and the separate value of the parts to be disregarded, and real and personal be alike included in the unity. The practice now universal of taxing persons and corporations in the state of domicil for all personal and real estate except such as is physically situated elsewhere must be abandoned in the case of things united in use.

(b) Each state is the judge of the size of the part over which it has jurisdiction, and when the separate parts are ascertained they may (they certainly will) amount to twice or thrice the whole, and very probably even more.

(c) Against this injustice and oppression the law affords no defense. There is no common tribunal which can determine the value of the whole and of the separate parts.

If an appeal be taken to this court, the answer will be "We cannot review determinations of fact," and yet the whole mischief lies in determinations of fact.

In one state the proportion will be reached by a comparison of mileage; in another by a comparison of gross receipts. Upon what principle can this court declare that one is wrong and the other right?

(d) An avalanche of litigation impossible to be dealt with will be the result. The victims will of course resort to this court before submitting to absolute ruin. The exactions they will show will shock the sense, and yet no fraud can be proved, and no rule invoked



Digitized by Google

by which the exactions can be reduced to just sums. And the necessities for relief will, as they always do, subject just and established rules to a strain under which they will break down.

204] *(e) It is taxation without representation, with all its evils. The citizens of Ohio can compel each other to establish justice and equality as between themselves. But what means have the citizens of New York to resort to to compel justice at the hands of the citizens of Ohio?

Second. The extreme importance and far-reaching effect of the decision which has been announced as a determination upon some of the most fundamental principles of constitutional law.

1. The Ohio method of taxation, once sustained by this court, will be followed in every state in which the express companies carry on their operations, even in the state of domicil, and as to such companies, at least, two practices, one or the other of which have heretofore been universally adopted, can no longer be followed, at least without the inevitable consequence of double taxation. These practices are: (1) That of taxing corporations in the state of their domicil upon the value of their capital stock, excepting therefrom the value of tangible property actually situated in another jurisdiction. (2) That of taxing corporations in the state of their domicil, upon the value of their property in that state without reference to capital stock, and assuming that all intangible property has its situs for the purpose of taxation within such state. We say that these practices must be abandoned or double taxation will be the result. This is an understatement. Treble or quadruple taxation will be the more probable consequence. And there will be no way of preventing this, for the assessments in the several states (and there may be forty) will be entirely independent of each other, with no common supervising authority to correct their errors or reconcile their inconsistencies, and there will be an irresistible temptation in each state to compel the citizens of other states to pay as large a share as possible of their own expenditures.

2. It seems also to follow that states favorably situated in respect to interstate commerce, like New Jersey, Pennsylvania, Ohio, and Indiana, will be easily enabled by an application of this method to compel enormous contributions from the citizens of other states for the natural facilities which passage

205] *through their territories affords; contributions to which, in an international point of view, no objection can be made, but a surrender of which it was one of the prime objects of the Constitution to compel in consideration of other advantages afforded by union, and which power those states certainly did surrender upon coming into the union.

3. These consequences cannot be limited to the case of the express companies, but must be applied in all instances where companies, or even individuals, carry on business operations in different states, and whose property can be justly said to be blended together by what is called in the decision "a unity of use."

4. The framers of the Constitution intended to create what would be, in substance, one country; at the same time they could not dispense with the existence of sovereign states. And as a substitute for the ordinary remedies, as between sovereign states, of war and retaliation (resorts no longer admissible) they provided the following safeguards: (1) First and foremost, the fundamental principle that the property of the citizen of one state could not be taxed by another unless it had an actual situs within the latter; (2) By making it impossible that any state impose any burden, by way of taxation or otherwise, upon any of the instrumentalities of interstate commerce; (3) By declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." These provisions, however, would be of comparatively little value if their interpretation and enforcement were allowed to rest with the states themselves; and therefore another provision was added, namely: (4) a power to transfer, in certain cases, judicial proceedings in the states to the court of the United States, and in other cases to subject the decisions of the former to review by the latter. These latter safeguards, quite efficient in many cases, would be substantially powerless in relation to the matter of taxation. Proceedings to assess property cannot be transferred, and indirect review is effective only when distinct principles of law are violated, whereas, in the determination of the value of property, opinion and discretion are the effective elements and *the [206 exercise of these by the state officers cannot be effectually supervised, checked, or restrained. If an attempt is made to tax the property of a nonresident not having an actual situs in the state, the safeguard is entirely effectual. If the ordinary rules limiting assessment to value as value is ordinarily understood are applied, a protection is secured equal to that which a citizen has in cases of the assessment of his property in his own state. If these rules of valuation are allowed to be disregarded or superseded by another as to which there is no safeguard, a citizen of one state has no defense against the exactions which may be imposed upon him by another. These United States will cease, in many of the most important respects, to be one country, but will become independent nations. And this, too, without the protection which independent nations have against each other in the mutual dread of retaliation of war.

Third. The immediate practical importance of the decision in its direct effect upon the express companies.

In the deliberate judgment of those companies the stroke is a crushing one. They are left at the mercy of the mere caprice of assessing boards all over the country; for this system of taxation establishes no standard or criterion by which the amount of the assessment can be tested or restrained. It may be a half million, as in Ohio, or a million and a half, as in Kentucky. This year it is a half million in Ohio, but she is not likely to be content with less than Kentucky, and next year Ohio may make it two millions, and the courts will be powerless to afford relief.

The express companies concede that it is not unjust, in view of the small amount of property which they use in their business, as compared with the police protection which they



Digitized by Google

receive, to lay a tax upon them, in addition to a property tax. Many states, including Ohio, levy such additional tax. Where it is laid by a reasonably definite rule, such as percentage upon gross receipts from state business, the companies have the protection of law; but the evils of a system such as the Nichols law, which sets up no standard that can be tested by any rule, are intolerable.

207] *1. That every state will resort to this new device, now that it has been pronounced legal, must of course be regarded as certain. A proper view of their own interests would require them to do so. The complaints of the citizens in each state at the burdens of taxation imposed upon them, growing louder and louder every year as that burden increases, will compel all assessing officers to impose as much of the burden as possible upon those whose complaints they can afford to disregard. What limit, indeed, can be placed upon the extent to which the people of a state will compel foreigners to bear the burden of their expenditures, if they have neither war nor judicial interference to apprehend?

The device of Ohio was immediately imitated by Indiana and Kentucky even before its validity was tested. That other states did not follow it is imputable only to the circumstance that they believed this court would promptly condemn it. But immediately upon announcement of this decision the legislative machinery has been started; and while these words are being written intelligence has come that bills for similar schemes have been introduced into the legislature of more than one state.

Fourth. The novelty of the questions discussed, and of the points necessarily determined by the judgment.

Upon this point no observations are needed. It is believed that no one will say that such a method of taxation has ever heretofore been practised in any civilized country, in respect to property having a market value and distinctly separable without affecting that value from the business with which it is connected.

Fifth. The fact that under the circumstances such failure on the part of counsel is not without reasonable excuse.

The insufficiency of the argument of the appellants was two-fold: first, in not embracing a review of authorities which it now appears by the opinion of the court are deemed decisive of the question; second, in not subjecting the theory of a unity of use to a thorough scrutiny, showing the grave objections to it.

The excuse for the omission of the review of 208]the prior *decisions is this: The cases of railroad and telegraph companies are, it will be agreed, to say the least, very different from that of express companies. They are assimilated to it in the opinion of the court on the ground that the property of the latter constitutes a unit profit-producing plant, an idea which, it will be admitted, has never before been entertained by this court. The extreme differences between the case of express companies and the class of companies above mentioned would alone have justified a hesitancy on the part of counsel in bringing into the discussion the decisions in the latter class of cases as being too remote. But, more than this, this court had in substance declared them inapplicable. It had said in *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339-354 [35: 1035-1040]: "On the other hand, express companies, such as are defined by this act, have no tangible property of any consequence subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted;" that express companies were "entirely dissimilar in vital respects, as regards the purposes and policy of taxation, from railroad companies and the like owning a large amount of tangible and other property subject to taxation under other and different laws and upon other and different principles," and that "in the nature of things, and irrespective of the definite legislation in question, they belong to different classes."

The opinion of the court disposes of *Pacific Exp. Co.* v. *Seibert*, by saying that Mr. Justice Lamar's reference was "to the legislation of the state of Missouri, and the scheme of taxation under consideration here was not involved in any manner." But the objection there made to that legislation (which imposed a tax on the gross receipts of the express company) was that the statute violated the 14th Amendment in denying to express companies the equal protection of the laws, because it did not impose a similar tax upon other persons, such as railroad companies, engaged in similar occupations. The answer of this court to that contention was, in the "language of Mr. Justice Lamar, that express companies were entirely dissimilar as regards the purpose and policy *of taxation from railroad companies,"[209 and that "in the nature of things, and irrespective of the definite legislation of Missouri, they belonged to different classes," and because they belonged to different classes, the court held that the statute of Missouri, which imposed a tax upon them that was not laid on railroads, was not in contravention of the provision of the Federal Constitution which vouchsafes the equal protection of the laws.

It is now, however, declared by the court that the prior decisions of the court in the railroad, telegraph, and sleeping-car company cases do decide, in principle at least, the very point raised in the present cases, and this opinion is reached without the benefit to the appellants in the present case of a close review of those decisions for the purpose of showing that such is not the fact.

As to the omission to scrutinize the foundation of the theory of a unity of use as a basis of taxation, the reason is the same. It had never been stated in terms by this court.

In *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 [29: 158, 1 Inters. Com. Rep. 382], it had been urged by the attorney general of Pennsylvania under the plea of a "homogeneous unit" (201 [161]) and repudiated by the court. The railroad, telegraph, and sleeping-car decisions had made no allusion to it. These were put on other grounds stated in the review hereto annexed. The notion is the invention of the supreme court of Ohio. How could counsel think it necessary to discuss such a theory when it had been so plainly intimated by this court that express companies, at least, could not be dealt with in such a way?



Digitized by Google

Sixth. The denial of the equal protection of the laws.

If property generally in the state of Ohio were assessed for taxation on the basis of the Nichols law, the express companies would have no substantial ground of complaint, because in that event the property of all other owners would be valued for taxation on the same basis as that of express companies, and while the amount of all assessments would be tremendously increased, the rate would be proportionately reduced, and the proportion of taxes paid by the express companies would not be increased. The practical injustice of the 210] Nichols *law lies in the fact that the property of express companies is valued for taxation according to the principles of that law, while all other property in the state is valued without reference to the earnings of the owner or the profitableness of the use to which he puts his property. Merchants, manufacturers, banks, brokers, newspapers, gas companies, street-railway companies, indeed all persons and corporations engaged in business in this state, except the companies covered by the Nichols law, are taxed without the slightest reference to the profits of their business. The market value of the shares of a bank, for instance, may be greatly in excess of the value of the bank's assets, owing to goodwill and a large deposit account, but its shares are assessed upon the simple basis of the cash value of the assets of the bank, after deducting its liabilities. The market value of the shares of a newspaper company may, on account of heavy circulation, largely exceed the value of the assets of the company, but it is taxed only upon the ordinary cash value of its printing presses and other appliances. In assessing a merchant or manufacturer for taxation, no inquiry is made as to the profitableness of his business, or if the business is conducted by a corporation, as to the par or market value of its shares. The assessment is laid upon the ordinary cash value of the tangible assets of the business.

All owners are not assessed by the same assessing officer or board, but the basis of valuation is the same, and absolutely without exception, except under the Nichols law. It was for the purpose of pointing out this unjust discrimination of the Nichols law that we printed in Exhibit Book (15-88) all of the statutes of Ohio governing the taxation of personal property.

We respectfully submit that the court has mistaken those statutes in assuming in the language of the opinion that "the policy pursued in Ohio is to classify property for taxation," and that "property of different sorts is classified under various statutory provisions for the purpose of assessment and taxation." There is not and never has been, in the state of Ohio, any classification affecting the method or basis 211] of valuation of *property for taxation except that introduced by the Nichols law.

The case of *Wagoner* v. *Loomis*, 37 Ohio St. 571, cited by the court in support of its statement, involved the taxation of shares of a national bank; but it will be seen by referring to the opinion in that case, or to the statute providing for the assessment of such shares, that they are estimated for purposes of taxation, not at their par or market price, but by taking the ordinary cash value of the bank's assets and dividing the sum by the number of shares.

We have never meant to dispute the rule so often announced, and reaffirmed in the opinion, that the 14th Amendment does not prevent a just classification of property for taxation. What we complain of is the adoption of a method of valuation which applies to those covered by the Nichols law and to no other owners, with the effect of increasing the assessments against express companies twenty fold.

A motion for a re-argument does not require and the pressure under which it is made does not permit elaboration. The above suggestions are but a part of those which may properly be urged, but they are the principal ones. Are they not enough to justify the indulgence of a further full opportunity to complete them by weaving them into a connected argument such as the court has not yet heard, designed to show that the scheme of taxation framed under these recent laws is not consistent with the Constitution of the United States?

Respectfully submitted,
James C. Carter,
Lawrence Maxwell, Jr.,
Counsel.

REVIEW OF SOME OF THE AUTHORITIES RELIED UPON IN THE OPINION OF THE COURT.

*Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 [35: 613, 3 Inters. Com. Rep. 595].

In this case the taxes challenged were levied under statutes of Pennsylvania imposing, in form, taxes on the capital stock of corporations incorporated by the laws of Pennsylvania, or of any other state *and doing business in [212 Pennsylvania, to be computed on a certain percentage of dividends made and declared. It was treated as being, not a tax on capital stock, but on property. The tax was made to depend partly upon the value of the capital stock, and partly on the amount of dividends, and the tax would therefore be dependent in part upon the value of the capital stock as ascertained in the manner provided by the act. So far as appears from the case the only questions to be determined were those stated by Mr. Justice Gray at the opening of his opinion, which was that of the court: "Upon this writ of error whether this tax was in accordance with the law of Pennsylvania is a question on which the decision of the highest court of the state is conclusive. The only question of which this court has jurisdiction is whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several states. The plaintiff in error contends that its cars could be taxed only in the state of Illinois, in which it was incorporated and had its principal place of business." We understand by this that the plaintiff in error took two grounds: First, that the taxation of such railroad cars at all, when in actual use, was a burden upon interstate commerce, and therefore void. Second, that if such cars were subject to taxation at all they could be taxed only where the corporation had its domicil, which was in Illinois.

The point involved in our express cases is, whether, in assessing the value of the personal property of an express company, which has



Digitized by Google

confessedly an ascertainable market value, such market value can be totally disregarded and superseded by reference to another criterion which has no relation whatever to value, as that term is commonly understood, and especially by reference to the value of a right to prosecute interstate commerce.

How these points can be supposed to have been determined by the discussion and determination of the questions above stated, as arising in the case of *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 [35: 613, 3 Inters. Com. Rep. 595], is not easy to see. Upon perusing the opinion in that case, it will be per-
213] ceived that it begins by an *emphatic statement and maintenance of the rule that property is not subject to taxation by a state unless it has an actual situs therein. It was manifest that the sleeping cars had an actual situs outside of the place of domicil of the company owning them, and therefore that they were justly taxable outside of that state. The puzzle was that they had this actual situs as much in one of several other states as another. Each might put in a claim that a situs was within its own territory exclusively. Such exceptional cases of course justify a resort to exceptional methods. The real problem was to ascertain how much of this sleeping-car property was fairly to be treated as having a situs in Pennsylvania. The actual method which was sanctioned was not subjected to discussion. What was insisted upon by the company was that no method was allowable. If the horses, wagons, etc., used by the express companies in Ohio had been, in point of fact, used in a similar manner in half a dozen different states, the decision in the sleeping-car case would have justified the adoption of some equitable method of ascertaining to how many of them a situs in Ohio should be assigned. Upon the other point, as to whether taxing these sleeping cars was imposing a burden upon interstate commerce, there is nothing certainly opposed to our contention. We have never asserted in the remotest degree that the horses, wagons, harness, etc., of the express companies in Ohio are in any way relieved from taxation because employed in interstate commerce.

If the sleeping cars, the taxation of which was the subject of dispute in this case, had been entirely confined in their operation and use to the state of Pennsylvania, and had been proved to be of the value of $10,000, and had, by a reference to the capital stock of the Pullman Car Company and the proportion of its lines within the state to that outside of it, been assessed at the value of $200,000 each, and the question had arisen as to the validity of such an assessment, a decision sustaining the assessment would have been authority in this case. The appellant's counsel cannot help thinking that if such had been the question, the taxation sustained in that case would have met a different fate.

214] *There is, indeed, in the opinion of the court, the following statement: "The tax on the capital of the corporation, on account of its property within the state, is, in substance and effect, a tax on that property," but this statement cannot be regarded as any part of the decision, because no issue was joined on it, nor was it subjected to any discussion whatever, as will be seen by the observation which immediately follows, namely: "This is not only admitted but insisted on by the plaintiff in error;" that is to say, the opinion deals with the case of the plaintiff in error, upon its own avowed assumptions.

It may be asked, however, if we admit the correctness of the proposition thus stated by the court. We do admit it fully in the sense in which it is declared in one of the two cases cited which affirm it. Nothing is more common than attempts by a state, where they are precluded by constitutional principles from taxing directly a particular item of property, to reach the object indirectly by imposing a tax upon some other thing which includes it, or is dependent upon it. Wherever such an attempt is made it ought to be denounced and defeated. The first case referred to by Mr. Justice Gray, *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 [29: 158, 1 Inters. Com. Rep. 882], was one of that character. The state of Pennsylvania wanted to tax a ferry boat belonging to a New Jersey corporation, which was employed on a ferry across the Delaware river, and which was, of course, from time to time, within the territory of Pennsylvania. It could not, it was admitted, do that directly. It sought to do it indirectly by attempting to impose a tax upon the capital stock of the New Jersey Company. This court promptly declared, as it ought to have done, that that was in substance and effect the same thing. What better authority could be found than this to support the contention of the appellants? The state of Ohio had, in every way which ingenuity could suggest, taxed everything which it had a right to tax against these express companies. It wanted to tax the capital stock. It knew that this could not be done directly. It sought to accomplish the same thing indirectly by imputing an utterly fictitious value to personal property owned by that company in the state and subject to *taxation. What ought[215 to be said in this case (a proposition laid down by Mr. Justice Gray in the case of *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 [35. 613, 3 Inters. Com. Rep. 595], abundantly sustained by *Gloucester Ferry Co.* v. *Pennsylvania*, *supra*, and by many other cases) is, that the state of Ohio, not having the right to tax the capital stock of these express companies directly, must not do it by the device which it has sought to employ.

It should hardly be necessary to say, however, that when a court stigmatizes an attempt by a state to tax specific property within which it has no right to tax, by saying that an indirect effort to accomplish the same thing by an attempt to tax capital stock cannot be permitted, it does not mean, by any means, that the taxing of specific property and the taxing of capital stock are so far identical that one may properly be resorted to wherever the other can be employed. Specific property belonging to a corporate body may have an actual situs within a state, and therefore be the subject of taxation, but it by no means follows from this that the capital stock or some portion of it, of such corporation, has such actual situs.

The case of *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217 [35: 994, 3 Inters. Com. Rep. 807], was, as the court declares in the begin-



Digitized by Google

ning of its opinion, "an excise tax upon the defendant corporation for the privilege of exercising its franchises within the state of Maine. The subject-matter of the tax was confessedly one within the taxing power of the state. There must necessarily, therefore, be some allowable mode for ascertaining the value of that privilege. The mode adopted was by a reference to comparative gross receipts. What error can be suggested in such a method, especially when, as in Maine, it was the one adopted as to domestic corporations of the same character? How can such a case, which was not that of a tax upon specific property, nor one in which the method was by a reference to the value of capital stock, nor one in which the amount of the tax was dependent upon the supposed value of the subject taxed, nor one in which, if it were so dependent, the subject taxed had a fixed value, be regarded as an authority upon the questions in these express company cases?

In the case of *Pittsburg, C. C. & St. L. R. Co.* 216] v. *Backus*, 154 U. S. 421 [38: 1031], *the tax assailed was one upon that part of the rail road property situated within the state of Indiana. The law under which the tax was imposed did not lay down any rule, as in these express company cases, for the guidance of the assessing board in determining value, but required it to assess it at its "actual cash value." It did, however, require statements which indicated that the board might and should look to the value of the whole road in determining the value of the part.

This mode of assessing property of a railroad company, undoubtedly within the state, was put in this case, as in a prior case cited in the opinion, upon its true ground, necessity. Are these cases authority for another in which the whole basis of the decision is wanting?

The next case cited in the opinion of the court is that of *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439 [38: 1041, 4 Inters. Com. Rep. 677]. The special attention of the court is respectfully called to the opinion. It was a case of taxation of railroad property under the same law as in the case last above mentioned, but the validity of the method was more emphatically assailed in argument, and was considered by Mr. Justice Brewer with great candor and deliberation. He was evidently not insensible to the abuses possible in the case of the imposition by one state of taxes upon the property of citizens of another state; but he properly recognizes the fact that it was right and indeed necessary that such taxes should be imposed. He upheld this method of assessment upon the obvious ground that it was the true and natural method which the individuals would employ, and was indeed the only practicable method; and that either such method must be adopted or the property be suffered to go exempt of taxation. He insisted that in the case of such property "there is no pecuniary value outside of that which results from such use;" and that "it is impossible to disintegrate the value of that portion of the road within Indiana." p. 445 [1046]. He affirmed the rule that no state must put any burden in any way upon interstate commerce, but declared that "the taxation of property according to the ordinary rule of property taxation" did not violate that rule.

*We respectfully invite the attention of [217 the court to the whole of this opinion and especially to so much of it as is on pages 443-447 [1044-1046]. Is it possible to think that if in that case it had appeared that there was "outside of the use to which the property was put" a distinct and clearly ascertainable pecuniary value, that the property could be separated from the use to which it was put, and bear the same value which it possessed before it was put to that use, that such property was ordinarily taxed in a wholly different way, and that the whole field of invasion of these rules which forbid the taxation of interstate commerce, or of property outside of the jurisdiction would be thrown open if the ordinary method should be displaced, the decision would not have been the other way?

The last case cited by the court is that of *Western U. Teleg. Co.* v. *Taggart*, 163 U. S. 1 [41: 49]. The decision was to the effect that the value of the easements, poles, wires, etc., of a telegraph company within a state were subject to the same rules of taxation as are applicable to the case of a railroad company. Nothing is perceived in this doctrine which has any direct bearing. It is relevant, however, in one respect, namely, that for the true defense of the principle of taxation as applied to the cases of railroads, it quotes very largely from the opinion of the court read by Mr. Justice Brewer in the case of *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439 [38: 1041, 4 Inters. Com. Rep. 677], above referred to, and adopts the reasoning laid down in that opinion.

Mr. Justice **Brewer** delivered the opinion the court:

We have had before us at the present term several cases involving the taxation of the property of express companies, some coming from Ohio, some from Indiana, and one from Kentucky; also a case from the latter state involving the taxation of the property of the Henderson Bridge Company. The Ohio and Indiana cases were decided on the 1st of February. 165 U. S. 194 [*ante*, 683]. Petitions for rehearing of those cases have been presented and are now before us for consideration.

The importance of the questions involved, the close division *in this court upon them, [218 and the earnestness of counsel for the express companies in their original arguments, as well as in their briefs on this application, lead those of us who concurred in the judgments to add a few observations to what has hitherto been said.

Again and again has this court affirmed the proposition that no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce. And it has as often affirmed that such restriction upon the power of a state to interfere with interstate commerce does not in the least degree abridge the right of a state to tax at their full value all the instrumentalities used for such commerce.

Now the taxes imposed upon express companies by the statutes of the three states of



Digitized by Google

Ohio, Indiana, and Kentucky are certainly not in terms "privilege taxes." They purport to be upon the property of the companies. They are therefore not in form, at least, subject to any of the denunciations against privilege taxes which have so often come from this court. The statutes grant no privilege of doing an express business, charge nothing for doing such a business, and contemplate only the assessment and levy of taxes upon the property of the express companies situated within the respective states. And the only really substantial question is whether, properly understood and administered, they subject to the taxing power of the state property not within its territorial limits. The burden of the contention of the express companies is that they have within the limits of the state certain tangible property, such as horses, wagons, etc.; that that tangible property is their only property within the state; that it must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them.

But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. In the complex civilization of to-day a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a state from [219] taxing *at its real value such intangible property. Take the simplest illustration: B, a solvent man, purchases from A certain property, and gives to A his promise to pay, say, $100,000 therefor. Such promise may or may not be evidenced by a note or other written instrument. The property conveyed to B may or may not be of the value of $100,000. If there be nothing in the way of fraud or misrepresentation to invalidate that transaction, there exists a legal promise on the part of B to pay to A $100,000. That promise is a part of A's property. It is something of value, something on which he will receive cash, and which he can sell in the markets of the community for cash. It is as certainly property, and property of value, as if it were a building or a steamboat, and is as justly subject to taxation. It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. Now whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon the separate pieces of tangible property?

The first question to be considered therefore is whether there is belonging to these express companies intangible property—property differing from the tangible property—a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is *something of no value, is to insult the [220] common intelligence of every man. Take the Henderson Bridge Company's property, the validity of the taxation of which is before us in another case. The facts disclosed in that record show that the bridge company owns a bridge over the Ohio, between the city of Henderson in Kentucky and the Indiana shore, and also 10 miles of railroad in Indiana; that that tangible property—that is, the bridge and railroad track—was assessed in the states of Indiana and Kentucky at $1,277,695.54, such, therefore, being the adjudged value of the tangible property. Thus the physical property could presumably be reproduced by an expenditure of that sum, and if placed elsewhere on the Ohio river, and without its connections or the business passing over it or the franchises connected with it, might not of itself be worth any more. As mere bridge and tracks, that was its value. If the state's power of taxation is limited to the tangible property, the company should only be taxed in the two states for that sum, but it also appears that it, as a corporation, had issued bonds to the amount of $2,000,000, upon which it was paying interest; that it had a capital stock of $1,000,000, and that the shares of that stock were worth not less than $90 per share in the market. The owners, therefore, of that stock had property which, for purposes of income and purposes of sale, was worth $2,900,000. What gives this excess of value? Obviously the franchises, the privileges the company possesses—its intangible property.

Now, it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation. Suppose such a bridge were entirely within the territorial limits of a state, and it appeared that the bridge itself cost only $1,277,000, could be reproduced for that sum, and yet it was so situated with reference to railroad or other connections, so used by the traveling public, that it was worth to the holders of it in the matter of income $2,900,000, could be sold in the markets for that sum, was therefore in the eyes of practical business men of the value of $2,900,000, can there be any doubt of the state's power to assess it at that sum, *and to [221] collect taxes from it upon that basis of value? Substance of right demands that whatever be the real value of any property, that value may be accepted by the state for purpose of taxation, and this ought not to be evaded by any mere confusion of words. Suppose an express company is incorporated to transact business within the limits of a state and does business only within such limits, and for the purpose of transacting that business purchases and holds a few thousands of dollars worth of horses and wagons, and yet it so meets the wants of the people dwelling in that state, so uses the tangible property which it possesses,



Digitized by Google

so transacts business therein, that its stock becomes in the markets of the state of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation.

A distinction must be noticed between the construction of a state law and the power of a state. If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the state comprehends all property in its scheme of taxation, then the goodwill of an organized and established industry must be recognized as a thing of value. The capital stock of a corporation and the shares in a joint-stock company represent not only the tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges, and goodwill of the concern.

Now, the same reality of the value of its intangible property exists when a company does not confine its work to the limits of a single state. Take, for instance, the Adams Express Company. According to the return filed by it [222] with the auditor *of the state of Ohio, as shown in the records of these cases, its number of shares was 120,000, the market value of each $140 to $150. Taking the smaller sum gives the value of the company's property taken as an entirety as $16,800,000. In other words, it is worth that for the purposes of income to the holders of the stock and for purposes of sale in the markets of the land. But in the same return it shows that the value of its real estate in Ohio was only $25,170; of real estate owned outside of Ohio $3,005,157.52; or a total of $3,030,327.52; the value of its personal property in Ohio $42,065; of personal property outside of Ohio $1,117,426.05; or a total of $1,159,491.05, making a total valuation of its tangible property $4,189,818.57, and upon that basis it insists that taxes shall be levied. But what a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purposes of income and sale $16,800,000, to be adjudged liable for taxation upon only one fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale.

It is suggested that the company may have bonds, stocks, or other investments which produce a part of the value of its capital stock, and which have a special situs in other states or are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities. If half of the property of the Adams Express Company, which by its own showing is worth $16,000,000 and over, is invested in United States bonds, and therefore exempt from taxation, or invested in any way outside the business of the company and so as to be subject to purely local taxation, let that fact be disclosed, and then if the state of Ohio attempts to include within its taxing power such exempted property, or property of a different situs, it will be time enough to consider and determine the rights of the company. That if such facts exist they must be taken into consideration by a state in its proceedings under such tax *laws as are here presented [223] has been heretofore recognized and distinctly affirmed by this court. *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421 [38: 1031]; *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 443 [38: 1045, 4 Inters. Com. Rep. 677]; *Western U. Teleg. Co.* v. *Taggart*, 163 U. S. 1, 23 [41: 49, 57]; *Adams Exp. Co.* v. *Ohio State Auditor*", 165 U. S. 194, 237 [*ante*, 683, 697]. Presumably all that a corporation has is used in the transaction of its business, and if it has accumulated assets which for any reason affect the question of taxation, it should disclose them. It is called upon to make return of its property, and if its return admits that it is possessed of property of a certain value, and does not disclose anything to show that any portion thereof is not subject to taxation, it cannot complain if the state treats its property as all taxable.

But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different states, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000 and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. Every state within which it is transacting business and where it has its property, more or less, may rightfully say that the $16,000,000 of value which it possesses springs, not merely from the original grant of corporate power by the state which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises, and privileges into a single *unit of [224] property, and this state contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the



Digitized by Google

entire property. That this is true is obvious from the result that would follow if all the states other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those states, but, unable to transact the express business within their limits, that $12,000,000 of value attributable to its intangible property would shrivel to a mere trifle.

It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was "*Mobilia personam sequuntur*," but that maxim was never of universal application, and seldom interfered with the right of taxation. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22 [35: 613, 616, 3 Inters. Com. Rep. 595]. It would certainly seem a misapplication of the doctrine expressed in that maxim to hold that by merely transferring its principal office across the river to Jersey City the situs of $12,000,000 of intangible property, for purposes of taxation, was changed from the state of New York to that of New Jersey.

It is also true that a corporation is, for purposes of jurisdiction in the Federal courts, conclusively presumed to be a citizen of the state which created it, but it does not follow therefrom that its franchise to be is for all purposes to be regarded as confined to that state. For the transaction of its business it goes into various states, and wherever it goes as a corporation it carries with it that franchise to be. But the franchise to be is only one of the franchises of a corporation. The franchise to do is an independent franchise, or rather a combination of franchises, embracing all things which the corporation is given power to do, and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be. Franchises to do go wherever the work is done. The Southern Pacific Railway Company is a corporation chartered by the state of Kentucky, yet within the limits of that state it is 225]said to have no tangible *property and no office for the transaction of business. The vast amount of tangible property which by lease or otherwise it holds and operates, and all the franchises to do which it exercises, exist and are exercised in the states and territories on the Pacific slope. Do not these intangible properties—these franchises to do—exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every state in which that tangible property is found?

It is said that the views thus expressed open the door to possibilities of gross injustice to these corporations, through the conflicting action of the different states in matters of taxation. That may be so, and the courts may be called upon to relieve against such abuses. But such possibilities do not equal the wrong which sustaining the contention of the appellant would at once do. In the city of New York are located the headquarters of a corporation, whose corporate property is confessedly of the value of $16,000,000—a value which can be realized by its stockholders at any moment they see fit. Its tangible property and its business are scattered through many states, all whose powers are invoked to protect its property from trespass and secure it in the peaceful transaction of its widely dispersed business. Yet because that tangible property is only $4,000,000 we are told that that is the limit of the taxing power of these states. In other words, it asks these states to protect property which to it is of the value of $16,000,000, but is willing to pay taxes only on the basis of a valuation of $4,000,000. The injustice of this speaks for itself.

In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine-spun theories about situs should interfere to enable these large corporations, whose business is carried on through many states, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires.

*The petition for a rehearing is denied.*

---

CHICAGO, BURLINGTON, & [226
QUINCY RAILROAD COMPANY, *Piff. in Err.*,

v.

CITY OF CHICAGO.

(See S. C. Reporter's ed. 226-263.)

*Federal question—due process of law—state judgment—just compensation—7th Amendment—review of facts tried by jury—common law—damages for running street across a railroad—erecting gates, etc.—additional trucks—instruction—equal protection of the laws.*

1 A Federal question is sufficiently set up and denied when distinctly asserted by the defendant in a written motion to set aside the verdict and grant a new trial in a condemnation case in which no provision is made for filing an answer, but is denied by the overruling of the motion, and is again asserted in an assignment of errors filed in the state supreme court and denied by that court by its judgment of affirmance, although the opinion does not expressly refer to the Federal question.

2. The prohibition of the 14th Amendment of the Federal Constitution against taking property without due process of law refers to all instrumentalities of a state, and is therefore violated whenever any person, by virtue of public position under a state government, deprives another of any right protected by that Amendment against deprivation by the state.

3. A judgment of a state court, even if it be authorized by state statute, whereby private prop-

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.

*Payment for private property taken for public use; Fifth Amendment to Constitution applies only to Federal government, and not to states*,—see note to Withers v. Buckley, 15: 816.



Digitized by Google

erty is taken for the state or under its direction for public use without compensation made or secured to the owner, is wanting in the due process of law required by the 14th Amendment of the United States Constitution.

4. The owner of private property taken under the right of eminent domain obtains just compensation if he is awarded such sum as, although merely nominal, is a fair and full equivalent for the thing taken from him by the public.

5. The last clause of the 7th Amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States, but applies equally to a case tried before a jury in a state court and brought here by writ of error from the highest court of the state.

6. The re-examination of facts tried by a jury in a state court, when the case is taken by writ of error to this court, is limited by the 7th Amendment of the Federal Constitution, providing that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

7. The ascertainment by a jury of just compensation in an eminent domain case being provided for by the state Constitution in Illinois, it can be re-examined in this court on writ of error only in accordance with the rules of the common law respecting facts tried by a jury, although the right to a jury trial would not exist in the absence of an express constitutional provision on the subject.

8. The mere possibility that a railroad right of way might in the future be used for other purposes is not to be taken into account in determining the damages for laying out a street across the railroad.

9. Expenses of erecting gates, planking the crossing, and maintaining flagmen, which will necessarily result from the laying out of a street across a railroad, must be regarded as incidental to the exercise of the police powers of the state, and do not constitute an element of the just compensation to the railroad.

10. The right to lay additional tracks on a railroad right of way is not affected by opening a street across the railroad, and therefore the loss of such right is not an element of damages for laying out the street across the tracks.

11. An instruction that if land of a railroad company to be crossed by a proposed street was used as part of "its railroad and terminal facilities," the value of which would be lessened by laying out the street, then the company could recover for the depreciation in value as damages to part of its land not taken or crossed,—is properly refused for the reason, if no other, that it is too general.

12. A railroad company is not denied the equal protection of the laws by awarding it merely nominal compensation for the laying out of a street across its road, while individual property owners are given the value of their land which is taken.

[No. 129.]

*Argued November 6, 9, 1896. Decided March 1, 1897.*

IN ERROR to the Supreme Court of the State of Illinois to review a judgment of that court affirming the judgment of the Circuit Court of Cook County in that state awarding the sum of $1 as the just compensation to be paid to the Chicago, Burlington, & Quincy Railroad Company, for the taking, under the right of eminent domain, of a part of its right of way for the putting a public street across said right of way in the city of Chicago. *Affirmed.*

See same case below, 149 Ill. 457.

The facts are stated in the opinion.

*Messrs.* **John J. Herrick** and *J. W. Blythe*, for plaintiff in error:

The prohibitions of the 14th Amendment extend to any action of a state through its constituted authorities, and therefore include any taking of private property without due process of law, or any denial of equal protection of the laws by the state, whether acting through its legislative, executive, or judicial department.

*Ex parte Virginia*, 100 U. S. 339 (25: 676); *Neal* v. *Delaware*, 103 U. S. 370 (26: 567); *Ex parte Virginia* ("*Virginia* v. *Rives*") 100 U. S. 313 (25: 667); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30: 220); *Scott* v. *McNeal*, 154 U. S. 34 38: 896); *Wood* v. *Brush*, 140 U. S. 278 (35: 505); *Gibson* v. *Mississippi*, 162 U. S. 579 (40: 1078); *Bush* v. *Kentucky*, 107 U. S. 110 (27: 354); *Robb* v. *Connolly*, 111 U. S. 624, 637 (28: 542, 546); *Murray* v. *Louisiana*, 163 U. S. 105 (41: 89); *Bergemann* v. *Backer*, 157 U. S. 655 (39: 845).

The taking by a state of property for public use without compensation to the owner is not "due process of law," within the meaning of the 14th Amendment.

*Hurtado* v. *California*, 110 U. S. 516 (28: 282); *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701 (28: 569); *Gardner* v. *Newburgh*, 2 Johns. Ch. 165, 7 Am. Dec. 526; *Sinnickson* v. *Johnson*, 17 N. J. L. 145, 34 Am. Dec. 184; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 324 (37: 467); *Sweet* v. *Rechel*, 159 U. S. 381 (40: 192); *Searl* v. *Lake County School Dist. No. 2*, 133 U. S. 553 (33: 740); *Mt. Washington Road Co.'s Petition*, 35 N. H. 141; *Bristol* v. *New Chester*, 3 N. H. 534, 535; *Ash* v. *Cummings*, 50 N. H. 612, 613; *Johnston* v. *Rankin*, 70 N. C. 550; *Parham* v. *Decatur County Inferior Ct. Justices*, 9 Ga. 348; *Scott* v. *Toledo*, 36 Fed. Rep. 385, 1 L. R. A. 688; *Baker* v. *Norwood*, 74 Fed. Rep. 997; *Henderson* v. *Central Pass. R. Co.* 21 Fed. Rep 365; *Mount Hope Cemetery Propr.* v. *Boston*, 158 Mass. 519; *Harness* v. *Chesapeake & O. Canal. Co.* 1 Md. Ch. 249; *Ex parte Martin*, 13 Ark. 199; 2 Story, Const. 5th ed. pp. 702, 703, § 1956; 1 Hare, Am. Const. Law, 347, 348; 2 Dill. Mun. Corp. 4th ed. § 586.

The judgment of the state court was a taking of the property of plaintiff in error without compensation, and for that reason without due process of law.

In addition to the authorities cited we refer to the following authorities:

1. Nominal damages were not compensation, and the judgment was in legal effect the same as if it had provided for a taking without compensation.

*Chicago W. D. R. Co.* v. *Metropolitan West Side Elec. R. Co.* 152 Ill. 519; *South Park Comrs.* v. *School Trustees*, 107 Ill. 491; 1 Sedgw. Damages, § 109, note b, and other cases cited.

2. It is well settled in Illinois that, in condemnation proceedings in that state the value of the land to be condemned is a fact to be affirmatively proved by the petitioner, and that, without proof of such value, it is not entitled to the judgment of condemnation.



Digitized by Google

*McReynolds* v. *Burlington & O. R. Co.* 106 Ill. 157; *Neff* v. *Cincinnati*, 32 Ohio St. 215, cited and approved in 106 Ill. 152, *supra*.

3. It is familiar law that a railroad company may sell or lease any of its surplus lands, like an individual, and that this power to sell surplus lands will be implied as incident to the right of ownership.

*Aurora Agri. & Mortg. Soc.* v. *Paddock*, 80 Ill. 263, 265; *Hendee* v. *Pinkerton*, 96 Mass. 386; *White Water Valley Canal Co.* v. *Vallette*, 62 U. S. 21 How. 424 (16:158); Morawetz, Priv. Corp. §§ 335, 368, 370; Beach, Priv. Corp. § 337.

In reviewing the judgment of the state court, this court will determine for itself the different questions involved in the determination of the question whether the judgment of the state court deprived the plaintiff in error of its property without due process of law, or denied it the equal protection of the laws as guaranteed by the 14th Amendment.

*Huntington* v. *Attrill*, 146 U. S. 657, 664, (36:1123, 1127) and cases cited; *Mobile & O. R. Co.* v. *Tennessee*, 153 U. S. 486, 492, 495 (38: 793, 796, 797), and cases cited; *Scott* v. *McNeal*, 154 U. S. 34 (38: 896).

The judgment of the state court denied to the plaintiff in error the equal protection of the laws guaranteed by the 14th Amendment.

The following authorities are cited upon the particular rulings of the state court in rendering the judgment of condemnation of the property of plaintiff in error without compensation.

*Hyde Park* v. *Washington Ice Co.* 117 Ill. 238; *Keithsburg & E. R. Co.* v. *Henry*, 79 Ill. 290; *Chicago & E. R. Co.* v. *Dresel*, 110 Ill. 89; *Lake Shore & M. S. R. Co.* v. *Chicago & W. I. R. Co.* 100 Ill. 21; *Hayes* v. *Ottawa, O. & F. R. Valley R. Co.* 54 Ill. 376; *Galena & S. W. R. Co.* v. *Haslam*, 78 Ill. 494; *Chicago* v. *McDonough*, 112 Ill. 85; *Tonica & P. R. Co.* v. *Unsicker*, 22 Ill. 221; *Butte County* v. *Boydston*, 64 Cal. 115; *Stone* v. *Heath*, 135 Mass. 561; *Chicago & A. R. Co.* v. *Springfield & N. W. R. Co.* 67 Ill. 147; *Peoria & P. U. R. Co.* v. *Peoria & F. R Co.* 105 Ill. 118; *Chicago & W. I. R. Co.* v. *Englewood R. Co.* 115 Ill. 383, 56 Am. Rep. 173; *St. Louis, J. & C. R. Co.* v. *Springfield & N. W. R. Co.* 96 Ill. 274; *Old Colony & F. River R. Co.* v. *Plymouth County*, 14 Gray, 155; *State, Central R. Co.*, v. *Bayonne*, 51 N. J. L. 428; *People* v. *Lake Shore & M. S. R. Co.* 52 Mich. 277; *Grand Rapids* v. *Grand Rapids & I. R. Co.* 58 Mich. 641; *Chicago & G. T. R. Co.* v. *Hough*, 61 Mich. 507; *Kansas C. R. Co.* v. *Jackson County Comrs.* 45 Kan. 716; *Kansas City* v. *Kansas City Belt R. Co.* 102 Mo. 633, 10 L. R. A. 851; Lewis, Em. Dom. § 498, and cases cited.

*Messrs.* **John S. Miller** and *William G. Beale*, for defendant in error:

There is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike.

*New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 566, 571 (38: 269, 274); *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205 (32: 107); *Missouri P. R. Co.* v. *Humes*, 115 U. S. 512, 523 (29:463, 467); *Walston* v. *Nevin*, 128 U. S. 578 (32:544).

The decision of the supreme court of Illinois is sustainable on grounds entirely of state law and not involving any Federal questions.

An examination of the opinion of the supreme court of Illinois will disclose that the case is decided on grounds not involving any Federal question within the rule laid down by this court in *Beatty* v. *Benton*, 135 U. S. 244 (34: 124); *Marrow* v. *Brinkley*, 129 U. S. 178 (32:654); *Hale* v. *Akers*, 132 U. S. 554 (33:442); *San Francisco* v. *Itsell*, 133 U. S. 65 (33:570); *Hopkins* v. *McLure*, 133 U. S. 380 (33:660).

If any of the questions were questions of general law and not of Federal law, and the case was disposed of by the decision of them, this court has no jurisdiction.

*Marrow* v. *Brinkley*, 129 U. S. 178, 181 (32: 654, 655); *San Francisco* v. *Itsell*, 133 U. S. 65 (33:570); *Hopkins* v. *McLure*, 133 U. S. 380 (33: 660); *Beatty* v. *Benton*, 135 U. S. 244 (34:124).

The decision of the supreme court of Illinois was not erroneous but was correct.

It is settled law that railroads are public highways.

*Cherokee Nation* v. *Southern K R. Co.* 135 U. S. 641, 657, 658 (34: 295, 308, 309); *Union P. R. Co.* v. *Chicago, R. I. & P. R. Co.* 163 U. S. 564, 585 (*ante*, 265, 272); *Chicago, B. & Q. R. Co.* v. *Iowa*, 9 West. Jur. 347; *Lake Shore & M. S. R. Co.* v. *Chicago & W. I. R. Co.* 97 Ill. 516; *Georgia R. & B. Co.* v. *Smith*, 128 U. S. 174 (32: 377); *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 (35:1051); *Pennsylvania R. Co.* v. *Miller*, 132 U. S. 75, 83, 84 (33: 267, 272); *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556 (38: 269); *Louisville & N. R. Co.* v. *Kentucky*, 161 U. S. 677 (40: 849); Ill. Const. art. 11, § 11.

The governmental or police power over railroads devoted to public use is much more extensive and broader than the police power over private property of the citizen.

*Illinois C. R. Co.* v. *Willenberg*, 117 Ill. 203, 57 Am. Rep. 862; *Boston & M. R. Co.* v. *York County Comrs.* 79 Me. 394; *Chicago & A. R. Co.* v. *Joliet, L. & A. R. Co.* 105 Ill. 405, 44 Am Rep. 799; *Lake Shore & M. S. R. Co.* v. *Cincinnati, S. & C. R. Co.* 30 Ohio St. 604; *Albany N. R. Co.* v. *Brownell*, 24 N. Y. 345; *Salem & H. Turnp. Co.* v. *Lyme*, 18 Conn. 451; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556 (38: 269).

The decision of the supreme court of Illinois in respect thereto involves no Federal question even if the question was one of general law. The rule of the supreme court upon this question is settled law in that state.

*Chicago & N. W. R. Co.* v. *Chicago*, 140 Ill. 309; *Illinois C. R. Co.* v. *Chicago*, 141 Ill. 586, 17 L. R. A. 530; *Illinois C. R. Co.* v. *Chicago*, 138 Ill. 463; *Peoria & P. U. R. Co.* v. *Peoria & F. R. Co.* 105 Ill. 110, 117; *Galena & C. U. R. Co.* v. *Loomis*, 13 Ill. 548; *Galena & C. U. R. Co.* v. *Dill*, 22 Ill. 264; *Galena & C. U. R. Co.* v. *Appleby*, 28 Ill. 283; *Ohio & M. R. Co.* v. *McClelland*, 25 Ill. 140; *Illinois C. R. Co.* v. *Willenborg*, 117 Ill. 203, 57 Am. Rep. 862.

And this rule is sustained by the weight of authority.

*Boston & M. R. Co.* v. *York County Comrs.* 79 Me. 386; *Thorpe* v. *Rutland & B. R. Co.* 27 Vt. 150, 62 Am. Dec. 625; *Lake Shore & M. S. R. Co.* v. *Cincinnati, S. & C. R. Co.* 30 Ohio St. 604; *Portland & R. R. R. Co.* v. *Deering*, 78 Me. 61, 70, 57 Am. Rep. 784; *Massachusetts C. R. Co.* v. *Boston, C. & F. R. Co.* 121 Mass. 124; *New York & N. E. R. Co.* v. *Waterbury*,



Digitized by Google

60 Conn. 1; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 393 (35: 1054).

Mr. Justice **Harlan** delivered the opinion of the court:

The questions presented on this writ of error relate to the jurisdiction of this court to re-examine the final judgment of the supreme court of Illinois, and to certain rulings of the state court which, it is alleged, were in disregard of that part of the 14th Amendment declaring that no state shall deprive any person of his property without due process of law, or deny the equal protection of the laws to any person within its jurisdiction.

The Constitution of Illinois provides that "no person shall be deprived of life, liberty, or property, without due process of law." Art. 2, § 2. It also provides: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken." Art. 2, § 13.

By the 5th article of the general statute of Illinois, approved April 10, 1872, and relating to the incorporation of cities and villages, it was provided that "the city council shall have power, by condemnation or otherwise, to extend any street, alley, or highway over or across, or to construct any sewer under or through, any railroad track, right of way or land of any railroad company (within the corporate limits); but where no compensation is made to such railroad company, the city shall restore such railroad track, right of way, [229]or land *to its former state, or in a sufficient manner not to have impaired its usefulness." 1 (Ill.) Starr & C. Anno. Stat. art. 5, pp. 452, 472, § 89.

The 9th article of the same statute declared that when the corporate authorities of a city or village provided by ordinance for the making of any local improvement authorized to be made, the making of which would require that private property be taken or damaged for public use, the city or village should file in its name a petition in some court of record of the county praying "that the just compensation to be made for private property to be taken or damaged" for the improvement or purpose specified in the ordinance be ascertained by a jury.

That statute further provided: "§ 14. Any final judgment or judgments, rendered by said court, upon any finding or findings of any jury or juries, shall be a lawful and sufficient condemnation of the land or property to be taken upon the payment of the amount of such finding as hereinafter provided. It shall be final and conclusive as to the damages caused by such improvement, unless such judgment or judgments shall be appealed from; but no appeal or writ of error upon the same shall delay proceedings under said ordinance, if such city or village shall deposit, as directed by the court, the amount of the judgment and costs, and shall file a bond in the court in which such judgment was rendered, in a sum to be fixed, and with security to be approved by the judge of said court, which shall secure the payment of any future compensation which may at any time be finally awarded to such party so appealing or suing out such writ of error, and his or her costs. § 15. The court, upon proof that said just compensation so found by the jury has been paid to the person entitled thereto, or has been deposited as directed by the court (and bond given, in case of any appeal or writ of error), shall enter an order that the city or village shall have the right, at any time thereafter, to take possession of or damage the property, in respect to which such compensation shall have been so paid or deposited, as aforesaid." 1 Starr & C. Anno. Stat. pp. 487 *et seq.*

*All of these provisions became a part[230 of the charter of the city of Chicago in 1875.

By an ordinance of the city council of Chicago approved October 9, 1880, it was ordained that Rockwell street in that city be opened and widened from West 18th street to West 19th street by condemning therefor, in accordance with the above act of April 10, 1872, certain parcels of land owned by individuals, and also certain parts of the right of way in that city of the Chicago, Burlington, & Quincy Railroad Company, a corporation of Illinois.

In execution of that ordinance a petition was filed by the city, November 12, 1890, in the circuit court of Cook county, Illinois, for the condemnation of the lots, pieces, or parcels of land and property proposed to be taken or damaged for the proposed improvement, and praying that the just compensation required for private property taken or damaged be ascertained by a jury.

The parties interested in the property described in the petition, including the Chicago, Burlington, & Quincy Railroad Company, were admitted as defendants in the proceeding.

In their verdict the jury fixed the just compensation to be paid to the respective individual owners of the lots, pieces, and parcels of land and property sought to be taken or damaged by the proposed improvements, and fixed $1 as just compensation to the railroad company in respect of those parts of its right of way described in the city's petition as necessary to be used for the purposes of the proposed street.

Thereupon the railroad company moved for a new trial. The motion was overruled, and a final judgment was rendered in execution of the award by the jury. That judgment was affirmed by the supreme court of the state. 149 Ill. 457.

The motion by the city to dismiss the writ of error for want of jurisdiction will be first considered. If the right now asserted under the Constitution of the United States was specifically set up or claimed by the defendant in the state court, the motion to dismiss must be overruled. U. S. Rev. Stat. § 709.

*An examination of the statutes under[231 which this proceeding was instituted will show that no provision is made for an answer by the defendants. In *Smith* v. *Chicago & W. I. R. Co.* 105 Ill. 511, 516, the supreme court of Illinois said that there was no rule of law or of practice authorizing the filing of an answer to a petition for the condemnation of land under the eminent domain act of that state; that the proceeding was purely statutory; and that al-



Digitized by Google

ugh the statute was very minute in all its ails, specifically setting forth every step to aken in the progress of a cause from its eption to its final determination, it did not tain any allusion to an answer by the dedants.

t is not, therefore, important that the dedant neither filed nor offered to file an anr specially setting up or claiming a right ler the Constitution of the United States. is sufficient if it appears from the record t such right was specially set up or claimed the state court in such manner as to bring o the attention of that court.

Now the right in question was distinctly ated by the defendant in its written motion set aside the verdict and grant a new trial. nong the grounds for a new trial were the lowing: That the several rulings of the urt in excluding proper evidence for the dedant, the statute under which the proceedgs for condemnation were instituted, and e verdict of the jury and the judgment based on it, were all contrary to the 14th Amendent declaring that no state shall deprive any rson of life, liberty, or property without due ocess of law, nor deny to any person within limits the equal protection of the laws.

When the trial court overruled the motion r a new trial and entered judgment it necesrily held adversely to these claims of Fedal right.

But this is not all. In the assignment of rors filed by the defendant in the supreme urt of Illinois, these claims of rights under ie Constitution of the United States were disnctly reasserted.

It is true that the supreme court of Illinois id not in its opinion expressly refer to the [232] Constitution of the United *States. But at circumstance is not conclusive against the urisdiction of this court to re-examine the final idgment of the state court. The judgment f affirmance necessarily denied the Federal ights thus specially set up by the defendant; or that judgment could not have been rendered without deciding adversely to such laims of right. Those claims went to the ery foundation of the whole proceeding so ar as it related to the railroad company, and he legal effect of the judgment of the supreme ourt of the state was to deny them. "The rue and rational rule," this court said in *Proprietors of Bridges* v. *Hoboken Land & Improv. Co.* 68 U. S. 1 Wall. 116, 148 [17: 571, 576], 'is that the court must be able to see clearly, 'rom the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." In *Roby* v. *Colehour*, 146 U. S. 153, 159 [36: 922, 924], it was said that "our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment." *DeSaussure* v. *Gaillard*, 127 U. S. 216, 234 [32: 125, 132]; *Brown* v. *Atwell*, 92 U. S. 327 [23: 512]; *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574, 577 [28: 1084, 1086]; *Sayward* v. *Denny*, 158 U. S. 180, 188 [39: 941, 942]. There is, we conceive, no room to doubt that the legal effect of the judgment below was to declare that the rights asserted by the defendant under the national Constitution were not infringed by the proceedings in the case. Consequently, the motion to dismiss for want of jurisdiction must be overruled, and we proceed to examine the case upon its merits.

The general contentions of the railroad company are—

That the judgment of the state court whereby a public street is opened across its land used for railroad purposes, and whereby compensation to the extent of $1 only is awarded, deprives it of its property without due process of law contrary to the prohibitions of the 14th Amendment; and,

*That the railroad company was en- [233] titled by reason of the opening of the street to recover as compensation a sum equal to the difference between the value of the fee of the land sought to be crossed without any restrictions on its right to use the land for any lawful purpose, and the value of the land burdened with a perpetual right in the public to use it for the purpose of a street subject to the right of the company or those acquiring title under it to use it only for railroad tracks or any purpose for which the same could be used without interfering with its use by the public.

The city contends that the question as to the amount of compensation to be awarded to the railroad company was one of local law merely, and as that question was determined in the mode prescribed by the Constitution and laws of Illinois, the company appearing and having full opportunity to be heard, the requirement of due process of law was observed. If this position be sound, it is an end of the case, and we need not determine whether the state court erred in not recognizing the principles of law embodied in the instructions asked by the railroad company.

It is therefore necessary to inquire at the outset whether "due process of law" requires compensation to be made or secured to the owner of private property taken for public use, and also as to the circumstances under which the final judgment of the highest court of a state in a proceeding instituted to condemn such property for public use may be reviewed by this court.

It is not contended, as it could not be, that the Constitution of Illinois deprives the railroad company of any right secured by the 14th Amendment. For the state Constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that *Amendment [234] against deprivation by the state, "violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the



Digitized by Google

state's power, his act is that of the state." This must be so, or, as we have often said, the constitutional prohibition has no meaning, and "the state has clothed one of its agents with power to annul or evade it." *Ex parte Virginia*, 100 U. S. 339, 346, 347 [25: 676, 679]; *Neal* v. *Delaware*, 103 U. S. 370 [26: 567]; *Yick Wo* v. *Hopkins*, 118 U. S. 356 [30: 220]; *Gibson* v. *Mississippi*, 162 U. S. 579 [40: 1078]. These principles were enforced in the recent case of *Scott* v. *McNeal*, 154 U. S. 34 [38: 896], in which it was held that the prohibitions of the 14th Amendment extended to "all acts of the state, whether through its legislative, its executive, or its judicial authorities;" and, consequently, it was held that a judgment of the highest court of a state, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the 14th Amendment.

Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. *United States* v. *Cruikshank*, 92 U. S. 542, 554 [23: 588, 592]; *Leeper* v. *Texas*, 139 U. S. 462, 468 [35: 225, 227]. But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest op-
235] portunity to be heard, and yet *it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form. This court, referring to the 14th Amendment, has said: "Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation." *Davidson* v. *New Orleans*, 96 U. S. 97, 102 [24: 616, 619]. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that Amendment.

It is proper now to inquire whether the due process of law enjoined by the 14th Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a state.

In *Davidson* v. *New Orleans*, above cited, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the 14th Amendment. See also *Missouri P. R. Co.* v. *Nebraska, Board of Transportation*, 164 U. S. 403, 417 [*ante*, 489, 495]. Such an enactment would not receive judicial sanction in any country having a written Constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such Constitution. It would be treated, not as an exertion of legislative power, but as a sentence—an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of *republican institutions. "Next in de- [236
gree to the right of personal liberty," Mr. Broom in his work on Constitutional Law says, "is that of enjoying private property without undue interference or molestation." p. 228. The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." 2 Story, Const. § 1790; 1 Bl. Com. 138, 139; Cooley, Const. Lim. *559; *People* v. *Platt*, 17 Johns. 195, 215 [8 Am. Dec. 382]; *Bradshaw* v. *Rodgers*, 20 Johns. 103, 106; *Mount Washington Road Co.'s Petition*, 35 N. H. 134, 142; *Parham* v. *Decatur County Justices of Inferior Ct.* 9 Ga. 341, 348; *Ex parte Martin*, 13 Ark. 199, 206 *et seq.*; *Johnston* v. *Rankin*, 70 N. C. 550, 555.

But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the 14th Amendment, it must be that the requirement of due process of law in that Amendment is applicable to the direct appropriation by the state to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be com-



Digitized by Google

pensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot con-
237] vert the process used *into due process of law, if the necessary result be to deprive him of his property without compensation.

In *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87, 135, 136 [3: 162, 177, 178], this court, speaking by Chief Justice Marshall, said: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation. To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of legislative power is well worthy of serious reflection."

In *Citizens' Sav. & L. Asso.* v. *Topeka*, 87 U. S. 20 Wall. 655, 663 [22: 455, 461], Mr. Justice Miller, delivering the judgment of this court, after observing that there were private rights in every free government beyond the control of the state, and that a government, by what ever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was after all but a despotism, said: "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." No court, he said, would hesitate to adjudge void any statute declaring that "the homestead now owned by A should no longer be his, but should henceforth be the property of B." In accordance with these principles it was held, in that case, that the property of the citizen could not be taken, under the power of taxation, to promote private objects, and, therefore, that a statute authorizing a town to issue its bonds in aid of a manufacturing enterprise of individuals was void because the object was a private, not a public, one. See also *Cole* v. *La Grange*, 113 U. S. 1 [28: 896].

In the early case of *Gardner* v. *Newburgh*, 2
238] Johns. Ch. 162 [7 Am. Dec. 526], there being no provision in the Constitution of the state of New York on the subject, Chancellor Kent said that it was a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice, that fair compensation be made to the owner of private property taken for public use. In *Sinnickson* v. *Johnson*, 17 N. J. L. 129, 145 [34 Am. Dec. 184], it was held to be a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain; that the one was so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle; and that the legislature "can no more take private property for public use without just compensation than if this restraining principle were incorporated into and made part of its state Constitution." These cases are referred to with approval in *Pumpelly* v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166, 178 [20: 557, 560], and in *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 325 [37: 463, 468], this court saying in the latter case: "And in this there is a natural equity which commends it to everyone. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that, when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

In *Searl* v. *Lake County School Dist. No. 2*, 133 U. S. 553, 562 [33: 740, 746], and in *Sweet* v. *Rechel*, 159 U. S. 380, 398 [40: 188, 196], the court said that it was a condition precedent to the exercise of the power of eminent domain that the statute make provision for reasonable compensation to the owner.

In *Scott* v. *Toledo*, 36 Fed. Rep. 385, 395, 396 [1 L. R. A. 688], the late Mr. Justice Jackson, while circuit judge, had occasion to consider this question. After full consideration that able judge said: "Whatever may have been the power of the states on this subject prior to the adoption of the 14th Amendment *to the Constitution, it seems clear [239 that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner; and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said Amendment. The conclusion of the court on this question is, that since the adoption of the 14th Amendment compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution." To the same effect are *Henderson* v. *Central Pass. R. Co.* 21 Fed. Rep. 359, and *Baker* v. *Norwood*, 74 Fed. Rep. 997.

In *Mount Hope Cemetery Propr.* v. *Boston*, 158 Mass. 509, 519, in which the 14th Amendment was invoked against a statute requiring the city of Boston to transfer certain cemetery



Digitized by Google

property owned by it to a particular company, the court said: "The conclusion to which we have come is, that the cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and that its ownership is protected under the Constitutions of Massachusetts and of the United States, so that the legislature has no power to require its transfer without compensation"—citing the Constitution of Massachusetts, Declaration of Rights, art. 10, and the 14th Amendment of the Constitution of the United States.

240] *In his work on Constitutional Limitations, Mr. Cooley says: "The principles, then, upon which the process is based are to determine whether it is 'due process' or not, and not any considerations of mere form. . . . When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession; but when property is appropriated by the government to public uses, or the legislature interferes to give direction to its title through remedial statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. . . . In every government there is inherent authority to appropriate the property of the citizen for the necessities of the state, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse. The restraints are, that when specific property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry, must be paid." pp. *856, *857. In his discussion as to the meaning and scope of the 14th Amendment the same writer in his edition of Story on the Constitution, after observing that every species of individual property was subject to be appropriated for the special needs of either the state or national government, but that the power to appropriate was subject to the restriction, among 241] others, that it must *not be exercised without making due compensation for whatever is taken, says: "Due process of law requires, first, the legislative act authorizing the appropriation, pointing out how it may be made and how the compensation shall be assessed; and, secondly, that the parties or officers proceeding to make the appropriation shall keep within the authority conferred, and observe every regulation which the act makes for the protection or in the interest of the property owner, except as he may see fit voluntarily to waive them." 2 Story, Const. § 1956.

In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.

It remains to inquire whether the necessary effect of the proceedings in the court below was to appropriate to the public use any property right of the railroad company without compensation being made or secured to the owner.

The contention of the railroad company is that the verdict and judgment for $1 as the amount to be paid to it was, in effect, an appropriation of its property rights without any compensation whatever; that the judgment should be read as if in form as well as in fact it made no provision whatever for compensation for the property so appropriated.

Undoubtedly the verdict may not unreasonably be taken as meaning that, in the judgment of the jury, the company's property, proposed to be taken, was not materially damaged; that is, looking at the nature of the property and the purposes for which it was obtained and was being used, that which was taken from the company was not, in the judgment of the jury, of any substantial value in money. The owner of private property taken under the right of eminent domain obtains just compensation if he is awarded such sum as, under all the *circumstances, is a fair [242 and full equivalent for the thing taken from him by the public.

If the opening of the street across the railroad tracks did not unduly interfere with the company's use of the right of way for legitimate railroad purposes, then its compensation would be nominal. But whether there was such an interference, what was its extent, and what was the value of that lost by the company as the direct result of such interference, were questions of fact which the state committed to the jury under such instructions touching the law as were proper and necessary. It was for the jury to determine the facts, but it belonged to the court to determine the legal principles by which they were to be governed in fixing the amount of compensation to the owner.

Whatever may have been the power of the trial court to set aside the verdict as not awarding just compensation, or the authority of the supreme court of Illinois under the Constitution and laws of the state to review the facts, can this court go behind the final judgment of the state court for the purpose of re-examining and weighing the evidence, and of determining whether, upon the facts, the jury erred in not returning a verdict in favor of the railroad company for a larger sum than $1? This



Digitized by Google

question may be considered in two aspects: first, with reference to the 7th Amendment of the Constitution, providing that "in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law;" second, with reference to the statute (Rev. Stat. § 709) which provides that the final judgment of the highest court of a state in certain named cases may be re-examined in this court upon writ of error.

It is clear that the last clause of the 7th Amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a state court and brought here by writ of error from 243] the highest court of the *state. One of the objections made to the acceptance of the Constitution as it came from the hands of the convention of 1787 was that it did not, in express words, preserve the right of trial by jury, and that under it facts tried by a jury could be re-examined by the courts of the United States otherwise than according to the rules of the common law. The 7th Amendment was intended to meet these objections, and to deprive the courts of the United States of any such authority. It could not have been intended thus to restrict the power of the courts of the United States to re-examine facts tried by juries in the courts of the Union, and leave it open for those courts to re-examine, in disregard of the rules of the common law, facts tried by juries impaneled in the state courts in cases which, by reason of the questions involved in them, could be brought under the cognizance of the courts of the United States. In *New York* v. *United States*, 76 U. S. 9 Wall. 274, 278 [19: 658, 661],—a case removed from a state court to a circuit court of the United States after verdict in the state court, and brought from the latter court to this court by writ of error,—the question was presented as to the constitutionality of so much of the 5th section of the act of March 3, 1863 (12 Stat. at L. 755, chap. 81), as authorized the removal of a judgment in a state court, in which the case was tried by a jury, to the circuit court of the United States for a retrial on the facts and the law. The argument was made that as by the construction uniformly given to the 1st clause of the Amendment the suits there mentioned were only those in the Federal courts, the words "and no fact tried by a jury," mentioned in the 2d clause, relate to trial by jury only in such courts. But this court said: "It is admitted that the clause applies to the appellate powers of the Supreme Court of the United States in all common-law cases coming up from an inferior Federal court, and also to the circuit court in like cases, in the exercise of its appellate powers. And why not, as it respects the exercise of these powers in cases of Federal cognizance coming up from a state court? The terms of the amendment are general, and contain no qualification in respect of 244]the restriction *upon the appellate jurisdiction of the courts, except as to the class of cases namely, suits at common law, where the trial has been by jury. The natural inference is that no other was intended. Its language, upon any reasonable, if not necessary, interpretation, we think, applies to this entire class, no matter from what court the case comes, of which cognizance can be taken by the appellate court. It seems to us also that cases of Federal cognizance, coming up from state courts, are not only within the words, but are also within the reason and policy of the amendment. They are cases involving questions arising under the Constitution, the laws of the United States, and treaties, or under some other Federal authority; and therefore are completely within the exercise of the judicial power of the United States, as much so as if the cases had been originally brought in some inferior Federal court. No other cases tried in the state courts can be brought under the appellate jurisdiction of this court or any inferior Federal court on which appellate jurisdiction may have been conferred. The case must be one involving some Federal question, and it is difficult to perceive any sensible reason for the distinction that is attempted to be made between the re-examination by the appellate court of a case coming from an inferior Federal court, and one of the class above mentioned coming up from a state court. In both instances the cases are to be disposed of by the same system of laws and by the same judicial tribunal." It was therefore held that Congress could not authorize a circuit court of the United States, upon the removal of a case tried by a jury in a state court, to retry "the facts and law."

Upon the reasoning in the case just referred to, it would seem to be clear that the last clause of the 7th Amendment forbids the retrial by this court of the facts tried by the jury in the present case. This conclusion is not affected by the circumstance that this proceeding is to be referred to the state's power of eminent domain, in which class of cases it has been held that, in the absence of express constitutional provisions on the subject, the owner of private property taken for public use cannot claim, as of right, that his compensation *shall be ascertained by a common-law [245 jury. The reason for this rule is, that before the establishment of the government of the United States it had been the practice in this country and in England to ascertain by commissioners, special tribunals, and other like agencies, the compensation to be made to owners of private property taken for public use, and it was not to be supposed that the general provisions in American Constitutions, national and state, preserving the right of trial by jury, superseded that practice. Lewis, Em. Dom. pp. 311, 312, and authorities cited. But in Illinois such practice is not permitted in cases of the condemnation of private property for public use. The state Constitution of 1848 provided that "the right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy." Art. 13, § 6. The Constitution of 1870 provides that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate, but the trial of civil cases before the justices of the peace by a jury of less than twelve men may be authorized by law." Art. 2, § 5. And by the latter instrument, as we have seen, it is ex-



Digitized by Google

pressly provided that the just compensation required to be made to the owner of private property taken or damaged for public use "shall be ascertained by a jury as shall be prescribed by law." Art. 2, § 13. That the last-named provision prohibited the ascertainment of such compensation in any other mode than by a jury, is made clear by the decision of the supreme court of Illinois in *Kine* v. *Defenbaugh*, 64 Ill. 291, in which it was adjudged that a provision in a statute of Illinois authorizing commissioners of highways, or three supervisors of the county on appeal from the commissioners, to ascertain the damages sustained by reason of the construction of a highway across the owner's premises, was superseded by the 13th section of art. 2 of the state Constitution—the court observing that a trial by jury was "a constitutional right of which the party may not be debarred either by the action or nonaction of the legislature. *People* v. *McRoberts*, 62 Ill. 38." The persons impaneled in this case to ascertain the just compensa-[246]tion due to the railroad *company constituted a jury as ordained by the Constitution of Illinois in cases of the condemnation of private property for public use, and, being a jury within the meaning of the 7th Amendment of the Constitution of the United States, the facts tried by it cannot be retried "in any court of the United States otherwise than according to the rules of the common law." The only modes known to the common law "to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings." *Parsons* v. *Bedford*, 28 U. S. 3 Pet. 433, 447, 448 [7: 732, 737]; *New York, C. & H. R. R. Co.* v. *Fraloff*, 100 U. S. 24, 31 [25: 531, 535].

To this it may be added that Congress has provided that the final judgment of the highest court of a state in cases of which this court may take cognizance, shall be re-examined upon writ of error, a process of common-law origin, which removes nothing for re-examination but questions of law arising upon the record. *Egan* v. *Hart*, 165 U. S. 188 [*ante*, 680]. Even if we were of opinion in view of the evidence that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company by reason of the opening of a street across its right of way, we cannot, on that ground, re-examine the final judgment of the state court. We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation.

We say, "in absolute disregard of the company's right to just compensation," because we do not wish to be understood as holding that every order or ruling of the state court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration of the law under which the proceedings were instituted.

*In *Lent* v. *Tillson*, 140 U. S. 316, 331[247] [35: 419, 426], which was a case of the widening of a public street, for the cost of which bonds were issued, to be paid by taxation on the lands benefited, in proportion to the benefits, and in which it was alleged by a property owner that the local statute had been so administered as to deprive him of his property without due process of law, this court said: "Errors in the mere administration of the statute, not involving jurisdiction of the subject-matter and of the parties, could not justify this court, in its re-examination of the judgment of the state court, upon writ of error, to hold that the state had deprived, or was about to deprive, the plaintiffs of their property without due process of law. Whether it was expedient to widen Dupont street, or whether the board of supervisors should have so declared, or whether the board of commissioners properly apportioned the cost of the work, or correctly estimated the benefits accruing to the different owners of property affected by the widening of the street, or whether the board's incidental expenses in executing the statute were too great, or whether a larger amount of bonds were issued than should have been, the excess, if any, not being so great as to indicate upon the face of the transaction a palpable and gross departure from the requirements of the statute, or whether upon the facts disclosed the report of the commissioners should have been confirmed, are none of them issues presenting Federal questions, and the judgment of the state court upon them cannot be reviewed here."

In harmony with those views, we may say in the present case that the state court having jurisdiction of the subject-matter and of the parties, and being under a duty to guard and protect the constitutional right here asserted, the final judgment ought not to be held to be in violation of the due process of law enjoined by the 14th Amendment, unless by its rulings upon questions of law the company was prevented from obtaining substantially any compensation. See also *Marchant* v. *Pennsylvania R. Co.* 153 U. S. 380 [38: 751].

The principal point of dispute between the parties was whether the railroad company, by reason of the opening of the street, was entitled to recover a sum equal to the difference *between the value of the land in question[248] as land, without any restriction on its right to use it for any lawful purpose, and the value of the land when burdened with the right of the public to use it for the purposes of a street crossing.

In its opinion in this case the supreme court of Illinois says that when a city council, under the authority of the act of April 10, 1872, extends a street across railroad tracks or right of way, "it does not condemn the land of the railroad company nor prevent the use of the tracks and right of way." 149 Ill. 457. We take this to be a correct interpretation of the local statute, and as indicating not only the interest acquired by the public through proceedings instituted for the extension of a street



Digitized by Google

across the tracks and right of way of the railroad company, but also the extent to which the company was deprived, by the proceedings for condemnation, of any right in respect of the land. Such being the law of the state, it would necessarily follow that the jury, in ascertaining the amount of compensation, could not properly take as a basis of calculation the market value of the land as land. The land as such was not taken, the railroad company was not prevented from using it, and its use for all the purposes for which it was held by the railroad company was interfered with only so far as its *exclusive* enjoyment for purposes of railroad tracks was diminished in value by subjecting the land within the crossing to public use as a street. The supreme court of Illinois well said that "the measure of compensation is the amount of decrease in the value of the use for railroad purposes caused by the use for the purposes of a street, such use for the purposes of a street being exercised jointly with the use of the company for railroad purposes. In other words, the company is to be compensated for the diminution in its right to use its tracks caused by the existence and use of the street." 149 Ill. 457.

But it was contended in the court below, and is here contended, that the land was subject to sale by the company for any lawful use; that after being condemned for purposes of a public street it could not be sold as land held for private use could be sold in the market; [249] consequently, its salable value, *treating it as land simply, was practically destroyed by the opening of a public street across it. Touching this point the state court, observing that a railroad company can only acquire land, whether by voluntary purchase or otherwise, for railroad purposes as defined in its charter, and that in this case the descriptions of the strips of land conveyed to the appellant, as set forth in the conveyances introduced in evidence, show that the strips were purchased for railroad right of way, and they have been ever since so used, said: "It is manifest that the appellant is restricted in its use of the right of way over which this street is to be extended to those purposes for which such right of way is now used. The future use must be the same as the present use so long as the appellant continues to operate its railroad, unless the legislature shall permit it to change its route." 149 Ill. 457, 461. The supreme court of Illinois therefore held that the trial court did not err in excluding evidence to show the general salable value of the right of way included in the crossing, or its general value for other uses than that to which it was applied. According to this view of the powers of the railroad company, it is clear that the jury could not properly have taken into consideration the possibility of such legislative permission being granted; that is, the power of the legislature to permit a change of route, and the possibility of the exercise of that power, could not be elements in the inquiry as to the compensation to be now awarded to the railroad company.

But even if it were true that the company, so long as it operated its railroad, could without legislative permission take up its tracks placed across the land in question, and use the land for purposes other than for a right of way, the jury could not properly have taken into consideration the possibility that at some future time the company would adopt that course, and thereby put itself in condition, if no street were opened across it, to sell its land for what it was worth as land, freed from any public easement. Such a possibility was too remote and contingent to have been taken into account. There was nothing in the evidence, introduced or *offered and excluded, [250] suggesting any probability that the company intended to use or would in the near future use the land within the crossing for any other purpose than as a right of way. While, as held in *Mississippi & R. R. Boom Co.* v. *Patterson*, 98 U. S. 403, 408 [25: 206, 209], the general rule is that compensation "is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future," it is well settled that "mere possible or imaginary uses, or the speculative schemes of its proprietor, are to be excluded." Pierce, Railroads, 217, and authorities cited; *Worcester* v. *Great Falls Mfg. Co.* 41 Me. 159, 164 [66 Am. Dec. 217]; *Dorlan* v. *East Brandywine & W. R. Co.* 46 Pa. 520, 525.

The company must be deemed to have laid its tracks within the corporate limits of the city subject to the condition—not, it is true, expressed, but necessarily implied—that new streets of the city might be opened and extended from time to time across its tracks as the public convenience required, and under such restrictions as might be prescribed by statute. Suppose the city had many years ago acquired the land in question by purchase or condemnation for the purpose of extending and had extended a street over it, and that the railroad company had thereafter acquired by condemnation the right to lay its tracks across the street upon making just compensation to the city. In ascertaining, in such a case, the compensation due the city, would it not be assumed, the street having once been opened, that the convenience of the public would always require it to be kept open, and that therefore compensation was to be ascertained, not upon the basis of the value of the city's land, as land, when crossed by the railroad tracks, but upon the basis that the land would always be a part of a public street? Both branches of this question must be answered in the affirmative. But they should not be so answered if the position of the railroad company be sound; for, according to its contention, the jury, in the case supposed, must have taken into account the possibility that the city might at some future *time discontinue [251] the street, and sell the land or devote it to other purposes. There was and is no more probability that the city, in the case supposed, would close the street than, in this case, that the railroad company will take up its tracks from the land in question. Such a probability was too remote to be regarded as an element in the inquiry as to compensation. When these proceedings were instituted the railroad company had an exclusive right to use the land



Digitized by Google

in question for tracks upon which to move its cars, and the city did not propose to interfere in any degree with the enjoyment of that right, otherwise than by the opening of a street across the tracks for public use. To what extent was the value of the company's right to use the land for railroad tracks unduly diminished by opening across it a public street? Under all the circumstances, in view of the purpose for which the railroad company obtained the land, for which the land was in fact used, and for which it was likely to be always used—which purpose is the most valuable one for the railroad company—that was the only question to be determined by the jury. As the right to open a street across the railroad tracks was all that the city sought to obtain by the proceeding for condemnation, it was not bound to obtain and pay for the fee in the land over which the street was opened. If, prior to the institution of these proceedings, the railroad company had constructed upon the land embraced within the crossing buildings to be used in its business, it would have been necessary for the jury, in ascertaining the just compensation to be awarded, to take into consideration the value of such buildings. But no such case is before us. The case is simply one of the opening of a street across land with no buildings upon it, and used only for railroad tracks.

It is next contended that error of law was committed by the refusal of the court to allow the company to prove that in the event of the opening of the street it would be necessary, in order that the railroad be properly and safely operated, to construct gates and a tower for operating them, plank the crossing, fill between the rails, put in an extra rail, and to incur an annual expense of depreciations, maintenance, [252]*employment of gatemen, etc. It was not claimed that the railroad company could recover specifically on account of such expenditures, but that the proof of their being made necessary by the opening of the street was admissible for the purpose of showing the compensation due to the company. There are some authorities that seem to support the view taken by the railroad company, but we are of opinion that no error was committed in excluding the evidence offered.

The plaintiff in error took its charter subject to the power of the state to provide for the safety of the public, in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people. In the recent case of *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 567 [38: 269, 273], this court declared it to be thoroughly established that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. "The governmental power of self-protection" the court said "cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied *liability to govern- [253] mental regulation in particulars essential to the preservation of the community from injury." See *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 671 [29: 516, 524].

In *Toledo, P. & W. R. Co.* v. *Deacon*, 63 Ill. 91, the supreme court of Illinois said: "The state has reserved to itself the power to enact all police laws necessary and proper to secure and protect the life and property of the citizen. Prominent amongst the rights reserved, and which must inhere in the state, is the power to regulate the approaches to and the crossing of public highways, and the passage through cities and villages, where life and property are constantly in imminent danger by the rapid and fearful speed of railway trains. The exercise of their franchises by corporations must yield to the public exigencies and the safety of the community." And in *Illinois C. R. Co.* v. *Willenborg*, 117 Ill. 203 [57 Am. Dec. 862], where the question was whether a railroad company could be required to construct a farm crossing over its road years after the road had been built, the court said: "The point is made, however, that these provisions are not obligatory on this corporation because they were enacted many years since it received its charter from the state. This is a misapprehension of the law. The regulations in regard to fencing railroad tracks, and the construction of farm crossings for the use of adjoining landowners, are police regulations in the strict sense of those terms, and apply with equal force to corporations whose tracks are already built, as well as those to be thereafter constructed. They have reference to the public security, both as to persons and to property. . . . No reason is perceived why, upon the same principle on which a railroad corporation may be required to fence its track and construct cattle guards, it may not be required also to construct farm crossings."

In *Chicago & N. W. R. Co.* v. *Chicago*, 140 Ill. 309, 317–319, the question was whether, in a case where a city institutes a condemnation proceeding to open or extend a street across a railroad already constructed, the company owning such railroad was entitled to be allowed, as a *part of its just compensation, [254] the amount of its expenses in constructing and maintaining the street crossing. In that case it appeared that the railroad was constructed prior to the above act of 1872 for the incor-



Digitized by Google

poration of cities and villages, and before the passage of the act of 1874, which required that thereafter at all railroad crossings of highways "and streets" the railroad companies should construct and maintain such crossings, and the approaches thereto, within their respective rights of way, so that at all times they should be safe as to person and property. 2 Starr & C. Anno. Stat. 1927. The court said: "Government owes to its citizens the duty of providing and preserving safe and convenient highways. From this duty results the right of public control over public highways. Railroads are public highways, and in their relations as such to the public are subject to legislative supervision, though the interests of their shareholders are private property. Every railroad company takes its right of way subject to the right of the public to extend the public highways and streets across such right of way. . . . If railroads so far as they are public highways are, like other highways, subject to legislative supervision, then railroad companies in their relations to highways and streets which intersect their rights of way are subject to the control of the police power of the state; that power of which this court has said that 'it may be assumed that it is a power coextensive with self-protection and is not inaptly termed the law of overruling necessity.' *Lake View* v. *Rose Hill Cemetery Asso.* 70 Ill. 191 [22 Am. Rep. 71]. The requirement embodied in § 8, that railroad companies shall construct and maintain the highway and street crossings and the approaches thereto within their respective rights of way is nothing more than a police regulation. It is proper that the portion of the street or highway which is within the limits of the railroad right of way should be constructed by the railroad company and maintained by it, because of the dangers attending the operation of its road. It should control the making and repairing of the crossing for the protection of those passing along the street and of those riding on the cars. . . . The items **255**]of expense for *which appellant claims compensation are such only as are involved in its compliance with a police regulation of the statute. It is well settled that 'neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common welfare.' *Chicago & A. R. Co.* v. *Joliet, L. & A. R. Co.* 105 Ill. 388 [44 Am. Rep. 799]. It has been held by this court in a number of cases that railroad corporations may be required to fence their tracks, to put in cattle guards, to place upon their engines a bell, and to do other things for the protection of life and property, although their charters contained no such requirements. *Galena & C. U. R. Co.* v. *Loomis*, 13 Ill. 548 [56 Am. Dec. 471]; *Galena & C. U. R. Co.* v. *Dill*, 22 Ill. 264; *Ohio & M. R. Co.* v. *McClelland*, 25 Ill. 140; *Peoria & P. U. R. Co.* v. *Peoria & F. R. Co.* 105 Ill. 110. . . . Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging without just compensation of private property, or of private property affected with a public interest." See also *Mugler* v. *Kansas*, 123 U. S. 623, 668 [31: 205, 213]; *Boston & M. R. Co.* v. *York County Comrs.* 79 Me. 386; *Thorpe* v. *Rutland & B. R. Co.* 27 Vt. 150 [62 Am. Dec. 625]; *Lake Shore & M. S. R. Co.* v. *Cincinnati, S. & C. R. Co.* 30 Ohio St. 604; *Portland & R. R. Co.* v. *Deering*, 78 Me. 61, 70 [57 Am. Rep. 784]; *State* v. *Chicago, B. & Q. R. Co.* 29 Neb. 412; *New York & N. E. R. Co.* v. *Waterbury*, 60 Conn. 1; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386, 393 [35: 1051, 1054].

We concur in these views. The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated,—if all that should be required,—necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state. What was obtained, and all that was *obtained, by the con-[**256** demnation proceedings for the public was the right to open a street across land within the crossing that was used, and was always likely to be used, for railroad tracks. While the city was bound to make compensation for that which was actually taken, it cannot be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people. And the value to the railroad company of that which was taken from it is, as we have said, the difference between the value of the right to the exclusive use of the land in question for the purposes for which it was being used, and for which it was always likely to be used, and that value after the city acquired the privilege of participating in such use by the opening of a street across it, leaving the railroad tracks untouched. Upon that theory the case was considered by the jury, and the court did not err in placing it before them upon that basis as to compensation.

One of the instructions asked by the company and refused by the court was to the effect that if the land to be crossed by the proposed street was of such width and dimensions that it would be practicable for the company or those acquiring title under it to lay and operate other railroad tracks in addition to those already placed thereon, the company was entitled to recover as part of the compensation to be awarded the difference, if any, between the value of the strip for railroad purposes with the right to lay and operate thereon such additional tracks, and the value of the same for railroad purposes with the right to use and operate only the railroad tracks now on the same. This instruction was properly refused, because it assumed, as matter of law, that the opening of the street across the existing railroad tracks prevented the company from laying additional tracks across the land within the crossing, if there was room for such tracks. The right of the company to use the land or its right of way for as many tracks as it reasonably required for its business—if such right it had when the present proceedings were instituted—is not affected by the opening of the street in ques-



Digitized by Google

tion. The opening of the street across the company's land—the city not acquiring the 257]*fee-simple title—was necessarily subject to the right, if any, of the company to lay down additional tracks if necessary in the proper conduct of its business.

Another instruction asked by the company, and to the refusal of which it excepted, was to the effect that if the land of the railroad company to be crossed by the proposed street was used by it for railroad purposes as part of "its railroad and terminal facilities," and the value of such railroad and terminal facilities would be depreciated and lessened by the use of the land by the public for the purposes of a street (such use for the purposes of a street being subject, however, to the use of the land by the company for railroad purposes), then the railroad company was entitled to recover from the city a sum equal to such depreciation in value as damages to part of its land not taken or crossed by the proposed street. This instruction was properly refused. It was objectionable for the reason, if there were no other, that it was too general. The words "its railroad and terminal facilities" included the company's entire line of road and terminal facilities within, at least, the corporate limits of the city. The land within the crossing is 8 miles inside the city limits, about 4 miles from the passenger depot of the company and 1,000 feet from its nearest freight depot. If the instruction last referred to had been given, the range of inquiry as to the sum due the company for what was taken from it would have been extended far beyond what was required or permissible in order to ascertain the amount of compensation.

It is further contended that the railroad company was denied the equal protection of the laws in that by the final judgment individual property owners were awarded, as compensation for contiguous property appropriated to the public use by the same proceeding, the value of their land taken, while only nominal compensation was given to the company—the value of its land, simply *as land*, across which the street was opened, not being taken into account. This contention is without merit. Compensation was awarded to individual owners upon the basis of the value of the property actually taken, having regard to 258] the uses for which it was best *adapted and the purposes for which it was held and used and was likely always to be used. Compensation was awarded to the railroad company upon the basis of the value of the thing actually appropriated by the public—the use of the company's right of way for a street crossing, having regard to the purposes for which the land in question was acquired and held and was always likely to be held. In the case of individual owners, they were deprived of the entire use and enjoyment of their property, while the railroad company was left in the possession and use of its property for the purposes for which it was being used and for which it was best adapted, subject only to the right of the public to have a street across it. In this there was no denial of the equal protection of the laws, unless it be that the public cannot have a street across the tracks of a railroad company, except upon the condition precedent that it shall condemn and acquire the absolute ownership of the land, *leaving untouched the right of the company to cross it with its tracks*. We do not think the equal protection of the laws imposes such a burden upon the people of a city within the limits of which a railroad company has been permitted to lay its tracks.

We have examined all the questions of law arising on the record of which this court may take cognizance, and which, in our opinion, are of sufficient importance to require notice at our hands, and finding no error, *the judgment is affirmed*.

*The Chief Justice took no part in the[259 consideration or decision of this case.

Mr. Justice **Brewer** dissenting:

I dissent from the judgment in this case. I approve that which is said in the first part of the opinion as to the potency of the 14th Amendment to restrain action by a state through either its legislative, executive, or judicial departments, which deprives a party of his property without due compensation; also the ruling that "due process" is not always satisfied by the mere form of the proceeding, the fact of notice, and a right to be heard. I agree to the proposition that "a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction, for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment to the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

It is disappointing after reading so strong a declaration of the protecting reach of the 14th Amendment and the power and duty of this court in enforcing it as against action by a state by any of its officers and agencies, to find sustained a judgment, depriving a party—even though a railroad corporation—of valuable property without any, or, at least, only nominal, compensation. It seems as though the denial which is so strenuously made as to the power of the state, through either its legislative, executive, or judicial departments, is subject to one limitation: that is, the verdict of a jury. The abundant promises of the fore part of the opinion vanish into nothing when the conclusion is reached. They amount to a mere *brutum fulmen*. It is a case frequent in all our experiences in life, where the promise and the performance are sadly at variance, and suggest those many sayings, some serious and some jocular, which are used to picture the grotesque incongruity so often manifested between the beginning and the end, the proclamation and the act.

For what is the result which is sustained and adjudged rightful by this decision? The railroad company, which owns a tract of land within the limits of the city of Chicago, holds *it by deed from the original proprietors,[260 having, therefore, the highest and best of all titles, a fee simple, and by virtue thereof a right to its exclusive use, with all the benefits and



Digitized by Google

profits which attend thereon, is deprived of such exclusive use, forced to admit everybody to an equal use and occupation, to give to the public, indeed, all the use and occupation it has of any road or highway, including therein its power to require all owners of steam cars crossing such highways to plank at their own expense crossings, construct gates, employ gatemen, and take all other necessary means to prevent accidents at such crossings, and receives for this only $1, merely nominal compensation. The property thus condemned is the private property of the company. *Missouri P. R. Co.* v. *Nebraska, Board of Transportation*, 164 U. S. 403-417 [*ante*, 81-86]. The individual owners of tracts alongside and similarly situated are, for being deprived the exclusive use (for in neither case is the fee taken) of their property, awarded damages at the rate of about $5,000 for an equal area of ground, and this without being exposed to any further burden than the loss of the use of the property condemned.

It is no answer to say that the company only uses this piece of ground for its tracks and the passage of its trains, and may still use it in the same way. It is not the present use but the possibilities of use which determine the value of property. Can the owner of vacant land have it taken from him without compensation simply because at the moment he does not use it? As said by this court in *Mississippi & R. R. Boom Co.* v. *Patterson*, 98 U. S. 403, 408 [25: 206, 208]: "The inquiry in such cases must be, What is the property worth in the market, viewed, not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted? that is to say, What is it worth from its availability for valuable uses?" The value of this property to the railroad company, its owner, does not depend alone on the uses to which it is now put, but also on the uses to which the company may rightfully put it; and, as shown by the testimony in this case, that portion of the ground on either side of the tracks is available and valuable for station **261**] houses, offices, coal chutes, *elevator offices, signal towers, switch stands, etc., the possibility of use for which purposes is taken away when the land is appropriated for a highway. The claim that the leaving of the present use of his property to the owner destroys the right of compensation is a proposition which to my mind is simply monstrous. Could another railroad company or an individual condemn and take from this company any use of its tracks, with only nominal compensation, simply because its own use was left to the company? And yet, if the taking of a crossing without compensation can be defended on this ground, why may not the taking of the use of the tracks without compensation also be defended?

Neither, as I submit, can the large matter of damages by liability to the expense of planking between the tracks, establishing gates, hiring gatemen, and resorting to all other necessary means of guarding against accidents at the crossing, be ignored in any just estimate of compensation. It is no sufficient answer to say that wherever a crossing has been rightfully established the public may legally compel the company at its own expense to provide these means of protection. The company is liable to no such burden until the highway is opened. As long as the public had no right of crossing, the company was under no burden. The establishment of the crossing, the taking of the property for a highway, creates the right on the part of the public to cast the burden upon the company, and it seems to me monstrous to say that the public can create the right to cast a large burden of expense upon the company and yet be under no obligations to compensate therefor. It amounts simply to this, that the city says to the railroad company, I will take your property and use it for a highway and pay you nothing for it or for your liability to bear such a burden of expense as I may see fit to cast upon you hereafter in order to protect that crossing against accident, and I can do all this without compensation, because if I had owned the property in the first place, and simply given you permission to cross my highway, I could compel you to bear such burden. The right to impose a burden after a public ownership is created is used as a justification *for creating the public owner- [**262** ship without compensation. I cannot agree to any such proposition.

This question was presented to the supreme court of Kansas in *Kansas C. R. Co.* v. *Jackson County Comrs.* 45 Kan. 716, 724, where a highway was sought to be established across a railroad track, without any compensation, and the court denied the claim, saying: "Whether the duty imposed upon the railroad company of constructing cattle guards, fences, signs, etc., can be or is imposed upon it under the police power of the state, makes no difference in this case. If the highway should not be established across the railroad company's right of way, then it would not be necessary for any of these things to exist; but if a highway is so established, then the duty under the statutes immediately springs into existence, requiring the railroad to so construct these things. The establishment of the highway is therefore the cause of all these additional burdens being imposed upon the railroad company. And must the railroad company bear these burdens and suffer these losses without compensation? Why should it be treated differently from others who have interests in real estate? All others having interests in real estate are entitled to compensation for losses resulting from the location of a public highway interfering with their free and rightful use of such interests. *Smith County Comrs.* v. *Labore*, 37 Kan. 480, 484, *et seq.*" See also the many cases cited in the opinion. Among them is *Grand Rapids* v. *Grand Rapids & I. R. Co.* 58 Mich. 641, 648, in which it was said by Campbell, Ch. J.: "The damage done to a railroad by having a highway run across it must necessarily include all the additional expenses entailed by such a crossing, which in a city may involve a considerable outlay in making the crossing safe, and providing guards against accidents." Again, in *Chicago & G. T. R. Co.* v. *Hough*, 61 Mich. 507, 508, the court observed, speaking by the same chief justice: "If a railroad interferes with an existing highway, it must bear all the expense of crossing and restoring the highway as far as practicable



Digitized by Google

to safe condition, and the fencing and cattle guards are necessary for that purpose. 263] But, as pointed out in *People* v. *Lake Shore & M. S. R. Co.* 52 Mich. 277, when a new highway is created, then it belongs to those who create it to bear the expense of making the crossing in the condition necessary to meet all the expense and danger which it occasions."

Indeed, in Illinois, as between two railroads, one seeking to obtain the right of crossing over the tracks of the other, the court, in *Chicago & A. R. Co.* v. *Springfield & N. W. R. Co.* 67 Ill. 142, well said: "Appellants are entitled to such a sum for damages, to be paid by appellee in money, as will enable appellants to construct and keep in repair all such works as may be necessary to keep their track in a safe and secure condition. Nothing short of this can amount to the 'just compensation' provided by law."

I do not care to enlarge upon this matter. These propositions seem to me so absolutely clear that the mere statement of them ought to carry conviction. And after a declaration by this court that a state may not through any of its departments take private property for public use without just compensation, I cannot assent to a judgment which, in effect, permits that to be done.

---

CHICAGO, B. & Q. R. CO., *Plff. in Err.*,
*v.*
CITY OF CHICAGO.

(See S. C. Reporter's ed. 258.)

[No. 130.]

*Argued with the preceding case, No. 129.*

IN ERROR to the Supreme Court of the State of Illinois.

See same case below, 149 Ill. 464.

*Messrs.* **John J. Herrick** and *J. W. Blythe* for plaintiff in error.

*Messrs.* **John S. Miller** and *Wm. G. Beale* for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This was a proceeding for condemnation under the Constitution and laws of Illinois similar to the one just disposed of.

For the reasons stated in the above case, No. 129, the judgment of the Supreme Court of Illinois is *affirmed*.

Mr. Justice **Brewer** dissents.

---

*Re* C. & A. POTTS & CO., *Petitioner.*

(See S. C. Reporter's ed. 263-268.)

*Decision of this court—authority of circuit court—mandamus.*

1. Questions of the novelty and infringement of a patent, decided by this court in reversing on the merits a decree which dismissed the bill, cannot be afterwards reconsidered by the lower court, but must be deemed to have been finally settled.

2. When the merits of a case have been once decided by this court on appeal, the circuit court has no authority, without express leave of this court, to grant a new trial, a rehearing, or a review, or to permit new defenses on the merits to be introduced by amendment of the answer.

3. Mandamus may be issued to compel the circuit court to set aside its orders granting, without previous leave of this court, a rehearing for newly-discovered evidence after the merits of the case have been disposed of by this court on appeal, when they were in unintentional but practical disobedience of its mandate.

[No. 12, Original.]

*Argued March 1, 1897. Decided March 15, 1897.*

PETITION for mandamus to the judge of the Circuit Court of the United States for the Southern District of Ohio to command him to execute a mandate of this court and to set aside orders made by him after receiving the mandate and inconsistent therewith. *Mandamus issued.*

See same case below, 71 Fed. Rep. 574, 77 Fed. Rep. 454; also same case, 44 Fed. Rep. 680, 155 U. S. 597, 610 (39: 275, 280).

*Statement by Mr. Justice **Gray**: [264

This was a petition, presented to this court on January 4, 1897, for a writ of mandamus to the Honorable George R. Sage, United States district judge, sitting as a judge of the circuit court of the United States for the southern district of Ohio, to command him to execute a mandate of this court, and to set aside orders made by him after receiving the mandate and inconsistent therewith. The case was as follows:

Upon a bill in equity for the infringement of letters patent, an answer denying patentable novelty and infringement, a general replication, and proofs taken and completed, the circuit court sustained the defense of want of novelty, and thereupon, on January 8, 1891, entered a final decree dismissing the bill for want of equity, with costs. *Potts* v. *Creager*, 44 Fed. Rep. 680.

The plaintiff appealed to this court, which on January 7, 1895, held that the letters patent were valid, and had been infringed, and therefore, as appeared by its opinion and mandate, reversed the decree of the circuit court, and remanded the cause to that court for further proceedings in conformity with that opinion. 155 U. S. 597, 610 [39: 275, 280].

On February 26, 1895, the circuit court entered a decree, "in conformity with the said mandate," setting aside its former decree, and adjudging that the letters patent were valid and had been infringed, referring the cause to a master to take an account of profits, and awarding a perpetual injunction against the defendants. On July 16, 1895, the master filed his report and account of profits.

Before any action of the circuit court upon the master's report, the defendants, on November 29, 1895, filed a petition for a rehearing, for newly discovered evidence affecting the novelty of the invention; and that court ordered notice to plaintiff to show cause, on January 4, 1896, why that petition should not be granted. On that day, the plaintiff objected in writing to the consideration of the petition, "on the grounds that this court is without jurisdiction or authority in the premises; that the issues sought to be made by said evidence are not properly before it; and that

NOTE.—*As to when mandamus will issue*, see note to M'Cluny v. Silliman, 4: 268.

*As to mandamus to control inferior courts; discretion*,—see note to *Ex parte* Morgan, 29: 135.



Digitized by Google

the proceedings are and have been irregular, and not according to law." But the circuit court, on January 15, 1896, granted the petition 265]for a rehearing, *for reasons stated in its opinion reported in 71 Fed. Rep. 574; and, after a hearing upon the new evidence, entered an order on December 21, 1896, by which the court being of opinion that the letters patent were "void for want of invention, in view of said new evidence, and that therefore the equities are with the defendants, it is ordered that said petition stand as a supplemental answer, and that the replication as filed be considered as a replication thereto." Its opinion upon entering that order is reported in 77 Fed. Rep. 454.

All the decrees and orders of the circuit court, above mentioned, were made by Judge Sage.

*Messrs.* **Chester Bradford** and **Ernest W. Bradford** for petitioner.

*Messrs.* **Edward Boyd** and *E. E. Wood* for respondent.

Mr. Justice **Gray** delivered the opinion of the court:

The general rules which govern cases of this kind are stated, and the decisions by which those rules have been established are collected, in the recent case of *Re Sanford Fork & Tool Co.* 160 U. S. 247 [40: 414], in which this court said: "When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court and disposed of by its decree is considered as finally settled. The circuit court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it further than to settle so much as has been remanded. If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by writ of mandamus to execute the man-266]date of this court. But the circuit *court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly." 160 U. S. 255, 256, [40: 416, 417].

In that case, the circuit court, at a hearing upon exceptions to an answer in equity, had sustained the exceptions, and, the defendant electing to stand by his answer, had entered a final decree for the plaintiff; and this court, upon appeal, ordered that decree to be reversed, and the cause remanded for further proceedings not inconsistent with its opinion. As the record stood, the only matter which was or could be decided by the circuit court, or by this court on the appeal, was the sufficiency of the answer; and, neither the circuit court, nor this court, upon adjudging the answer to be sufficient, could deprive the plaintiffs of the right to file a replication, putting the cause at issue. It was for that reason, and because no issue of fact had been joined or tried in either court, that this court held that the cause had been left open for a trial of the facts in controversy between the parties, and that the circuit court, for the purpose of more fully or clearly presenting those facts, was authorized to allow an amendment of the bill. This court therefore declined to grant a writ of mandamus, but took the precaution of adding: "The case is quite different, in this respect, from those in which the whole case, or all but a subsidiary question of accounting, had been brought to and decided by this court upon the appeal." 160 U. S. 259 [40: 417].

The case now in question comes exactly within the class of cases so referred to and distinguished. It was originally heard in the circuit court, not merely upon a question of sufficiency of pleading, but upon the whole merits. That court, at a hearing upon pleadings and proofs, involving the questions of the novelty of the alleged invention, and of its infringement by the defendants, entered a final decree dismissing the bill. Upon the appeal from that decree, both those questions were presented *to and considered by this court, [267 and thereby it decided in the plaintiff's favor. Its decision of those questions in that way was the ground of its opinion, decree, and mandate, reversing the decree of the circuit court dismissing the bill, and remanding the cause to that court for further proceedings in conformity with the opinion of this court. The decision and decree of this court did not amount, indeed, technically speaking, to a final judgment, because the matter of accounting still remained to be disposed of. *Humiston* v. *Stainthorp*, 69 U. S. 2 Wall. 106 [17: 905]; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518 [*ante*, 810]. But they constituted an adjudication by this court of all questions, whether of law or of fact, involved in the conclusion that the letters patent of the plaintiff were valid and had been infringed. Applying the rules stated at the beginning of this opinion, the questions of novelty and infringement were before this court, and disposed of by its decree, and must therefore be deemed to have been finally settled, and could not afterwards be reconsidered by the circuit court.

When the merits of a case have been once decided by this court on appeal, the circuit court has no authority, without express leave of this court, to grant a new trial, a rehearing, or a review, or to permit new defenses on the merits to be introduced by amendment of the answer. *Ex parte Story*, 37 U. S. 12 Pet. 339 [9: 1108]; *Southard* v. *Russell*, 57 U. S. 16 How. 547 [14: 1052]; *Dubuque & P. R. Co.* v. *Litchfield*, 68 U. S. 1 Wall. 69 [17: 514]; *Stewart* v. *Salamon*, 97 U. S. 361 [24: 1044]; *Gaines* v. *Caldwell* ("*Gaines* v. *Rugg*"), 148 U. S. 228 [37: 432]. In this respect, a motion for a new trial or a petition for a rehearing stands upon the same ground as a bill of review, as to which Mr. Justice Nelson, speaking for this court, in *Southard* v. *Russell*, above cited, said:



Digitized by Google

"Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the court of chancery and House of Lords in England; and we think it founded in principles essential to the proper administration of the law, and to a rea-
268]sonable termination of litigation *between parties in chancery suits." 57 U.S. 16 How. 570, 571 [14: 1062]. So, in *United States* v. *Moorehead*, 66 U. S. 1 Black, 488, 489 [17: 80], Chief Justice Taney said that, in a case brought before this court exercising general jurisdiction in chancery, "the defeated party, upon the discovery of new evidence, may, after a final decree in this court, obtain leave here to file a bill of review in the court below to review the judgment which this court had rendered."

The decree entered by the circuit court presently after receiving the mandate, setting aside its former decree, and adjudging that the letters patent were valid and had been infringed, referring the case to a master for an account of profits, and awarding a perpetual injunction, was, as it purported to be, in conformity with the mandate of this court. But the subsequent orders of the circuit court, entertaining and granting the petition for a rehearing, without previous leave obtained from this court for the filing of such a petition, were irregular and unauthorized, based upon a misunderstanding of the mandate, and in practical, though unintentional, disobedience of the command thereof that further proceedings be had in conformity with the opinion of this court. Upon the record as it stands, a clear case is shown for issuing a writ of mandamus to set aside those orders, and to execute the mandate according to what appears to this court to be its manifest meaning and effect.

Upon the question whether an application for leave to file a petition for a rehearing in the circuit court could and should be entertained by this court, at the present stage of the case, no opinion is expressed, because no such application has been made.

Unless such an application shall be made to this court within twenty days, and shall upon consideration be granted by this court, *an order will be entered that the writ of mandamus issue as prayed for.*

---

## 269] MARGARET M. GIBSON, *Appt.*, v. UNITED STATES.

(See S. C. Reporter's ed. 269-276.)

*Riparian ownership subject to the right of the government to improve navigation—obstruction to use of landing.*

1. Riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard.

2. Obstruction to the use of the landing of a riparian owner, which is merely incidental to the lawful and proper exercise of governmental power in improving navigation, and which is done without coming into physical contact with the land of the person injured or taking any part of it, or throwing back water upon it, or causing contact with it in any way, does not give any right to claim damages from the United States.

[No. 155.]

*Argued January 15, 1897. Decided March 22, 1897.*

APPEAL from a judgment of the Court of Claims in favor of the United States, defendant, in a petition filed by Margaret M. Gibson, claimant, to recover damages because of the construction of a dike by the United States in the Ohio river near Neville island about 9 miles west of the city of Pittsburg. *Affirmed.*

See same case below, 29 Ct. Cl. 18.

Statement by Mr. Chief Justice **Fuller**:

This was a petition to recover damages because of the construction of a dike by the United States in the Ohio river at a point off Neville island, about 9 miles west of the city of Pittsburg. The court of claims made the following findings of fact:

"I. In the year 1885, and before, the claimant was the owner in her own right and in possession of a tract of land containing about 20 acres, situate on Neville island, in the Ohio river, 9 miles below the city of Pittsburg, in the county of Allegheny and state of Pennsylvania.

"II. The claimant's land, at the time of the alleged grievance, was in a high state of cultivation, well improved with a good dwelling house, barn, and other outbuildings. The claimant was in the year 1885, and is now, engaged in market gardening, cultivating and shipping strawberries, raspberries, potatoes, melons, apples, peaches, etc., to the cities of Pittsburg and Allegheny, Pennsylvania, for sale.

"III. The claimant's farm has a frontage of 1,000 feet on the north or main navigable channel of the Ohio river, where the claimant has a landing, which was used in shipping the products from and the supplies to her said farm; that the said farm extends across the said Neville island in a southwesterly direction to the south channel of said Ohio river, which is not navigable; that the said landing is the only one on claimant's farm from which she can ship the products from and supplies to her farm.

"IV. Congress, by the river and harbor [270 acts of July 5, 1884 (23 Stat. at L. 133, 147), and August 5, 1886 (24 Stat. at L. 310, 327), authorized and directed the improvement of the said Ohio river as follows:

" 'Improving the Ohio river: Continuing

---

NOTE.—*As to alluvion or accretion and reliction; right to and ownership of; by what law title to, is determined; rule of division among riparian owners,* —see notes to Kennedy v. Hunt, 12: 859, and St. Clair County v. Lovingston, 23: 59.

*As to right of the United States and the states to shore lands and accretions against piers,* see note to Doe, Hallett, v. Beebe, 14: 35.

*As to what is seashore; how far lands bounded on, extend,*—see note to United States v. Pacheco, 17: 865.

*As to title to water by appropriation; common-law*



Digitized by Google

improvement, six hundred thousand dollars . . . (act 1884).

"Improving the Ohio river: Continuing improvement, three hundred and seventy-five thousand ($375,000) dollars' . . . (act 1886).

"Under said authority Lieut. Col. William E. Merrill, of the engineer corps of the U. S. Army, by the direction of the chief of engineers of the U. S. Army, and the Secretary of War, commenced, June 17, 1885, the construction of a dike 2,200 feet in length to concentrate the water-flow in the main channel of the Ohio river, beginning at a point on said Neville island 400 feet east of the claimant's farm and running in a northwesterly direction with the main or navigable channel of the said Ohio river to the outer point of a bar in said river known as Merriman's bar, contiguous to and extending into the said river from the northwest point of claimant's farm; that the said dike has been completed to, and beyond, the northeastern point of said Merriman's bar.

"V. The construction of said dike by the United States for the purposes aforesaid has substantially destroyed the landing of the claimant, by preventing the free egress and ingress to and from said landing on and in front of the claimant's farm, to the main or navigable channel of said river.

"The claimant is unable to use her landing for the shipment of products from and supplies to her farm for the greater part of the gardening season on account of said dike obstructing the passage of the boats; that she can only use the said landing at a high stage of water. That during the ordinary stage of water the claimant cannot get the products off or the supplies to her farm, without going over the farms of her neighbors to reach another landing.

"VI. The claimant's land was worth $600

---

*rule; rule of mining states,*—see note to Atchison v. Peterson, 22: 414.

*Navigable waters; ownership; tide waters; intrastate water; public right of passage; exercise of the right; legislative power over improvements; right of riparian owner to compensation.*

Navigable waters include all those which afford a channel for useful commerce. Such waters are public highways of common right. Olive v. State, 86 Ala. 88; Carson v. Blazer, 2 Binn. 475, 478, 4 Am. Dec. 463; Elder v. Burrus, 6 Humph. 358; Little Rock, M. R. & T. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; Brown v. Chadbourne, 31 Me. 9, 21, 50 Am. Dec. 641; Albert v. State, 66 Md. 325, 59 Am. Rep. 159; Parsons v. Clark, 76 Me. 476; McManus v. Carmichael, 3 Iowa, 1; Monongahela Bridge Co. v. Kirk, 46 Pa. 112, 84 Am. Dec. 527; Kentucky Lumber Co. v. Green, 87 Ky. 257; Morgan v. King, 35 N. Y. 454; Smith v. Fonda, 64 Miss. 551; Jones v. Pettibone, 2 Wis. 308; Boykin v. Shaffer, 13 La. Ann. 129; Weise v. Smith, 3 Or. 445, 448, 8 Am. Rep. 621; Turner v. Holland, 54 Mich. 300; The Daniel Ball v. United States, 77 U. S. 10 Wall. 557 (19: 999); Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255; United States v. The Montello, 87 U. S. 20 Wall. 430 (22: 391); People v. Gold Run D. & M. Co. 66 Cal. 138, 56 Am. Rep. 80; Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584; McCartney v. Chicago & E. R. Co. 112 Ill. 611; Diedrich v. Northwestern U. R. Co. 42 Wis. 248, 24 Am. Rep. 399; Ross v. Faust, 54 Ind. 471, 23 Am. Rep. 655; Healy v. Joliet & C. R. Co. 2 Ill. App. 438; Chenango Bridge Co. v. Paige, 83 N. Y. 178, 38 Am. Rep. 407.

It is not the ebb and flow of the tide which, as in England, constitutes the usual or, it may be said, any test at all of the navigability of waters, by which we mean their subjection to public use. The test is the adaptability of the waters to the purposes of navigation; whether they are, or in fact have been, used by the public, or are capable of being used, in their natural condition, as highways for commerce; for trade and travel; for the transportation of the products of the country, of its industries, of its fields, forests, or mines, in the customary modes of such transportation. Walker v. Allen, 72 Ala. 456; Broadnax v. Baker, 94 N. C. 675, 681, 55 Am. Rep. 633; Gaston v. Mace, 33 W. Va. 14, 5 L. R. A. 392; St. Louis, I. M. & S. R. Co. v. Ramsey, 53 Ark. 314, 8 L. R. A. 559.

In order that waters may be navigable in the legal sense, commerce must be carried on over them which is of an essentially valuable character. Burrows v. Gallup, 32 Conn. 493, 87 Am. Dec. 186; Neaderhouser v. State, 28 Ind. 257; Woodman v. Pitman, 79 Me. 456; Charlestown v. Middlesex County Comrs. 3 Met. 202; Murdock v. Stickney, 8 Cush. 113, 115; Rowe v. Granite Bridge Corp. 21 Pick. 344.

A traveler for pleasure is as fully entitled to protection in using a public highway, whether by land or by water, as a traveler for business. Attorney General v. Woods, 108 Mass. 436, 11 Am. Rep. 380.

Waters which are capable only of floating rafts and logs are public highways for that purpose. Veazie v. Dwinel, 50 Me. 479; Gerrish v. Brown, 51 Me. 256, 81 Am. Dec. 569; Moore v. Sanborne, 2 Mich. 520, 59 Am. Dec. 209; Thunder Bay River Boom. Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184; Shaw v. Crawford, 10 Johns. 236; Browne v. Scofield, 8 Barb. 239; Morgan v. King, 18 Barb. 277, 30 Barb. 9, 35 N. Y. 454; Pierrepoint v. Loveless, 72 N. Y. 211; United States v. Mississippi & R. R. Boom Co. 3 Fed. Rep. 548; Moore v. Sanborne, 2 Mich. 520, 59 Am. Dec. 209.

It is not necessary that such waters be fit for navigation at all times, but their capacity therefor must recur with regularity. Walker v. Allen, 72 Ala. 456; Little Rock, M. R. & T. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; Thunder Bay River Boom. Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184; Hogg v. Zanesville Canal & Mfg. Co. 5 Ohio, 410; Olson v. Merrill, 42 Wis. 203; Lewis v. Coffee County, 77 Ala. 190, 54 Am. Rep. 55; Smith v. Fonda, 64 Miss. 551; Haines v. Hall, 17 Or. 165, 3 L. R. A. 609.

In order to make a stream floatable, it is not necessary that it should be so at all seasons of the year. It is sufficient if it have that character at different periods with reasonable certainty and for such a length of time as to make it profitable for that purpose. Holden v. Robinson Mfg. Co. 65 Me. 216; Felger v. Robinson, 3 Or. 457.

Small streams capable of floating logs only during a freshet or for a limited portion of the year are not subject to the public easement of floatage. Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439; Lewis v. Coffee County, 77 Ala. 190, 54 Am. Rep. 55; Cardwell v. Sacramento County, 79 Cal. 347; Rowe v. Granite Bridge Corp. 21 Pick. 344; Munson v. Hungerford, 6 Barb. 265; Curtis v. Keesler, 14 Barb. 511; Morgan v. King, 18 Barb. 277, 30 Barb. 9, 35 N. Y. 454; Haines v. Welch, 14 Or. 319; Haines v. Hall, 17 Or. 165, 3 L. R. A. 609.

If, however, such stream is so used without objection for twenty years, it is a public thoroughfare. Stump v. McNairy, 5 Humph. 363, 42 Am. Dec. 437.

It is not essential that waters, in order to be navigable, afford a continuous passage throughout their entire extent for water-craft or logs. Walker v. Allen, 72 Ala. 456; Brown v. Chadbourne, 31 Me. 9, 25, 50 Am. Dec. 641; Morgan v. King, 18 Barb. 277;



Digitized by Google

per acre before the construction of the said dike; that it is now greatly reduced in value (from $150 to $200 per acre) by the obstruc-
271] tion caused "by said dike; that the damage to the claimant's farm exceeds the sum of $3,000.

"VII. Claimant's access to the navigable portion of the stream was not entirely cut off; at a 9-foot stage of the water, which frequently occurs during November, December, March, April, and May, she could get into her dock in any manner; that from a 3-foot stage she could communicate with the navigable channel through the chute; that at any time she could haul out to the channel by wagon.

"VIII. There was no water thrown back on claimant's land by the building of said dike, and that said dike has not itself come into physical contact with claimant's land and has not been the cause of any such physical contact in any other way. In making the improvement the defendants did not recognize any right of property in the claimant, in and to the right alleged to be affected, did not attempt or assume to take private property in and by the construction of the dike, but proceeded in the exercise of a claimed right to improve the navigation of the river."

And upon these findings the court held, as a conclusion of law, that the claimant was not entitled to recover, and dismissed the petition.

The opinion of the court by Weldon, J., discusses the case at length, citing many decisions, and maintains the conclusion on the grounds that the court had no jurisdiction; and that, if it had, there still could be no recovery because the United States were not responsible to claimant for injuries suffered in the use and occupation of her property in consequence of the construction of the works. 29 Ct. Cl. 18.

*Messrs.* **T. H. N. McPherson** and *N. W. Shafer*, for appellant:

The appellant's property, land, was legally

---

Broadnax v. Baker, 94 N. C. 675, 681, 55 Am. Rep. 633; United States v. The Montello, 87 U. S. 20 Wall. 430 (22: 391); Spooner v. McConnell, 1 McLean, 337.

Streams not naturally fitted for floating logs do not become public through improvement by the riparian owner. Wadsworth v. Smith, 11 Me. 278, 26 Am. Dec. 525; Holden v. Robinson Mfg. Co. 65 Me. 215.

The existence of a current is not a test of the navigability of a river; it may be navigable with or without such current. Turner v. Holland, 54 Mich. 300.

Public waters and the soil beneath them are common property. The public not only have the right of navigation, but all other rights incident to ownership. Soliday v. Johnson, 38 Pa. 380.

The open sea is the common property of all nations and cannot be exclusively appropriated. 1 Whart. International Law Dig. § 26; 1 Kent, Com. 26; 2 Grotius, De Jure Belli, chap. 2, § 3; Vattel, Droit des Gens, Chitty's ed. § 280.

The title to all tide-waters and their beds is, in this country, vested in the several states for the use and benefit of the public. Martin v. Waddell, 41 U. S. 16 Pet. 367 (10: 997); Pollard v. Hagan, 44 U. S. 3 How. 212 (11: 565); Howard v. Ingersoll, 54 U. S. 13 How. 381 (14: 189); Bennett v. Bogga, Baldw. 76; Smith v. Maryland, 59 U. S. 18 How. 74 (15: 271); Mumford v. Wardwell, 73 U. S. 6 Wall. 423 (18: 756); Barney v. Keokuk, 94 U. S. 324 (24: 224); McCready v. Virginia, 94 U. S. 391 (24: 248); Roger v. Jones, 1 Wend. 261, 19 Am. Dec. 493; Smith v. Levinus, 8 N. Y. 472; People v. Tibbetts, 19 N. Y. 523; Hudson River R. Co. v. Loeb, 7 Robt. 418; People v. New York & S. I. Ferry Co. 68 N. Y. 71; Towle v. Remsen, 70 N. Y. 303.

Over navigable waters entirely within its borders a state may exercise complete control, subject only to the limitations imposed by virtue of the powers of Congress over commerce. Delaware & H. Canal Co. v. Lawrence, 2 Hun, 163; Hoeft v. Seaman, 6 Jones & S. 62; Groton v. Hurlburt, 22 Conn. 178; Livingston v. Van Ingen, 9 Johns. 507; Bedlow v. New York Floating Dry Dock Co. 112 N. Y. 263, 2 L. R. A. 699; Pollard v. Hagan, 44 U. S. 3 How. 212 (11: 565); Texas & P. R. Co. v. New Orleans, 40 Fed. Rep. 111; United States v. Bain, 3 Hughes, 593.

The public have the right of passage over all streams which afford capacity for that purpose. This right of navigation is paramount to all other rights and interests. Musser v. Hershey, 42 Iowa, 356, 361; Delaware & M. R. Co. v. Stump, 8 Gill & J. 479, 29 Am. Dec. 561; Post v. Munn, 4 N. J. L. 61, 7 Am. Dec. 570; Davis v. Jerkins, 5 Jones, L. 300; Hodges v. Williams, 95 N. C. 331, 59 Am. Rep. 242; Flanagan v. Philadelphia, 42 Pa. 219; Cobb v. Bennett, 75 Pa. 326.

In England the right is paramount to any right of property in the Crown, and the latter cannot make a grant inconsistent with it. Colchester v. Brooke, 7 Q. B. 339, 15 L. J. Q. B. N. S. 59, 9 Jur. 1090; Williams v. Wilcox, 8 Nev. & P. 606, 8 Ad. & El. 314.

By the civil law the public enjoyed a servitude in the banks and shores of navigable waters as appurtenant to the right of passage, and the same is true of states where the principles of that system prevail. 2 Justinian, Inst. tit. 1; Louisiana Civ. Code, 446; Municipality No. 2 v. New Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624; New Orleans v. New Orleans, M. & C. R. Co. 27 La. Ann. 414; O'Fallon v. Daggett, 4 Mo. 343, 29 Am. Dec. 640.

But under the common law it seems now to be settled that the rights of navigators are limited by high-water mark, and that the easement of passage does not include the use of banks and shores for the general purposes auxiliary to navigation. Talbott v. Grace, 80 Ind. 369; The Magnolia v. Marshall, 39 Miss. 109; Bell v. Gough, 23 N. J. L. 624; Chambers v. Ferry, 1 Yeates, 167; Sherlock v. Bainbridge, 41 Ind. 35, 13 Am. Rep. 302; Ensininger v. People, 47 Ill. 384, 95 Am. Dec. 495.

The public right to a landing place cannot be acquired by custom or prescription, according to some decisions. Talbott v. Grace, *supra*; Pearsall v. Post, 20 Wend. 111, 22 Wend. 425; Pearsall v. Hewlett, 20 Wend. 111, 22 Wend. 559; Adams v. Rivers, 11 Barb. 390; Curtis v. Keesler, 14 Barb. 511; Ets v. Daily, 20 Barb. 32; Kelsey v. King, 32 How. Pr. 32; Bloomfield & R. Nat. Gaslight Co. v. Calkins, 62 N. Y. 386.

But a different rule obtains in Massachusetts. Kean v. Stetson, 5 Pick. 492; Coolidge v. Learned, 8 Pick. 504; Boston v. Richardson, 105 Mass. 351, 357. In North Carolina, Askew v. Wynne, 7 Jones, L. 23. In Pennsylvania, Bird v. Smith, 8 Watts, 434, 34 Am. Dec. 488. Also in Maine, Hill v. Lord, 48 Me. 83; Littlefield v. Maxwell, 31 Me. 134, 50 Am. Dec. 653.

The right of navigation is subject to the governmental power to regulate and control it, and to improve rivers and harbors. Zimmerman v. Union Canal Co. 1 Watts & S. 346; Craig v. Kline, 65 Pa. 399, 3 Am. Rep. 632; Chicago v. McGinn, 51 Ill. 266, 2 Am. Rep. 295; Hollister v. Union Co. 9 Conn. 436, 25 Am. Dec. 36.

In the United States, the authority of Congress, under the commercial clause of the Constitution, is paramount. Gibbons v. Ogden, 22 U. S. 9 Wheat. 1 (6: 23); United States v. Coombs, 37 U. S. 12 Pet. 72



Digitized by Google

appropriated; the United States liable under an implied contract; the taking not a tort.

*Pumpelly* v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166 (20: 557).

A serious interruption of the common and necessary use of property may be equivalent to the taking of it, and under the constitutional provisions it is not necessary that the land should be absolutely taken.

Angell, Watercourses, § 465*a*; *Hooker* v. *New Haven & N. Co.* 14 Conn. 146, 36 Am. Dec. 477; *Rowe* v. *Granite Bridge Corp.* 21 Pick. 344; *Canal Appraisers* v. *People, Tibbits*, 17 Wend. 604; *Lackland* v. *North Missouri R. Co.* 31 Mo. 180; *Stevens* v. *Middlesex Canal Proprs.* 12 Mass. 466.

The diversion of water by the government is held to be an exercise of the right of eminent domain, and not trespass or tort.

*Gardner* v. *Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526; *State* v. *Glen*, 7 Jones, L. 321; *Cornelius* v. *Glen*, 7 Jones, L. 512; *Trenton Water Power Co.* v. *Raff*, 36 N. J. L. 325; *Harding* v. *Stamford Water Co.* 41 Conn. 87; *Stein* v. *Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Yates* v. *Milwaukee*, 77 U. S. 10 Wall. 504 (19: 986); *Bowman* v. *Wathen*, 2 McLean, 383; *Haight* v. *Morris Aqueduct Proprs.* 4 Wash. C. C. 607.

The government of the United States may, upon providing just compensation, take the property of a riparian proprietor for the purpose of affording increased facilities for navigation and commerce between states.

Gould, Waters, § 242; *Avery* v. *Fox*, 1 Abb. U. S. 246; *United States* v. *Jones*, 109 U. S. 513 (27: 1015); *Velte* v. *United States*, 76 Wis. 278; Potter's Dwarr. Stat. 393.

It makes no difference as to payment whether corporeal property, as land, or incorporeal, as an easement or a franchise, is taken for public use.

*Armington* v. *Barnet*, 15 Vt. 745, 40 Am. Dec. 705; *Pierce* v. *Somersworth*, 10 N. H. 369; *James River & K. Co.* v. *Thompson*, 3 Gratt. 270; *West River Bridge Co.* v. *Dix*, 47 U. S. 6 How. 507 (12: 535); *White River Turnp. Co.* v. *Vermont C. R. Co.* 21 Vt. 590; *Red River*

---

(9: 1004); Pollard v. Hagan, 44 U. S. 3 How. 212 (11: 565); Smith v. Turner ("Passenger Cases") 48 U. S. 7 How. 283 (12: 702); Veazie v. Moor, 55 U. S. 14 How. 568 (14: 545); Withers v. Buckley, 61 U. S. 20 How. 84 (15: 816); Milnor v. New Jersey R. & Transp. Co. reported only in U. S. Sup. Ct. 16 L. ed. 799; Gilman v. Philadelphia, 70 U. S. 3 Wall. 713 (18: 96); The Daniel Ball v. United States, 77 U. S. 10 Wall. 557 (19: 999); United States v. The Montello, 87 U. S. 20 Wall. 430 (22: 391); Pound v. Turck, 95 U. S. 459 (24: 525); Mobile County v. Kimball, 102 U. S. 691 (26: 238).

In the absence of congressional action the power of the state legislatures is supreme. They may direct the improvement of navigable rivers, or may authorize improvements by individuals and private corporations. Cannon v. New Orleans, 87 U. S. 20 Wall. 577 (22: 417); Huse v. Glover, 15 Fed. Rep. 292; Tewksbury v. Schulenberg, 41 Wis. 584; Lipes v. Hand, 104 Ind. 508; Kellogg v. Union Co. 12 Conn. 7; Chaffe v. Trezevant, 33 La. Ann. 746; Chicago v. McGinn, 51 Ill. 266, 2 Am. Rep. 295; McReynolds v. Smallhouse, 8 Bush, 447; Sinking Fund Comrs. v. Green & B. Rivers Nav. Co. 79 Ky. 73; Carondelet Canal & Nav. Co. v. Parker, 29 La. Ann. 430, 29 Am. Rep. 339; Clay v. Pennoyer Creek Improv. Co. 34 Mich. 204; Benjamin v. Manistee River Improv. Co. 42 Mich. 628; Wilcox v. Paddock, 65 Mich. 23.

An act of a state legislature, imposing reasonable tolls, as a compensation for improving the navigation of a river within its own borders, is constitutional, unless it conflicts with the powers of Congress in actual exercise. Thames Bank v. Lovell, 18 Conn. 500, 46 Am. Dec. 332.

The ordinance of 1787 creating the northwest territory, and providing that the navigable waters shall be common highways and forever free, does not prohibit a state from improving the navigation thereof, and charging a reasonable toll for the increased facilities. Palmer v. Cuyahoga County Comrs. 3 McLean, 226; Huse v. Glover, 119 U. S. 543 (30: 487); Benjamin v. Manistee River Improv. Co. 42 Mich. 628; Sands v. Manistee River Improv. Co. 123 U. S. 288 (31: 149).

Nor did the act admitting Mississippi into the Union as a state by guaranteeing the free navigation of the Mississippi river prohibit that state from improving the river. Withers v. Buckley, 61 U. S. 20 How. 84 (15: 816).

The state may authorize the conversion of an unnavigable into a navigable stream, and the authorized assessment of tolls for the use of the improvement is not unconstitutional or unlawful. Carondelet Canal & Nav. Co. v. Parker, 29 La. Ann. 430, 29 Am. Rep. 339; Wisconsin River Improv. Co. v. Manson, 43 Wis. 255, 28 Am. Rep. 542.

Nor are riparian owners entitled to be compensated for injuries ordinarily incident to such improvements.

The public authorities may build wharves and levees on the banks of the Mississippi, and otherwise improve the navigation thereof, without the consent of the adjacent proprietor, and without making him compensation. Barney v. Keokuk, 94 U. S. 324 (24: 224).

The flooding of land in consequence of a duly authorized improvement of navigation is not *damnum absque injuria* as being properly incidental to an improvement of navigation. Hackstack v. Keshena Improv. Co. 66 Wis. 439.

Authority to improve a stream to make it floatable within the natural flow of the stream gives no power to act outside of the channel of the stream or to interfere with riparian owners. White Deer Creek Improv. Co. v. Sassaman, 67 Pa. 414.

One who owns a towing path is entitled to compensation for obstructions thereby by a commission improving the navigation of the river. Reg. v. Thames & I. Navigation, 5 Ad. & El. 804.

The Connecticut legislature may authorize improvements to the navigation of waterways of the state without reference to remote and consequential damage to land within the state; for instance, diminution of water power. This does not amount to a "taking" of private property, etc., within the Constitution. Holyoke Water Power Co. v. Connecticut River Co. 20 Fed. Rep. 71.

The obstruction or deepening of the waters of a stream which is a public highway, by authority of an act of assembly, is not the subject of a claim of damages by the owner of the adjoining land for an injury done to or destruction of a fording across the stream. Zimmerman v. Union Canal Co. 1 Watts & S. 346.

A statute declaring a river not in full navigable to be a public highway does not make it so if no provision for the compensation of riparian owners is made. Olive v. State, 36 Ala. 88; Pierrepont v. Loveless, 72 N. Y. 211; Morgan v. King, 35 N. Y. 454.

In Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393, diversion of the waters of a nontidal navigable stream for supplying a city, authorized by the legislature, was held unlawful as against riparian owners, for the loss of whose rights the law provided no compensation.



Digitized by Google

*Bridge Co.* v. *Clarksville*, 1 Sneed, 176, 60 Am. Dec. 148; *Crosby* v. *Hanover*, 36 N. H. 404.

This case is *ex contractu* and not *ex delicto*, and the court has jurisdiction.

*Langford* v. *United States*, 101 U. S. 341 (25: 1010); *Hill* v. *United States*, 149 U. S. 593 (37: 862); *United States* v. *Great Falls Mfg. Co.* 112 U. S. 645 (28: 846), 124 U. S. 581 (31: 527).

Appellant's riparian right is an appendant to her land, and cannot be taken for the public use without just compensation.

*Yates* v. *Milwaukee*, 77 U. S. 10 Wall. 497 (19: 984).

This riparian right is property, and valuable, and the owner can be deprived of it only if necessary that it be taken for the public good, upon due compensation.

*Chicago* v. *Laflin*, 49 Ill. 172; *Baltimore & O. R. Co.* v. *Chase*, 43 Md. 38; *Diedrich* v. *Northwestern U. R. Co.* 42 Wis. 248; *Delaplaine* v. *Chicago & N. W. R. Co.* 42 Wis. 214, 226, 24 Am. Rep. 386.

These riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself adjacent to the water.

The foundation of riparian rights is the ownership of the bank or shore. In such ownership they have their origin. They may and do exist though the fee in the bed of the river or lake be in the state.

*Chapman* v. *Oshkosh & M. R. Co.* 33 Wis. 629; *Bowman* v. *Wathen*, 2 McLean, 376; *Duke of Buccleugh* v. *Metropolitan Bd. of Works*, L. R. 5 H. L. 418; *Union Depot Street R. & T. Co.* v. *Brunswick*, 31 Minn. 297, 47 Am. R p. 789; *Lyon* v. *Fishmongers' Co.* L. R. 1 App. Cas. 662.

An injury to riparian rights for public use is a taking for which compensation must be made.

Lewis, Em. Dom. §§ 80–84, and authorities cited; Gould, Waters, §§ 149, 246.

*Mr.* **Joshua Eric Dodge**, Assistant Attorney General, for appellee:

Liability in court for incidental and consequential injuries to private property ought not to exist where, as here, it is obvious no such result was in contemplation of Congress and was not intended to be provided for in the appropriation made.

No actual contract, either express or tacit, exists. The claims all sound in tort.

*Hill* v. *United States*, 149 U. S. 593 (37: 862); *Schillinger* v. *United States*, 155 U. S. 163 (39: 108); *Belknap* v. *Schild*, 161 U. S. 10 (40: 599); *Mills* v. *United States*, 46 Fed. Rep. 788, 12 L. R. A. 673; *McIntyre* v. *United States*, 25 Ct. Cl. 200; *Friend* v. *United States*, 30 Ct. Cl. 94; *Hayward* v. *United States*, 30 Ct. Cl. 219; *Scranton* v. *Wheeler*, 57 Fed. Rep. 803.

On no subject is the law better settled than that to give jurisdiction to the court of claims, there must have been a meeting of minds constituting a contract. The court is excluded from that field of moral or legal obligations, which, though enforceable in form *ex contractu*, are raised by the law in spite of the understanding and intention of the parties, instead of in accordance therewith.

*United States* v. *Smoot*, 82 U. S. 15 Wall. 36 (21: 107); *Louisiana, Folsom*, v. *New Orleans*, 109 U. S. 285 (27: 936); *Schillinger* v. *United States*, 155 U. S. 163 (39: 108); *Jones* v. *United States*, 131 U. S. 1 (33: 90).

The owner of riparian property or rights, either in the submerged soil or in the shore, holds them subject to the right and duty of the government to use, improve, and modify the course or conditions of the water for purposes of navigation.

*Scranton* v. *Wheeler*, 57 Fed. Rep. 803; *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387 (36: 1018); *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635 (25: 336); *Shively* v. *Bowlby*, 152 U. S. 1 (38: 331).

Under the law of Pennsylvania, where the claimant's property in this case is situated, she held title under such conditions of law as to have no right of action for any consequential injury resulting from works in aid or improvement of navigation.

*Pennsylvania R. Co.* v. *Marchant*, 119 Pa. 541, 555; *Shively* v. *Bowlby*, 152 U. S. 1 (38: 331); *Monongahela Nav. Co.* v. *Coons*, 6 Watts & S. 101; *Henry* v. *Pittsburg & A. Bridge Co.* 8 Watts & S. 85; *Susquehanna Canal Co.* v. *Wright*, 9 Watts & S. 9; *Rundle* v. *Delaware & R. Canal Co.* 55 U. S. 14 How. 80 (14: 335); *Branson* v. *Philadelphia*, 47 Pa. 330; *McKeen* v. *Delaware Div. Canal Co.* 49 Pa. 424, 52 Pa. 117; *West Branch & S. Canal Co.* v. *Mulliner*, 68 Pa. 357; *Hoffer* v. *Pennsylvania Canal Co.* 87 Pa. 221.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

All navigable waters are under the control of the United States for the purpose of regu-[272 lating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution. *South Carolina* v. *Georgia*, 93 U. S. 4 [23: 782]; *Shively* v. *Bowlby*, 152 U. S. 1 [38: 331]; *Eldridge* v. *Trezevant*, 160 U. S. 452 [40: 490].

In *South Carolina* v. *Georgia*, a proposed improvement of the Savannah river consisted of the practical closing of one channel around an island and the throwing of water into other channels, to the substantial improvement of the harbor of Savannah. This court held that, in view of the general rule, although structures deemed by Congress to be in aid of navigation might in fact be in obstruction of certain methods of navigation of the particular stream, their construction was, nevertheless, within the Federal power, and Mr. Justice Strong, delivering the opinion of the court, said: "It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build lighthouses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage. If, as we have said, the United States have succeeded to the power and rights of the several states, so far as control over interstate and foreign commerce is concerned, this is not to be doubted. . . . Upon this



Digitized by Google

bject the case of *Pennsylvania* v. *Wheeling & Bridge Co.* 59 U. S. 18 How. 421 [15: 435], instructive. There it was ruled that the ower of Congress to regulate commerce inudes the regulation of intercourse and navi-ation, and consequently the power to deterine what shall or shall not be deemed, in e judgment of law, an obstruction of naviga-on. . . . The case of *Gray* v. *Chicago, & N. R. Co.* (*"The Clinton Bridge"*) 77 U. . 10 Wall. 454 [19: 969], is in full accord ith this decision. It asserts plainly the ower of Congress to declare what is and hat is not an illegal obstruction in a navi-able stream."

273] *In *Shively* v. *Bowlby*, 152 U. S. 1 [38: 31], the leading authorities of the courts of the United States and of most of the states and of Great Britain as to the character of the title to submerged land are considered, and the conclusion announced that the title is in each state, with full power in the state legislature to confer it on individuals, subject at all times to the servitude of the Federal government for regulation and improvement of navigation.

In *Eldridge* v. *Trezevant*, 160 U. S. 452 [40: 490], the doctrine existing in the state of Louisiana that lands abutting on the rivers and bayous were subject to a servitude in favor of the public, whereby such portions thereof as were necessary for the purpose of making and repairing public levees might be taken, in pursuance of law, without compensation, was fully recognized as enforceable notwithstanding the 14th Amendment.

By the established law of Pennsylvania, as observed by Mr. Justice Gray in *Shively* v. *Bowlby*, "the owner of lands bounded by navigable water has the title in the soil between high and low water mark, subject to the public right of navigation, and to the authority of the legislature to make public improvements upon it, and to regulate his use of it."

The Constitution of that state, prior to 1873, provided that no man's property could "be taken or applied to public use without the consent of his representatives and without just compensation being made."

In *Monongahela Nav. Co.* v. *Coons*, 6 Watts & S. 101, plaintiff's mill site was destroyed by the backing up of water by a dam built by a canal company under authority of law for the improvement of navigation, and the supreme court of Pennsylvania held this to be a mere consequential damage resulting from the exercise of the public right to improve navigation; that it was *damnum absque injuria;* and that such flooding and injury did not amount to a taking under the Constitution.

In the opinion of the court it was stated by Chief Justice Gibson:

"It cannot be said that the plaintiff's mill was taken or applied, in any legitimate sense, 274] by the state, or by the company *invested with its power; nor can it be said that he was deprived of it. In the case of *Philadelphia & T. R. Co.* 6 Whart. 25 [36 Am. Dec. 202], the words in the first paragraph were allowed to have their obvious and popular meaning, so as to be restrained to property taken away, and not extended to property injured by an act which did not amount to an assumption of the possession. . . . Still, it is only to a case of taking that the obligation extends; and when a corporation acts by virtue of a constitutional law, it is subject to no other responsibility for acts of consequential damage, than is specially provided for. . . . It is not, therefore, enough to set before us a case of moral wrong, without showing us that we have legal power to redress it. Beyond constitutional restraint or legislative power, there is none but the legislative will, tempered by its sense of justice, which has happily been sufficient, in most cases, to protect the citizen. Compensation has been provided for every injury which could be foreseen, whether within the constitutional injunction or not, in all laws for public works by the state or a corporation, though cases of damage have occurred which could neither be anticipated nor brought within the benefit of the provision by the most strained construction. In one instance, a profitable ferry on the Susquehanna, at its confluence with the Juniata, was destroyed by the Pennsylvania canal; and, in another, an invaluable spring of water, at the margin of the river, near Selinsgrove, was drowned. These losses, like casualties in the prosecution of every public work, are accidental, but unavoidable; and they are but samples of a multitude of others."

Numerous subsequent cases sustain the rule thus laid down, which is, indeed, the general rule upon the subject.

The Pennsylvania Constitution of 1873 contained this additional provision: "Municipal and other corporations and individuals, invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed, by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such *taking, injury, or destruction;"[275 and in *Pennsylvania R. Co.* v. *Marchant*, 119 Pa. 541, it was ruled that this had relation to such injuries to one's property as were the natural and necessary results of the original construction or enlargement of its works by a corporation, and not of their subsequent operation. 153 U. S. 380 [38: 751].

The 5th Amendment to the Constitution of the United States provides that private property shall not "be taken for public use without just compensation." Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power.

The applicable principle is expounded in *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635 [25: 336]. In that case, plaintiff being an owner of lands situated at the intersection of La Salle street, in Chicago, with the Chicago river, upon which it had valuable dock and warehouse accommodations, with a numerous line of steamers accustomed to land at that dock, was interrupted in his use thereof by the building of a tunnel under the Chicago river by authority of the state legislature, in accomplishing which work it was necessary to tear up La Salle street, which precluded plaintiff from access to his property for a considerable time; also to build a coffer dam in the Chicago



Digitized by Google

river, which excluded his vessels from access to his docks; and such an injury was held to be *damnum absque injuria*. This court said, again speaking through Mr. Justice Strong: "But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, p. 542, and notes. The extremest qualification

276] *of the doctrine is to be found, perhaps, in *Pumpelly* v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166 [20: 557], and in *Eaton* v. *Boston, C. & M. R. Co.* 51 N. H. 504 [12 Am. Rep. 147]. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes.

In short, the damage resulting from the prosecution of this improvement of a navigable highway for the public good was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject.

*Judgment affirmed.*

---

A. H. NELSON, Frank J. Cannon, and A. H. Cannon, *Plffs. in Err.*,
v.
RICHARD FLINT.

(See S. C. Reporter's ed. 276-280.)

*Conversation as evidence—collateral security—affidavit—refusal of instruction—10 per cent damages on affirmance.*

1. A conversation between two makers of a note, in the absence of the payee, cannot be proved in their favor against him in an action upon the note.

2. Evidence as to collateral security which, it is claimed, should have been exhausted before bringing action on a note, is not admissible on the part of the defense where there is no suggestion in the answer respecting such security.

3. An affidavit filed with the clerk, but not incorporated in any bill of exceptions, cannot bring into the record evidence of what took place on the trial.

4. Refusal by the trial court to give an instruction presented after the charge was finished, without showing that the matter had not already been fully and satisfactorily explained to the jury, will not warrant a reversal.

5. Ten per cent damages were awarded on an affirmance when the errors alleged were frivolous and the writ of error was sued out for delay.

[No. 196.]

*Argued and Submitted March 3, 1897. Decided March 22, 1897.*

IN ERROR to the Supreme Court of the Territory of Utah to review a judgment of that court affirming the judgment of the District Court of the Fourth Judicial District of that Territory in favor of the plaintiff, Richard Flint, against the defendants, Alfred H. Nelson *et al.*, for the amount of a note executed by them with interest. *Affirmed, with 10 per cent damages.*

See same case below, 10 Utah, 261.

Statement by Mr. Justice **Brewer**:

On June 8, 1892, the defendant in error commenced suit in the district court of the fourth judical district of the territory of Utah for the county of Weber upon a promissory note, of which the following is a copy:

$6,700. Salt Lake City, Utah, April 8, 1891.

On or before the 23d day of April, 1892, without grace, for value received, we or either of us promise to pay to the order of Richard Flint $6,700, negotiable and payable at Ogden, Utah, without defalcation or discount, with interest, at the rate of 10 per cent per annum, from date until paid, both before and after judgment.

Interest payable semi-annually.

Alfred H. Nelson.
Frank J. Cannon.
A. H. Cannon.

The original answer denied that plaintiff was the owner or holder of the note, and alleged generally that it was made without consideration, and that plaintiff wrongfully obtained possession thereof. Subsequently an amendment was filed which stated that the plaintiff had been since about June 19, 1889, the holder and owner of two promissory notes signed by the defendants Nelson and Frank J. Cannon, amounting to $6,700; that he offered to surrender those notes and waive all claim for interest if the makers of those notes would furnish him a new note signed by them and

---

NOTE.—*As to declarations of third persons referred to, evidence against party*, see notes to Clerk v. Russell, 1: 660, and Leeds v. Marine Ins. Co. 4: 286.

*As to parol evidence as to bill or note admissible for what purpose*, see note to Bank of United States v. Dunn, 8: 316.

*As to what particularity in exceptions is necessary in order to a review in appellate court; general exception or objection, when not sufficient*,—see note to Moore v. Bank of Metropolis, 10: 173.



Digitized by Google

heir codefendant in this case, A. H. Cannon; hat in reliance upon such agreement the note ued upon was signed and the plaintiff obtained ossession of it upon a promise to return the old notes, which he had failed to do. This amended answer was met by, in substance, a general denial. Upon a trial before the court and a jury a verdict and judgment were returned 278 and entered *in favor of the plaintiff for the full amount of the note and interest. This judgment was thereafter affirmed by the supreme court of the territory, to reverse which latter judgment of affirmance a writ of error was sued out from this court.

*Mr.* **Abbot R. Heywood** for plaintiffs in error.

*Mr.* **Pliny B. Smith** for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

On the face of the paper the right of the plaintiff to recover is clear. The record does not contain the entire testimony offered on the trial. It cannot, therefore, be said, even if this court were at liberty to examine the testimony, that it was not amply sufficient to sustain the verdict and judgment.

It is alleged that the trial court erred in ruling out evidence of a conversation between Frank J. Cannon and A. H. Cannon in the absence of the plaintiff—a conversation which it was claimed induced A. H. Cannon to sign the note. The mere statement of the proposition carries its own answer. Conversations between two makers of a note, in the absence of the payee, are clearly not binding upon the latter. No representations, true or false, made by one maker of a note to another, no secret understanding between such makers, no inducements offered by one to the other, affect the validity of the instrument in the hands of the payee unless he knew or was chargeable with notice of such facts. The vital question is not what passed between the makers by themselves, but what passed between the payee and any one of the makers.

It is also alleged that there was error in refusing to permit evidence as to certain collateral security, which it is claimed should have been exhausted before an action could be maintained on the note. It is a sufficient reply to this contention that there is no suggestion in 279] the answer of any collateral *security, and the court properly refused to consider any defenses not so presented.

A final matter is this: Frank J. Cannon testified that when he handed this note to plaintiff the latter promised to return the two original notes of $3,200 and $3,500 respectively, amounting in the aggregate to $6,700, which he then held; that he failed to do so, or to cancel such prior notes. The bill of exceptions states that the defendants asked the following instruction:

"If you find that Flint took the note in suit under the representations that he would return it the following day or cancel the old notes, then you must find a verdict for defendants."

Upon which the court made this minute:

"Not handed in until after the instruction had been given.

"This request was not given the court until after the court had instructed the jury; therefore refused."

The instructions which were given are not copied in the record, nor is there anything in the bill of exceptions showing how long after the court had finished its charge to the jury this instruction was asked. It is true that there appears in the transcript, as printed, this affidavit of counsel:

"A. R. Heywood on oath says: 'I handed above request for instruction to judge immediately on his ceasing his own charge to jury, and on his refusal I took on the margin an exception to his refusal.'"

But no such affidavit can be considered by this court. A party cannot by merely filing with the clerk an affidavit, not incorporated in any bill of exceptions, bring into the record evidence of what took place on the trial. So that upon the record as properly prepared we can only consider the question whether error can be adjudged in a refusal by the trial court to give an instruction presented at any time after it has finished its charge, and when it does not appear that the same matter has not already been fully and satisfactorily explained to the jury. Obviously but one answer can be given to this question. It cannot be that after the court has finished its charge, after perhaps the jury have retired to consider of their verdict, and at any time before such verdict is returned, *a party can hand up an [280 instruction to the court and demand as of right that it shall be given to the jury; and then if the court fails to recall the jury, and give such instruction, and it embodies a proposition apparently correct, the judgment must be set aside without any showing as to what the charge of the court really was, or that it did not cover the matter contained in this instruction asked at such late time. It is unnecessary to consider whether the proposition of law as stated therein was correct or not. It is enough to hold that, so far as this record discloses the time and manner in which this instruction was presented, it does not affirmatively appear that it was presented under such circumstances as to demand consideration on the part of the court.

These are all the questions presented. We see no error in the record, and must affirm the judgment.

The defendant in error, plaintiff below, asks this court to add 10 per cent damages, on the ground of the frivolousness of the errors alleged, and because the suing out of the writ of error was for delay. Under clause 2 of rule 23 of this court we think this application should be granted. *The judgment is affirmed, with costs, and 10 per cent damages.*



Digitized by Google

PANAMA RAILROAD COMPANY, *Appt.*,
*v.*
NAPIER SHIPPING COMPANY.

(See S. C. Reporter's ed. 280-290.)

*Entire case, when re-examined—jurisdiction of admiralty—liability of owner of pier for injury to a vessel.*

1. The entire case is open for examination by this court when in the exercise of its supervisory jurisdiction it issues a writ of certiorari to bring up the whole record of the case after an opinion by the circuit court of appeals affirming a decree for damages, although this was the second appeal to that court and the circuit court of appeals may have been limited to the mere question of damages because on a prior appeal it had decided the merits of the case by reversing a decree of dismissal, and had remanded the case for an assessment of damages.
2. A court of admiralty has jurisdiction of a libel against a domestic corporation by a foreign corporation for damage to a vessel in a foreign port while entering a pier, by a dangerous obstruction under water.
3. The owner of a pier is not liable for injury to a vessel while entering a berth at the pier, by a spindle of a sunken dredge the location of which was not known, where he merely assented to the occupation of the berth, and the agent of the vessel, who was acquainted with the danger or put upon inquiry respecting it, assumed the responsibility of providing the vessel with a safe berth.

[No. 102.]

*Argued January 25, 1897. Decided March 22, 1897.*

ON WRIT OF CERTIORARI to the Circuit Court of Appeals for the Second Circuit to review a decree of that court reversing the decree of the Circuit Court of the United States for the Southern District of New York of July 7, 1891, which affirmed *pro forma* the decree of the District Court of the United States for said District dismissing a libel filed in said District Court for damages sustained by the Napier Shipping Company, libellant, through injuries received by its steamer Stroma while lying at the pier of the Panama Railroad Company, respondent, in the port of Colon, Isthmus of Panama; also to review the decree of said Circuit Court of Appeals affirming the decree of the said Circuit Court for the damages sustained by the libellant for the said injuries. *Decree of Circuit Court of July 7, 1891, affirmed*, and cause remanded to that court with directions to dismiss the libel.

See same case below, 42 Fed. Rep. 922, 1 U. S. App. 161, 20 U. S. App. 568.

Statement by Mr. Justice **Brown**:

This was a libel *in personam*, filed in the district court for the southern district of New York, to recover damages sustained by the libellant through injuries received by its steamer Stroma, while lying at the respondent's pier in the port of Colon.

The undisputed facts of the case were substantially as follows: The libellant was a British corporation and owner of the steamer Stroma, and the respondent a New York corporation and the proprietor of certain piers known as piers Nos. 1 and 2 at Colon, in the Isthmus of Panama, and of a slip between those piers. These piers it was accustomed to let to vessels desiring to use the same, and to charge wharfage therefor. Between the piers, which were parallel to each other, was a slip about 135 feet wide, in which there was water to a depth of about 20 feet at the bulkhead, to 30 feet at the end of the pier. Pier No. 2 was about 450 feet in length, covered with a shed, in the sides of which were doors at intervals for the transfer of cargo to and from vessels lying at the pier.

For a few weeks prior to the arrival of the Stroma, respondent had been engaged in dredging the slip, and for this purpose had employed a steam dredge, 60 feet long by 30 feet wide, consisting of a shallow scow, upon which were a steam boiler, a crane operated by machinery and used for hoisting the refuse from the bottom of the slip, and a spindle about 9 feet long, located in the middle of the forward end of the scow, constituting the pivot of the crane. On December 6, 1888, while the dredge was anchored in the slip between the piers, the port was visited by a storm known as a "norther," which was so violent that the vessel foundered and sank in the slip. Respondent secured a wrecking vessel and diver to raise the dredge and to remove it from the slip, operations *for which [282 were begun December 15. The diver located the dredge as lying diagonally across the slip, the corner of the dredge being about 22 feet from pier No. 2; but owing to the turbidness of the water he did not discover the spindle. He also found the crane and boiler detached from the dredge and lying upon the other side toward pier No. 1. He marked the dredge and detached machinery with buoys, located at the end of the crane, at the platform, at the boiler, and at the two ends of the dredge, five buoys in all. Besides the buoys the wrecking boat itself was secured in the slip near the wreck, the head in and the stern towards the sea, with two lines running across to each pier.

The Stroma arrived in Colon about 8 o'clock in the morning of December 31, drawing 11 feet forward and 13 feet aft, and, as she approached the piers, her consignee raised a flag at the end of pier No. 2 to indicate the berth she was to occupy. There was a shed on the pier, and in order to avail herself of the openings in the shed in the discharge of her cargo,

NOTE.—*As to what questions the United States Supreme Court will review on writ of error; bill of exceptions*,—see note to Parks v. Turner, 13: 833.

*As to high seas, meaning of*, see note to United States v. Wiltberger, 5: 37.

*As to what places the jurisdiction of admiralty is confined to*, see note to Allen v. Newberry, 16: 110.

*As to jurisdiction of state and United States courts, as to territory and offenses; ebb and flow of tide, as to criminal and civil jurisdiction*,—see notes to United States v. Bevans, 4: 404, and The Thomas Jefferson, 6: 358.

*As to right to construct wharves; right to charge wharfage; lien for*,—see note to *Ex parte* Easton, 24: 373.



Digitized by Google

the Stroma adjusted herself accordingly. She lay at the pier during the day discharging her cargo, and was there seen and visited by agents of the respondent. At about 6 o'clock in the evening, it was reported that there was something wrong in the engine-room, and upon the engineer going down he heard a rush of water coming into the ship. An investigation disclosed a hole in the bilge of the ship's bottom on the starboard side, punctured by what was afterwards discovered to be the spindle rising from the deck of the sunken dredge. The deck of the dredge was 15 feet under water; the spindle over 7 feet in height, and about 9 inches in diameter. The vessel continued to fill with water and sank. Fifteen days later she was raised, temporarily repaired, and then brought to New York, where full repairs were made. A considerable portion of her cargo was ruined, and other portions damaged.

Upon a hearing in the district court the libel was dismissed (42 Fed. Rep. 922), and upon appeal to the circuit court (in which court the appeal was pending when the act establishing the court of appeals was passed) the 283] decree of *the district court was affirmed *pro forma*, and an appeal taken to the circuit court of appeals, which reversed the decree of the district and circuit courts (1 U. S. App. 161), and remanded the cause to the circuit court for an ascertainment of damages, which were subsequently assessed in the circuit court, and a final decree rendered for $38,861.86. A second appeal was taken to the circuit court of appeals, which, on April 19, 1894, affirmed the decree of the circuit court (20 U. S. App. 568). Whereupon respondent was granted a writ of certiorari from this court.

*Messrs.* **Frederic R. Coudert** and *David Keane* for appellant.

*Messrs.* **Wilhelmus Mynderse** and *Butler, Stillman, & Hubbard* for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

The main question in this case is one of fact, and turns upon the point whether the accident to the Stroma was caused by the negligence of the respondent, or that of the libellant.

1. It is claimed that, upon this hearing, we are limited to the question of damages, for the reason that the writ of certiorari was issued after the decrees of the district and circuit courts, dismissing the libel upon the merits, had been reversed, the case remanded to the circuit court to assess the damages, a final decree of the circuit court for $38,861.86, and a second appeal to the court of appeals, which had pronounced an opinion affirming the decree of the circuit court, although no formal decree seems to have been entered at the time the writ of certiorari was issued. While this writ begins with a recital that "there is now pending" in the circuit court of appeals "a suit in which," etc., we think it is giving it too narrow a construction to hold that it was intended to bring before this court only the question of damages then pending before the circuit court of appeals, particularly in view of the fact that the petition for the writ *of certiorari set forth the facts of the [284 case, and claimed that upon those facts the libel should have been dismissed—making no claim whatever that error had been committed in the assessment of damages. A difference of opinion existed in the court below upon the question of liability, and the writ was granted to review the whole case as on appeal from the second decree of the circuit court, which was contrary to its first decree, and was entered in obedience to the direction of the court of appeals.

If, under such circumstances, this court were powerless to examine the whole case upon certiorari, we should then be compelled to issue it before final decree, whereas, as was recently said in the case of *The Conqueror* [*ante*, 514], it is and generally should be issued only after a final decree. The case of *Pearce* v. *Germania Ins. Co.* ("*The Lady Pike*"), 96 U. S. 461 [24:672], is not in point. In that case there had been an appeal from a decree dismissing the libel, which was reversed by this court, and the cause remanded for an assessment of damages. A second appeal was taken from such assessment, and it was held that the re-examination of the case could not extend to anything decided here upon the first appeal. So in *Ames* v. *Quimby*, 106 U. S. 342 [27:100], it was held that after a new trial had been had, pursuant to the mandate of this court, and a second judgment rendered, no errors other than those committed after the mandate was received below can be considered here. To the same effect are *Roberts* v. *Cooper*, 61 U. S. 20 How. 467 [15:969]; *Wayne County Supers.* v. *Kennicott*, 94 U. S. 498 [24:260]; *Clark* v. *Keith*, 106 U. S. 464 [27:302]; and *Chaffin* v. *Taylor*, 116 U. S. 567 [29:727]. But while the court of appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitation applies to this court, when, in the exercise of its supervisory jurisdiction, it issues a writ of certiorari to bring up the whole record. Upon such writ the entire case is before us for examination.

2. There is no difficulty about the jurisdiction of a court of admiralty in this case So far as concerns the subject-matter of the libel it is covered by the case of *Philadelphia, W. & B. R. Co.* v. *Philadelphia, H. de G. Steam Towboat Co.* 64 U. S. 23 How. 209 [16:433], in which it was held that *the jurisdiction [285 of a court of admiralty extended to an injury received by a vessel by running upon certain piles which had been negligently left in the bed of the Susquehanna river at Havre de Grace. See also *Atlee* v. *Northwestern Packet Co.* 88 U. S. 21 Wall. 389 [22:619], and 2 Brown, Civ. & Adm. Law, 203.

The fact that the cause of action arose in the waters of a foreign port is immaterial. While in some cases it is said that a court of admiralty has jurisdiction of all torts arising upon the high seas, or upon the navigable waters of the United States (*Commercial Transp. Co.* v. *Fitzhugh*, 66 U. S. 1 Black, 574 [17:107]; *Holmes* v. *Oregon & C. R. Co.* 5 Fed. Rep. 77; *The Clatsop Chief*, 8 Fed. Rep. 167), the connection in which those words are found indicate that they were not used restrictively; and the law is entirely well settled,



Digitized by Google

both in England and in this country, that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court. The authorities upon this subject are fully reviewed in an exhaustive opinion by the late Judge Emmons in the case of *The Avon*, Brown, Adm. 170, wherein jurisdiction was taken of a collision occurring upon the Welland canal in Canada. To the same effect are *Smith* v. *Condry*, 42 U. S. 1 How. 28 [11:35]; *The Ticonderoga*, Swab. Adm. 215; *The Griefswald*, Swab. Adm. 430; *The Diana*, Lush. Adm. 539; *The Courier*, Lush. Adm. 451; *The Halley*, L. R. 2 Adm. & Eccl. 3, L. R. 2 P. C. 193; *The Mali Ivo*, L. R. 2 Adm. & Eccl. 356; *The M. Moxham*, L. R. 1 Prob. Div. 43, 107.

Indeed, large numbers of collisions arise upon the Canadian side of the St. Clair, Detroit, and St. Lawrence rivers, which would not be cognizable in our courts, if the general proposition claimed by the appellant were true, since by the treaty between this country and Great Britain the boundary line is located in or near the center of the river.

Had both parties to the libel been foreigners, it might have been within the discretion of the court to decline jurisdiction of the case, though the better opinion is that, even under those circumstances, the court will take cognizance of torts to which both parties are foreigners: at least in the absence of a protest from a foreign consul. *The Maggie Hammond* v. *Moreland* (*"The Maggie Hammond"*), 76 U. S. 9 Wall. 435 [19:772]; *The Belgenland* v. *Jensen*, 114 U. S. 286 355 [29:152]; **The Courier*, Lush. Adm. 541; *The Havana*, 1 Sprague, 402; *The Invincible*, 2 Gall. 29; *The Johann Friederick*, 1 W. Rob. Adm. 35; *The Charkieh*, L. R. 4 Adm. & Eccl. 120; *The Vivar*, L. R. 2 Prob. Div. 29; *The Anne Johanne*, 2 Stuart, Vice Adm. 521; *Thomassen* v. *Whitwell*, 9 Ben. 113; *Chubb* v. *Hamburg-American Packet Co.* 39 Fed. Rep. 431.

3. Was there any negligence on the part of the respondent, or, to state it more accurately, was there any negligence with respect to the libellant, or of which it was entitled to complain?

The owners of the Stroma were represented at Colon by one Andrews, who was acting as the agent for William Warriner, the regular agent of the West India & Pacific Steamship Company, and the consignee at Colon of the Stroma. Learning that the steamer was about to arrive, Andrews wrote to Mr. Abello, the harbor master of the port and the freight agent of the Panama Company, asking him that a berth be assigned to the Stroma, which was expected to arrive in a day or two. In reply, Mr. Abello came to him in person, and, as Abello says, told him the West Indian, also expected, could go to No. 1 wharf, but that he had no berth for the Stroma. Mr. Andrews suggested to him that the seaward end of the north side of No. 2 wharf might be a suitable place, and Abello assented to his putting her there. Andrews admits that he had seen the dredge sink in the slip, but claims that "at the time it sunk it was lying close to No. 1 wharf, to which it had been moored," the distance between the two wharves being about 150 feet. As his office was opposite Abello's, and but a short distance from the dock, he must have known that a diver had been engaged in the work of raising the sunken dredge, although he testifies that he could not say that he saw the diver at work, and did not remember being informed that the dredge was broken into pieces, which were scattered about in several places in the slip. He could hardly have failed to observe that no vessel had been moored on that side of the slip since the dredge sank. He denies that he had seen any of the buoys which had been placed to mark the position of the sunken dredge, and says *that he took [287 it for granted that the railroad company, having had a diver at work on the sunken dredge for several days, knew whether this berth was safe or not; that he relied upon their knowledge for a safe berth, and supposed that the wreck was on the north side of the slip where he saw the dredge sink. It appears, however, that operations for raising the wreck had been progressing for about three weeks prior to the arrival of the Stroma.

The steamer arrived at about 8 o'clock in the morning of December 31, was met by a boat sent out by the agent of the company to direct her to the dock, and was ordered by the man in charge to go to pier No. 2, and find a berth on the north side of the wharf. As the steamer approached, the company's flag was displayed from the corner of the wharf, indicating the position she should take. As she neared the wharf, Andrews spoke to the officer in charge, reminding him of the dredge being there, pointing him in the direction, and then called out to the captain "hug in close to the wharf, and you will clear the wreck." The testimony of the supercargo of the Stroma was that, as the steamer swung along parallel with the pier, Andrews called out to the captain "to be very careful in backing up the dock and not permit the stern of the ship to swing out into the dock, as there was a sunken dredge somewhere up the dock that it might run foul of;" and that similar instructions were given by Mr. Commager, an employee of the railroad company, who was standing on the dock awaiting her arrival.

This testimony is corroborated by Commager himself, who swears that, when he went down to meet the steamer, he reminded Andrews of the danger, saying: "I suppose you have not forgotten about that dredge," pointing out its position, and that Andrews did not answer him, but spoke to some officer of the boat, calling out and reminding him of the dredge being there. This testimony is also corroborated by that of the witness Muller, also an employee of the railroad company, who heard the conversation with Commager. It would appear that at this time the buoys which had been placed to mark the position of the wreck were still visible—at *least four witnesses swore to that effect, [288 and there was practically nothing to contradict them. But as they do not seem to have been at all conspicuous we do not think that negligence can be imputed to anyone for not observing them.

Had the respondent undertaken, through its agent, to provide a berth for the Stroma and see that she was properly moored, it would probably have been responsible for this acci-



Digitized by Google

dent; but it appears that Abello, the company's agent, on being applied to for a berth, merely assented to a suggestion made by Andrews, that the Stroma was a small steamer, and that he could very easily put her on the north side of No. 2 pier, on the other side of the obstruction (meaning thereby the seaward end of the wharf), to which Andrews replied that "if you will do that there will be no objection to your doing so." He further says that, in the same interview, Andrews told him that he had seen the dredge sink; that he had been on the wharf when she had sunk in the morning, and that he had witnessed her going down. Not only had Andrews undertaken himself to bring the ship to a berth, but he admits it to have been the custom of the place for the railroad company to leave the putting of the ship at the berth entirely under the management of the agent of the ship. Under such circumstances, it is clear that Andrews, knowing that the dredge was sunk somewhere in the slip, should have made further inquiries as to its exact location, since from their conversation, and from what Abello knew of Andrews' knowledge, he had a right to assume that Andrews had informed himself of the danger of the Stroma lying there, and of the spot where the dredge was sunk; or, at least, that he would look for the buoys and ascertain for himself.

In all the cases in which wharfingers have been held for casualties of this kind, the vessel has approached the slip in ignorance of the real condition of the bottom, and the respondent has been held liable, upon the theory that it was his duty to furnish a safe berth.

This test is manifestly inapplicable where the agent of the vessel is already acquainted with the danger, and assumes the responsibility of providing her with a safe berth. In this 289]case *there was no misrepresentation or concealment, and if Abello did not point out the precise location of the dredge, it was evidently because he supposed, and had a right to suppose, that Andrews knew it already, or would make further inquiries if he deemed it necessary. It is altogether probable that both parties assumed that the Stroma, being a small steamer, drawing only 13 feet of water, when there was 22 feet of clear water above the deck of the dredge, could safely lie inside, if not immediately over, the dredge, and that both overlooked the existence of the spindle; but if Andrews was apprised of the danger which the Stroma might incur by lying there, it is scarcely just to impose a liability upon the respondent for the consequences of the spindle—the existence of which did not appear to have been known either to Andrews or to Abello, and which, if known, neither party had considered of sufficient importance to specially provide against. It would doubtless have been more prudent for Abello to have informed Andrews fully and explicitly of the danger he was incurring, but we think that, under the circumstances, he discharged his legal obligation.

As the diver, who was sent down to locate and buoy the dredge, never discovered the spindle, owing to the extreme turbidness of the water, it is difficult to see how negligence can be imputed to the respondent for not having warned the master of the steamer specially against it. Indeed, so little appears to have been known about it that, when a consultation was called, after the accident occurred, at which Mr. Andrews and Mr. Dennis, an associate superintendent of the respondent, took part, no one of them was able to surmise what had caused the disaster—the general opinion seeming to be that the Stroma had settled upon a pile, or a piece of machinery dropped by a Spanish steamer. No one suspected that the dredge had caused the damage, until the diver and surveyors on the following day reported the fact. If, as we have already found, Mr. Andrews was either apprised of, or put upon inquiry as to, all the facts with regard to the location of the sunken dredge, respondent cannot be charged with negligence because it did not warn him specially against *the spindle, since it [290 had not been informed of its existence by the diver, who does not seem to have been guilty of any negligence in not discovering it, and for whose negligence it is at least doubtful whether respondent would have been liable.

Inasmuch as we are of opinion that the circuit court of appeals was in error in holding the respondent liable, *the decree of the Circuit Court of July 7, 1891, must be affirmed*, and the cause remanded to that court, with directions to dismiss the libel.

---

## UNITED STATES, *Appt.*,
*v.*
## TRANS-MISSOURI FREIGHT ASSOCIATION.

(See S. C. Reporter's ed. 290-374.)

*Appeal when not prevented by dissolution of association—stipulation—jurisdictional amount—contract between competing railroads as to traffic rates—commerce act—debates in Congress—combinations—act of July 2, 1890—unlawful restraints and monopolies—contract in restraint of trade—common knowledge—right of railroad company—public policy—combination in violation of law—agreement to restrain commerce—retroactive effect of statute—action for dissolution of unlawful combination—injunction.*

1. The voluntary dissolution of an association of common carriers after a decree dismissing a suit

---

NOTE.—*As to jurisdiction of United States Supreme Court dependent on amount; interest added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy,*—see note to Gordon v. Ogden, 7: 592.

*As to where an illegal combination is proved, declarations of one about the enterprise are evidence against conspirators*, see note to Lincoln v. Claflin, 19: 106.

*As to construction of statute, according to purpose for which it was passed*, see note to United States v. Saunders, 22: 736.

*As to provisos in statutes; construction and interpretation*,—see note to United States v. Dickson, 10: 689.

*That popular and received import of words fur-*



Digitized by Google

in equity seeking such dissolution and asking that defendants be enjoined from continuing in a like combination, and from further conspiring, agreeing, combining, or acting together to maintain rates of freight, does not prevent this court from taking cognizance of an appeal and deciding the case on its merits, where the judgment of this court is sought upon the legality of their agreement and defendants claim it to be legal and necessary, and on dissolving such association entered into and acted upon another similar agreement.

2. Where parties have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law, and the jurisdiction of the court has attached by the filing of a bill to restrain such or any like action under a similar agreement, and a trial has been had and judgment entered, the appellate jurisdiction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit.

3. A stipulation between the parties, while not controlling as to the amount in controversy on appeal, may be regarded in a particular case with other facts appearing in the record as sufficient proof of the amount in controversy to sustain the jurisdiction of this court.

4. The amount involved on an appeal exceeds $1,000 where the bill seeks a dissolution of an association of common carriers for the regulation of rates, when those rates exceed $1,000 per day, and the carriers claim that such an association or something similar thereto is necessary to the prosperity, if not the life, of each company.

5. A contract between competing railroads relating to traffic rates for the transportation of articles of commerce between the states, the direct effect of which is to produce a restraint of trade or commerce, is within the provision of the act of Congress of July 2, 1890, declaring that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is illegal.

6. Competing and nonconnecting railroads are not authorized by the commerce act to make an

---

*nishes rules of interpretation in law as well as in public and social transactions; exceptions and qualifications; accustomed sense and usage,*—see note to Millard v. Lawrence, 14: 925.

*As to when "may" means "must" or "shall," when a power for public purposes is conferred, a duty arises to execute that power,*—see note to Minor v. Mechanics' Bank, 7: 47.

*Illegal contracts; monopolies; restraint of trade; trade combinations; corporate trusts and combinations; stockholding corporations.*

Whatever tends to injustice or oppression, restraint of liberty, commerce, and natural or legal right; whatever tends to the obstruction of justice, or to the violation of a statute; and whatever is against good morals, when made the object of a contract,—is against public policy, and therefore void, and not susceptible of enforcement. 9 Am. & Eng. Enc. Law, 880, citing Smith v. Arnold, 106 Mass. 269; Durgin v. Dyer, 68 Me. 143; Burkholder v. Beetem, 65 Pa. 496; Pierce v. Evans, 61 Pa. 415; Bank of United States v. Owens, 27 U. S. 2 Pet. 527 (7: 506); Bishop v. Palmer, 146 Mass. 469, 474.

A contract may be illegal though fair on its face. Riley v. Jordan, 122 Mass. 231.

The object of a contract may be against public policy so as to render it void, though the contracting parties may have had no criminal or unlawful *animus*. Saratoga County Bank v. King, 44 N. Y. 87.

Though a party imposed upon may have relief against a wrong-intending party, yet the object of the contract, if against public policy, cannot be achieved. Quirk v. Thomas, 6 Mich. 76; Suit v. Woodhall, 113 Mass. 391; Wright v. Crabbs, 78 Ind. 487; Harrington v. United States ("The Distilled Spirits") 78 U. S. 11 Wall. 356 (20: 167); Hanauer v. Doane, 79 U. S. 12 Wall. 342 (20: 439).

A contract void against public policy because inhibited by statute does not become valid by reason of the subsequent repeal of the statute. It can neither be cured by a later statute nor by a supplemental agreement made after the repeal, by which the promise first given without lawful consideration is sought to be renewed. Banchor v. Mansel, 47 Me. 58; Robinson v. Barrows, 48 Me. 186; Webber v. Howe, 36 Mich. 150, 24 Am. Rep. 590; Ludlow v. Hardy, 33 Mich. 690; Anding v. Levy, 57 Miss. 51, 34 Am. Rep. 435; Decell v. Lewenthal, 57 Miss. 331, 34 Am. Rep. 449; Gilliland v. Phillips, 1 S. C. 152; King v. Winants, 71 N. C. 469, 17 Am. Rep. 11, and 73 N. C. 563; Wilson v. Bozeman, 48 Ala. 71; Cate v. Blair, 6 Coldw. 639; Pierce v. Kibbee, 51 Vt. 559; Everingham v. Meighan, 55 Wis. 354; Petrel Guano Co. v. Jarnette, 25 Fed. Rep. 675.

An agreement in general or total restraint of trade is void, although it may be founded on a legal and valuable consideration. An agreement not to carry on a certain business anywhere is invalid, whether it be by parol or speciality, or whether it be for a limited or unlimited time. Story, Cont. § 650; Mitchel v. Reynolds, 1 P. Wms. 181, 190; Homer v. Ashford, 3 Bing. 323; Pierce v. Fuller, 8 Mass. 223, 5 Am. Dec. 102; Nobles v. Bates, 7 Cow. 307; Morris v. Colman, 18 Ves. Jr. 437; Hinde v. Gray, 1 Man. & G. 195; Alger v. Thacher, 19 Pick. 51, 31 Am. Dec. 119; Chappell v. Brockway, 21 Wend. 159; Dunlop v. Gregory, 10 N. Y. 244, 61 Am. Dec. 742; Hilton v. Eckersley, 6 El. & Bl. 47; Rousillon v. Rousillon, L. R. 14 Ch. Div. 351; Dean v. Emerson, 102 Mass. 480; Ross v. Sadgbeer, 21 Wend. 166.

Contracts in partial restraint of trade, limited as to time and territory, founded on a reasonable consideration confined to particular persons, are valid. Rannie v. Irvine, 7 Man. & G. 976; Chappel v. Brockway, 21 Wend. 157; Hartley v. Cummings, 5 C. B. 247; Bunn v. Guy, 4 East. 190; Pierce v. Woodward, 6 Pick. 206; Perkins v. Lyman, 9 Mass. 522; Hayward v. Young, 2 Chit. 407; Mallan v. May, 11 Mees. & W. 653; Wickens v. Evans, 3 Younge & J. 318; Lawrence v. Kidder, 10 Barb. 641; Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 199; Dean v. Emerson, 102 Mass. 480; Richardson v. Peacock, 33 N. J. Eq. 597; Guerand v. Dandelet, 32 Md. 561, 3 Am. Rep. 164; Warfield v. Booth, 33 Md. 63; Lange v. Werk, 2 Ohio St. 519.

All combinations between merchants, speculators, or any class of men to elevate or depress the market are injurious to the public interest and in restraint of trade. When such a purpose is apparent in a contract, it strikes the agreement with nullity. Fairbank v. Leary, 40 Wis. 637; Wiggins Ferry Co. v. Ohio & M. R. Co. 72 Ill. 360; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666.

When several corporations combine to do certain business, under the general management of a committee, which, representing all the corporations, is to have charge of the property, machinery, etc., of all; and when the profits thus earned are to be divided between the parties to the combination,—they thus constitute a partnership of corporations, not a mere "traffic arrangement." Such contract of partnership is *ultra vires* and void, unless duly authorized by statute. Mallory v. Hanaur Oil Works, 86 Tenn. 598; Grain Elevator Co. v. Memphis & C. R. Co. 85 Tenn. 709; Thomas v. West Jersey R. Co. 101



Digitized by Google

agreement of maintenance of rates and the curbing of competition.

7. Debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body.

8. All combinations in restraint of trade or commerce are prohibited by the act of Congress of July 2, 1890, whether they are in the form of trusts or in any other form whatever.

9. The above-mentioned act of July 2, 1890, covers and was intended to cover common carriers by railroad.

10. The words "unlawful restraints and monopolies," in the title of the act of Congress of July 2, 1890, do not show that the purpose of the act was to include only contracts which were unlawful at common law, but refer to and include those restraints and monopolies which are made unlawful in the body of the act.

11. The term "contract in restraint of trade," as used in the act of Congress of July 2, 1890, does not refer only to contracts which were invalid at common law, but includes every contract in restraint of trade, and is not limited to that kind of a contract which is in unreasonable restraint of trade.

12. It is a matter of common knowledge that agreements as to rates have been continually made of late years between railroad companies, and that complaints of each company in regard to the violation of such agreements by its rivals have been frequent and persistent.

13. The right of a railroad company to charge reasonable rates does not include the right to enter into a combination with competing roads to maintain reasonable rates.

14. The public policy of the government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the law-making power speaks on a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts.

15. A contract or combination made in violation of a law is void, whatever may have been there-

---

U. S. 71 (25: 950); Whittenton Mills v. Upton, 10 Gray, 582, 71 Am. Dec. 681.

A corporation can exercise no other powers than such as are specifically granted, or such as are necessary for carrying into effect the powers granted. Vandall v. South San Francisco Dock Co. 40 Cal. 83; Thomas v. West Jersey R. Co. 101 U. S. 71 (25: 950); Oregon R. & Nav. Co. v. Oregonian R. Co. 130 U. S. 1 (32: 837); Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24 (35: 55); Morawetz, Priv. Corp. § 816.

A contract between corporations organized to distribute and furnish water to consumers in a county and city, one of which owns a supply of water and a pipe line ending at the city limits, and the other a distributing plant within the city, for co-operation in supplying water to the city and providing a method of determining the price of water, is not in violation of public policy as a monopoly for its sale, as the California Constitution reserves to municipal corporations the power of regulating water rates. San Diego Water Co. v. San Diego Flume Co. 108 Cal. 549, 29 L. R. A. 889.

A patentee may secure and protect his monopoly in any lawful way, by suit against infringers, by purchase of conflicting devices, by compromise or arrangements with competitors when infringements may be doubtful, and may contract with a rival to secure it in the monopoly of the manufacture which the patent affects. Bonsack Mach. Co. v. Smith, 70 Fed. Rep. 383, 78 Pat. Off. Gaz. 963.

Although there may be no direct constitutional provisions against a monopoly, yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the Bill of Rights the 1st section of which declares "that no man or set of men is entitled to the exclusive public emoluments or privileges from the community," to render them void. 4 Bac. Abr. 764, tit. *Monopoly;* 4 Bl. Com. 160; 3 Coke, Inst. 181; Butchers' Benevolent Asso. v. Crescent City L. S. L. & S. H. Co. ("Slaughter House Cases") 83 U. S. 16 Wall. 102 (21: 417).

A manufacturing corporation which instead of manufacturing its product and disposing of it to the public on what might be fair competitive prices, becomes a party to a combination in part at least designed to create a monopoly and exact from the public prices which could not be otherwise obtained, is liable to have its charter vacated and annulled for such subversion of the object for which it was created. People v. North River Sugar Ref. Co. 54 Hun, 354, 5 L. R. A. 386.

An agreement between corporations engaged in the manufacture of cotton-seed oil, to select a committee composed of representatives from each corporation, and to turn over to this committee the properties and machinery of each company, to be managed and operated for a specified term by the committee, for the common benefit, the profits and losses to be shared in agreed proportions, is not a mere "traffic arrangement," but a contract of partnership which is *ultra vires* and consequently void so far as it is unexecuted, even though it be authorized by both shareholders and directors. Mallory v. Hanaur Oil Works, 86 Tenn. 598.

A contract between an individual and three manufacturers under several patents, forming a combination of the parties with a view to regulate competition between the parties to it in the sale of the particular commodity which they severally make, is a contract for a lawful purpose, where it does not refer to an article of prime necessity, to a staple of commerce, or to a merchandise to be bought or sold on the market. Central Shade Roller Co. v. Cushman, 143 Mass. 353.

An agreement between several commercial firms, by which they bound themselves for the term of three months not to sell any India cotton bagging, except with the consent of a majority of their number, was held unlawful in India Bagging Asso. v. Kock, 14 La. Ann. 164. Other cases that may be properly cited in connection with this as being in support of the general principle therein applied, although the particular facts involved in them are different, are Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 282; Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 173; Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190.

A contract by which a railroad company agreed that an elevator company should, in consideration of the erection of an elevator, have the handling of all through grain brought by the railroad company to Dubuque, and receive a fixed price therefor, is not repugnant to the commercial power of Congress nor to public policy. Dubuque & S. C. R. Co. v. Richmond, 86 U. S. 19 Wall. 584 (22: 173).

Any agreement between large dealers, meant to control the market and obtain exorbitant prices, is an unlawful conspiracy against trade and void. Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Fairbanks v. Leary, 40 Wis. 637; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666, 672; Collins v. Locke, L. R. 4 App. Cas. 674; Western U. Teleg.



Digitized by Google

tofore decided by the courts to have been the public policy of the country on the subject.

16. An agreement between railroad companies "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local," is by its necessary effect an agreement to restrain trade or commerce within the meaning of the act of Congress of July 2, 1890, no matter what the intent was on the part of those who signed it.

17. Retroactive effect is not given to a statute making combinations in restraint of trade illegal, by applying the statute to a continuation, after its passage, of a pre-existing contract.

18. The United States is authorized by § 4 of the act of July 2, 1890, to bring an action for the dissolution of an unlawful combination of carriers in violation of such act, and for an injunction against continuing such a combination.

19. A remedy by injunction for the protection of interstate commerce may be provided by Congress as more efficient than any other civil remedy.

[No. 67.]

*Argued December 8, 9, 1896. Decided March 23, 1897.*

APPEAL from a decree of the United States Circuit Court of Appeals for the Eighth Circuit affirming a decree of the Circuit Court of the United States for the District of Kansas, First Division, dismissing a suit in equity brought by the United States as complainant against the Trans-Missouri Freight Association *et al.*, for the purpose of having an agreement between the defendant railroad companies for mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic set aside and declared illegal and void, and to have the association dis-

---

Co. v. Chicago & P. R. Co. 86 Ill. 246, 29 Am. Rep. 23; Western U. Teleg. Co. v. American U. Teleg. Co. 65 Ga. 160, 38 Am. Rep. 781; Wiggins Ferry Co. v. Ohio & M. R. Co. 72 Ill. 360.

All contracts entered into in violation of the Illinois act of June 11, 1891, denouncing trusts and combinations in restraint of trade, are absolutely void. American Strawboard Co. v. Peoria Strawboard Co. 65 Ill. App. 502.

A combination between independent manufacturers engaged in making and selling under different patents and in various forms an extensively used article, by which a corporation is formed to which the legal title to the several patents is assigned, while the assignors are vested with the exclusive right to manufacture and sell under their own patents, but must sell at uniform prices and upon the same terms without respect to cost or merits of their respective articles, and are strictly forbidden to manufacture or sell any other style or kind,—is illegal as against sound public policy, although it involves patents and patented articles only. National Harrow Co. v. Hench, 76 Fed. Rep. 667, 76 Pat. Off. Gaz. 2011.

The uniting of corporations into a particular consolidation or partnership, not authorized by their charters or effected under statutes in reference to consolidation of corporations, is *ultra vires* and warrants the forfeiture of their corporate existence.

Such combinations have frequently been condemned by courts as unlawful and against public policy. Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Alger v. Thacher, 19 Pick. 51, 31 Am. Dec. 119; Hannah v. Fife, 27 Mich. 172; Hooker v. Vandewater, 4 Denio, 349, 47 Am. Dec. 258; Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 282; Hoffman v. Brooks, 11 Cin. L. Bull. 258; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 672; Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 166.

The possibility that other business enterprises in the same pursuit may be set on foot to counteract the effect of a combination to control the market in a commodity, will not relieve such combination from illegality. People v. North River Sugar Ref. Co. 54 Hun, 354, 5 L. R. A. 386.

The organization of a corporation for the purpose of controlling the manufacture and trade in matches, by getting all manufacturers of matches to enter into a combination, giving it the whole control of the business, and by buying out all others who might be competitors, is an unlawful enterprise, being an attempt to create a monopoly. Richardson v. Buhl, 77 Mich. 632, 6 L. R. A. 457.

Public policy encourages fair dealing, honest thrift, and enterprise, and is opposed to monopolies and combinations, because unfriendly to such thrift and enterprise; and it declares all combinations whose object is to destroy or impede free competition in business as utterly void. Bennett, J., in Anderson v. Jett, 89 Ky. 375, 6 L. R. A. 390.

A trust in the form of a stockholding corporation has also been held illegal, and the American decisions are nearly unanimous to the effect that in the absence of express legislative permission a corporation cannot purchase and hold stock in other corporations. People, Peabody, v. Chicago Gas Trust Co. 130 Ill. 268, 8 L. R. A. 497; Valley R. Co. v. Lake Erie Iron Co. 46 Ohio St. 44, 1 L. R. A. 413; Central R. Co. v. Pennsylvania R. Co. 31 N. J. Eq. 475; Franklin Co. v. Lewiston Sav. Inst. 68 Me. 43, 28 Am. Rep. 9; Central R. Co. v. Collins, 40 Ga. 582; Franklin Bank v. Commercial Bank, 36 Ohio St. 354, 38 Am. Rep. 594; Millbank v. New York, L. E. & W. R. Co. 64 How. Pr. 20; Talmage v. Pell, 7 N. Y. 328; Mechanics' & W. Mut. Sav. Bank v. Meriden Agency Co. 24 Conn. 159; Berry v. Yates, 24 Barb. 200; Sumner v. Marcy, 3 Woodb. & M. 105; Haselhurst v. Savannah, G. & N. A. R. Co. 43 Ga. 13; State, Memphis, v. Butler, 36 Tenn. 614; Buckeye Marble & F. Co. v. Harvey, 92 Tenn. 115, 18 L. R. A. 258; Pierson v. McCurdy, 33 Hun, 520; New Orleans, F. & H. S. S. Co. v. Ocean Dry Dock Co. 28 La. Ann. 178, 26 Am. Rep. 90.

The following articles have been held to be of such general importance that an attempt to control their production is illegal: *Coal*, Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 173; Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190. *Gas*, Gibbs v. Consolidated Gas Co. 130 U. S. 408 (32: 964); People, Peabody, v. Chicago Gas Trust Co. 130 Ill. 268, 8 L. R. A. 497; Chicago Gaslight & C. Co. v. People's Gaslight & C. Co. 121 Ill. 530. *Matches*, Richardson v. Buhl, 77 Mich. 632, 6 L. R. A. 457. *Lumber*, Santa Clara Valley Mill & L. Co. v. Hayes, 76 Cal. 387. *Cotton bagging*, India Bagging Asso. v. Kock, 14 La. Ann. 164. *Butter*, Chapin v. Brown, 83 Iowa, 156, 12 L. R. A. 428. *Grain*, Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171. *Salt*, Clancey v. Onondaga Fine Salt Mfg. Co. 62 Barb. 395. *Alcohol*, State v. Nebraska Distilling Co. 29 Neb. 700. *Candles*, Emery v. Ohio Candle Co. 47 Ohio St. 320. *Milk*, Chicago Milk Shippers' Asso. v. Ford, 4 Nat. Corp. Rep. 300. *Preserves*, American Preservers' Trust v. Taylor Mfg. Co. 46 Fed. Rep. 152, *Cloth*, Hilton v. Eckersley, 6 El. & Bl. 47. *Grain bags*, Pacific Factor Co. v. Adler, 90 Cal. 110. *Harrows*, Strait v. National Harrow Co. 18 N. Y. Supp. 234.



Digitized by Google

solved. *Reversed*, and case remanded to the circuit court for further proceedings.

See same case below, 58 Fed. Rep. 440, 19 U. S. App. 36, 24 L. R. A. 73, 4 Inters. Com. Rep. 448.

Statement by Mr. Justice Peckham:

On the 2d of July, 1890, an act was passed by the Congress of the United States, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies" (26 Stat. at L. 209, chap. 647; Rev. Stat. Supp. p. 762).

The act is given in full in the margin.†

292]*On the 15th day of March, 1889, all but three of the defendants, the railway companies named in the bill, made and entered into an agreement by which they formed themselves into an association to be known as the "Trans-Missouri Freight Association," and they agreed to be governed by the provisions contained in the articles of agreement.

The memorandum of agreement entered into between the railway companies named therein stated, among other things, as follows: "For the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local, the subscribers do hereby form an association to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions:

"Article 1.

"The traffic to be included in the Trans-Missouri Freight Association shall be as follows:

*"1. All traffic competitive between [293 any two or more members hereof, passing between points in the following described territory: Commencing at the Gulf of Mexico, at the 95th meridian; thence north to the Red river; thence *via* that river to the eastern boundary line of the Indian territory; thence north by said boundary line and the eastern line of the state of Kansas to the Missouri river at Kansas City; thence *via* the said Missouri river to the point of intersection of that river with the eastern boundary of Montana; thence *via* the said eastern boundary line to the international line—the foregoing to be known as the 'Missouri river line'—thence *via* said international line to the Pacific coast; thence *via* the Pacific coast to the international line between the United States and Mexico; thence *via* said international line to the Gulf of Mexico; and thence *via* said gulf to the point of beginning, including business between points on the boundary line as described.

*"2. All freight traffic originating [294 within the territory as defined in the 1st section when destined to points east of the aforesaid Missouri river line."

Certain exceptions to the above article are then stated as to the particular business of several railway companies, which was to be regarded as outside and beyond the provisions of the agreement.

Article 2 provided for the election of a chairman of the organization and for meetings

†An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled.*

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Sec. 5. Whenever it shall appear to the court before which any proceeding under § 4 of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in § 1 of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sec. 8. That the word "person" or "persons," wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country.

Approved July 2, 1890.



Digitized by Google

at Kansas City, or otherwise, as might be provided for. By § 2 of that article each road was to "designate to the chairman one person who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings, when possible, and shall represent his road, unless a superior officer is present. If unable to attend he shall send a substitute with written authority to act upon all questions which may arise, and the vote of such substitute shall be binding upon the company he represents."

Section 3 provides that "a committee shall be appointed to establish rates, rules, and regulations on the traffic subject of this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ the question at issue shall be referred to the managers of the lines parties hereto; and if they disagree it shall be arbitrated in the manner provided in article 7."

By § 4 it was provided that "at least five days' written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates or change in any rule or regulation governing freight traffic; eight days in so far as applicable to the traffic of Colorado or Utah."

Sections 5, 6, 7, 8, 9, 10, and 11 of article 2 read as follows:

"Sec. 5. At each monthly meeting the association shall consider and vote upon all changes proposed, of which due notice has been given, and all parties shall be bound by the decisions of the association, as expressed, unless 295] then and there* the parties shall give the association definite written notice that, in ten days thereafter, they shall make such modification notwithstanding the vote of the association: *Provided*, That if the member giving notice of change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favors the same, and if, in the judgment of such majority, the rate so made affects seriously the rates upon other traffic, then the association may, by a majority vote, upon such other traffic put into effect corresponding rates to take effect on the same day. By unanimous consent, any rate, rule, or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

"Sec. 6. Notwithstanding anything in this article contained, each member may, at its peril, make at any time, without previous notice, such rate, rule, or regulations as may be necessary to meet the competition of lines not members of the association, giving at the same time notice to the chairman of its action in the premises. If the chairman, upon investigation, shall decide that such rate is not necessary to meet the direct competition of lines not members of the association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate, it shall be reported to the association, and if the association shall decide by a two-thirds vote that such rate was not made in good faith to meet such competition, the member offending shall be subject to the penalty provided in § 8 of this article. If the association shall decide by a two-thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

"Sec. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the association: *Provided, however*, That when one road has a proprietary interest in another, the divisions between such roads shall be *what they may [296 elect, and shall not be the property of the association: *Provided, further*, That, as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms.

"Sec. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine, by a majority vote (the member against whom complaint is made to have no vote), what, if any, penalty shall be assessed, the amount of each fine not to exceed $100, to be paid to the association. If any line party hereto agrees with a shipper, or anyone else, to secure a reduction or change in rates, or change in the rules and regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, and traffic thereby secured, such action shall be reported to the managers, who shall determine as above provided what, if any, penalty shall be assessed.

"Sec. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said company that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed.

"Sec. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as fines.

"Sec. 11. Any member not present or fully represented at roll call of general or special meetings of the freight association, of which due and proper notice has been given, shall be fined $1, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented."

Articles 3, 5, 6, and 7 contain appropriate provisions for the carrying out of the purposes of the agreement, but it is not necessary to here set them forth in detail.

*Article 4 reads as follows: [297

"Article 4.

"Any wilful underbilling in weights, or billing of freight at wrong classification, shall be considered a violation of this agreement; and the rules and regulations of any weighing association or inspection bureau, as established by it



Digitized by Google

or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any wilful violation of them shall be subject to the penalties provided herein."

Article 8 provides that the agreement should take effect April 1, 1889, subject thereafter to thirty days' notice of a desire on the part of any line to withdraw from the same.

On the 6th of January, 1892, the United States, as complainant, filed in the circuit court of the United States for the district of Kansas, through its United States attorney for that district, and under the direction of the attorney general of the United States, its bill of complaint against the Trans-Missouri Freight Association, named in the agreement above mentioned, the Atchison, Topeka, & Santa Fé Railroad Company, and some seventeen other railroad companies, the officers of which had, it was alleged, signed the agreement above mentioned in behalf of and for their respective companies. The bill was filed by the government for the purpose of having the agreement between the defendant railroad companies set aside and declared illegal and void, and to have the association dissolved.

It is alleged that the defendant railroad corporations signing the agreement were at that time and ever since have been common carriers of all classes and kinds of freight and commodities which were commonly moved, carried, and transported by railroad companies in their freight traffic, and at all such times have been and then were continuously engaged in transporting freight and commodities in the commerce, trade, and traffic which is continuously carried on among and between the several states of the United States, and among and [298] *between the several states and territories of the United States, and between the people residing in, and all persons engaged in trade and commerce within and among and between the states, territories, and countries aforesaid; that each of the defendants was, prior to the 15th day of March, 1889, the owner and in the control of, and that they were respectively operating and using, distinct and separate lines of railroad fitted up for carrying on business as such carriers in the freight traffic above mentioned, independently and disconnectedly with each other, and that said lines of railroad had been and then were the only lines of transportation and communication engaged in the freight traffic between and among the states and territories of the United States having through lines for said freight traffic in all that region of country lying to the westward of the Mississippi and Missouri rivers and east of the Pacific ocean; and these lines of railroad furnish to the public and to persons engaged in trade and traffic and commerce between the several states and territories and countries above mentioned separate, distinct, and competitive lines of transportation and communication extending along and between the states and territories of the United States lying westward of the Mississippi and Missouri rivers to the Pacific ocean, and that the construction and maintenance of said several separate, distinct and competitive lines of railroad aforesaid had been encouraged and assisted by the United States and by the states and territories in the region of country aforesaid, and by the people of the said several states and territories, by franchises and by grants and donations of large amounts of land of great value, and of money and securities, for the purpose of securing to the public and to the people engaged in trade and commerce throughout the region of country aforesaid competitive lines of transportation and communication, and that, prior to the 15th day of March, 1889, and subsequently and up to the present time, each and all of said defendants have been and are engaged as common carriers in the railway freight traffic connected with the interstate commerce of the United States.

It is then alleged in the bill as follows:

*"And your orator further avers that on [299 or about the 15th day of March, 1889, the defendants not being content with the usual rates and prices for which they and others were accustomed to move, carry, and transport property, freight, and commodities in the trade and commerce aforesaid and in their said business and occupation, but contriving and intending unjustly and oppressively to increase and augment the said rates and prices, and to counteract the effect of free competition on the facilities and prices of transportation, and to establish and maintain arbitrary rates, and to prevent any one of said defendants from reducing such arbitrary rates, and thereby exact and procure great sums of money from the people of the said states and territories aforesaid, and from the people engaged in the interstate commerce trade, and traffic within the region of country aforesaid, and from all persons having goods, wares, and merchandise to be transported by said railroads, and intending to monopolize the trade, traffic, and commerce among and between the states and territories aforesaid, did combine, conspire, confederate, and unlawfully agree together, and did then and there enter into a written contract, combination, agreement, and compact, known as a memorandum of agreement of the Trans-Missouri Freight Association, which was signed by each of said above-named defendants."

The bill then sets forth the agreement signed by the various corporations defendant.

It is further alleged that the agreement went into effect on the 1st day of April, 1889, and that since that time each and all of the defendants, by reason of the agreement, have put into effect and kept in force upon the several lines of railroad the rules and regulations and rates and prices for moving, carrying, and transporting freight fixed and established by the association, and have declined and refused to fix or establish and maintain or give on their railroads rates and prices for the carrying of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each particular *road, and the people of the states and [300 territories subject to said association, and all persons engaged in trade and commerce within, among, and between the different states and territories have been compelled to and are still compelled to pay the arbitrary rates of freight and submit to the arbitrary rules and regulations established and maintained by the asso-



Digitized by Google

ciation, and ever since that date have been and still are deprived of the benefits that might be expected to flow from free competition between said several lines of transportation and communication, and are deprived of the better facilities and cheaper rates of freight that might be reasonably expected to flow from free competition between the lines above mentioned, and that the trade, traffic, and commerce in such region of country, and the freight traffic in connection therewith, have been and are monopolized and restrained, hindered, injured, and retarded by the defendants by means and through the instrumentality of such association.

The bill further averred that notwithstanding the passage of the act of Congress above mentioned on the 2d day of July, 1890, the "defendants still continue in and still engage in said unlawful combination and conspiracy, and still maintain said Trans-Missouri Freight Association, with all the powers specified in the memorandum of agreement and articles of association hereinbefore set forth, which said agreement, combination, and conspiracy so as aforesaid entered into and maintained by said defendants is of great injury and grievous prejudice to the common and public good and to the welfare of the people of the United States."

The prayer of the bill is as follows:

"In consideration whereof, and inasmuch as your orator can only have adequate relief in the premises in this honorable court where matters of this nature are properly cognizable and relievable, your orator prays that this honorable court may order, adjudge, and decree that said Trans-Missouri Freight Association be dissolved, and that said defendants, and all and each of them, be enjoined and prohibited from further agreeing, combining, and conspiring and acting together to maintain rules and regula-
301] tions and rates for carrying *freight upon their several lines of railroad to hinder trade and commerce between the states and territories of the United States, and that all and each of them be enjoined and prohibited from entering or continuing in a combination, association, or conspiracy to deprive the people engaged in trade and commerce between and among the states and territories of the United States of such facilities and rates and charges of freight transportation as will be afforded by free and unrestrained competition between the said several lines of railroad, and that all and each of said defendants be enjoined and prohibited from agreeing, combining, and conspiring and acting together to monopolize or attempt to monopolize the freight traffic in the trade and commerce between the states and territories of the United States, and that all and each of said defendants be enjoined and prohibited from agreeing, combining, and conspiring and acting together to prevent each and any of their associates from carrying freight and commodities in the trade and commerce between the states and territories of the United States at such rates as shall be voluntarily fixed by the officers and agents of each of said roads acting independently and separately in its own behalf."

The defendants were required to answer fully, etc., each and all of the matters charged in the bill, but such answer was not required to be under oath, an answer under oath being specially waived.

The Chicago, Kansas, & Nebraska Railway Company, the Missouri, Kansas, & Texas Railway Company, and the Denver, Texas, & Fort Worth Railroad Company denied being parties to the association. The other fifteen companies filed separate answers, each setting up substantially the same defense.

They admit they are common carriers engaged in the transportation of persons and property in the states and territories mentioned in the agreement, and they allege that as such common carriers they are subject to the provisions of the act of Congress, approved February 4, 1887 (24 Stat. at L. 379, chap. 104), entitled "An Act to Regulate Commerce," with the various amendments thereof and additions thereto, *and they allege that that act [302 and the amendments constitute a system of regulations established by Congress for common carriers subject to the act, and they deny that they are subject to the provisions of the act of Congress passed July 2, 1890, and above set forth.

They admit that they severally own, control, and operate separate and distinct lines of railroad constructed and fitted for carrying on business as common carriers of freight, independently and disconnectedly with each other; except that a common interest exists between certain companies, named in the answer. They admit that the lines of railroad mentioned in the bill furnish lines of transportation and communication to persons engaged in freight traffic between and among the states and territories of the United States, having through lines for freight traffic in that region of country lying to the westward of the Mississippi and Missouri rivers and east of the Pacific ocean, but deny that they are the only such lines, and allege that there are several others, naming them.

They further admit that prior to the organization of the freight association the defendants furnished to the public and to persons engaged in trade, traffic, and commerce between the several states and territories named in the agreement, separate, distinct, and competitive lines of transporation and communication, and they allege that they still continue to do so.

They admit that some of the roads mentioned in the bill received aid by land grants from the United States, and others received aid from states and territories by loans of credits, donations of depot sites, and rights of way, and in a few cases by investments of money, and that the people of the states and territories to a limited extent made investments in the stocks and bonds of some of the roads, while others, mentioned in the bill, were almost exclusively constructed by capital furnished by nonresidents of that region.

It is also admitted that the purpose of the land grants, loans, donations, and investments was to obtain the construction of competitive lines of transportation and communication to the end that the public and the people engaged in trade *and commerce throughout that [303 region of country might have facilities afforded by railways in communicating with each other



Digitized by Google

and with other portions of the United States and the world, and denies that they were granted for any other purpose.

The defendants admit the formation on or about March 15, 1889, of the voluntary association described in the bill as the "Trans-Missouri Freight Association."

They deny the allegation that they were not content with the rates and prices prevailing at the date of the agreement; they deny any intent to unjustly increase rates, and deny that the agreement destroyed, prevented, or illegally limited or influenced competition; they deny that arbitrary rates were fixed or charged, or that rates have been increased, or that the effect of free competition has been counteracted; they deny any purpose in the formation of the association to monopolize trade, traffic, and commerce between the states and territories within the region mentioned in the bill; and they deny that the agreement is in any respect the illegal result of any unlawful confederation or conspiracy. The defendants allege that the proper object of the association is to establish reasonable rates, rules, and regulations on all freight traffic, and the maintenance of such rates until changed in the manner provided by law; that the agreement was filed with the Interstate Commerce Commission as required by § 6 of the act of February 4, 1887. They also allege that it was not the purpose of the association to prevent the members from reducing rates or changing the rules and regulations fixed by the association; that by the terms of the agreement each member may do so, the preliminary requirement being that the proposed change shall be voted upon at a meeting of the association, after which, if the proposal is not agreed to, the line making the proposal can make such reduced rate notwithstanding the objection of the other lines; that the purpose of this provision was to afford opportunity for the consideration of the reasonableness of any proposed rate, rule, or regulation by all lines interested and an interchange of views on the effect [304] of such *reduction, and that reductions of rates have been made in numerous instances through said process by the association. They admit the agreement took effect April 1, 1889, and that it has remained in operation since, and *that the rates, rules, and regulations fixed and established from time to time under said agreement have been put into effect and maintained in conformity to law, and it is denied that by reason of the agreement or under duress of fines and penalties, or otherwise, the defendants have refused to establish and maintain just and reasonable rates; and it is alleged that the object of the association at all times has been and is to establish all rates, rules, and regulations upon a just and reasonable basis, and to avoid unjust discrimination and undue preference. They deny that shippers or the public are in any way oppressed or injured by reason of the rates fixed by the association, but on the contrary they allege that the agreement and the association established under it have been beneficial to the patrons of the railway lines composing the association and the public at large. These in substance are the allegations in the various answers.

The cause came on for hearing on bill and answer before the circuit court of the United States for the district of Kansas, first division. That court dismissed the bill without costs against the complainant. 53 Fed. Rep. 440. The government duly appealed from the judgment to the United States circuit court of appeals for the eighth circuit, and that court after argument affirmed, in October, 1893, the judgment of the circuit court, without costs, Shiras, District Judge, dissenting. 19 U. S. App. 36, 24 L. R. A. 73, 4 Inters. Com. Rep. 443. From that judgment the government has appealed to this court.

A motion is now made upon affidavits to dismiss the appeal. The affidavits show that on the 18th of November, 1892, a resolution was adopted by the Trans-Missouri Freight Association, one of the defendants, providing that the organization should be discontinued from and after the 19th of November, 1892, and the secretary was instructed to wind up its affairs at as early a date as possible. It further appeared by the affidavits that the Trans-Missouri Freight Association was *actually dis- [305 solved and its existence ended on the above date, November 19, 1892, and that it has not since that date been revived, nor has it since that date had any activity of any kind, "and that it has not conducted or been engaged in any operations or business whatever, but that it has been dead and out of existence."

It is also alleged as another ground for dismissing the appeal that the matter in controversy does not exceed $1,000, and that the case does not come under any other provision of the act of 1891, allowing an appeal from the circuit courts of appeals to this court. In opposition to the motion it appeared upon the part of the appellant that at the same meeting at which the resolution above referred to was adopted, the following resolution was also adopted: "*Resolved*, That a committee of seven be appointed by the chairman of this meeting to draw up a new agreement for the conduct of business now substantially covered by the Trans-Missouri agreement and to make a report to all lines in the Trans-Missouri Association at a meeting to be called in Chicago on December 6, 1892." A committee of seven was accordingly appointed, which adopted a resolution calling a meeting for the 6th of December, 1892, of the lines formerly members of the Trans-Missouri Association and representatives of other interested lines for the purpose of considering any changes in the tariffs and of business which was under the jurisdiction of that association and which might be submitted to the parties at that time, and to further consider the organization of one or more rate committees to govern the manner of making rates on such traffic until some permanent organization could be effected. In the early days of December, 1892, the meeting so called was held and was participated in by most of the railroad companies which were parties to the Trans-Missouri agreement, and at that meeting an agreement was made upon the subject of rates of freight, and a West-Missouri freight rate committee was appointed, the duties of which committee were to establish and maintain reasonable rates in the territory described, and other lines therein not represented but interested in the freight traffic of such territory were to be invited to become members.



Digitized by Google

306] A plan for the *establishment of subrate committees for the purpose of agreeing upon rates was therein set forth and agreed to. The agreement was to become effective on the 1st of January, 1892, and to remain in force until the following April, during which time it was supposed that a new and permanent association to provide for an agreement relating to rates of freight might be founded. It does not appear whether such permanent association has been formed or that the temporary agreement has been actually terminated.

In answer to the motion to dismiss on the ground that the matter in controversy did not amount to over $1,000, the parties have stipulated as follows: "It is hereby stipulated for the purposes of this case and no other, and without waiving any right to question the legal effect of such fact, that the daily freight charges on interstate shipments collected by all the railway companies at points where they compete with each other were, at the time of the agreement mentioned in the pleadings herein, and have been since, more than $1,000.

*Mr. W. F. Guthrie* filed a brief in favor of the motion to dismiss the appeal, on behalf of the Burlington & Missouri River Railroad Company.

*Messrs. George R. Peck, A. T. Britton, Lloyd W. Bowers*, and *A. B. Browne* filed a brief in favor of the motion to dismiss the appeal, for appellees.

*Mr. Lawrence Maxwell, Jr.*, Solicitor General, filed a brief for the United States in opposition to the motion to dismiss the appeal.

On the merits, *Mr.* **Judson Harmon**, Attorney General for the United States, appellant.

*Messrs.* **John F. Dillon, James C. Carter, E. J. Phelps,** *A. L. Williams, Harry Hubbard*, and *John M. Dillon* for appellees.

*Mr. W. F. Guthrie* filed a brief for the Burlington & Missouri River Railroad Company.

*Mr. Lloyd W. Bowers* filed a brief for the Fremont, Elkhorn, & Missouri Valley Railroad Company and the Sioux City & Pacific Railroad Company.

Mr. Justice **Peckham** delivered the opinion of the court:

The defendants object to the hearing of this appeal, and ask that it be dismissed on the ground that the Trans-Missouri Freight Association has been dissolved by a vote of its members since the judgment entered in this suit in the court below. A further ground urged for the dismissal of the appeal is that the requisite amount (over $1,000) is not in controversy in the suit, and that as an appeal would only lie to this court in this character of suit under the act of March 3, 1891 (28 Stat. at L. 826, chap. 517; Rev. Stat. Supp. p. 901), where that amount is in controversy, the appeal should be dismissed.

As to the first ground, we think the fact of the dissolution of the association does not prevent this court from taking cognizance of the appeal and deciding the case upon its merits.

307] *The prayer of the bill filed in this suit asks, not only for the dissolution of the association, but, among other things, that the defendants should be restrained from continuing in a like combination, and that they should be enjoined from further conspiring, agreeing, or combining and acting together to maintain rules and regulations and rates for carrying freight upon their several lines, etc. The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal, the court is asked, not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future.

The defendants, in bringing to the notice of the court the fact of the dissolution of the association, take pains to show that such dissolution had no connection or relation whatever with the pendency of this suit, and that the association was not terminated on that account. They do not admit the illegality of the agreement, nor do they allege their purpose not to enter into a similar one in the immediate future. On the contrary, by their answers the defendants claim that the agreement is a perfectly proper, legitimate, and salutary one, and that it or one like it is necessary to the prosperity of the companies. If the injunction were limited to the prevention of any action by the defendants under the particular agreement set out, or if the judgment were to be limited to the dissolution of the association mentioned in the bill, the relief obtained would be totally inadequate to the necessities of the occasion, provided an agreement of that nature were determined to be illegal. The injunction should go further, and enjoin defendants from entering into or acting under any similar agreement in the future. In other words, the relief granted should be adequate to the occasion.

As an answer to the fact of the dissolution of the association, it is shown on the part of the government that these very defendants, or most of them, immediately entered into a substantially similar agreement, which was to remain in force for *a certain time, and un-

309] der which the companies acted, and in regard to which it does not appear that they are not still acting. If the mere dissolution of the association worked an abatement of the suit as to all the defendants, as is the claim made on their part, it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow. Although the general rule is that equity does not interfere simply to restrain a possible future violation of law, yet where parties have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law, and the jurisdiction of the court has attached by the filing of the bill to restrain such or any like action under a similar agreement, and a trial has been had, and judgment entered, the appellate jurisdiction of this court is not ousted by a similar dissolution of the asso-



Digitized by Google

ciation, effected subsequently to the entry of judgment in the suit.

Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the government has endeavored to procure by a judgment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case. By designating the agreement in question as illegal and the alleged combination as an unlawful one, we simply mean to say that such is the character of **310**] the agreement as claimed by the *government. That question the government has the right to bring before the court and obtain its judgment thereon. Whether the agreement is of that character is the question herein to be decided.

We think, therefore, the first ground urged by defendants for the dismissal of the appeal is untenable.

We have no difficulty either in sustaining the jurisdiction of this court in regard to the second ground, that of the amount in controversy in the suit.

The bill need not state, in so many words, that a certain amount exceeding $1,000 is in controversy in order that this court may have jurisdiction on appeal. The statutory amount must as a matter of fact be in controversy, yet that fact may appear by affidavit after the appeal is taken to this court (*Whiteside* v. *Haselton*, 110 U. S. 296 [28:152]; *Red River Cattle Co.* v. *Needham*, 137 U. S. 632 [34: 799]), or it may be made to appear in such other manner as to establish it to the satisfaction of the court. A stipulation between the parties as to the amount is not controlling, but in the discretion of the court it may be regarded in a particular case, and with reference to the other facts appearing in the record as sufficient proof of the amount in controversy to sustain the jurisdiction of this court.

The bill shows here an agreement entered into (as stated in the agreement itself) for the purpose of maintaining reasonable rates to be received by each company executing the agreement, and the stipulation entered into between the parties hereto shows that the daily freight charges on interstate shipments collected by the railway companies at points where they compete with each other were, at the time of the making of the agreement mentioned in the pleadings herein, and have been since, more than $1,000. This agreement so made, the government alleges, is illegal as being in restraint of trade, and was entered into between the companies for the purpose of enhancing the freight rates. The companies, while denying the illegality of the agreement or its purpose to be other than to maintain reasonable rates, yet allege that without some such agreement the competition between them for *traffic would [**311** be so severe as to cause great losses to each defendant and possibly ruin the companies represented in the agreement. Such a result, it is claimed, is avoided by reason of the agreement. Upon the existence, therefore, of this or some similar agreement directly depends (as is alleged) the prosperity, if not the life, of each company. It must follow that an amount much more than $1,000 is involved in the maintenance of the agreement or in the right to maintain it or something like it. These facts, appearing in the record and the stipulation, show that the right involved is a right which is of the requisite pecuniary value. A reduction of the rates by only the fractional part of 1 per cent would, in the aggregate, amount to over $1,000 in a very few days. This is sufficient to give the court jurisdiction on appeal. *United States, South Carolina*, v. *Seymour* ("*South Carolina* v. *Seymour*"), 153 U. S. 353, 357 [38: 742, 744]. There is directly involved in this suit the validity and the life of this agreement, or one similar to it. Out of this agreement directly springs the ability as well as the right to maintain these rates, and each company is interested in maintaining the validity of the agreement to the same extent as all the others. As against the agreement the government represents the interest of the public, and thus the parties stand opposed to each other—the one in favor of dissolving and the other of maintaining the agreement.

Unlike the case of *Gibson* v. *Shufeldt*, 122 U. S. 27 [30: 1083], and the cases therein cited in the opinion of the court delivered by Mr. Justice Gray, the defendants here are jointly interested in the question, and it is not the case of a fund amounting to more than the requisite sum which is to be paid to different parties in sums less than the jurisdictional amount.

For the reasons above stated, we think the jurisdictional fact in regard to each defendant appears plainly and necessarily from the record and the stipulation, and that the duty is thus laid upon this court to entertain the appeal.

Coming to the merits of the suit, there are two important questions which demand our examination. They are, first, whether the above-cited act of Congress (called herein the trust act) applies to and covers common carriers by railroad; *and, if so, second, Does [**312** the agreement set forth in the bill violate any provision of that act?

As to the first question:

The language of the act includes every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations. So far as the very terms of the statute go, they apply to any contract of the nature described. A contract, therefore, that is in restraint of trade or commerce is by the strict language of the act prohibited, even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property. If such an agreement restrain trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation, cannot restrain trade or commerce.



Digitized by Google

We see no escape from the conclusion that if any agreement of such a nature does restrain it, the agreement is condemned by this act. It cannot be denied that those who are engaged in the transportation of persons or property from one state to another are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the owners of the articles transported, such agreement would at least relate to the business of commerce, and might more or less restrain it. The point urged on the defendants' part is that the statute was not really intended to reach that kind of an agreement relating only to traffic rates entered into by competing common carriers by railroad; that it was intended to reach only those who were engaged in the manufacture or sale of articles of commerce, and who by means of trusts, combinations, and conspiracies were engaged in affecting the supply or the price or the place of manufacture of such articles. The terms of the act do not bear out such construction. Railroad companies are instruments of commerce, and their business is commerce itself. *Philadelphia & R. R. Co.* v. *Pennsylvania* (*"State Freight Tax"*), 82 U. S. 15 Wall. 282, 275 [21: 146, 161]; *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 464 [26: 1067, 1068]. **313]** *An act which prohibits the making of every contract, etc., in restraint of trade or commerce among the several states, would seem to cover by such language a contract between competing railroads, and relating to traffic rates for the transportation of articles of commerce between the states, provided such contract by its direct effect produces a restraint of trade or commerce. What amounts to a restraint within the meaning of the act if thus construed need not now be discussed.

We have held that the trust act did not apply to a company engaged in one state in the refining of sugar under the circumstances detailed in the case of *United States* v. *E. C. Knight Co.* 156 U. S. 1 [39: 325], because the refining of sugar under those circumstances bore no distinct relation to commerce between the states or with foreign nations. To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the states would leave little for the act to take effect upon.

Nor do we think that because the 6th section does not forfeit the property of the railroad company when merely engaged in the transportation of property owned under and which was the subject of a contract or combination mentioned in the 1st section, any ground is shown for holding the rest of the act inapplicable to carriers by railroad. It is not perceived why, if the rest of the act were intended to apply to such a carrier, the 6th section ought necessarily to have provided for the seizure and condemnation of the locomotives and cars of the carrier engaged in the transportation between the states of those articles of commerce owned as stated in that 6th section. There is some justice and propriety in forfeiting those articles, but we see none in forfeiting the locomotives or cars of the carrier simply because such carrier was transporting articles as described from one state to another, even though the carrier knew that they had been manufactured or sold under a contract or combination in violation of the act. In the case of a simple transportation of such articles the carrier would be guilty of no violation of any of the provisions of the act. Why, therefore, *would it follow that the 6th section **[314** should provide for the forfeiture of the property of the carrier if the rest of the act were intended to apply to it? To subject the locomotives and cars to forfeiture under such circumstances might also cause great confusion to the general business of the carrier and in that way inflict unmerited punishment upon the innocent owners of other property in the course of transportation in the same cars and drawn by the same locomotives. If the company itself violates the act, the penalties are sufficient as provided for therein.

But it is maintained that an agreement like the one in question on the part of the railroad companies is authorized by the commerce act, which is a special statute applicable only to railroads, and that a construction of the trust act (which is a general act) so as to include within its provisions the case of railroads, carries with it the repeal by implication of so much of the commerce act as authorized the agreement. It is added that there is no language in the trust act which is sufficiently plain to indicate a purpose to repeal those provisions of the commerce act which permit the agreement; that both acts may stand, the special or commerce act as relating solely to railroads and their proper regulation and management, while the later and general act will apply to all contracts of the nature therein described, entered into by anyone other than competing common carriers by railroad for the purpose of establishing rates of traffic for transportation. On a line with this reasoning it is said that if Congress had intended to in any manner affect the railroad carrier as governed by the commerce act, it would have amended that act directly and in terms, and not have left it as a question of construction to be determined whether so important a change in the commerce statute had been accomplished by the passage of the statute relating to trusts.

The first answer to this argument is that, in our opinion, the commerce act does not authorize an agreement of this nature. It may not in terms prohibit, but it is far from conferring, either directly or by implication, any authority to make it. If the agreement be legal it does not owe its *validity to any **[315** provision of the commerce act, and if illegal it is not made so by that act. The 5th section prohibits what is termed "pooling," but there is no express provision in the act prohibiting the maintenance of traffic rates among competing roads by making such an agreement as this, nor is there any provision which permits it. Prior to the passage of the act the companies had sometimes endeavored to regulate competition and to maintain rates by pooling arrangements, and in the act that kind of an arrangement was forbidden. After its passage other devices were resorted to for the purpose of curbing competition and maintaining rates. The general nature of a contract like the one before us is not mentioned in or provided for by the act. The provisions of that act look to



Digitized by Google

the prevention of discrimination, to the furnishing of equal facilities for the interchange of traffic, to the rate of compensation for what is termed the long and the short haul, to the attainment of a continuous passage from the point of shipment to the point of destination, at a known and published schedule, and, in the language of counsel for defendants, "without reference to the location of those points or the lines over which it is necessary for the traffic to pass," to procuring uniformity of rates charged by each company to its patrons, and to other objects of a similar nature. The act was not directed to the securing of uniformity of rates to be charged by competing companies, nor was there any provision therein as to a maximum or minimum of rates. Competing and nonconnecting roads are not authorized by this statute to make an agreement like this one.

As the commerce act does not authorize this agreement, argument against a repeal by implication of the provisions of the act which it is alleged grant such authority becomes ineffective. There is no repeal in the case, and both statutes may stand, as neither is inconsistent with the other.

It is plain, also, that an amendment of the commerce act would not be an appropriate method of enacting the legislation contained in the trust act, for the reason that the latter act includes other subjects in addition to the contracts of or combinations among railroads, [316] and is *addressed to the prohibition of other contracts besides those relating to transportation. The omission, therefore, to amend the commerce act furnishes no reason for claiming that the later statute does not apply to railroad transportation. Although the commerce statute may be described as a general code for the regulation and government of railroads upon the subjects treated of therein, it cannot be contended that it furnishes a complete and perfect set of rules and regulations which are to govern them in all cases, and that any subsequent act in relation to them must, when passed, in effect amend or repeal some provision of that statute. The statute does not cover all cases concerning transportation by railroad and all contracts relating thereto. It does not purport to cover such an extensive field.

The existence of agreements similar to this one may have been known to Congress at the time it passed the commerce act, although we are not aware, from the record, that an agreement of this kind had ever been made and publicly known prior to the passage of the commerce act. Yet if it had been known to Congress, its omission to prohibit it at that time, while prohibiting the pooling arrangements, is no reason for assuming that when passing the trust act it meant to except all contracts of railroad companies in regard to traffic rates from the operation of such act. Congress for its own reasons, even if aware of the existence of such agreements, did not see fit when it passed the commerce act to prohibit them with regard to railroad companies alone, and the act was not an appropriate place for general legislation on the subject. And at that time, and for several years thereafter, Congress did not think proper to legislate upon the subject at all. Finally it passed this trust act, and in our opinion no obstacle to its application to contracts relating to transportation by railroads is to be found in the fact that the commerce act had been passed several years before, in which the entering into such agreements was not in terms prohibited.

It is also urged that the debates in Congress show beyond a doubt that the act as passed does not include railroads. Counsel *for [317] the defendants refer in considerable detail to its history from the time of its introduction in the Senate to its final passage. As the act originally passed the Senate the 1st section was in substance as it stands at present in the statute. On its receipt by the House that body proposed an amendment, by which it was in terms made unlawful to enter into any contract for the purpose of preventing competition in the transportation of persons or property. As thus amended the bill went back to the Senate, which itself amended the amendment by making the act apply to any such contract as tended to raise prices for transportation above what was just and reasonable. This amendment by the Senate of the amendment proposed by the House was disagreed to by that body. The amendments were then considered by conference committees, and the first conference committee reported to each House in favor of the amendment of the Senate. This report was disagreed to and another committee appointed, which agreed to strike out both amendments and leave the bill as it stood when it first passed the Senate, and that report was finally adopted, and the bill thus passed.

Looking at the debates during the various times when the bill was before the Senate and the House, both on its original passage by the Senate and upon the report from the conference committees, it is seen that various views were declared in regard to the legal import of the act. Some of the members of the House wanted it placed beyond doubt or cavil that contracts in relation to the transportation of persons and property were included in the bill. Some thought the amendment unnecessary as the language of the act already covered it, and some refused to vote for the amendment or for the bill if the amendments were adopted on the ground that it would then interfere with the interstate commerce act and tend to create confusion as to the meaning of each act. Senator Hoar (who was a member of the first committee of conference from the Senate), when reporting the result arrived at by the judiciary committee recommending the adoption of the House amendment, said: "The other clause of the House amendment is that contracts or agreements entered into for the purpose of *preventing competition in the trans-[318] portation of persons or property from one state or territory into another shall be deemed unlawful. That the committee recommend shall be concurred in. *We suppose that it is already covered by the bill as it stands;* that is, that transportation is as much trade or commerce among the several states as the sale of goods in one state to be delivered in another, and, therefore, that it is covered already by the bill as it stands. But there is no harm in agreeing in an amendment which expressly describes it,



Digitized by Google

and an objection to the amendment might be construed as if the Senate did not mean to include it; so we let it stand."

Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each House in relation to the meaning of the act. It cannot be said that a majority of both Houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act as we determine the meaning of other acts from the language used therein.

There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States* v. *Union P. R. Co.* 91 U. S. 72, 79 [23: 224, 228]; *Aldridge* v. *Williams*, 44 U. S. 3 How. 9-24 [11: 469-475], Taney, Ch. J.; *Mitchell* v. *Great Works Milling & Mfg. Co.* 2 Story, 648, 653; *Reg.* v. *Hertford College*, L. R. 3 Q. B. Div. 693, 707.

The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occa-
319]sion, by a resort* to the history of the times when it was passed. Cases cited, *supra*. If such resort be had, we are still unable to see that the railroads were not intended to be included in this legislation.

It is said that Congress had very different matters in view and very different objects to accomplish in the passage of the act in question; that a number of combinations in the form of trusts and conspiracies in restraint of trade were to be found throughout the country, and that it was impossible for the state governments to successfully cope with them because of their commercial character and of their business extension through the different states of the Union. Among these trusts it was said in Congress were the Beef Trust, the Standard Oil Trust, the Steel Trust, the Barbed Fence Wire Trust, the Sugar Trust, the Cordage Trust, the Cotton Seed Oil Trust, the Whiskey Trust, and many others, and these trusts it was stated had assumed an importance and had acquired a power which were dangerous to the whole country, and that their existence was directly antagonistic to its peace and prosperity. To combinations and conspiracies of this kind it is contended that the act in question was directed, and not to the combinations of competing railroads to keep up their prices to a reasonable sum for the transportation of persons and property. It is true that many and various trusts were in existence at the time of the passage of the act, and it was probably sought to cover them by the provisions of the act. Many of them had rendered themselves offensive by the manner in which they exercised the great power that combined capital gave them. But a further investigation of "the history of the times" shows also that those trusts were not the only associations controlling a great combination of capital which had caused complaint at the manner in which their business was conducted. There were many and loud complaints from some portions of the public regarding the railroads and the prices they were charging for the service they rendered, and it was alleged that the prices for the transportation of persons and articles of commerce were unduly and improperly enhanced by combinations among the different roads. *Whether these complaints [320 were well or ill founded we do not presume at this time and under these circumstances to determine or to discuss. It is simply for the purpose of answering the statement that it was only to trusts of the nature above set forth that this legislation was directed, that the subject of the opinions of the people in regard to the actions of the railroad companies in this particular is referred to. A reference to this history of the times does not, as we think, furnish us with any strong reason for believing that it was only trusts that were in the minds of the members of Congress, and that railroads and their manner of doing business were wholly excluded therefrom.

Our attention is also called to one of the rules for the construction of statutes which has been approved by this court; that while it is the duty of courts to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words whenever it is found necessary to do so in order to carry out the legislative intent. *Brewer* v. *Blougher*, 39 U. S. 14 Pet. 178, 198 [10: 408, 417]; *Petri* v. *Commercial Nat. Bank*, 142 U. S. 644, 650 [35: 1144, 1146]; *McKee* v. *United States*, 164 U. S. 287 [*ante*, 137]. It is therefore urged that if by a strict construction of the language of this statute it may be made to include railroads, yet it is evident from other considerations now to be mentioned that the real meaning of the legislature would not include them, and they must for that reason be excluded. It is said that this meaning is plainly to be inferred because of fundamental differences both in an economic way and before the law between trade and manufacture on the one hand and railroad transportation on the other. Among these differences are the public character of railroad business, and as a result the peculiar power of control and regulation possessed by the state over railroad companies. The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or *unreasonable; he may make [321 such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction; while, on the contrary, a railroad company must transport all persons and property that come to it, and



Digitized by Google

it must do so at the same price for the same service, and the price must be reasonable, and it cannot at its will discontinue its business. It is also urged that there are evils arising from unrestricted competition in regard to railroads which do not exist in regard to any other kind of property; that it is so admitted by the latest and best writers on the subject, and that practical experience of the results of unrestricted competition among railroads tends directly to the same view; that the difference between railroad property on the one hand, and all other kinds of property on the other hand, is so plain that entirely different economic results follow from unrestricted competition among railroads from those which obtain in regard to all other kinds of business. It is also said that the contemporaneous industrial history of the country, the legal situation in regard to railroad properties at the time of the enactment of this statute, its legislative history, the ancient and constantly maintained different legal effect and policy regarding railway transportation and ordinary trade and manufacture, together with a just regard for interests of such enormous magnitude as are represented by the railroads of the country, all tend to show that Congress in passing the anti-trust act never could have contemplated the inclusion of railroads within its provisions. It is therefore claimed to be the duty of the court, in carrying out the rule of statutory construction, above stated, to restrict the meaning of these general words of the statute which would include railroads, because from the considerations above mentioned it is plain that Congress never intended that railroads should be included.

Many of the foregoing assertions may be well founded, while at the same time the correctness of the conclusions sought to be drawn therefrom need not be conceded. The points of difference between the railroad and other corporations are many and great. It cannot be dis-[322]puted that a railroad *is a public corporation, and its business pertains to and greatly affects the public, and that it is of a public nature. The company may not charge unreasonable prices for transportation, nor can it make unjust discriminations, nor select its patrons, nor go out of business when it chooses, while a mere trading or manufacturing company may do all these things. But the very fact of the public character of a railroad would itself seem to call for special care by the legislature in regard to its conduct, so that its business should be carried on with as much reference to the proper and fair interests of the public as possible. While the points of difference just mentioned and others do exist between the two classes of corporations, it must be remembered that they have also some points of resemblance. Trading, manufacturing, and railroad corporations are all engaged in the transaction of business with regard to articles of trade and commerce, each in its special sphere, either in manufacturing or trading in commodities or in their transportation by rail. A contract among those engaged in the latter business by which the prices for the transportation of commodities traded in or manufactured by the others is greatly enhanced from what it otherwise would be if free competition were the rule, affects and to a certain extent restricts trade and commerce, and affects the price of the commodity. Of this there can be no question. Manufacturing or trading companies may also affect prices by joining together in forming a trust or other combination, and by making agreements in restraint of trade and commerce, which when carried out affect the interests of the public. Why should not a railroad company be included in general legislation aimed at the prevention of that kind of agreement made in restraint of trade, which may exist in all companies, which is substantially of the same nature wherever found, and which tends very much towards the same results whether put in practice by a trading and manufacturing or by a railroad company? It is true the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity and have been induced by motives of individual or corporate aggrandizement *as against the public interest. In[323] business or trading combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all powerful combination of capital. In any great and extended change in the manner or method of doing business it seems to be an inevitable necessity that distress and, perhaps, ruin, shall be its accomplishment in regard to some of those who were engaged in the old methods. A change from stage coaches and canal boats to railroads threw at once a large number of men out of employment; changes from hand labor to that of machinery; and from operating machinery by hand to the application of steam for such purpose leave behind them for the time a number of men who must seek other avenues of livelihood. These are misfortunes which seem to be the necessary accompaniment of all great industrial changes. It takes time to effect a readjustment of industrial life so that those who are thrown out of their old employment, by reason of such changes as we have spoken of, may find opportunities for labor in other departments than those to which they have been accustomed. It is a misfortune, but yet in such cases it seems to be the inevitable accompaniment of change and improvement.

It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to *what price shall be paid for[324]



Digitized by Google

the article. In this light it is not material that the price of an article may be lower. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others. Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. The results naturally flowing from a contract or combination in restraint of trade or commerce, when entered into by a manufacturing or trading company such as above stated, while differing somewhat from those which may follow a contract to keep up transportation rates by railroads, are nevertheless of the same nature and kind, and the contracts themselves do not so far differ in their nature that they may not all be treated alike and be condemned in common. It is entirely appropriate generally to subject corporations or persons engaged in trading or manufacturing to different rules from those applicable to railroads in their transportation business, but when the evil to be remedied is similar in both kinds of corporations, such as contracts which are unquestionably in restraint of trade, we see no reason why similar rules should not be promulgated in regard to both, 325]and both be covered in the same *statute by general language sufficiently broad to include them both. We see nothing either in contemporaneous history, in the legal situation at the time of the passage of the statute, in its legislative history, or in any general difference in the nature or kind of these trading or manufacturing companies from railroad companies, which would lead us to the conclusion that it cannot be supposed the legislature in prohibiting the making of contracts in restraint of trade intended to include railroads within the purview of that act.

Neither is the statute, in our judgment, so uncertain in its meaning or its language so vague that it ought not to be held applicable to railroads. It prohibits contracts, combinations, etc., in restraint of trade or commerce. Transporting commodities is commerce, and if from one state to or through another it is interstate commerce. To be reached by the Federal statute it must be commerce among the several states or with foreign nations. When the act prohibits contracts in restraint of trade or commerce, the plain meaning of the language used includes contracts which relate to either or both subjects. Both trade and commerce are included so long as each relates to that which is interstate or foreign. Transportion of commodities among the several states or with foreign nations falls within the description of the words of the statute with regard to that subject, and there is also included in that language that kind of trade in commodities among the states or with foreign nations which is not confined to their mere transportation. It includes their purchase and sale. Precisely at what point in the course of the trade in or manufacture of commodities the statute may have effect upon them or upon contracts relating to them may be somewhat difficult to determine, but interstate transportation presents no difficulties. In *United States* v. *E. C. Knight Co.* 156 U. S. 1 [39: 325], heretofore cited, it was in substance held, reiterating the language of Mr. Justice Lamar in *Kidd* v. *Pearson*, 128 U. S. 1 [32: 346, 2 Inters. Com. Rep. 232], that the intent to manufacture or export a manufactured article to foreign nations or to send it to another state did not determine the time when the article or product passed from the control of the state and belonged to *commerce. The difficulty in deter- [326 mining that question, however, is no reason for denying effect to language which, by its terms, plainly includes the transportation of commodities among the several states or with foreign nations, and which may also be the subject of contracts or combinations in restraint of such commerce. The difficulty of the subject, so far as the trade in or the manufacture of commodities is concerned, arises from the limited control which Congress has over the matter of trade or manufacture. It was said by Mr. Justice Lamar in *Kidd* v. *Pearson*, *supra*: "If it be held that the term [commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include the productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry."

In the *Knight Company Case*, *supra*, it was said that this statute applied to monopolies in restraint of interstate or international trade or commerce, and not to monopolies in manufacture even of a necessary of life. It is readily seen from these cases that if the act does not apply to the transportation of commodities by railroads from one state to another or to foreign nations, its application is so greatly limited that the whole act might as well be held inoperative.

Still another ground for holding the act inapplicable is urged, and that is that the language covers only contracts or combinations like trusts or those which, while not exactly trusts, are otherwise of the same form or nature. This is clearly not so.

While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. All combinations which are in restraint of trade or



Digitized by Google

commerce are prohibited, whether in the form of trusts or in any other form whatever.

We think, after a careful examination, that [327] the *statute covers, and was intended to cover, common carriers by railroad.

Second. The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal?" Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers,—all contracts of that nature?

We are asked to regard the title of this act as indicative of its purpose to include only those contracts which were unlawful at common law, but which require the sanction of a Federal statute in order to be dealt with in a Federal court. It is said that when terms which are known to the common law are used in a Federal statute those terms are to be given the same meaning that they received at common law, and that when the language of the title is "to protect trade and commerce against unlawful restraints and monopolies," it means those restraints and monopolies which the common law regarded as unlawful, and which were to be prohibited by the Federal statute. We are of opinion that the language used in the title refers to and includes and was intended to include those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in its text.

It is now with much amplification of argument urged that the statute in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the pro- [328] visions of the *act; that the common-law meaning of the term "contract in restraint of trade" includes only such contracts as are in *unreasonable* restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.

The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term "contract in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

Proceeding, however, upon the theory that the statute did not mean what its plain language imported, and that it intended in its prohibition to denounce as illegal only those contracts which were in unreasonable restraint of trade, the courts below have made an exhaustive investigation as to the general rules which guide courts in declaring contracts to be void as being in restraint of trade, and therefore against the public policy of the country. In the course of their discussion *of [329] that subject they have shown that there has been a gradual though great alteration in the extent of the liberty granted to the vendor of property in agreeing, as part consideration for his sale, not to enter into the same kind of business for a certain time or within a certain territory. So long as the sale was the bona fide consideration for the promise, and was not made a mere excuse for an evasion of the rule itself, the later authorities, both in England and in this country, exhibit a strong tendency towards enabling the parties to make such a contract in relation to the sale of property, including an agreement not to enter into the same kind of business, as they may think proper, and this with the view to granting to a vendor the freest opportunity to obtain the largest consideration for the sale of that which is his own. A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question. But we cannot see how the statute can be limited, as it has been by the courts below, without reading into its text an exception which alters the natural meaning of the language used, and that, too, upon a most material point, and where no sufficient reason is shown for believing that such alteration would make the statute more in accord with the intent of the lawmaking body that enacted it.

The great stress of the argument for the defendants on this branch of the case has been to show, if possible, some reason in the attendant circumstances, or some fact existing in the nature of railroad property and business, upon which to found the claim that although by the language of the statute agreements or combinations in restraint of trade or commerce are included, the statute really means to declare illegal only those contracts, etc., which are in



Digitized by Google

unreasonable restraint of trade. In order to do this the defendants call attention to many facts which they have already referred to in their argument, upon the point that railroads were not included at all in the statute. They again draw attention to the fact of the peculiar 330] nature of railroad *property. When a railroad is once built, it is said, it must be kept in operation; it must transport property, when necessary in order to keep its business, at the smallest price and for the narrowest profit, or even for no profit, provided running expenses can be paid, rather than not to do the work; that railroad property cannot be altered for use for any other purpose, at least without such loss as may fairly be called destructive; that competition, while, perhaps, right and proper in other business, simply leads in railroad business to financial ruin and insolvency, and to the operation of the road by receivers in the interest of its creditors instead of in that of its owners and the public; that a contest between a receiver of an insolvent corporation and one which is still solvent tends to ruin the latter company, while being of no benefit to the former; that a receiver is only bound to pay operating expenses so he can compete with the solvent company and oblige it to come down to prices incompatible with any profit for the work done, and until ruin overtakes it to the destruction of innocent stockholders and the impairment of the public interests.

To the question why competition should necessarily be conducted to such an extent as to result in this relentless and continued war, to eventuate only in the financial ruin of one or all of the companies indulging in it, the answer is made that if competing railroad companies be left subject to the sway of free and unrestricted competition the results above foreshadowed necessarily happen from the nature of the case; that competition being the rule, each company will seek business to the extent of its power, and will underbid its rival in order to get the business, and such underbidding will act and react upon each company until the prices are so reduced as to make it impossible to prosper or live under them; that it is too much to ask of human nature for one company to insist upon charges sufficiently high to afford a reasonable compensation, and while doing so to see its patrons leave for rival roads who are obtaining its business by offering less rates for doing it than can be afforded and a fair profit obtained therefrom. Sooner than experience ruin from mere inanition, efforts will 331] *be made in the direction of meeting the underbidding of its rival until both shall end in ruin. The only refuge, it is said, from this wretched end lies in the power of competing roads agreeing among themselves to keep up prices for transportation to such sums as shall be reasonable in themselves, so that companies may be allowed to save themselves from themselves, and to agree not to attack each other, but to keep up reasonable and living rates for the services performed. It is said that as railroads have a right to charge reasonable rates it must follow that a contract among themselves to keep up their charges to that extent is valid. Viewed in the light of all these facts it is broadly and confidently asserted that it is impossible to believe that Congress or any other intelligent and honest legislative body could ever have intended to include all contracts or combinations in restraint of trade, and as a consequence thereof to prohibit competing railways from agreeing among themselves to keep up prices for transportation to such a rate as should be fair and reasonable.

These arguments, it must be confessed, bear with much force upon the policy of an act which should prevent a general agreement upon the question of rates among competing railroad companies to the extent simply of maintaining those rates which were reasonable and fair.

There is another side to this question, however, and it may not be amiss to refer to one or two facts which tend to somewhat modify and alter the light in which the subject should be regarded. If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities. Which is the one to which reference is to be made as the standard? Or is the *reasonableness of the profit to be limited [332 to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation. While even after the standard should be determined there is such an infinite variety of facts entering into the question of what is a reasonable rate, no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the illwill of the road itself in all his future dealings with it. To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves.

It must also be remembered that railways



Digitized by Google

are public corporations organized for public purposes, granted valuable franchises and privileges, among which the right to take the private property of the citizen *in invitum* is not the least (*Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 657 [34: 295, 302]); that many of them are the donees of large tracts of public lands and of gifts of money by municipal corporations, and that they all primarily owe duties to the public of a higher nature even than that of earning large dividends
333] for their *shareholders. The business which the railroads do is of a public nature closely affecting almost all classes in the community—the farmer, the artisan, the manufacturer, and the trader. It is of such a public nature that it may well be doubted, to say the least, whether any contract which imposes any restraint upon its business would not be prejudicial to the public interest.

We recognize the argument upon the part of the defendants that restraint upon the business of railroads will not be prejudicial to the public interest so long as such restraint provides for reasonable rates for transportation and prevents the deadly competition so liable to result in the ruin of the roads and to thereby impair there usefulness to the public, and in that way to prejudice the public interest. But it must be remembered that these results are by no means admitted with unanimity; on the contrary, they are earnestly and warmly denied on the part of the public and by those who assume to defend its interests both in and out of Congress. Competition, they urge, is a necessity for the purpose of securing in the end just and proper rates.

It was said in *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396, 408 [32: 979, 984], by Mr. Chief Justice Fuller, as follows: "The supply of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650 [29: 516]; *Louisville Gas Co.* v. *Citizens' Gaslight Co.* 115 U. S. 683 [29: 510]; *Shepard* v. *Milwaukee Gaslight Co.* 6 Wis. 539 [70 Am. Dec. 479]; *Chicago Gaslight & C. Co.* v. *People's Gaslight & C. Co.* 121 Ill. 530; *St. Louis* v. *St. Louis Gaslight Co.* 70 Mo. 69. Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract (*Printing & N. Registering Co.* v. *Sampson*, L. R. 19 Eq. 462), yet, in the instance of business of such a character that it presumably cannot be restrained to any extent whatever without prejudice to the public inter-
334] est, courts decline to enforce or *sustain contracts imposing such restraint, however partial because in contravention of public policy. This subject is much considered, and the authorities cited, in *West Virginia Transp. Co.* v. *Ohio River Pipe Line Co.* 22 W. Va. 600 [46 Am. Rep. 527]; *Chicago Gaslight & C. Co.* v. *People's Gaslight & C. Co.* 121 Ill. 530; *Western U. Teleg. Co.* v. *American U. Teleg. Co.* 65 Ga. 160 [38 Am. Rep. 781].

It is true in the *Gibbs' Case* there was a special statute which prohibited the company from entering into any consolidation, combination or contract with any other gas company whatever, and it was provided that any attempt to do so or to make such combination or contract should be utterly null and void. The above extract from the opinion of the court is made for the purpose of showing the difference which exists between a private and a public corporation; that kind of a public corporation which while doing business for remuneration is yet so connected in interest with the public as to give a public character to its business, and it is seen that while, in the absence of a statute prohibiting them, contracts of private individuals or corporations touching upon restraints in trade must be unreasonable in their nature to be held void, different considerations obtain in the case of public corporations like those of railroads where it well may be that any restraint upon a business of that character as affecting its rates of transportation must thereby be prejudicial to the public interests.

The plaintiffs are, however, under no obligation in order to maintain this action to show that by the common law all agreements among competing railroad companies to keep up rates to such as are reasonable were void as in restraint of trade or commerce. There are many cases which look in that direction if they do not precisely decide that point. Some of them are referred to in the opinion in the *Consolidated Gas Company Case*, above cited. The case of *Mogul Steamship Company* v. *McGregor*, L. R. 21 Q. B. Div. 544, L. R. 23 Q. B. Div. 598 [1891] A. C. 25, has been cited by the courts below as holding in principle that contracts of this nature are valid at common law. The agreement held valid there was *an agreement[335 for lowering rates of transportation among the parties thereto, and it was entered into for the purpose of driving out of trade rival steamships in order that thereafter the rates might be advanced. The English courts held that the agreement was not a conspiracy, and that it was valid, although the result aimed at was to drive a rival out of the field, because so long as the injury to such rival was not the sole reason for the agreement, but self-interest the predominating motive, there was nothing wrong in law with an agreement of that kind. But assuming that agreements of this nature are not void at common law, and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found in the terms of the statute under consideration. The provisions of the interstate commerce act relating to reasonable rates, discriminations, etc., do not authorize such an agreement as this, nor do they authorize any other agreements which would be inconsistent with the provisions of this act.

The general reasons for holding agreements of this nature to be invalid even at common law, on the part of railroad companies are quite strong, if not entirely conclusive.

Considering the public character of such corporations, the privileges and franchises which they have received from the public in order that they might transact business, and bearing in mind how closely and immediately the question of rates for transportation affects the whole public, it may be urged that Congress



Digitized by Google

had in mind all the difficulties which we have before suggested of proving the unreasonableness of the rate, and might, in consideration of all the circumstances, have deliberately decided to prohibit all agreements and combinations in restraint of trade or commerce, regardless of the question whether such agreements were reasonable or the reverse.

It is true that, as to a majority of those living along its line, each railroad is a monopoly. Upon the subject now under consideration it is well said by Judge Oliver P. Shiras, United States district court judge, northern district of Iowa, in his very able dissenting opinion in this case in the United States circuit court of appeals, as follows:

336] *"As to the majority of the community living along its line, each railway company has a monopoly of the business demanding transportation as one of its elements. By reason of this fact the action of the corporation in establishing the rates to be charged largely influences the net profit coming to the farmer, the manufacturer, and the merchant, from the sale of the products of the farm, the workshop, and manufactory, and of the merchandise purchased and resold, and also largely influences the price to be paid by everyone who consumes any of the property transported over the line of railway. There is no other line of business carried on in our midst which is so intimately connected with the public as that conducted by the railways of the country. . . . A railway corporation engaged in the transportation of the persons and property of the community is always carrying on a public business which at all times directly affects the public welfare. All contracts or combinations entered into between railway corporations intended to regulate the rates to be charged the public for the service rendered must of necessity affect the public interests. By reason of this marked distinction existing between enterprises inherently public in their character and those of a private nature, and further by reason of the difference between private persons and corporations engaged in private pursuits, who owe no direct or primary duty to the public and public corporations created for the express purpose of carrying on public enterprises, and which, in consideration of the public powers exercised in their behalf, are under obligation to carry on the work intrusted to their management primarily in the interest and for the benefit of the community, it seems clear to me that the same test is not applicable to both classes of business and corporations in determining the validity of contracts and combinations entered into by those engaged therein. . . . In the opinion of the court are found citations from the reports of the Interstate Commerce Commission in which are depicted the evils that are occasioned to the railway companies and the public by warfares over rate charges, and the advantages that are gained in many directions by proper conference and concert of action among the competing

337] *lines. It may be entirely true that as we proceed in the development of the policy of public control over railway traffic, methods will be devised and put in operation by legislative enactment whereby railway companies and the public may be protected against the evils arising from unrestricted competition and from rate wars which unsettle the business of the community, but I fail to perceive the force of the argument that because railway companies *through their own action cause evils to themselves* and the public by sudden changes or reductions in tariff rates they must be permitted to deprive the community of the benefit of competition in securing reasonable rates for the transportation of the products of the country. Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject. No law can be enacted nor system be devised for the control of human affairs that in its enforcement does not produce some evil results, no matter how beneficial its general purpose may be. There are benefits and there are evils which result from the operation of the law of free competition between railway companies. The time may come when the companies will be relieved from the operation of this law, but they cannot, by combination and agreements among themselves, bring about this change. The fact that the provisions of the interstate commerce act may have changed in many respects the conduct of the companies in the carrying on of the public business they are engaged in does not show that it was the intent of Congress, in the enactment of that statute, to clothe railway companies with the right to combine together for the purpose of avoiding the effects of competition on the subject of rates."

*The whole opinion is a remarkably [338 strong presentation of the views of the learned judge who wrote it.

Still, again, it is answered that the effects of free competition among railroad companies, as described by the counsel for the companies themselves in the course of their argument, are greatly exaggerated. According to that argument, the moment an agreement of this nature is prohibited the railroads commence to cut their rates, and they cease only with their utter financial ruin, leaving, perhaps, one to raise rates indefinitely when its rivals have been driven away. It is said that this is a most overdrawn statement, and that while absolutely free competition may have in some instances and for a time resulted in injury to some of the railroads, it is not at all clear that the general result has been other than beneficial to the whole public, and not in the long run detrimental to the prosperity of the roads. It is matter of common knowledge that agreements as to rates have been continually made of late years, and that complaints of each company in regard to the violation of such agreements by its rivals have been frequent and persistent. Rate wars go on notwithstanding any agreement to the contrary,



Digitized by Google

and the struggle for business among competing roads keeps on, and in the nature of things will keep on, any alleged agreement to the contrary notwithstanding, and it is only by the exercise of good sense and by the presence of a common interest that railroads, without entering into any affirmative agreement in regard thereto, will keep within the limit of exacting a fair and reasonable return for services rendered. These agreements have never been found really effectual for any extended period.

The Interstate Commerce Commission, from whose reports quotations have been quite freely made by counsel for the purpose of proving the views of its learned members in regard to this subject, has never distinctly stated that agreements among competing railroads to maintain prices are to be commended, or that the general effect is to be regarded as beneficial. They have stated in their fourth annual report that competition may degenerate into rate wars, and that such wars are as unsettling [339] to the business of the country *as they are mischievous to the carriers, and that the spirit of existing law is against them. They then add: "Agreements between railroad companies which from time to time they have entered into with a view to prevent such occurrences have never been found effectual, and for the very sufficient reason that the mental reservations in forming them have been quite as numerous and more influential than the written stipulations." It would seem true, therefore, that there is no guaranty of financial health to be found in entering into agreements for the maintenance of rates, nor is financial ruin or insolvency the necessary result of their absence.

The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it.

As a result of this review of the situation, we find two very widely divergent views of the effects which might be expected to result from declaring illegal all contracts in restraint of trade, etc.; one side predicting financial disaster and ruin to competing railroads, including thereby the ruin of shareholders, the destruction of immensely valuable properties, and the consequent prejudice to the public interest; while on the other side predictions equally earnest are made that no such mournful results will follow, and it is urged that there is a necessity, in order that the public interests may be fairly and justly protected, to allow free and open competition among railroads upon the subject of the rates for the transportation of persons and property.

*The arguments which have been ad- [340] dressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the law-making branch of the government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do. That impolicy is not so clear, nor are the reasons for the exception so potent, as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the roads and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These considerations are, however, not for us. If the act ought to be read as contended for by defendants, Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable. Large numbers do not agree that the view taken by defendants is sound or true in substance, and Congress may and very probably did share in that belief in passing the act. The public policy of the government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts. If the law prohibit any contract or *combination in restraint of trade or [341] commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject.

The conclusion which we have drawn from the examination above made into the question before us is that the anti-trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature.

Although the case is heard on bill and answer, thus making it necessary to assume the truth of the allegations in the answer which are well pleaded, yet the legal effect of the agreement itself cannot be altered by the answer.



Digitized by Google

nor can its violation of law be made valid by allegations of good intention or of desire to simply maintain reasonable rates; nor can the plaintiffs' allegations as to the intent with which the agreement was entered into be regarded, as such intent is denied on the part of the defendants; and if the intent alleged in the bill were a necessary fact to be proved in order to maintain the suit, the bill would have to be dismissed. In the view we have taken of the question, the intent alleged by the government is not necessary to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local." To that end the association is formed and a body created which is to adopt rates, which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt that [342] *its direct, immediate, and necessary effect is to put a restraint upon trade or commerce as described in the act.

For these reasons the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it.

One or two subsidiary questions remain to be decided.

It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect; that the contract at the time it was entered into was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of an act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued it then becomes a violation of the act. There is nothing of an *ex post facto* character about the act. The civil remedy by injunction and the liability to punishment under the criminal provisions of the act are entirely distinct, and there can be no question of any act being regarded as a violation of the statute which occurred before it was passed. After its passage, if the law be violated, the parties violating it may render themselves liable to be punished criminally; but not otherwise.

It is also argued that the United States have no standing in court to maintain this bill; that they have no pecuniary interest in the result of the litigation or in the question to be decided by the court. We think that the 4th section of the act invests the government with full [343] power and authority to bring such an action as this, and if the facts be proved, an injunction should issue. Congress having the control of interstate commerce, has also the duty of protecting it, and it is entirely competent for that body to give the remedy by injunction as more efficient than any other civil remedy. The subject is fully and ably discussed in the case of *Re Debs*, 158 U. S. 564 [39: 1092]. See also *Cincinnati N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184 [40: 935, 5 Inters. Com. Rep. 391]; *Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197 [40: 940, 5 Inters. Com. Rep. 405].

For the reasons given, *the decrees of the United States Circuit Court of Appeals and of the Circuit Court for the District of Kansas must be reversed*, and the case remanded to the circuit court for further proceedings in conformity with this opinion.

Mr. Justice **White** dissenting:

It is unnecessary to refer to the authorities showing that although a contract may in some measure restrain trade, it is not for that reason void or even voidable unless the restraint which it produces be unreasonable. The opinion of the court concedes this to be the settled doctrine.

The contract between the railway companies which the court holds to be void because it is found to violate the act of Congress of the 2d of July, 1890 (26 Stat. at L. 209), substantially embodies only an agreement between the corporations by which a uniform classification of freight is obtained, by which the secret undercutting of rates is sought to be avoided, and the rates as stated in the published rate sheets, and which, as a general rule, are required by law to be filed with the Interstate Commerce Commission, are secured against arbitrary and sudden changes. I content myself with giving this mere outline of the results of the contract, and do not stop to demonstrate that its provisions are reasonable, since the opinion of the court *rests upon that hypothesis. I [344] commence, then, with these two conceded propositions, one of law and the other of fact, first, that only such contracts as unreasonably restrain trade are violative of the general law, and, second, that the particular contract here under consideration is reasonable, and therefore not unlawful if the general principles of law are to be applied to it.

The theory upon which the contract is held to be illegal is that even though it be reasonable, and hence valid, under the general principles of law, it is yet void, because it conflicts with the act of Congress already referred to. Now, at the outset, it is necessary to understand the full import of this conclusion. As it is conceded that the contract does not unreasonably restrain trade, and that if it does not so unreasonably restrain, it is valid under the



Digitized by Google

general law, the decision, substantially, is that the act of Congress is a departure from the general principles of law, and by its terms destroys the right of individuals or corporations to enter into very many reasonable contracts. But this proposition, I submit, is tantamount to an assertion that the act of Congress is itself unreasonable. The difficulty of meeting, by reasoning, a premise of this nature is frankly conceded, for, of course, where the fundamental proposition upon which the whole contention rests is that the act of Congress is unreasonable, it would seem conducive to no useful purpose to invoke reason as applicable to and as controlling the construction of a statute which is admitted to be beyond the pale of reason. The question, then, is, Is the act of Congress relied on to be so interpreted as to give it a reasonable meaning, or is it to be construed as being unreasonable and as violative of the elementary principles of justice?

The argument upon which it is held that the act forbids those reasonable contracts which are universally admitted to be legal is thus stated in the opinion of the court, and I quote the exact language in which it is there expressed, lest in seeking to epitomize I may not accurately reproduce the thought which it conveys:

"Contracts in restraint of trade have been [345] known and *spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

To state the proposition in the form in which it was earnestly pressed in the argument at bar, it is as follows: Congress has said every contract in restraint of trade is illegal. When the law says every, there is no power in the courts, if they correctly interpret and apply the statute, to substitute the word 'some' for the word 'every.' If Congress has meant to forbid only restraints of trade which were unreasonable it would have said so; instead of doing this it has said *every*, and this word of universality embraces both contracts which are reasonable and unreasonable.

Is the proposition which is thus announced by the court, and which was thus stated at bar, well founded?—is the first question which arises for solution. I quote the title and the 1st section of the act which, it is asserted, if correctly interpreted, destroys the right to make just and reasonable contracts:

*"'An Act to Protect Trade and Commerce [346] against Unlawful Restraints and Monopolies.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

Is it correct to say that at common law the words "restraint of trade" had a generic signification which embraced all contracts which restrained the freedom of trade, whether reasonable or unreasonable, and, therefore, that all such contracts are within the meaning of the words "every contract in restraint of trade?" I think a brief consideration of the history and development of the law on the subject will not only establish the inaccuracy of this proposition, but also demonstrate that the words "restraint of trade" embrace only contracts which unreasonably restrain trade, and, therefore, that reasonable contracts, although they, in some measure, "restrain trade," are not within the meaning of the words. It is true that in the adjudged cases language may be found referring to contracts in restraint of trade which are valid because reasonable. But this mere form of expression, used not as a definition, does not maintain the contention that such contracts are embraced within the general terms "every contract in restraint of trade." The rudiments of the doctrine of contracts in restraint of trade are found in the common law at a very early date. The first case on the subject is reported in Year Book 2 Hen. V. fol. 5, p. 26, and is known as *Dier's Case*. That was an action of damages upon a bond conditioned that the defendant should not practise his trade as a dyer at a particular place during a limited period, and it was held that the contract was illegal. The principle upon which this case was decided was not described as one forbidding contracts in restraint of trade, but was stated to be one by which contracts restricting the liberty of the subject *were forbidden. The doctrine declared [347] in that case was applied in subsequent cases in England prior to the case of *Mitchel* v. *Reynolds*, decided in 1711, and reported in 1 P. Wms. 181. There the distinction between general restraints and partial restraints was first definitely formulated, and it was held that a contract creating a partial restraint was valid, and one creating a general restraint was not. The theory of partial and general restraints established by that case was followed in many decided cases in England, not, however, without the correctness of the difference between the two being in some instances denied and in others questioned, until the matter was set finally at rest by the House of Lords in *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.*



Digitized by Google

reported in [1894] A. C. 535. In that case it was held that the distinction between partial and general restraint was an incorrect criterion, but that whether a contract was invalid because in restraint of trade must depend upon whether, on considering all the circumstances, the contract was found to be reasonable or unreasonable. If reasonable, it was not a contract in restraint of trade, and if unreasonable, it was.

The decisions of the American courts substantially conform to both the development and ultimate results of the English cases. Whilst the rule of partial and general restraint has been either expressly or impliedly admitted, the exact scope of the distinction between the two has been the subject of discussion and varying adjudication. And although it is accurate to say that in the cases expressions may be found speaking of contracts as being in form, in restraint of trade and yet valid, it results from an analysis of all the American cases, as it does from the English, that these expressions in no way imply that contracts which were valid because they only partially restrained trade were yet considered as embraced within the definition of contracts in restraint of trade. On the contrary, the reason of the cases, where contracts partially restraining trade were accepted and hence held to be valid, was because they were not contracts in restraint of trade in the legal meaning of those words. Referring to the [348] modern and American *rule on the subject, Beach in his recent treatise on the Modern Law of Contracts, at § 1589, says:

"The tendency of modern thought and decisions has been no longer to uphold in its strictness the doctrine which formerly prevailed respecting agreements in restraint of trade. The severity with which such agreements were treated in the beginning has relaxed more and more *by exceptions and qualifications*, and a gradual change has taken place, brought about by the growth of industrial activities and the enlargement of commercial facilities which tend to render such agreements less dangerous, because monopolies are less easy of accomplishment."

The fact that the exclusion of reasonable contracts from the doctrine of restraint of trade was predicated on the conclusion that such contracts were no longer considered as coming within the meaning of the words "restraint of trade," is nowhere more clearly and cogently stated than in the opinion of the court of appeals of the state of New York, in the case of *Matthews* v. *Associated Press of New York*, 136 N. Y. 333. In considering the contention that a by-law of the defendant association which prohibited its members from receiving or publishing "the regular news despatches of any other news association covering a like territory and organized for a like purpose" was void, because it tended to restrain trade and competition and to create a monopoly, the learned judge said (p. 340):

"We do not think the by-law improperly tends to restrain trade, assuming that the business of collecting and distributing news would come within the definition of a trade. The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. *The courts do not go to the length of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts, and to be enforced; they do, however, now hold many contracts not open to the objection that they are in restraint of trade which a few years back would have been avoided on that sole ground, both here and in England.* The cases in this *court which are the latest manifestations [349] of the turn in the tide are cited in the opinion in this case at general term, and are *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473 [60 Am. Dec. 464]; *Hodge* v. *Sloan*, 107 N. Y. 244; *Leslie* v. *Lorillard*, 110 N. Y. 519 [1 L. R. A. 456]. So that when we agree that a by-law which is in restraint of trade is void, we are still brought back *to the question What is a restraint of trade in the modern definition of that term?* The authority to make by-laws must also be limited by the scope and purpose of the association. I think this by-law is thus limited, and that *it is not in restraint of trade as the courts now interpret that phrase.*"

This lucid statement aptly sums up the process of reasoning by which partial and reasonable contracts came no longer to be considered as included in the words "contracts in restraint of trade," and points to the fallacy embodied in the proposition that contracts which were held not to be in restraint of trade were yet covered by the words "in restraint of trade;" that is, that although they were not such contracts, yet they continued so to be. After analyzing the provisions of the by-law, the opinion proceeds as follows (p. 341):

"Thus a by-law of the nature complained of would have a tendency to strengthen the association and to render it more capable of filling the duty it was incorporated to perform. A business partnership could provide that none of its members should attend to any business other than that of the partnership, and that each partner who came in must agree not to do any other business and must give up all such business as he had theretofore done. *Such an agreement would not be in restraint of trade*, although its direct effect might be to restrain to some extent the trade which had been done."

This adds cogency to the demonstration, and shows in the most conclusive manner that the words "contracts in restraint of trade" do not continue to define those contracts which are no longer covered by the legal meaning of the words.

This court has not only recognized and applied the distinction between partial and general restraints, but has also decided that the true test whether a contract be in restraint of trade is not *whether in a measure it pro- [350] duces such effect, but whether under all the circumstances it is reasonable. *Oregon Steam Nav. Co.* v. *Winsor*, 87 U. S. 20 Wall. 64, 68 [22: 315, 318]; *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396, 409 [32: 979, 984]. As it is unnecessary here to enter into a detailed examination of the cases, I append in the margin a reference to decisions of some of the state courts and to several writers on the subject of contracts in restraint of trade, by whom the



Digitized by Google

doctrine is reviewed and the authorities very fully referred to.†

It follows from the foregoing statement that at common law contracts which only partially restrain trade, to use the precise language of Maule, Justice, in *Rannie* v. *Irvine*, 7 Man. & G. 977, were "*an exception engrafted upon that rule*," that is, the rule as to contracts in restraint of trade, "*and that the exception is in furtherance of the rule itself.*" I submit, also, manifestly that the further development of the doctrine by which it was decided that if a contract was reasonable it would not be held to be included within contracts in restraint of trade, although such contract might, in some measure, produce such an effect, was also an exception to the general rule as to the invalidity of contracts in restraint of trade. The theory, then, that the words "restraint of trade" define and embrace all such contracts without reference to whether they are reasonable, amounts substantially to saying that, by the common law and the adjudged American cases, certain classes of contracts were carved out of and excepted from the general rule, and yet were held to remain embraced within the general rule from which they were removed. But the obvious conflict which is shown by this contradictory result to which the contention leads rests, not upon the mere form of statement, but 351] upon the *reason of things. This will, I submit, be shown by a very brief analysis of the reasons by which partial restraints were held not to be embraced in contracts in restraint of trade, and by which ultimately all reasonable contracts were likewise decided not to be so embraced. That is to say, that the reasoning by which the exceptions were created conclusively shows the error of contending that the words "contracts in restraint of trade" continued to embrace those reasonable contracts which those words no longer described.

It is perhaps true that the principle by which contracts in restraint of the freedom of the subject or of trade were held to be illegal was first understood to embrace all contracts which in any degree accomplished these results. But as trade developed it came to be understood that if contracts which only partially restrained the freedom of the subject or of trade were embraced in the rule forbidding contracts in restraint of trade, both the freedom of contract and trade itself would be destroyed. Hence, from the reason of things, arose the distinction that where contracts operated only a partial restraint of the freedom of contract or of trade they were not in contemplation of law contracts in restraint of trade. And it was this conception also which, in its final aspect, led to the knowledge that reason was to be the criterion by which it was to be determined whether a contract which, in some measure, restrained the freedom of contract and of trade, was in reality, when considered in all its aspects, a contract of that character or one which was necessary to the freedom of contract and of trade. To define, then, the words "in restraint of trade" as embracing every contract which in any degree produced that effect would be violative of reason, because it would include all those contracts which are the very essence of trade, and would be equivalent to saying that there should be no trade, and therefore nothing to restrain. The dilemma which would necessarily arise from defining the words "contracts in restraint of trade" so as to destroy trade by rendering illegal the contracts upon which trade depends, and yet presupposing that trade would continue and should not be restrained, is shown by an argument advanced, and which has been *compelled by the exigency of the premise[352 upon which it is based. Thus, after insisting that the word "every" is all-embracing, it is said from the necessity of things it will not be held to apply to covenants in restraint of trade which are collateral to a sale of property, because not "supposed" to be within the letter or spirit of the statute. But how, I submit, can it be held that the words "*every* contract in restraint of trade" *embrace all* such contracts, and yet at the same time it be said that certain contracts of that nature are not included? The asserted exception not only destroys the rule which is relied on, but it rests upon no foundation of reason. It must either result from the exclusion of particular classes of contracts, whether they be reasonable or not, or it must arise from the fact that the contracts referred to are merely collateral contracts. But many collateral contracts may contain provisions which make them unreasonable. The exception which is relied upon, therefore, as rendering possible the existence of trade to be restrained is either arbitrary or it is unreasonable.

But, admitting *arguendo* the correctness of the proposition by which it is sought to include every contract, however reasonable, within the inhibition of the law, the statute, considered as a whole, shows, I think, the error of the construction placed upon it. Its title is "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies." The word "unlawful" clearly distinguishes between contracts in restraint of trade which are lawful and those which are not. In other words, between those which are unreasonably in restraint of trade, and consequently invalid, and those which are reasonable and hence lawful. When, therefore, in the very title of the act the well-settled distinction between lawful and unlawful contracts is broadly marked, how can an interpretation be correct which holds that all contracts, whether lawful or not, are included in its provisions? Whilst it is true that the title of an act cannot be used to destroy the plain import of the language found in its body, yet when a literal interpretation will work out wrong or injury, or where the words of the statute are ambiguous, the title may be resorted to as an instrument of construction. *In *United States* v. *Palmer*, [353 16 U. S. 3 Wheat. 610 [4: 471], where general language found in the body of a criminal stat-

†Diamond Match Co. v. Roeber, 106 N. Y. 473 [60 Am. Dec. 461]; Leslie v. Lorillard, 110 N. Y. 519, 533 [1 L. R. A. 456]; Beal v. Chase, 31 Mich. 90, 518; National Benefit Co. v. Union Hospital Co. 45 Minn. 272 [11 L. R. A. 437]; Ellerman v. Chicago Junction R. & U. S. Y. Co 49 N. J. Eq. 215, 217; Richards v. American Desk & S. Co. 87 Wis. 508, 514; 2 Parsons, Cont. 748, note; Angier v. Webber (1867) 92 Am. Dec. 751, note; Mitchel v. Reynolds, 1 Smith, Lead. Case. 705, note, and supplemental note, 9th Am. ed. (1888) 716; Review of cases by A. M. Eaton in 4 Harv. L. Rev. (1890) 129; Patterson, Restraint of Trade (1891).



Digitized by Google

ute was given a narrow and restricted meaning, Mr. Chief Justice Marshall, in the course of the opinion, said (p. 631 [477]): "The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature. The title of this act is 'An Act for the Punishment of Certain Crimes against the United States.' It would seem that offenses against the United States, not offenses against the human race, were the crimes which the legislature intended by this law to punish."

So, also, in *United States* v. *Union P. R. Co.* 91 U. S. 72 [23: 224], where the construction of a statute was involved, it was held that the interpretation adopted was supported by the title, which disclosed the general purpose which Congress had in view in adopting the law under consideration. The same rule was announced in *Smythe* v. *Fiske*, 90 U. S. 23 Wall. 374, 380 [23: 47, 49], and *Cooeaw Min. Co.* v. *South Carolina*, 144 U. S. 550 [36: 537], and cases there cited.

Pretermitting the consideration of the title, it cannot be denied that the words "restraint of trade" used in the act in question had long prior to the adoption of that act been construed as not embracing reasonable contracts. The well-settled rule is that where technical words are used in an act, and their meaning has previously been conclusively settled by long usage and judicial construction, the use of the words without an indication of an intention to give them a new significance is an adoption of the generally accepted meaning affixed to the words at the time the act was passed. Particularly is this rule imperative where the statute in which the words are used creates a crime, as does the statute under consideration, and gives no specific definition of the crime created. Thus, in *United States* v. *Palmer*, *supra*, Mr. Chief Justice Marshall, referring to the term "robbery" as used in the statute, said (p. 630 [477]): "Of the meaning of the term 'robbery,' as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognized and defined at common law."

354] *If these obvious rules of interpretation be applied, it seems to me they render it impossible to construe the words "every restraint of trade" used in the act in any other sense than as excluding reasonable contracts, as the fact that such contracts were not considered to be within the rule of contracts in restraint of trade, was thoroughly established both in England and in this country at the time the act was adopted. It is, I submit, not to be doubted that the interpretation of the words "every contract in restraint of trade," so as to embrace within its purview every contract, however reasonable, would certainly work an enormous injustice and operate to the undue restraint of the liberties of the citizen. But there is no canon of interpretation which requires that the letter be followed, when by so doing an unreasonable result is accomplished. On the contrary, the rule is the other way, and exacts that the spirit which vivifies, and not the letter which killeth, is the proper guide by which to correctly interpret a statute. In *Smythe* v. *Fiske*, 90 U. S. 23 Wall. 374, 380 [23: 47, 49], this court declared that "a thing may be within the letter of the statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law." In *Lau Ow Bew* v. *United States*, 144 U. S. 47 [36: 340], this court, speaking through Mr. Chief Justice Fuller, said (p. 59 [344]):

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion. *Church of Holy Trinity* v. *United States*, 143 U. S. 457 [36: 228]; *Henderson* v. *Wickham*, 92 U. S. 259 [23: 543]; *United States* v. *Kirby*, 74 U. S. 7 Wall. 482 [19: 278]; *Oates* v. *First Nat. Bank*, 100 U. S. 239 [25: 580]."

In all the cases there cited the literal language of the statutes was disregarded, in order to restrict its operation within reason. To those cases may also be added *United States* v. *Mooney*, 116 U. S. 104 [29: 550], where it was contended that by the act of March 3, 1875, chap. 137, the circuit courts were vested with jurisdiction concurrent with district courts over certain suits. The plausibility of the argument, based upon the literal language of the statute, was conceded by the court, but the results which *would follow from sustain-[355 ing the construction contended for were pointed out by the court, and it was observed (p. 107 [552]), "A construction which involves such results was clearly not contemplated by Congress."

Indeed, it seems to me there can be no doubt that reasonable contracts cannot be embraced within the provisions of the statute if it be interpreted by the light of the supreme rule commanding that the intention of the law must be carried out, and it must be so construed as to afford the remedy and frustrate the wrong contemplated by its enactment.

The plain intention of the law was to protect the liberty of contract and the freedom of trade. Will this intention not be frustrated by a construction which, if it does not destroy, at least gravely impairs, both the liberty of the individual to contract and the freedom of trade? If the rule of reason no longer determines the right of the individual to contract or secures the validity of contracts upon which trade depends and results, what becomes of the liberty of the citizen or the freedom of trade? Secured no longer by the law of reason, all these rights become subject, when questioned, to the mere caprice of judicial authority. Thus, a law in favor of freedom of contract, it seems to me, is so interpreted as to gravely impair that freedom. Progress and not reaction was the purpose of the act of Congress. The construction now given the act disregards the whole current of judicial authority and tests the right to contract by the conceptions of that right entertained at the time of the year books instead of by the light of reason and the necessity of modern society. To do this violates, as I see it, the plainest conception of public policy, for, as said by Sir G. Jessel, Master of the Rolls, in *Printing & N. Registering Co.* v. *Sampson*, L. R. 19 Eq. 465, "if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost lib-



Digitized by Google

erty of contracting, and their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."

The remedy intended to be accomplished by the act of Congress was to shield against the
356] danger of contract or combination *by the few against the interest of the many and to the detriment of freedom. The construction now given, I think, strikes down the interest of the many to the advantage and benefit of the few. It has been held in a case involving a combination among workingmen, that such combinations are embraced in the act of Congress in question, and this view was not doubted by this court. *United States* v. *Debs*, 64 Fed. Rep. 724, 745-755, 158 U. S. 564 [39: 1092]. The interpretation of the statute, therefore, which holds that reasonable agreements are within its purview, makes it embrace every peaceable organization or combination of the laborer to benefit his condition either by obtaining an increase of wages or diminution of the hours of labor. Combinations among labor for this purpose were treated as illegal under the construction of the law which included reasonable contracts within the doctrine of the invalidity of contract or combinations in restraint of trade, and they were only held not to be embraced within that doctrine either by statutory exemption therefrom or by the progress which made reason the controlling factor on the subject. It follows that the construction which reads the rule of reason out of the statute embraces within its inhibition every contract or combination by which workingmen seek to peaceably better their condition. It is therefore, as I see it, absolutely true to say that the construction now adopted which works out such results not only frustrates the plain purpose intended to be accomplished by Congress, but also makes the statute tend to an end never contemplated, and against the accomplishment of which its provisions were enacted.

But conceding for the sake of argument that the words "every contract in restraint of trade," as used in the act of Congress in question, prohibits all such contracts however reasonable they may be, and therefore that all that great body of contracts which are commonly entered into between individuals or corporations and which promote and develop trade, and which have been heretofore considered as lawful, are no longer such; and conceding also that agreements entered into by associations of workingmen to peaceably better their condition either by obtaining an increase
357] or preventing a decrease *of wages, or by securing a reduction in the hours of labor, or for mutually protecting each other from unjust discharge, or for other reasonable purposes, have become unlawful, it remains to consider whether the provisions of the act of 1890 were intended to apply to agreements made between carriers for the purpose of classifying the freight to be by them carried, or preventing secret cutting of the published rates; in other words, whether the terms of the statute were intended to apply to contracts between carriers entered into for the purpose of securing fairness in their dealings with each other and tending to protect the public against improper discrimination and sudden changes in rates. To answer this question involves deciding whether the act here relied upon was intended to abrogate the provisions of the act of Congress of the 4th of February, 1887, and the amendments thereto, commonly known as the interstate commerce act. The question is not whether railway companies may not violate the terms of the statute of 1890 if they do acts which it forbids and punishes, but whether that statute was intended to abrogate the power of railway companies to make contracts with each other which are either expressly sanctioned by the interstate commerce act or the right to make which arises by reasonable implication from the terms of that act; that is to say, not whether the act of 1890 is not operative upon all persons and corporations, but whether, being so generally operative, it was intended to forbid, as in restraint of trade, all contracts on the subjects embraced within and controlled by the interstate commerce law. The statute commonly known as the interstate commerce law was a special act, and it was intended to regulate interstate commerce transported by railway carriers. All its provisions directly and expressly related to this subject. The act of 1890, on the contrary, is a general law, not referring specifically to carriers of interstate commerce. The rule is that a general will not be held to repeal a special statute unless there be a clear implication unavoidably resulting from the general law that it was the intention that the provisions of the general law should cover the subject-matter previously, expressly and specifically provided for by particular legislation. The doctrine on this subject *is thus stated in *Ex parte Kang-Gi-*
358] *Shun-Ca* ("*Ex parte Crow Dog*"), 109 U. S. 570 [27:1050]:

"'The general principle to be applied,' said Boville, Ch. J., in *Thorpe* v. *Adams*, L. R. 6 C. P. 135, 'to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C., in *Fitzgerald* v. *Champenys*, 30 L. J. Ch. 782; 2 Johns. & H. 31-54, 'that the legislature, having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterward to derogate from its own act when it makes no special mention of its intention so to do.'"

These principles thus announced are treated as elementary by the text-writers. Endlich, Interpretation of Statutes, § 223; Sedgw. Stat. Const. §§ 157, 158; Sutherland, Stat. Const. § 157.

Does, therefore, the implication irresistibly arise that Congress intended in the act of 1890 to abrogate, in whole or in part, the provisions of the act of 1887, regulating interstate commerce? It seems to me that the nature of the two enactments clearly demonstrates that there was no such intention. The act to regulate interstate commerce expressed the purpose of Congress to deal with a complex and particular subject which, from its very nature, required special legislation. That act was the initiation



Digitized by Google

of a policy by Congress looking to the development and working out of a harmonious system to regulate the highly important subject of interstate transportation.

Conceding *arguendo* that the debates which took place at the time of the passage of the act of 1890 may not be resorted to as a means of interpreting its text, yet a review of the proceedings connected with the passage of the act of July 2, 1890, through the two Houses of Congress, it seems to me, leaves no room for question that the act was not designed to cover the particular subjects which had been theretofore specially regulated by provisions of the interstate commerce law.

**359**] *Prior to the passage of the act of 1890, various reports had been made to Congress concerning the operations of the interstate commerce act, in which the Commission pointed out the desirability and necessity of contracts between railroad companies in the matter of classification, stable rates, etc. After the act of 1890 had been adopted in the Senate, it was amended in the House of Representatives so as to specifically include among the contracts declared lawful "contracts for the transportation of persons or property from one state or territory into another." 21st Cong. Rec. part 5, pp. 4099, 4144. On the return of the bill to the Senate the amendment was agreed to with the added provision that the contracts for transportation to be prohibited, "should only be such as raise the rates of transportation above what is just and reasonable." 21st Cong. Rec. part 5, p. 4753. The House refused to concur in the Senate amendment. A conference committee was appointed by both bodies, which recommended that the House of Representatives recede from its disagreement to the amendments of the Senate and agree to the same modified by the addition of the provision that "nothing in this act shall be deemed or held to impair the powers of the several states in respect to any of the matters in this act mentioned." In a statement accompanying the report, Mr. Stewart, for the conferees on the part of the House, said:

"A majority of the committee of conference on the part of the House on the disagreeing votes of the two Houses on Senate bill submit the following statement:

"In the original bill two things were declared illegal, namely, contracts in restraint of interstate trade or commerce and the monopolization of such trade.

"Its only object was the control of trusts, so-called, so far as such combinations in their relation to interstate trade are within reach of Federal legislation.

"The House amendment extends the scope of the act to all agreements entered into for the purpose of preventing competition, either in the purchase or sale of commodities or in the transportation of persons or property within the jurisdiction of Congress.

**360**] *"It declares illegal any agreement for relief from the effects of competition in the two industries of transportation or merchandising, however excessive or destructive such competition may be.

"The amendment reported by the conference is the state amendment with the added proviso that the power of the states over the subjects embraced in the act shall not be impaired thereby.

"It strikes from the House amendment the clause relating to contracts for the purchase of merchandise, and modifies the transportation clause by making unlawful agreements which raise rates above what is just and reasonable." 21st Cong. Rec. part 6, p. 5950.

The House rejected the report of the conference committee and adhered to its amendments. A new conference committee was appointed, and the recommendation of that committee that both Houses recede was concurred in, and the bill as it originally passed the Senate was adopted. 21st Cong. Rec. part 9, p. 6212.

It thus appears that the bill was originally introduced in the form in which it now appears, that this form was thought not to be sufficient to embrace railroad transportation, and that a determined effort was made by the proposed amendment to include such contracts, and that the effort was unsuccessful. The reports to Congress by the Commission and by the conference committee being facts proper to be noticed in seeking to ascertain the intention of Congress (*Church of Holy Trinity* v. *United States*, 143 U. S. 457 [36: 227]), it would seem to be manifest therefrom that there was no intention by the act to interfere with the control and regulation of railroads under the interstate commerce act or with acts of the companies which had therefore been recognized as in conformity to and not in conflict with that act.

That there was and could have been no intention to repeal by the act of 1890 the earlier "act to regulate interstate commerce" is additionally evidenced by the fact that no reference is made in the later act to the prior one, and that no language is contained in the act of 1890 which could in any way be construed as *abrogating any of the rights conferred [**361**] or powers called into existence by the interstate commerce act. Nowhere, contemporaneous with the act of 1890, is there anything indicating that anyone supposed that the provisions of that act were intended to repeal the interstate commerce act. The understanding of Congress in this respect is shown by the circumstances that the interstate commerce act has been amended in material particulars and treated as existing since the adoption of the act of 1890; and this conception of the legislative department of the government has also been that entertained by the executive and judicial departments, evidenced by the appointment of new members of the Commission, and by decisions of the courts enforcing various provisions of that act, and treating it as still subsisting in its entirety. The two laws then co-existing, is the agreement of the carriers to secure a uniform classification of freight and to prevent secret changes of the published rates, in other words, to secure just and fair dealings between each other, sanctioned by the act to regulate interstate commerce, and, therefore, not within the inhibition of the act of 1890?

The interstate commerce act provided for the appointment of a Commission to whom was to be confided the supervision of the execution of the law. Without going into detailed mention of the provisions of the statute, I adopt and quote the summary statement of the leading features of the original act contained in the first



Digitized by Google

annual report made to Congress by the Commission, as required by the act. It is as follows:

"All charges made for services by carriers subject to the act must be reasonable and just. Every unjust and unreasonable charge is prohibited and declared to be unlawful.

"The direct or indirect charging, demanding, collecting, or receiving for any service rendered a greater or less compensation from any one or more persons than from any other for a like and contemporaneous service, is declared to be unjust discrimination, and is prohibited.

"The giving of any undue or unreasonable preferences, as between persons or localities or
362] kinds of traffic, or the subjecting *any one of them to undue or unreasonable prejudice or disadvantage, is declared to be unlawful.

"Reasonable, proper, and equal facilities for the interchange of traffic between lines, and for the receiving, forwarding, and delivering of passengers and property between connecting lines, is required, and discrimination in rates and charges as between connecting lines is forbidden.

"It is made unlawful to charge or receive any greater compensation in the aggregate for the transportation of passengers or the like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance.

"Contracts, agreements, or combinations for the pooling of freights of different and competing railroads, or for dividing between them the aggregate or net earnings of such railroads or any portion thereof, are declared to be unlawful.

"All carriers subject to the law are required to print their tariffs for the transportation of persons and property, and to keep them for public inspection at every depot or station on their roads. An advance in rates is not to be made until after ten days' public notice, but a reduction in rates may be made to take effect at once, the notice of the same being immediately and publicly given. The rates publicly notified are to be the maximum as well as the minimum charges which can be collected or received for the services respectively for which they purport to be established.

"Copies of all tariffs are required to be filed with the Commission, which is also to be promptly notified of all changes that shall be made in the same. The joint tariffs of connecting roads are also required to be filed, and also copies of all contracts, agreements, or arrangements between carriers in relation to traffic affected by the act.

"It is made unlawful for any carrier to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedules, carriage in different cars, or by other means of devices, the carriage of freights from being continuous from the place of shipment to the place of destination."

363] *These provisions substantially exist in the act as now in force, except that by an amendment made March 2, 1889, it was provided that rates should not be reduced by carriers except upon three days' public notice of an intention so to do.

This summary of the act, which omits reference to a number of its provisions relating to the power of the Commission and the mode in which these powers are to be exercised, will suffice for an examination of the matter in hand.

Now, a consideration of the terms of the statute, I submit, makes it clear that the contract here sought to be avoided as illegal is either directly sanctioned or impliedly authorized thereby. That the act did not contemplate that the relations of the carrier should be confined to his own line and to business going over such line alone, is conclusively shown by the fact that the act specifically provides for joint and continuous lines; in other words, for agreements between several roads to compose a joint line. That these agreements are to arise from contract is also shown by the fact that the law provides for the filing of such contracts with the Commission. And it was also contemplated that the agreements should cover joint rates, since it provides for the making of such joint tariffs and for their publication and filing with the Commission. The making of a tariff of this character includes necessarily agreements for the classification of freight, as the freight classification is the essential element in the making up of a rate. That the interstate commerce rates, all of which are controlled by the provisions as to reasonableness, were not intended to fluctuate hourly and daily as competition might ebb and flow, results from the fact that the published rates could not either be increased or reduced, except after a specified time. It follows, then, that agreements as to reasonable rates and against their secret reduction conform exactly to the terms of the act. Indeed, the authority to make agreements on this subject not only results from the terms of the act just referred to, but from its mandatory provisions forbidding discrimination against or preference to persons and places. The argument that these provisions referred to joint lines alone and not to competitive lines is without force; since joint rates necessarily relate to and are influenced *by the rates on competitive lines. To [364 illustrate, suppose three joint lines of railroads between Chicago and New York, each made up of many roads. How could a joint rate be agreed on by the roads composing one of these continuous lines, without an ascertainment of the rate existing on the other continuous line? What contract could be made with safety for transportation over one of the lines without taking into account the rate of all the others? There certainly could be no prevention of unjust discrimination as to the persons and places within a given territory, unless the rates of all competing lines within the territory be considered and the sudden change of the published rates of all such lines be guarded against.

I do not further elaborate the reasons demonstrating that classification is essential to rate-making, and that a joint rate to be feasible must consider the competitive rates in the same territory, since these propositions are to be self-evident, and their correctness is substantiated by statements found in the reports of the Interstate Commerce Commission to Congress, of which reports judicial notice may be taken. *Heath* v. *Wallace*, 138 U. S. 573, 584 [34: 1063, 1068].

I excerpt from some of these reports of the



Digitized by Google

Commission to Congress statements bearing on these subjects, as well as other statements indicating that agreements among carriers, competitive as well as connecting, for the purpose of securing a uniform classification and preventing of undercutting of rates, underbilling, etc., existed prior to the interstate commerce act, were continued thereafter, and were deemed not to be forbidden by law, but, on the contrary, were considered as instruments tending to secure its successful evolution. Whilst it is doubtless true that in a recent report the Commission, as now constituted, has said that agreements between competitors to prevent the undercutting of rates may operate to cause carriers to disregard the lawful orders of the Commission, but this fact does not change the legal inference to be deduced from the construction placed upon the law by those charged with its administration in the period immediately following its adoption and which was then reported to Congress.

365] *On the subject of relative rates, the Commission at page 39 of their first annual report said:

"Questions of rates on one line at one point cannot be considered by themselves exclusively; a change in them must affect rates in a considerable part of the country. . . . Just rates are always relative; the act itself provides for its being so when it forbids unjust discrimination as between localities." That is to say, if one continuous line made joint rates and fixed and published them, and the other then made a different rate, not only would the first joint rate be injurious to the interests of the railroads making it, during the period in which it could not be changed, but would also be against the interests of the public and of those who had contracted to ship, since it would create among shippers and the receivers that inequality which it was the express purpose of the act to prevent.

In the same report of the Commission at page 33, not only the expediency but the necessity of contractual relations between railroad companies is pointed out in the following language:

"To make railroads of the greatest possible service to the country, contract relations would be essential, because there would need to be joint tariffs, joint running arrangements, an interchange of cars and a giving of credit to a large extent, some of which were obviously beyond the reach of compulsory legislation, and even if they were not, could be best settled and all the incidents and qualifications fixed by the voluntary action of the parties in control of the roads respectively."

Also at page 35, after referring to the fact that the former railroad associations had been continued in existence since the enactment of the interstate commerce law, though pooling had been prohibited, among other objects, for the "making of regulations for uninterrupted and harmonious railroad communication and exchange of traffic within the territories embraced by their workings," the Commission observed that "some regulations in addition to those made by the law are almost if not altogether indispensable."

On the same page the fact is emphasized that classification had not been taken, by the act,

366] out of the hands of the carriers, *and it was observed that classification was best made by the joint action of the railroads themselves. In its second annual report the Commission, in commenting upon the evils arising from the want of friendly business relations between railroads and the injury that a short road might cause by simply abstaining from extending accommodation that could not be lawfully forced from it, said (p. 28):

"The public has an interest in being protected against the probable exercise of any such power. But its interest goes further than this; it goes to the establishment of such relations among the managers of roads as will lead to the extension of their traffic arrangements with mutual responsibility, just as far as may be possible, so that the public may have in the service performed all the benefits and conveniences that might be expected to follow from general federation. There is nothing in the existence of such arrangements which is at all inconsistent with earnest competition. They are of general convenience to the carriers, as well as to the public, and their voluntary extension may be looked for until in the strife between the roads the limits of competition are passed and warfare is entered upon. But in order to form them great mutual concessions are often indispensable, and such concessions are likely to be made when relations are friendly, but are not to be looked for when hostile relations have been inaugurated."

At page 29 of the report the existence of traffic arrangements between railroads is called to the attention of Congress in the following language:

"While the Commission is not at this time prepared to recommend general legislation towards the establishment and promotion of relations between the carriers that shall better subserve the public interest than those which are now common, it must nevertheless look forward to the possibility of something of that nature becoming at some time imperative, unless a great improvement in the existing condition of things is voluntarily inaugurated."

So, also, the existence of traffic associations, between competitive roads, for purposes recognized by the act as lawful, *and their [367 favorable tendency seems to be conceded in the fourth annual report of the Commissioners, where at page 29, it is said:

"If the regulations which are established by the railroad associations were uniformly, or even generally, observed by their members, respectively, there would be little difficulty in enforcing a rule of reasonable rates, for the competition between the roads which even then would exist would be such as would prevent the establishment of rates which are altogether unreasonable, and the public would not be likely to complain if they were satisfied that the rate sheets were observed."

The character of associations such as that under consideration is alluded to at page 26 of the same report, where, in discussing the subject of how best to secure a unity of railroad interests, it was observed "without legislation to favor it little can be done beyond the formation of consulting and advisory associations, and the work of these is not only necessarily defective, but it is also limited to a circumscribed territory."

The significance of the statement that to ob-



Digitized by Google

tain uniformity of classification, a result most desirable for the best interest of the public, agreements between the railroads themselves were essential, is apparent from the fact, frequently declared by the Commission in its reports, that uniformity of classification is one of the prerequisites of uniformity of rates. 1 Inters. C. C. Ann. Rep. 30, 35; 2 Inters. C. C. Ann. Rep. 40; 3 Inters. C. C. Ann. Rep. 51, 52; 4 Inters. C. C. Ann. Rep. 32. The very great importance of uniform and stable rates has also frequently been reiterated in the reports of the Commission. Thus, at page 6 of the first annual report, in reviewing the causes which led to the adoption of the interstate commerce act, it said:

"Permanence of rates was also seen to be of very high importance to every man engaged in business enterprises, since without it business contracts were lottery ventures. It was also perceived that the absolute sum of the money charges exacted for transportation, if not clearly beyond the bounds of reason, was of inferior importance in comparison with the obtaining of rates that should be open, equal, rela-[368]tively just as between places and as steady as in the nature of things was practicable."

That unstable rates between competing carriers lead to injurious discrimination, one of the evils sought to be remedied by the act, was mentioned in the same report at pages 36 and 37, in connection with a discussion of the subject of reasonable charges, in the following language:

"Among the reasons most frequently operating to cause complaints of rates may be mentioned: the want of steadiness in rates. . . . More often, perhaps, growing out of disagreements between competing companies, which, when they become serious, may result in wars of rates between them. Wars of rates, when mutual injury is the chief purpose in view, as is sometimes the case, are not only mischievous in their effects upon the parties to them, and upon the business community whose calculations and plans must for a time be disturbed, but they have a permanently injurious influence upon the railroad service because of their effect upon the public mind."

The evil effects of shifting rates was also treated of at page 22 of the second annual report, where the Commission inserted a letter received from a business man of Kansas City, not connected with railroads, who said:

"The frequent and violent changes in railway rates which have taken place during the past few years, and which seem likely to be unabated, seem to me to call for new legislation in the way of amendment of the interstate commerce bill. These changes are ruinous to all business men, as well as the railways, and are the cause of great discontent among shippers everywhere, and especially to the farmers. What is needed is a fixed permanent rate, which shall be reasonable, and which can be counted upon by anyone engaging in business."

So, also, in the fourth annual report it was observed that shifting, unstable rates by competing roads was contrary to the purpose of the interstate commerce act, and hampered the operations of the Commission. It was said, at page 21:

"In former reports the Commission has[369] referred to the undoubted fact that competition for business between railroad companies is often pushed to ruinous extremes, and that the most serious difficulty in the way of securing obedience to the law may be traced to this fact. When competition degenerates to rate wars, they are as unsettling to the business of the country as they are mischievous to the carriers, and the spirit of existing law is against them."

In addition to the text of the law heretofore commented on, the section which forbids pooling adds cogency to the construction that the law could not have been intended to forbid contracts between carriers for the purpose of preventing the doing of those things which the law forbade. For, as I have seen, it cannot be denied that at the time of the passage of the act there existed associations and contracts between carriers for other purposes than the pooling of their earnings. Whilst the exact scope of these contracts is not shown, the fact that their existence was considered by Congress results from the face of the act, since it requires that agreements and contracts between carriers shall be filed with the Commission. Moreover, the earlier reports of the Commission, as I have shown, refer to such traffic agreements, and state that after the passage of the act they continued to exist as they had existed before eliminating only the pooling feature.

In view of these facts, when the act *expressly forbids contracts and combinations between railroads for pooling, and makes no mention of other contracts*, it is clear that the continued existence of such contracts was contemplated, and they are not intended to be forbidden by the act. The elementary rule of *expressio unius* entirely justifies this implication.

And it is, I submit, no answer to this reasoning to say that the record does not show the terms of these contracts, since judicial notice may be taken of the reports made by the Commission to Congress, from which reports the nature of the contracts is sufficiently pointed out to authorize the conclusion to illustrate that they were of the general character of the one here assailed.

Whilst the excerpts from the reports of the Commission, heretofore made, serve to elucidate the text of the act, they also, I sub-[370]mit, constitute a contemporaneous construction of the provisions of the act made by the officers charged with its administration, which is entitled to very great weight. *Brown* v. *United States*, 113 U. S. 571 [28: 1080], and cases there cited.

The rule sustained by these authorities receives additional sanction here, from the fact that the construction at the time made by the Commission was reported to Congress, and the act was subsequently amended by that body without any repudiation of such construction.

It is, I submit, therefore not to be denied that the agreement between the carriers, the validity of which is here drawn in question, seeking to secure uniform classification and to prevent the undercutting of the published rates, even though such agreements be made with competing as well as joint lines, is in accord with the plain text of the interstate commerce act, and is in harmony with the views



Digitized by Google

of the purposes of that law contemporaneously expressed to Congress by the body immediately charged with its administration, and tacitly approved by Congress.

But, departing from a consideration of the mere text and looking at the interstate commerce act from a broader aspect, in order to discover the intention of the lawmaker and to discern the evils which it was intended to suppress and the remedies which it was proposed to afford by its enactment, it seems to me very clear that the contract in question is in accord with the act and should not be avoided.

It cannot be questioned that the interstate commerce act was intended by Congress to inaugurate a new policy for the purpose of reasonably controlling interstate commerce rates and the dealings of carriers with reference to such rates. Two systems were necessarily presented: the one a prohibition against the exaction of all unreasonable rates and subject to this restriction, allowing the hourly and daily play of untrammelled competition, resulting in inequality and discrimination; the other imposing a like duty as to reasonable rates, and whilst allowing competition subject to this limitation, preventing the injurious con-[371]sequences arising from a *constant and daily change of rates between connecting or competing lines, thus avoiding discrimination and preference as to persons and places.

The second of these systems is, I submit, plainly the one embodied in the interstate commerce act. At the outset reasonable rates are exacted, and the power to strike down rates which are unreasonable is provided. In the subsequent provisions discrimination against persons and against places to arise from daily fluctuation in rates is guarded against by requiring publication of rates and forbidding changes of the published rates, whether by way of increase or reduction during a limited time. To hold, then, the contract under consideration to be invalid when it simply provides for uniform classification, and seeks to prevent secret or sudden changes in the published rates, would be to avoid a contract covered by the law and embodied in its policy. It cannot, I think, be correctly said that whilst the avowed purpose of the contract in question embraced only the foregoing objects, its ulterior intent was to bring about results in conflict with the interstate commerce law. The answers to the bill of complaint specially denied the allegations as to the improper motives of the parties to the contract, and also expressly averred their lawful and innocent intention. As the case was heard upon bill and answer, improper motives cannot therefore be imputed. Indeed, the opinion of the court sustains this view, since it eliminates all consideration of improper motives and holds that the validity of the contract must depend upon its face, and deduces as a legal conclusion from this premise that the contract is invalid, because even reasonable contracts are embraced within the purview of the act of 1890. To my mind, the judicial declaration that carriers cannot agree among themselves for the purpose of aiding in the enforcement of the provisions of the interstate commerce law, will strike a blow at the beneficial results of that act, and will have a direct tendency to produce the preferences and discriminations which it was one of the main objects of the act to frustrate. The great complexity of the subject, the numerous interests concerned in it, the vast area over which it *operates, present difficulties enough [372] without, it seems to me, it being advisable to add to them by holding that a contract which is supported by the text of the law is invalid, because, although it is reasonable and just it must be considered as in restraint of trade.

Nor do I think that the danger of these evil consequences is avoided by the statement that if the contract be annulled these dangers will not arise, because experience shows that contracts such as that here in question, when entered into by railroads, are never observed, and therefore it is just as though the contract did not exist. How, may I ask, can judicial notice be taken of this fact, when it is said that judicial notice cannot be taken of the fact that there are such contracts? How, moreover, may I ask, can it be said on one branch of the case that the contract, although reasonable, must be avoided, because it is a contract in restraint of trade, and then on the other branch declare that contracts of that character never do restrain trade because they are never carried out between the parties who enter into them?

There is another contention which, I submit, is also unsound, that is the suggestion that it is impossible to say that there can be such a thing as a reasonable contract between railroads seeking to avoid sudden or secret changes in reasonable rates because the question of railroad rates is so complex and is involved in so much difficulty that to say that a rate is reasonable is equivalent to saying that it must be fixed by the railroads themselves, as no mind outside of the officials of the particular roads can determine whether a rate is reasonable or not. But this proposition absolutely conflicts with the methods of dealing with railroad rates adopted in England and expressly put in force by Congress in the interstate commerce act and by many of the states of the Union. For years, the rule in England was reasonable rates enforced by judicial power, and subsequently by enactment securing such reasonable rates by administrative authority. The interstate commerce act especially provides for reasonable rates, and vests primarily in the Commission, and then in the courts the power to enforce the provision, and like machinery is provided *in many of [373] the states. Will it be said that Congress and other legislative bodies have provided for reasonable rates and created the machinery to enforce them, when whether rates are reasonable or not is impossible of ascertainment? If this proposition be correct, what, may I ask, becomes of the judgment of this court in *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184 [40: 935], where it is held that the order of the Commission finding certain rates charged by a rail road to be unreasonable was correct?

In conclusion, I notice briefly the proposition that though it be admitted that contracts, when made by individuals or private corporations, when reasonable will not be considered as in restraint of trade, yet such is not the case as to public corporations, because any contract made by them in any measure in restraint of



Digitized by Google

trade, even when reasonable, is presumptively injurious to the public interests, and therefore invalid. The fallacy in this proposition consists in overlooking the distinction between acts of a public corporation which are *ultra vires* and those which are not. If the contract of such a corporation which is assailed be *ultra vires*, of course the question of reasonableness becomes irrelevant, since the charter is the reason of the being of the corporation. The doctrine is predicated on the following expressions taken from the opinion of the court expressed by Mr. Chief Justice Fuller in *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 408 [32: 984]:

"Yet in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited, in *West Virginia Transp. Co.* v. *Ohio River Pipe Line Co.* 22 W. Va. 600; *Chicago Gaslight & C. Co.* v. *People's Gaslight & C. Co.* 121 Ill. 530; *Western U. Teleg. Co.* v. *American U. Teleg. Co.* 65 Ga. 160 [38 Am. Rep. 781]."

But, manifestly, this language must be construed with reference to the facts of the case in which it was used. What the facts were in that case is shown by the statement in the 374]*opinion (p. 406 [983]) that the contract there considered "was an agreement for the abandonment by one of the companies of the discharge of its duties to the public." It is also to be remembered that it was this character of contract, that is, one which was *ultra vires*, which was held to be illegal in the West Virginia, Illinois, and Georgia cases, which were cited in the *Gibbs Case* in support of the excerpt just quoted. That the language in the *Gibbs Case* referred to conditions of fact like that there passed upon, that is, contracts *ultra vires*, is shown by the subsequent case of *Chicago, St. L. & N. O. R. Co.* v. *Pullman Southern Car Co.* 139 U. S. 79 [35: 97], where a contract of the railway company was assailed as in restraint of trade, and the court held that although by the contract the company had restrained itself for a long period of years from using other than certain drawing room and sleeping cars, the contract was yet a valid and proper contract. Manifestly, this decision is utterly irreconcilable with the view that in the case of a railroad company, every restraint imposed by contract upon its freedom of action is necessarily injurious to the public interests, and hence invalid. Indeed, the proposition that any restraint of its conduct which a railroad may create by contract is invalid, because such road is a public corporation, is demonstrated to be erroneous by the interstate commerce act, which, in the provisions heretofore referred to, not only expressly authorizes, but in some instances commands, agreements from which restraint of the action of the corporation necessarily arises.

I am authorized to say that Mr. Justice **Field**, Mr. Justice **Gray**, and Mr. Justice **Shiras** concur in this dissent.

## THE MAJESTIC.

(See S. C. Reporter's ed. 373-386.)

*Conditions on back of steamship passenger's ticket—act of God—inevitable accident.*

1. A notice containing conditions, on the back of a steamship passenger's contract ticket, but not referred to therein, except by the words "See back" printed on the face of the ticket, does not form a part of the cotnract binding on the passenger as to the liability of the steamship company for baggage or otherwise, where the passenger's attention is not called to the conditions, and there is no proof that he ever read or assented to them.
2. A carrier has the burden of proving that injury to the baggage of a passenger was caused by an act of God for which the carrier is not liable.
3. Damage by sea water to baggage in a compartment of a steamship is not shown to have been caused by an act of God or inevitable accident, by evidence which merely tends to show that it resulted from the breaking in of the cover of a porthole in the compartment by floating wreckage, where the evidence does not fully establish this fact or the fact that the porthole was properly inspected before the alleged accident, or explain why, if the wreckage was sufficient to do that damage, the vessel did not steer away from it or slacken speed while passing through it.

[No. 163.]

*Argued January 20, 21, 1897. Decided March 29, 1897.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review an order to enter a decree in favor of the libellants, Grace Howard Potter *et al.*, for the sum of $48.60 and interest, in favor of each of them, which order was made on appeal from a decree from the District Court of the United States for the Southern District of New York for the recovery by the libellants of the full amount of damages to their baggage amounting to the sum of $2,828.50, against the steamship Majestic, etc. *Order of the Circuit Court of Appeals reversed, and decree of the District Court affirmed.*

See same case below, 56 Fed. Rep. 244, 20 U. S. App. 503, 23 L. R. A. 746.

Statement by Mr. Chief Justice **Fuller**:

Libellants, the Misses Potter and their maid, were passengers on the steamship Majestic, which sailed from Liverpool on January 20, 1892, and arrived at New York on the 28th. On disembarking, the contents of their trunks were found badly damaged by sea water, and this libel was filed in the district court for the southern district of New York to recover for the loss.

The libel alleged that the Oceanic Steam

NOTE.—*As to act of God, what is; rights, duties, and liabilities of carriers of passengers; who are passengers; measure of care required; contributory negligence; tickets; ejectment of passengers,*—see note to Gleeson v. Virginia M. R. Co. 35: 458.

*As to how far consignment of goods vests the property in consignee, and to whom is the carrier responsible for loss or injury,*—see note to Grove v. Brien, 12: 1142.

*As to what is included in baggage for which carrier is responsible,*—see note to Hannibal & St. J. R. Co. v. Swift, 20: 423.



Digitized by Google

Navigation Company, owner of the Majestic, for a valuable consideration agreed to carry and transport libellants, with their personal baggage, to New York; and charged that the damage to the baggage was caused by negligence and want of proper care. The answer admitted the delivery of the baggage on board in good order, and its condition on arrival at New York, but put in issue the allegations of negligence and want of proper care. It set up certain stipulations as contained in the ticket under which libellants took passage, by which it was averred the ship was discharged of liability, or, in any case, was not liable for any injury beyond the amount of £10; and it finally alleged that the injury, if any, was caused by the act of God or the perils of the sea, and was in no wise caused or contributed to by the neglect or misconduct of any of its agents or servants.

The so-called ticket issued to the three libellants, omitting numbering and the display headings, was as follows:

## Cabin Passenger's Contract Ticket.

*These Directions and the Notices to Passengers below, form part of, and must appear on, each Contract Ticket.*

1. A Contract Ticket in this Form must be given to every Cabin Passenger engaging a Passage in a Passenger Ship from the United Kingdom to any place out of Europe, and not being within the Mediterranean Sea, under a penalty not exceeding £50.
2. Unless the Passengers are to have a free Table, the Victualling Scale for the Voyage must be appended to the Contract Ticket.
3. All the Blanks must be correctly and legibly filled in, and the Ticket must be legibly signed with the Christian Names and Surname, and Address in full of the Party issuing the same.

377] 4. The Day of the Month on which the Ship is to sail must be inserted in Words and not in Figures only.

5. When once issued, this Ticket must not be withdrawn from the passenger, nor any alteration or erasure made in it unless with his consent.

*British Steam-ship* Majestic *of* 4,244 *Tons register, to sail from* LIVERPOOL, *for* NEW YORK, *on the* twentieth *day of* January, 1892.

| NAMES. | No. of Persons. Adults above 12 Years. | Children 12 Years & under. |
|---|---|---|
| | | |
| Miss GRACE HOWARD POTTER. | 1 | |
| Miss B. HOWARD POTTER. | 1 | |
| & maid. | 1 | |
| | | |
| | | |
| | | |
| | | |
| Total No. of Persons... | Three. | |

IN CONSIDERATION of the sum of £124 10/ I hereby agree with the Person named in the margin hereof that such Person shall be provided with First Class Cabin Passage in the above-named British Steam-ship, to sail from the Port of Liverpool for the Port of NEW YORK, in North America, with not less than Twenty Cubical Feet for Luggage for each Person, and that such Person shall be victualled as First Class Cabin Passenger during the voyage, and the time of detention at any place before its determination: and I further engage to land the Person aforesaid with their Luggage, at the last mentioned Port, free of any Charge beyond the Passage Money aforesaid; and I hereby acknowledge to have received the sum of £ paid in full Payment of such Passage Money.

For and on behalf of the

OCEANIC STEAM NAVIGATION COMPANY, LIMITED, OF GREAT BRITAIN,

THOMAS HENRY ISMAY,
Per R. MARTCKELLELL.
Liverpool, 16th Jan'y, 1892.

*Deposit*....£_____
*Balance*...£_____*to be paid at the office, 10 Water Street, Liverpool, one day before the above date for sailing.*
*Total*.....£ full

### NOTICE TO CABIN PASSENGERS.

1.—If Cabin Passengers, through no default of their own, fail to obtain a passage in the Ship, and on the day named in this Contract Ticket, they may obtain Redress for Breach of Contract by summary Process, under the 73d Section of the Passengers' Act, 1855.

2.—Cabin Passengers must produce, on Demand, their Contract tickets to the *Government [378 Emigration Officer under a Penalty not exceeding £10. This Ticket should therefore be preserved, and kept in readiness to be produced on board the Ship. N. B.—This Contract Ticket is exempt from Stamp Duty.

CAUTION.—To prevent the possibility of robberies occurring before the steamer leaves the wharf, Passengers are requested to be careful to leave their baggage in charge of the Company's Servants only, and to give money, jewellery and other valuables in care of the Purser, who will issue a receipt and deposit the articles in the Ship's Safe. This Ticket is only available for the date for which issued.

[SEE BACK.

[On the back:]

## NOTICE TO PASSENGERS.

This contract is made subject to the following conditions:—

1. The Steamer may tow and assist vessels in all situations, put back or into any port, and deviate from the direct and customary course.



Digitized by Google

2. If the Steamer shall be prevented by any cause from sailing or proceeding in the ordinary course the Passenger may, at the Shipowner's expense, be transhipped to any other steamer bound for the port of destination.

3. Neither the Shipowner nor the Passage Broker or Agent is responsible for loss of or injury to the Passenger or his luggage or personal effects, or delay on the voyage, arising from steam, latent defects in the Steamer, her machinery, gear, or fittings, or from act of God, Queen's enemies, perils of the sea or rivers, restraints of princes, rulers, and peoples, barratry or negligence in navigation, of the Steamer or of any other vessel.

4. Neither the Shipowner nor the Passage Broker or Agent is in any case liable for loss of or injury to or delay in delivery of luggage or personal effects of the Passenger beyond the amount of £10, unless the value of the same in excess of that sum be declared at or before the issue of this Contract Ticket, and freight at current rates for every kind of property (except pictures, statuary, and valuables of any description upon which one per cent will be charged) is paid.

5. The Passenger is not liable in respect of his luggage or personal effects to pay or entitled to receive any general average contribution.

6. If the Passenger does not use this Ticket for the ship and date mentioned on the face of it, or if it is lost or mislaid, it is to be considered as cancelled and the passage money will be absolutely forfeited.

7. All questions arising on this Ticket shall be decided according to English law, with reference to which this Contract is made.

For and on behalf of the OCEANIC STEAM NAVIGATION COMPANY, LIMITED, OF GREAT BRITAIN,

THOMAS BRUCE ISMAY.

**New United States Immigration Act, in effect April 1st, 1891.**

The following Information is required by the United States' Authorities before Passengers will be permitted to land. Agents will please either fill up the blanks or request Passengers to do so themselves.

[Here followed certain unfilled blanks.]

The signature "R. Martckellell" was in writing, the other signatures in print.

The ticket was purchased at London by direction of the father of the young ladies; was brought to the office of his firm; and, as was usual, was held in a particular department until given to those for whom it was intended; 379]he had no recollection *of having seen it, and, if he did, did not examine it. One of the libellants received the ticket in an envelope, did not look at it, and knew nothing of its contents, and the others did not see it. There was no proof whatever that Mr. Potter or the libellants ever had their attention called to the notices on the back of the paper, or ever read or assented to what was printed thereon.

The injured baggage was checked from London to New York direct, after it had been properly marked and labeled for the hold, in accordance with an arrangement between the steamship company and the London & Northwestern Railway for checking baggage through, the practice of the company being to furnish its alternative labels for passengers' baggage, indicating the place in which the baggage should be put.

The baggage was not put in the hold proper but stowed in compartment No. 3 of the orlop deck, where the mails were also. This compartment was about 25 feet in length, had watertight bulkheads at each end, was ordinarily a safe place for the baggage of passengers, and frequently so used. It had three or four portholes on each side, considerably above the water line, closed in the usual way, with glass, covered over with an iron protector called a dummy.

On the morning of January 25, it was found that a porthole was broken in orlop No. 3, and that the whole compartment was flooded with sea water. On which side of the ship the shattered porthole was located was not shown.

The log contained this entry: "Jany. 25th. Commenced with clear weather and a high westerly swell. From 7 to 8 A. M. vessel passed through a quantity of wood, apparently deck planking, and about 8 A. M. it was found that the after port in the mail room had been broken through by the sea or by wreckage, and that a large quantity of water had found its way in and damaged the mails and baggage. The broken port was at once replaced by a spare one, and measures were taken to remedy the damage as much as possible."

The captain testified: "When I got up in the morning, the *first thing I saw when I[380 came out of the chart room were some planks, floating wreckage that the ship had evidently passed through in the dark, and was passing through at the time; and there was a pretty rough sea. I saw this port after it was stove in, and it was forced right in. The glass had broken in a great many pieces, and the iron dummy protecting it was forced off the hinges and turned right back—which could not possibly have been done by the sea alone."

The chief officer was called as a witness by libellants, and testified that he was on the bridge on the morning of the 25th from 6 to 8; that they "had rough seas; a bad choppy sea;" that he "saw one piece of wreckage; it looked like deal; it was a good-sized piece of timber; it was on the port side, away from the ship." His evidence leaves it doubtful whether he inspected orlop No. 3 on the day the voyage commenced. As to whatever inspection he made, he states: "I merely opened the watertight door and looked in." At first he said that he had not made an examination of orlop No. 3 before the 25th since leaving port, but afterwards that he was mistaken and that he was down to the orlop "the day after we left Queenstown;" and that the accident might have occurred on any one of the intervening days. He was asked on cross-examination on behalf of the steamship: "What called your attention to this damage to the baggage? *A.* The wash of the water when I opened the door. You see, it is all in total darkness." He was further asked and answered on cross-examination as follows: "*Q.* Were these portholes in orlop No. 3 just as securely pro-



Digitized by Google

tected as any of the other portholes in the hold? *A.* Oh, yes; more so if anything. They are examined by an officer in Liverpool, and he signs a paper to that effect —says the ports are secure. *Q.* Were these ports examined on this voyage in Liverpool? *A.* Yes, sir." There was no other evidence as to inspection at Liverpool in respect of the security of the ports.

Decree was entered in favor of libellants for the full amount of damages claimed together with interest and costs. 56 Fed. Rep. 244. From this decree the steamship company appealed to the circuit court of appeals for the 381] second circuit. After *the appeal was taken, a motion was made before a judge of that court for leave to take new proofs under the rules of that court, which was denied. Subsequently claimant moved for leave to put in evidence certain reported cases, and this motion was denied.

The circuit court of appeals directed the district court to enter a decree in favor of each of the libellants for the sum of $48.67 and interest from January 25, 1892, and costs in the district court, with costs of the appeal to the company. 20 U. S. App. 503 [23 L. R. A. 746]. Whereupon the cause was brought here by a writ of certiorari. Afterward diminution of the record was suggested, and a writ of certiorari issued to bring up the transcript of the proceedings on the application to take additional testimony, etc., and it was transmitted accordingly; but as the court found nothing justifying revision in this regard this requires no further notice.

*Messrs.* **Frederick W. Whitridge** and **Willard Parker Butler** for libellants, appellants.

*Mr.* **Everett P. Wheeler** for claimant, appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By the contract in this case, the steamship company agreed to land libellants with their luggage at the port of New York, and none of the alleged exceptions or conditions were referred to therein. They were notices and nothing more, and it cannot be held, as matter of law, that, whether they were regulations for the conduct of business or limitations upon common-law obligations, they constituted any part of the contract.

Such is the rule in England, where this contract between the shipowner, a British corporation, and citizens of the United States, was entered into.

In *Richardson* v. *Rowntree* [1894] A. C. 217, the respondent had paid passage money for 382] a voyage *on appellants' steamer, and had received a ticket folded up so that no writing was visible unless she opened it, but on which were the words: "It is mutually agreed for the consideration aforesaid that this ticket is issued and accepted upon the following conditions." One of the conditions was: "The company is not under any circumstances liable to an amount exceeding $100 for loss of or injury to the passenger or his luggage." Respondent having brought an action against appellants to recover damages exceeding $100 for personal injuries, certain questions were left to the jury, in response to which they found that she knew there was writing or printing on the ticket, but did not know that the writing or printing contained conditions relating to the terms of the contract of carriage, and that appellants did not do what was reasonably sufficient to give her notice of the conditions; and returned a verdict in her favor for £100. The House of Lords affirmed the judgment of the court of appeal that there was evidence upon which the jury could properly find as they did, and that judgment was properly entered for plaintiff upon the findings.

The Lord Chancellor, Lord Herschell, said: "Now, those are questions which the majority of the court of appeal, in the case of *Parker* v. *South Eastern R. Co.*, pointed out, by their judgment, ought to be left to the jury. That was a case, in its broad features, very similar to this, inasmuch as the plaintiff there had deposited some luggage at the luggage office of one of the railway companies, and received in return for the deposit of the luggage a ticket on which there was printed 'See back,' and on the back were certain conditions by which it was sought to limit the liability of the company. The majority of the court of appeal held that they could not say, as matter of law, that by reason of taking that ticket in exchange for the goods the plaintiff was bound by the conditions; that there were questions to be determined by the jury, and that upon their determination would depend the liability of the defendants. My Lords, the only question that now comes before this *House[383 is whether there was any evidence to go to the jury upon which they could properly find the answer that they did to the last two questions. Now, what are the facts, and the only facts, bearing upon this question which were proved before the jury? That the plaintiff paid the money for her passage for the voyage in question, and that she received this ticket handed to her folded up by the ticket clerk, so that no writing was visible unless she opened and read it. There are no facts beyond those. Nothing was said to draw her attention to the fact that this ticket contained any conditions; and the argument of the appellants is, and must be, this, that where there are no facts beyond those which I have stated the defendants are entitled, as a matter of law, to say that the plaintiff is bound by those conditions. That, my Lords, seems to me to be absolutely in the teeth of the judgment of the court of appeal in the case of *Parker* v. *South Eastern R. Co.*, with which I entirely agree; nor does it seem to me consistent with the case of *Henderson* v. *Stevenson* in your Lordship's House when that case is carefully considered." *Parker* v. *South Eastern R. Co.* L. R. 2 C. P. Div. 416, L. R. 1 C. P. Div. 618; *Henderson* v. *Stevenson*, L. R. 2 H. L. Sc. 470.

In *Henderson* v. *Stevenson* a ticket having on its face only the words "Dublin to White Haven" was given by a steam packet company to a passenger, who without looking at it paid for it, and went on board their steamer. The ship was wrecked, the passenger lost all his luggage, and brought an action against the company. The defense was that on the back



Digitized by Google

of the ticket these words were printed: "This ticket is issued on the condition that the company incur no liability whatever in respect of loss, injury, or delay to the passenger, or to his (or her) luggage, whether arising from the act, neglect, or default of the company or their servants, or otherwise." Judgment was given against the company and affirmed by the House of Lords. The Lord Chancellor, Lord Cairns, said, among other things: "It seems to me that it would be extremely dangerous, not merely with regard to contracts of this description, but with regard to all contracts, if it were to be 384]* held that a document complete upon the face of it can be exhibited as between two contracting parties, and, without any knowledge of anything beside, from the mere circumstance that upon the back of that document there is something else printed which has not actually been brought to and has not come to the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him. I am glad to find that there is no authority for such a proposition in any of the cases that have been cited." It was held that a mere notice from the steam packet company, without the passenger's assent, would not discharge it from performing its duty to carry safely and securely unless prevented by unavoidable accident.

The rule is not otherwise in this country, and is stated in Wheeler on the Modern Law of Carriers, 263, thus: "A notice or memorandum, even though printed upon the bill of lading or other contract with a carrier, unless referred to in the body of the contract and thus made a part of it, is no more than a notice, and does not form a part of the contract between the shipper and the carrier."

In *Michigan C. R. Co.* v. *Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318 [21: 297], it was held that although a common carrier might limit his common-law liability by special contract, assented to by the consignor of goods, an unsigned notice printed on the back of a receipt did not amount to such contract, though the receipt with such notice on it might have been taken by the consignor without dissent. And *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 47 U. S. 6 How. 344 [12: 465], was cited to the point that nothing short of an express stipulation by parol or in writing should be permitted to discharge the carrier from duties which the law has annexed to his employment.

In *New York C. & H. R. R. Co.* v. *Fraloff*, 100 U. S. 24, 27 [25: 531, 533], this court said: "It is undoubtedly competent for carriers of passengers, by specific regulations, *distinctly brought* 385]* *to the knowledge of the passenger*, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk."

In *Malone* v. *Boston & W. R. Co.* 12 Gray, 388 [74 Am. Dec. 598], it was ruled that there was no presumption of law that a passenger on a railroad has read a notice limiting the liability of the railroad corporation for baggage, printed upon the back of a check delivered him, having on the face the words "Look on the back," and that the question of notice was properly submitted to the jury as a question of fact. And see *Brown* v. *Eastern R. Co.* 11 Cush. 97; *Merchants' Despatch Transp. Co.* v. *Theilbar*, 86 Ill. 71; *Rawson* v. *Pennsylvania R. Co.* 48 N. Y. 212 [8 Am. Rep. 543]; *Wilson* v. *Chesapeake & O. R. Co.* 21 Gratt. 654.

On the evidence, we are unable to conclude that the libellants should be held bound, as matter of fact, by any of the alleged conditions or limitations. They were not included in the contract proper, in terms or by reference.

The contract was signed in writing on behalf of the steamship company, but the notices were not. Libellants did not sign, nor were they required to do so, nor was it contemplated that they should.

The ticket was sent to the office of the father of two of the libellants and was forwarded or handed to one of them in an envelope. It was not seen by her until taken up in the middle of the ocean, nor by either of the others at all. The attention of neither of them was called to the notices, nor in any way to the ticket, nor had either of them read it, or read any of the printed matter, in fine type, by which the contract for passage was surrounded. The father of the two young ladies had directed passage to be engaged, and it is true that he had been in the habit of using such tickets himself in crossing, but there was no evidence that his attention had ever been particularly called to them; he had never read them; and he had no idea that the limitations contended for had ever been claimed to have been imposed thereby.

*We quite agree with Lord O'Hagan in [386 *Henderson* v. *Stevenson*, L. R. 2 H. L. Sc. 470, that "when a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted."

But while we hold that libellants were not subjected to these alleged conditions and limitations, and that, therefore, the court of appeals erred in its conclusion that each of them was limited in recovery to £10, a limitation which we must say does not strike us as exactly reasonable in view of the "20 cubical feet" of luggage for each, which the company had expressly contracted to carry, the question still remains, on the doctrine of implied exceptions, whether the injury here was by the act of God, for which the company was not liable. The burden in this respect is on the carrier. *Clark* v. *Barnwell*, 53 U. S. 12 How. 272 [27: 780]; *Western Transp. Co.* v. *Downer*, 78 U. S. 11 Wall. 129 [20: 160]; *Bradley Fertilizer Co.* v. *The Edwin I. Morrison* ("*The Edwin I. Morrison*"), 153 U. S. 199 [38: 688]; *The Caledonia*, 157 U. S. 144 [39: 651].

The act of God, said Chancellor Kent (2 Kent, Com. p. 597), means "inevitable accident, without the intervention of man and public enemies;" and again (3 Kent, Com. p. 216), that "perils of the sea denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. A *casus*



Digitized by Google

*fortuitus* was defined in the civil law to be, *quod damno fatali contingit, cuivis diligentissimo posit contingere.* It is a loss happening in spite of all human effort and sagacity." The words "perils of the sea" may, indeed, have grown to have a broader signification than "the act of God," but that is unimportant here.

Judge Shipman in the court of appeals quotes from 1 Parsons on Shipping & Admiralty, 255, the definition there given of the "act of God," and the reason for it, as follows: "The 'act of God' is limited . . . to causes in which no man has any agency whatever; because it was intended never to raise, in the case of the common carrier, the dangerous and difficult question whether he actually had any agency in causing the loss; for, if this were *possible*, he should be held."

We think it quite clear that the damage 387] complained of *cannot be held to have been the result of such inevitable accident. The evidence was wholly unsatisfactory as to any inspection of the porthole before the vessel left Liverpool. What the chief officer says in that regard, in answer to leading questions, is manifestly not of his own personal knowledge, but on the assumption that such inspection had taken place, because it should have, which could have been established, yet was not, by calling the person whose duty it was to make it. Whether the ports were properly closed when the vessel sailed was not made out, nor was any such inspection of the compartment, after she sailed, proved, as, if the ports were not properly closed, would have detected the fact. The 2 or 3 feet of water in the mail room, orlop No. 3, was perhaps not more than might have been taken in during the first four or five days of the voyage, if the port were not securely fastened and partially open. As remarked by the district judge, whether the covers to all of the ports in the mail room, where this baggage was placed, were screwed down tight, or whether some of them were left open for light or any other purpose, was not affirmatively shown. The theory of the defense was that the breaking of the port was caused by floating wreckage, and while that might possibly have been so, there was no evidence directly tending to establish it as a fact. If it had been shown that when the vessel sailed the ports were in proper condition and properly closed, and that this was their condition on the day before the accident was discovered, that would have presented a different question. The captain testified that the iron dummy was turned back in a way which could not have been done by the sea, but he admitted that his memory was treacherous, after the lapse of time; and the log stated that the port was broken "either by the sea or by wreckage," while the chief officer, who was on the bridge, as the captain was not, said that, between six and eight that morning, he saw only one large piece of wreckage, which was "a good sized piece of timber;" "on the port side; away from the ship."

And, as Judge Brown held, if the wreckage referred to was of a kind adequate to force open an iron cover properly constructed and firmly screwed down over the port, then it devolved 388] *upon the company to show why the ship did not steer away from the wreckage or slacken speed while passing through it; and this was not attempted. In our opinion the steamship company failed to show that the accident was one which could not have been prevented by human effort, sagacity, and care, and we perceive no reasonable ground for disagreeing with the judgment of the district court upon the facts.

*The order of the Circuit Court of Appeals is reversed, and the decree of the District Court affirmed, with costs.*

---

## CITY OF ST. LOUIS, *Plff. in Err.*, v. WESTERN UNION TELEGRAPH COMPANY.

(See S. C. Reporter's ed. 388-391.)

*Case tried by court without a jury—questions open for review.*

1. Where the record shows simply a general finding and rendition of judgment in favor of the defendant, without any special finding of facts, in a case tried by the court without a jury, inquiry in this court on writ of error must be limited to the sufficiency of the complaint and the rulings, if any be preserved, on questions of law arising during the trial; the bill of exceptions cannot be used to bring up the whole testimony for review.
2. Exceptions to rulings which involve a determination of facts present no questions of law to this court, where those fact are not found by a special finding of the court and there is no exception to the competency or relevancy of the evidence.

[No. 219.]

*Argued March 18, 19, 1897. Decided April 5, 1897.*

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment for the defendant in an action brought by the city of St. Louis, plaintiff, against the Western Union Telegraph Company, to recover the sum of $5 per pole for 1,509 telegraph poles which the defendant maintained on the streets of that city. *Affirmed.*

See same case, 148 U. S. 92 [37: 380].

Statement by Mr. Justice **Shiras:**

An action was brought in the circuit court of the United States for the eastern district of Missouri by the city of St. Louis, seeking to recover from the Western Union Telegraph Company the sum of $5 per annum per pole for 1,509 telegraph poles which the defendant maintained on the streets of that city between July 1, 1884, and July 1, 1887. The case was tried without a jury, and resulted, on June 17, 1889, in a judgment in favor of the defendant, the court holding that the burden imposed was a privilege or license tax, which the city had no authority to impose. A writ of error was sued out *of this court, where it was held that[389

NOTE.—*As to what questions the United States Supreme Court will review on writ of error; bill of exceptions,*—see note to Parks v. Turner, 12: 868.



Digitized by Google

the municipal charge in question was not in the nature of a privilege or license tax, but was a rental charge for the permanent and exclusive appropriation of those spaces in the streets which are occupied by the telegraph poles. To the defense asserted by the telegraph company that by ordinance the city had contracted with defendant to permit the erection of these poles in consideration of the right of the city to occupy and use the top cross-arm of any pole for its own telegraph purposes, free of charge, it was replied by this court that there was nothing in the record to show that any of the poles were erected under or by virtue of the ordinance mentioned, and that therefore, so far as the facts appeared, there was simply a temporary matter of street regulation, and one subject to change at the pleasure of the city. But this court did not find it necessary to consider the matter of this ground of defense at length, as on the new trial awarded the facts in respect thereto could be more fully developed. It was further claimed by the telegraph company that the ordinance charging $5 a pole per annum was unreasonable. But this court thought this question also should be passed for further investigation on the new trial. 148 U. S. 92 [37: 380].

Thereafter, in January, 1894, the second trial was proceeded with, a jury being waived, and resulted in a judgment in favor of the defendant. The present writ of error was then sued out from this court.

*Mr.* **W. C. Marshall** for plaintiff in error.

*Messrs.* **John F. Dillon, Elenelous Smith,** *George H. Fearons,* and *Joseph Dickson* for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

We are urged in the argument for the plaintiff in error to convict the circuit court of error in holding that a contract existed between the city and telegraph company, which contract 390]*would be impaired by the ordinance imposing a charge upon the company for maintaining its poles upon the streets, and in holding that said ordinance was void because unreasonable and oppressive.

But, in the view that we take of this record, those questions are not presented for our determination. The case was tried by the court without a jury and the record shows simply a general finding and a rendition of judgment in favor of the defendant. There is no special finding of facts, and therefore inquiry in this court must be limited to the sufficiency of the complaint, and the rulings, if any be preserved, on questions of law arising during the trial. In such cases a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury. *Norris* v. *Jackson*, 76 U. S. 9 Wall. 128 [19: 609]; *Lehnen* v. *Dickson*, 148 U. S. 72 [37: 373].

When all the evidence had been adduced in the case the plaintiff asked the court to declare the law to be as follows:

"The court declares the law to be that, under the pleadings and evidence herein, ordinance No. 11,604 [which was the ordinance which granted the company the right to maintain its poles, upon condition that the city should occupy the top cross-bar free of charge] is not a contract between the plaintiff and defendant, but is simply a municipal regulation, which the city has a right to change at any time it sees fit, and that ordinance No. 12,788, [which was the ordinance imposing the charge of $5 per pole annually] is a valid ordinance regulation, and that the defendant is bound thereby."

"The court declares the law to be that upon the pleadings and evidence in this case ordinance No. 12,738 is a valid ordinance, and is not void as being unreasonable, oppressive, or unjust."

"The court declares the law to be that, upon the pleadings and evidence in this case the plaintiff is entitled to recover from the defendant the sum of $22,685, with interest thereon at the rate of 6 per cent from the 7th day of April, 1888."

The refusal of the court so to hold was excepted to and is assigned for error. But these were rulings which involved a determination of facts, and those facts are not found for us *by a special finding by the court, and as[391 the evidence which developed the facts is not brought to our notice by exception to its competency or relevancy, no questions of law are presented for our review.

It is true that an agreed statement of facts was stipulated into the record of the case from the former trial; but additional evidence was introduced at this trial, and the prayers were based on the entire evidence.

It was said in *Grayson* v. *Lynch*, 163 U. S. 472 [41: 232], that "this court has held in a series of cases that the special findings of facts, referred to in the acts allowing parties to submit issues of fact in civil cases to be tried and determined by the court, is not a mere report of the evidence, but a finding of those ultimate facts upon which the law must determine the rights of the parties; and if the findings of facts be general, only such rulings of the court in the progress of the trial can be reversed as are presented by a bill of exceptions, and that in such cases a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury." *Norris* v. *Jackson*, 76 U. S. 9 Wall. 125 [19: 608]; *Dirst* v. *Morris*, 81 U. S. 14 Wall. 484 [20: 723]; *Boogher* v. *New York L. Ins. Co.* 103 U. S. 95 [26: 311]; *Lehnen* v. *Dickson*, 148 U. S. 72 [37: 373].

*The judgment of the Circuit Court is accordingly affirmed.*

---

JOSEPH A. IASIGI, *Appt.*,
v.
JOHN E. VAN DE CARR, Warden of the City Prison of the City of New York.

(See S. C. Reporter's ed. 391-395.)

*Fugitive from justice—habeas corpus.*

1. The discharge on habeas corpus of a person arrested on a warrant of a state court as a fugitive

NOTE.—*As to when habeas corpus may issue, and when not; and from what courts, and by what judges; what may be inquired into by writ of,*—see note to United States v. Hamilton, 1: 490.



Digitized by Google

from the justice of a state of which he is a native-born citizen, when claimed on the ground that he holds a consular office, may be denied by a Federal court when his consular office has terminated at the date of the order of denial, although it existed at the time of his arrest and when the petition for the writ was filed.

2. Courts of the United States may exercise a discretion in determining the question of the discharge of a person on habeas corpus who has been arrested as a fugitive in a state proceeding in aid of a prosecution for the violation of the laws of another state.

[No. 746.]

*Argued March 22, 1897. Decided April 5, 1897.*

APPEAL from an order of the District Court of the United States for the Southern District of New York dismissing a writ of habeas corpus and remanding Joseph A. Iasigi to the custody of the warden of the city prison of the city of New York to await the warrant of the governor of New York, on requisition of the governor of Massachusetts for his surrender as a fugitive from justice. *Affirmed.*

The facts are stated in the opinion.

*Messrs.* **Frederic R. Coudert, Jr.**, *Chas. Frederic Adams*, and *David Keane* for appellant.

*Messrs.* **John D. Lindsay**, *Albert Stickney*, and *W. M. K. Olcott* for appellee.

**Mr. Chief Justice Fuller** delivered the opinion of the court:

Joseph Iasigi, a native-born citizen of Massachusetts, was arrested February 14, 1897, on a war-

---

*As to what questions may be considered on habeas corpus*, see note to *Ex parte* Carll, 27: 288.

*As to suspension of writ of habeas corpus*, see note to Luther v. Borden, 12: 581.

*As to extradition of persons accused of crime, on demand of foreign governments*, see note to Kentucky v. Dennison, 16: 717.

*As to extradition from another state; right to try person extradited for a different crime from that for which he was surrendered; who are fugitives from justice; character of offense; demand for arrest and delivery of fugitives; surrender of fugitives*,—see note to Cook v. Hart, 38: 994.

*Extradition; international and interstate; treaty laws of Congress; crimes; political offenses; complaint necessary; by whom complaint made; criminality, how shown; hearing and evidence; delivery by the executive; power to surrender vested in executive authority of state or territory; indictment or affidavit; receiving agent; power of judge or justice of the peace; crime, how proved; sufficiency of indictment or affidavits; executive warrant may be revoked; who are fugitives from justice.*

That the indictment attached to the requisition for the extradition of a fugitive from justice is inartistically drafted or is technically defective in form will not defeat extradition where a felony is substantially charged. Jackson v. Archibald, 13 Ohio C. C. 155.

The executive upon whom a requisition for extradition is made by the governor of a state should not undertake to examine the technical accuracy of the indictment accompanying the requisition, if it substantially charges the accused with a definite offense recognized as a crime in the state, but he must satisfy himself of that fact. *Re* Lyon, 24 Wash. L. Rep. 679.

A fugitive from justice surrendered by one state on the demand of another may be prosecuted by the latter for any extraditable offense committed within its borders, without first having an opportunity to return to the state which surrendered him. State, Petry, Leidigh, 47 Neb. 126.

One discharged from confinement under a conviction because he was not extradited for the crime of which he was convicted may be arrested and tried for such crime in the state where he has been at liberty for twelve days and failed to avail himself of his reasonable opportunity to return to the state from which he was extradited. *Ex parte* McKnight, 3 Ohio N. P. 255, 4 Ohio Dec. 254.

The old doctrine that proceedings for the extradition of an alien are to be conducted with extreme technicality has long been abandoned. *Re* Breen, 73 Fed. Rep. 458.

That the evidence in extradition proceedings for embezzlement shows the amount embezzled to be different from that charged is immaterial where an embezzlement is shown. *Re* Breen, 73 Fed. Rep. 458.

A British subject may be surrendered, under the English extradition act 1870, § 6, providing that every fugitive criminal of a foreign state shall be liable to be apprehended and surrendered without express consent by the government, under the treaty with Belgium providing that in no case shall the parties be bound to surrender their own subjects. *Re* Galwey [1896] 1 Q. B. 230, 65 L. J. M. C. N. S. 38, 73 L. T. 756.

The court has no jurisdiction to inquire whether the demand for surrender of a fugitive criminal, made by the government of a friendly state for offenses within the English extradition act 1870, and the extradition treaty with that state, is made in good faith and in the interests of justice. *Re* Arton [1896] 1 Q. B. 108, 65 L. J. M. C. N. S. 23, 73 L. T. 667.

The decision by a commissioner in favor of the extradition of persons charged with murder, arson, robbery, and kidnapping during a raid by 130 or 140 men from Texas into Mexico, in which they attacked about forty Mexican soldiers, killed and wounded some, assaulted private persons, burned houses, and carried away property, cannot be reviewed by writ of habeas corpus on the ground that the offenses were purely political, even if there is some evidence that their purpose was to fight against the government. Ornelas v. Ruiz, 161 U. S. 502 (40: 787).

A person extradited from England for the crime of assault with intent to murder, for which the treaty between Great Britain and the United States provides extradition, cannot be convicted of an assault to do bodily harm, for which offense no extradition is provided by such treaty. People v. Young, Hannan, 9 Misc. 600.

An affidavit for extradition which does not substantially set forth any crime, but merely refers to a criminal statute not identified by the reference, and a warrant which is vague and does not inform the prisoner of the character of the crime alleged nor the time, place, or circumstances of its commission, is insufficient to justify his surrender as a fugitive from another state when attacked by habeas corpus. *Ex parte* Slauson, 73 Fed. Rep. 666.

A person charged with fraudulent appropriation of money in proceedings for his surrender as a fugitive from another state may on habeas corpus show that he has not committed such crime and that the person instituting the proceeding is acting maliciously. *Ex parte* Slauson, 73 Fed. Rep. 666.

One arrested in New York under an indictment found in another district, for the purpose of removing him to the latter district, under U. S. Rev.



Digitized by Google

rant issued by one of the city magistrates of the city of New York, as a fugitive from the justice of the state of Massachusetts, charged with having committed the crime of embezzlement in that state, and, upon examination, was committed, February 16, to the custody of the warden and keeper of the city prison of the city of New York to await the warrant of the governor of New York on the requisition of the executive authority of the state of Massachusetts for his surrender as such fugitive, pursuant to N. Y. Code Crim. Proc. pt. 6, chap. 1, title 4, §§ 828, 830.

On the 18th of February he filed a petition for the writ of habeas corpus in the district court of the United States for the southern district of New York, to procure his release from custody, which averred that he was the Consul General of the Sultan of Turkey at Boston, duly recognized as such *by the government of the United States; that the embezzlement was charged to have occurred on July 1, 1892; that he had never been indicted by a grand jury for the commission of any crime; that he was arrested while on a visit to New York, where access was impossible to his books and papers to vindicate himself; and that the proceedings before the city magistrate were without authority or jurisdiction because of his consular office. [393

The writ was issued and a hearing had, and on the 12th day of March the district court entered an order dismissing the writ and remanding Iasigi to custody. From this order an appeal was allowed to this court.

The contention of petitioner was that no court of the state of Massachusetts had jurisdiction to entertain a criminal prosecution

---

Stat. § 1014, is entitled to have the facts and circumstances tending to show criminality shown upon oath, to have the complainant's witnesses, if within the county, recalled for examination, and to produce witnesses in his own behalf. *Re* Dana, 68 Fed. Rep. 886.

An indictment in another district, though admissible as prima facie evidence of probable cause to believe that a crime has been committed, upon an application to remove the person so indicted to such district for trial, is not conclusive and cannot shut out evidence in his behalf to show that no offense was committed by him within the district to which removal is sought. *Re* Dana, 68 Fed. Rep. 886.

In the absence of treaty stipulations no obligation is imposed upon the asylum state, by the law of nations, to surrender and deliver to the demanding state persons who have committed offenses within its jurisdiction, and have fled from justice, and sought refuge within the jurisdiction of the sovereign upon whom the demand for surrender is made. Respublica v. De Longchamps, 1 U. S. 1 Dall. 112 (1: 59); Ferreira's Case, 2 Brock. 493; Com. v. Deacon, 10 Serg. & R. 125; *Re* British Prisoners, 1 Woodb. & M. 66; United States v. Davis, 2 Sumn. 482; *Ex parte* Holmes, 12 Vt. 631; Holmes v. Jennison, 39 U. S. 14 Pet. 540 (10: 579); United States v. Rauscher, 119 U. S. 407 (30: 425); Com. v. Hawes, 13 Bush, 697, 26 Am. Rep. 242; Adriance v. Lagrave, 59 N. Y. 110, 17 Am. Rep. 317; *Re* Kaine, 55 U. S. 14 How. 103 (14: 345); *Re* Metzger, 46 U. S. 5 How. 176 (12: 104); Lawrence's Wheat. International Law, 233, and authorities cited.

By the law and usages of nations fugitives charged with felony and other higher crimes should be surrendered by a foreign and friendly jurisdiction to which they have fled. *Re* Washburn, 4 Johns. Ch. 106, 8 Am. Dec. 548.

The Constitution has merely made that obligatory between the states which between nations entirely foreign to each other was done from comity, *viz.*, the delivering up of criminals who have fled from justice. Com. v. Green, 17 Mass. 515.

Power of arresting and detaining offenders against laws of other countries exists of necessity, if a right exists in every sovereign state, independent of constitutional provision or treaty obligation, to surrender such fugitive. *Re* Fetter, 23 N. J. L. 311, 57 Am. Dec. 382, and note.

Prior to treaties there was no well-defined obligation on one country to deliver up such fugitives to another; and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognised as among those obligations of one government toward another which rest upon established principles of international law. United States v. Rauscher, 119 U. S. 407 (30: 425).

Some courts have held that no delivery of fugitives could lawfully be made by the President under a treaty with the United States without a legislative act prescribing the manner of such delivery. *Re* Metzger, 1 Barb. 248; Foster v. Neilson, 27 U. S. 2 Pet. 253 (7: 415); Turner v. American Baptist Missionary Union, 5 McLean, 344.

When the aid of no such act of Congress seems necessary in respect to a ministerial duty devolved on the executive by the supreme law of a treaty, the executive need not wait, and does not wait, for acts of Congress, to direct such duties to be done. *Re* British Prisoners, 1 Woodb. & M. 66; Christiana Cochrane's Case, 4 Ops. Atty. Gen. 201.

When a treaty is entered into, it applies to past as well as future crimes. *Re* De Giacomo, 12 Blatchf. 391.

Unless specially provided for by treaty, political offenders will not be delivered up. Spear, Extradition, 1st ed. 43, 44; Lawrence's Wheat. International Law, 245 note; Woolsey, International Law, § 79; Lewis, Dasdeutsche Seerecht, 44; Phillim. International Law, 407; Heffter, § 63; Fœlix II. No. 609; Mohl, 705; Marquardsen, 48; Bar, Interpretations Divergentes du Traité d' Extradition de 1842, § 150; Geyer, in Holtzendorff's Enc. Leipzig, 1870, 540; Kluit, 85, cited in Whart. Conflict Laws, § 948.

The initial step necessary to give jurisdiction in extradition proceedings is a complaint made on oath or affirmation, charging the person found within the jurisdiction of any state, district, or territory with having committed, within the jurisdiction of the demanding government, any one or more of the crimes specified in the treaty or convention with such country, and reciting the requisites prescribed by treaty and statute. *Re* Fares, 1 Blatchf. 34, *Re* Henrich, 5 Blatchf. 414; *Re* Heilbonn, 1 Park. Crim. Rep. 429; Spear, Extradition, 1st ed. 217.

The complaint must show on its face that the person making it is an agent or representative of the foreign government. The complainant must be an official representative of that government. *Re* Harris, 32 Fed. Rep. 583; *Re* Kaine, 55 U. S. 14 How. 103 (14: 445); Spear, Extradition, 1st ed. 217.

The criminality of the accused may be shown by oral testimony taken before the court, or by depositions, warrants, and other papers offered in evidence, if they are properly and legally authenticated. Spear, Extradition, 1st ed. 219; U. S. Rev. Stat. § 5271.

The commissioner may adjourn the hearing a reasonable time, on the application of either party,



Digitized by Google

against him by reason of the matters specified in the commitment, jurisdiction being vested, because of his official position, exclusively in the Federal courts; but the conclusion of the district court rested on the ground that whatever implications in favor of exclusive Federal jurisdiction might be claimed, they were in no way incompatible with the preliminary arrest by the magistrate for removal to the state where the crimes charged against him were alleged to have been committed, and where all questions as to the proper tribunal for trial could be more properly heard and determined.

On the argument in this court, it appeared from a communication from the Assistant Secretary of State, under date of March 19, that Iasigi had been removed from his consular office, and that all official connection between him and the Turkish government had been severed, as the Department of State had been officially informed by the Turkish Minister on the 9th of March.

Therefore when the order remanding Iasigi to the custody of the state officer was entered, he was not holding a consular office, and the supposed objection to his detention for extradition to Massachusetts did not exist.

As under U. S. Rev. Stat. § 761, it is the duty of the court, justice, or judge granting the writ, on hearing, "to dispose of the party as law and justice require," the question *at once [394 arises whether the order of the district court dismissing the writ should be reversed, and

---

for the purpose of procuring testimony not then attainable. *Re* Ludwig, 33 Fed. Rep. 774; *Re* Macdonnell, 11 Blatchf. 79.

A person under examination in extradition proceedings has a right to introduce witnesses in his own behalf. *Re* Kelley, 25 Fed. Rep. 268; *Re* Farez, 7 Blatchf. 345, 2 Abb. U. S. 346; *Re* Kaine, 55 U. S. 14 How. 107 (14: 346).

The judiciary can neither order the delivery, nor bind the action of the President by its judgment, affirming that the case is a suitable one for extradition. Spear, Extradition, 1st ed. 223.

After all the proper proceedings have been had before the committing magistrate, and the facts certified as required by statute, the President still has a discretionary power in the matter of final delivery, and may lawfully decline to issue his warrant for the surrender of the fugitive. *Re* Stupp, 12 Blatchf. 501; Spear, Extradition, 1st ed. 214, 215.

Interstate extradition, in the United States, is the surrender by one state to another, on its demand, of fugitives from justice, pursuant to the Constitution and laws of the United States. 1 Bouvier, Law Dict. 567.

Under the Constitution of the United States and act of Congress the right to demand the surrender of fugitives from justice is vested solely and absolutely in the executive authority of the state or territory where the crime was committed. U. S. Const. art. 4, § 2.

The evidence of the charge, in the form of a copy of an indictment or an affidavit, made before a magistrate, properly certified as authentic by the governor or chief magistrate of the demanding state or territory, must accompany the demand before the requisites of the statute are complied with. U. S. Rev. Stat. § 5278.

The person appointed to receive the fugitive is the agent of the demanding state, and a warrant issued to him as such agent, authorizing the arrest of a fugitive, is valid. Com. v. Hall, 9 Gray, 262, 69 Am. Dec. 285; *Re* Titus, 3 Ben. 411.

A judge or justice of the peace has power to order the arrest of a fugitive from justice from another state or territory, before demand. State v. Buxine, 4 Harr. (Del.) 572; State v. Howell, R. M. Charlt. 120; *Re* Washburn, 4 Johns. Ch. 106, 8 Am. Dec. 548; *Ex parte* Cubreth, 49 Cal. 436.

The executive has discretion in causing arrest and delivery, and if in his discretion he declines to make the surrender there is no power vested in the courts or general government to compel or cause him to perform that duty. Kentucky v. Dennison, 65 U. S. 24 How. 66 (16: 717); Leary's Case, 10 Ben. 197, 212, 6 Abb. N. Cas. 43, 56.

Under the extradition laws of the United States, the governor of a territory, as well as the governor of a state, is bound, when a proper demand is made upon him by the executive authority of any other state or territory, to deliver up fugitives from justice. *Ex parte* Reggel, 114 U. S. 642 (29: 250); *Ex parte* Morgan, 20 Fed. Rep. 298.

The United States statute of 1793, chap. 7, § 1, requires three things: (1) That the fugitive must be demanded by the executive of the state from which he has fled; (2) a copy of an indictment found, or an affidavit made before a magistrate, charging the fugitive with having committed the crime; (3) such copy of the indictment or affidavit must be certified as authentic by the executive. Kingsbury's Case, 106 Mass. 223; *Re* Clark, 9 Wend. 212, 219; State v. Schlemn, 4 Harr. (Del.) 579; *Re* Romaine, 23 Cal. 585; *Ex parte* Sheldon, 34 Ohio St. 319; *Ex parte* Thornton, 9 Tex. 646.

The fact that the person demanded is charged with crime is to be proved by a copy of an indictment or affidavit certified by the governor of the demanding state. No other authentication can be required on habeas corpus. Leary's Case, 6 Abb. N. Cas. 43.

It is not necessary that an affidavit upon which a requisition has issued should set forth the crime with all the legal exactness necessary in an indictment. The charge of the commission of an offense is all that is necessary. *Re* Manchester, 5 Cal. 237.

But the affidavit must charge that crime has been committed by the accused in the state or territory from which he has fled. *Ex parte* Smith, 3 McLean, 121; *Re* Heyward, 1 Sandf. 701; People, Lawrence, v. Brady, 56 N. Y. 182.

Such affidavit must not be on belief, or embody a hearsay statement, but must distinctly charge the offense. And it must also allege that the accused has fled from justice. *Re* Leland, 7 Abb. Pr. N. S. 64; *Re* Rutter, 7 Abb. Pr. N. S. 67; *Ex parte* Romanes, 1 Utah, 33; *Re* Fetter, 23 N. J. L. 311, 57 Am. Dec. 382.

And if the affidavit is defective in any of these particulars, the court will not ordinarily remand the prisoner until the proper documents can be prepared. *Re* Leland, 7 Abb. Pr. N. S. 64; *Re* Rutter, 7 Abb. Pr. N. S. 67.

If a warrant for the extradition of a fugitive has been obtained in a case in which it should not have issued the governor may revoke it, whether issued by himself or his predecessor. Work v. Corrington, 34 Ohio St. 64, 32 Am. Rep. 345; *Re* Carroll, Chicago Legal News, Sept. 28, 1878; Spear, Extradition, 1st ed. 304, 305.

A fugitive from justice is a person who commits a crime within a state and withdraws himself from such jurisdiction without waiting to abide the consequences of such act. *Re* Voorhees, 32 N. J. L. 141; Kingsbury's Case, 106 Mass. 223, 227.

The term "flee from justice," in art. 4, § 2, of the Constitution of the United States, includes cases where a citizen of one state commits a crime in another state and then returns to his home. *Ex parte* Swearingen, 13 S. C. 74.



Digitized by Google

etitioner absolutely discharged, because the bjection existed when the writ issued, although it did not when the order was entered, ven if such an objection were ever tenable, hich we do not intend in the slightest degree o intimate it could be.

If the application for the writ had been ade on the 12th of March, it could not have een awarded, on the ground alleged in this etition, and as, on that day, the petitioner ould not have been discharged on that round, in accordance with the principles of aw and justice, we are unable to hold that he order of the district court was erroneous. *Ex parte Royall* (No. 1), 117 U. S. 241 [29: 868]; *Ex parte Watkins*, 28 U. S. 3 Pet. 193, 201 [7: 650, 652]; *Ex parte Milligan*, 71 U. S. 4 Wall. 2, 111 [18: 281, 292].

In *Ex parte Hitz*, 111 U. S. 766 [28: 592], an application was made for a writ of certiorari commanding the supreme court of the district of Columbia to certify to this court an indictment, and the proceedings thereunder, against Hitz in that court, on the ground that when the indictment was filed and when the offenses charged thereunder were committed, he was the diplomatic representative of the Swiss Confederation duly accredited and recognized by the United States under the title of Political Agent. It appeared that Hitz was for many years the Consul General of the Swiss Confederation within the United States, and was also accredited to the United States by the same government as Political Agent. On the 30th of May, 1881, he was requested by the Swiss government to resign both these offices, and this he did on the 15th of June. The indictment was filed on the 17th of June, and on the 20th of June his resignations were accepted. The writ of certiorari was denied.

In *Ekiu* v. *United States*, 142 U. S. 651 [35: 1146], the writ of habeas corpus was sued out May 18, 1891, by a female subject of the Emperor of Japan, detained at San Francisco by a state inspector of immigration, with the approval of the collector, for the reason that, under existing laws, she should not be permitted to land in the United States. After the issue of the writ, and before a hearing, and on May 395]14, one *John L. Hatch was appointed United States inspector of immigration at that port, who, on May 16, made the inspection and examination required by the act of March 3, 1891 (26 Stat. at L. 1084, chap. 551), which he reported to the collector, and on May 18 he intervened in opposition to the writ of habeas corpus, stating his doings and insisting that under the act his finding and decision were reviewable by the superintendent of immigration and the Secretary of the Treasury only. The circuit court sustained the intervention, and remanded petitioner, and its order was affirmed on appeal by this court. It was said by Mr. Justice Gray, delivering the opinion, that "a writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment."

The proceeding here was a state proceeding in aid of a prosecution for the violation of state laws, and under such circumstances the courts of the United States may exercise a discretion in determining the question of discharge. *Cook* v. *Hart*, 146 U. S. 183 [36: 934].

And we think the case falls within the principle of the rule laid down in *Ekiu* v. *United States*, *supra*.

*Order affirmed.*

---

## ALEXANDER S. HOOE, JR., *et al.*, *Plffs. in Err.*, *v.* HUGH JAMIESON *et al.*

(See S. C. Reporter's ed. 395-399.)

*District of Columbia is not a state—diverse citizenship.*

1. The District of Columbia is not a state within the meaning of the provision giving courts of the United States cognizance of controversies between citizens of different states.
2. An action by two or more joint plaintiffs is not within the jurisdiction of a Federal court on the ground of diverse citizenship, unless each one of the plaintiffs could sue each of the defendants in the Federal court on that ground.

[No. 374.]

*Submitted March 1, 1897. Decided April 5, 1897.*

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin to review a judgment dismissing a suit in ejectment brought by Alexander S. Hooe *et al.*, against Hugh Jamieson. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **A. R. Bushnell** for plaintiffs in error.

*Mr.* **S. S. Barney** for defendants in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was an action of ejectment brought in the circuit court of the United States for the western district of Wisconsin, by the complaint in which plaintiffs in error alleged that they resided in and were citizens of the city of Washington, District of Columbia, and that defendants all resided in and were citizens of the state of Wisconsin. Defendants moved to dismiss the action on the ground that the circuit court had no jurisdiction as the controversy was not between citizens of different states. The circuit court ordered that the action be dismissed unless plaintiffs within five days thereafter should so amend their complaint as to allege the necessary jurisdictional facts. Plaintiffs then moved for leave to amend their complaint by averring that three of them were

NOTE.—*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question*,—see note to Hamblin v. Western Land Co. 37: 267.

*As to when United States courts do not follow state decisions*, see note to Buts v. Muscatine, 19: 490.

*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1: 640.



Digitized by Google

when the suit was commenced, and continued to be, citizens of the District of Columbia, but that one of them was a citizen of the state of Minnesota, and that each was the owner of an undivided one fourth of the lands and premises described in the complaint, and that they severally claimed damages and demanded judgment. This motion was denied and the action dismissed. Plaintiffs sued out this writ of error under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, § 5), and the circuit court certified to this court these questions of jurisdiction:

"First. Whether or not said complaint sets forth any cause of action in which there is a controversy between citizens of different states, so as to give said circuit court jurisdiction thereof:

"Second. Whether or not said complaint as so proposed to be amended would, if so amended, set forth any cause of action in which there is a controversy between citizens of different states, so as to give said circuit court jurisdiction thereof."

The judicial power extends under the Con-
397 ] stitution to controversies *between citizens of different states, and the judiciary act of 1789 provided, as does the act of March 3, 1887, as corrected by the act of August 13, 1888 (25 Stat. at L. 433, chap. 866), that the circuit courts of the United States should have original cognizance of all suits of a civil nature at common law or in equity in which there should be a controversy between citizens of different states.

We see no reason for arriving at any other conclusion than that announced by Chief Justice Marshall in *Hepburn* v. *Ellzey*, 6 U. S. 2 Cranch, 445 [2: 332], February term, 1805, "that the members of the American confederacy only are the states contemplated in the Constitution;" that the District of Columbia is not a state within the meaning of that instrument; and that the courts of the United States have no jurisdiction of cases between citizens of the District of Columbia and citizens of a state.

In *Strawbridge* v. *Curtis*, 7 U. S. 3 Cranch, 267 [2: 435], it was held that if there be two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States in order to support the jurisdiction; and in *Smith* v. *Lyon*, 133 U. S. 315 [33: 635], *Strawbridge* v. *Curtiss* was followed, and it was decided that under the acts of 1887 and 1888 the circuit court has not jurisdiction, on the ground of diverse citizenship, if there are two plaintiffs to the action who are citizens of and residents in different states and the defendant is a citizen of and resident in a third state, and the action is brought in the state in which one of the plaintiffs resides.

*New Orleans* v. *Winter*, 14 U. S. 1 Wheat. 91 [4: 44], was an action in ejectment brought by two plaintiffs claiming as joint heirs, and it appeared that one of them was a citizen of the state of Kentucky, and that the other was a citizen of the territory of Mississippi. It was held that jurisdiction could not be maintained, and Chief Justice Marshall, delivering the opinion of the court, said: "Gabriel Winter, then, being a citizen of the Mississippi territory, was incapable of maintaining a suit alone in the circuit court of Louisiana. Is his case mended by being associated with others who are capable of suing in *that court? In [398
the case of *Strawbridge* v. *Curtiss* it was decided that where a joint interest is prosecuted, the jurisdiction cannot be sustained, unless each individual be entitled to claim that jurisdiction. In this case it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite."

In *Peninsular Iron Co.* v. *Stone*, 121 U. S. 631 [30: 1020], the interests of the parties being separate and distinct, but depending on one contract, plaintiffs elected to sue on the common obligation, and the case was dismissed under the rule in *New Orleans* v. *Winter*.

In *Barney* v. *Baltimore*, 73 U. S. 6 Wall. 280 [18: 825], which was a bill for partition, it appeared that some of the defendants were citizens of the District of Columbia and some of them citizens of Maryland, and, in dismissing the case for want of jurisdiction, the court, through Mr. Justice Miller, said: "In the case of *Hepburn* v. *Ellzey*, 6 U. S. 2 Cranch, 445 [2: 332], it was decided by this court, speaking through Marshall, Ch. J., that a citizen of the District of Columbia was not a citizen of a state within the meaning of the judiciary act, and could not sue in a Federal court. The same principle was asserted in reference to a citizen of a territory, in the case of *New Orleans* v. *Winter*, and it was there held to defeat the jurisdiction, although the citizen of the territory of Mississippi was joined with a person who, in suing alone, could have maintained the suit. These rulings have never been disturbed, but the principle asserted has been acted upon ever since by the courts when the point has arisen."

Many other decisions are to the same effect, and in the late case of *Merchants' Cotton Press & S. Co.* v. *Insurance Co. of North America*, 151 U. S. 368, 384 [38: 195, 204, 4 Intera. Com. Rep. 499], the rule in *New Orleans* v. *Winter* was applied and it was held that "the voluntary joinder of the parties has the same effect for purposes of jurisdiction as if they had been compelled to unite."

In the case at bar no application was made for leave to discontinue as to the three plaintiffs who were citizens of the *District of Co [399
lumbia, and to amend the complaint and proceed with the cause in favor of that one of the plaintiffs alleged to be a citizen of Minnesota. Jurisdiction of the case as to four plaintiffs could not be maintained on the theory that when the trial terminated it might be retained as to one.

*The Circuit Court was right and its judgment is affirmed.*



Digitized by Google

ALEXANDER S. HOOE, JR., *et al.*, *Plffs. in Err.*,
*v.*
JACOB WERNER *et al.*

(See S. C. Reporter's ed. 399.)

*Jurisdiction.*

**Hooe v. Jamieson**, 166 U. S. 395 [*ante*, 1049], followed in holding that the United States courts have no jurisdiction of cases between citizens of the District of Columbia and citizens of a state on the ground of diverse citizenship.

[No. 373.]

*Submitted March 1, 1897. Decided April 5, 1897.*

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

*Mr.* **A. R. Bushnell** for plaintiffs in error.
*Mr.* **S. S. Barney** for defendants in error.

THE CHIEF JUSTICE: The only difference between this case and that just decided is that the proposed amendment was allowed and the action then dismissed for want of jurisdiction. For the reasons above given, this case must take the same course as that.

*Judgment affirmed.*

---

JOAQUIN MARTIN, *Plff. in Err.*,
*v.*
ATCHISON, TOPEKA, & SANTA FÉ RAILROAD COMPANY.

(See S. C. Reporter's ed. 399-404.)

*Fellow servants—master's liability—safe place to work.*

1. A conductor and hands on a work train, and a section foreman in charge of a hand car, are fellow servants of a laborer on the hand car under the orders of such foreman, when through their negligence he is injured by a collision of the train with the hand car.
2. The orders of a section foreman to a laborer who is with him on a hand car, that he shall not look back to watch for a train, and assurance that the foreman himself will watch and give warning of any danger, do not make the master liable for an injury to the laborer resulting from the negligence of the foreman in failing to watch for the train.
3. The doctrine as to the duty of the master to furnish a safe place for the servant to work has no application to the failure of a foreman in charge of a hand car to watch for an approaching train, when the car itself is in every way fit for the purpose for which it is used.

[No. 170.]

*Submitted January 25, 1897. Decided April 5, 1897.*

IN ERROR to the Supreme Court of the Territory of New Mexico to review a judgment reversing the judgment of the District Court of the Second Judicial District of that Territory in favor of plaintiff, and directing judgment for the Railroad Company in an action brought by Joaquin Martin against the Atchison, Topeka, & Santa Fé Railroad Company to recover damages for injuries sustained by plaintiff by being run over by a train on the railroad of defendant. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **Neill B. Field** for plaintiff in error.

*Messrs.* **E. D. Kenna** and **Robert Dunlap** for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

This action was brought by the plaintiff in error to recover damages for injuries sustained by him by being run over by a train on a railroad belonging to the defendant, near Albuquerque, New Mexico. The case was tried before a jury in the district court of the second judicial district of that territory, and resulted in a verdict for the plaintiff in the sum of $8,000. Judgment having been entered the railroad company took the case, by writ of error, to the supreme court of the territory, which court reversed the judgment, and directed judgment for the railroad company, and for costs against the plaintiff, who thereupon sued out a writ of error from this court, and the case is now here for review.

On the trial evidence was given showing substantially the following facts: The plaintiff had been employed by the railroad company at Albuquerque, New Mexico, as a common laborer, "fixing the road, straightening out the rails, and fixing ties wherever required;" he was about thirty-nine years of age and had been so employed by the company, through one of its section foremen, for several months prior to the happening of the accident. He was under the orders of the section foreman and was to do what the foreman told him. The section foreman was employed by the roadmaster and the foreman employed the men; the roadmaster directed the section foremen what work to do and where to do it; he laid out the work for them and told them what to do. The section foreman employed the men and saw that they did the work properly. If the foreman thought a man ought to be discharged, he would see the roadmaster or send him a request that the man should be discharged, and the roadmaster had the power to discharge him. The men under the section foreman, like the plaintiff, were paid by the agents of the company, who came along the line in a pay car.

On June 5, 1889, while the plaintiff was thus employed, he *came to the station at [401 Albuquerque about 6:45 o'clock in the morning for the purpose of going to his work on a hand car with one Mares, his colaborer, and Charles Smith, his section foreman. The place where

NOTE.—*As to who are coemployees or coservants, within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a coservant*, see note to Hough v. Texas & P. R. Co. 35: 612.

*As to negligence; responsibility of master to servant for carefulness and competency of coservants,*—see note to Wabash R. Co. v. McDaniels, 27: 605.

*As to fellow servants and their negligence; who are fellow servants; liability of master,*—see note to Baltimore & O. R. Co. v. Baugh, 37: 772.



Digitized by Google

they were to work was about 8 or 9 miles north from Albuquerque on the line of the road. A few minutes before 7 the party, consisting of the section foreman, Mares, and the plaintiff, started on a hand car for the place where they were to work during the day. They went north upon the road for 300 or 400 yards and there the car was stopped, and the men got off and procured a barrel of water, which was placed on the car, and the men again started north to continue their ride. All three men worked the crank on the hand car, but just as they started Mares said to the foreman that he thought the work train seemed to be starting from Albuquerque towards them. The track at that point was straight and the view to the station was unobstructed. Plaintiff then turned his head backwards towards the station, when the foreman told him not to do that; that he had no business to do it, and that it was not his business to watch for trains, and that he, the foreman, would take care of that. Plaintiff thereupon turned his head away from the station and continued to look north, the way they were going. They worked the crank so that the car was going as rapidly as they could make it, all three men having their heads turned towards the north. In the meantime a work train backed out from the station at Albuquerque, going north, and continued backing rapidly until it was moving at the rate of 17 or 18 miles an hour. Before the men on the hand car had proceeded very far along the road they were overtaken by the work train, which ran over them, killing the foreman and badly injuring the plaintiff and Mares. Neither of the latter had heard the approach of the train; it was under the management of a conductor, and at that time there was a roadmaster on the train who had control of the line of road where the accident occurred. He was not in charge of the running of the train, but the train went to different points on the road as he had occasion to visit them for working purposes. Some of the hands on the [402] work train saw the *hand car a short distance before it was struck, and one of them tried to communicate with the engineer of the train, but failed. No one on the hand car was looking backward or saw the approach of the work train.

It was claimed in the petition on the part of the plaintiff that the accident occurred from the neglect of the conductor and of the hands on the work train, and also by reason of the neglect of the section foreman on the hand car with the plaintiff in ordering plaintiff to face north while working the car, and in not keeping a lookout himself for the approach of the train from behind.

The defendant had filed a plea of not guilty.

Upon the trial of the action, after the evidence for both sides had been introduced and each side had rested the case, the defendant moved the court "to instruct the jury to find for the defendant upon the ground that the negligence, if any, through which the plaintiff was injured was the negligence of the fellow servants of the plaintiff, for which the defendant is not liable." After hearing arguments, the court overruled the defendant's motion, and counsel for the defendant then and there excepted.

After the verdict for plaintiff had been rendered and judgment entered thereon, the defendant obtained a writ of error from the supreme court of the territory to review the rulings of the district court. Various assignments of errors were made, and among them was the eighth, which reads as follows: "The court erred in not sustaining defendant's motion to instruct the jury to find a verdict in favor of the defendant, and the defendant not guilty."

The supreme court held that whatever negligence was proved, as against the employees of the defendant, such negligence was that of fellow servants with the plaintiff, and on that ground the judgment was reversed and judgment ordered in favor of the defendant, with costs.

The plaintiff seeks here a reversal of the last judgment.

We think the decision of the supreme court was right, and that the judgment entered thereon must be affirmed.

The cases of *_Baltimore & O. R. Co._ v. [403 _Baugh_, 149 U. S. 368 [37: 772]; _Northern P. R. Co._ v. _Hambly_, 154 U. S. 349 [38: 1009]; _Northern P. R. Co._ v. _Peterson_, 162 U. S. 346 [40: 994]; and _Northern P. R. Co._ v. _Charless_, 162 U. S. 359 [40: 999],—cover this case in all its aspects, and render it entirely clear that the employees of the defendant herein, whose negligence caused the injury to the plaintiff, were his fellow servants at that time, and hence the defendant cannot be held liable to plaintiff for the injuries sustained by him as a result of that negligence.

The counsel for the plaintiff has argued before us that the defendant must be held responsible because the plaintiff had been directed by the foreman, under whose orders he was placed, to look north while he was on the car, and had received the foreman's assurance that he (the foreman) would warn him of the approach of danger, and that as the foreman failed to do so it was the failure of the defendant to do something which it was bound as a master to do in furtherance of the obligation it was under to see that the plaintiff had a reasonably safe place in which to perform his work. We do not perceive that the doctrine as to the duty of the master to furnish a safe place for the servant to work in has the slighest application to the facts of this case. There is no intimation in the evidence, nor is any claim made, that the hand car upon which the plaintiff was riding was not properly equipped and in good repair, and in every way fit for the purpose for which it was used. It was a perfectly safe and proper means of transit in and of itself from the station at Albuquerque to the point where the plaintiff was going to work. The negligence of the section foreman in failing to note the approaching train and to give the proper warning, so that the car might be taken from the track, was not the neglect of the defendant in regard to the performance of any duty which as master it owed the plaintiff. If the car were rendered unsafe, it was not by reason of any lack of diligence on the part of the defendant in providing a proper car, but the danger arose simply because a fellow servant of the plaintiff failed to discharge his own duty in watching for the approach of a train from the south.

*Upon an examination of the cases [404



Digitized by Google

above cited it will be found that the principles therein laid down clearly and plainly cover this case.

*The judgment must be affirmed.*

Mr. Justice **Harlan** dissents.

---

## THE UMBRIA.

(See S. C. Reporter's ed. 404-428.)

*Speed of steamer in a fog—order to go at full speed—management of injured vessel—custom—proper precaution—circumstances—porting helm—13th article—avoiding collision—contributory fault—rule of liability—damages.*

1. A vessel is gravely in fault for running at a speed of from 16 to 19 knots an hour within 12 miles of New York harbor, in the track of vessels going in and out, when there is an intermittent or variable fog which is sometimes so dense that vessels cannot see each other more than 1 or 2 lengths off.
2. An order to go ahead at full speed in a fog, after hearing whistles from another vessel the course and position of which have not been definitely ascertained, and which is in fact so near that a collision results within a minute or two, is a gross fault, although the master thought the whistles indicated that the vessel was a long distance off and well out of his course.
3. Doubts regarding the management of the injured vessel or contribution of her faults, if any, to the collision, should be resolved in her favor, where the gross fault of the other vessel was the immediate cause of the collision.
4. A custom of large passenger steamers carrying the mails to run at full speed in a fog, on the ground that this is really the safer course for them, as they pass the fog belt the sooner, cannot be sanctioned by the courts, as it implies a flagrant disregard of the safety of other vessels.
5. Notwithstanding the negligence of one vessel is the immediate cause of the collision, it is the duty of the other vessel to take proper precautions, and the testimony of her officers and crew is to be accepted as conclusive in judging of the propriety of her manœuvers, where there is no other testimony to contradict it.
6. Where two steamships are approaching each other in a fog, there is no rigid rule prohibiting either ship to alter her helm until the signals of the other give clear indication of her direction, but each case must depend upon its own circumstances, which may afford reasonable ground for belief as to what the direction must be.
7. It is not necessarily a fault for a vessel proceeding at moderate speed in a fog, on hearing a whistle which appears to come from off her port bow, to port her own helm two points, the effect of which would be to give the other vessel more room, although it may be more prudent not to change the course.
8. A steamer in a fog is not guilty of a violation of the 13th article of the Revised International Regulations requiring her to go at a moderate speed, where her general speed did not exceed 4 knots an hour, the lowest speed necessary to the maintenance of steerageway.
9. A steamer in a fog is bound to use only such precautions as will enable her to stop in time to avoid a collision after the approaching vessel comes in sight, provided the latter is herself going at the moderate speed required by law.

---

NOTE.—*As to collision; measure of damages for,*—see notes to Smith v. Condry, 11: 35, and Williamson v. Barrett, 14: 68.

*As to collision; rights of steam and sailing vessels with reference to each other and in passing and meeting; instances,*—see note to St. John v. Paine, 13: 537.

*As to collision; vessel overtaking another,*—see note to The Abbotsford v. Johnson, 25: 168.

*As to collision; rules for avoiding; steamer meeting steamer; instances,*—see note to Williamson v. Barrett, 14: 68.

*As to collision; damages where two vessels are at fault, for injury to a third,*—see note to The City of Hartford v. Rideout, 24: 930.

*Collision; rules of navigation; vessels meeting; speed; vessels in a fog; steamships; other vessels.*

The owner of a steam vessel approaching another head and head, or nearly so, is liable for an injury to the latter by collision resulting from a failure to answer the signal of the latter that it intends to pass on the right side of the other as required by a rule of navigation, and keeping straight ahead instead of turning to the right as required by such rule. Flannery v. Cornell Steamboat Co. 89 Hun, 135.

The luffing of a vessel in the presence of imminent danger of collision is not such a fault as will preclude recovery for damages from such collision. Bigelow v. Nickerson, 34 U. S. App. 261, 70 Fed. Rep. 113, 30 L. R. A. 336.

The continuance at unabated speed, without other signal, of a steamboat moving 9 or 10 miles an hour, after observing that its signal to an approaching steamer 800 or 1,000 feet distant is disregarded, in violation of the navigation rule requiring it in such case to give specified signals and slow down, is such negligence as will prevent a recovery for injuries caused by a collision. New York Harbor Towboat Co. v. New York, L. E. & W. R. Co. 148 N. Y. 574.

A vessel which leaves port in a thick fog without cargo or charter, and drives through it on her regular course, directly in the path of the traffic to and from Chicago, at a speed of 12 knots per hour while a light could not be distinguished for more than 400 feet, and does not check her speed until a fog whistle of another steamer is heard three or four times, is at fault for a collision. The Arthur Orr, 69 Fed. Rep. 350.

It is imprudent and unjustifiable navigation for steamboats to go so near to another high intervening vessel as to be concealed from the view of others likely to be approaching so as to leave no sufficient time for effective manœuvers after the proximity of the other vessel is known. The Albany, 74 Fed. Rep. 314.

One of two passing ships, which persists without good reason in keeping on the wrong side of the channel, in starboarding her helm when it is seen that the helm of the other is hard to port and the vessels are rapidly approaching, and in reversing her engines and turning her bow to starboard after signaling that she is going to port, is at fault for a collision following where the other ship acts consistently with good seamanship. The Cuba v. McMillan, 26 Can. S. C. 651.

A steamship hearing the signals of another while they are ½ to ¾ a mile apart is at fault in failing to reverse until the latter is within a couple of lengths head to head, where danger of collision is evident. The Friesland, 76 Fed. Rep. 591.

An easily managed steamboat is at fault for a collision with the tow of a tug which departs from the rules of navigation, where she could without difficulty have avoided the tow by reversing in time after it was clear that the tug was not adopt-



Digitized by Google

9. A vessel running at a moderate speed in a fog is not chargeable with contributory fault for keeping her engines in motion, in case of her collision with an approaching vessel which was running at such speed that a collision could not possibly have been avoided by the stopping and reversing of the former vessel.

11. If two steamers are approaching each other in a fog their manœuvers must be determined, not by the chance of their meeting at a point where their courses intersect, but upon the theory that their courses shall not actually intersect; in other words, that both will stop before the point of intersection is reached; and if one of them is running at such speed that no manœuver of the other can prevent the former from passing the point of intersection, it only is responsible.

12. The probable profits of a charter not yet entered upon cannot be included in the damages for the total loss of a vessel by collision, but these are limited to the value of the vessel, with interest thereon, and the net freight pending at the time of the collision.

[No. 28.]

*Argued March 27, 30, 1896. Ordered for reargument December 21, 1896. Reargued March 2, 3, 1897. Decided April 5, 1897.*

ON WRIT OF CERTIORARI to the Circuit Court of Appeals for the Second Circuit to review a decision of that court sustaining the decree of the District Court for the Eastern District of New York as to the fault of the Umbria, but finding the Iberia also to be in fault, and reversing the decision of the district court upon a question involved in the master's report, in a suit in admiralty by the owners of the steamship Iberia against the steamship Umbria, to recover damages for a collision off the coast of Long Island about 11 miles from the New York harbor. *Case remanded to the district court with directions to enter a new decree in conformity with the opinion of this court.*

See same case below, 40 Fed. Rep. 898, 1 U. S. App. 614.

Statement by Mr. Justice Brown:

*This was a suit in admiralty, brought [405 in the district court for the eastern district of York by the owners of the French steamship New Iberia against the British steamship Umbria, to recover damages for a collision, which took place about a quarter past one in the afternoon of November 10, 1888, in a dense fog off the coast of Long Island, about 11 miles from the entrance to New York harbor, and 6 miles south of Rockaway beach.

The Iberia was a French steamship 240 feet long, of 1,059 tons register, capable of a speed of from 9½ to 10 knots an hour, was laden with a valuable cargo, and bound from the Red sea and Mediterranean ports to New York. She had been in a fog since 8 o'clock in the morning, and was running with her engines "easy," the lowest order short of stopping, at a speed of from 3½ to 4 knots an hour on a W. N. W. course, and making occasional soundings with her lead. On two occasions, within a half hour preceding the collision, she had heard the whistle of an approaching steamer a little on her port bow, had altered her course two points to the starboard, kept on until the whistles

---

ing the proper course and was unable to avoid collision. The Little Silver, 74 Fed. Rep. 574.

A steamship is at fault for collision in a dense fog, in running at the rate of 7 knots per hour through the water so that she cannot be brought to a standstill within the distance within which a vessel can be seen, or take necessary steps for the protection of another vessel. The Louisburg, 75 Fed. Rep. 424, 33 U. S. App. 542.

Vessels approaching each other in a fog and hearing each other's signals, but being unable to determine their respective positions, must stop and await the lifting of the fog or seek to ascertain each other's situation by repeated signals, and at all events slow down so completely that each can stop forward motion within the distance at which a vessel might certainly be seen through the fog. The Grenadier v. The August Korff, 74 Fed. Rep. 974.

A vessel running free with the wind on the port side, which without sufficient excuse fails to perform her duty to keep clear of another vessel closehauled with the wind on the starboard side, is liable for a resulting collision. The Charles H. Trickey, 66 Fed. Rep. 1020.

A schooner running light and free 11 knots over the ground with plenty of sea room, is bound to keep out of the way of another schooner closehauled and about holding her own, which is situated a mile away. The Robert Graham Dunn, 63 Fed. Rep. 167.

A schooner running free on the port tack heading about E. ½ N. when another schooner is sighted sailing closehauled on the starboard tack, is bound to keep out of the way while the latter is required to keep her course; and the former is responsible for a collision not brought about by inevitable accident or some fault of the latter. The Gypsum Prince, 67 Fed. Rep. 613.

A steamer approaching in a fog another whose customary course is to her knowledge such that they will pass starboard to starboard is at fault for collision in erroneously assuming that they are coming together on opposite courses, and giving the signal to pass to port, and swinging across the other's bow. The Flyer, 62 Fed. Rep. 615.

A tug having a schooner in tow and steamship will be held jointly liable for a collision between the schooner and the steamship, where it would not have happened had either taken more timely and efficient measures to avoid the other. The J. J. Driscoll, 63 Fed. Rep. 1023.

The fact that there is no substantial change in the bearing of the lights of another vessel is sufficient to make it obvious to a bark bound to keep out of the way that decided and timely manœuvers are necessary to perform her duty. The Grace Seymour, 63 Fed. Rep. 168.

A vessel discovering another on her starboard bow on a crossing course at a distance of ¼ a mile is at fault for a collision, where she fails to pay any attention to the movements of such vessel and wholly disregards her obligation to avoid them, and the latter does all in her power to avoid a collision after she has sufficient reason to suppose that the former will not fulfil her obligations. The Shackamaxon, 66 Fed. Rep. 75.

The failure of a vessel to take any precaution to avoid collision with another vessel which fails to respond to signals when meeting in a narrow channel, except to repeat the disregarded signal when it is too late to avoid collision, is a fault, although the other vessel may be more grossly in fault. The Victory, 66 Fed. Rep. 395, Modifying 63 Fed. Rep. 631.

A signal that a tug is coming down on the starboard bow of a steamer, while the tug comes in sight almost immediately, only a few hundred feet



Digitized by Google

indicated that the steamers were passed, and then returned to her former course. About a quarter of an hour after passing the last of these steamers she heard a whistle which proved to be that of the Umbria, bearing about two points on her port bow. Immediately, as on the previous occasions, her head was put two points more to starboard, a short whistle was blown, her helm was steadied upon a N. W. course, and held so. While so proceeding, during four or five minutes, several more of the Umbria's whistles were heard, all bearing about the same direction from the Iberia (allowing two points for the porting), the sound rapidly increasing in volume. Finally the Umbria herself came into view about 900 feet away, and bearing about five points on her port hand. She then put her engines full speed ahead in an attempt to escape the Umbri.. by crossing her bow and had nearly passed her, when the Umbria struck her stem on at an angle of about six or seven points, and cut her stern completely off.

The Umbria was a steamship of the Cunard
406] line, 525 feet *long, of 8,450 tons register, capable of a speed of 19½ knots an hour, and was bound upon a voyage from New York to Liverpool, laden with a cargo, and having on board a number of passengers. After passing Sandy Hook and discharging her pilot, she was put upon a compass course of E. by S. ½ S. From half past twelve, when she discharged her pilot at the outer buoy, until the collision, she was kept at full speed more or less of the time, as the intermittent character of the fog permitted, sounding her whistle at intervals of a minute or two. The French steamship Normandie discharged her pilot ahead of the Umbria, and proceeded on her course a little more to the southward than the latter; at times being in sight of the Umbria and again being concealed by the fog. Her whistle was heard from time to time on board the Umbria and off her starboard quarter, the latter having passed her before she reached the place of collision. Shortly after one o'clock the fog thickened, and while the Umbria was running at full speed, a very faint single blast of a whistle, which subsequently proved to be from the Iberia, was thought to be heard on the Umbria's starboard bow, apparently a long distance off, and well to the southward. Upon hearing this whistle, and at ten minutes past one, her speed was reduced by order of her master, and attention given toward the direction of the sound for a repetition of the signal. Shortly afterwards a second, and, as some say, a third, whistle was heard, still apparently a long distance off, on the Umbria's starboard bow, and well to the southward. The master of the Umbria thereupon determined that the signals which had been heard were from a steamship approaching on a course parallel to his own; and concluding that the Umbria was clear of her, and that she would probably port her helm to avoid the Normandie, ordered her engines full speed ahead at eleven minutes past one o'clock. Within a minute from the time such order was given, another whistle was heard closer to the Umbria and drawing ahead of her, and almost simultaneously the Iberia loomed in sight, a little on the Umbria's

---

off, with nothing to indicate the presence of a tow, does not make the steamer in fault for proceeding, when she passes the tug in safety but strikes the tow. The Ludvig Holberg, 157 U. S. 60 (39: 620).

A vessel is not obliged to stop at the first signal heard by her, unless its proximity be such as to indicate immediate danger. *Ibid.*

A tug meeting a steamer on her starboard hand on a crossing course is not excused for failure to keep out of the steamer's way by the latter's giving the signal of one whistle, where the latter keeps her course as required by the rules of navigation. The Luckenbach, 67 Fed. Rep. 619.

A steamer having another four points off her starboard bow on crossing courses, and being herself five or six points off the starboard bow of a third steamer on crossing courses, is at fault for a collision with the first of such other steamers in failing to do anything to keep out of her way after the latter signals, where the distance between her and such third steamer was ample, and the latter kept out of her way. The City of Chester, 68 Fed. Rep. 574.

The rule that the privileged vessel should keep her course and speed after having given a signal is qualified by the special circumstance that to the knowledge of the other vessel she is a ferry boat about to make her slip; and her stopping and reversing will not render her liable for a collision due to the maintenance of too high a speed by the other vessel. The Dakota, 68 Fed. Rep. 507.

The failure of a schooner in tow of a tug to select the best means of escape from collision with a sloop, when placed in a position of danger without fault of her own, will not render her liable for the collision. The George W. Childs, 67 Fed. Rep. 289.

The luffing up of a vessel just before collision with another which was bound to keep out of her way, in order to ease the blow, is a manœuver in *extremis*, and will not render her liable for the collision. The Gypsum Prince, 67 Fed. Rep. 612; The Grace Seymour, 68 Fed. Rep. 163.

A steamer is liable for collision with a sailing vessel due to the violation by her pilot of rule of navigation 21 requiring her to keep to the starboard side of the mid channel. The Energia, 66 Fed. Rep. 604.

A steamer meeting a schooner must in her manœuvers allow a sufficient margin for passing and for the usual and necessary variation in the course of the schooner through yawing or leeway. The City of St. Augustine, 68 Fed. Rep. 393.

A steamer does not comply with the rule requiring her to keep out of the way of a sailing vessel entering a channel under such circumstances that she must accomplish a sharp turn and need considerable sea room, in waiting only till the schooner takes her course through the channel, and putting on full steam so as to reach the entrance when she is performing the most difficult part of her movement. The Iron Chief, 63 Fed. Rep. 289.

While it is the duty of a steam vessel meeting a sailing vessel to keep out of the way of the latter, there is a correlative duty on the part of the latter to keep her course; and failure so to do must be imputed to her as a fault. The Relief, 68 Fed. Rep. 169.

The primary responsibility for collision between a bark and a steamer is upon the bark, where she changes her course after hearing the steamer's whistle, and the steamer would have unquestionably passed her without collision had she not made such change. The Saale, 68 Fed. Rep. 478.

A change of course of a sailing vessel meeting a steamer will not render her liable for collision, where it is made long before risk of collision is in-



Digitized by Google

starboard bow, on a course crossing her own nearly at right angles, and about twice the Umbria's length away. The Umbria's engines were 407] immediately reversed at full speed, her helm put hard aport, but before the Iberia had crossed her course the collision ensued. She struck the Iberia on the port side, about 30 feet forward of her stern, cut her completely in two, and passed on out of sight in the fog.

Upon this state of facts the district court held the Umbria to have been solely in fault for the collision, entered an interlocutory decree, January 13, 1890, to that effect (40 Fed. Rep. 893), and referred the question of damages to a commissioner, who made a report to which both parties filed exceptions. One of the exceptions by the libellant, the owner of the Iberia, was sustained by the court, and in accordance therewith a new report was made and a final decree entered July 3, 1891, for the sum of $147,500.17. Claimant appealed to the circuit court of appeals for the second circuit, which rendered a decision by a divided court, sustaining the decree of the district court as to the fault of the Umbria, but finding the Iberia also to have been in fault; first, because, after hearing the first whistle of the Umbria, she changed her course without knowing the latter's bearing, course, or speed; and second, because she violated article 18 of the International Regulations, by continuing on, when she knew, or ought to have known, that the courses of the two vessels were crossing, and thereby involving risk of collision. 1 U. S. App. 614. The decision of the district court was also reversed upon the question involved in the exception to the master's report. A rehearing having been refused, libellant applied to this court for a writ of certiorari, which was granted.

*Messrs.* **Frederic R. Coudert, Frank D. Sturges,** and *Edward L. Owen* for appellant, on first argument.

*Mr.* **Robert D. Benedict** for appellee, on first argument.

*Messrs.* **Frederic R. Coudert,** *Edward L. Owen,* and *Frank D. Sturges* for appellant, on reargument.

*Mr.* **Robert D. Benedict** for appellee, on reargument.

**Mr. Justice Brown** delivered the opinion of the court:

1. That the Umbria was gravely in fault in the matter of speed is too clear for serious argument. She was within 12 miles of one of the most frequented harbors in the world, in the track of vessels bound into and out of this harbor, and was running at a speed of from 16 to 19 knots an hour through an intermittent or variable fog, which was sometimes so dense that vessels could not see each other more than 1 or 2 lengths off. She had heard at least two whistles from the Iberia, and without waiting definitely to locate her, had ordered her engines full speed ahead within a minute from the time she hove in sight. Her excuse is that the first whistle of the Iberia, which does not seem to have been heard by the master, but was heard by some of the other officers, appeared to be upon the starboard

---

volved, and cannot operate to mislead, confuse, or obstruct the navigation of the steamer. The Energia, 66 Fed. Rep. 604.

Failure of a sloop passing a steamer to beat out her tack, and her sudden change of course causing a collision with the steamer, constitute negligence rendering her liable for the collision. The Relief, 63 Fed. Rep. 169.

A schooner meeting a steamer at the entrance to a difficult channel is not at fault in taking the well-known navigated channel, although she might go through an open spread of shallower water deep enough for her, where there is no great danger of collision if both parties exercise due care. The Iron Chief, 63 Fed. Rep. 289.

A tug with tow meeting a sailing vessel beating down a river is at fault for collision in taking such a course as will bring her into dangerous proximity to the sloop, where there is plenty of water to avoid her, although the sloop is at fault in failing to beat out her tack. The Relief, 63 Fed. Rep. 169.

Where two steamers are meeting end on, or nearly so, if the pilot of either blows a single whistle,—the signal of passing to the right,—and the other steamer answers by a single whistle, each steamer is bound to pass to its own right; and if afterwards one of the steamers changes the course by blowing two whistles, they must be given in time to enable the steamers to change their courses and to pass safely to the left, or the steamer giving the two whistles is guilty of negligence if a collision thereby occurs. Belden v. Chase, 150 U. S. 674 (37: 1218).

If the rules of the board of inspectors for navigation of vessels upon crossing courses apply to two vessels in a fog near each other and neither knowing the course or exact position of the other, a vessel whose duty it is to keep ahead cannot avoid responsibility for collision arising from her failure to reverse, where she did not comply with the rule by keeping ahead, but stopped. The Fountain City, 62 Fed. Rep. 87.

It is the duty of a steamship hearing the fog horn of another vessel in close proximity, in a dense fog, but unable to ascertain her course and position, to stop and reverse her engines so as to bring her to a standstill until the position and course of the other vessel are known. The Martello v. Willey, 153 U. S. 64 (38: 637).

A tug is at fault for a collision in failing to stop and reverse in a fog, where the failure of another vessel with which signals have been interchanged to respond to a third signal raises doubt as to her course in the minds of the mate, captain, and lookout of the tug. The Fountain City, 62 Fed. Rep. 87.

A steam vessel approaching another in a fog so that the "bearing of the whistle of the one is a few points off either bow" must, under U. S. Rev. Stat. § 4233, rule 21, in force on the Great Lakes, stop, and, if necessary, reverse, until the exact position and course of the other vessel can be ascertained, unless such circumstances present themselves at the time as would lead a reasonably prudent and skilful navigator to the confident belief that no risk of collision exists. The North Star, 62 Fed. Rep. 71; The Fountain City, 62 Fed. Rep. 87.

A steamer approaching another steamer in a fog to a few points off her bow is guilty of gross negligence rendering her liable for a collision, in mistaking a double blast from the other for a single blast or two of them, and, without stopping to ascertain her exact position and course, taking it for granted that she is going to port, and herself porting so as to run across the bows of the other. The North Star, 62 Fed. Rep. 71.

Of two vessels upon crossing or interfering courses, the one whose duty it is to keep out of the



Digitized by Google

bow, apparently a long distance off; that the second whistle also seemed a long distance off and well to the southward; and the master, supposing that they were from a steamer approaching upon a course parallel to his own, concluded that he was clear of her or had shaken her off; that the approaching steamer would probably port her helm to avoid the Normandie, which was coming up on the Umbria's starboard quarter, and therefore ordered his engines full speed ahead to avoid the danger consequent upon such a movement on the part of the Iberia. This assumption was clearly an insufficient excuse for the order. It is difficult to locate the exact position of a vessel in a fog, and still more difficult to determine her course and distance; and while a whistle continues to be heard so nearly ahead, it is manifestly unsafe to assume that she is upon a course that will take her clear. The assumption might be justified if the signals were often repeated and kept constantly growing fainter or broader off the 409] bow; but in this case the Umbria *heard but two, or possibly three, whistles from the Iberia, the last one of which must have seemed nearer than the first, since the steamers were rapidly approaching each other. The Iberia could not have appeared to be further to southward than when her first signal was blown, since she had then ported two points, and was really further to the northward. In resuming his speed under such circumstances, the master acts at his peril. As was said by Sir Robert Phillimore, in the case of *The Kirby Hall*, L. R. 8 Prob. Div. 71: "We wish to state with as much emphasis as possible, that those in charge of a ship in such a dense fog as was described in this case should never conjecture anything when they hear a whistle in such close proximity, as was the case here, whether the sound appears to them to come from a vessel approaching them or not." Of course there is a point depending upon the number, distinctness, and apparent position of the approaching signals, beyond which precautions are unnecessary and the master has the right to assume that he has shaken off the other vessel, but it is entirely clear that that point had not been reached in this case, and that the immediate cause of the collision was the order to go ahead at full speed before the course and position of the Iberia had been definitely ascertained. Indeed, so gross was the fault of the Umbria in this connection, that we should unhesitatingly apply the rule laid down in *Alexandre* v. *Machan* ("*The City of New York*," 147 U. S. 72, 85 [37: 84, 90], and *The Ludvig Holberg*, 157 U. S. 60, 71 [39: 620, 624], that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor. It was suggested upon the argument that it was customary for large passenger steamers carrying the mails to run at full speed in a fog, and that this was really the safer course for them, as the greater the speed the sooner they pass the foggy belt. However this may be, the custom is not one to which the courts can lend their sanction as it implies a flagrant disregard of the safety of other vessels.

2. But notwithstanding the negligence of the Umbria, the Iberia was chargeable with the

---

way is liable for collision if she fails to allow a sufficient margin for the contingencies of navigation. Thames Towboat Co. v. Central R. Co. 61 Fed. Rep. 117.

A steam vessel bearing the fog signals of another steamer upon her starboard hand has the duty of avoiding such other steamer. The Phœnix, 58 Fed. Rep. 927.

The first of two steamers meeting, which violates the rules of navigation requiring them to pass starboard to starboard, by signaling the other to pass port to port, takes the risk of passing in safety, and is held in fault for a collision in failing in the movement. The Oceanic, 61 Fed. Rep. 338.

A steamship is at fault for a collision in a fog, in deviating from her proper course and continuing at a dangerous rate of speed when the near proximity of another vessel is in fact known to her officers, instead of stopping until the position and course of such other vessel have been made out and proper signals for passing given and understood by both, as required by law. The Premier, 59 Fed. Rep. 797.

A tug is not rendered liable for a collision with a steamship by the fact that her engineer leaves her engine and runs at the last moment to save his life, where the collision is not attributable to his act. The Delaware, 61 Fed. Rep. 525.

A bark changing her course to starboard in a thick fog after hearing a steamer's whistle, so as to bring about a collision, is primarily responsible for the collision. The Saale, 59 Fed. Rep. 716.

A tug meeting a sloop in a narrow channel in New York harbor is to blame for a collision where she fails to see the sails of the sloop in sufficient time, and fails to reverse at all; and it is not sufficient excuse that the pilot did not know which way the sloop was going,—especially where she could reverse in three seconds, and reversal for a very short period would have detained the tug enough to permit the sloop to pass on and avoid the collision. The Brinton, 59 Fed. Rep. 714.

A pilot boat which first perceives a steamship going at 7 knots an hour in a dense fog, at a distance of from 1,000 to 1,300 feet, while the wind is light, is *in extremis*, and is not bound to undertake any sudden change of course. The Orizaba, 57 Fed. Rep. 247.

A pilot boat is not at fault for keeping her course in accordance with the 23d rule of navigation after hearing or sighting a steamer which comes in collision with her, where the location of the steamer is to be made out by the bearings of her signal through the fog, and where, although such bearing is not perceptibly changed, no one can tell but that the very moment chosen for a change of course will be that when the steamer will change her own, or whether such change by the steamer will be to port or starboard. La Normandie, 58 Fed. Rep. 427.

A steamer which, meeting another, attempts to cross the latter's bow and fails to stop and reverse when the latter makes no response to her signal, is at fault for an ensuing collision, although the latter is guilty of inexcusable misconduct. The New York, 53 Fed. Rep. 553.

A steamer whose officers fail to hear two signals by another steamer, and to see her after their attention is challenged by a third whistle, until she sounds an alarm whistle, when they are scarcely ¼ of a mile apart, although the weather is favorable and the conditions call for careful navigation; and which, although invoking against the other vessel rules 19 and 21, neither holds her course as required by the former, nor slackens speed, but changes her course and keeps her speed to the very instant of collison,—is guilty of inexcusable misconduct rendering her liable for a collision, and which should



Digitized by Google

duty of taking proper precautions, and, in 410] *judging of the propriety of her manœuvers, we are obliged to accept the testimony of her officers and crew as conclusive, since there is no other testimony to contradict it.

It appears that she was bound toward New York harbor upon a course crossing to the northward, but still not far from parallel to that of the Umbria, and was proceeding at a speed of from 3½ to 4 knots an hour. Her officers say that they heard the Umbria's first whistle about two points on her port bow; that her helm was immediately ported and her head put two points more to starboard, bringing her upon a northwest course, which she held until she came in sight of the Umbria. This brought her upon a course more than two points divergent from that of the Umbria. While proceeding under this course, several more whistles were heard from the Umbria, bearing in about the same direction (allowing two points for the porting), and rapidly increasing in volume. There could be but one interpretation put upon these signals. A steamer was drawing rapidly nearer upon a course crossing that of the Iberia. That she was nearing her was evident from the increasing loudness of each succeeding whistle; that she was not upon a parallel course was evident from the fact that the Iberia was herself upon a course which, if continued, would have carried her ashore upon Rockaway beach. The probabilities all were that the other steamer was bound out from New York harbor.

Under such circumstances, and in view of the fact that the exact position and course of the Umbria could not be determined, we think it would have been more prudent on the part of the Iberia not to have changed her course until the position and course of the approaching steamer had been definitely ascertained, although we should be reluctant to hold that such change of course was a fault on her part, which should condemn her in a moiety of the damages. There are undoubtedly authorities and some expressions of this court to the effect that a change of the helm, in ignorance of the exact position and course of an approaching vessel, is a fault, although we have never held that it would be a fault in every case presenting these conditions. *The Sarah Watson* v. *The Sea Gull*, 90 U. S. 23 Wall. 165, 175, 177 [23: 90, 93]; **Alexandre* v. *Machan* (*"The City* [411 *of New York"*) 147 U. S. 72, 85 [37: 84, 90]; *The James Watt*, 2 W. Rob. Adm. 271; *The Alberta*, 23 Fed. Rep. 807, 811; *The Bougainville*, L. R. 5 P. C. 316; *The Franconia*, 4 Ben. 181, 185; *The Shakspeare*, 4 Ben. 128; *The Lorne*, 2 Stu. Adm. 177; *The Western Metropolis*, 2 Ben. 399, 402; *The Hammonia*, 4 Ben. 518, 522; *The Northern Indiana*, 3 Blatchf. 92, 110; *The North Star*, 43 Fed. Rep. 807, 23 U. S. App. 242, 252; *The Fountain City*, 22 U. S. App. 301; *The Arthur Orr*, 69 Fed. Rep. 350; *The Resolution*, 6 Asp. Mar. L. Cas. 363.

We think, however, that a more reasonable position in this connection was taken by the House of Lords in the case of *The Vindomora* [1891] A. C. 1, in which it was held that there was no rigid rule that where two steamships were approaching each other in a fog so as to involve risk of collision, neither

---

result in a suspension or revocation of her master's license. *Ibid.*

A schooner which is to the leeward of a barkentine at night nearly head on, the lights of both vessels being clearly visible, is at fault for a collision produced by her failure firmly to keep her course; but the barkentine sailing free is also at fault where she steers a course unnecessarily close to the other vessel in violation of the rule requiring her to keep clear. The Rabonni, 53 Fed. Rep. 952, Modifying 53 Fed. Rep. 948.

A steamer which collides with a sailing vessel because of the breaking of her rudder chain without unusual strain is liable for the collision, where the chain is of medium quality and has lost one third of the area through long wear. The Riversdale, 58 Fed. Rep. 286.

A schooner meeting a steamer is at fault for a collision, where the steamer is always to the windward and the shooner luffs so that they come into collision at right angles. The Portia, 55 Fed. Rep. 1017.

A steamer which, meeting another end on or nearly so, fails to appreciate the situation by endeavoring to avoid a sailing vessel, and thereby brings about a collision with such steamer, is responsible for the collision. The Sarah Thorp, 50 Fed. Rep. 587, 1 U. S. App. 154.

Steamers approaching each other in a dense fog are jointly responsible for a collision, where both fail to reverse after hearing each other's signals. The Midland, 48 Fed. Rep. 331.

A brig sailing free is liable for a collision in clear weather, in Long Island sound, with a schooner closehauled on the wind, where both vessels exhibit the proper light and there is no inevitable accident or fault on the part of the schooner which brings about the collision. The Havilah, 50 Fed. Rep. 331, 1 U. S. App. 128.

If a steam vessel was brought into extreme danger by the fault of a sailing vessel, the steam vessel will not be held to blame for any error of judgment at the time,—especially where nothing she could have done would have averted the collision, and she did everything she could to that end. The Blue Jacket v. Tacoma Mill Co. 144 U. S. 371 (36: 469).

A sailing vessel which, by the use of a foghorn blown by steam, instead of atmospheric pressure as required by the sailing rules, deceives a steamer approaching her in a fog into believing that another steamer is approaching, and acting accordingly, and thereby produces a collision, is solely liable for its results. The Parthian, 43 Fed. Rep. 175.

When two steamers are approaching each other in a fog, and repeated signals from each of them indicate that they are drawing together upon opposite or crossing courses, it is the duty of each to stop until they come to a clear understanding with regard to their respective positions and courses, and, if their be any confusion of signals, or any other apparent risk of collision, it is their duty not only to stop but to reverse their engines. The North Star, 43 Fed. Rep. 807.

If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side must keep out of the way of the other, and the other must keep her course, to avoid collision. The R. A. Packer v. New Jersey Lighterage Co. 140 U. S. 360 (35: 453).

A steam vessel is bound to keep out of the way of a schooner; and if a collision occurs, the steamer must be held wholly responsible, unless she shows a fault on the part of the schooner which contributed to the collision, or that it was due to unavoidable accident. The Nacoochee v. Moseley, 137 U. S. 330 (34: 687).



Digitized by Google

ship ought to alter her helm until the signals of the other gave clear indication of her direction; and that each case must depend upon its own circumstances, which might afford reasonable ground for believing what the direction must be. In that case it was argued that one of the steamers concerned must be held in fault for having starboarded before her officers knew the direction in which the approaching steamer was coming. In considering this, Lord Herschell remarked: "I do not think the cases which the learned counsel cited support the proposition that there is any such absolute hard and fast rule as that a vessel having only the indication of a single whistle from the other vessel is never justified in manœuvering, and must always be held to blame if she does manœuver. I should be very sorry to say anything to indicate any dissent from the view that where two vessels are approaching one another in a fog, without any sufficient indication to justify action, neither vessel would be justified in altering her course. I think the proper steps to be taken in such a case would be for each vessel to keep the course on which she was proceeding. But, although I entirely agree that that is a good general rule to lay down, yet that rule must be interpreted in each case according to the circumstances of that case. It is impossible to lay down an abstract rule of that description which shall be applicable to all [412] circumstances, *to all parts of the seas, and to all positions of vessels." In that case, as the whistle of the approaching steamer was heard broad off the starboard bow, it was held that the other vessel was not in fault for starboarding, and that such starboarding did not contribute to the collision. See also *The Frankland and Kestrel*, L. R. 4 P. C. 529, 533.

Upon these considerations, while we think it would have been more prudent in the Iberia not to have changed her course, yet in view of the fact that the whistle of the Umbria appeared to come from off her port bow, we should be unwilling to say that it was necessarily a fault on her part to port her helm two points, the effect of which would be to give the Umbria more room. It is possible that, under the peculiar circumstances, the Iberia had a right to assume that the Umbria was outward bound from New York, and pursuing a course substantially parallel to her own.

The question whether the Iberia performed her whole duty in continuing upon her course, even at a low rate of speed, instead of stopping when the whistles of the Umbria were repeated and apparently drawing nearer, remains to be considered. The only two articles of the Revised International Regulations of 1885 (23 Stat. at L. 488) which have any pertinence to the case are the following:

"Art. 13. Every ship, whether a sailing ship or a steamship, shall in a fog, mist, or falling snow go at a moderate speed."

"Art. 18. Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary."

The former of these articles deals with the general speed of ships in a fog; the latter, with the special precautions to be observed after the proximity of another vessel has been ascertained by her signals. As the general speed of the Iberia did not exceed 4 knots an hour—the lowest speed necessary to the maintenance of steerageway—it is clear that she was guilty of no violation of the 13th article.

Her conduct, after the whistles of the Umbria began to be heard by the Iberia's officers, is deserving of more serious *consideration. [413] We certainly do not wish to be understood as holding that it is necessary for a steamer to stop the moment she hears a whistle ahead of her in a fog, though it be directly ahead. Under such circumstances she may proceed at a reduced rate of speed; but if the whistle be repeated two or three times, and appear to be drawing nearer, the authorities generally hold that, if the fog be dense, prudent navigation requires that she shall stop her engines and drift ahead, until the approaching steamer comes in sight, or her whistles indicate that the two vessels are well clear of each other.

A review of the leading cases upon the subject will exhibit the circumstances under which it has been held that steamships navigating in a fog or other atmospheric obscuration are bound to stop upon hearing signals from vessels, the exact position and course of which it is impossible to ascertain.

In the case of *The Hypodame* v. *Chapin* ("*The Hypodame*"), 73 U. S. 6 Wall. 216 [18: 794], the earliest case in this court, a steamer proceeding at the rate of 6 to 8 miles heard a hail before it from a vessel exhibiting no light, and immediately slowed her engines, and then stopped. She was held to have been in fault for not *instantly* stopping and reversing her engines.

The next is that of *The Colorado* v. *The H. P. Bridge* ("*The Colorado*"), 91 U. S. 692 [23: 379]. In this case a propeller was proceeding in a dense fog at the rate of 5 or 6 miles an hour. Hearing the blast of a fog horn from a sailing vessel, which was crossing her course at the rate of 4 miles an hour, it was held that her speed was excessive, and that any speed was too great which did not enable the steamer to perform the duty imposed upon her by the act of Congress "to keep out of the way of the sailing vessel," if the latter has in all respects complied with the rules of navigation.

In *Alexandre* v. *Machan* ("*The City of New York*"), 147 U. S. 72 [37: 85], it was held that a steamer proceeding at her usual speed, upon hearing the fog horn of a bark only one point on her starboard bow, should at once have checked her speed, and if the sound indicated that the approaching vessel was near, should have stopped or reversed until the sound was definitely located, or the vessels came in sight of each other.

*And in *The Martello* v. *Willey* ("*The Martello*"), 153 U. S. 64 [38: 637], a steamer leaving the port of New York in a dense fog, at a speed of 5 to 6 miles an hour, heard a blast from a fog horn on her starboard bow, indicating that a vessel was approaching from a direction which might take her across the steamer's bow, and was held to have been in fault for not at once stopping, until, by repeated blasts of the horn, she could assure herself of the exact bearing, speed, and course of the approaching vessel. [414]

The English cases upon the subject of speed are much more numerous and explicit. In that of *The Frankland and Kestrel*, L. R. 4



Digitized by Google

P. C. 529, two steamships were approaching each other in a fog so dense that vessels could not be seen at a greater distance than 200 or 300 feet. The speed of each vessel was *not over 2 to 2½ knots* through the water. The finding of the admiralty court was that "both vessels were going, in truth, in the most absolute uncertainty as to the proceedings of the other;" and the opinion of that court, fortified by that of its nautical assessors, was "that upon hearing the whistles of each other so near and approaching each other, each vessel ought, not only to have stopped, but to have reversed until its way was stopped, when it could have hailed and ascertained with certainty which way the head of the other vessel was, and which way she was proceeding; and by that means the collision would or might have been avoided." The Privy Council was of the opinion that both vessels were going at a moderate speed; but that the Frankland, the only vessel which appealed, having heard a whistle sounded many times, indicating that a steamer was approaching her and had come very near to her—so near, indeed, that if the vessels had then stopped they would have been within hailing distance—should not only have stopped the motion of her engines, but should have reversed them, and that she ought not to have waited until the vessels sighted each other, when such a manœuver would have been too late.

In *The Kirby Hall*, L. R. 8 Prob. Div. 71, it was said to be the first duty of those who have charge of a steamship in motion during a dense fog, on first hearing the whistle of a steamship in such close proximity to them that a risk of [415] collision is involved, "to bring their vessel immediately to a standstill, and not to execute any manœuver with her helm until they have definitely ascertained the position and course of the other ship. In this case, although the Kirby Hall was going *dead slow*, it was held that she was to blame for not stopping when the whistle of the approaching steamer was heard the first time near at hand, instead of going ahead without knowing where the other vessel was or what she was doing. And said the court: "We wish to state with as much emphasis as possible that those in charge of a ship in such a dense fog as was described in this case should never conjecture anything when they hear a whistle in such close proximity as was the case here, whether the sound appears to them to come from a vessel approaching them or not." The fog was "as dense a fog as one can well imagine."

In *The John McIntyre*, L. R. 9 Prob. Div. 135, a steamer hearing a whistle on her port bow in a *dense* fog, "so thick that she can hardly see before her," slackened her speed. Later on the whistle was repeated two or three times, clearly nearing her and in her vicinity, but she did not then stop and reverse, and it was held that she was in fault. The approaching steamer, the Monica, though making only 8 knots an hour, was admitted to have been in fault.

In *The Dordogne*, L. R. 10 Prob. Div. 6, the master of the Dordogne, while running in a dense fog, heard a whistle three points off her starboard bow. On hearing it, the engines were stopped. The whistle was again heard broader on the starboard bow, and was replied to and the engines again set ahead. The engines were again stopped and again moved ahead. It was held that, considering the way in which these vessels were approaching each other, the officer in charge ought to have brought the Dordogne to a standstill, and, when the other vessel was coming nearer to him, he should have stopped and reversed. The other vessel—the Edith—was admitted to be in fault, though proceeding "dead slow."

In the case of *The Ebor*, L. R. 11 Prob. Div. 25, the rule was still more stringently enforced. In this case, the plaintiff's steamer heard a whistle almost directly ahead in a "thick" fog. She was "then going only about 3 knots [416 an hour, and continued at this speed for about a minute, until a second whistle was heard, when the order was given to stop and reverse; but the defendants' steamer coming in sight, a collision occurred. The defendants admitted that they were to blame, though making only 8 knots an hour, but it was also held that the officer in charge of the plaintiff's steamer, on hearing the first whistle, should have reduced her speed to as slow a rate as possible, only keeping her under command, and was in fault for failing so to do.

In the case of *The Ceto*, L. R. 14 App. Cas. 670, it was held that where two steamships, invisible to each other by reason of a *dense* fog, find themselves gradually drawing nearer until they are within a few ship's lengths, each of them ought at once to stop and reverse; unless the fog signals of the other vessel have unequivocally indicated that she is steered so as to pass clear without involving risk of collision; or unless other circumstances exist which make it dangerous to stop and reverse. The exact speed of the two steamers was not given, although it is stated in one of the opinions that the Ceto was going "dead slow," while the Lebanon had reduced her speed to "easy." Both were held to blame. In the latest English case upon this point, *The Lancashire* [1894], A. C. 1, two steamships were approaching one another on opposite courses in a fog. They came in sight of each other at a distance of 450 feet. The Ariel was conceded to be in fault. The Lancashire, although proceeding only at the rate of 3½ knots an hour, stopped her engines on hearing the repeated whistles of the Ariel a point and a half on her starboard bow, but was held in fault for not reversing.

It is apparent from an examination of these cases that they are distinguishable from the one under consideration in two important particulars, *viz.*, that the fog was dense, and that the approaching vessel was herself running at a comparatively low rate of speed.

In every case the fog was described as "dense"—in *The Frankland and Kestrel*, "so dense that vessels could not be seen at a greater distance than 200 or 300 feet;" "in [417 *The Kirby Hall*, "as dense as one can well imagine" (6 Asp. Mar. L. Cas. 90); in *The John McIntyre*, "so thick she can hardly see before her" (6 Asp. Mar. L. Cas. 278); and in the other simply as "dense," or "thick." Under such circumstances, it might well be held to be the duty of each steamer to stop and reverse her engines and feel her way, until the course of the other had been definitely ascer-



Digitized by Google

tained. But in cases of this kind much depends upon the density of the fog, and something must be left to the judgment and discretion of the master. Precautions, which might be indispensable in a fog so thick that vessels are invisible at a distance of 300 feet, might become unnecessary and even burdensome if they can be seen at a distance of 1,000 feet. It was said in the early case of *The Batavier*, 9 Moore, P. C. 286, that "at whatever rate she was going, if going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate." This language was quoted with approval in *The Colorado* v. *The H. P. Bridge* ("*The Colorado*") 91 U. S. 692, 703 [23: 379, 383].

So, too, in the case of *The Great Eastern*, Brown & L. Adm. 287, it was said that "their lordships are of opinion that it is the duty of the steamer to proceed only at such a rate of speed as will enable her, after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent any collision from taking place." Similar language was used by this court in the case of *The Nacooches* v. *Moseley* ("*The Nacooches*") 137 U. S. 330, 339 [34: 687, 690].

The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. In a dense fog this might require both vessels to come to a standstill, until the course of each was definitely ascertained. In a lighter fog it might authorize them to keep their engines in sufficient motion to preserve their steerageway.

The fog in this case was what is termed intermittent; sometimes dense, sometimes light, [418] occasionally lifting so much as to *permit other vessels to be seen, and again shutting down so as to hide them completely. That, immediately prior to the collision, it was not a dense fog is shown by the admitted fact that the steamers became visible to each other at a distance of from 900 to 1,000 feet. Under such circumstances, if the Umbria herself had been observing the rule with regard to moderate speed, we think it would have been possible for the two steamers, by prompt reversal of their engines, to have avoided each other—at any rate, the master of the Iberia might, in the exercise of sound judgment, have concluded that it was safer for him to maintain a low rate of speed than come to a standstill.

It should also be borne in mind that she had a right to assume that, even if the Umbria were not pursuing the moderate speed required by the statute, at least she was not guilty of maintaining the extraordinary and reckless speed of 19 knots per hour. While the signals of the Umbria indicated that she was approaching her very fast, the bearing of these signals tended to show that she was broadening off from, rather than bearing in upon, her course, and that the Iberia would probably pass the point of intersection before the Umbria reached it. Indeed, if it be true, as sworn by her witnesses, that the Iberia was proceeding on a N. W. course after she had ported, and the Umbria was proceeding on a course E. by S. ½ S., and the whistles were several times heard four points on the bow of the Iberia, there could not have been any collision, since the courses of the two vessels would have crossed each other far astern of the Iberia. It is probably also true that, considering the great speed of the Umbria, it were better that the Iberia should keep her steerageway rather than stop her engines and reverse, since she would respond to her wheel more readily, if her engines were kept in motion than if her headway were entirely stopped. The case presented is not one where, if both vessels had stopped and reversed, the collision might have been avoided; but whether, under the facts as they subsequently appeared to be, the Iberia could be deemed in fault for a manœuver which would have tended to avoid the collision rather than bring *it about, by aiding her in keeping [419] out of the way of the Umbria.

The English cases are also distinguishable in the fact that the approaching vessel was herself running at a low rate of speed—generally at "dead slow," or, as in one or two of the cases, at "easy speed." Indeed, it does not appear that either vessel was running at a speed to exceed 3½ or 4 knots an hour, which, however, was held to be too great to enable two vessels to avoid a collision after they came in sight of each other. Under such circumstances, these decisions can have but an imperfect application to a case where one of the steamers is proceeding at "dead slow," and the other at her full speed of 16 to 19 knots an hour. While we do not question the soundness of Lord Halsbury's observations in the case of *The Ceto*, L. R. 14 App. Cas. 670, that the solution of the question of speed must not depend upon the state of facts afterwards ascertained, unless there was enough to tell both parties at the time what the condition of fact was, still the whole theory of the cases which hold it to be the duty of a steamer meeting another steamer in a fog, to stop or reverse, is based upon the hypothesis that a collision may thereby be avoided; and if the facts afterwards ascertained indicate that such manœuver, under the circumstances of a particular case, could not have subserved any useful purpose, the steamer ought not to be held in fault for the nonobservance of the rule. These rules are intended solely for the prevention of collisions, and if it be clearly apparent that the observance of a certain rule would not have prevented a collision in the particular case, the nonobservance of such rule becomes immaterial. Thus, there are a number of cases holding that after two vessels have approached each other so near that a collision has become inevitable or imminent, the master of either may, in the exercise of a sound judgment, put his engines at full speed with a possibility thereby of escaping contact, or of easing the blow (as was actually done by the Iberia in this case); although if he had done it before the collision had become imminent, it would have been a gross fault. Indeed, article 23 of the International Regulations makes special provision for exceptional *cases by declaring [420] that "in obeying and construing these rules due regard shall be had to all dangers of navigation and to any special circumstances which may



Digitized by Google

render a departure from the above rules necessary in order to avoid immediate danger."

Upon this subject, it was said by this court in *The Cayuga* v. *Hoboken Land & Improv. Co.* ("*The Cayuga*") 81 U. S. 14 Wall. 270, 275 [20: 828, 829]: "Persons engaged in navigating vessels upon the seas are bound to observe the nautical rules enacted by Congress, whenever they apply, and in other cases to be governed by the rules recognized and approved by the courts. Nautical rules, however, were framed and are administered to prevent such disasters and to afford security to life and property, but it is a mistake to suppose that either the act of Congress, or the decisions of the courts, require the observance of any given rule in a case where it clearly appears that the rule cannot be followed without defeating the end for which it was prescribed or without producing the mischief which it was intended to avert."

In the English cases above cited, both vessels were proceeding at a rate of speed no greater than that of the Iberia, and both were held in fault for not stopping and reversing, because, if that had been done promptly, no collision would have occurred; but, if it turn out that the approaching vessel was proceeding at such a rate of speed that a collision could not possibly have been avoided by the other stopping and reversing, it cannot be said to have been at fault with respect to such approaching vessel, that she still continued to keep her engines in motion. In this case it is manifest that no precautions on the part of the Iberia would have been of the slightest avail, in view of the extraordinary speed of the Umbria. It is true that if she had stopped promptly, she might not have reached the point where the courses of the two steamers intersected; but it is equally true that if she had been going at a much greater speed than she was, she would have passed the point of intersection before the Umbria reached it. Manifestly this is not the proper test. The propriety of certain manœuvers cannot be determined by the chance that the two vessels may, or may not, reach the point of intersection *at the same time*, but by the question whether their speed can be stopped 421]*before their arrival at the point where their courses intersect. If two steamers are approaching each other in a fog, manifestly their manœuvers must be determined, not by the chance of their meeting at a point where their courses intersect, but upon the theory that their courses shall not actually intersect—in other words, that both shall stop before the point of intersection is reached; and if one of them is running at such a speed that no manœuver on the part of the other can prevent that one from passing the point of intersection, the latter only is responsible.

The court is therefore unanimously of opinion that the damages should not have been divided. The majority think that the Iberia was not in fault, while other members of the court rest their conclusion upon the view that, even if she were in fault, such fault did not contribute to the collision.

3. Error is also alleged in the refusal of the court of appeals to allow as an item of damage the probable profits of a charter party made October 27, 1888, about a fortnight before the collision, under which the Iberia, described as then being on a voyage from Aden to New York, was to proceed to Cadiz in Spain with a cargo of tobacco. There was clearly no error in rejecting this item. There is nothing in the peculiar facts of the case to take it out of the general rule that in cases of total loss by collision damages are limited to the value of the vessel, with interest thereon, and the net freight pending at the time of the collision. The probable net profits of a charter may be considered in cases of delay, occasioned by a partial loss, where the question is as to the value of the use of the vessel pending her repairs. In such cases the net profits of a charter, which she would have performed except for the delay, may be treated as a basis for estimating the value of her use. *Williamson* v. *Barrett*, 54 U. S. 13 How. 101, 110, 112 [14: 68, 73, 74]; *The Potomac* v. *Cannon*, 105 U. S. 630 [26: 1194]; *The Mayflower*, Bro. Adm. 376; *The Belgenland*, 36 Fed. Rep. 504; *The Gorgas*, 10 Ben. 666; *The Argentino*, L. R. 13 Prob. Div. 191, L. R. 14 App. Cas. 519; *The Mary Steele*, 2 Low. Dec. 370.

But in cases of total loss the probable profits of a charter, not yet entered upon, are always rejected. In the case *of *The Amiable* [422 *Nancy*, 16 U. S. 3 Wheat. 546 [4:456], which was one of an illegal seizure by privateers, a claim made for loss of supposed profits of the voyage on which the vessel was originally bound was held to have been properly rejected. Said Mr. Justice Story: "The probable or possible benefits of a voyage as yet *in fieri* can never afford a safe rule by which to estimate damages in cases of a marine trespass. There is so much uncertainty in the rule itself, so many contingencies which may vary or extinguish its application, and so many difficulties in sustaining its legal correctness, that the court cannot believe it proper to entertain it. In several cases in this court, the claim for benefits has been expressly overruled; and in *Del Col* v. *Arnold*, 3 U. S. 3 Dall. 333 [1: 624], and *The Anna Maria*, 15 U. S. 2 Wheat. 327 [4: 252], it was, after strict consideration, held that the prime cost or value of the property lost, at the time of the loss, and in case of injury, the diminution in value, by reason of the injury, with interest upon such valuation, afforded the true measure for assessing damages."

So, in England, in the case of *The Columbus*, 3 W. Rob. Adm. 158, it was held that where the vessel was sunk in a collision and compensation awarded to the full value of the vessel, as for a total loss, the plaintiff would not be entitled to recover anything in the way of demurrage for the loss of the employment of his vessel, or his own earnings, in consequence of the collision. See also *The Clyde*, Swab. Adm. 23; *The North Star*, 44 Fed. Rep. 492.

In cases of a partial loss there is no injustice in allowing the probable profits of a charter for the short time during which the vessel is laid up for repairs, but in cases of a total loss the recovery of such profits is limited to the voyage which the vessel is then performing, since, if the owner was entitled to recover the profits of a future voyage or charter, there would seem to be no limit to such right so far as respects the time of its continuance; and if



Digitized by Google

the vessel were under a charter which had months or years to run, the allowance of the probable profits of such charter might work a great practical injustice to the owner of the vessel causing the injury.

The cases relied upon by the libellant do not 423] support his contention. *The Canada*, Lush. Adm. 586, was a case of total loss, in which the measure of the loss of freight was said to be the gross freight contracted for at the time of the accident, less the charges which would have been necessarily incurred in earning it. The case is somewhat imperfectly reported. The vessel was carrying a cargo from Cadiz to St. Johns, New Brunswick, and was lost before reaching that place. She was also under a charter to carry timber from Quebec to England, but it does not appear clearly from the report whether the freight upon this charter was allowed, or whether the freight spoken of in the report was not limited to the freight earned upon the voyage from Cadiz to St. Johns. *The Star of India*, L. R. 1 Prob. Div. 466, was a case of partial loss, and, in addition to demurrage pending repairs, the vessel was allowed a compensation for the loss of a charter party which had been canceled by reason of her being unable to take the cargo at the time agreed upon. This does not differ materially from the rule in this country. So, too, in the case of *The Consett*, L. R. 5 Prob. Div. 229, the vessel was injured by collision, and compelled to put into port to repair. The repairs occupied so long a time that it was not possible for her to fulfil a charter into which she had entered, and so was allowed damages for its loss. In the case of *The Freddie L. Porter*, 8 Fed. Rep. 170, a vessel, totally lost by collision, was chartered for a fixed time, and was lost during the continuance of the charter, before it had expired. Her owner was allowed the profits of the whole charter. The decision was admitted to be an advance upon any which had been previously made, but it is no authority for the allowance of a charter, the performance of which had not been entered upon.

Upon the whole, we think the opinion of the court of appeals dividing the damages was erroneous, and that the decree of the district court of January 18, 1890, with respect to the question of liability should have been affirmed, and the case is therefore remanded to that court with directions to enter a new decree in conformity with this opinion.

---

424] ROBERT H. HUNT and Hugh C. Ward, *Plffs. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 424-427.)

*Jurisdiction of circuit court of appeals.*

A writ of scire facias upon a forfeited recognizance to secure the appearance of a person to answer to a charge of embezzlement is a case "arising under the criminal laws," of which the jurisdiction of the circuit court of appeals is made final by the act of Congress of March 3, 1891, chap. 517.

[No. 230.]

*Submitted March 25, 1897. Decided April 12, 1897.*

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that court affirming the judgment of the District Court of the United States for the Western District of Missouri in favor of the United States, plaintiff, against Robert H. Hunt *et al.*, upon a forfeited recognizance, in the sum of $3,000, conditioned that Millard C. Curtis should appear and answer a charge of embezzlement. *Dismissed for want of jurisdiction.*

See same case below, 19 U. S. App. 683, 27 U. S. App. 287.

The facts are stated in the opinion.

*Mr.* **Hugh C. Ward** for plaintiffs in error.

*Mr.* **Edward B. Whitney**, Assistant Attorney General, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This was a writ of scire facias from the district court of the United States for the western district of Missouri against Millard C. Curtis, Robert H. Hunt, and Hugh C. Ward, upon a forfeited recognizance in the sum of $3,000, entered into by Curtis as principal and Hunt and Ward as sureties, the condition of which was that Curtis should appear at the next term of that court to answer a charge of embezzling moneys of a national banking association, in violation of U. S. Rev. Stat. § 5209, and should abide the judgment of the court, and not depart without its leave. The recognizance was taken before the clerk of the court, under written authority of the judge, while the court was not in session.

An answer to the writ of scire facias was filed by Hunt and Ward, and a demurrer and a replication to the answer by the United States. A jury was waived in writing, and the case tried by the court, which gave judgment for the United States. The case was taken by writ of error to the circuit court of appeals, which affirmed the judgment and denied a *petition for a rehearing. 19 [425 U. S. App. 683, 27 U. S. App. 287. The defendants thereupon sued out this writ of error.

They contended that the recognizance was void, because taken before the clerk, and not before the judge; and that the only authority for taking a recognizance to answer for an offense against the laws of the United States was under U. S. Rev. Stat. § 1014, which provides that "for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."



Digitized by Google

But the first question presented by the record is whether this court has jurisdiction of this writ of error. The United States contend that the case is one "arising under the criminal laws," of which the jurisdiction of the circuit court of appeals is made final by the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, § 6). The plaintiffs in error, on the other hand, contend that the writ of scire facias upon a recognizance is a civil action, and therefore not a case arising under the criminal laws.

How far a writ of scire facias upon a recognizance to answer for an offense should be considered a civil action is a question upon which there has been some diversity of judicial opinion, depending in some degree upon the manner in which the question has arisen, and upon the comparative regard to be paid to the form of the proceedings, and to the purpose for which and the circumstances under which such a recognizance is taken.

In the earlier judiciary acts of the United States, the general jurisdiction of the courts of the United States, as depending upon the suit being of a criminal or of a civil nature, was usually defined by the words "any cause, 426] civil *or criminal" (U. S. Rev. Stat. § 687); or "any civil suit or criminal prosecution" (U. S. Rev. Stat. §§ 641, 643); or, on the one hand, by the words, "crimes and offenses;" and, on the other hand, by the words "suits of a civil nature, at common law or in equity," or "suits at common law," or "civil actions." Act of September 24, 1789 (1 Stat. at L. 76-79, 84, chap. 20, §§ 9, 11, 22); act of March 3, 1875 (18 Stat. at L. 470, chap. 137, §§ 1, 2); U. S. Rev. Stat. § 563, cl. 1, 4; U. S. Rev. Stat. § 629, cl. 1, 3, 20; U. S. Rev. Stat. § 633.

Under those acts a writ of scire facias upon a recognizance to answer a criminal charge might have been deemed a civil action. *Stearns* v. *Barrett*, 1 Mason, 153; *United States* v. *Payne*, 147 U. S. 687, 690 [37: 332, 333]; *Com.* v. *M'Neill*, 19 Pick. 127; *Com.* v. *Stebbins*, 4 Gray, 25; *State* v. *Kinne*, 41 N. H. 238. Yet see *Respublica* v. *Cobbet*, 3 U. S. 3 Dall. 467 [1: 683], 2 Yeates, 352; *Com.* v. *Philadelphia County Comrs.* 8 Serg. & R. 151; *State* v. *Cornig*, 42 La. Ann. 416; *State* v. *Murmann*, 124 Mo. 502, 507.

But the phraseology of the act of March 3, 1891, chap. 517, is quite different in this respect. After providing, in § 5, that writs of error may be taken from the district courts or from the existing circuit courts directly to this court "in cases of conviction of a capital or otherwise infamous crime" (since restricted by the act of January 20, 1897, chap. 18, to convictions of capital crimes only), it provides, in § 6, that in all cases, other than those provided for in § 5, the circuit courts of appeals shall have appellate jurisdiction, and that their judgments shall be final "in all cases arising" "under the criminal laws." 26 Stat. at L. 828.

A writ of scire facias upon a recognizance to answer to a charge of crime, even if it be, technically considered, a civil action, and only incidental and collateral to the criminal prosecution, is certainly a case arising under the criminal laws; for it is a suit to enforce the penalty of a recognizance taken to secure the appearance of the principal to answer the charge and to abide any sentence against him; the provision of U. S. Rev. Stat. § 1014, under which the recognizance in suit was taken, is contained in U. S. Rev. Stat. chap. 18, title 13, under the *head of "Criminal Proced- [427 ure," and in the first of the sections regulating arrest, bail, indictments, pleadings, commitments, challenges, witnesses, trial, verdict, sentence, and execution, in criminal cases; and this recognizance is, as it is described in § 1020, a "recognizance in a criminal cause."

*Writ of error dismissed for want of jurisdiction.*

---

MORRIS L. GLADSON, *Plff. in Err.*,
*v.*
STATE OF MINNESOTA.

(See S. C. Reporter's ed. 427-433.)

*State law requiring trains to stop at county seats—police power—interference with commerce—United States mails.*

1. A railroad aided by lands granted under an act of Congress with a provision that the road shall remain a public highway for the use of the government, free from all toll or other charge for transportation of property or troops of the United States, and that it shall transport mails at prices fixed by Congress or the Postmaster General, and permitting connection with another railroad, is not thereby exempted from the operation of a state law requiring trains to stop at a county seat.
2. A reasonable exercise of the police power of the state requiring railroad trains to stop at all stations at county seats does not take the property of the railroad company without due process of law.
3. A railroad train running between two points within the same state, although carrying passengers who are to be transferred to another train of the same company which will carry them to another state, is not exempt from a state law requiring it to stop at county seats, on the ground that this constitutes an interference with interstate commerce.
4. A train carrying United States mails is not exempt from the operation of a state law requiring all regular passenger trains to stop at all stations at county seats.

[No. 240.]

*Argued March 26, 1897. Decided April 12, 1897.*

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment of that court affirming the judgment of the District Court of Pine County, Minnesota, against Morris L. Gladson, engineer of a passenger train of the St. Paul & Duluth Railroad Company, convicting him of a misdemeanor for not stopping the train at the county seat of Pine county, as required by a statute of Minnesota. *Affirmed.*

---

NOTE.—*As to interstate commerce; regulation of; power of Congress, how far exclusive,*—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

*As to power of Congress to regulate commerce,*—see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

*As to what is due process of law,*—see note to Pearson v. Yewdall, 24: 436.



Digitized by Google

See same case below, 57 Minn. 390.

The facts are stated in the opinion.

*Messrs.* **Emerson Hadley** and *James D. Armstrong* for plaintiff in error.

*Messrs.* **H. W. Childs,** Attorney General of Minnesota, and *Geo. B. Edgerton* for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This was a complaint to a justice of the peace of the county of Pine and state of Minnesota, by a passenger on a regular passenger train of the St. Paul & Duluth Railroad Company, running between the cities of St. Paul and 428] Duluth in the state, *and not being "a train entering this state from another state, or going from this state to another state, or a transcontinental train," against the engineer of the train, for not stopping it on July 22, 1893, at the station in the village of Pine City, the county seat of Pine county, as required by the statute of Minnesota of March 31, 1893, chap. 60, by which it was enacted as follows:

"All regular passenger trains, run by any common carrier operating a railway in this state, or by any receiver, agent, lessee, or trustee of said common carrier, shall stop a sufficient length of time at its stations at all county seats within this state to take on and discharge passengers from such trains with safety; and any engineer, conductor, or other agent, servant, or employee of, or any person acting for, such common carrier, or for any receiver, agent, lessee, or trustee of such common carrier, who violates any provision of this act, is guilty of a misdemeanor, and is punishable by a fine of not less than $25 nor more than $100, or by imprisonment in the county jail for not less than ten days nor more than three months: Provided, however, that this act shall not apply to through railroad trains entering this state from any other state, or to transcontinental trains of any railroad." Minn. Laws 1893, p. 173.

The defendant was convicted before the justice of the peace, and appealed to the district court for the county. Upon the trial in that court, the case appeared to be as follows:

The St. Paul & Duluth Railroad Company was a corporation of the state of Minnesota; and had become vested, under the laws of the state, with the lands received by the state under the act of Congress of May 5, 1864, chap. 79, "making a grant of lands to the state of Minnesota to aid in the construction of the railroad from St. Paul to Lake Superior," and providing that "the said railroad shall be and remain a public highway for the use of the government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States;" that "the United States mail shall be transported over said road, under the direction of the Post Office Department," at prices to be fixed 429]*by Congress or by the Postmaster General; and that "any railroad which may hereafter be constructed from any point on the bay of Superior in the state of Wisconsin shall be permitted to connect with the said railroad." 13 Stat. at. L. 64, 65; Minn. Special Laws 1865, chap. 2, p. 19; *State, Marr,* v. *Luther,* 56 Minn. 156.

On the afternoon of July 2, 1893, the complainant was a passenger on a train of the company running from St. Paul to Duluth, and held a ticket for a passage from Rush City to Pine City, both being stations on the line between St. Paul and Duluth, and Pine City being a village of eight hundred inhabitants and the county seat of Pine county; but, although he showed his ticket to the conductor, the train was not stopped at Pine City. The train was a fast express train, known as "the limited," carrying passengers and the United States mail, running daily from St. Paul to Duluth only, stopping for wood and water at Hinckley, and at railroad crossings and junctions at Rush City and elsewhere, but not scheduled to stop nor actually stopping at Pine City or other stations on the way. The mail, and about one third of the passengers, on the average, were destined for West Superior, and were transferred at West Duluth in the state of Minnesota to another train of the same company running thence to the city of West Superior in the state of Wisconsin, just across the line between the two states. To have stopped the train at Pine City would have caused a loss of time of from five to seven minutes, and an expense of from $1.25 to $1.60. Two passenger trains and a mixed train passed daily each way over the road from St. Paul to Duluth, stopping at Pine City.

The defendant, as stated in his bill of exceptions, "moved the court for his discharge, on the ground that the statute under which the complaint is made is unconstitutional on its face, not falling within the legitimate scope of the police power of the state, consequently being a taking of the property of this railroad company without due process of law; that, even if it is not unconstitutional on its face, it is unconstitutional as applied to the train in controversy: in the first place, being an attempt on the part of the state to regulate interstate *commerce; and secondly, being[430 an unlawful interference with and an attempt to regulate the United States mail."

The court denied the motion, and submitted the case to the jury, who returned a verdict of guilty, upon which judgment was rendered. The defendant appealed to the supreme court of the state, which affirmed the judgment. 57 Minn. 390. The defendant sued out this writ of error.

The principles of law which govern this case are familiar, and have often been affirmed by this court. A railroad corporation created by a state is for all purposes of local government a domestic corporation, and its railroad within the state is a matter of domestic concern. Even when its road connects, as most railroads do, with railroads in other states, the state which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience, and comfort of the passengers and of the public. All such



Digitized by Google

regulations are strictly within the police power of the state. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States. *Stone* v. *Farmers' Loan & T. Co.* 116 U. S. 306, 333, 334 [29: 636, 645]; *Smith* v. *Alabama*, 124 U. S. 465, 481, 482 [31: 508, 513, 1 Inters. Com. Rep. 804]; *Hennington* v. *Georgia*, 163 U. S. 299, 308, 317 [41: 166, 170, 173]; *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628, 632 [*ante*, 853, 854].

In Minnesota, as in other states, the county seat of each county is the place appointed for holding the meetings of the county commissioners and the sessions of the district court, and for keeping the offices of the clerk of that court, 431] the *judge of probate, the county auditor, the county treasurer, the sheriff, and the register of deeds. Minn. Gen. Stat. 1878, chap. 8, §§ 102, 129, 148, 174, 195, 220, 227, 258.

The legislature of the state may well treat it as one important object of establishing a railroad within the state, that public officers, parties to actions, jurors, witnesses, and citizens generally, should be enabled the more promptly to reach and leave the centers to which their duties or business may call them. To require every regular passenger train, running wholly within the limits of the state, to stop at all stations at county seats, directly in its course, for the few minutes, and at the trifling expense, needed to take on and discharge passengers with safety, is a reasonable exercise of the police power of the state, and cannot be considered a taking of property of the company without due process of law, nor an unconstitutional interference with interstate commerce or with the transportation of the mails of the United States.

The recent case of *Illinois C. R. Co.* v. *Illinois, Butler*, 163 U. S. 142 [41: 107], cited by the plaintiff in error, was essentially different from the present case.

In that case, the statute of the state of Illinois, as construed and applied by the supreme court of the state, required a fast train, carrying interstate passengers and the United States mail from Chicago in the state of Illinois to places in other states south of the Ohio river, over an interstate highway established by authority of Congress, to delay the transportation of such passengers and mails, by turning aside from the direct interstate route, and running to a station 8¼ miles away from a point on that route, and back again to the same point, and thus traveling 7 miles which formed no part of its course, before proceeding on its way; and, as the court observed, the question whether a statute which merely required interstate railroad trains, without going out of their course, to stop at county seats, would be within the constitutional power of the state, was not presented, and could not be decided, upon the record in that case. 163 U. S. 153, 154 [41: 111].

But in the case at bar the train in question ran 432] wholly *within the state of Minnesota, and could have stopped at the county seat of Pine county without deviating from its course; and the statute of Minnesota expressly provides that "this act shall not apply to through railroad trains entering this state from any other state, or to transcontinental trains of any railroad."

*Judgment affirmed.*

Mr. Justice **Brewer** did not hear the argument and took no part in the decision of this case.

---

## *Re* PHILIP HIEN, *Petitioner.*

(See S. C. Reporter's ed. 433-439.)

*Rules limiting the time of appeals—applicable to a case already decided—limitation in patent cases.*

1. The Court of Appeals of the District of Columbia has authority to make rules limiting the time of taking appeals to that court from the decisions of the Commissioner of Patents by § 6 of the act creating the court (26 Stat. at L. 434, chap. 74), as well as by § 6 as amended by the act of July 30, 1894.
2. A rule limiting the time for an appeal is applicable to a case already decided.
3. The two years' limitation under U. S. Rev. Stat. § 4894, prescribed for the prosecution of applications for patents, has no relation to the limitation on appeals under § 4911.

[No. 16, Original.]

*Argued March 22, 1897. Decided April 12, 1897.*

APPLICATION for a writ of mandamus commanding the Court of Appeals of the District of Columbia to hear and determine the appeal of Philip Hien from a decision of the Commissioner of Patents in a patent case. *Writ denied.*

See same case below, 24 Wash. L. Rep. 837, 25 Wash. L. Rep. 8.

The facts are stated in the opinion.

*Messrs.* **W. H. Singleton** and *F. W. Ritter, Jr.*, for petitioner.

*Mr.* **W. A. Megrath** for respondents, by special leave.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The Commissioner of Patents, in an interference proceeding between Philip Hien and one William A. Pungs, awarded priority of the invention in controversy to Pungs, June 9, 1894. Hien gave notice to the Commissioner March 12, 1896, of an appeal from his decision, under U. S. Rev. Stat. § 4912, of the court of appeals for the District of Columbia, and filed his petition of appeal in that court, *June 2, [433 1896, which was dismissed on the 3d day of the following December because the appeal was not taken within the time prescribed by the rules of the court. 24 Wash. L. Rep. 837. December 12, 1896, Hien moved that his appeal be reinstated on the ground that the court of appeals had no authority to make the rules in question, which was denied. 25 Wash. L. Rep. 8. Hien then applied to this court for leave to file a petition for a writ of mandamus; leave was granted; the petition filed; and a rule to



Digitized by Google

now cause entered, to which return was duly made.

Section 780 of the Revised Statutes of the District of Columbia, approved June 22, 1874, reads:

"Sec. 780. The supreme court, sitting in banc, shall have jurisdiction of and shall hear and determine all appeals from the decisions of the Commissioner of Patents, in accordance with the provisions of §§ 4911 to 4915, inclusive, of chapter 1, title 60, of the Revised Statutes, 'Patents, Trademarks, and Copyrights.'"

The sections of the Revised Statutes thus referred to are as follows:

"Sec. 4911. If such party, except a party to an interference, is dissatisfied with the decision of the Commissioner, he may appeal to the supreme court of the District of Columbia, sitting in banc.

"Sec. 4912. When an appeal is taken to the supreme court of the District of Columbia, the appellant shall give notice thereof to the Commissioner, and file in the Patent Office, within such time as the Commissioner shall appoint, his reasons of appeal, specifically set forth in writing.

"Sec. 4913. The court shall, before hearing such appeal, give notice to the Commissioner of the time and place of the hearing, and on receiving such notice the Commissioner shall give notice of such time and place in such manner as the court may prescribe, to all parties who appear to be interested therein. The party appealing shall lay before the court certified copies of all the original papers and evidence in the case, and the Commissioner shall furnish [434] the court with the *grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal. And at the request of any party interested, or of the court, the Commissioner and the examiners may be examined under oath, in explanation of the principles of the thing for which a patent is demanded.

"Sec. 4914. The court, on petition, shall hear and determine such appeal, and revise the decision appealed from in a summary way, on the evidence produced before the Commissioner, at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal. After hearing the case the court shall return to the Commissioner a certificate of its proceedings and decision, which shall be entered of record in the Patent Office, and shall govern the further proceedings in the case. But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question.

"Sec. 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the supreme court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commission to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

Sections 6 and 9 of the act to establish the court of appeals *for the District of Co- [435] lumbia, approved February 9, 1893 (27 Stat. at L. 434, chap. 74), provided:

"Sec. 6. That the said court of appeals shall establish a term of the court during each and every month in each year excepting the months of July and August, and it shall make such rules and regulations as may be necessary and proper for the transaction of the business to be brought before it, and for the time and method of the entry of appeals and for giving notice of appeals thereto from the supreme court of the District of Columbia, and such other rules and regulations as may be necessary and proper in the premises."

"Sec. 9. That the determination of appeals from the decision of the Commissioner of Patents, now vested in the general term of the supreme court of the District of Columbia, in pursuance of the provisions of § 780, of the Revised Statutes of the United States relating to the District of Columbia, shall hereafter be and the same is hereby vested in the court of appeals created by this act; and in addition, any party aggrieved by a decision of the Commissioner of Patents in any interference case may appeal therefrom to said court of appeals."

By the act of July 30, 1894 (28 Stat. at L. 160, chap. 172), § 6 was amended so as to read as follows:

"Sec. 6. That said court of appeals shall establish by rule of court such terms of the court in each year as to it may seem necessary. *Provided, however*, That there shall be at least three terms in each year, and it shall make such rules and regulations as may be necessary and proper for the transaction of its business and the taking of appeals to said court."

The court of appeals, June 5, 1893, promulgated a set of rules, among which were these:

"Rule 9—1. No order, judgment, or decree of the supreme court of the District of Columbia, or of any justice thereof, shall be reviewed by the court of appeals, unless the appeal shall be taken within twenty days, Sundays excluded, after the order, judgment, or decree complained of shall have been made or pronounced."

"Rule 19—6. The appeals from the [436] Commissioner of Patents shall be subject to all the rules of this court provided for other cases therein, except where such rules, from the nature of the case, or by reason of special provisions inconsistent therewith, are not applicable."

The Commissioner of Patents issued an order May 16, 1894, that "all examiners are hereby directed to withhold from issue the application of the prevailing party in interference cases for thirty days from the date of final is-



Digitized by Google

sue in order that an appeal may be taken to the court of appeals of the District of Columbia, if desired." The order was published in the Official Gazette of June 5, 1894. 67 Pat. Off. Gaz. 1195.

The court of appeals promulgated a new set of rules September 29, 1894, of which Rule 20 related to appeals from the Commissioner of Patents, the second subdivision reading thus:

"20—2. The appellant, upon complying with the preceding section of this rule, shall file in the case a petition, addressed to the court, in which he shall briefly set forth and show that he has complied with the requirements of U. S. Rev. Stat. §§ 4912, 4913, to entitle him to an appeal, and praying that his appeal may be heard upon and for the reasons assigned therefor to the Commissioner; and said appeal shall be taken within forty days from the date of the ruling or order appealed from, and not afterwards."

The order of May 16, 1894, was modified by the Commissioner, April 27, 1896, so as to direct the examiners to withhold from issue the application of the prevailing party in interference cases for forty-five days from the date of the final decision.

The contention is that the court of appeals of the District of Columbia was without authority to promulgate a rule limiting the time of taking appeals from the decisions of the Commissioner of Patents; and that, by analogy, two years were allowed therefor in view of U. S. Rev. Stat. § 4894.

The general rule undoubtedly is that courts of justice possess the inherent power to make [437] and frame reasonable rules not conflicting with express statute; but apart from that we think it clear that the court of appeals was duly authorized by § 6 of the act creating the court, as well as by § 6 as amended by the act of July 30, 1894, to make rules limiting the time taking appeals to the court from the decisions of the Commissioner of Patents. Since by § 9 of the court of appeals was vested with authority to review such decisions, we do not think it can properly be held that under the original act the authority in respect of appeals was limited only to appeals from the supreme court of the District of Columbia, or to the conduct of appeals after they had come before the appellate court.

Of the rules of June 5, 1893, rule 19 is to be read with rule 9 as limiting the time of appeals to the court from the decisions of the Commissioner to twenty days, exclusive of Sundays, which time was enlarged to forty days by rule 20, promulgated September 29, 1894, the rule specifically declaring that such appeals could not be taken after the expiration of the time prescribed.

And if the original act were not so comprehensive as above indicated, the result would be the same under the amendatory act, in respect of the power imparted by which there can be no question. The petitioner complied neither with the rule of June 5, 1893, nor with the rule of September 29, 1894, and if not governed by the former was certainly subject to the latter, for although this was promulgated after the decision of the Commissioner of Patents in the case, the court of appeals was quite right in holding that "the right of appeal is not a vested right that may not be altered by statute, or by rule of court made in pursuance of statutory authority to enact such rules."

In compliance with U. S. Rev. Stat. § 4912, Hien gave notice to the Commissioner of Patents, under date May 12, 1896, of an appeal from his decision to the court of appeals, and filed his petition, under the rule, on June 2. These proceedings, if they had been in time, amounted to the taking of an appeal, but as they were not initiated and prosecuted within the time limited, they were ineffectual. We have no doubt that the court of appeals [438] had authority, in regulating the taking of appeals, to limit the time in which the conditions of such taking had to be performed; and that there was no restriction thereon by reason of U. S. Rev. Stat. § 4894, as contended.

That section is as follows:

"Sec. 4894. All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

This has no relation to the limitation on appeals under § 4911, but has reference solely to the abandonment of an application by failure to prosecute it.

In *Gandy* v. *Marble*, 122 U. S. 432 [30: 1223], which was a bill in equity under U. S. Rev. Stat. § 4915, to obtain an adjudication in favor of the granting of a patent, we held that while such a proceeding was a suit according to the ordinary course of equity practice and procedure, and not a technical appeal from the Patent Office, confined to the case as made in the record of that office, yet that the requirement of § 4894 that the application should be regarded as abandoned if the applicant failed to prosecute the same within two years after any action therein, of which notice should have been given him, unless it were "shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable," was applicable, and that the court could not adjudge that the applicant was entitled, "according to law, to receive a patent," unless he showed to the satisfaction of the court that the delay of two years "was unavoidable, under an allegation to that effect in the bill." It was held that the bill in equity was *sub modo* a branch of the application for the patent, and was governed by the rule as to laches and delay declared by § 4894. But this had nothing to do with the time within which an appeal from the Commissioner of Patents must be [439] taken, but merely decided that a bill in equity under § 4915 would be defeated where the application had been abandoned in the Patent Office under § 4894.

The bill in equity provided for by § 4915 is wholly different from the proceeding by appeal from the decision of the Commissioner under consideration in this case. The one is in the exercise of original, the other, of appellate, jurisdiction.

The court under § 4914, on petition, is to



Digitized by Google

clear and determine the appeal and to revise the decision appealed from in a summary way upon the evidence produced before the Commissioner, at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal."

Section 4915 provides, as to the remedy by bill in equity, that "the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention as specified in his claim, or for any part thereof, as the facts in the case may appear."

In *Butterworth* v. *United States*, 112 U. S. 50, 61 [28: 656, 660], this court distinguished the proceeding by bill in equity under § 4915 from an appeal under § 4911, and said: "This means a proceeding in a court of the United States having original equity jurisdiction under the patent laws, according to the ordinary course of equity practice and procedure. It is not a technical appeal from the Patent Office, like that authorized in § 4911, confined to the case as made in the record of that office, but is prepared and heard upon all competent evidence adduced and upon the whole merits."

This being so, § 4894 was inapplicable, and the power of the court of appeals to limit the time of appeal was not affected thereby.

*Writ denied.*

---

**440] FIRST NATIONAL BANK OF ABERDEEN,** *Plff. in Err.*,

*v.*

**COUNTY OF CHEHALIS and J. M. Carter,** as Treasurer and *ex officio* Collector of Taxes of Said County.

(See S. C. Reporter's ed. 440-462.)

*State decision—payment by a bank of tax on its stock—discrimination—legal conclusion.*

1. This court is bound by the judgment of the supreme court of a state in the mere matter of the construction of a state law.
2. A statutory appointment of a national bank to pay, as agent of the stockholders, a tax assessed upon its capital stock, is not inconsistent with the Federal law pertaining to national banks.
3. The omission from taxation of investments by individual citizens in loans and securities, and of moneyed capital invested in stocks and bonds, does not make the taxation of the shares of capital stock in a national bank invalid as an unfair discrimination against the latter, unless it is shown that the money invested in the property which is not assessed comes into competition with the business of national banks.
4. An allegation that investments were "taxable capital," without describing their character, is an averment in the nature of a legal conclusion.

[No. 88.]

*Argued April 30, 1896. Decided April 12, 1897.*

IN ERROR to the Supreme Court of the State of Washington to review a judgment of that court affirming the judgment of the Superior Court of said State for the County of Chehalis in favor of the defendants, the County of Chehalis *et al.*, in an action brought by the First National Bank of Aberdeen to enjoin defendants from levying upon the property of complainant for the purpose of collecting a tax upon the shares of its capital stock. *Affirmed.*

See same case below, 6 Wash. 64.

Statement by Mr. Justice **Shiras:**

The First National Bank of the city of Aberdeen, state of Washington, a banking corporation organized under the national banking laws of the United States, filed its complaint in the superior court of the said state, for the county of Chehalis, May 16, 1892, against the county of Chehalis and J. M. Carter, as *ex officio* tax collector of the county, seeking to enjoin the defendants from levying upon the safes, time locks, and other personal property of the complainant, for the purpose of collecting a tax upon the shares of its capital stock. The defendants demurred to the complaint, and the demurrer having been sustained, and the complainant having refused to amend its complaint, judgment was entered in the said court, *September 13, 1892, in favor of [441 the defendants. The complainant took the case upon writ of error to the supreme court of the state, where the judgment was affirmed. 6 Wash. 64. The complainant then sued out a writ of error bringing the case here.

The essential allegations of the complaint were that the capital stock of the bank consisted of 500 shares of $100 each; that all of the stock was paid up, and was owned in part by citizens of the state of Washington resident therein, and in part by citizens of the United States residing outside of the state; that the assessor of the said county was charged, under the provisions of an act of the legislature of the said state, approved March 9, 1891, entitled "An Act to Provide for the Assessment and Collection of Taxes in the State of Washington and Declaring an Emergency," with the duty of preparing an assessment roll of all the property subject to taxation in the said county, as owned and there subject to taxation on April 1, 1891; that thereupon the assessor proceeded to make out an assessment roll, wherein he listed to the complainant, as owner thereof, all of its capital stock, and, though informed by the complainant of the residence of each of the stockholders, and of the amount of stock held by each of them on April 1, 1891, assessed the capital stock *in solido* to the complainant as owner thereof, at a total valuation of $50,000; that upon the said assessment the defendant Carter, as treasurer, was officially directed to collect from the complainant a tax in the amount of $686.25; that the tax not having been paid, the said defendant, as treasurer, on March 1, 1892, declared the same delinquent, and

NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

*That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations*,—see note to Providence Bank v. Billings, 7: 939.

*Admission or statement in pleadings, conclusive, and cannot be contradicted by evidence; finding of referee contrary to, cannot be sustained*,—see note to M'Ferran v. Taylor, 2: 436.



Digitized by Google

added thereto a certain sum by way of penalty for nonpayment, and a certain sum as interest, and was about to proceed to collect the total amount, being $787.22, by levying upon the safes, time locks, and other property used by the bank, and that if he were permitted so to do, the complainant would suffer irreparable injury. That on April 1, 1891, there existed in the said county moneyed capital, other than that invested in shares of stock of national banks and banking business, owned by citizens 442 of the state resident in that *county, and there invested in loans and securities owing by other citizens of the state residing in the county, exceeding the sum of $237,400; that there existed in the state moneyed capital owned by citizens of the state who were residents of other counties thereof (aside from the capital invested in banks and banking business), invested in loans and securities owing by citizens of the state residing in counties other than the county aforesaid, exceeding the sum of $14,000,000; that the total capitalization of national banks located in the state was the sum of $7,000,000 and the total capitalization of banks there located, incorporated under the laws of the state, the sum of $4,000,000; that large amounts of moneyed capital were invested in the state, by residents thereof, in the stocks and bonds of insurance, wharf, and gas companies, which amounts, together with all the moneyed capital above mentioned, made an aggregate of at least $26,000,000; that these facts were well known to the several assessors and other taxing officers throughout the state, but that the moneyed capital referred to, other than the said capital of the national and state banks, was purposely omitted from assessment and taxation in pursuance of an agreement entered into before April 1, 1891, between the assessors of the several counties, based upon an opinion rendered by the attorney general of the state, advising such omission. That this omission necessarily operated as a discrimination in favor of the other moneyed capital in the hands of individual citizens of the state and against shares of stock of the national banking corporations located within the state, and necessarily resulted in the taxation of the shares of the national banks at a greater rate than other moneyed capital in the hands of the individual citizens of the state.

*Messrs.* **James B. Howe**, *Eugene M. Carr*, *Harold Preston*, and *M. J. Cochran*, for plaintiff in error:

The supreme court of the state of Washington erred in holding that plaintiff's complaint did not show that plaintiff's capital had been taxed in violation of the Constitution of the United States and of U. S. Rev. Stat. §§ 5214, 5219.

*Churchill* v. *Utica* ("*Van Allen* v. *Assessors*"), 70 U. S. 8 Wall. 573 (18: 229); *Bradley* v. *Illinois*, 71 U. S. 4 Wall. 459 (18: 433); *First Nat. Bank* v. *Kentucky*, 76 U. S. 9 Wall. 353 (19: 701); *Paul* v. *McGraw*, 8 Wash. 296; *Boston* v. *Beal*, 51 Fed. Rep. 306, Aff'd 55 Fed. Rep. 26.

The assessment complained of by the plaintiff in said action was an assessment *in solido* to the plaintiff as the owner of the whole number of shares of its capital stock and amounted to the assessment and taxation of the capital of the plaintiff, and was in contravention of the Constitution of the United States and of U. S. Rev. Stat. §§ 5214, 5219, and the supreme court of Washington erred in not so holding.

*Covington City Nat. Bank* v. *Covington*, 21 Fed. Rep. 484; *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738 (6: 204); *Mercantile Nat. Bank* v. *New York*, 28 Fed. Rep 776; *New York* v. *Weaver*, 100 U. S. 539–543 (25: 705, 706); *Boyer* v. *Boyer*, 113 U. S. 689 (28: 1089); *Wasson* v. *First Nat. Bank*, 107 Ind. 206; *Maguire* v. *Board of Revenue & R. Comrs.* 71 Ala. 401; *First Nat. Bank* v. *Richmond*, 39 Fed. Rep. 309; *National Bank* v. *Richmond*, 42 Fed. Rep. 877; *First Nat. Bank* v. *Fisher*, 45 Kan. 726; *Collins* v. *Chicago*, 4 Biss. 472; *Miller* v. *First Nat. Bank*, 46 Ohio St. 424.

The supreme court of the state of Washington erred in not holding that the complaint showed that the taxation of the shares of capital stock of the plaintiff was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the state of Washington, and therefore was void, under U. S. Rev. Stat. § 5219.

*Isaacs* v. *Holland*, 4 Wash. 54; *Boyer* v. *Boyer*, 113 U. S. 689 (28: 1089); *Mercantile Nat. Bank* v. *New York*, 121 U. S. 138 (30: 895); *Washington Nat. Bank* v. *King County*, 9 Wash. 607.

That the moneyed capital omitted from taxation was other moneyed capital in the hands of individual citizens, within the meaning of U. S. Rev. Stat. § 5219, is clear.

*Boyer* v. *Boyer*, *supra*; *Talbott* v. *Silver Bow County Comrs.* 139 U. S. 438 (35: 210); *Wasson* v. *First Nat. Bank*, 107 Ind. 206; *Maguire* v. *Board of Revenue & R. Comrs.* 71 Ala. 401.

Such omission resulted in the taxation of the shares in national banks at a rate greater than that imposed on other moneyed capital in the hands of individual citizens.

*Albany County Supers.* v. *Stanley*, 105 U. S. 317, 318 (26: 1121); *Pelton* v. *Commercial Nat. Bank*, 101 U. S. 143 (25: 901); *Cummings* v. *Merchants' Nat. Bank*, 101 U. S. 153 (25: 903); *First Nat. Bank* v. *Lindsay*, 45 Fed. Rep. 620; *Puget Sound Nat. Bank* v. *King County*, 57 Fed. Rep. 433; *Andrews* v. *King County*, 1 Wash. 46.

This would be true even though the revenue law of this state forbade such omission.

*First Nat. Bank* v. *Lucas County*, 25 Fed. Rep. 749; *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30: 220).

*Messrs.* **James A. Haight**, Assistant Attorney General, and **W. C. Jones**, Attorney General, of the state of Washington, for defendants in error:

The point of the violation of the Federal Constitution cannot be raised in this court, not having been raised in the court below. The "title, right, privilege, or immunity" contended for by the plaintiff in error was not "claimed under the Constitution of the United States," and the decision of the court was not against a "title, right, privilege, or immunity" so claimed.

*Ex parte Spies*, 123 U. S. 131, 181 (31: 80, 91); *French* v. *Hopkins*, 124 U. S. 524 (31: 536);



Digitized by Google

*Clark* v. *Pennsylvania*, 128 U. S. 395 (32: 487); *Morrison* v. *Watson*, 154 U. S. 111 (38: 927); *Winona & St. P. Land Co.* v. *Minnesota* (No. 2), 159 U. S. 540 (40: 252).

Even had the point been raised on a petition for rehearing, it would not be considered by this court.

*Chappell* v. *Bradshaw*, 128 U. S. 132 (32: 369); *Texas & P. R. Co.* v. *Southern P. Co.* 137 U. S. 48 (34: 614); *Caldwell* v. *Texas*, 137 U. S. 692 (34: 816); *Loeder* v. *Schroeder*, 149 U. S. 580 (37: 856); *Bushnell* v. *Crooke Min. & S. Co.* 148 U. S. 682 (37: 610); *Miller* v. *Texas*, 153 U. S. 535, 538 (38: 812, 813); *Sayward* v. *Denny*, 158 U. S. 180 (39: 941).

Being raised for the first time on the assignment of errors, it cannot be considered by this court.

*Ansbro* v. *United States*, 159 U. S. 695 (40: 310).

The 14th Amendment to the Federal Constitution does not undertake to control the mode of imposing a tax if notice and an opportunity for a hearing are afforded.

*Walston* v. *Nevin*, 128 U. S. 578 (32: 544); *Palmer* v. *McMahon*, 133 U. S. 660 (33: 772); *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232 (33: 892); *Paulsen* v. *Portland*, 149 U. S. 30 (37: 637); *Pittsburg, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421 (38: 1031).

Nor does this Amendment limit the taxing power of the state by imposing on it any rule of equality.

*Chester* v. *Pennsylvania*, 134 U. S. 240 (33: 896); *Home Ins. Co.* v. *New York*, 134 U. S. 594 (33: 1025); *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339 (35: 1035), 8 Inters. Com. Rep. 810; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 (35: 1051); *Jennings* v. *Coal Ridge Improv. & C. Co.* 147 U. S. 147 (37: 117); *Grozza* v. *Tiernan*, 148 U. S. 657 (37: 599).

The statutory provisions for the taxation of the capital stock of national banks (§§ 5214, 5219) forbid the taxation of the capital and permit only the taxation of shares of stock of national banks.

*Churchill* v. *Utica* ("*Van Allen* v. *Assessors*"), 70 U. S. 3 Wall. 573 (18: 229); *First Nat. Bank* v. *Kentucky*, 76 U. S. 9 Wall. 353 (19: 701).

Laws of 1891, chap. 140, §§ 21, 23, as construed by our supreme court, provide for the taxation of the shares only of national banks.

*Paul* v. *McGraw*, 8 Wash. 296, 303, 307; *First Nat. Bank* v. *Chehalis County*, 6 Wash. 64.

This construction by the state court will govern this court.

*New York* v. *Weaver*, 100 U. S. 539 (25: 705); *Palmer* v. *McMahon*, 133 U. S. 660 (33: 772); *First Nat. Bank* v. *Ayers*, 160 U. S. 660 (40: 573); *Stryker* v. *Crane* ("*Stryker* v. *Goodnow*"), 123 U. S. 527 (31: 194); *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162 (36: 925).

No Federal question arises where the validity of the state statute is admitted.

*Commercial Bank* v. *Buckingham*, 46 U. S. 5 How. 317, 342 (12: 169, 182); *Grand Gulf R. & B. Co.* v. *Marshall*, 53 U. S. 12 How. 165 (13: 938).

No Federal question arises when the exemption from taxation claimed under the Federal law is sustained.

*Tyler* v. *Cass County*, 142 U. S. 288 (35: 1016).

The assessment of the shares against the bank and the collection of the same therefrom seem to have been contemplated by the framers of the Federal statutes, and have been repeatedly upheld by this court.

*First Nat. Bank* v. *Kentucky*, 76 U. S. 9 Wall. 353 (19: 701); *Lionberger* v. *Rouse*, 76 U. S. 9 Wall. 468 (19: 721); *Van Slyke* v. *Wisconsin*, 154 U. S. 581 (20: 340); *Bell's Gap. R. Co.* v. *Pennsylvania*, 134 U. S. 232 (33: 892).

The tax on the shares may be collected from the national bank by distraint.

*First Nat. Bank* v. *Douglas County*, 3 Dill. 330; *State Nat. Bank* v. *Morrison*, 1 McCrary, 204.

The listing *in solido* by the assessor, being in compliance with the statutes and approved by the supreme court of Washington, was valid.

*Paul* v. *McGraw*, 8 Wash. 296.

The supreme court of the state having held the action of the assessor to be authorized by the statutes as above construed, there is no Federal question.

*Sage* v. *Louisiana Board of Equalization*, 144 U. S. 647 (36: 577).

The exemption of property not "moneyed capital" from taxation, or the taxation of such property at a lower rate than "moneyed capital" causes no "taxation at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state.

*First Nat. Bank* v. *Waters*, 7 Fed. Rep. 153; *McMahon* v. *Palmer*, 102 N. Y. 176, 55 Am. Rep. 796; *New York, Duer*, v. *Tax Comrs.* 71 U. S. 4 Wall. 244 (18: 344); *Mercantile Nat. Bank* v. *New York*, 121 U. S. 138 (30: 895); *Palmer* v. *McMahon*, 133 U. S. 660 (33: 772); *Talbott* v. *Silver Bow County Comrs.* 139 U. S. 438 (35: 210).

The omission to tax personal credits is alleged in the complaint to have been made pursuant to an opinion of the attorney general duly rendered, of which opinion the supreme court of Washington took judicial notice.

*First Nat. Bank* v. *Chehalis County*, 6 Wash. 64, 70.

The Federal inhibition of taxation that discriminates against national banks has no application to general exemption laws founded on just reason and not operating as an unfriendly discrimination against investments in national bank shares.

*New York, Duer*, v. *Tax Comrs. supra; Hepburn* v. *Carlisle School Directors*, 90 U. S. 23 Wall. 486 (23: 112); *Adams* v. *Nashville*, 95 U. S. 19 (24: 369); *Mercantile Nat. Bank* v. *New York*, 121 U. S. 138 (30: 895); *National Bank of Redemption* v. *Boston*, 128 U. S. 60 (31: 689).

The exemption of credits in this case subserves the purpose of preventing double taxation.

Ops. Atty. Gen. 1891, p. 59; *Hepburn* v. *Carlisle School Directors*, 90 U. S. 23 Wall. 480 (23: 112).

The exemption of savings bank deposits being an exemption of moneyed capital that does not compete with the business of national banks, and being founded in reason, causes no discrimination against shares in national banks though such savings in the state amount to $500,000,000 and upwards.



Digitized by Google

*Mercantile Nat. Bank* v. *New York*, and *National Bank of Redemption* v. *Boston*, *supra*.

The exemption of an amount of moneyed capital, large in itself but small relatively to the whole amount of moneyed capital, cannot be deemed an unfair discrimination.

*Mercantile Nat. Bank* v. *New York*, 121 N. Y. 138 (30: 895).

**443] *Mr. Justice Shiras** delivered the opinion of the court:

It is contended on behalf of the plaintiff in error that an assessment and taxation of all the shares of the stock of a national bank *in solido* to the bank direct, as owner thereof, constitutes a tax upon the bank forbidden by U. S. Rev. Stat. § 5219.

The tax in question was assessed under § 21 of an act of the legislature of the state of Washington, approved March 9, 1891 (Wash. Laws 1891, pp. 280-289), in the following terms:

"Every individual, firm, corporation, or association of persons, carrying on a general banking business in this state, whether the same has been organized under the banking laws of this state or the United States, or conducted under the style of private bankers, shall be assessed and taxed in the county, town, city, or village where such bank or banking association is located, and not elsewhere, in the following manner: Annually, at such times as provided for listing property for taxation, any such bank or banking association as contemplated in this section shall, by its accounting officer, furnish the county or city assessor a statement, verified by oath, giving the amount of paid-up capital stock, the amount of surplus or reserved fund, and the amount of undivided profits of such bank or banking association. The aggregate amount of capital, surplus, and undivided profits shall be assessed and taxed as other like property in the state is assessed and taxed: *Provided*, At the time of listing the capital stock, the amount and description of its legally authorized investments in real estate shall be assessed and taxed as other real estate is assessed and taxed under this act, and the assessor shall deduct the amount of such investments in real estate from the aggregate amount of such capital, surplus, and undivided profits, and the remainder then taxed as above provided."

If this section stood alone there might be ground for the contention that it contemplates taxation of the capital of the bank. But § 23 of **444]** the statute provides that "each bank *and banking association shall be liable to pay any taxes assessed against them as the agent of each of its shareholders, owners, or owner under the provisions of this act, and may pay the same out of their individual profit account or charge the same to their expense account, or to the accounts of such shareholders, owners, or owner in proportion to their ownership."

The supreme court of Washington held in this case that these two sections are to be read together, and that, so read, their provisions are not inconsistent with those of the Federal statute.

That the two sections of the state law should be read together is obviously proper, and, at any rate, we are bound by the judgment of the supreme court of the state in the mere matter of the construction of that law.

In holding that the state law, in the provisions under consideration, was not in contravention of the Federal statute, the supreme court of Washington claimed to follow the case of *First Nat. Bank* v. *Kentucky*, 76 U. S. 9 Wall. 353 [19: 701], and we agree with that court in thinking that the case referred to is decisive of the contention now made. In that case it appeared that a statute of the state of Kentucky provided that a tax should be laid on "the bank stock or stock in any moneyed corporation of loan or discount, 50 cents on each share thereof equal to $100, or on each $100 of stock therein owned by individuals, corporations, or societies;" and further provided that the cashier of a bank, whose stock is taxed, shall, on the 1st day of July in each year, pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same and 20 per cent upon the amount."

It was claimed by the bank that the shares of the stock were the property of the individual stockholders, and that the bank could not be made responsible for a tax levied on those shares, and could not be compelled to collect and pay such tax to the state. In delivering the opinion of the court, Mr. Justice Miller said:

"It is strongly urged that it is to be deemed a tax on the *capital of the bank, because the **[445** law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the state has a right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on these shares. It has been the practice of many of the states for a long time to require of its corporations thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England states, and in several of them the portion of this tax which should properly go as the shareholder's contribution to local or municipal taxation is thus collected by the state of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the state, it is the only mode in which the state can reach their shares for taxation. We are therefore of opinion that the law of Kentucky is a tax upon the shares of the stockholder. . . . A very nice criticism of the proviso to the 41st section of the National Bank Act [now U. S. Rev. Stat. § 5219] which permits the states to tax the shares of such bank, is made to us to show that the tax must be collected of the shareholder directly, and that the mode we have been considering is by implication forbidden. But we are of opinion that while Congress intended to limit state taxation to the shares of the bank as distinguished from its capital, and to provide against a discrimination in taxing such bank shares unfavorable to them as compared with the shares of other corporations, and with other moneyed capital, it did not intend to prescribe to the states the mode in which the tax should be collected. The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends and on the income arising from bonds of corpora-



Digitized by Google

ons. It is the only mode which, certainly nd without loss, secures the payment of the ix on all the shares, resident or nonresident; nd, as we have already stated, it is the mode hich experience has justified in the New ngland states as the most convenient and roper in regard to the numerous wealthy cor- orations of those states. It is not to be read- [446] ily inferred, therefore, *that Congress in- ended to prohibit this mode of collecting a tax hich they expressly permitted the states to evy."

This case was followed in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 239 [33: 896], and *Van Slyke* v. *Wisconsin*, 154 U. S. 581 [20: 240], and its doctrine, that the statutory appointment of the bank to pay the whole tax as agent of the stockholders is not inconsistent with the Federal law pertaining to national banks, was correctly interpreted and applied by the state court to the case in hand. It was not alleged in the bill, or claimed on argument, that the bank was not in possession of funds, belonging to the stockholders severally sufficient to pay the tax, proportioned to their ownership of the stock.

It is also contended that the supreme court of Washington erred in not holding that the bill of complaint showed that the taxation of the shares of capital stock of the plaintiff was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the state of Washington, and was therefore void under U. S. Rev. Stat. § 5219.

As the case was disposed of in the court below on a demurrer to the bill, it is proper to have before us the very language of the bill which presents this question, and which was as follows:

"That on the 1st day of April, 1891, there existed in the county of Chehalis, state of Washington, taxable moneyed capital (other than and beyond that invested in shares of stock of national banks and banking business), owned by citizens of said state, resident in said county, and there invested in loans and securities to them payable, and owing by other citizens of said state residing in said county, of vast amount, to wit, exceeding the sum of $237,400. That on said 1st day of April, 1891, there existed in the state of Washington, in counties other than the county of Chehalis aforesaid, other taxable capital in money and moneyed capital (aside from the moneyed capital referred to in the paragraph preceding, and aside from the capital in banks and banking business), owned by citizens of the state of Washington resident in said state (in counties other than the county of Chehalis), and there [447] invested in loans *and securities to them payable and owing by other resident citizens of said state in counties other than the county of Chehalis, of vast amount, to wit, exceeding the sum, as complainant is informed and believes, of $14,000,000. That on the said 1st day of April, 1891, the total capitalization of national banks located in the state of Washington was the sum of $7,000,000; that the total capitalization of banks there located, but incorporated under the laws of the state of Washington, was the sum of $4,000,000; and that at the same time large amounts of moneyed capital were invested in the state of Washington by residents of said state in the stocks and bonds of insurance, wharf, and gas companies; and in addition to the foregoing there then existed in said state other moneyed capital amounting to at least $26,000,000, being the other moneyed capital hereinbefore referred to; that in no case, as complainant is informed and believes and so charges the fact to be, is the stock of any national bank or the shares of the stock of any national bank located in the state of Washington valued for assessment for taxation in said state at a less sum or assessed upon a valuation of less than 85 per cent of the par value thereof; and, further, that the total assessment and total valuation in the assessment for taxation throughout the state of Washington for the year 1891 of and upon the bonds and shares of banks, banking corporations, insurance, gas, wharf, and other corporations, was the sum of $8,205,503. That the facts alleged in the preceding paragraphs thereof were then and during all of the times intervening between the 1st day of April, 1891, and the time of the return of the several assessment rolls throughout the state of Washington by the county assessors to the county auditors, well known to the assessor of the county of Chehalis and all other county assessors throughout the state of Washington, and during all of said times and until the 1st day of March, 1892, were well known to the several county and state officers hereinbefore referred to, and also to the boards of equalization and boards of county commissioners and the auditor of each of the counties *in said state, [448] and since the 1st day of March, 1892, have been and are now well known to the defendant, the treasurer of Chehalis county. That on said 1st day of April, 1891, the entire capital, surplus, and undivided profits of complainant were invested as follows, to wit: $12,500 in bonds of the United States, and the remainder in loans to residents of the state of Washington, furniture and fixtures; that all of said other moneyed capital referred to in the foregoing paragraphs hereof was purposely omitted from the assessment and from taxation whatsoever by each and every of the county assessors and other taxing officers throughout the state of Washington, and the same and the whole thereof has escaped taxation throughout the state of Washington. That the omission by the several county assessors and taxing officers of the several counties in said state to either assess or tax other moneyed property or capital last aforesaid was made through, under, and by reason and in pursuance of an agreement entered into prior to the 1st day of April, 1891, between the several county assessors of the several counties in said state, whereby it was agreed upon between them that such omission should be made by them and all of them; and said omission and agreement to omit were in pursuance of an opinion rendered by the attorney general of the state of Washington to the said several county assessors at their request, advising such omission, the said attorney general being by virtue of his office required by the laws of the state of Washington to render such opinion upon the request of said assessors; that such omission necessarily operated as a discrimination in favor of other moneyed capital in the hands of individual citizens of said state and



Digitized by Google

against shares of stock of national banking corporations located within this state, including complainant, and necessarily resulted in taxation of the shares of such national banks, including complainant, at a greater rate than other moneyed capital in the hands of the individual citizens of the said state, all of which was well known to and most wrongfully intended by said several county assessors and taxing officers, and all of which is in direct violation of and forbidden by the provisions of the Revised Statutes hereinabove specifically referred to."

449] *It is claimed by the plaintiff in error that the withdrawal from taxation of so large a proportion of moneyed capital in the hands of individual citizens, as is shown by these allegations, had the effect of taxing national bank shares at a greater rate than the remaining moneyed capital in the hands of individual citizens was taxed.

Before we consider the legal import of these statements in the complaint, we shall briefly review some of the previous decisions of this court in which similar questions have been dealt with.

In *New York, Duer*, v. *Tax Comrs.* 71 U. S. 4 Wall. 244 [18: 344], the question presented was whether a tax imposed under a law of the state of New York, on shares of a national bank, was invalid, as a discrimination against the shareholders, because no allowance or deduction was made on account of investments made by the bank in United States bonds, whereas such a deduction or allowance was made in assessments upon insurance companies and individuals. The answer given by this court was "that upon a true construction of this clause of the act [which provided that taxation of such shares by the state authority should not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such states], the meaning and intent of the lawmakers were that the rate of taxation of the shares should be the same or not greater than upon the moneyed capital of the individual citizen which is subject or liable to taxation; that is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens." And it was said that "it is known as sound policy that, in every well-regulated and enlightened state or government, certain descriptions of property, and also certain institutions—such as churches, hospitals, academies, cemeteries, and the like—are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordered that it should be uniform."

In *Lionberger* v. *Rouse*, 76 U. S. 9 Wall. 468 [19: 721], a shareholder in the Third National Bank of St. Louis resisted payment of a tax

450] *of nearly 2 per cent on his stock, imposed under a law of the state of Missouri, because there were in that state two banks which by a contract the state had, prior to the passage of the national bank laws, disabled itself from taxing at a greater rate than 1 per cent; and it was claimed that the tax complained of was assessed in disregard of that provision of the Federal statute which enacted "that the tax so imposed, under the laws of any state, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the state where such association is located." Speaking through Mr. Justice Davis, this court said:

"It is very clear that Congress, in conceding to the states the right to tax, adopted a measure which it was supposed would operate to restrain them from legislating adversely to the interests of the national banks. The measure itself had reference to prospective legislation by the states, and its object was accomplished when the states conformed, as far as practicable, their revenue systems to it. Exact conformity was required, if attainable, but the lawmaking power did not intend such an absurd thing, as that the power of the state to tax should depend on its doing an act which it had obliged itself not to do. It was well known at the time, and Congress must be supposed to have legislated on this subject with reference to it, that states, by contracts with individuals or corporations, could grant away the right of taxation, and that this power had been frequently exercised. It was equally within the knowledge of Congress that the policy on this subject varied in different states; while some of them retained in their own hands the power of taxation over all species of property, except such as were devoted to religious or charitable purposes, others had parted with it to interests of a purely business character, like banks and railroads. Can it be supposed that Congress, in this condition of things in the country, meant to confer a privilege by one section of a law which by another it made practically unavailable? If the construction contended for by the plaintiff in error be allowed, *then a[451 state so unfortunate as to have a single bank, whose shareholders are exempt by contract from taxation in the manner provided by Congress, can derive no benefit from the power to tax the shares of national banks. And this further consequence would follow, that the shareholders of national banks located in one state would escape all taxation, while those whose property was invested in banks in a different locality would have to contribute their full share of the public burdens. This court will not impute to Congress a purpose that would lead to such manifest injustice, in the absence of an express declaration to that effect. Without pursuing the subject further, it is enough to say that, in our opinion, Congress meant no more by the second limitation in the proviso to the 41st section of the national banking act, than to require of each state, as a condition to the exercise of the power to tax the shares in national banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

By a statute of Pennsylvania of March 31, 1870, all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate were made exempt from taxation except for state purposes. The stock of one Hepburn in the First National Bank of Carlisle, the par value of which was $100 a share, was subjected, at its market value of $150 per share, to taxation for county,



Digitized by Google

school, and borough purposes. The validity of such taxation was upheld by the supreme court of Pennsylvania, and the case was brought to this court. It was contended on behalf of the shareholder that as, by the Pennsylvania statute, other moneyed capital in the hands of individuals in the county where the bank was located was not subject to taxation for local purposes, such taxes upon shares in a national bank were in the nature of a discrimination and void. It was also contended that in valuing these shares at 50 per cent above par the tax was made 50 per cent greater than on "other moneyed capital in the hands of individuals."

Both these contentions were overruled by this court; and, in disposing of the argument that
452] the taxes in question made *an illegal discrimination against national bank shares, it was said:

"It is next insisted that no municipal or school taxes could be assessed upon the shares of the First National Bank of Carlisle, a national bank, located within the borough of Carlisle, because by the laws of Pennsylvania as is claimed, other moneyed capital in the hands of individual citizens at that place is exempt from such taxation. In support of this claim it is shown that all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate are exempt from taxation in that borough except for state purposes. This is a partial exemption only. It was evidently intended to prevent a double burden by the taxation both of property and debts secured upon it. Necessarily there may be other moneyed capital in the locality than such as is exempt. . . . Some part of it only is. It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt. Certainly there is no presumption in favor of such an intention. To have effect it must be manifest. The affirmative of the proposition rests upon him who asserts it. In this case it has not been made to appear." *Hepburn* v. *Carlisle Borough School Directors*, 90 U. S. 23 Wall. 480 [23: 112].

To the same effect was the case of *Adams* v. *Nashville*, 95 U. S. 19 [24: 369].

In *New York* v. *Weaver*, 100 U. S. 539 [25: 705], it was held that the statute of a state which establishes a mode of assessment by which shares in a national bank are valued higher in proportion to their real value than other moneyed capital is in conflict with U. S. Rev. Stat. § 5219, although no greater percentage is levied on such valuation than on that of other moneyed capital; and that the statutes of New York which permit a party to deduct his just debts from the valuation of all his personal property, except so much thereof as consists of such shares, tax them at a greater rate than other moneyed capital, and were, therefore, void as to them.

In *Boyer* v. *Boyer*, 113 U. S. 690 [28: 1089], there was brought into question the validity of a county tax levied on national bank shares under a law of the state of Pennsylvania, where other
453] *moneyed capital in the hands of individual citizens within the same taxing district was exempted from such taxation. The previous decisions of the court respecting state taxation of shares in national banks were reviewed, and the conclusion reached was that those decisions did not sustain the proposition that national bank shares may be subjected, under the authority of the state, to local taxation where a very material part, relatively, of other moneyed capital in the hands of individual citizens is exempt. It was observed that "as the act of Congress does not fix a definite limit as to percentage of value, beyond which the states may not tax national bank shares, cases will arise in which it will be difficult to determine whether the exemption of a particular part of moneyed capital in individual hands is so serious or material as to infringe the rule of substantial equality."

That case, like the present one, was determined in the court below on bill and demurrer, and this court thought the better course was to remand the cause with a recommendation that the defendants should be put to answer, so that the facts of the case might be more fully disclosed.

In *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 239 [33: 895], a question was raised, in behalf of citizens of other states, of the validity of a law of the state of Pennsylvania which imposed a tax upon the nominal or face value of corporation bonds, instead of a tax upon their actual value; and, while it was not a case of taxation of national bank stock, some observations were made by Mr. Justice Bradley, in expressing the views of the court, that are applicable to the question now before us:

"The provision in the 14th Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; *it may tax visible property [454 only, and no ttax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all classes. They must be decided as they arise. We think we are safe in saying that the 14th Amendment was not intended to compel the states to adopt an iron rule of equal taxation. If that were its proper construction it would not only supersede all these constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory



Digitized by Google

these discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt."

*Mercantile Nat. Bank* v. *New York*, 121 U. S. 138 [30: 895], was the case of a bill filed by a national bank in the city of New York; the object of which was to restrain the collection of taxes assessed upon its stockholders on the ground that the taxes assessed were illegal and void under U. S. Rev. Stat. § 5219, as being at a greater rate than those assessed under the laws of New York upon other moneyed capital in the hands of the individual citizens of that state. From the decree of the circuit court of the United States dismissing the bill an appeal was prosecuted to this court.

The question presented was thus stated by Mr. Justice Matthews, who delivered the opinion of this court:

"The proposition which the appellant seeks to establish is that the state of New York, in seek-[455]ing to tax national bank *shares, has not complied with the condition contained in U. S. Rev. Stat. § 5219, that such taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such states, 'in that it has by its legislation expressly exempted from all taxes in the hands of the individual citizens numerous species of moneyed capital, aggregating in actual value the sum of $1,686,000,000, whilst it has by its laws subjected national bank shares in the hands of individual holders thereof (aggregating a par value of $83,000,000) and state bank shares (having a like value of $22,815,700) to taxation upon their full actual value, less only a proportionate amount of the real estate owned by the bank.' This exemption, it is claimed, is of a 'very material part relatively' of the whole, and renders the taxation of national bank shares void."

The exemptions referred to were classified as follows: Shares of stock in the hands of the individual shareholders of all incorporated moneyed or stock corporations deriving an income or profit from their capital or otherwise, incorporated by the laws of New York, not including trust companies and life insurance companies, and state or national banks—the value of such shares was admitted to be $755,018,892; trust companies and life insurance companies—the value of whose shares was admitted to be $35,558,900—in addition the life insurance companies owned personal property composed of mortgages, loans, and bonds to the amount of $195,257,305; savings banks and the deposits therein amounting to $437,107,501, and a surplus of $68,669,001; certain municipal bonds issued by the city of New York under an act passed in 1880, of the value of $13,467,000; shares of stock in corporations created by states other than New York, in the hands of individual holders, resident of said state, amounting to $250,000,000.

The contention on behalf of the national bank was that within the doctrine of the case of *Boyer* v. *Boyer*, 113 U. S. 689 [28: 1089], these exemptions constituted so material a part relatively of the moneyed capital in the hands of individual citizens as to make the tax upon the shares of national banks an unfair discrimination against that class of property.

*On the part of the state it was claimed[456] that the shares of stock in the various companies incorporated by the laws of New York as moneyed or stock corporations, deriving an income or profit from their capital or otherwise, including trust companies, life insurance companies and savings banks, were not moneyed capital in the hands of the individual citizen within the meaning of the act of Congress; that, if any of them are, then the corporations themselves were, taxed under the laws of New York in such a manner and to such an extent that the shares of stock therein are in fact subject to a tax equal to that which was assessed upon shares of national banks; and that if there are any exceptions, they were immaterial in amount and based upon considerations which excluded them from the operation of the rule of relative taxation intended by the act of Congress. Upon a careful review of the cases the following conclusions were reached by the court:

"That 'moneyed capital in the hands of individual citizens' does not necessarily embrace shares of stock held by them in *all* corporations where capital is employed, according to their respective corporate powers and privileges, in business carried on for the pecuniary profit of shareholders, although shares in *some* corporations, according to the nature of their business, may be such moneyed capital. . . . The key to the proper interpretation of the act of Congress is its policy and purpose. The object of the law was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the Treasury of the United States. The capital of each of the banks in this system was to be furnished entirely by private individuals; but, for the protection of the government and the people it was required that this capital, so far as it was the security for its circulating notes, should be invested in the bonds of the United States. These bonds were not subjects of taxation; and neither the banks themselves, nor their capital, however invested, nor the shares of stock therein held by individuals, could be taxed by the states in which they were located without the consent of Congress, being exempted from the power of the states in this respect, *because these banks were means [457] and agencies established by Congress in execution of the powers of the government of the United States. It was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the states the authority to tax them within the limits of a rule prescribed by the law. In fixing those limits it became necessary to prohibit the states from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote. The business of banking, including all the operations which distinguish it, might be carried on under state laws, either by corporations or private persons, and capital in the form of money might be invested and employed by individual citizens in many single and separate operations forming substantial parts of the business of



Digitized by Google

banking. A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden. The main purpose, therefore, of Congress, in fixing limits to state taxation, on investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy. Applying this rule of construction, we are led, in the first place, to consider the meaning of the words 'other moneyed capital,' as used in the statute. Of course it includes shares in national banks; the use of the word 'other' requires that. If bank shares were not 'moneyed capital,' the word 'other' in this connection would be without significance. But 'moneyed capital' does not mean all capital the value of which is measured in terms of money. In this sense, all kinds of real and personal property would be embraced by it, for they all have an estimated 458] *value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations, are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation, but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which, in the hands of individuals, no one would think of calling 'moneyed capital,' and its business may not consist in any kind of dealing in money, or commercial representatives of money. So far as the policy of the government in reference to national banks is concerned, it is indifferent how the states may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all. Whether property interests in railroads, in manufacturing enterprises, in mining investments and others of that description are taxed or exempted from taxation, in the contemplation of the law, would have no effect upon the success of national banks. There is no reason, therefore, to suppose that Congress intended, in respect to these matters, to interfere with the power and policy of the states. The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of Congress. *That [459 the words of the law must be so limited appears from another consideration; they do not embrace any moneyed capital in the sense just defined, except that in the hands of individual citizens. This excludes moneyed capital in the hands of corporations, although the business of some corporations may be such as to make the shares therein belonging to individuals moneyed capital in their hands, as in the case of banks. A railroad company, a mining company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money, and so may be the owners of moneyed capital; but, as we have seen, the shares of stock in such companies held by individuals are not moneyed capital. The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property. Accordingly, it was said in *Evansville Nat. Bank* v. *Britton*, 105 U. S. 322 [26: 1054]: 'The act of Congress does not make the tax on personal property the measure of the tax on bank shares in the state, but the tax on moneyed capital in the hands of the individual citizen. Credits, money loaned at interest, and demands against persons or corporations, are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly, there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property *is not necessarily [460 moneyed capital. But the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which bona fide debts may be deducted, all mean moneyed capital invested in that way.'"

In respect to trust companies the court held that it was evident, from the powers granted them in the legislation of New York, that they were not banks in the commercial sense of that word, and did not perform the function of banks in carrying on the exchanges of commerce, and that, taxed as they were, on their franchises based on income, it could not be said that there existed any discrimination



Digitized by Google

against national banks. As to savings banks it was held that, though it could not be denied that their deposits constituted moneyed capital in the hands of individuals, yet it was clear that they were not within the meaning of the act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must also be exempted; that it was part of the policy of the state to encourage the accumulation of small savings belonging to the industrious and thrifty, and were within the reasonable exercise of the power of the state to exempt particular kinds of property, and the conclusion of the court, in respect to savings banks, was thus expressed: "The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exceptions should be founded upon just reason, and not operate as an unfriendly discrimination against investments in national bank shares. However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the state exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation."

The conclusions to be deduced from these decisions are that money invested in corporations or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments, and investments [461] in mortgages, does not come into competition with the business of national banks, and is not therefore within the meaning of the act of Congress that such stocks as those in insurance companies may be legitimately taxed on income instead of on value, because such companies are not competitors for business with national banks; and that exemptions, however large, of deposits in savings banks, or of moneys belonging to charitable institutions, if exempted for reasons of public policy and not as an unfriendly discrimination against investments in national bank shares, should not be regarded as forbidden by U. S. Rev. Stat. § 5219.

We shall now, in the light of the previous decisions, advert to the allegations contained in the bill of complaint.

The substance of those allegations is: First, that there was taxable moneyed capital in Chehalis county, which escaped taxation, amounting to $237,400; second, that there was also unassessed moneyed capital in other portions of the state exceeding $14,000,000; third, that the moneyed capital invested in banks, national and state, was $11,000,000; fourth, that there was invested in the stocks and bonds of insurance, wharf, and gas companies and other moneyed institutions, moneyed capital amounting to at least $26,000,000.

Even if it be conceded that the stocks and bonds of insurance, wharf, and gas companies were, in point of fact, exempted from taxation, such companies are not, as we have seen, competitors for business with the national banks, and, therefore, might be legally exempted. As to the sum of $237,400 alleged to be invested by individual citizens of Chehalis county in loans and securities to them payable and owing by other citizens of that county, we are not informed by the bill of the nature of such loans and securities, and, as against the pleader, we may well assume that they belong to a class of investments which does not compete with the business of national banks. The same is true of the sum of $14,000,000 alleged to be invested in loans and securities by citizens of the state of Washington and to them payable and owing by other citizens of said state.

It is, indeed, alleged in the bill that these investments were "taxable capital," but that is an averment in the nature of a legal conclusion. [462] If those loans and securities had been identified in the bill, or their character described, the court might have reached a different conclusion as to their taxable character.

There is an allegation in the bill that the omission by the taxing officers of these classes of capital from assessment and taxation was in pursuance of an opinion rendered by the attorney general of the state of Washington; and it is alleged that the said attorney general was required by the laws of the state to render opinions upon request of the assessors. But the bill does not set forth that opinion, or the reasons upon which the attorney general proceeded. The supreme court of the state of Washington, adverting to this allegation of the bill, suggests that it is probable that the opinion referred to was one dated February 5, 1891, addressed to the state auditor, and in which the attorney general advised that accounts, promissory notes, and mortgages were to be exempted, in order, perhaps, to avoid double taxation. And the supreme court well observes that if the action of the assessors was based upon this decision of the law officer of the state, and went no further, the allegations of the bill would certainly turn out to be unsupported. 6 Wash. 64.

We agree with the supreme court of Washington in thinking that the allegations of this complaint nowhere show that any moneyed capital of the character defined by the Federal Supreme Court was omitted or intended to be omitted by the assessors; or if the intention of the complaint be to cover any such existing cases, the allegations are so general and indefinite that they cannot be made the basis of action.

*The judgment of the Supreme Court of Washington is affirmed.*

Mr. Justice **Harlan**, Mr. Justice **Brown**, and Mr. Justice **White** are of opinion that the bill makes a prima facie case of illegal discrimination against capital invested in national bank stock, and therefore that the demurrer should have been overruled.



Digitized by Google

**463] NATIONAL BANK OF COMMERCE OF SEATTLE,** *Plff. in Err.*,
*v.*
**CITY OF SEATTLE** *et al.*

**SEATTLE NATIONAL BANK OF SEATTLE,** *Plff. in Err.*,
*v.*
**CITY OF SEATTLE** *et al.*

**PUGET SOUND NATIONAL BANK OF SEATTLE,** *Plff. in Err.*,
*v.*
**CITY OF SEATTLE** *et al.*

**WASHINGTON NATIONAL BANK OF SEATTLE**
*v.*
**COUNTY OF KING** *et al.*

(See S. C. Reporter's ed. 463, 464.)

*Assessment of stock of national banks.*

The omission from assessment of all moneyed capital in a city owned by resident individual citizens and invested in interest-bearing loans, discounts, and securities, except that invested in incorporated banks located in the city, is not sufficient to make a tax on the shares of stock of a national bank invalid as an unlawful discrimination against the latter, unless the moneyed capital left unassessed was, as to any material portion thereof, moneyed capital coming into competition with that of national banks.

[Nos. 223–226.]

*Argued March 23, 1897. Decided April 12, 1897.*

IN ERROR to the Supreme Court of the State of Washington to review judgments of that court affirming judgments of the Superior Court of said State in favor of defendant in actions brought by the above-named plaintiffs in error, severally, against the above-named defendants in error, severally, to enjoin said defendants from levying and collecting a tax upon the shares of stock of said plaintiffs in error. *Affirmed.*

See same case below, 9 Wash. 607.

The facts are stated in the opinion.

*Messrs.* **Harold Preston,** *James B. Howe,* and *Eugene M. Carr* for plaintiffs in error.

*Messrs.* **John K. Brown,** *John B. Allen,* and *F. B. Tipton* for city of Seattle *et al.*, defendants in error.

*Messrs.* **Andrew F. Burleigh,** *James A. Haight,* and *Samuel H. Piles* for County of King *et al.*, defendants in error.

Mr. Justice **Shiras** delivered the opinion of the court:

The bills of complaint in these cases are substantially of the same legal import, so far as any Federal question is concerned, with that considered in the case of *First Nat. Bank* v. *Chehalis County*, in which the opinion of this court has just been delivered.

The only difference that we notice is that, in connection with the allegation that there existed large amounts of taxable moneyed capital owned by resident citizens and invested in interest-bearing loans and securities, there is made the additional *allegation that all of said[464 other moneyed capital referred to was all the moneyed capital in the city owned by resident individual citizens and invested in interest-bearing loans, discounts, and securities, except that invested in incorporated banks located in the city.

It is not perceived that this additional allegation calls for any different conclusion than the one reached in the previous case. We are still uninformed whether the moneyed capital left unassessed was, as to any material portion thereof, moneyed capital coming into competition with that of national banks. The averment that the moneyed capital exempted was "taxable" does not enable us to say that it therefore consisted of investments within the meaning of the term "moneyed capital" as used in the act of Congress.

*The judgment of the Supreme Court of Washington is, in each case, affirmed.*

Mr. Justice **Harlan,** Mr. Justice **Brown,** and Mr Justice **White** dissented.

---

**AMERICAN PUBLISHING COMPANY,**
*Plff. in Err.*,
*v.*
**A. FISHER and Aaron Keyser, Copartners, Doing Business under the Firm Name of A. Fisher Brewing Company.**

(See S. C. Reporter's ed. 464–468.)

*Trial by jury—law authorising a verdict by nine or more jurors unconstitutional.*

1. The Utah law of March 10, 1892, that a verdict in a civil case may be rendered on the concurrence therein of nine or more members of the jury, is invalid, either by force of the 7th Amendment to the United States Constitution, or by the acts of Congress (9 Stat. at L. 458, § 17), extending the Constitution and laws of the United States over the territory, and 18 Stat. at L. p. 27, chap. 80, in regard to the territories, which provides that no party shall be deprived of the right of trial by jury in cases cognizable at common law.
2. Unanimity is one of the peculiar and essential features of trial by jury at common law, and the constitutional right of trial by jury is violated by a territorial statute authorizing a verdict by the concurrence of nine or more members of the jury.

[No. 242.]

*Argued March 29, 1897. Decided April 12, 1897.*

NOTE.—*As to taxation of shares in national banks and of other corporations,* see note to Providence Bank v. Billings, 7:999.

NOTE.—*As to trial by jury, how affected by 7th Amendment to the Constitution,* see note to New York Sup. Ct. Justices v. United States, Murray, 19:658.

*As to jury, of what number; practice in regard to; illness or insanity of one; thirteen or eleven jurors; wrong person serving as juror by mistake,*—see note to Silsby v. Foote, 14:294.



Digitized by Google

IN ERROR to the Supreme Court of the Territory of Utah to review a judgment of that court affirming the judgment of the District Court of Salt Lake County, in that Territory, in favor of defendants in an action brought by the American Publishing Company, plaintiff, against A. Fisher *et al.*, to recover on a contract for furnishing labels, cards, etc.; the verdict on which the judgment was rendered was signed by nine jurors, the others not concurring. *Reversed*, and case remanded to the state supreme court.

See same case below, 10 Utah, 147.

Statement by Mr. Justice **Brewer**:

On April 29, 1891, plaintiffs in error commenced an action in the district court of Salt Lake county, territory of Utah, to recover of defendants the sum of $20,844.75 on a contract for furnishing labels, cards, etc. After answer the case come on for trial before a jury on December 10, 1892, and resulted in a verdict in favor of the defendants, signed by nine jurors, the others not concurring. Judgment was rendered upon this verdict, which was sustained by the supreme court of the territory. 10 Utah, 147.

This action of the trial and supreme courts in sustaining a verdict returned by only nine of the jurors was under the authority of an act of the legislature of Utah, approved March 10, 1892 (Utah Laws 1892, p. 46), which provides as follows:

"Sec. 1. That § 3371 of the Compiled Laws of 1888 of Utah is hereby amended so as to read as follows:

"Sec. 3371. In all civil cases a verdict may be rendered on the concurrence therein of nine or more members of the jury."

The bill of exceptions contains this recital in respect to an instruction and the verdict:

"The court further charges you that the concurrence of nine or more members of the jury is essential to your verdict, and that all who agree to it should sign it.

"(To which last charge the plaintiff duly excepted.)

"The jury having retired and deliberated, returned a written verdict into court on the 12th day of December, 1892, 'finding the issues for the defendant,' signed by nine (9) of its members—the others refusing to concur therein. Which verdict the court then and there received and caused to be entered upon the record.

"To which action of the court the plaintiff excepted."

*Messrs.* **Jermiah M. Wilson** and *F. W. Von Cotzhausen*, for plaintiff in error:

At the time of the adoption of the Constitution, the jury recognized by the common law consisted of twelve men, and unanimity of the twelve was essential to a valid verdict.

*Callan* v. *Wilson*, 127 U. S. 549 (32: 226); 2 Sharswood's Bl. Com. bk. 3, p. 375; 18 Enc. Brit. 785.

By a jury means *ex vi termini* a trial by jury of twelve men impartially selected, in accordance with law, who must unanimously concur in the guilt of the accused before a conviction can be had. Any law, therefore, dispensing with any of these requisites may be considered unconstitutional.

*Work* v. *State*, 2 Ohio St. 296, 59 Am. Dec. 671; *State* v. *Cox*, 8 Ark. 436; *People* v. *Johnson*, 2 Park. Crim. Rep. 332; *People* v. *Toynbee*, Id. 329, 562; *People* v. *Fisher*, Id. 402; *Work* v. *State*, 2 Bennett & H. Lead. Crim. Cas. 327, and note; *State* v. *McClear*, 11 Nev. 39–60; *Lamb* v. *Lane*, 4 Ohio St. 177; *Willyard* v. *Hamilton*, 7 Ohio, pt. 2, p. 11; *Turns* v. *Com.* 6 Met. 231; *Kleinschmidt* v. *Dunphy*, 1 Mont. 118; Story, Const. 3d ed. § 1779.

The right of trial by jury secured by the 7th Amendment applies to the territorial courts.

*Webster* v. *Reid*, 52 U. S. 11 How. 437-460 (13: 761–770); *Callan* v. *Wilson*, 127 U. S. 540 (32: 223).

*Mr.* **J. L. Rawlins**, for defendants in error:

The question of the validity of the verdict rendered by nine of the eleven jurors is not properly before the court. It does not appear from the record that plaintiff made any objection to the reception of the verdict or the entry of judgment thereon, or claimed any violation of the Constitution.

The only way to raise the question of the sufficiency of the verdict is by objecting to its being received by the court and recorded, and in case such objection is overruled by them, and there excepting to such ruling.

*State* v. *Austin*, 6 Wis. 205; *Farrell* v. *Hennessey*, 21 Wis. 632; *Com.* v. *Costley*, 118 Mass. 1; *Cross* v. *Grant*, 62 N. H. 675; *Alhambra Addition Water Co.* v. *Richardson*, 72 Cal. 598; *Algier* v. *The Maria*, 14 Cal. 167.

Mr. Justice **Brewer** delivered the opinion of the court:

As the amount in controversy is over $5,000 this court in any view has jurisdiction of the case, and may inquire into all matters properly preserved in the record. The recital in the bill of exceptions shows that proper exceptions were taken to the charge of the court in respect to the number of jurors whose concurrence was essential to the verdict, and also to its action in receiving and entering of record such verdict.

The territorial statute was relied upon as authority for this action. Its validity, therefore, must be determined. Whether the 7th Amendment to the Constitution of the United States, which provides that "in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved," operates *ex proprio vigore* to invalidate this statute, may be a matter of dispute. In *Webster* v. *Reid*, 52 U. S. 11 How. 437 [13:761], an act of the legislature of the territory of Iowa dispensing with a jury in a certain class of common-law actions was held void. While in the opinion, on page 460 [770], the 7th Amendment was quoted, it was also said: "The organic law of the territory of Iowa, by express provision and by reference, extended the laws of the United States, including the ordinance of 1787, over the territory, so far as they are applicable;" and the ordinance of 1787, art. 2, in terms provided that "the inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury." So the invalidity may have been adjudged by



Digitized by Google

reason of the conflict with congressional legislation.

In *Reynolds* v. *United States*, 98 U. S. 145, 154 [25:244,246], it was said, in reference to a criminal case coming from the territory of Utah, that "by the Constitution of the United States (Amendment 6) the accused was entitled to a 467] trial by *an impartial jury." Both of these cases were quoted in *Callan* v. *Wilson*, 127 U. S. 540 [32: 224], as authorities to sustain the ruling that the provisions in the Constitution of the United States relating to trial by jury are in force in the District of Columbia. On the other hand, in *Church of Jesus Christ* v. *United States*, 136 U. S. 1, 44, [34:478,491], it was said by Mr. Justice Bradley, speaking for the court: "Doubtless, Congress in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions." And in *McAllister* v. *United States*, 141 U. S. 174 [35:693], it was held that the constitutional provision in respect to the tenure of judicial offices did not apply to territorial judges.

But if the 7th Amendment does not operate in and of itself to invalidate this territorial statute, then Congress has full control over the territories irrespective of any express constitutional limitations, and it has legislated in respect to this matter. In the first place, in the act to establish a territorial government for Utah, act of Sept. 9, 1850 (9 Stat. at L. 458, chap. 51, § 17) it enacted "that the Constitution and laws of the United States are hereby extended over and declared to be in force in said territory of Utah, so far as the same, or any provision thereof, may be applicable." A subsequent statute has more specific reference to jury trials. April 7, 1874 (18 Stat. at L. 27, chap. 80). The 1st section of this act, after confirming the statutes of the various territories so far as they authorize a uniform course of proceeding in all cases, whether legal or equitable, closes with this proviso: "Provided, that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law." This, of course, implies, not merely that the form of a jury trial be preserved, but also all its substantial elements. *Walker* v. *New Mexico & S. P. R. Co.* 165 U. S. 593 [*ante*, 837].

Therefore, either the 7th Amendment to the Constitution, or these acts of Congress, or all 468] together, secured to *every litigant in a common law action in the courts of the territory of Utah the right to trial by jury, and nullified any act of its legislature which attempted to take from him anything which is of the substance of that right. Now unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right. It follows, therefore, that the court erred in receiving a verdict returned by only nine jurors, the others not concurring.

In order to guard against any misapprehension it may be proper to say that the power of a state to change the rule in respect to unanimity of juries is not before us for consideration. *Walker* v. *Sauvinet*, 92 U. S. 90 [23:678]; *Hurtado* v. *California*, 110 U. S. 516 [28:232].

*The judgment will be reversed*, and as the questions involved in the case are not of a Federal nature, and diverse citizenship is not alleged, the case must be remanded to the supreme court of the state for further proceedings.

---

## UNITED STATES, *Appt.*,
*v.*
## AMERICAN TOBACCO COMPANY for the Use of Certain Insurance Companies.

(See S. C. Reporter's ed. 468-480.)

*Destruction of internal revenue stamps—recovery from United States insurable interest—objection, when too late.*

1. An oath to the fact of destruction of internal revenue stamps purchased by a tobacco company, and that the company had not presented any claim to the government for the refunding of the amount or any part thereof, or received the value thereof, either directly or indirectly from the government, is a substantial compliance with the regulations of the department providing the form of an oath from which the words "to the government" are omitted.
2. The right of a tobacco company to recover from the United States the value of tobacco tax stamps which were destroyed unused by a fire, under U. S. Rev. Stat. § 3426, is not lost by the fact that the company has received payment therefor from an insurance company, but the recovery may be had in its name for the benefit of the insurer.
3. A tobacco company has an insurable interest in internal revenue stamps which it has purchased and paid for to use on packages of its goods.
4. An objection that the Commissioner of Internal Revenue had the option to deliver other stamps, instead of refunding money paid for stamps which has been destroyed, is made too late when made for the first time upon argument in this court in an action against the United States for the value of the stamps, which was brought after the Commissioner had absolutely refused to reimburse the claimant in either way, on the ground that their value had been already paid to him by insurers.

[No. 742.]

*Submitted March 29, 1897. Decided April 12, 1897.*

APPEAL from a judgment of the Court of Claims in favor of the American Tobacco Company against the United States for the value of internal revenue stamps destroyed by fire before they were used. *Affirmed.*

Statement by Mr. Justice **Peckham**:

This action was brought in the court of claims for the purpose of recovering the value of certain internal revenue stamps alleged to



Digitized by Google

have been destroyed by fire before they had been used. The action is founded upon the provisions of U. S. Rev. Stat. § 3426, as amended by chapter 125 of the Laws of 1879 (20 Stat. at L. 327, 349), the 1st paragraph of § 17 of which reads as follows:

"The Commissioner of Internal Revenue may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps issued under the provisions of this title, or of any internal revenue act, as may 470] have been *spoiled, destroyed, or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which, through mistake, may have been improperly or unnecessarily used, or where the rates or duties represented thereby have been excessive in amount, paid in error, or in any manner wrongfully collected; and such allowance or redemption shall be made either by giving other stamps in lieu of the stamps so allowed for or redeemed, or by refunding the amount or value to the owner thereof, deducting therefrom, in case of repayment, the percentage, if any, allowed to the purchaser thereof; but no allowance or redemption shall be made in any case until the stamps so spoiled or rendered useless shall have been returned to the Commissioner of Internal Revenue, or until satisfactory proof has been made showing the reason why the same cannot be so returned: *Provided*, That nothing herein shall be held as authorizing redemption of or allowance for any of the stamps allowance for which is prohibited by the provisions of 'An act Relative to the Redemption of Unused Stamps,' approved July 12th, 1876."

On the 27th of May, 1895, the American Tobacco Company filed its petition in the court of claims in its own name for the use of certain insurance companies named in the petition, to recover the value of stamps destroyed by fire in its factory. The facts as to the loss and destruction of the stamps were set forth and judgment asked for the value thereof. The usual general denial of all the allegations of the petition was filed by the Attorney General on behalf of the United States, and the case went to trial, and after the evidence had been submitted the court found the following facts: That the tobacco company was a manufacturer of tobacco, occupying a building in New York city, which was established solely as a manufactory, no sales of tobacco being made at the factory, the shipments therefrom being made in bulk after the tobacco had been stamped according to law. On the 2d of April, 1893, the factory and its entire contents were destroyed by fire. Among those contents were internal revenue stamps of the United States of the face value of $4,100.10. These stamps had been purchased by the company from the United 471] *States collector of internal revenue for use in the factory. Some of the stamps were unattached to packages of tobacco, and had never been used, and they were of the face value of $1,356.63; the balance of the stamps of the face value of $2,743.47 had been attached to packages of tobacco which had not been sold or offered for sale or removed from the factory for sale. The tobacco company had purchased and paid for these stamps, which were totally destroyed, and there were no unsettled claims against the company on behalf of the United States.

The court also found the following facts:

"IV. On or about the 1st day of November, 1893, the claimant filed with the Treasury Department, under the rules and regulations of said department, a claim for the redemption of said stamps so destroyed, with proof of said loss, which claim was examined and certified as true and correct by the United States internal revenue collector for said district, but without recommendation of payment, for the reason, stated by the collector, 'that the claimant had been paid by the insurance companies for the value of the stamps;' and on the 14th day of February, 1894, the department rendered its decision upon said application, declining to allow the same, for the reason 'that satisfactory evidence has been furnished to this office that you have received reimbursement of the value of said stamps by the recovery of insurance thereon.'

"V. Thereafter, on or about the 2d day of April, 1895, the claimant, by its attorneys, filed an amended petition for the redemption of said stamps, and asked for a rehearing; and on April 10, 1895, the Treasury Department rendered a decision declining to grant a rehearing, and this suit was brought.

"VI. The contents of said factory were insured to the American Tobacco Company, by the insurance companies for whose use this suit is brought, in the full sum of $189,500. The total loss by fire as adjusted and settled with said claimant was $78,635.47, which sum said companies have paid to the American Tobacco Company in proportions as the face of their several policies bears to the whole sum insured. The *face value of said United[472 States internal revenue stamps destroyed as aforesaid, namely, $4,100.10, was a part of the sum so paid by said insurance companies.

"VII. In the adjustment of the losses and the payment thereof it was understood between the claimant and the insurance companies that the insurance companies were entitled to have and should receive, in the proportions their several policies bore to the entire amount insured, the amount of the redemption money for the destroyed stamps to be recovered upon the application aforesaid or in this suit.

"VIII. This suit was brought by the claimant, for the use of said insurance companies in the proportions aforesaid, to recover the value of said stamps so destroyed.

"IX. By an existing regulation of the Commissioner of Internal Revenue, made June 12, 1873, by authority of the act of June 10, 1864, § 11, afterwards re-enacted as Revised Statutes, § 3426, all claims arising under that section were required to be made upon a certain printed form, called 'Form 38,' and ever since some time in 1875, and probably earlier, all claimants under the said section have been required to make oath, upon form 38, that they have not heretofore presented any claim for the refunding of the above-mentioned amount or any part thereof,' and 'that the value or reimbursement of the value of said stamps, or any portion thereof, has not heretofore been received by claimant, directly or indirectly.'

"X. In presenting the claim as stated in finding IV. the claimant's general manager



Digitized by Google

did not make the oath referred to in finding IX. in the form required by the Commissioner of Internal Revenue, but, instead of taking the required oath, he made oath that the claimant had 'not heretofore presented any claim *to the government* for the refunding of the above-mentioned amount, or any part thereof,' and 'that the value or reimbursement of the value of said stamps, or any portion thereof, has not heretofore been received by claimant, directly or indirectly, *from the government.*'"

As a conclusion of law the court found that claimant was entitled, for the use of the companies, to recover the sum of $4,100.10. Judgment pursuant to the finding of the court was entered, from which an appeal was taken to this court.

*Messrs.* **J. E. Dodge,** Assistant Attorney General, and **Charles C. Binney,** Assistant Attorney, for appellant.

*Messrs.* **Charles W. Needham** and **John B. Cotton** for appellee.

Mr. Justice **Peckham** delivered the opinion of the court:

Three assignments of errors alleged to have been made by the court below have been filed on the part of the government, as follows:

"1. In holding that the use appellees had an equitable claim against the appellant which could be enforced by a suit in the name of the nominal appellee.

"2. In holding that U. S. Rev. Stat. § 3426, as amended in 1879, required the Commissioner of Internal Revenue to refund the tax represented by the face value of destroyed tobacco-tax stamps, or to furnish others in their place, in cases where the full amount represented by such face value had been recovered by the tobacco manufacturer from insurance companies, so that he had been subjected to no loss.

"3. In entering judgment in favor of the appellee for the sum of $4,100.10."

It is argued upon the part of the government that as the insurance companies have paid the tobacco company in full for the value of the stamps destroyed by fire, they have thereby become the actual plaintiffs in this suit, and that the connection of the tobacco company is merely nominal; the case must therefore be decided as one between the United States and the insurance companies. Dealing with the companies in that light, it is further urged that their right to sue is based upon the ground that they are subrogated to the rights of the tobacco company, and consequently if there be no right of subrogation, there is no right of recovery; there [474] *is no right of subrogation, because there was no insurable interest in the stamps on the part of the tobacco company; and there was no insurable interest because the tobacco company could obtain from the government either other stamps in lieu of the stamps destroyed, or the amount or value thereof, upon giving satisfactory evidence of the necessary facts to the Commissioner of Internal Revenue, and therefore the tobacco company was not liable to suffer any loss, and as a consequence had no insurable interest in the stamps.

The argument, as we think, is not well founded. The case is not to be treated or decided as one between the United States and the insurance companies. On the contrary, the rights of the companies, as between them and the government, are not the subject-matter of the suit. The insurance companies, as such, have no right of action against the government. It is the right of the claimant, the tobacco company, which is to be passed upon, and unless that company has a legal cause of complaint no recovery can be had in this suit. The companies must recover in the name of the tobacco company and by reason of its rights. *Hall* v. *Nashville & C. R. Co.* 80 U. S. 13 Wall. 367, 372 [20: 594, 597], and cases cited.

The suit is properly brought in the name of the insured for the use of the insurers, but the cause of action rests on the rights of the owner. *Hall* v. *Nashville & C. R. Co. supra; Phœnix Ins. Co.* v. *Erie & W. Transp. Co.* 117 U. S. 312, 321 [29: 873, 878], and cases cited.

Payment to the owner by the insurer does not bar the right against another party originally liable for the loss, but the owner, by recovering payment of the underwriters, becomes trustee for them, and by necessary implication makes an equitable assignment to them of *his* right to recover *in his name. Rockingham Mut. F. Ins. Co.* v. *Bosher,* 89 Me. 253, 255 [63 Am. Dec. 618].

The question then arises as to what right, if any, the tobacco company has under the statute above cited, when it appears that the company has received payment from the insurance companies for the value of the stamps destroyed. Is that fact a bar to its right to claim payment under that section in a case where the recovery is sought for the purpose of reimbursing *the insurance companies for the pay- [475 ment made by them to the extent of the value of the stamps?

We think upon the facts found by the court of claims the action can be maintained, and the payment by the insurance companies constitutes no bar.

No question is made in regard to the sufficiency of the proof in regard to the destruction of the stamps by fire or of the bona fides of the tobacco company. The claim was examined and certified as true and correct by the United States collector of internal revenue for the district in which the factory was situated, but he failed to recommend payment of the claim, for the reason, as stated by him, "that the claimant had been paid by the insurance companies for the value of the stamps;" and the department itself, when the claim was made, rendered its decision upon the application, declining to allow the same, for the reason "that satisfactory evidence has been furnished to this office that the claimant has received reimbursement of the value of the stamps by the recovery of insurance thereon."

It is true that the claimant was unable to comply with the regulations of the department in one particular regarding the oath to be made by such claimant. It could not truthfully be said that the claimant had not theretofore received directly or indirectly the value or reimbursement of the value of the stamps. This oath was required by what is called "Form 38," which was a certain printed form of oath to be taken by all claimants for reimbursement for stamps claimed to have been destroyed



Digitized by Google

within the meaning of the section of the Revised Statutes heretofore quoted.

The claimant, however, through its proper officer, did make oath that it "had not heretofore presented any claim *to the government* for the refunding of the above mentioned amount, or any part thereof," and "that the value or reimbursement of the value of said stamps, or any portion thereof, has not heretofore been received by claimant directly or indirectly *from the government.*"

While the regulation prescribed by the Commissioner of Internal Revenue would be regarded as proper and appropriate for the pur-476]pose *of satisfying him of the fact of the destruction of the stamps, yet we think there was a substantial compliance with that regulation on the part of the tobacco company in this case, when it made oath through its proper officer to the fact of such destruction, and that it had not presented any claim for the refunding of the amount or any part thereof to the government, nor had the value of said stamps, or any portion thereof, been theretofore received by the claimant, either directly or indirectly, from the government.

The real object of the regulation, it must be assumed, was to prevent fraud upon or improper claims against the government and to protect it from itself twice paying for the loss. If the object of the regulation were to discover whether the stamps had been insured and whether payment therefor had been made by the insurance company, and if so, to base a refusal to reimburse upon that fact, we think that portion of the regulation was unreasonable, and compliance with the form as provided was unnecessary.

The purpose of the statute was to have the government reimburse the person who had bought and paid for internal revenue stamps which had been destroyed under the circumstances mentioned in the statute, before they had been used. To make such reimbursement would be no loss to the government, while to retain the amount paid would be highly inequitable. The government recognized this fact by the passage of the statute in question. The company did not purchase the stamps in payment of any tax then due from it to the government; they were purchased as a matter of convenience and to be thereafter affixed to packages of tobacco which were to be sold in the future. The tax was laid upon sales of tobacco and the stamps were resorted to as a convenient means of collecting the tax on such sales. Of course, if no sales of packages of tobacco took place upon which the stamps might be affixed, no tax had become due to the government, and therefore if after the purchase of the stamps they were destroyed by fire, the purpose of their purchase was frustrated and the government was not entitled, upon any equitable ground, to retain the money paid for the stamps.

477] *In *Jones* v. *Van Benthuysen*, 103 U. S. 87, 88 [26: 477, 478], Mr. Justice Miller said, speaking for the court:

"Undoubtedly this statute [15 Stat. at L. 125, 153] only intended to impose a tax upon the sales of tobacco, and if the dealer was also the owner of stamps to be used in paying the duties on tobacco he could sell them separately in any quantity, without being liable to a tax for such sales. When unattached to the tobacco they do not enter into its value, and they can be bought and sold at their face value as an independent commodity, to be used when and wherever the purchasers choose to do so. For such sales no tax is imposed upon the seller or the buyer. On the other hand, we are of opinion that when they are once attached to the tobacco and canceled, and can never be lawfully used again, they cease to have any separate and independent value, and that which they had previously has become merged into that of the tobacco. All subsequent sales are made upon the basis of the increased value the tobacco has acquired by the payment of the stamp duty, and can never be estimated apart from this. It would seem to follow from this that if the stamps for which the plaintiff was charged by the collector were not affixed to the tobacco at the time he made the sale, no tax should be charged to him for that value. On the other hand, if the stamps were affixed at the time of the sale, they then entered into the value of the tobacco purchased, and the broker who made the sale should be taxed on the price of the tobacco as it was sold."

When the stamps have been destroyed under the circumstances detailed in this case, and those who paid for them apply to the government to be reimbursed for their value, what materiality is there in the fact that the applicant has been paid the value of such stamps by an insurance company under and by virtue of a separate contract made with that company on the part of the claimant upon good consideration? That circumstance does not alter the fact that the government has been paid for the stamps which were to be used for a certain purpose—the payment of taxes thereafter to become due the *government—[478 and that by reason of the destruction of the stamps by fire they cannot be used for the purpose for which they were intended. Whatever sales of tobacco might be thereafter effected by the tobacco company would have to be evidenced by the attaching of other stamps upon the packages sold. Unless, therefore, the government repaid the value of these stamps so destroyed, or provided other stamps in lieu thereof without any further payment, the government would be in the position of one who retained money to which it had no equitable right. It would be no answer to that fact to show that some other person had reimbursed the claimant the amount it had paid for the stamps. That would not alter the position of the government. We cannot think that the payment to the claimant by the insurance companies absolved the government in the slightest degree from the duty, under that statute, of paying back the money which it had received and for which it had delivered stamps that had been destroyed by fire before the contemplated use of them had been made. Whether or not the insurance companies could have made a successful defense (to the extent of the value of the stamps in question) to an action on their policies by the assured, because of an alleged lack of insurable interest in the stamps by the assured, is beside the question. They were not bound to make such defense. Having received the premiums they had the right to fulfil their



Digitized by Google

contract, and the tobacco company after such payment might still ask the government to pay to it the value of the stamps in order that it might thereafter repay the insurance companies. The government loses nothing by payment in such case. It simply repays money which it has no equitable right to retain. The technical question of insurable interest does not arise in this case, which involves simply the construction of the statute cited and the right of the claimant to recover. As was said in *Mason* v. *Sainsbury*, 3 Dougl. 60, 64, by Mansfield, Lord Chief Justice, in reference to a defense of payment by the insurance companies: "The case is clear; the act puts the hundred, for civil purposes, in the place of the trespassers; and upon principles of policy, as in the case of other remedies against the hundred, I am 479] satisfied *that it is to be considered as if the insurers had not paid a farthing." This was a case against the hundred, upon a statute making it liable for damages to property caused by a mob. Although the insurance company had paid the damages, the action in the name of the owner of the property was sustained exactly the same as if there had been no payment by the insurers. The liability of the hundred, under the statute, was not thereby in the least affected. This case under the statute cited is still stronger because the government suffers no actual loss by the repayment, while it would secure an unjust and inequitable profit by its refusal to pay.

We are also of opinion that the tobacco company had an insurable interest in the stamps. It owned them absolutely, having purchased and paid for them. The right of reimbursement under the conditions named in the statute did not affect that insurable interest, nor prevent the possibility of loss or prejudice arising from the destruction of the stamps. Because an owner of property may be able to reimburse himself in case of its destruction, from other sources, is no reason for denying to such owner an insurable interest in the property. An owner has an insurable interest in his property to the extent of the value of the building on it, notwithstanding the existence of a mortgage on the property sufficient to absorb it. Per Bradley, J., in *Royal Ins. Co.* v. *Stinson*, 103 U. S. 25, 29 [26: 473, 477]; May, Ins. §§ 81, 82. The amount of interest or its character is not material in determining the question whether a party who attempts to recover under a policy has an insurable interest. *Royal Ins. Co.* v. *Stinson, supra;* May, Ins. §§ 81, 82.

Upon all the facts, we think the objections above alluded to are untenable.

Another objection raised by the government is that under the section of the statute cited the Commissioner of Internal Revenue had the choice, in making an allowance or redemption, either to give other stamps in lieu of the stamps so allowed for or redeemed, or to refund in money the amount or value to the owner of the stamps, and that as he had such election when he was applied to by the owner, an action thereafter commenced to recover the face 480] value of the stamps in *money deprived him of that election, and hence could not be maintained.

The statute does give to the Commissioner of Internal Revenue the choice as to how reimbursement for the loss of stamps should be made; whether by delivering other stamps or by payment of the face value thereof in money. When the claim in this case was filed with the Treasury Department, the Commissioner had then the choice, upon being satisfied of the necessary facts, to reimburse the claimant in either way he thought proper, either in stamps or in money. That was the time when his election could properly have been made. Instead thereof he refused absolutely to do either, and gave as his reason that the claimant had already been paid for the stamps by the recovery of the insurance thereon. If that were a sufficient reason in law, the Commissioner was justified in his refusal. As it was not a sufficient reason, the Commissioner was not justified, however sincerely he believed that he was. The claimant was, therefore, by reason of this refusal, compelled to resort to the courts in order to obtain his legal rights under the statute. Having filed its claim in the court of claims and asked for judgment for the money value of the stamps, and a trial upon the merits as to the liability of the government to respond at all having been had in the court below, and so far as appears from the record no question of this kind having been therein made, it is too late, upon argument in this court, for the government for the first time to question the form of the remedy, whether it should be a demand for money only or one which left the election still with the Commissioner to reimburse claimant by giving stamps instead of payment in cash. The objection does not go to the merits of the claim, but is one of procedure only; hence, even if it would have been valid if taken in time, it may be and was waived by the failure of the government, so far as the record shows, to take the objection until the argument of the case in this court.

*We find no error in the record authorizing a reversal of the judgment of the Court of Claims, and it is therefore affirmed.*

---

## *Re* EDWARD ECKART, *Petitioner.* [481

(See S. C. Reporter's ed. 481–485.)

*Jurisdictional defect—habeas corpus.*

1. A conviction for murder upon a verdict which fails to specify the degree of murder, when the law divides it into degrees, the punishment varying according to the degree, although erroneous, is not a jurisdictional defect, and the judgment thereon is not void, so as to entitle the person convicted to be discharged upon habeas corpus.
2. When a court has jurisdiction by law of the offense charged, and of the party who is so charged, its judgments are not nullities which can be collaterally attacked. The writ of habeas corpus

NOTE.—*As to when habeas corpus may issue, and when not; and from what courts, and by what judges; what may be inquired into by writ of,*—see note to United States v. Hamilton, 1: 490.

*As to what questions may be considered on habeas corpus*, see note to *Ex parte* Carll, 27: 288.

*As to suspension of writ of habeas corpus*, see note to Luther v. Borden, 12: 581.



Digitized by Google

cannot be made to perform the functions of a writ of error.

[No. 14, Original.]

*Submitted March 22, 1897. Decided April 19, 1897.*

APPLICATION of Edward Eckart for the allowance of a writ of habeas corpus to obtain his discharge from an alleged unlawful imprisonment in the Wisconsin state prison. *Writ refused.*

The facts are stated in the opinion.

*Mr.* **Rublee A. Cole** for petitioner.

*Mr.* **W. H. Mylrea,** Attorney General of Wisconsin, for respondent.

Mr. Justice **White** delivered the opinion of the court:

This is an application for the allowance of a writ of habeas corpus, to obtain the discharge of the petitioner from an alleged unlawful imprisonment in the Wisconsin state prison.

From the statements in the petition and return, it appears that petitioner has been detained in custody since April 13, 1878, under a judgment of the circuit court of Jefferson county, Wisconsin, entered upon a verdict of a jury finding him "guilty," after trial had, upon an information which charged Eckart with having "on the 18th day of December in the year 1877 at Jefferson county, state of Wisconsin, unlawfully, feloniously, and of his malice aforethought, killed and murdered Charles Paterson, against the peace and dignity of the state of Wisconsin." The ground relied upon to establish that the imprisonment, under the judgment referred to, was unlawful is that under the laws of Wisconsin murder is divided into three degrees, the punishment varying according to the degree, and that as the verdict in question failed to specify the de-**482**]gree* of murder of which the accused was found guilty, the trial court was without jurisdiction to pass sentence and judgment upon the accused, and the deprivation of liberty under such judgment is without due process of law.

It also appears from the statements in the petition and answer to the rule that in September, 1893, Eckart unsuccessfully applied to the supreme court of Wisconsin for the allowance of a writ of habeas corpus, asserting in his petition the same detention and the same grounds for his right to release as is relied upon in the present application, and that in his petition to the Wisconsin court he specially set up that he was restrained of his liberty "contrary to the Constitution of the United States and laws enacted thereunder, and without the due process of law guaranteed by the 14th Amendment to that instrument."

It has been held by the supreme court of Wisconsin that under the statutes of that state an allegation of the commission of crime in language such as was employed in the information upon which Eckart was tried would justify a conviction of murder in either the first, second, or third degree, and it has also been there held that the jury must find the degree in their verdict, in order that the court may impose the proper punishment. *Hogan* v. *State*, 30 Wis. 428, 434 [11 Am. Rep. 575]; *Allen* v. *State*, 85 Wis. 22; *La Tour* v. *State* (Wis.) 67 N. W. 1138.

In its decision refusing the writ applied for by Eckart, the supreme court of Wisconsin held that while the conviction under the sentence in question was erroneous, the error in passing sentence was not a jurisdictional defect and the judgment was therefore not void. In this view we concur. The court had jurisdiction of the offense charged and of the person of the accused. The verdict clearly did not acquit him of the crime with which he was charged, but found that he had committed an offense embraced within the accusation upon which he was tried. It was within the jurisdiction of the trial judge to pass upon the sufficiency of the verdict and to construe its legal meaning, and if in so doing he erred, and held the verdict to be sufficiently certain to authorize the imposition of punishment for the highest grade of the offense charged, it *was an [**483** error committed in the exercise of jurisdiction, and one which does not present a jurisdictional defect, remediable by the writ of habeas corpus. The case is analogous in principle to that of a trial and conviction upon an indictment, the facts averred in which are asserted to be insufficient to constitute an offense against the statute claimed to have been violated. In this class of cases it has been held that a trial court possessing general jurisdiction of the class of offenses within which is embraced the crime sought to be set forth in the indictment is possessed of authority to determine the sufficiency of an indictment, and that in adjudging it to be valid and sufficient acts within its jurisdiction, and a conviction and judgment thereunder cannot be questioned on habeas corpus, because of a lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime. *Ex parte Coy*, 127 U. S. 731, 756-758 [32: 274, 280, 281], and cases there cited.

The ruling in *Ex parte Belt*, 159 U. S. 95 [40: 88], is also applicable. There an application was presented for leave to file a petition for a writ of habeas corpus directed to the superintendent of the Albany county penitentiary, in the state of New York, for the discharge of Belt from custody under a sentence of the supreme court of the District of Columbia. Belt had been indicted for the crime of larceny. In the course of the trial the record of a former conviction of larceny was introduced to establish that the offense for which the prisoner was then upon trial was a second offense, which fact, if established, subjected the accused to a greater punishment than would otherwise be authorized. Objection was taken to the admission of the record, on the ground that it showed a waiver of the right of trial by a jury on the part of the prisoner and a trial and conviction by the court alone without a jury, a mode of procedure claimed to be in violation of the Constitution of the United States, and rendering the subsequent proceedings null and void. The objection was overruled, and Belt was convicted and sentenced. The judgment being affirmed on appeal, Belt made the application to this court referred to, asking to be relieved from imprisonment under the alleged void sentence and judgment. It was argued on his behalf that



Digitized by Google

484] *the constitutional requirement of trial by a jury in criminal cases could not be waived by the accused, though in pursuance of a statute authorizing such a waiver, and on the assumption that the first conviction was necessarily void, the second conviction predicated thereon was likewise a nullity. Upon the authority, however, of *Ex parte Bigelow*, 113 U. S. 328 [28: 1005], it was held that the ground of application did not go to the jurisdiction or authority of the trial court, but was allegation of mere error, which was not reviewable on habeas corpus, citing on this latter proposition *Re Schneider* (No. 2), 148 U. S. 162 [37: 406].

The case of *Ex parte Bigelow* determined that the action of a trial court in overruling a plea of former jeopardy could not be reviewed on habeas corpus. In the course of the opinion, the court said (p. 330 [1006]):

"The trial court had jurisdiction of the offense described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and to decide upon the defenses offered by him. The matter now presented was one of those defenses. Whether it was a sufficient defense was a matter of law on which that court must pass so far as it was purely a question of law, and on which the jury, under the instructions of the court, must pass, if we can suppose any of the facts were such as required submission to the jury. If the question had been one of former acquittal, a much stronger case than this, the court would have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offense, and if the identity of the offense were in dispute it might be necessary, on such a plea, to submit that question to the jury on the issue raised by the plea. The same principle would apply to a plea of a former conviction. Clearly, in these cases the court not only has jurisdiction to try and decide the question raised, but it is its imperative duty to do so. If the court makes a mistake on such trial it is error which may be corrected by the usual modes of correcting such errors, but that the court had jurisdiction to decide upon the matter raised by the plea, both as mat-

485] ter *of law and of fact, cannot be doubted. . . . It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of a court so as to make its action, when erroneous, a nullity. But the general rule is that when the court has jurisdiction by law of the offense charged, and of the party who is so charged, its judgments are not nullities."

In *Ex parte Bell*, 159 U. S. 95 [40: 88], this court, speaking through Mr. Chief Justice Fuller, said (p. 99 [89]):

"Without in the least suggesting a doubt as to the efficacy, value, and importance of the system of trial by jury in criminal as well as in civil actions, we are clearly of opinion that the supreme court of the District had jurisdiction and authority to determine the validity of the act which authorized the waiver of a jury and to dispose of the question as to whether the record of a conviction before a judge without a jury, where the prisoner waived trial by jury according to statute, was legitimate proof of a first offense, and, this being so, we cannot review the action of that court and the court of appeals in this particular on habeas corpus."

The case presented by the record is not within any of the exceptions to the general rule that when a court has jurisdiction by law of the offense charged, and of the party who is so charged, its judgments are not nullities which can be collaterally attacked. The writ of habeas corpus cannot be made to perform the functions of a writ of error. *United States v. Pridgeon*, 153 U. S. 48 [38: 631].

It follows that *the rule must be discharged and the writ refused*, and it is so ordered.

---

## HERMAN ZADIG *et al.*
*v.*
## IDA B. BALDWIN.

(See S. C. Reporter's ed. 485-486.)

*Federal question.*

Where the record does not show that any question was made in the state court as to the validity of a state constitutional provision, under the Constitution of the United States, but establishes that at the trial the validity of such provision was assumed, this court has no jurisdiction to pass upon such question, although the record contains an extract from the closing brief in the state court discussing such Federal question, and it is orally asserted at bar that in the oral argument in the state court such question was presented.

[No. 222.]

*Argued and Submitted March 19, 1897. Decided April 19, 1897.*

IN ERROR to the Supreme Court of the State of California to review a judgment of that court affirming, with some modification, the judgment of the Superior Court of the State of California in and for the County of San Francisco in favor of the plaintiff, Ida B. Baldwin, against Herman Zadig *et al.*, for money had and received. *Dismissed for want of jurisdiction.*

See same case below, 104 Cal. 594.

The facts are stated in the opinion.

*Mr.* **Edmund Taussky** for plaintiffs in error.

*Mr.* **T. C. Van Ness** for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

The action below was originally instituted in the superior court of the state of California in and for the county of San Francisco by the

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

*As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws*,—see notes to Hart v. Lamphire, 7: 679, and Commercial Bank v. Buckingham, 12: 169.



Digitized by Google

defendant in error to recover from plaintiffs in error the sum of $595, with interest and costs. The complaint was in the ordinary form for money had and received, and did not otherwise indicate the nature or character of plaintiff's alleged cause of action. A demurrer to the complaint having been overruled, defendants filed an answer simply denying any indebtedness to the plaintiff.

Upon the trial before the court without a jury, it developed that the plaintiff based her right to recover upon § 26 of article 4 of the Constitution of the state of California, which provides as follows: "All contracts for the sale of shares of the capital stock of any corporation or association on margin or to be delivered at a future day shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." The defendants were shown to be partners, engaged in business as stock brokers, and the amount claimed from them was the aggregate of sums asserted to have been paid them from time to time as margins upon purchases of stock for account of the plaintiff.

The record clearly establishes that at the trial the validity of the constitutional provision re-[487 ferred to was assumed, and that the sole contention was whether or not the dealings between the parties as shown by the evidence were of the character prohibited by the state Constitution. At the close of the testimony for the plaintiff the defendants moved for a nonsuit upon the single ground "that it has not been shown that there was any transaction in margins between the parties, such as is inhibited by the Constitution; there is no evidence here showing what constitutes margin contract, or that there was any contract for the sale of stocks on margin between plaintiff and defendants."

The court having rendered its decision in favor of the plaintiff, the defendants filed a motion for a new trial, and with it a statement in conformity to the state practice, containing specifications of errors in law occurring at the trial and of particulars in which the evidence was insufficient to sustain the decision, as also specifications of the particulars in which the decision was against law. Nowhere, however, in such motion or statement, was any question raised as to the validity of the constitutional provision, nor was there contained therein any assertion that rights of the defendants under the Federal Constitution were invaded. From the judgment entered an appeal was taken to the supreme court of the state. That appeal was heard in department one of the court, by which tribunal the judgment was modified by excluding interest. The opinion of the court (104 Cal. 594) discloses that the questions passed upon were solely those which were presented by the record as brought up from the trial court. A petition was subsequently filed for a rehearing of the case in banc, but the application was denied. Thereupon the case was brought to this court for review.

The errors assigned assert that § 26 of article 4 of the Constitution of the state is repugnant to § 1 of the 14th Amendment of the Constitution of the United States and to § 8 of article 1 of the same instrument, and that the decision of the supreme court of the state holding that the contracts between the parties constituted sales of stocks on margins within the meaning of the state Constitution impaired the obligation of a contract and was repugnant to § 10 of article 1 of the Constitution [488 of the United States.

It is clear, however, that we have no jurisdiction to pass upon the questions presented in these assignments, for the reason that it nowhere appears in the record that the plaintiffs in error at any time questioned the validity, under the Constitution of the United States, of the section of the state Constitution relied on to support the claim made against them, or in any manner specially set up or claimed the protection of any clause of the Constitution of the United States.

The contention that there was a Federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this court, what purports to be an extract from the closing brief of counsel presented to the supreme court of the state, in which such a Federal question is discussed, and it is asserted orally at bar that in the oral argument made in the supreme court of California a claim under the Federal Constitution was presented. But, manifestly, the matters referred to form no part of the record and are not adequate to create a Federal question when no such question was necessarily decided below, and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the state. *Pim v. St. Louis*, 165 U. S. 273 [*ante*, 714]; *Chicago & N. W. R. Co. v. Chicago*, 164 U. S. 454, 457 [*ante*, 511, 512]; *Dibble v. Bellingham Bay Land Co.* 163 U. S. 63, 70 [41: 72, 74]; *Ansbro v. United States*, 159 U. S. 695 [40: 310]; *Sayward v. Denny*, 158 U. S. 180 [39: 941], and cases there cited.

*Dismissed for want of jurisdiction.*

---

ELECTRIC COMPANY, *Plff. in Err.*, [489

*v.*

JOSEPH A. DOW, Administrator of Samuel I. Dow, Deceased.

(See S. C. Reporter's ed. 489–493.)

*Estoppel—state decision.*

1. A party electing to have damages assessed by a jury in the exercise of a privilege given by a stat-

NOTE.—*As to estoppel by recitals in negotiable bonds or securities*, see note to Mercer County v. Hackett, 17: 548.

*As to jurisdiction of United States Supreme Court dependent on amount; interest added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy*,—see note to Gordon v. Ogden, 7: 592.

*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

*As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws*,—see notes to Hart v. Lamphire, 7: 679, and Commercial Bank v. Buckingham, 12: 169.



Digitized by Google

ute is precluded from denying the validity of a provision of that statute for the addition of 50 per cent to the verdict.

2. A decision by a state court that a party who has elected to have damages assessed by a jury is precluded from contesting the validity of a provision of the statute for the addition of 50 per cent to the verdict is not subject to review by the Supreme Court of the United States, as it is not based on any Federal question.

[No. 258.]

*Submitted April 1, 1897. Decided April 19, 1897.*

IN ERROR to the Supreme Court of the State of New Hampshire to review a judgment of that court against the Electric Company, a corporation of that state, upon a petition filed by Samuel I. Dow, for the assessment of damages occasioned to his land by an overflow caused by a dam erected by the defendant company in the Piscataquay river. *Dismissed.*

See same case below, 31 Atl. 22.

Statement by Mr. Justice **Shiras**:

This was a writ of error to reverse a judgment of the supreme court of New Hampshire against the Electric Company, a corporation of the state of New Hampshire, the plaintiff in error, upon a petition filed by Samuel I. Dow for the assessment of damages occasioned to his land by an overflow caused by a dam erected by the defendant company in the Piscataquay river. The defendant company also filed a petition praying for an inquisition into the question of damages. The proceedings were had under the general mill act of that state, approved July 8, 1868. Both parties elected trial by jury, which resulted in a verdict for Dow in the sum of $1,500. The plaintiff moved that 50 per cent be added to the amount of the verdict in pursuance of a provision of the statute which is as follows:

"If either party shall so elect, said court shall direct an issue to the jury to try the facts alleged in the said petition and assess the damages; and judgment rendered on the verdict of such jury, with 50 per cent added, shall be final, and said court may award costs to either party at its discretion."

490] *The defendant objected to this motion on the ground that said provision of the statute, requiring the court to add 50 per cent to the damages assessed by the jury, was in violation of the Constitution of the United States. The question thus raised was reserved by the trial judge and certified to the law term of the supreme court of the state, which overruled the defendant's contention, and judgment was accordingly entered in the supreme court for the amount of the verdict, with 50 per cent added and costs, to review which this writ of error was sued out.

*Messrs.* **H. E. Loveren** and *David Cross* for plaintiff in error.

*Mr.* **Henry M. Baker** for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

We agree with the supreme court of New Hampshire in thinking that the plaintiff in error, by availing itself of the power conferred by the statute, and joining in a trial for the assessment of the damages, is precluded from denying the validity of that provision which prescribes that 50 per cent shall be added to the amount of the verdict. The act confers a privilege, which the plaintiff in error was at liberty to exercise or not as it thought fit.

*Clay* v. *Smith*, 28 U. S. 3 Pet. 411 [7: 723], was a case where the plaintiff below, a citizen of the state of Kentucky, instituted a suit against the defendant, a citizen of the state of Louisiana, for the recovery of a debt incurred in 1808, and the defendant pleaded his discharge by the bankrupt law of Louisiana in 1811, under which, according to the provisions of the law, "as well his person as his future effects," were forever discharged from all the claims of his creditors. Under this law, the plaintiff, whose debt was specified in the list of the defendant's creditors, received a dividend of 10 per cent on his debt, declared by the assignees of the defendant. It was held by

*this court that the plaintiff, by voluntari-[491

ly making himself a party to those proceedings, abandoned his extraterritorial immunity from the operation of the bankrupt law of Louisiana, and was bound by that law to the same extent to which the citizens of Louisiana were bound.

In *Beaupré* v. *Noyes*, 138 U. S. 397 [34: 991], a similar question was presented. There it was contended on behalf of creditors, the plaintiffs in error, that an alleged assignment was conclusively fraudulent as to them for want of an immediate delivery, followed by an actual and continued change of possession of the goods assigned; that their right so to treat the assignment, although such right was specially set up and claimed, was denied; and that consequently they were denied a right arising under an authority exercised under the United States. But this court said:

"Whether the state court so interpreted the territorial statute as to deny such right to the plaintiffs in error we need not inquire, for it proceeded, in part, upon another and distinct ground not involving any Federal question, and sufficient in itself to maintain the judgment without reference to that question. That ground is, that there was evidence tending to show that the defendants acquiesced in and assented to all that was done, and waived any irregularity in the mode in which the assignee conducted the business; and that the question whether the defendants so acquiesced and assented with knowledge of all the facts, and thereby waived their right to treat the assignment as fraudulent, was properly submitted to the jury. The state court evidently intended to hold that, even if the assignment was originally fraudulent as against the creditors, . . . it was competent for the plaintiffs in error to waive the fraud and treat the assignment as valid for all the purposes specified in it. That view does not involve a Federal question. Whether sound or not, we do not inquire. It is broad enough, in itself, to support the final judgment without reference to the Federal question."

In July, 1887, William J. Eustis brought an action in the supreme judicial court of Massa-



Digitized by Google

492]chusetts against Bolles and *Wilde, wherein he sought to recover the balance on a note remaining unpaid after the receipt of one half received under insolvency proceedings under a state act passed after the creation of the debt. The defendants pleaded the proceedings in insolvency, their offer of composition, its acceptance by the majority in number and value of their creditors, their discharge, and the acceptance by Eustis of the amount coming to him under the offer of composition. To this answer the plaintiff demurred. The trial court, which overruled the demurrer, made a finding of facts, and reported the case for the determination of the full court.

The supreme judicial court was of opinion that Eustis, by accepting the benefit of the composition, had waived any right that he might otherwise have had to object to the validity of the composition statute as impairing the obligation of a contract made before its enactment. 146 Mass. 413.

The case was brought to this court, where it was argued, on behalf of the plaintiff in error, that a composition act was, as to debts existing prior to its passage, void and in contravention of the Constitution of the United States, and that a creditor, where demand is saved from the operation of a state statute or of a state decree by the Constitution of the United States, does not waive the benefit of this constitutional immunity by accepting the part of his demand which the state statute or decree says shall constitute full satisfaction.

This court held that the supreme judicial court of Massachusetts, in holding that, when the composition was confirmed, Eustis was put to his election whether he would avail himself of the composition offer or would reject it and rely upon his right to enforce his debt against his debtors, notwithstanding their discharge, did not decide a Federal question, and that hence the question as to the constitutionality of the state statute did not arise. *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111].

The plaintiff in error accepted the powers and rights conferred by the act of 1868, and joined in the proceedings for the assessment of damages. It must, therefore, be deemed to have agreed that the damages should be assessed in the manner provided for in the act. At 493]all events, the supreme *court of the state had so decided, and as its judgment was not based on any Federal question we have no jurisdiction to review it, and *the writ of error is accordingly dismissed.*

---

EDWIN D. CARTER, *Plff. in Err.*,
*v.*
CHARLES RUDDY *et al.*

(See S. C. Reporter's ed. 493-501.)

*Location of Sioux half-breed scrip—verdict—constructive possession.*

1. A certificate of location of Sioux half-breed scrip issued under the act of Congress of April 17, 1854, creates at best only an equitable title, which is insufficient to sustain an action of ejectment in the Federal courts.
2. A verdict determining the facts on conflicting but sufficient evidence cannot be reviewed by this court.
3. Constructive possession of a half block of land which is cut up into separate and distinct lots and so marked upon the ground, and which are held and treated as distinct tracts, is not shown by actual possession of some of the lots.

[No. 250.]

*Submitted March 30, 1897. Decided April 19, 1897.*

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the District of Idaho in favor of the defendants, Charles Ruddy *et al.*, in an action of ejectment brought by Edwin D. Carter, plaintiff, to recover the possession of land in Shoshone County, Idaho. *Affirmed.*

See same case below, 15 U. S. App. 129.

Statement by Mr. Justice **Brewer**:

On April 12, 1889, plaintiff in error commenced an action of ejectment in the district court of Shoshone county, territory of Idaho, to recover of defendants the possession of a portion of the north half of block 23 in the town of Wallace in said county and territory, and damages for the detention thereof. After answers by the several defendants (Idaho having been admitted into the Union as a state), the case was, on application of the plaintiff, transferred to the circuit court of the United States for the district of Idaho. The petition for the transfer alleged two grounds: one, diverse citizenship, and the other, the existence of Federal questions, to wit, the construction of the act of Congress, of date July 17, 1854, *authorizing the issue and location of [494 Sioux half-breed scrip (10 Stat. at L. 304, chap. 83), the construction of U. S. Rev. Stat. §§ 2387–2389, relating to town sites, and the question whether Idaho Rev. Stat. 1887, § 4556, is or is not inconsistent with the laws of Congress governing the possession and disposition of the public lands. A trial was had before a jury, commencing on December 4, 1891, which resulted in a verdict for the defendants. Upon this verdict judgment was entered in their favor, which judgment was affirmed by the court of appeals. 15 U. S. App. 129. Thereupon the case was brought here on error.

*Messrs.* **John R. McBride, Albert Allen,** and **W. B. Heyburn** for plaintiff in error.

*Mr.* **Edgar Wilson** for defendants in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The first question arises on the plaintiff's

---

NOTE.—*As to when a judgment at law in ejectment will be enjoined by a bill in equity*, see note to Davis v. Tileston, 12: 866.

*That court will not restore possession on payment of the rent*, see note to Smith v. Trabue, 9: 30.

*As to mesne profits, when recoverable*, see note to Green v. Biddle, 5: 547.

*As to requisites of adverse possession*, see note to Ricard v. Williams, 5: 398, and Ewing v. Burnet, 9: 624.

*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 371.



Digitized by Google

aim of a legal title by virtue of a location of oux half-breed scrip. It appears that under ie act of Congress a certificate, No. 430, Let- r C, for 80 acres, was issued to Walter ourke. This certificate, which was marked not transferable or assignable," was dated lovember 24, 1856. On June 5, 1886, it was resented by W. R. Wallace at the local land ffice at Cœur d'Alene, accompanied by an ir- evocable power of attorney to him executed y Walter Bourke and his wife, on February 7, 1883, and was located upon 80 acres, within which was the property in dispute. When he location papers were transmitted to the General Land Office at Washington it was dis- covered that Bourke had on October 26, 1870, applied to the department for a duplicate cer- tificate, on a representation that the original had been lost or destroyed; that such applica- tion had been sustained and a duplicate cer- tificate issued; that on March 9, 1880, he had located such duplicate on land in Dakota, and received a patent therefor. Upon the disclo-

[495] sure *of these facts the Commissioner of the General Land Office canceled this loca- tion in Idaho.

Now, the contention of plaintiff is that the location of this scrip operated to transfer the legal title to Bourke, by deed from whom the plaintiff claimed; that no patent was necessary, and that whatever of wrong Bourke may have committed, the legal title was in him and could only be devested by a suit in equity brought by the United States. This scrip is of the same character as that which was before this court in *Felix* v *Patrick*, 145 U. S. 317 [36: 719]. While it is true that the act of 1854 does not in terms provide for the issue of a patent, and simply authorizes the location of the scrip upon any public lands, yet the general rule is that a patent is necessary for the transfer of the legal title to public lands. In *Bagnell* v. *Broderick*, 38 U. S. 13 Pet. 436, 450 [10: 235, 242], it was said: "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; until its issuance the fee is in the government which by the patent passes to the grantee, and he is entitled to recover the possession in ejectment." See also *Wilcox* v. *Jackson*, *McConnel*, 38 U. S. 13 Pet. 498, 516 [10: 264, 173]; *Langdon* v. *Sherwood*, 124 U. S. 74, 83 [31: 344, 346], in which it was said: "It has been repeatedly decided by this court that such certificates of the officers of the land department do not convey the legal title of the land to the holder of the certificate, but that they only evidence an equitable title, which may afterwards be perfected by the issue of a patent, and that in the courts of the United States such certificates are not sufficient to authorize a recovery in an action of ejectment." *Hussman* v. *Durham*, 165 U. S. 144 [*ante*, 664].

It is true there are exceptions to this rule. One is specially provided by statute (U. S. Rev. Stat. § 2449), which makes a certification to a state equivalent to a patent as a conveyance of title. Again, as said in *Wilcox* v. *Jackson*, *McConnel*, *supra*, "One class of cases to be excepted is, where an act of Congress grants land, as is sometimes done in words of present grant. This exception *was rec-

[496] cognized in *Wisconsin C. R. Co.* v. *Price County*, 133 U. S. 496 [33: 687]; *St. Paul & P. R. Co.* v. *Northern P. R. Co.* 139 U. S. 1 [35: 77]; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241 [35: 999].

It is well settled that an action of ejectment cannot be maintained in the courts of the United States on a merely equitable title. See in addition to *Langdon* v. *Sherwood*, *supra*, *Johnson* v. *Christian*, 128 U. S. 374, 382 [32: 412, 414], and cases cited.

With reference to the power of the Commissioner of the General Land Office to cancel an erroneous certificate of location issued by local land officers, see *Cornelius* v. *Kessel*, 128 U. S. 456 [32: 482]; *Knight* v. *United Land Asso.* 142 U. S. 161, 177 [35: 974, 979]; *Orchard* v. *Alexander*, 157 U. S. 372 [39: 737]. It is, however, unnecessary to enter into any inquiry as to the power of the land department to issue duplicate in lieu of original scrip alleged to have been lost or destroyed, or even as to the regularity of the proceedings by which this certificate of location was canceled. It is enough that there is nothing to exempt this case from the ordinary rule that a patent is necessary to convey the legal title; that the certificate of location created at best but an equitable title, and that such a title is not sufficient to sustain an action of ejectment in the Federal courts.

We pass, therefore, to the other question which arises on the contention of the plaintiff that he was in peaceable possession, holding under a claim of title, when the defendants forcibly dispossessed him, and that such prior possession under claim of title is sufficient to sustain this action against mere intruders. To an understanding of this question some further facts must be stated. In May, 1886, and before the certificate of location, one Trask, a surveyor, surveyed this tract of 80 acres and laid it off into lots and blocks. This was done at the instance of Wallace, who held the scrip and power of attorney from Bourke, and who was proposing to establish the town of Wallace. On this plat block 22 was laid off into 24 lots, 12 facing north and 12 south, with an alley between them. On July 31, 1886, Bourke, by his attorney *Wallace, conveyed

[497] this block to plaintiff, the description in the deed being "block 22 (twenty-two) in said town of Wallace, consisting of 24 town lots, each of 25 x 100 ft., and bounded on the north by Lockey st., on the south by Bank st. and on the west by Sixth st., on the east by Seventh st., the title of said land having been vested in the party of the first part by location of half-breed Sioux scrip issued to the said Walter Bourke, under an act of Congress of July 17, A. D. 1854, in exchange for lands held by said party of the first part at Lake Pepin, Minnesota, and now located and duly recorded in the United States land office with field notes of survey as provided by said act of Congress, at Cœur d'Alene city, Idaho territory."

At the time of the certificate of location and of the deed the 80-acre tract was covered with a dense growth of timber, and plaintiff, who put up a sawmill near by, proceeded, under



Digitized by Google

contract with Wallace, to cut down the trees and convert them into lumber at his mill. In this way block 23 was substantially cleared of standing timber. Prior to February 19, 1889, plaintiff had built two houses on the north half of the block. These houses were on lots not in controversy in this action. There was no fencing around the block, or any part of it. Some board sidewalk had been placed by plaintiff in front of some of the lots and on one side of the block, but it was claimed by defendants that this was done in order to accommodate the travel passing between the depot and a hotel belonging to the plaintiff some little distance from the lots in controversy. There was a conflict in the testimony as to the condition of the block other than the lots upon which the houses were built, the defendants' testimony tending to show that it was covered over with stumps, fallen timber, and brush. In May, 1888, proceedings were taken before the county commissioners of Shoshone county for the incorporation of the town of Wallace. On February 19, 1889, there was a general taking possession of vacant lots, done apparently with a view to the acquiring of title under the town-site acts of Congress; and among other lots these in controversy were taken possession of and fenced by the sev-
498] eral defendants. There was *other testimony bearing upon the question of the alleged possession by plaintiff, but enough has been stated to outline the nature of the dispute between the parties. Of course, the verdict of the jury determines the questions of fact adversely to the plaintiff, and it is not the province of this court to review such determination or to examine the testimony further than to see that there was sufficient to justify the conclusions reached by the jury.

We pass, therefore, to consider the charge of the court and the instructions asked and refused. The plaintiff insists that he entered into possession by virtue of the deed of July 31, 1886; that his actual possession of two lots by virtue of the erection of houses thereon must be taken as constructive possession of the entire block, there being at the time no pretense of any adverse possession, and that, therefore, he was entitled to a peremptory instruction directing a verdict in his favor. He cites in support of the extent of his possession *Clarke* v. *Courtney*, 30 U. S. 5 Pet. 319, 354 [8: 140, 153], in which this court said: "Where a person enters into land under a deed or title, his possession is construed to be coextensive with his deed or title; and, although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseised to the extent of the boundaries of such deed or title."

The court declined to give such peremptory instruction, but charged as follows:

"It is the law that where a party holds a tract of land as a separate and distinct tract and as one tract under a claim of title as the boundaries of the tract are so designated, described, and marked that they may be known, his possession, either by himself or tenants, of a part of the tract operates as possession of all.

"If in this case you find that this half block was held by plaintiff as one tract or parcel of land, and that it was so marked out and designated in any way that defendants could know its location, and plaintiff had possession of any part of it, such possession extended to and gave him possession of the entire tract; but if, on the contrary, it was cut up into separate and distinct lots and so marked upon the ground and was held *and treated [499
as distinct tracts, then he must show the possession of all thereof.

. . . . . .

"11th. The next question is, What are the acts of ownership and possession to which your attention must be directed? As acts of ownership and possession the plaintiff claims he entered upon the premises in good faith in pursuance of his deed; that he thereupon proceeded to clear the land of its timber and to prepare it for occupation; that he put sidewalks along the sides of a portion of it; that he put them there as the owner of the ground for its convenient use and to improve and enhance its value; that as such owner and claimant he caused water to be conducted to some part of the premises; that he paid taxes on the premises, and that he has always, since purchasing the ground, claimed to own it, and has openly and publicly exercised control over it.

"If these assertions of plaintiff are true, and that these acts were done by him or by his agents, you are instructed that they constituted in him such a possessory title to the premises in dispute as the government will protect and as against any other person claiming by a similar or subsequent possessory title.

"12th. On the contrary, the defendants claim that the plaintiff's entry on the land was not in good faith to hold it; that his object was to cut therefrom for milling purposes the timber thereon; that he did not clear the land; that the sidewalks were not constructed for the benefit of the property, or because plaintiff owned it, but to benefit and add to the convenient use of other property he owned and business he was operating in that vicinity; that the water he had conducted there was not to benefit the premises, but was a part of the town system of waterworks, and that the plaintiff had, through himself or his agents, ceased to exercise control over the property, and that on the 19th day of February, 1889, it was vacant unoccupied lands of the United States, and that on such day they peaceably entered the premises.

"If you find the claim of the defendants to be true then their entry and possession was lawful."

*It is not necessary for a court to give [500
instructions in the very language of counsel. It is enough if it gives the law fully and accurately, and we think this charge not only stated the law accurately, but also covered all the ground which was necessary in order to fully advise the jury of the rights of the plaintiff. While his deed was of block 23 it describes the block as composed of 24 lots, and the plat upon which the deed was based shows that there was an alley running through the block and separating the 12 lots on the north from the 12 lots on the south. It was therefore not a single tract. Further, plaintiff, in his complaint, thus described the property for which he sued:

"Said half block being 300 feet long in an east and west, and 100 feet wide in a north



Digitized by Google

and south, direction (except two separate lots, pieces, or parcels of land described on the plat of said town as lots twelve (12) and twenty (20) in said block twenty-two (22), each of said lots being 25 feet wide and 100 feet long)."

In respect to which the court of appeals, in its opinion, well said:

"It may be observed that plaintiff alleged that the lots which he claims to have been in possession of tenants were 'two separate lots, pieces, and parcels of land' from the land sued for. Can their possession, therefore, be the possession of land from which they were 'separate?'"

We do not think it could have been properly held as matter of law that the plaintiff was in constructive possession of this entire half block, and the rule of law in respect to such constructive possession was in the charge we have quoted correctly stated. In this respect, it may not be inappropriate to notice two sections of the territorial statutes (Idaho Rev. Stat. 1887, §§ 4040, 4556), the first of which, referring to property held for five years under a claim of title founded upon a written instrument, declares that the property so included in such instrument is deemed to have been adversely held, "except that, when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract;" and the second provides that in 501 ]an action *for the possession of "a lot or parcel of land, situated in any city, town, or village on the public lands," the plaintiff is required to prove an actual inclosure of the whole lot, or the erection of a dwelling house or other substantial building on some part thereof, and adds that "proof of such building, with or without inclosure, is sufficient to hold such lot or parcel to the bounds thereof, as indicated by the plat of such city, town, or village, if there be one, and if there be no such plat, then to hold the same, with its full width and extent from and including such building to the nearest adjacent street, where the intervening space has not been previously claimed by adverse possession."

As to the circumstances to be considered in determining the question of possession other than the instrument under which the title is claimed, we think the court, in ¶¶ 11 and 12, heretofore quoted, stated the law in such a way as to give the plaintiff no ground of objection, and as upon these instructions the jury found the facts adversely to the plaintiff we must accept that finding as conclusive.

We see no error in the record, and *the judgment of the Court of Appeals is affirmed.*

---

ALONZO W. ALLEN, *Piff. in Err.*,

*v.*

ANDREW J. CULP.

(See S. C. Reporter's ed. 501-506.)

*Reissue of patent.*

A surrender of a patent for reissue takes effect under the patent act of 1870, § 53, only when the patent is reissued; and if a reissue be refused the surrender never takes effect, and the patent stands as if no application had ever been made for a reissue, even if in making his surrender the patentee declared that the patent was inoperative and invalid.

[No. 252.]

*Argued and Submitted March 30, 1897. Decided April 19, 1897.*

IN ERROR to the Court of Common Pleas, No. 4, for the County of Philadelphia, State of Pennsylvania, to review a judgment of that court after affirmance thereof by the Supreme Court of the state in favor of the plaintiff, Andrew J. Culp, against Alonzo W. Allen, for the amount of half the profits made by the defendant from a certain patent. *Affirmed.*

See same case below, 166 Pa. 286.

Statement by Mr. Justice **Brown:**

This was an action originally instituted in the court of common pleas for the county of Philadelphia, by the defendant in error, Andrew J. Culp, against Alonzo W. Allen, to recover half of the profits made by the defendant from a certain *patent for a cop and[502 bobbin winding machine, granted jointly to Culp and Allen, and subsequently assigned to the defendant Allen.

The alleged consideration of the transfer of plaintiff's half interest was a promise on the part of the defendant that he would divide with him the profits made by the sale of the device, of which they were the joint owners, and also all damages which might be recovered against infringers of the patent; the principal object of the transfer being to enable the defendant to have title thereto for the purpose of prosecuting these infringers. It seems that in November, 1892, the defendant was advised by his counsel to apply for a reissue, in order to more fully protect the invention, and he thereupon obtained the signature of the plaintiff, his coinventor, to the application by renewing the promises he had already made. Both parties joined in the surrender of their patent and in the application for a reissue, which, however, was rejected on the ground of unreasonable delay, and also upon the further ground that the new claims of the reissue had been anticipated by other patents. Counsel for the defendant, who appears to have had absolute control of the reissue proceedings, made no effort to meet the formal objection of the examiner, and permitted the application to lapse by his failure to prosecute it within two years. He also neglected to take an appeal from the rejection of the application.

In January, 1893, defendant informed the plaintiff that he did not intend to take any further proceedings with reference to the patent, and refused to fulfil his promise with reference to the division of profits.

Thereafter plaintiff began this suit to recover, under his contract with the defendant, the half of the profits which the latter had made

---

NOTE.—*As to when assignee may sue for infringement; when patentee must; when they must join,*—see note to Wilson v. Rousseau, 11: 1141.

*As to notes given for patent rights; purchaser before maturity,*—see note to Mandeville v. Welch, 5: 87.



Digitized by Google

out of the patent. The suit resulted in a verdict for the plaintiff for $225. A new trial being refused, defendant carried the case to the supreme court of Pennsylvania, by which the judgment of the court of common pleas was affirmed, and the record remitted to that court. 166 Pa. 286. Thereupon defendant sued out this writ of error.

*Mr.* **Hector T. Fenton** for plaintiff in error.

*Messrs.* **George Bradford Carr** and *Conway Dillingham* for defendant in error.

**Mr. Justice Brown** delivered the opinion of the court:

Upon the trial, the plaintiff having offered evidence in support of his case, the defendant put in evidence a certified copy of the application for a reissue of the letters patent in question, and also a model of the tension device made and sold by the defendant. The application for a reissue was made by Culp and Allen jointly, who prayed that they might be allowed to surrender the patent, and the same might be reissued to Allen for the same invention upon an amended specification. To the specification was appended the usual affidavit to the effect that the deponents believed that the patent surrendered was inoperative or invalid, by reason of a defective and ineffective specification, in that it failed to properly describe the essential and important features of the invention, and that such errors arose from inadvertency, accident, and mistake, and without any fraudulent or deceptive intention. The record also contained a communication from the examiner refusing the reissue upon the ground of unreasonable delay, and also because the new claims had been substantially anticipated by other patents.

Thereupon the court charged the jury, at the request of the plaintiff, that "where the reissue of letters patent is applied for the surrender takes effect only upon the issue of the amended patent, and if the issue is refused, the original patent is returned to its owner;" and that "the action of the Patent Office in refusing to reissue the patent in suit did not affect its validity, and the contract between the plaintiff and defendant in reference thereto was not rendered invalid by such action."

In this connection the court also refused to charge the jury, at the request of the de-[504 fendant, that "the joint act of the parties in surrendering the patent in question, and applying for a reissue thereof on November 18, 1892, amounted to a cancelation of the patent; and being followed by a refusal on the part of the government to grant the reissue, operated to end and determine the contract sued upon as to any of the patented machines made after such surrender."

The first statutory provision for the reissue of letters patent made its appearance in the act of July 8, 1832, repeated and expanded in the 18th section of the patent act of 1836, which provided generally that whenever any patent should be inoperative or invalid, by reason of a defective description or specification, or by reason of the patentee claiming more than he had a right to; if the error arose from inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it should be lawful for the Commissioner, upon the surrender to him of such patent, to cause a new one to be issued for the same invention, for the residue of the period then unexpired for which the original patent was granted, in accordance with the patentee's corrected description and specification. This was but little more than putting in statutory form a power which this court had already held to exist, prior to the act of 1832, in the Secretary of State in the absence of a statute. *Grant* v. *Raymond*, 31 U. S. 6 Pet. 218 [8: 376]. But in construing this statute it was uniformly held by this court that the surrender of the patent for reissue was a legal cancelation and extinguishment of it; that no rights could afterwards be asserted upon it, and that suits pending for an infringement of such patent fell with its surrender, because the foundation upon which they were begun no longer existed. *Moffitt* v. *Garr*, 66 U. S. 1 Black, 273 [17: 207]; *Reedy* v. *Scott*, 90 U. S. 23 Wall. 352, 364 [23: 109, 110]; *Peck* v. *Collins*, 103 U. S. 660 [26: 512].

To obviate the injustice to inventors occasioned by the peremptory requirement that the patent should be treated as extinguished from the moment it was surrendered for a reissue,

---

*That prior use or sale of invention renders patent void*, see note to French v. Carter, 34: 664.

*As to assignments of patents, their construction and effect; licenses to use patents; royalties*,—see note to Dalzell v. Dueber Watch Case Mfg. Co. 37: 749.

*As to anticipation of patents; prior patents and publications; application and issue; claims and specifications*,—see note to Leggett v. Standard Oil Co. 37: 737.

*As to patentability of inventions; patentable subject-matter; utility; what constitutes invention; patentable novelty; combinations; foreign patents and their effects*,—see note to Grant v. Walter, 37: 552.

*As to reissued patents for inventions, when valid; effect of reissue; laches*,—see note to National Meter Co v. Yonkers Water Comrs. 37: 644.

*As to what constitutes infringement of patent; similarity of devices; designs; combinations; machines; construction of patent*,—see note to Royer v. Coupe, 36: 1073.

*As to patents for designs, when valid*, see note to Smith v. Whitman Saddle Co. 37: 606.

*For what patents are granted; when declared void*,—see note to Evans v. Eaton, 4: 433.

*As to patentability of inventions*, see notes to Thompson v. Boisselier, 29: 76, and Corning v. Burden, 14: 683.

*As to abandonment of invention*, see note to Pennock v. Dialogue, 7: 327.

*As to distinction between inventions of mechanism, articles, or products and processes; when latter patented*,—see note to Corning v. Burden, 14: 683.

*As to including process and product in same patent; separate patents therefor*,—see note to Evans v. Eaton, 4: 433.

*As to what reissue may cover*, see note to O'Reilly v. Morse, 14: 601.

*As to assignment before issuing and reissuing patent; recording; when assignment transfers extended terms*,—see note to Gayler v. Wilder, 13: 504.

*As to damages for infringement of patent; treble damages*,—see note to Hogg v. Emerson, 12: 894.



Digitized by Google

it was provided, in § 53 of the patent act of 1870, amending the 13th section of the act of 1836, that upon the surrender of a patent for that
505]purpose a reissue should be *granted "for the unexpired part of the term of the original patent, *the surrender of which shall take effect upon the reissue of the amended patent.*" These words were obviously inserted for the purpose of preventing the surrender taking immediate effect, and to postpone its legal operation until the patent should be reissued. When a patent is thus surrendered, there can be no doubt that it continues to be a valid patent until it is reissued, when it becomes inoperative; but if a reissue be refused, it is entirely clear that the surrender never takes effect, and the patent stands as if no application had ever been made for a reissue. Whether, if the reissue be void, the patentee may fall back on his original patent, has never yet been decided by this court, although the question was raised in *Eby* v. *King*, 158 U. S. 366 [39: 1018]; but as the original patent in that case was also held to be void, it did not become necessary to express an opinion upon the question. But if the original application for a reissue be rejected, the original patent stands precisely as though a reissue had never been applied for, unless at least the reissue be refused upon some ground equally affecting the original patent. If it were otherwise, every patentee who applies for a reissue would do so at the peril, not only of having his application refused, but of losing what he already possessed. This was the very contingency the act of 1870 was designed to provide against.

It is true that, in making his surrender, the patentee declares that his patent is inoperative and invalid, but this is not necessarily so for all purposes, but for the purpose for which he desires to have it reissued. Such a patent might be inoperative and invalid as against certain persons who had pirated the underlying principle of the patent, and avoided infringing the exact language of the claims, and yet be perfectly valid as against others, who were making machines clearly covered by their language. Such was the case here since the defendant in his affidavit of defense admitted that, "after the dissolution of said firm, each party on his individual account continued the same business, deponent having made some of said patented machines." But in addition to this, the court charged the jury that unless
506]the devices *made by the defendant were essentially the same as that covered by the patent there could be no recovery, and the verdict necessarily established their identity.

*There was no error in the ruling of the court below, and its judgment is therefore affirmed.*

CAROLINE M. FORSYTH, *Appt.*,
*v.*
CITY OF HAMMOND *et al.*

(See S. C. Reporter's ed. 506-520.)

*Power of this court to require a case to be certified to it by the circuit court of appeals—such power will be sparingly exercised—conflict between decisions of state and Federal courts—annexation of territory to a city—when person bound by judgment—Federal Constitution—state decision—when followed by Federal court.*

1. The power of this court to require a case to be certified to it by the circuit court of appeals under the act of March 3, 1891, is not affected by the condition of the case as it exists in the latter court, but may be exercised before or after any decision by that court, and irrespective of any ruling or determination therein.
2. This court will sparingly exercise the power to require a case to be certified to it by the circuit court of appeals, and will exercise it only when the circumstances of the case show that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interest of the nation in its internal or external relations, demands such exercise.
3. The possibilities of conflict and collision which might arise from adverse decisions of the supreme court of a state and a Federal circuit court of appeals respecting the validity of the annexation of territory to a city, when the decision of the circuit court of appeals would except from the territorial limits of the city a tract within its exterior boundaries, constitute sufficient reason for requiring the latter court to certify the case to this court, although no final decree has been entered therein.
4. The validity of proceedings under a statute for the annexation of territory to a city is a question of a judicial nature, and not a matter solely of legislative cognizance.
5. One who has voluntarily sought the judgment of the supreme court of a state to declare that a decree of a lower court was not only erroneous but void, although not a voluntary litigant in the trial court, is bound by the judgment of the supreme court as *res judicata*, and cannot attack it collaterally in a circuit court of the United States.
6. The Federal Constitution does not prevent the

NOTE.—*As to jurisdiction of United States Supreme Court in cases certified on division of circuit court; on what division should be,*—see note to Webster v. Cooper, 13: 325.

*Jurisdiction of United States Supreme Court; it is for state courts to construe their own statutes; supreme court will not review their decisions except when specially authorized by statute,*—see note to Commercial Bank v. Buckingham, 12: 169.

*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution,* see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

*As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,*—see notes to Hart v. Lamphire, 7: 679, and Commercial Bank v. Buchingham, 12: 169.



Digitized by Google

people of a state from giving full jurisdiction to the courts to determine the territorial boundaries of a municipal corporation, since the preservation of legislative control in such matters is not one of the essential elements of a republican form of government guaranteed by U. S. Const art. 4, § 4.

7. The matter of the territorial boundaries of a municipal corporation is local in its nature; and its determination by the supreme court of the state cannot be reviewed or controlled by a circuit court of the United States on collateral attack, when it is not subject to review on writ of error by this court.

8. The decision of the supreme court of a state upon a question of a local nature involving the internal policy of the state should be generally followed by the Federal courts as binding and conclusive, when the question so decided is afterwards raised in the latter courts between the same parties.

[No. 615.]

*Argued January 20, 1897. Decided April 19, 1897.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree of that court reversing a decree of the Circuit Court of the United States for the District of Indiana denying a motion for an injunction and dismissing a suit in equity to restrain the collection of taxes levied by the city of Hammond on certain property, in an action brought by Caroline M. Forsyth against said city. *Decree of court of appeals reversed*, and case remanded to the circuit court with instructions to dismiss the suit.

See same case below, 68 Fed. Rep. 774, 34 U. S. App. 552.

Statement by Mr. Justice **Brewer**:

The legislation of Indiana authorizes the annexation of contiguous territory to the limits of a city with or without the consent of the owner. The statutory provisions in respect thereto, found in 1 Horner's Anno. (Ind.) Rev. Stat. 1896, are printed in the margin.†

*The city of Hammond is situated in [508 the county of Lake, and in 1893 it instituted proceedings to extend its limits over a large tract of contiguous territory, some of which at least was not laid off and platted into lots. The application was denied by the board of county commissioners of Lake county, whereupon the city appealed to the circuit court of that county, and the case thus appealed was thereafter transferred by change of venue to the circuit court of Porter county, Indiana, which court, upon a verdict of the jury, entered a decree in favor of the city for the annexation of the territory.

The present plaintiff was a party to these proceedings. She was the owner of about 725 acres within the area attempted to be annexed. After the decision *by the circuit court of Por-[509 ter county the city levied taxes on the property to the amount of $3,500, whereupon on April 29, 1895, she filed her bill in the circuit court of the United States for the district of Indiana, praying for an injunction to restrain the collection of those taxes. An amended bill was filed on May 1, 1895, upon which amended bill a hearing was had, resulting in a denial of the motion for an injunction and the dismissal of the suit. 68 Fed. Rep. 774. From such dismissal she appealed to the court of appeals for the seventh circuit, by which court, on January 16, 1896, the decree of the circuit court dismissing the bill was reversed, and the case remanded to that court with directions for further proceedings. 34 U. S. App. 552. Whereupon the city of Hammond applied to this court for a certiorari, directed to the court of appeals, which application was sustained, and on October 19, 1896, a certiorari was ordered.

Before the filing of the bill in the United States circuit court this plaintiff with others had appealed from a decree of the circuit court of Porter county to the supreme court of Indiana, and by that court, on April 11, 1895, the decree had been affirmed. 142 Ind. 505 [30 L. R. A. 576]. A petition for rehearing was denied on November 8, 1895. 142

†3195. *Extension over Platted Lots*—84. Whenever there shall be or may have been lots laid off and platted adjoining such city, and a record of the same is made in the recorder's office of the proper county, the common council may, by a resolution of the board, extend the boundary of such city so as to include such lots; and the lots thus annexed shall thereafter form a part of such city and be within the jurisdiction of the same. The common council shall immediately thereafter file a copy of such resolution, defining the metes and boundaries of such addition, in the office of the recorder aforesaid; which shall be recorded.

3196. *Extension over Contiguous Lands—Action of Council*—85. The limits of any city may be extended over any lands or contiguous territory, by the consent of the owner thereof in writing, and a resolution of the common council, passed by a two-thirds vote, extending the limits of such city over such lands or territory; which written consent and resolution shall be entered at length in the records of such city; and the common council shall cause a certified copy of both to be recorded in the recorder's office in the proper county. If any city shall desire to annex contiguous territory not laid off in lots, and to the annexation of which the owner will not consent, the common council shall present to the board of county commissioners a petition setting forth the reasons of such annexation, and, at the same time, present to such board an accurate description by metes and bounds, accompanied with a plat of the lands or territory proposed or desired to be annexed to such city. The common council shall give thirty days' notice, by publication in some newspaper of the city, of the intended petition, describing in such notice the territory sought to be annexed.

3197. *Proceedings by County Board*—86. The board of county commissioners, upon the reception of such petition, shall consider the same, and shall hear the testimony offered for or against such annexation; and if, after inspection of the map and of the proceedings had in the case, such board is of the opinion that the prayer of the petition should be granted, it shall cause an entry to be made in the order book, specifying the territory annexed, with the boundaries of the same according to the survey; and they shall cause an attested copy of the entry to be filed with the recorder of such county, which shall be duly recorded in his office, and which shall be conclusive evidence of such annexation in all courts in this state.

3243. *Appeal from County Board*—1. In proceedings before the board of county commissioners for the annexation of territory to cities and towns against the will of the owner, the petitioner and the owner of any portion of the territory proposed to be annexed may appeal to the circuit court from the final decision of the board, by filing, within thirty days, with the auditor, a bond or undertaking for the due prosecution of the appeal and payment of all costs that may be adjudged against the appellant, with sureties to be approved by the board or the auditor. But no appeal shall be dis-



Digitized by Google

nd. 516 [30 L. R. A. 582]. While this decision of the supreme court, though announced before the disposition of the case in the United States circuit court of appeals, has not been formally incorporated into the record by an amendment of the pleadings or otherwise, it was made a matter of consideration by the court of appeals, and has been discussed and treated by counsel in the arguments before us as a fact in the case and to be considered in determining the questions that are presented.

The bill alleged that the plaintiff's lands were used solely for pasturage and hay and other agricultural purposes; that the real value did not exceed $100 per acre; that the land had no market value, but only one speculative and prospective, dependent upon the location, not yet secured, of manufacturing establishments whose market and offices would be in Chicago; that no part of the land had ever been mapped or platted with a view to the sale of lots; [510] that on the *entire tract there were but twenty-one dwelling houses, ten of them being in a row and within about a quarter of a mile of the town of Whiting, in the county of Lake, in which town the tenants of all said houses were engaged in business and work; that the houses on the lands were 4½ miles distant from any police station, fire-engine house, or gas lamp of the city of Hammond, so that in the nature of things no benefit could be received from the municipal government of that city; that the lands were valued for taxation by the city at the rate of $250 to $500 per acre, and the taxes thereon amounted to about $5 per acre; that the valuation was enormously in excess of the real value and the taxes exorbitant, oppressive, and extortionate. The bill further alleged that at the time the annexation proceedings were instituted the city of Hammond did not contain more than 6,000 or 7,000 inhabitants; that it had territory about 3 miles long by 2 miles wide; that on the northern boundary and within the limits of the city were about 2 square miles of lands, no part of which had ever been laid off into lots and blocks, on one of which there was not a single house or road and on the other but seven houses and one road; that this vacant tract was between the settled parts of the city and the lands of the complainant; that the part of the city of Hammond laid off into lots is much larger than is likely to be required for city purposes for many years to come; that the city's boundaries contained nearly 4,000 acres, and that the territory attempted to be annexed consisted of about 5 square miles of practically vacant lands lying directly north of the city limits and extending all the way from such limits to the shores of Lake Michigan. Other facts were alleged also tending to show the impropriety of the annexation of this comparatively vacant territory to the city of Hammond.

It was specifically charged that the city of Hammond had a municipal debt amounting to nearly twice the constitutional limit, and that the purpose of the annexation was by adding new property at an exaggerated valuation to so increase the appraised taxables of said city as to lift it out of its constitutional dilemma without regard whatever to the advantages or benefits *to the property so sought to be an- [511] nexed. The bill further set forth the proceedings before the county commissioners and in the state circuit court, but averred that those proceedings were void because the enlargement of the limits of a city was a matter of legislative and not of judicial cognizance, and that it was not competent for the legislature to intrust to the courts the decision of such questions.

*Messrs.* **Benjamin Harrison, W. H. H. Miller,** and *John B. Elam* for appellant.

*Messrs.* **Charles H. Aldrich,** *Frank F. Reed,* and *E. D. Crumpacker* for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

The first proposition of counsel for plaintiff is that the writ of certiorari was prematurely issued, and that this court could not at that time rightfully take jurisdiction of the case because there had been no final decree. The court of appeals simply reversed the decree of the circuit court and remanded the case for further proceedings. This contention involves two matters: First, the question of power, and second, that of propriety. It may be that the question of propriety should be considered as foreclosed by the action of the court in awarding the writ of certiorari, but the question of power, being one of jurisdiction, is always open, and must whenever presented be considered and determined.

This question of power has, indeed, already been decided by this court in prior cases (*American Const. Co.* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 383 [37: 486, 491]; *United States* v. *The Three Friends,* 166 U. S. 1 [*ante,* 897]), but as it has again been discussed by counsel, a brief reference to those cases and the reasons therein stated may not be inappropriate. Up to the time of the passage of the act of 1891, creating the circuit courts of appeal, the theory of Federal jurisprudence had been, a single appellate court, to wit, the Supreme Court of *the United States, by [512] which a final review of all cases of which the lower Federal courts had jurisdiction was to be made. It is true there existed certain limitations upon the right of appeal and review, based on the amount in controversy and other considerations; but such limitations did not

missed for a want of a sufficient bond or undertaking, if one shall be filed, under the direction of the court, at any time before the trial.

3244. *Auditor's Duty*—2. Within twenty days after filing the appeal bond or undertaking, the auditor shall deliver it, with all the other papers in the cause and a complete transcript of the proceedings of the board, to the clerk of the circuit court, who shall docket it with the other causes pending therein.

3245. *Trial*—3. The appeal shall stand for trial, when taken during the session of the board, at the first term after the papers shall have been filed ten days, and when taken in vacation, at the first term after summons shall have been served upon the appellee ten days before the first day of such term. The appeal shall be tried and determined as an original cause.

3246. *Effect of Appeal*—4. All further proceedings in the annexation of territory shall be suspended until the final disposition of the appeal. The court may make a final determination of the proceeding and compel its execution, or may send its decision to the board, with direction how to proceed, and require compliance.



Digitized by Google

recognize or provide for the existence of another appellate court, and did not conflict with the thought that this court was to be the single tribunal for reviewing all cases and questions of a Federal nature. The rapid growth of the country and the enormous amount of litigation involving questions of a Federal character so added to the number of cases brought here for review that it was impossible for this court to keep pace with the growing docket. The situation had become one of great peril, and many plans for relief were suggested and discussed.

The outcome was the act of March 3, 1891 (26 Stat. at L. 826, chap. 517), the thought of which was the creation in each of the nine circuits of an appellate tribunal composed of three judges, whose decision in certain classes of cases appealable thereto should be final. *McLish* v. *Roff*, 141 U. S. 661, 666 [35: 893, 895]. While this division of appellate power was the means adopted to reduce the accumulation of business in this court, it was foreseen that injurious results might follow if an absolute finality of determination was given to the courts of appeal. Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this court, create an unfortunate confusion in respect to the rules of Federal decision. As the courts of appeal would often be constituted of two circuit judges and one district judge, a division of opinion between the former might result in a final judgment where the opinions of two judges of equal rank were on each side of the questions involved. Cases of a class in which finality of decision was given to the circuit courts of appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation. It was obvious that all contingencies in which a decision by this tribunal was of importance could not be foreseen, [513] and so there *was placed in the act creating the courts of appeal, in addition to other provisions for review by this court, this enactment:

"And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

The general language of this clause is noticeable. It applies to every case in which but for it the decision of the circuit court of appeals would be absolutely final, and authorizes this court to bring before it for review and determination the case so pending in the circuit court of appeals, and to exercise all the power and authority over it which this court would have, in any case, brought to it by appeal or writ of error. Unquestionably, the generality of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the court of appeals. It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein. All that is essential is that there be a case pending in the circuit court of appeals, and of those classes of cases in which the decision of that court is declared a finality, and this court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination. Obviously, a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the courts of appeal. So exercised it might burden the docket of this court with cases which it was the intent of Congress to terminate in the courts of appeal, and which, brought here, would simply prevent that promptness of decision which in all judicial actions is one of the elements of justice.

So it has been that this court, while not doubting its power, has been chary of action in respect to certioraris. It has said: *"It is [514 evident that it is solely questions of gravity and importance that the circuit courts of appeals should certify to us for instruction; and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the court of appeals is made final, to be certified, can be properly invoked." *Ex parte Lau Ow Bew*, 141 U. S. 583, 587 [35: 868, 870]; *Ex parte Woods*, 143 U. S. 202 [36: 125]; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58 [36: 340, 344]; *American Const. Co.* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 383 [37: 486, 491].

We have declined to issue writs of certiorari in cases where, there being only a matter of private interest, there had been no final judgment in the court of appeals. *Chicago & N. W. R. Co.* v. *Osbone*, 146 U. S. 354 [36: 1002]. On the other hand, in *United States* v. *The Three Friends*, at the present term, 166 U. S. 1 [*ante*, 897], we issued a writ of certiorari in a case appealed to the circuit court of appeals before any action had been taken by that court; but this was in view of the fact that the question involved was one affecting the relation of this country to foreign nations, and therefore one whose prompt decision by this court was of importance, not merely for the guidance of the executive department of the government, but also to disclose to each citizen the limits beyond which he might not go in interfering in the affairs of another nation without violating the laws of this.

We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in certiorari extends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court. And further, that while this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal *and the courts of a state, or some matter [515



Digitized by Google

affecting the interests of this nation in its internal or external relations, demands such exercise.

Among the considerations thus suggested are those which indicate why in this case the court properly exercised its power and issued the writ of certiorari. There was a conflict between the decision of the circuit court of appeals for the seventh circuit and the supreme court of the state of Indiana. The latter court had declared that the proceedings by which the contiguous territory was annexed to the city of Hammond were legal, and, therefore, that that territory was to be considered by all the officers of the state of Indiana as within the territorial limits of the city. The United States circuit court of appeals by its decision in this case had declared that such annexation proceedings were invalid; and that the property of this petitioner was not within the city limits. This tract of plaintiff's was not on the extreme limit of the lands sought to be incorporated into the city, and if the decision of the circuit court of appeals was enforced there would be a tract of a few hundred acres within the exterior boundaries of the city of Hammond, as defined by the judgment of the supreme court of the state, withdrawn from the city's jurisdiction, and in fact excepted from its territorial limits. All the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested when this application for certiorari was made, and, although no final decree had been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment.

Coming now to the merits of the case, it appears that on the pivotal question of the validity of the annexation proceedings the decision of the supreme court of the state is one way and that of the court of appeals directly the reverse. It is insisted by the plaintiff that the determination of the boundaries of a municipal corporation in the first instance, and any subsequent change in its boundaries by annexation of outside territory, are matters solely of legislative cognizance, and not judicial in their
516] nature; that such *is the general rule obtaining in the several states of the Union and up to the time of the decision of the supreme court of Indiana in this controversy, recognized in that state as elsewhere; that, therefore, the judicial proceedings in respect to this controversy in the courts of the state, culminating in the decision of its highest court, were beyond the jurisdiction of such courts, and not to be regarded as creating an adjudication binding upon other tribunals. Article 8 of the state Constitution is referred to, which reads: "The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." It is not denied that questions of a judicial nature may grow out of proceedings to annex territory to a municipal corporation, but it is insisted that the annexation itself is a legislative function, and must be determined by direct action of the legislature or some subordinate body exercising legislative functions. The supreme court of Indiana in its opinion on the petition for rehearing (142 Ind. 516 [30 L. R. A. 582]), said: "It may be conceded that annexation of territory to a city is a legislative function. This function is exercised by the common council when it resolves to annex certain described lands to the city, and to present a petition therefor to the county board." This suggestion is vigorously attacked by counsel for plaintiff, as lifting the *ex parte* action of one party to a controversy to the dignity of the exercise of a legislative function and making it the equivalent of a legislative determination.

But back of any criticism of the reasoning of the supreme court in its two opinions lies the fact of its decision. And here these things appear. The city of Hammond sought to bring within its limits, among other territory, the lands of plaintiff. After action by the city council, the city instituted proceedings before the county commissioners, which proceedings were subsequently taken by appeal, as prescribed by statute, to the circuit court, a court of general jurisdiction, and in that court a decree was entered annexing plaintiff's lands *to the city of Hammond. Were or were
517] not these proceedings valid, and was or was not such decree a binding adjudication which neither the city nor the plaintiff could elsewhere dispute? That question certainly is one of a judicial nature. Now, it is no less a judicial function to consider whether those proceedings and that decree were valid and effective, and determine that they were and operated to annex plaintiff's territory to the city, than to enter upon a like consideration and determine that they were invalid and ineffective to make such annexation. The decision of the supreme court of Indiana was in favor of the validity, that of the court of appeals against their validity, and if it is judicial to hear and determine one way, it is likewise judicial to hear and determine the other. If action by the state tribunals stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the supreme court of the state to have that claim established. She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum and there challenged the decree of the circuit court, challenged it for error and also for lack of jurisdiction. The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the supreme court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the supreme court would be



Digitized by Google

conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles con-[518 trolling the doctrine of *res judicata* have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions. *Cromwell* v. *Sac County*, 94 U. S. 351 [24: 195]; *Mason Lumber Co.* v. *Buchtel*, 101 U. S. 638 [25: 1074]; *Stout* v. *Lye*, 103 U. S. 66 [26: 428]; *Nesbitt* v. *Riverside Independent Dist.* 144 U. S. 610 [36: 562]; *Johnson Co.* v. *Wharton*, 152 U. S. 252 [38: 429]; *Last Chance Min. Co.* v. *Tyler Min. Co.* 157 U. S. 683 [39: 859].

But there is another aspect of this case. The matter in controversy is one peculiarly within the domain of state control. *Kelly* v. *Pittsburg*, 104 U. S. 78 [26: 658]. It is for the state to determine its political subdivisions, the number and size of its municipal corporations, and their territorial extent. These are matters of a local nature, in which the nation, as a whole, is not interested, and in which, by the very nature of things, the determination of the state authorities should be accepted as authoritative and controlling. We do not mean to hold that in the creation or change of municipal boundaries there may not be action taken by the state which involves a trespass upon rights secured by the Federal Constitution; or that in proceedings looking to such change no questions can arise which are of a Federal nature, and in respect to which the judgment of the courts of the nation must be controlling. All that we mean to decide is that the matter of the territorial boundaries of a municipal corporation is local in its nature, and, as a rule, to be finally and absolutely determined by the authorities of the state. The opinion of the court of appeals in this case is devoted to questions arising under the state Constitution and statutes; and the amended bill filed in the circuit court rests the jurisdiction of that court, not upon the existence of any right claimed under the Federal Constitution, but simply on adverse citizenship.

The construction by the courts of a state of its Constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the supreme court of a state has [519 misconstrued its Constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions. In *Claiborne County* v. *Brooks*, 111 U. S. 400, 410 [28: 470, 474], it was said: "It is undoubtedly a question of local policy with each state, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the state." See also *Burgess* v. *Seligman*, 107 U. S. 20, 33 [27: 359, 365]; *Bucher* v. *Cheshire R. Co.* 125 U. S. 555 [31: 795]; *Detroit* v. *Osborne*, 135 U. S. 492 [34: 260]; *South Branch Lumber Co.* v. *Ott*, 142 U. S. 622 [35: 1136]; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254 [35: 1004]; *McElvaine* v. *Brush*, 142 U. S. 155 [35: 971]; *Stutsman County* v. *Wallace*, 142 U. S. 293 [35: 1018], quoting *Norton* v. *Shelby County*, 118 U. S. 425 [30: 178], and *Gormley* v. *Clark*, 134 U. S. 338 [33: 909]; *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162 [36: 925]; *Bauserman* v. *Blunt*, 147 U. S. 647 [37: 316]; *May* v. *Tenney*, 148 U. S. 60 [37: 368]; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 373 [37: 772, 776]; *Lewis* v. *Monson*, 151 U. S. 545 [38: 265]; *Balkam* v. *Woodstock Iron Co.* 154 U. S. 177 [38: 953], quoting *Lefflingwell* v. *Warren*, 67 U. S. 2 Black, 599, 603 [17: 261, 262].

It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a state from giving, if they see fit, full jurisdiction over such matters to the courts, and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which, under § 4 of article 4 of the Constitution, the United States are bound to guarantee to every state in this Union. And whenever the supreme court of a state holds that under the true construction of its Constitution and statutes the courts of that state have jurisdiction over such matters, the Federal courts can neither deny the correctness of this construction nor repudiate its binding force as presenting anything in conflict with the Federal Constitution.

It is conceded that the judgment of the [520 supreme court of Indiana in this controversy could not be reviewed by this court on writ of error; that the questions involved and decided by that court are not of a Federal nature or such as to vest any appellate jurisdiction in this court. But if this court cannot set aside such judgment on the ground of error of law, it would seem to follow that no subordinate Federal court has the power on the same ground to strike it down. What the highest court of the United States cannot do directly would seem to be beyond the reach of a subordinate court in collateral attack. The case of *Burgess* v. *Seligman*, *supra*, is largely relied upon in the opinion of the court of appeals, but there are several reasons why that authority does not justify its action. In the first place the decision of the supreme court of the state was rendered before the filing of this bill in the circuit court of the United States, and not as in the *Burgess Case* after the judgment in the circuit court. In the second place the decision was upon a question of a local nature, involving the internal policy of the state, and therefore is such a decision as should be, generally speaking, recognized and followed by the Federal courts. And, thirdly, it was a final adjudication between the same parties, and should have been respected as binding and conclusive upon the principle of *res judicata*.

For these reasons we think that the de-



Digitized by Google

cision of the court of appeals was erroneous. Its *decree will be reversed*, and the case remanded to the circuit court of the United States for the district of Indiana with instructions to sustain the demurrer to the bill and dismiss the suit.

---

521] WASHINGTON & GEORGETOWN RAILROAD COMPANY and Baltimore & Potomac Railroad Company, *Plffs. in Err.*,
*v.*
MARGARET L. HICKEY *et al.*

(See S. C. Reporter's ed. 521-532.)

*Negligence of driver of street car and of gateman —lowering the gates—instruction—variance.*

1. The negligence of the driver of a street car in attempting to cross a railroad in front of a rapidly approaching train which was so near that the least interruption or delay in crossing would probably lead to an accident, and the negligence of a gateman in lowering the gates so as to pen the car in on the track, which two negligent acts unite in producing the result, make one cause of concurring negligence on the part of both companies; and the negligence of the gateman is not the distinct and proximate cause of the resulting accident, even if this would not have happened if the gates had not been lowered improperly.
2. An attempt by a driver of a street car to cross a railroad when a train was so near that the least delay would probably lead to an accident may constitute negligence, even though he would have got across safely except for the unanticipated act of a gatekeeper in wrongfully lowering the gates.
3. Error in an instruction as to damages cannot be considered in the absence of any exception thereto.
4. There is no substantial variance between the allegations and proof of the plaintiff, when the alleged variance was mainly produced by proof introduced by the defendants, who are not in any manner surprised or injured by the variance.

[No. 253.]

*Argued March 30, 1897. Decided April 19, 1897.*

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment of that Court affirming a judgment of the Supreme Court of that District in favor of the plaintiffs, Margaret L. Hickey *et al.*, against the Washington & Georgetown Railroad Company *et al.*, for damages for personal injuries sustained by the above-named plaintiff by the negligence of the defendants. *Affirmed.*

See same case below, 5 App. D. C. 436.

The facts are stated in the opinion.

*Messrs.* **Samuel Maddox, Walter D. Davidge,** and *Walter D. Davidge*, Jr., for plaintiffs in error.

*Messrs.* **M. J. Colbert** and **G. E. Hamilton** for defendants in error.

Mr. Justice **Peckham** delivered the opinion of the court:

This action was brought by the defendants in error, who are husband and wife, to recover from the defendants (the one being a horse-car company and the other a steam railroad company) damages for personal injuries sustained by the wife on account of the alleged negligence of the servants of the defendants. The facts of the negligence were alleged in the declaration, and each defendant filed a plea of not guilty, upon which issue was joined. A trial was had in the supreme court of the District of Columbia, resulting in a verdict for the plaintiffs, the judgment upon which having been affirmed by the court of appeals, the defendants have brought the case here for review.

On the trial evidence was given tending to show these facts: Mrs. Hickey, one of the plaintiffs, who was living with her husband in the city of Washington, left her home therein on the morning of the 12th day of August, 1889, and took a street car of the defendant horse-railroad company at the corner of Pennsylvania avenue and Seventh street for the purpose of going south along the last-named street; the car was a summer car and crowded with people going to the river on an excursion; she sat on the outside of the third seat in the front of the car and in a very small space; the people seemed in a hurry and some of them called out frequently to the driver to "hurry up;" upon coming to the crossing of Seventh street and Maryland avenue, where the car tracks of the two corporations intersect each other, the steam cars were seen approaching the intersection at quite a rapid rate; [523 the street car stopped upon coming to the crossing, as the railroad gates were lowered; then and before the steam train came on they were raised, and the street car was started, and after it got on the track of the steam cars the gates were again lowered, shutting in the street car, the gates coming down, one on the car and one just behind the horses. When the street car entered upon the steam-car crossing, the train on the tracks of the latter company was still moving quite rapidly towards the crossing and but a short distance away and in plain sight from the horse car; after getting partially upon the steam-railroad track, the gates, as stated, came down, and then they were again raised, and the driver of the horse car whipped up his horses and the car got across. Before the horse car had crossed the tracks, the steam cars were coming pretty fast;

---

NOTE.—*As to damages for personal injury from negligence*, see note to Pennsylvania Co. v. Roy, 36: 141.

*As to freedom of plaintiff from contributory negligence necessary to entitle him to recover*, see note to Stokes v. Saltonstall, 10: 115.

*As to care and precaution necessary in crossing a railroad track*, see note to Continental Improv. Co. v. Stead, 24: 408.

*As to who are coemployees or coservants, within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a coservant*, see note to Hough v. Texas & P. R. Co. 25: 612.

*As to trespassers or persons on track of railroads; duty of railroad company towards them.*—see note to Mitchell v. New York, L. E. & W. R. Co. 36: 1064.



Digitized by Google

the men who were sitting down in the horse car all got up and the women commenced screaming; the people on the horse car rushed to get off, and Mrs. Hickey was, in the course of the excitement and commotion, pushed off the car and was badly and permanently injured; when she fell, the steam cars were coming down and the horse car (the gates having been raised) was then driven across to the other side; the train was so close to the horse car that it just got off the track in time to escape being run over, while Mrs. Hickey says she was so near the steam-car tracks when the train passed that she felt the air from the engine upon her head.

One of the witnesses said that the driver of the street car first noticed the train when he was about 50 feet from the steam-car track. His car was moving at the rate of 4½ to 5 miles an hour, and the train was then between Eighth and Ninth streets, about 300 feet from Seventh street. The driver wanted to cross the steam-car tracks before the gate went down, and thought he could do so without danger; he did not see that the gates were being lowered as he approached, and did not put on the brakes or make other effort to stop the car until "he got the bell." The gates were once lowered and then raised to let the car pass, and then they were again lowered, and [524] it was when they were lowered *the second time that they came down between the car and the horses, penning the car in on the steam track. The gates were raised again, and the driver succeeded in getting the horse car across the track before the train approached.

The counsel for the horse-car company claimed that the cause of the accident was the commotion immediately preceding it, and by reason of which the plaintiff was pushed from the car and injured, and the question was, What caused the commotion? He urged that the commotion was caused by the improper and negligent lowering of the gates at the time when they penned the horse car between them and prevented its progress across the tracks of the steam-car company, and that if the gates had not been thus lowered the horse car would have had plenty of time to cross, and there would have been no commotion and no accident. He therefore made several requests to the court to charge the jury upon that subject. The point of such requests was that if the jury should find that the commotion and confusion which led to the accident were caused by the sudden and negligent lowering of the gates upon the street car, which the driver of that car had no reason to believe would be thus lowered, and if the driver could have crossed in safety but for such lowering, then the horse-car company was not responsible, and no recovery could be had against it.

A further request was made to charge that there was no evidence that the management of the horse car entered into or contributed to the negligence of the gatekeeper, and if the jury should find that the injury was caused by the negligence of the gatekeeper, the verdict must be in favor of the horse-car company; also, that if the jury should find that the horse car would have passed the steam-car track without injury to the plaintiff except for the lowering of the gates upon the horse car, and that the lowering was the cause of the injury and was an act of negligence on the part of the gatekeeper, then the horse-car company was not responsible for the injury; also, that if the jury found the injury to have been the result of negligence of the gatekeeper in the management of the gates, and that but for such negligence the injury *would not have been [525] sustained by the plaintiff, and that the driver of the horse car did not know and had no reason to believe that the gatekeeper would be negligent, then the plaintiffs were not entitled to recover against the horse-car company.

The refusal of the court to charge as requested was excepted to and is now made a ground for the reversal of the judgment by this court. In his argument here the counsel for the horse-car company said: "The gist of all of which instructions is that no matter whether it was negligence or not for the street-car company to drive its car upon the steam-car track, yet, if the jury found that it was the lowering of the gates (and not the negligence, if it were such, in going upon the steam track) that caused the injury, then they should find for the street-car company. The gist of the instructions is that it was the lowering of the gates that caused the injury."

The vice in all this argument, as we think, consists in the attempted separation into two distinct causes (remote and proximate) of what in reality was one continuous cause. It leaves out of view the action of the driver of the street car as to whether he was or was not negligent, provided the jury should say the accident would not have happened if the gates had not been improperly lowered. That is, although the jury should find that the act of the driver was negligent, and by reason of that negligence his car was placed in such a position that the negligent lowering of the gates concurred with his action in producing the injury, the street-car company must be absolved, if the jury should be able to say that but for such negligent lowering of the gates (which the driver of the horse car had no reason to foresee) the accident would not have happened. This is an attempt to separate that which upon the facts in this case ought not to be separated. The so-called two negligent acts were, in fact, united in producing the result, and they made one cause of concurring negligence on the part of both companies. They were in point of time substantially simultaneous acts and parts of one whole transaction, and it would be improper to attempt a separation in the manner asked for by the counsel for the horse-car company.

*In this connection the court did [526] charge the jury as follows:

"It is claimed by the counsel for the Washington & Georgetown Railroad Company that there was ample time for its cars to pass over the track of the Baltimore & Potomac Railroad Company before the train of the latter would reach the point of intersection of the two tracks, and that as the car of the former company approached the track of the latter the gates were up, and that the horses drawing the car had reached the steam-car track when the gatekeeper suddenly lowered the gates, and thereby produced whatever alarm or confusion the evidence shows ensued among



Digitized by Google

the passengers, including the plaintiff, on the street car.

"If you find the evidence establishes these facts, as thus claimed by the Washington & Georgetown Railroad Company, it would be entitled to your verdict in its favor."

The alleged negligence of the horse-car driver consisted in endeavoring to cross at all, under the circumstances, until after the passage of the train on the steam railroad. Upon the evidence the jury would have been justified in finding that he had no right to indulge in any close calculation as to time in attempting to cross the steam-car tracks before the train thereon reached the point of intersection; that it was a negligent act in making the attempt under a state of facts where the least interruption or delay in the crossing over by the horse car would probably lead to an accident. In this view of the evidence and finding, it was not material that the driver had no ground to expect the particular negligent act of lowering the gates and the consequent obstruction to his passage across the steam-car tracks, or that he would have had time to cross if the delay thus occasioned had not occurred. The jury had the right to find it was negligent to cause his car to be so placed that any delay might bring on a collision. The apparent liability to accident, if any delay should occur from any cause whatever, was plain, and such fact would support a finding of negligence in attempting to cross before the steam-car train had passed. In such case it would be no excuse that the particular cause of a possible or probable delay, *viz.*, the lowering of the gates, [527] was not anticipated. The important fact was that there existed a possibility of delay, and, therefore, of very great danger, and that danger ought to have been anticipated and avoided. A delay might be occasioned at that time by an almost infinite number of causes; the horses might stumble, the harness might give way, the car might jump the track; a hundred different things might happen which would lead to a delay, and hence to the probability of an accident. It was not necessary that the driver should foresee the very thing itself which did cause the delay. The material thing for him to foresee was the possibility of a delay from any cause, and this he ought naturally to think of, and a failure to do so, and an attempt to cross the tracks, might be found by the jury to be negligence, even though he would have succeeded in getting across safely on the particular occasion if it had not been for the action of the gatekeeper in wrongfully lowering the gates. The act of the driver being a negligent act, and that act being in full force and in the very process of execution at the time the accident occurred, which accident would not have happened but for such negligent act, the fact that another negligent act of a third party contributed to the happening of the accident would not absolve the horse-car company. The negligent act of the horse-car driver joined with and became a part of the other act in wrongfully lowering the gates, as described, and both acts constituted but one cause for the commotion which naturally resulted therefrom, and on account of both of these acts, as parts of a whole transaction, the injury occurred.

In *Louisiana Mut. Ins. Co.* v. *Tweed*, 74 U. S. 7 Wall. 44 [19: 65], which was an action upon a policy of insurance that contained an exception against fire that might happen "by means of an invasion, insurrection, riot, or civil commotion, or any military or usurped power, *explosion*, earthquake, or hurricane," the insurance company was held not liable, although the fire by which the premises insured were burned was not directly caused by the explosion. The explosion occurred in another warehouse, by reason of which a fire was started that caught in still another building, and the fire from that building was communicated to the premises which were insured, and which were in that manner destroy- [528] ed by fire. The court held that as the whole fire was continuous from the time of the explosion, and was under full headway in about a half an hour, that the loss by fire was within the exception contained in the policy, and the insurers were not liable. In that case the question of proximate and remote causes was alluded to, and it was said, by Mr. Justice Miller, that "one of the most valuable of all the criteria furnished us by the authorities [by which to distinguish the remote from the proximate cause of damage] is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote." In one sense there was in that case a new cause existing in the fact that the explosion caused a fire in another building first, and that the fire was carried by the wind from that building to the building in question and not from the building in which the explosion occurred, and so it was claimed that the fire in the building covered by the policy was not directly caused by the explosion; but the court held that the distinction was not well founded, and that within the policy the insurers were not liable. The fire, in other words, occurred by means of the explosion and no new cause could be said to have intervened simply because the premises insured were burned by the fire communicated from a third building.

The case of *Scheffer* v. *Washington City, V. M. & G. S. R. Co.* 105 U. S. 249 [26: 1070], is an example of the other side. It was there held that where the passenger was injured by reason of a railway collision, and as a result of such injury he became disordered in mind and body, and some eight months after the collision committed suicide, his personal representatives could not maintain an action against the railway company for his death, as his own act was the proximate cause thereof. It was held that the relation of the negligence of the railroad company to the death of the passenger was too remote to be regarded as a cause of such death, or to justify a recovery against the company. Mr. Justice Miller, in delivering the opinion of the court, said:

"The argument is not sound which [529] seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to



Digitized by Google

that 'great first cause least understood,' in which the train of all causation ends. The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train. His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him and his death."

So in *Carter* v. *Towne*, 103 Mass. 507, and *Davidson* v. *Nichols*, 11 Allen, 514, cited by counsel, the intervention of another and sufficient cause to produce the result is apparent.

In the first case whatever of fault there was in the sale of the gunpowder by the defendant to the boy became absolutely blotted out when, with the knowledge of his aunt, who had charge of him and the house where he was living, it was placed in the cupboard, and a week afterwards his mother gave him some of the powder and he fired it off with her knowledge. The fact that some days later he took, with her knowledge, more of the powder and fired it off and was injured by the explosion, could not in any rational degree be said to be caused by the original wrongful sale of the powder.

In the other case, the druggist sold an article harmless in itself, mistaking it for another article, also harmless in itself, but another person afterwards intermixed the article sold with another article, making thereby a dangerous explosive from which injury was suffered. It was held that there could be no recovery against the druggist, because the sale was not the proximate cause of the accident.

These are plain cases of intervention of other 530] and *sufficient causes for the injuries sustained and where the original actions were too remote to be regarded as causes of such injuries. The other cases cited by counsel are clearly distinguishable in principle from this one. It is unnecessary after what has been said to further comment on them.

We think there was no error in the refusal of the court to charge as requested, and the exceptions to such refusal are therefore untenable.

Another objection now urged by the counsel for the defendant railroads is to the charge of the learned judge on the subject of damages. In response to the request of counsel for plaintiffs the judge charged that—

"If the jury find from all the evidence that the plaintiffs are entitled to recover in this action, then they shall award such damages *within the limits of the sum claimed in the declaration* as will fairly and reasonably compensate the plaintiff Margaret for the pain and suffering caused to her by the injury which she sustained and for the injury to her bodily health and power of locomotion, if any such they find, which she has sustained in the past and will continue to sustain in the future as a natural consequence of said injury, and for such internal injuries and impairment to her physical health as they may find to be established by the evidence."

And the judge also charged:

"Your verdict, if you find for the plaintiff, must be a matter to be fixed by you in the exercise of a sound discretion, subject of course to the limits placed in the declaration, of $30,000."

The objection which the counsel makes to this charge is that it amounted to a direct intimation to the jury that the finding of a verdict for the sum named in the declaration would not be excessive, and that the jury were misled by it, for they brought in a verdict for the plaintiff for $12,000, which the court actually found to be excessive, and directed that the verdict should be set aside unless plaintiffs consented to remit $6,000, which they did.

But we fail to find from the record that any exception was taken to the charge of the judge upon this subject of damages. *We do [531 not intimate that an exception would have been good, if it had been taken; it is sufficient that no exception raises the question, and we do not therefore either discuss or decide it.

It is also objected that there is a variance between the declaration and the proof, and that the trial court did not try the issues formed by the pleadings, but went beyond them and made a new case for the plaintiffs.

The declaration alleges that the female plaintiff was pushed and shoved from her seat in the car and thrown violently to the ground and was injured in that way. The court charged the jury that if they should find from the evidence that the female plaintiff either jumped off the car in a reasonable effort to avoid injury from collision, or was pushed or thrown from the car by some other passenger or passengers endeavoring in a reasonable manner to avoid injury from such collision, and was thereby injured, then the plaintiffs were entitled to recover.

Upon this subject of variance it was said by Mr. Chief Justice Alvey, in delivering the opinion of the court of appeals in this case, that—

"Whether she [Mrs. Hickey] fell in consequence of a push received from some other terrified passenger, or in an attempt to save herself by jumping from the car, it would make no material difference in her right to recover. It is not so much the manner of leaving the car as it was the exciting cause that operated upon her, either directly and caused her to jump to save herself, or upon others whose actions were justifiably incited by the impending danger, and, by natural impulsive movement, forced her from the car. In either case, her fall to the ground and injury were the direct consequences of the apparent and impending danger produced by the negligent conduct of the defendant's servants and employees. There is therefore no such variance as should defeat the plaintiffs' right to recover, if the facts were found to exist, as we must assume they were, according to the hypothesis of the instruction given by the court. It is said by the Supreme Court of the United States that no variance ought ever to be regarded material where the allegation and proof substantially *correspond, or where the variance [532



Digitized by Google

was not of a character which could have misled the defendant at the trial. *Nash* v. *Towne*, 72 U. S. 5 Wall. 689, 697 [18: 527, 528]. Here the variance that is supposed to exist was mainly produced by the proof introduced on the part of the defendants, and therefore there was no surprise to them, and it is not pretended that they were, in any manner, injured by the supposed variance. There is in reality no substantial variance between the allegations and proof."

We think this is a correct statement, and nothing more need be said upon the subject.

These are all the questions raised by the counsel for the horse-railroad company which we think it necessary to mention.

We have carefully examined the various points raised by the learned counsel for the steam-railroad company, and are of opinion that they show the existence of no material errors in the conduct of the trial which could or in any way did prejudice the company. There was proper and sufficient evidence submitted to the jury on the question of the employment of the gateman by the steam-railroad company. Although there was no direct evidence of an actual contract of employment entered into between the company and the gateman, yet there was ample evidence from which an inference of such employment might properly have been drawn by the jury. We also think the duties of a person so employed were correctly stated to the jury. The question whether the gateman neglected to properly discharge those duties was submitted to the jury in a manner to which no exception could be taken.

Upon an examination of the whole case, we find no error prejudicial to either company, and *the judgment against both must be affirmed.*

---

533] FREDERICK L. MANSON, *Appt.*,
v.
CHARLES C. DUNCANSON.

(See S. C. Reporter's ed. 533-543.)

*Nonresident minor—answer by guardian—valid decree—collateral attack.*

1. A nonresident minor may be bound by a decree for the sale of lands in which he is interested for the debts of his ancestor, without any service of process upon him, when a guardian *ad litem* is appointed to represent him.

2. An answer by a guardian *ad litem* of an alleged infant who was present when the guardian was appointed cannot be repudiated by the latter in a collateral proceeding on the ground that he was past twenty-one years of age when the answer was made.

3. Holding that advances by an administrator with the will annexed to pay debts of the decedent constitute a collectible debt against the estate for which real estate may be sold, even if erroneous, does not invalidate the decree of sale on collateral attack.

4. Error in holding that a trust did not protect real estate from the creditors of a beneficiary, or in holding that a will not so executed that it can be proved in the jurisdiction constitutes a sufficient exercise of a power of appointment, will not render the decision void on collateral attack.

[No. 127.]

*Argued January 8, 11, 1897. Decided April 19, 1897.*

APPEAL from a decree of the Court of Appeals of the District of Columbia reversing the decree of the Supreme Court of that District, adjudging that a decree entered in a former equity suit was null and void, that the deeds made under that decree were void and passed no title; that the defendant had no title to a certain parcel of land at the time of the condemnation, and was not entitled to the proceeds thereof; that the fund in the registry of the court be paid to the complainant, his solicitor or assigns, etc. *Decree of Court of Appeals affirmed.*

See same case below, 8 App. D. C. 260.

Statement by Mr. Justice **Shiras**:

In condemnation proceedings instituted by the United States in the supreme court of the District of Columbia to obtain land for a post-office site in the city of Washington, a Treasury draft for the sum of $17,000 was paid by the United States into the registry of that court on October 9, 1891, as compensation to the owner of a parcel of land designated in the proceedings as parcel 15, in square 323. Frederick L. Manson and Charles C. Duncanson both claimed this fund, each as having been owner in fee simple of the said parcel 15 at the time of the condemnation, and on June 20, 1892, Manson filed his bill in equity in the said court against Duncanson, seeking to enjoin the defendant from receiving the fund, and asking for an order directing payment of the same to the complainant. The facts presented by the case which arose upon this bill are substantially as follows:

On August 2, 1862, James W. Barker, who then owned a part of lot 6 in the said square, which part included the land designated in the said proceedings as parcel 15, executed a deed, wherein his wife joined, conveying the property to *William R. Woodward, in trust. [534 William L. Manson and Sarah Jane Manson, his wife, united with Barker and wife in the execution of this deed, and it was recited therein that Sarah Jane Manson was possessed of property separate from her husband, which she was desirous of having invested in the said premises, and that therefore William L. Manson, with her consent and concurrence, had entered into a contract with Barker for the purchase of the same, and for the purchase price thereof was to pay a certain amount in cash and give certain notes, the amount of one of which was to discharge a purchase-money debt due by Barker. It was further recited that all of the notes had been executed by Manson and wife, and delivered. The deed provided that Woodward should hold in trust to secure the payment of the notes, and, until there should be some default in payment of the same, to permit Sarah Jane Manson to occupy and enjoy the premises, and receive the

NOTE.—*As to infancy not a defense in trover, or for a tort*, see note to Vasse v. Smith, 3: 207.

*As to acts of infant, when void, and when voidable, and by whom voidable*, see note to Tucker v. Moreland, 9: 345.

*As to infancy in avoidance of deeds*, see note to Harding v. Handy, 6: 429.



Digitized by Google

rents thereof for her separate use; and upon the full payment of all the notes, to make conveyance of the property upon the trusts and for the purposes expressed and declared for the benefit of Sarah Jane Manson in and by a certain other deed or declaration, bearing even date with the conveyance described.

The deed or declaration referred to was executed by Manson and his wife, and described the said Woodward and Erastus Poulson as parties thereto of the second and third part respectively. It directed that, after payment of the notes, etc., Woodward should convey the premises to Poulson, who should thenceforth stand seised of the same upon the trusts following, *viz.*:

"In trust for the said Sarah Jane Manson for and during her life, and to permit her to occupy said premises and to receive the rents and profits thereof for her own sole and separate use, free from the interference of her present or any future husband, and without being liable for his debts or engagements, her receipt alone being a valid discharge for such rents and profits.

"And upon further trust that it shall be lawful for the said Sarah Jane Manson at any time, [535] and from time to time *during her life, to dispose of the said premises, either by absolute sale or mortgage thereof, as she may think proper, in which the said party hereto of the third part, his heirs and assigns, shall join, such disposition to be made by deed or deeds to be executed and acknowledged by the said trustees, and by the said Sarah Jane Manson as if she were sole and unmarried. And in default of any such sale or mortgage, or so far as the same shall not extend, upon further trust for such person or persons and for such estate, and in such parts, shares, and proportions as she, the said Sarah Jane Manson, shall or may, from time to time, by any deed or instrument of writing, or by her last will and testament, under her hand and seal (and which she is hereby authorized to make), limit, direct, or appoint, give or devise the same; and in default of any such limitation, direction, and appointment, gift or devise, in trust for such child or children as she shall leave surviving her, and the issue of any deceased child or children equally share and share alike, such issue taking his, her, or their parent or parents' share; and for default of all such children or issue, then in trust for the right heirs of the said Sarah Jane Manson forever. And it is further declared that all moneys which shall or may be raised by sale or mortgage of the said premises, or any part thereof, shall be paid to the said Mary Jane Manson, and be disposed of as she shall or may think best, her receipt being a valid discharge therefor; and the party paying the same not being bound to see to the application or disposition thereof."

On August 2, 1865, all of the notes then having been paid, Barker and Woodward, by deed of that date, released and conveyed the property to Poulson, in trust for the sole and separate use and benefit of Sarah Jane Manson, exclusive of her husband, and upon the trusts declared in the deed or declaration aforesaid.

Sarah Jane Manson died in Bucks county, Pennsylvania, on September 4, 1870, leaving a will, dated April 20, 1865, whereby she directed that her debts be paid, and then devised and bequeathed all her estate, real and personal, as follows: Her husband, William L. Manson, to take and receive all the *rents and [536] profits of her estate during his life and apply the same for his support and the support and education of her three children, namely, Frederick L. Manson, William H. Walters (a child of the testatrix by a former husband), and Cecelia M. Manson, and, on the death of her husband, all of her estate, real and personal, to be equally divided, share and share alike, among the said three children, when the youngest of them should reach the age of twenty-one years, and not before. This will was attested by only two witnesses, and was therefore not effectual to pass real estate in the District of Columbia, and was never admitted to probate therein. On September 12, 1870, it was duly admitted to probate in Philadelphia, and letters of administration, with the will annexed, were granted to William L. Manson, the surviving husband.

In her lifetime, Sarah Jane Manson sold a part of the property embraced in the said deeds, but made no sale or conveyance of the said parcel 15.

On June 18, 1874, William L. Manson filed a creditor's bill in the said court against Erastus Poulson, trustee; Frederick L. Manson, William H. Walters, and Cecelia M. Manson, stating that all the parties were citizens of the state of Pennsylvania; that Poulson was sued as trustee by virtue of the deeds aforesaid, and the other defendants as heirs at law of Sarah Jane Manson, and that the defendants Frederick L. Manson and Cecelia M. Manson were minors. The bill alleged that Sarah Jane Manson, at the time of her death, was seised of the said parcel of land in her own right, and free from any right or claim of her husband, and died intestate as to the same; that the complainant settled her estate in Bucks county, Pennsylvania, by virtue of said letters of administration, a certified copy of which was filed as an exhibit; that her personal estate proved insufficient to pay her debts, and that the complainant made advances out of his own funds towards the payment of the same, and that such advances, together with the assets of the estate, paid in full all the just claims proved against the decedent; that the complainant paid out of his own funds on such account, over and above the *assets coming into his hands, the sum of [537] $2,051.26, which amount was justly due him; and that no funds remained from which he might be reimbursed, unless the said real estate should be sold and the proceeds thereof applied to the payment of his claim. The said deeds were referred to and made a part of the bill. The complainant prayed that a trustee might be appointed to sell and convey the property, and out of the proceeds arising from the sale to pay the indebtedness due the complainant and distribute the balance; that guardians *ad litem* might be appointed to appear and defend the interests of each of the said infants; that writs of subpœna might be issued against each of the said defendants, Erastus Poulson, trustee, Frederick L. Manson, William H. Walters, and Cecelia M. Manson; and that the complainant might have such other



Digitized by Google

and further relief as the nature of the case might require.

Process was issued against all of the defendants, and was returned by the marshal of the District of Columbia not found. Orders were thereupon entered appointing commissioners in Philadelphia and in Fort Clark, Texas, to appoint guardians *ad litem* to take the answers of the infant defendants Cecelia M. Manson and Frederick L. Manson. These commissions were duly executed, and answers of the said infant defendants, by guardian *ad litem*, were duly filed, whereby all interests and rights of the infants were claimed, but submitted to the court. Erastus Poulson, trustee, filed an answer, admitting the allegations of the bill, and submitting himself to the orders of the court. Walter, the adult defendant, also filed an answer, wherein he claimed all such interest as he might be entitled to, and submitted his rights to the court.

The cause was heard upon the pleadings and upon a certified copy of the confirmed report of the auditor of the orphans' court of Philadelphia, and on March 18, 1875, a decree was entered whereby it was ordered and adjudged that the complainant's claim set forth in said creditor's bill be recognized as a valid lien against the property described therein, and that the property be sold, and the proceeds of sale be applied, first, in satisfaction of all proper taxes and assessments or other prior en-[538] cumbrances due and unpaid upon *the property, and secondly, to the payment of the claim of the complainant; the balance, if any, to be distributed *pro rata* among the heirs of Sarah Jane Manson. A trustee was appointed, who, after having given notice by advertisement, was to proceed to make the sale as aforesaid, and thereafter to report the same to the court, and upon final ratification thereof to "convey to the purchaser or purchasers, by good and sufficient deed, all right, title, and interest of said defendants or any of them, as of said complainant, in and to said property."

The sale, having been duly made and reported by the trustee, was finally ratified on May 18, 1875, and the trustee, W. P. Bell, subsequently conveyed the property to Frederick Volk, the purchaser. Volk afterwards conveyed the same to Louis Schmid, Edward Schmid, and Alexander Schmid, and they, by deed dated June 21, 1890, conveyed to Charles C. Duncanson. The proceeds of sale were applied in accordance with the terms of the decree, but there does not appear to have been any balance for distribution among Sarah Jane Manson's heirs at law.

William L. Manson died in the year 1877.

The present suit was commenced, as aforesaid, by Frederick L. Manson, who filed his bill of complaint in the said court on June 20, 1892. The bill set out, in substance, the facts stated above, and alleged that, upon the death of Sarah Jane Manson, the complainant and Cecelia M. Manson and William H. Walters became the owners, by purchase, of the said parcel 15, by virtue of the aforesaid deeds of 1862 and 1865; that nothing set out in the said creditor's bill served to give the court jurisdiction of the subject-matter thereof, or of any person mentioned therein, and that the court had no jurisdiction to make any order in the said proceedings except an order dismissing the bill.

It was further alleged that in April, 1878, the complainant, while a minor, enlisted with the consent of his father in the Fourth United States Cavalry, and remained in the army until 1881, when he was honorably discharged; that during the intervening time he was stationed at military posts in Texas *and Kansas,[539] and since his discharge had resided continuously in Illinois and Kansas; that until August 15, 1891, he had no knowledge of the said equity proceedings, or of the said answer or any answer filed or intended to be filed therein in his behalf, or of the existence of the said deeds of 1862 and 1865, or the interest they vested in him, or of the said condemnation proceedings; that shortly after learning of the existence of the deeds, and of the record in the said suit, he filed a petition in the condemnation proceedings, claiming the proceeds of parcel 15, but that, as he was informed, and believed, the court was of opinion that it had no jurisdiction in those proceedings to pass upon contested claims to the said proceeds. The complainant further alleged that his sister, Cecelia M. Manson, left home shortly after his enlistment in the army, and sought her own livelihood; that since the complainant was informed of the property interests in question he had made diligent inquiry concerning the whereabouts of his said sister and of his said brother, William H. Walters, and had been unable to learn anything concerning the whereabouts of his sister since 1880, or of his brother for several years prior thereto, and that therefore he believes them both to be dead, and to have died intestate, leaving the complainant their only heir at law.

The complainant prayed the court to declare that all decrees, orders, and proceedings had in the said suit were null and void for want of jurisdiction; that the sale made and the deed executed by the trustee appointed in that suit, as well as all other deeds executed under the decree therein, were void and of no effect; and that the complainant was the legal and equitable owner of parcel 15 at the time of the condemnation of the same, and was entitled to the said fund. He further prayed that the defendant might be enjoined from receiving the fund.

The defendant filed his answer on September 6, 1892, insisting that the said court had before it, by due process of law, all the parties in interest, and therefore had jurisdiction to enter the said decree and to order the said sale, and that the defendant's title, acquired by conveyance under the decree, *was valid. [540] He denied the allegations of the complainant as to the time when he was first informed of the said suit, and alleged that it would be inequitable if the complainant should be allowed the benefit of any alleged defect in the said proceedings in view of the fact of his having waited until the expiration of fourteen years after the death of William L. Manson, who could have testified as to the complainant's knowledge of the proceedings, and until the expiration of sixteen years after the sale, before setting up any claim to the property; that since the sale the respective holders of the property had been in the open, notorious, and



Digitized by Google

adverse possession thereof under the decree; that the complainant had been guilty of laches, and on that account was not entitled to relief. The defendant asked for strict proof of the alleged death and intestacy of the complainant's sister and brother, provided proof of the same should be material. He prayed that it might have the full benefit of all objections to the bill that could have been raised and availed of upon demurrer thereto.

Replication was entered and testimony taken, and on June 14, 1893, after final hearing, a decree was entered whereby, "it appearing to the court from an examination of the record in equity cause numbered 3796, referred to in this cause, that there was nothing set forth and contained therein to give the court jurisdiction to sell the real estate described therein," it was ordered and adjudged that the decree entered in the said cause was null and void; that the deeds made under that decree were void and passed no title; that the defendant had no title to parcel 15 at the time of the condemnation, and was not entitled to the proceeds thereof; that the defendant's plea of laches be not sustained; and that the fund in the registry of the court be paid to the complainant, his solicitor of record, or assigns.

Duncanson thereupon appealed to the court of appeals of the District of Columbia, where the decree of the court below was reversed. Manson then appealed to this court.

*Messrs* **Walter H. Smith** and *Charles H. Armes* for appellant.

*Messrs.* **William F. Mattingly** and *Henry Wise Garnett* for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

The only matter for our consideration relates to the validity of a decree of the supreme court of the District of Columbia of May 18, 1875, ratifying and confirming the sale of the property in dispute, and that depends upon the solution of the question whether that court had jurisdiction of the person of Frederick L. Manson and of the subject-matter of the suit in which the decree was entered.

There was no service of a subpœna upon Frederick L. Manson, but there was an appointment of a guardian *ad litem* by commissioners appointed by the court; and an answer was taken and filed by such guardian. Such a method of appointment of a guardian *ad litem* is spoken of in *Bank of United States* v. *Ritchie*, 33 U. S. 8 Pet. 128 [8: 890], as according to the most approved usage. A full discussion of this subject and of the law as it existed in Maryland prior to the erection of the District of Columbia will be found in the case of *Snowden* v. *Snowden*, 1 Bland, Ch. 550, and the case of *Hammond* v. *Hammond*, 2 Bland, Ch. 306, 350; and wherein the practice of bringing in a nonresident minor by the appointment of a guardian *ad litem*, and thus subjecting him to a decree for the partition of land, and for the sale of lands to pay the debts of a decedent, is recognized as usual and proper.

In the case of *New York L. Ins. Co.* v. *Bangs*, 103 U. S. 435 [26: 580], this court held that it was not competent for the Federal courts to appoint a guardian *ad litem* for a nonresident or absent infant, so as to subject him to a purely personal claim. But it was distinctly admitted that where the infant had an interest in real estate within the state or district, the rule was otherwise, and that the power to appoint a guardian *ad litem* in such a case was founded in the general powers of courts of equity. In this case it was said: "Our attention has been called to several cases of the state courts, in which it has been held that a *decree or judgment could not be[542 collaterally attacked, though rendered in a case where a guardian *ad litem* had been appointed without service of process on the infant. Such are the cases of *Preston* v. *Dunn*, 25 Ala. 507; *Robb* v. *Irwin*, 15 Ohio, 689; and *Gronfier* v. *Puymirol*, 19 Cal. 629. All of them are illustrative of the position we have stated; they all relate to the interest of the infant in real property in the state."

In the answer, which was sworn to by the guardian, Frederick L. Manson said that he was an infant under twenty-one years of age, that he claimed such interest in the premises as he was entitled to, and submitted such interest to the protection of the court. This answer was subscribed and sworn to on the 1st day of December, 1874. In his testimony, taken in the present case, Manson claims to have been past twenty-one years of age when that answer was made. If so, as the evidence is clear that he was present when the appointment of the guardian was made, he must be deemed to have regarded the answer as his own, and cannot be heard to repudiate it in a collateral proceeding.

Moreover, it may be claimed with some show of reason that if the trust deeds of 1862 and 1865 really vested the legal title to the land in question in Erastus Poulson, subject to the trusts set forth in those instruments, and such is the theory of the complainant's bill in the present suit, he, as trustee, represented all the parties beneficially interested, and they, even if not parties, are bound by the decree unless it is impeached for fraud or collusion between him and the adverse parties.

In *Shaw* v. *Norfolk County R. Co.* 5 Gray, 162, it was said:

"The rule of equity pleading, that all persons interested in the subject-matter of the suit, and whose rights may be affected by a final decree, must be made parties to the bill, is subject to several exceptions, which are as well established as the rule itself. . . . It has been held that, where persons are made trustees for the payment of debts and legacies, a suit may be sustained in which the trustees only are either plaintiffs or defendants, without joining the creditors or legatees for whom *they are trustees, and whose rights [543 and interests are directly involved in the case. *Fenn* v. *Craig*, 8 Younge & C. 216. Upon this principle, it has been decided by this court that, in a bill concerning the title to the assets of an insolvent debtor, it is sufficient, without joining the creditors, to make the assignees parties, who alone have the right to claim the property, the legal title being in them; and who are authorized and empow-



Digitized by Google

ered and whose duty it is, to represent the interests of and to act for all the creditors interested in the trust. *Stevenson* v. *Austin*, 8 Met. 474. In like manner, it has been determined that a trustee holding a mortgage in trust for several creditors may maintain a bill to foreclose, without joining his *cestuis que trust* as parties.

"The principle seems to be well settled that in an action by a creditor to reach trust property, in the hands of administrators or trustees who have the control of, and whose duty it is to protect, the property, the *cestuis que trust* need not be joined as parties. The defense of the trustees is their defense, and their presence in court is not necessary to the protection of their interests." *Winslow* v. *Minnesota & P. R. Co.* 4 Minn. 317 [77 Am. Dec. 519].

In the case of *Kerrison* v. *Stewart*, 93 U.S. 155 [23: 843], the question was whether the creditors of an insolvent firm, in whose favor a deed of trust had been executed by the firm, were bound by a decree against the trustee, and this court held that "where a trustee is invested with such powers, and subjected to such obligations, that his beneficiaries are bound by what is done against him or by him, they are not necessary parties to a suit against him by a stranger to defeat the trust in whole or in part. In such case, he is in court on their behalf; and they, though not parties, are concluded by the decree, unless it is impeached for fraud or collusion between him and the adverse party."

With the proper parties before the court, the next question is whether the court had such jurisdiction over the subject-matter of the suit as to protect its decree from attack in a collateral proceeding.

That the bill in this case is collateral in its nature is obvious. It does not seek the correc-
544] tion of errors in the proceedings or *decree in the former case. Its avowed object is to have the former proceedings declared null and void, because taken in a court without jurisdiction of either person or subject-matter.

That the court had jurisdiction to decree the sale of real estate to pay the debts of a deceased debtor and owner is undeniable. The bill contained averments that the complainant was a creditor of the estate of Sarah J. M. Manson; that the decedent had died intestate as to her real estate situated in the city of Washington and District of Columbia; that the personal estate was inadequate to pay the debts of the decedent; that the decedent, at the time of her decease, was seised of described real estate. These are the usual and necessary allegations of a bill in such a case, and, if found to be true, plainly warranted a decree of sale.

It is true that Erastus Poulson, trustee, was made a party defendant, and that the several deeds of 1862 and 1865, creating and defining the trust, were referred to, and, in effect, made part of the bill, and also copies of the will of the decedent and of letters of administration thereon.

It is claimed, on behalf of the appellant, that the bill did not sufficiently allege the existence of unpaid debts. The allegation in question was as follows:

"Your complainant settled the estate of Sarah J. M. Manson, deceased, by virtue of certain letters of administration *c. t. a.* issued from the office of the register for the probate of wills and granting letters of administration, in and for the city of Philadelphia, a certified copy of which is hereto annexed and marked 'Complainant, Exhibit A,' as part of this bill; and the personal estate of the said decedent has been fully and finally administered and the same would have proved insufficient and inadequate to pay the debts of the estate, but your complainant made advances out of his own fund to pay the indebtedness of said estate in full, and said advances, together with assets of the estate, paid in full all the just claims filed and proved against said decedent, and your complainant has paid out of his own funds, on said account, over and above assets coming into his hands, the sum of $2,051, which amount is justly due him, and there* remains [545 no fund from which to reimburse him, unless the real estate hereinbefore described be sold and so much of the proceeds as may be necessary be applied to the payment of your complainant's claim."

We are unable to accept the appellant's contention that these allegations, taken to be true, do not disclose the existence of debts collectible by proceedings in the District court, and that an administrator with the will annexed cannot be reimbursed for advances made by him in the process of settling the estate.

At all events, even if the District court erred in holding that the allegations and proof were sufficient to establish the existence of a collectible debt, such an error did not invalidate the decree so as to subject it to attack by a collateral proceeding.

The next contention, and one that has been ably argued, is that the bill for a sale showed that the court had no jurisdiction of the subject-matter, because it showed that Sarah J. Manson, the decedent, had no interest in the realty at the time the bill was filed; that she had had a life estate only.

It must be conceded that if the property sold was not owned by the decedent, and was not subject to her debts, the decree of sale was void; and it must also be conceded that, by the allegations of the bill, the court was obliged to take notice of the contents and legal import of the deed creating and defining Poulson's estate as trustee.

It is admitted that the real estate in question was paid for by moneys belonging to Mrs. Manson; that, under the terms of the trust deeds, she had the right to occupy the premises, and to receive the rents and profits thereof for her sole and separate use, her receipt alone being a valid discharge for such rents and profits; that it should be lawful for her, at any time, and from time to time, during her life, to dispose of said premises either by absolute sale or mortgage thereof as she might think proper, that, in default of any such sale or mortgage, or so far as the same shall not extend, upon further trust for such person or persons, and for such estate and in such parts, shares, and proportions, as she, the said Sarah J. *Manson, [546 should or might from time to time, by any deed or instrument of writing, or by her last will and testament, under her hand and seal (which will she was authorized to make), limit, direct, or



Digitized by Google

appoint, give or devise, the same; and in default of any such limitation, direction, and appointment, gift or devise, in trust for such child or children as she should leave surviving her, and the issue of any deceased child, such issue taking his, her, or their parent or parents' share; and for default of all such children or issue, then in trust for the right heirs of the said Sarah J. Manson forever; and that all money which should or might be raised by sale or mortgage of the said premises or any part thereof should be paid to the said Sarah J. Manson and be disposed of as she should or might think best, her receipt being a valid discharge therefor, the party paying the same not being bound to see to the application or disposition thereof.

The record does not inform us upon what view of the legal import of these provisions the District court proceeded in awarding the decree of sale. It may have been thought that such a trust did not protect the real estate described from the creditors of Sarah J. Manson, either during her life or at her death. *Nichols* v. *Eaton*, 91 U. S. 716 [23: 254]. Or the court may have regarded the will of Sarah J. Manson, though not so executed as to permit it to be proved in the District of Columbia, as a sufficient exercise of the power of appointment, in which case, according to a rule well established in England and in this country, where a person has a general power of appointment, either by deed or will, and executes this power, the property appointed is deemed, in equity, part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees. *Clapp* v. *Ingraham*, 126 Mass. 200; *Brandies* v. *Cochrane*, 112 U. S. 344 [28: 760].

We do not wish to be understood as intimating that either of such views would have been a sound construction of the trust deed; but we do say that these were questions before the District court for decision, and if any error was committed by that court the remedy was by appeal or by a bill of review if duly filed.

547] *We adopt the language and reasoning of the court of appeals in this case:

"It is certainly the policy of the law to maintain judicial sales, and every reasonable intendment should be indulged to uphold them. Otherwise the public would become distrustful, and fair prices for property sold under judicial authority would seldom be obtained. Purchasers, while they are required to take notice of the existence and terms of the decrees or judgments under which they purchase, and as to the parties bound thereby, cannot be required to become judicial critics, and to pass in review, at their peril, upon the correctness of the proceedings upon which the judgments or decrees may be founded. As was pertinently said by the Supreme Court of the United States, in the case of *Thompson* v. *Tolmie*, 27 U. S. 2 Pet. 168 [7: 385]: 'After a lapse of years, presumptions must be made in favor of what does not appear. If the purchaser was responsible for the mistakes of the court, in point of fact, after they had adjudicated upon the facts, and acted upon them, these sales would be snares for honest men. The purchaser . . . is not bound to see whether the court was mistaken in the facts of debts and children. The decree of the orphans' court in a case within its jurisdiction is reversible only on appeal, and not collaterally in another suit. . . . When a court has jurisdiction it has a right to decide every question that may arise in the cause; and whether its decisions be correct or not, its judgment, until reversed, is regarded as binding in every other court.' These principles apply in all respects and with special force in this case. It was for the court whose decree is attempted to be impeached, not only to decide on the facts before it, but upon the construction and legal effect of all deeds and muniments of title upon which the proceeding was based. The court having general jurisdiction over the subject-matter of decreeing the sale of real estate of a deceased debtor for the payment of debts, had the right and was required to determine the question as to the liability of the property for the debts, and whether the case was within its jurisdiction; and though its decision may have been erroneous, it could only be reversed upon a direct appeal."

548] "It is of no avail," said this court in *Cooper* v. *Reynolds*, 77 U. S. 10 Wall. 308 [19: 931], "to show that there are errors in that record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has been often held by this court and by all courts, and it takes rank as an axiom of the law."

And in *Nash* v. *Williams*, 87 U. S. 20 Wall. 226 [20: 254], it was declared that "the settled rule of law is, that jurisdiction having attached in the original case everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud."

Having concluded that the District court had jurisdiction over the parties and the subject-matter, and that its decree cannot be successfully impeached in this collateral proceeding, it is unnecessary to consider other questions suggested in the record and discussed in the briefs of the counsel.

*The decree of the Court of Appeals is affirmed.*

---

## *Ex parte* LENNON.

(See S. C. Reporter's ed. 548-557.)

*Habeas corpus—jurisdiction—suit to enforce interstate commerce act—injunction—objection to—limit of restraint—contempt of an injunction.*

1. A writ of habeas corpus cannot be made use of to perform the functions of a writ of error or an appeal.

2. Where the requisite citizenship appears upon the face of the bill, the jurisdiction of the court cannot be collaterally attacked by evidence de-

NOTE.—*As to when habeas corpus may issue and when not; and from what courts and by what judges; what may be inquired into by writ of,*—see note to United States v. Hamilton, 1: 490.

*As to what questions may be considered on habeas corpus*, see note to *Ex parte* Carll, 27: 288.



Digitized by Google

*hors* the record upon habeas corpus by one who was not a party to the original case.

2. A bill to enforce provisions of the interstate commerce act of 1887 by requiring a railroad company to receive cars from another line in the course of interstate business is within the jurisdiction of a Federal court, irrespective of the citizenship of the parties.

3. A person having actual notice of an injunction is amenable thereto, although he was not a party to the suit in which the injunction was issued, and has not been served with process, or with notice of application for, or a copy of, the injunction.

4. An injunction against refusing to extend to a certain railway such facilities for the interchange of traffic on interstate business as are enjoyed by other companies, and against refusing to receive its cars billed from one state to another, is not subject to the objection that it attempts to compel the performance of personal contracts for service by railroad employees.

5. Equity is not limited to the restraint of a contemplated or threatened action, but may even require affirmative action where the circumstances of the case demand it.

6. An announcement that he quits the service, made by a locomotive engineer when ordered to take into his train a car which his brotherhood had boycotted, will not relieve him from liability for contempt of an injunction against refusing to receive such cars, when he made the announcement merely as a trick and device to avoid obeying the order of the court, and as soon as he was instructed by the brotherhood, after he had held the train for a few hours, continued with this train to its destination, and said nothing more about quitting.

[No. 254.]

*Submitted March 30, 1897. Decided April 19, 1897.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Sixth Circuit to review a decree of that court affirming the decree of the Circuit Court of the United States for the Northern District of Ohio dismissing a petition for a writ of habeas corpus, to relieve James Lennon from custody for contempt in disobeying an injunction. *Judgment of court of appeals affirmed.*

See same case below, 54 Fed. Rep. 746, 19 L. R. A. 395, 5 Inters. Com. Rep. 545, 22 U. S. App. 561.

Statement by Mr. Justice **Brown**:

This was a petition for a writ of habeas corpus originally filed in the circuit court for the northern district of Ohio.

The petitioner alleged that he was a citizen of the state of Ohio, and was unlawfully restrained of his liberty by the marshal, under an order of the circuit court of the United States, made in a case pending in that court, wherein the Toledo, Ann Arbor, & North Michigan Railway Company, a corporation of the state of Michigan, was complainant, and several railway companies, citizens of Ohio, as well as the Michigan Central Railroad Company, a citizen of Michigan, were defendants.

The bill in that case, which was annexed to the petition as an exhibit, averred the complainant to be the owner of a line of railroad from Toledo, Ohio, northwesterly through the state of Michigan; that a large part of its business consisted in the transportation of freight cars from points in the states of Michigan, Minnesota, and Wisconsin to points in Ohio and other states east thereof, and that it was engaged as a common carrier in a large amount of interstate commerce, which was regulated and controlled by the interstate commerce act of Congress. The bill further averred that the defendants' lines of railroad connected with those of complainant at or near Toledo, and that a large and important part of its business consisted in the interchange of freight cars between the defendant and complainant companies, and was subject to the provisions of the interstate commerce act; that it was the duty of the defendant companies to afford reasonable and equal facilities for the interchange of traffic, and to receive, forward, and deliver freight cars in the ordinary transaction of business, without any discrimination; that the defendant companies and their employees had given out and threatened that they would refuse to receive from complainant cars billed over its road for transportation by complainant to their destination, for the reason that the complainant had employed as locomotive en-[550 gineers in its service men who were not members of the Brotherhood of Locomotive Engineers, "an irresponsible voluntary association," and that the locomotive engineers in the employ of the defendant companies had refused to handle cars to be interchanged with the complainant's road; notwithstanding that they continued to afford the other railroad companies full and free facilities for the interchange of traffic, while refusing to transact such business with the complainant, thereby illegally discriminating against it.

Upon the filing of this bill, and upon the application of the complainant, the circuit court issued an injunction against the defendants, their officers, agents, servants, and employees, enjoining them from refusing to afford and extend to the Toledo, Ann Arbor, & North Michigan Railway Company the same facilities for an interchange of interstate business between the companies as were enjoyed by other railway companies, and from refusing to receive from the complainant company cars billed from points in one state to points in another state, which might be offered to the defendant companies by the complainant.

The injunction was served upon the Lake Shore & Michigan Southern Railway Company, one of the defendants, one of whose employees was the appellant, James Lennon, a locomotive engineer, who had received notice of the injunction, and, still continuing in the service of the company, had refused to obey it.

*As to suspension of writ of habeas corpus*, see note to Luther v. Borden, 12: 581.

*As to when an injunction to restrain acts of public officers will be granted*, see note to Mississippi v. Johnson, 18: 437.

*As to power of court to punish for contempt*, see note to *Ex parte* Robinson, 22: 205.

*That there is no review of decree punishing for contempt; limits to rule*,—see note to New Orleans v. New York Mail S. S. Co. 22: 354.

*That where an illegal combination is proved, declarations of one about the enterprise are evidence against co-conspirators*, see note to Lincoln v. Claflin, 19: 106.



Digitized by Google

Thereupon the Lake Shore Company applied to the court for an attachment against Lennon, and certain others of its engineers and firemen, setting forth that, with full knowledge of the injunction theretofore made, they had refused to obey the order of the court, and deserted their locomotives and engines in the yard of the company, for the reason that Ann Arbor cars of freight were in the trains of such company, and that they had refused to haul such cars and perform their service for that reason.

The persons named, including the petitioner Lennon, being served with an order to show
551] cause, appeared in pursuance of *such order in person and by counsel, and witnesses were examined as to their knowledge of, and as to their violation of, the order. The court found that Lennon was guilty of contempt in disobeying the order of injunction, and imposed a fine of $50 and costs. *Toledo, A. A. & N. M. R. Co.* v. *Pennsylvania Co.* 54 Fed. Rep. 746 [19 L. R. A. 395, 5 Inters. Com. Rep. 545].

Thereupon Lennon filed this petition, setting forth the above facts, and alleging that the circuit court had no jurisdiction or lawful authority to arrest or proceed against him in manner as aforesaid, and that its order and judgment—whereby he was committed to the custody of the marshal—were without authority of law and void: (1) that such order was issued in a suit whereof the circuit court had no jurisdiction, because the complainant and one of the defendants, namely, the Michigan Central Railroad Company, were, at the time of the filing of the bill, and ever since have been, citizens of the same state, and that said suit did not arise under the Constitution and laws of the United States; (2) that the circuit court had no jurisdiction of the person of the petitioner, because he was not a party to the suit, nor served with any subpœna notifying him of the same; had no notice of the application for the injunction, nor was served with a copy thereof; nor had any notice whatever of the issuing of such injunction, nor of its contents; (3) that the circuit court was also without jurisdiction to make the order, because it was beyond the jurisdiction of a court of equity to compel the performance of a personal contract for service and to interfere, by mandatory injunction, with the contract between himself and the Lake Shore & Michigan Southern Railway Company.

Upon a hearing in the circuit court it was ordered that the petition be dismissed. Lennon, after appealing to this court, which held it had no jurisdiction and dismissed the appeal (150 U. S. 393 [37: 1120]), thereupon appealed to the circuit court of appeals for the sixth circuit, which affirmed the decree of the circuit court (*Lennon* v. *Lake Shore & M. S. R. Co.* 22 U. S. App. 561), whereupon petitioner applied for and obtained a writ of certiorari from this court.

*Messrs.* **G. M. Barber, Walter H. Smith, Frank H. Hurd,** and *James H. Southard* for James Lennon.

*Mr.* **George C. Greene,** by special leave, for Lake Shore & Michigan Southern Railway Company.

**Mr. Justice Brown** delivered the opinion of the court:

The only question which can properly be raised upon this writ is whether the circuit court exceeded its jurisdiction in holding the petitioner for a contempt and in imposing upon him a fine therefor. We are not at liberty to consider the testimony, or to inquire whether the facts, as they appeared upon the hearing, justified the action of the circuit court. It is only upon the theory that the proceedings and judgment of the court were nullities that we are authorized to reverse its action. It has been too frequently decided to be now open to question, that a writ of habeas corpus cannot be made use of to perform the functions of a writ of error or an appeal. *Ex parte Kearney*, 20 U. S. 7 Wheat. 38, 43 [5: 391, 392]; *Ex parte Terry*, 128 U. S. 289 [32: 405]; *Ex parte Cuddy*, 131 U. S. 280 [33: 154]; *Ex parte Nielsen*, 131 U. S. 176 [33: 118]; *Ex parte Tyler*, 149 U. S. 167 [37: 690]; *United States* v. *Pridgeon*, 153 U. S. 48 [38: 631].

Acting upon this theory, the petitioner claims that the circuit court exceeded its jurisdiction in adjudging him guilty of contempt, for the reason that it had no jurisdiction of the original bill, because one of the defendants to such bill was a citizen of the same state with the complainant; because petitioner was not a party to the suit and was never served with a subpœna or the injunction; and, finally, because it was beyond the jurisdiction of a court of equity to compel the performance of a personal contract for service.

1. The original bill averred the complainant—the Toledo, Ann Arbor, & North Michigan Railway Company—to be a corporation and citizen of the state of Michigan, and the several railway companies defendant to be citizens either of Pennsylvania or Ohio; and there is nothing in the record of *that case to show [553 this averment was not true. It only appears that to be otherwise by an allegation in the petition for the habeas corpus; and the question at once arises whether, where the requisite citizenship appears upon the face of the bill, the jurisdiction of the court can be attacked by evidence *dehors* the record in a collateral proceeding by one who was not a party to the bill. We know of no authority for such action. The general rule is that parties to collateral proceedings are bound by the jurisdictional averments in the record, and will not be permitted to dispute them except so far as they may have contained a false recital with respect to such parties. Doubtless the averments with regard to citizenship might have been directly attacked by anyone who was a party to that suit. But this cannot be done upon habeas corpus. *Michaels* v. *Post*, 88 U. S. 21 Wall. 398 [22: 520]; *Hudson* v. *Guestier*, 10 U. S. 6 Cranch, 281 [3: 224]; *McCormick* v. *Sullivant*, 23 U. S. 10 Wheat. 192, 199 [6: 300, 302]; *Thompson* v. *Tolmie*, 27 U. S. 2 Pet. 157 [7: 381]; *Ex parte Watkins*, 28 U. S. 3 Pet. 193 [7: 650]; *Grignon* v. *Astor*, 43 U. S. 2 How. 319 [11: 283]; *United States* v. *Arredondo*, 31 U. S. 6 Pet. 691, 709 [8: 547, 554]; *Florentine* v. *Barton*, 69 U. S. 2 Wall. 210 [17: 783]; *Comstock* v. *Crawford*, 70 U. S. 3 Wall. 396 [18: 34];



Digitized by Google

*Dyckman* v. *New York*, 5 N. Y. 434; *Jackson* v. *Crawfords*, 12 Wend. 533; *Betts* v. *Bagley*, 12 Pick. 572; *Fisher* v. *Bassett*, 9 Leigh, 119. 131, 33 Am. Dec. 227; *Dowell* v. *Applegate*, 152 U. S. 327 [38: 463].

Irrespective of this, however, we think the bill exhibited a case arising under the Constitution and laws of the United States, as it appears to have been brought solely to enforce a compliance with the provisions of the Interstate commerce act of 1887, and to compel the defendants to comply with such act, by offering proper and reasonable facilities for the interchange of traffic with complainant, and enjoining them from refusing to receive from complainant, for transportation over their lines, any car which might be tendered them. It has been frequently held by this court that a case arises under the Constitution and laws of the United States whenever the party plaintiff sets up a right to which he is entitled under such laws, which the parties defendant deny to him, and the correct decision of the case depends upon the construction of such laws. As was said in *Tennessee* v. *Davis*, 100 [554] U. S. 257, 264 [25: 648, 651]: "Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted." See also *Starin* v. *New York*, 115 U. S. 257 [29: 390]; *Kansas P. R. Co.* v. *Atchison, T. & S. F. R. Co.* 112 U. S. 414[28: 794]; *Ames* v. *Kansas, Johnston*, 111 U. S. 462 [28: 487]; *New Orleans, M. & T. R. Co.* v. *Mississippi*, 102 U. S. 135 [26: 96].

2. The facts that petitioner was not a party to such suit, nor served with process of subpœna, nor had notice of the application made by the complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial, so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice. High, Inj. § 1444; *Mead* v. *Norris*, 21 Wis. 312; *Wellesley* v. *Mornington*, 11 Beav. 181.

Conceding the question whether he had such notice in this case to be open to review here, we are of opinion that upon the facts appearing in this record this question must be answered, as it was answered in the court below, in the affirmative. The testimony upon this point is fully set forth in the opinion of the circuit court (54 Fed. Rep. 746, 757 [19 L. R. A. 395, 5 Inters. Com. Rep. 545]), and it establishes beyond all controversy that Lennon had notice and knowledge of the injunction.

It appears that, immediately after the injunction order was granted and served upon the Lake Shore Company, the company had copies of the order printed, and attached thereto a notice, signed by its superintendent, calling the attention of employees to the injunction; that printed copies of the injunction and notice were posted on all the bulletin boards at roundhouses where engineers took their engines, and that it was the duty of engineers to examine all notices so posted before starting on their runs. That on the morning of the 18th of March, Lennon was upon his engine at Alexis, making a run with his train [555] from Monroe to Toledo; that on his arrival at Alexis, and before he refused to receive and haul the Ann Arbor car, Mr. Chillcote, an agent of the Lake Shore Company, handed to him (Lennon) a printed copy of said injunction order, and the notice signed by the general superintendent, and he received and examined them.

Mr. Chillcote says: "I handed him these papers and he said he had seen the order; that it was posted somewhere; I think at the roundhouse, I think at Detroit. I wouldn't say positive as to that; but he said he had seen a copy of it. . . . I simply handed it to him, and he said, 'We understand the order,' or 'We have seen the order,' or words to that effect." Chillcote further says: "He stated when I handed him the order, before he read it, that he understood it."

Mr. Keegan testified that he was present when the copy of the order was handed to Lennon, and that he said, "I have seen it before." This occurred about 10 o'clock A. M., and Lennon, after having the copy of the order delivered to him and admitting that he had seen it before and understood it, refused to receive the Ann Arbor car until after 2:30 P. M. when he received a telegram from Mr. Watson, an officer of the Brotherhood of Locomotive Engineers, saying, "You can come along and handle Ann Arbor cars," and he then at once proceeded with his train to Toledo, receiving and hauling the Ann Arbor car.

3. To the objection that it was beyond the jurisdiction of a court of equity to compel the performance of a personal contract for service, and to interfere by mandatory injunction with petitioner's contract with the railway company, it is sufficient to say that nothing of the kind was attempted. The petitioner, as one of the employees of the Lake Shore railway, was enjoined from refusing to extend to the Ann Arbor railway such facilities for the interchange of traffic on interstate commerce business between such railways as were enjoyed by other companies, and from refusing to receive from the Ann Arbor Company cars billed from points in one state to points in other states. No attempt was made to interfere with petitioner's contract with his [556] own company, or to compel a continuance of his service in such company. There could be no doubt of the power of the court to grant this injunction, which bore solely upon the relations of the railway companies to each other. It was alleged in the bill to have been a part of the regular business of the defendant roads to interchange traffic with the Ann Arbor road, and the injunction was sought to prevent an arbitrary discontinuance of this custom. Perhaps, to a certain extent, the injunction may be termed mandatory, although its object was to continue the existing state of things, and to prevent an arbitrary breaking off of the current business connections between the roads. But it was clearly not beyond the power of a court of equity, which is not always limited to the restraint



Digitized by Google

of a contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it. *Robinson* v. *Lord Byron*, 1 Bro. C. C. 587; *Hervey* v. *Smith*, 1 Kay & J. 389; *Beadel* v. *Perry*, L. R. 3 Eq. 465; *Whitecar* v. *Michenor*, 37 N. J. Eq. 60; *Broome* v. *New York & N. J. Teleph. Co.* 42 N. J. Eq. 141.

It appears from the testimony in this case that Lennon was on his run as engineer from Detroit, Michigan, to Air Line Junction, near Toledo, with a train of forty-five cars. Having reached an intermediate station called Alexis, he was ordered to take on an empty car from the Ann Arbor road. He refused to take the car into the train and held the train there for five hours, and then proceeded on his run after receiving a despatch from the chairman of a committee of the Engineer Brotherhood instructing him to "come along and handle Ann Arbor cars." When he first received the order at Alexis to take the Ann Arbor car he refused, and said "I quit," but afterwards agreed with the superintendent of the division to take the train to its destination if the order to take the boycotted car was countermanded. Though he claimed to have quit at Alexis at about 10 o'clock he brought his train to its destination, and when told what his next run would be gave no notice of having quit or intending to quit.

It is not necessary for us to decide whether **557** an engineer may *suddenly and without notice quit the service of a railway company at an intermediate station or between stations, though cases may be easily imagined where a sudden abandonment of a trainload of passengers in an unfrequented spot might imperil their safety and even their lives. It is sufficient, in the present case, to observe that the court found, upon the testimony, that the petitioner did not quit in good faith in the morning, but intended to continue in the company's service, and that his conduct was a trick and device to avoid obeying the order of the court.

The finding of the court in this particular is not open to review, and hence the question whether the court has power to compel the performance of a personal contract for service does not arise. It was a question for the court to determine whether the petitioner's action in delaying the train five hours at Alexis was taken in pursuance of a determination to abandon the service of the company, or for the purpose of disobeying the lawful injunction of the court. The finding of the court was against the petitioner upon that point.

*There was no error in the judgment of the Court of Appeals, and it is therefore affirmed.*

## CITY RAILWAY COMPANY, *Appt.*, v. CITIZENS' STREET RAILROAD COMPANY.

(See S. C. Reporter's ed. 557-571.)

*Federal question—statute, when retrospective—estoppel—consideration—acceptance of franchise—consent by manager—acceptance of ordinance—ratification — contract with street railroad.*

1. A claim by a corporation in good faith that it has a contract with a city, which the latter has attempted to impair by a grant to another corporation, is sufficient to give jurisdiction to a circuit court of the United States of a suit to enjoin the latter corporation from interfering with the rights of the former, although both parties are corporations and citizens of the same state.
2. A statute should not be construed to act retrospectively or to affect contracts entered into prior to its passage, unless its language be so clear as to admit of no other construction.
3. A city is estopped to assert that an ordinance extending the franchise of a street-railway company is invalid for want of consideration, as against bondholders who have in good faith invested their money in the bonds of the company relying upon the validity of the ordinance.
4. The continued operation of a street railroad is a sufficient consideration for the extension of its franchise.
5. No formal resolution of acceptance of the extension of a franchise of a street-railway company is necessary if there is an actual practical acceptance or action which would be explicable only in case of the acceptance.
6. A consent by the manager of a street-railway company to an ordinance modifying the provision which he sought to have made by an amendment to the ordinance granting the company's franchise obviates the necessity of a subsequent acceptance of the new ordinance by the corporation.
7. The acceptance of an ordinance extending the franchise of a street-railway company may be presumed from the facts that the amendment is beneficial to the corporation, and that it issued bonds falling due at the expiration of the enlarged franchise.
8. A statute allowing cities to permit the use of electricity on street railways ratifies a previous consent by a city to the use of such power, on the faith of which large expenditures have been incurred.
9. A contract by a city with a railway company giving it permission to lay its tracks for street-railway lines through streets occupied by the lines of another company under a previous unexpired contract with the city is invalid so far as it interferes with the latter company in the construction, operation, and maintenance of its street-car system.

[No. 214.]

*Argued March 16, 17, 1897. Decided April 19, 1897.*

NOTE.—*As to concurrent jurisdiction of state and United States courts as to territory and offenses*, see note to United States v. Bevans, 4: 404.

*As to what laws are void as impairing obligation of contracts*, see note to Fletcher v. Peck, 3: 162.

*As to retrospective statutes, when valid*, see note to Otoe County v. Baldwin, 28: 331.



Digitized by Google

APPEAL from a decree of the Circuit Court of the United States for the District of Indiana forever enjoining the defendant, the City Railway Company, from disturbing the complainant, the Citizens' Street Railroad Company, in the construction, operation, and maintenance of its street-car system in the city of Indianapolis, and declaring a contract and ordinance to be void, etc. *Affirmed.*

See same case below, 56 Fed. Rep. 746, 64 Fed. Rep. 647.

Statement by Mr. Justice **Brown:**

This was a bill in equity by the Citizens' Street Railroad Company to enjoin the appellant from interrupting or disturbing complainant in the construction, operation, and maintenance of its street car system in the city of Indianapolis, and for the establishment of complainant's rights and the quieting of its title in that connection.

The facts of the case are substantially as fol-559] lows: In 1861, *the general assembly of the state of Indiana passed an act authorizing incorporation of street railway companies, the 2d section of which act provided that the stockholders in such companies, and their successors, should be "a body politic and corporate *in perpetuity*, by the name stated in the articles of association;" and the 11th and 12th sections of which were as follows:

"Sec. 11. This act may be amended or repealed at the discretion of the legislature.

"Sec. 12. Nothing in this act contained shall be so construed as to take away from the common councils of incorporated cities the exclusive powers now exercised over the streets, highways, alleys, and bridges within the corporate limits of such cities; and all street-railroad companies which may be organized under the provisions of this act shall first obtain the consent of such common council to the location, survey, and construction of any street railroad, through or across the public streets of any city before the construction of the same shall be commenced."

Pursuant to this act, the Citizens' Street Railway Company was organized January 15, 1864, and on January 18, 1864, the common council of Indianapolis passed an ordinance, the 1st, 3d, and 15th sections of which contained the following:

"Sec. 1. *Be it ordained by the common council of the city of Indianapolis*, That under and by virtue of an act of the general assembly of state of Indiana, entitled, 'An Act to Provide for the Incorporation of Street Railroad Companies,' approved June 4, 1861; and by virtue of the powers and authority of the common council otherwise by law vested, consent, permission, and authority are hereby given, granted, and duly vested unto the company organized with R. B. Catherwood as president, a body politic and corporate by the name of the Citizens' Street Railway Company of Indianapolis, and their successors, to lay a single or double track for passenger railway lines, with all the necessary and convenient tracks for turnouts, side tracks, and switches, in, upon, and along the course of the streets and alleys of the city of Indianapolis hereinbefore mentioned; and to keep, maintain, use, 560] *and operate thereon railway cars and carriages in the manner and for the *time* and upon the conditions hereinafter prescribed."

"Sec. 3. The cars to be used on such tracks shall be operated with animal power only."

"Sec. 15. The right to operate said railway shall extend to the full time of thirty years from the passage hereof; and the said city of Indianapolis shall not, during all the time to which the privileges hereby granted to said company shall extend, grant to or confer upon any person or corporation any privilege which will impair or destroy the rights and privileges herein granted to the said company."

The 2d section of this ordinance named certain streets upon which the company was authorized to lay its tracks, and in the following year (1865) a supplemental ordinance was passed giving to the company the right to lay its tracks upon all the streets or roads within the corporate limits of the city, and providing, in § 4, "that in laying, constructing, and operating" the same, the company should be governed by the provisions of the ordinance of January 18, 1864.

The Citizens' Street Rail*way* Company constructed and operated its plant until April 23, 1888, when it was sold and conveyed to the complainant, the Citizens' Street Rail*road* Company.

On April 7, 1880, the common council passed another ordinance supplemental to that of 1864, providing that § 15 of that ordinance should be amended so as "to read thirty-seven years, where the same now reads thirty."

On April 23, 1888, an ordinance was passed approving the sale and transfer of the railway company to the railroad company, and on December 18, 1889, a further ordinance was passed, supplementary to that of January 18, 1864, authorizing the use of electric power, and providing the manner in which it should be applied. This ordinance was formally accepted by the railroad company on January 4, 1890. The company thereupon proceeded at very great expense to build a power house and change its plant to an electric system.

In 1893 a dispute arose between the board of public works *of the city and the [561 president and directors of the complainant over the question whether complainant's franchise would expire on January 18, 1894, thirty years from its date.

On February 6, 1893, a further ordinance was passed declaring it to be unlawful for any person or corporation to cut or dig into a paved street without first obtaining from the board of public works a written permit so to do.

On April 24, 1893, pursuant to an act of the general assembly of the state, quoted in the opinion, the city, through its board of public works, entered into a contract with the defendant,—the City Railway Company,—giving it permission to lay its tracks for street-railway lines to be operated by electricity or other improved power, through a large number of streets, most of which were already occupied by the lines of the complainant company. This contract was approved upon the same day by the common council, and was accepted by the defendant.

The bill averred that it was impossible that electric cars, other than complainant's, could



Digitized by Google

be operated on such streets without their practical destruction as thoroughfares for public travel. It further set forth certain acts on the part of the city, which are alleged to be part of a plan of the city authorities, in combination with the defendant, to prevent it from making extensions and improvements and from operating its lines of railway; and that they, the city and the defendants, were asserting the right of the city to disregard and set aside by the exercise of the legislative power conferred upon its common council by the legislature of the state in the charter of 1891, a contract duly entered into and existing between the state and the complainant under its charter, and between the city and complainant, thereby seeking to impair, annul, and destroy the obligation of such contracts in violation of the Constitution of the United States. This bill was filed on May 11, 1893, within a month after the contract and ordinance of April 24.

A motion was made to dismiss the bill upon the ground of the want of jurisdiction in the circuit court, which was denied. 56 Fed. Rep. 746. The bill was subsequently amended, and **562**] *the case being put at issue upon an answer and replication, came on to be heard upon the pleadings and proofs, and resulted in a decree, in accordance with the prayer of the bill and the opinion of the presiding judge, forever enjoining the defendant from disturbing the complainant in the enjoyment of its rights to the streets, occupied by it at the time of the commencement of the suit, and declaring the contract and ordinance of April 24, 1893, to be void, in so far as they attempted to confer upon the defendant company any right to the streets occupied by the complainant at the commencement of the suit. 64 Fed. Rep. 647. From this decree an appeal was taken to this court.

*Mr.* **Addison C. Harris** for appellant.

*Messrs.* **Benjamin Harrison, P. C. Knox,** *W. H. H. Miller, F. Winter,* and *John B. Elam* for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

This case involves the right of the Citizens' Street Railroad Company of Indianapolis to operate a street railroad upon the streets upon which it had constructed its tracks at the commencement of this suit, as well as the validity of a certain contract, and ordinance ratifying the same, between the city and the City Railway Company, in so far as the city attempted to confer upon that company a right to lay its tracks upon the streets already occupied by the complainant, or to abridge its rights in the use of such streets.

1. There can be no doubt that the circuit court had jurisdiction of the case, notwithstanding the fact that both parties are corporations and citizens of the state of Indiana. It should be borne in mind in this connection that jurisdiction depended upon the allegations of the bill, and not upon the facts as they subsequently turned out to be. The gravamen of the bill is that, under the act of the **563**] general assembly *of 1861, and the ordinances of January 18, 1864, and April 7, 1880, the Citizens' Railroad Company had become vested with certain exclusive rights to operate a street railway in the city of Indianapolis, either in perpetuity or for the term of thirty years or thirty-seven years, which the city had attempted to impair by entering into a contract with the City Railway Company to lay and operate a railway upon the same streets.

All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair. Conceding that the legislature of the state alone had the right to make such grant, "it may," as was observed in *Wright* v. *Nagle,* 101 U. S. 791, 794 [25: 921, 922], "exercise its authority by direct legislation, or through agencies duly established, having power for that purpose. The grant, when made, binds the public, and is directly or indirectly the act of the state. The easement is a legislative grant, whether made directly by the legislature itself or by any one of its properly constituted instrumentalities. The complainants claim," as in the case under consideration, "they have such a grant through the agency of the inferior court, acting under the authority of the legislature." See also *Saginaw Gaslight Co.* v. *Saginaw,* 28 Fed. Rep. 529; *Weston* v. *Charleston,* 27 U. S. 2 Pet. 463 [7: 486]; *New Orleans Waterworks Co.* v. *Rivers,* 115 U. S. 674 [29: 525].

That the complainant had a contract with the city is entirely clear. It was so held by the supreme court of Indiana in *Western Paving & S. Co.* v. *Citizens' Street R. Co.* 126 Ind. 525 [10 L. R. A. 770], in which the liability of the company for certain street improvements was discussed and passed upon. It is true that, by § 11 of the original act of 1861, a right was reserved to the general assembly to amend or repeal at their discretion the act authorizing the incorporation of street-railway companies; but that was a right reserved to the general assembly itself and was never delegated, if in fact it could be delegated, to the common council of the city.

That the city did attempt to impair this contract by the *agreement of April 24, 1893, [**564** with the City Railway Company, and its ordinance ratifying the same, is equally clear. This contract was entered into in pursuance of a supposed right given by the act of the general assembly of March 9, 1891, known as the City Charter, the 59th section of which enacted that "the board of public works shall have power . . . to authorize and empower by contract telephone, telegraph, electric-light, gas, water, steam, or street-car, or railroad companies to use any street, alley, or other public place in such city; . . . provided, that such contracts shall, in all cases, be submitted by said board to the council of such city, and approved by them by ordinance before the same shall take effect." This contract and ordinance of April 24, 1893, even if otherwise valid, could not be construed to interfere with the rights of the complainant to occupy the streets of the city under the act of 1861, and the ordinance of January 18, 1864, without coming in conflict with that provision of the Constitution which forbids states from enacting laws impairing the obligation of contracts. Whether the state had or had not impaired the obligation



Digitized by Google

of this contract was not a question which could be properly passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one. *New Orleans* v. *New Orleans Waterworks Co.* 142 U. S. 79, 88 [35: 943, 946].

Even if the charter were held to have expired on January 18, 1894,—thirty years from its date,—it would not have necessarily affected the jurisdiction of the court to entertain this bill, since it was filed eight months before that time, although it might have affected the right of the complainant to a decree.

Did the act of 1891, known as the new charter, repeal the act of 1861 authorizing the incorporation of railway companies?—in other words should it be construed as an exercise of the power, reserved to the state in the 11th section of the act of 1861, to amend or repeal that act at the discretion of the legislature? As the act of 1891 practically established a new system and vested the whole power of the [565] legislature *over street-railway companies in the board of public works of the several cities therein named, subject to the approval of the common council of such cities, perhaps it might be construed to repeal the former, so far as there was a conflict between the two acts; but it certainly should not be construed to act retrospectively or to affect contracts entered into prior to its passage, unless its language be so clear as to admit of no other construction. While it was doubtless intended to authorize the board of public works of the cities covered by the act to contract for the use of their streets by railway companies, there is nothing from which can be inferred a power to disturb or interfere with contracts already existing—indeed, it is highly improbable that it would ever have delegated such a power to a subordinate body. There is always a presumption that statutes are intended to operate prospectively only (*Shreveport* v. *Cole*, 129 U. S. 39 [32: 589]), and we see nothing in this statute to rebut such presumption.

2. In arguing the case upon the merits, complainant insisted with great earnestness that inasmuch as the act of 1861, providing for the incorporation of street-railway companies, had declared, in § 2, that the stockholders in the companies organized under that act, and their successors, should be "a body politic and corporate in perpetuity, by the name stated in the articles of association," the common council of Indianapolis, which by § 12 must have given its consent "to the location, survey, and construction" of any street railway before the construction of the same could be commenced, had no power in its ordinance of January 18, 1864, to limit the right of the complainant to operate its railway to the term of thirty years; and that such ordinance, though valid in so far as it gave consent to build and operate the railway, was invalid in so far as it attempted to abridge the franchise granted by the general assembly, which existed in perpetuity. We do not, however, find it necessary to express an opinion upon this question, in view of the conclusion we have reached upon the legality of the ordinance of April 7, 1880, amending § 15 of the original ordinance by extending complainant's franchise from thirty to thirty-seven years.

*No question was made respecting the [566] validity of the original ordinance, but the amended ordinance of April 7, 1880, was attacked, principally upon the ground of a want of consideration for the extension of the franchise for seven years. The facts connected with this amendment were substantially as follows: The railway being mortgaged for $200,000, in first-mortgage bonds and $100,000 in second-mortgage bonds at 7 per cent interest, at the time of the purchase by the railroad company, the company was desirous of paying them off, as they were at liberty to do under the mortgages, and of renewing the loan in one mortgage at a lower rate of interest. In negotiating with the proposed purchasers of the bonds it was insisted that the contract with the city ought to be extended, as the proposed new issue of bonds would run beyond the time fixed for the termination of the contract. The manager of the road thereupon applied to the common council for an ordinance amending § 15 of the original ordinance, by making it read forty-five years instead of thirty years. The committee declined to agree to this, but recommended as a compromise an ordinance fixing the term of the original ordinance at thirty-seven years instead of forty-five years. To this the company finally agreed. Thereupon the common council adopted the ordinance in question.

While this transaction cannot properly be termed a legal consideration for the ordinance, since the negotiation of the new loan was neither a benefit to the city nor a detriment to the railway company, yet we think that the subsequent negotiation of the loan operates against the city by way of estoppel. All that is necessary to create an estoppel *in pais* is to show that, upon the faith of a certain action on the part of the city, which it had power to take, the company incurred a new liability; as, for example, by the negotiation of a new loan, and the issue of a new bond and mortgage to secure the same. Under such circumstances, justice to the bondholders, who have in good faith invested their money in reliance upon the validity of such action, demands that the city shall be held to its contract, notwithstanding there may have been originally no consideration to support it. The consequences of a different *ruling would not only destroy the [567] credit of the company, but might be disastrous to the bondholders, the value of whose investment would depend very largely upon the length of time the bonds were to run. Experience shows that the value of bonds or debentures depends, not only upon the sufficiency of the security and the rate of interest, but upon the length of time they have to run and the certainty that they will not, before the expiration of such time, be called in for redemption.

But however this may be, it seems to us that the continued operation of the road may itself be regarded a sufficient consideration for the extension of the franchise. This extension was not a mere gratuity or bounty within the case of *Grand Lodge F. & A. Masons* v. *New Orleans*, 166 U. S. 143 [*ante*, 548], recently decided, but was an agreement to prolong the



Digitized by Google

privilege of occupying the streets of the city, in consideration that the company should continue the facilities already afforded to its citizens. The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition, when accepted by the company and the road built and operated as specified, became a contract which the state was not at liberty to impair during its continuance; but if, at the expiration of the thirty years, the road had been sold to another company, and that company had applied for and obtained from the common council a franchise to occupy its streets for another period, it seems to be clear that such a contract would need no other consideration to support it than the continued operation of the road under such conditions as the city chose to impose. But this is practically such a case, since it makes no difference in principle whether the road passes into the hands of a new company or is retained by the old one, or whether the extension is granted at the time of or before the original franchise expired. In either case the consideration, *viz.*, the continued operation of the road, is the same. If, instead of extending the original ordinance, this ordinance had been surrendered by the 568]*company, and a new one had been enacted by which the franchise was extended, it would hardly be contended that the continued operation of the road would not be a sufficient consideration for the new ordinance. This was, in reality, part of the consideration upon which the original franchise was granted, and is, we think, a valuable consideration within the meaning of the law, and sufficient to support the extension.

This ordinance is also attacked upon the ground that it was never formally accepted by the company. There is really nothing in this contention. No formal resolution of acceptance is necessary in any case, if the facts show an actual, practical acceptance by the company, or action which would be only explicable in case the amendment were accepted. There are two circumstances in this case, either of which is sufficient to constitute an acceptance.

Mr. Johnson, the manager of the road, who desired the extension of the charter, applied for an amendment making the original § 15 read forty-five years instead of thirty years, and in that connection says: "After a good deal of argument I was finally forced to concede to the wishes of the committee, and they recommended to the council an ordinance making it read 'thirty-seven years,' instead of the 'forty-five' we applied for. This ordinance we consented to in committee, and afterwards agreed to with the council, as the best we could do under the circumstances." This was sufficient, as it is universally held that a previous request for an ordinance obviates the necessity of a subsequent acceptance. *Atlanta* v. *Gate City Gaslight Co.* 71 Ga. 106; *Illinois River R. Co.* v. *Zimmer*, 20 Ill. 654; *Lincoln & K. Bank* v. *Richardson*, 1 Me. 79 [10 Am. Dec. 34]; *State, Carlton*, v. *Dawson*, 22 Ind. 272; *Newton* v. *Carbery*, 5 Cranch, C. C. 632; *Perkins* v. *Sanders*, 56 Miss. 782, 789; 1 Morawetz, Priv. Corp. § 23.

We are also of opinion that an acceptance may be presumed from the fact that the amendment was beneficial to the corporation (*Bank of United States* v. *Dandridge*, 25 U. S. 12 Wheat. 64, 70 [6: 552, 554]; *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 344; *Com.* v. *Cullen*, 13 Pa. 133, 140 [53 Am. Dec. 450]; *Bangor, O. & M. R. Co.* v. *Smith*, 47 Me. 34), and from the further *fact that it issued[569 its bonds, as was contemplated when the ordinance was applied for, and made them fall due at the expiration of the enlarged franchise.

There is nothing in the so-called electrical ordinance which affects this question. It seems that in December, 1889, the common council adopted an ordinance amendatory of the original ordinance of January 18, 1864, to the effect that "the cars to be used on such tracks shall be operated with animal or electrical power only." The ordinance further provided that "nothing herein contained shall be construed so as to lengthen the term of the franchise, enlarge, or in any other way change or affect the rights of the Citizens' Street Railroad Company of the city of Indianapolis, under said ordinance of January 18, 1864, except to authorize the use of electrical as well as animal power."

It was also provided that the appellee should signify its acceptance by writing, within sixty days, filed with the city clerk, which was done.

At this time there was no law of the state permitting electricity to be used, and it is now claimed that the common council exceeded its powers in authorizing this change to be made.

But it seems that on March 3, 1891, a law was enacted by the general assembly, declaring "that any street or horse railroad heretofore or hereafter organized . . . may, with consent of the common council of the city, . . . use electricity for motive power." Conceding, although not deciding, that the city might have exceeded its lawful power in authorizing the change from animal power to electricity, in the absence of legislative authority so to do, we think the act of 1891 should be construed, not only as conferring a new authority upon the city, but as a ratification of what the city had already done in that direction. In view of the large expenditures incurred by the company upon the faith of this ordinance, it is ill becoming the city to set up its own want of power to make it, when such power was directly and explicitly given a few months thereafter.

The fact that the ordinance declared that it should not *be so construed as to lengthen[570 the term of the franchise under the ordinance of January 18, 1864, is wholly immaterial, since the ordinance had been amended, changing the original limitation of time from thirty to thirty-seven years. In fact, the ordinance had but a single object, which was to permit the substitution of electric for animal power, and it is scarcely possible that, if either party had understood that the franchise was to expire in January, 1894, four years from the time the electric ordinance was adopted, the complainant company would have entered upon the work of changing its entire system of street



Digitized by Google

railway into an electrical system, and incurred the very large expense necessary for that purpose, knowing that before it could reap any substantial return from such an investment its rights in the streets of the city would expire by limitation. The improbability becomes the more apparent when it is considered that it was under no compulsion to make the change, and might, at its option, have continued the use of horse power until the original franchise had expired.

We are therefore of opinion that the complainant company had a valid contract with the city, under the original ordinance of January 18, 1864, as amended by the ordinance of April 7, 1880, which will not expire until January 18, 1901, and that the contract and ordinance of April 24, 1893, with the defendant company is invalid, in so far as it may be construed to interfere with the complainant in the construction, operation, and maintenance of its street-car system in the city of Indianapolis. But as we are not called upon to express an opinion whether complainant is entitled to a perpetual franchise from the city, the decree of the court below must be modified by striking out from the 2d paragraph the words "without regard to any limitation of time mentioned in any ordinance of the city," and, also, the word "forever," and as so modified it is *affirmed*.

Mr. Justice **Gray** and Mr. Justice **White** concurred in the result.

571] *Mr. Justice **Shiras** was of opinion that the decree should be affirmed without modification.

Mr. Justice **Harlan** did not hear the argument or participate in the decision of this case.

---

WILLIAM H. MOSES *et al.*, *Piffs. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 571-600.)

*Variance—seals upon bond—power of Secretary of War—bond by officer—voluntary bond—disbursing officer of signal service—chief signal officer—recovery upon bond—defense—certificates—sureties—evidence—restatement of account—judgment, when evidence.*

1. A variance between a bond described in the declaration as bearing date April 2, when the instrument in evidence purports to bear date the — day of March, is immaterial when the evidence shows that the bond was accepted on April 2, as it speaks from the date of acceptance.
2. A prima facie presumption that seals upon an official bond were placed there with the consent of the parties arises when there is full proof of the original signing of the bond by the sureties, and of its presentation to the government without any defect except the lack of seals, and that after this defect was pointed out the principal on the bond took it back to obtain the seals, and returned it subsequently to the government with seals upon it.
3. An order of the War Department that an army officer assigned to duty in the signal service as property and disbursing officer should give a bond is within the power of the Secretary of War to make, although there is no statute requiring a bond.
4. A bond by an officer may be valid, although no statute directs its delivery, when its consideration or its condition is not in violation of law, and it does not run counter to any statute and is not *malum prohibitum* nor *malum in se*.
5. An official bond is voluntary in the sense that it is not illegally extorted, although the officer is reluctant to give it and only does so upon the demand of his superior, who has a right to demand the bond as a condition of permitting the officer to remain in his position.
6. The bond given by a "property and disbursing officer of the signal service" for the discharge of his duties and for faithfully expending and honestly accounting for public money and property is not void because there is no law creating such a position as that officer, or regulation defining his duties.
7. The chief signal officer has a right to designate an officer under him as a disbursing officer, and the Secretary of War by directing him to give a bond approves of his appointment and provides for such an officer; and forgery of vouchers and embezzling public moneys are a violation of such officer's duty and of such bond.
8. A recovery upon a plain and certain condition of a bond will not be denied because another condition of the bond is uncertain.
9. The fact that larger sums were disbursed by an officer than was anticipated forms no defense to an action on his bond conditioned for his honest disbursement of the public moneys.
10. Certificates by accounting officers of the Treasury that an officer is not indebted to the United States, which are given to enable him to obtain payment of salary, are not conclusive against the government on subsequently discovering that he has obtained such settlement by forged vouchers.
11. Sureties on an official bond are not released by the facts that the government on discovering a defalcation sues the officer alone and attaches his property, and that there is a delay of more than a year and a half in taking judgment against him, although he puts in no answer, when there is no evidence that they have suffered any damage by reason of any action or lack of action on the part of the government.
12. The admission in evidence of a statement of balances of an officer's account, made by the Treasury Department, is not material error when

---

NOTE.—*As to what is prima facie evidence*, see note to Kelly v. Morris, 8: 523.

*As to bonds, official and other, and for debts; liability of sureties, on*,—see notes to United States v. Giles, 3: 708, and Postmaster General v. Early, 6: 577.

*As to rights and liabilities of sureties*, see note to Hall v. Smith, 12: 66.

*As to liability of sureties on official and other bonds, and for debts*, see notes to United States v. Giles, 3: 708, and Postmaster General v. Early, 6: 577.

*As to when violation of contract or agreement for delay discharges surety*, see note to Miller v. Stewart, 6: 189.

*As to what forbearance or extension of time to principal debtor will discharge surety*, see note to Creath v. Sims, 12: 110.

*As to obligation of married woman as surety or guarantor for her husband or others*, see note to Bein v. Heath, 12: 416.

*As to surety or bail, how discharged; rights of surety*,—see note to Griswold v. Hazard, 35: 673.



Digitized by Google

it is accompanied by other transcripts giving both sides of the account with the items.

13. A restatement of an account between the government and an officer, disallowing credits which had been given him upon false and forged vouchers, is admissible against his sureties, although it was made after his resignation.

14. A judgment against a public officer establishing a defalcation far beyond the penalty in his bond is at least prima facie evidence against his sureties to show a breach of the bond.

[No. 135.]

*Argued December 7, 10, 1894. Affirmed by Divided Court, December 17, 1894. Rehearing Granted January 7, 1895. Reargued March 24, 25, 1897. Decided April 19, 1897.*

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment of that court affirming the judgment of the Supreme Court of that District in favor of the United States against William H. Moses *et al.*, administrators, for the amount of a bond given by Henry W. Howgate, disbursing officer of the signal service, and his sureties, for the faithful discharge of his duties, etc. *Affirmed.*

See same case below, 8 App. D. C. 277.

Statement by Mr. Justice **Peckham:**

On the 7th day of December, 1880, First Lieutenant H. W. Howgate, acting signal officer, U. S. Army sent in his resignation to the Adjutant General, at Washington, through the acting chief signal officer. At that time there was in existence United States Army Regulations, ¶ 2394, which provided that "an officer retiring from service shall before final payment produce certificates from the several accounting officers of nonindebtedness to the United States, and make an affidavit upon the final voucher, stating in addition the correctness of its several items, the place of his residence, and that he is not indebted to the United States on any account whatever." These certificates were obtained by Lieutenant Howgate, and his resignation was accepted by the President to take effect December 18, 1880. On the 27th of April, 1881, a final payment was made to him of $104, being the balance due him for salary, etc., and his accounts as then appearing on the books of the government stood balanced. Soon after the date of this final payment it became evident, from examinations made in the books of the government and by investigations from other sources, that Lieutenant Howgate had perpetrated gross frauds upon the government by means of fraudulent and forged vouchers, which had been accepted by the government as genuine, and upon which his certificates for settlements had been made. Upon a restatement being had, in which these false and fraudulent vouchers were omitted from the credits which had been thereby given to him, it appeared that he was a defaulter in the sum of over $133,000. On the 24th of August, 1881, an action was commenced by the government against 573] him to recover *over $100,000, being the amount of moneys unlawfully drawn and obtained by him on the United States Treasury, a list of which was set forth in the "particulars of demand" accompanying the declaration.

Upon affidavits setting up certain facts showing the false and forged character of the vouchers an attachment was issued in the action, and certain property of his was attached.

The defendant appeared by attorney, and finally on the 24th day of May, 1883, upon motion of the district attorney, judgment in favor of the United States against the defendant for want of a plea was granted, and judgment entered in favor of the plaintiff against the defendant for $101,257.06, with interest thereon from August 24, 1881.

By virtue of this judgment the property which had been seized by virtue of the attachment issued in the action was sold, and the sum of $28,000 was realized upon such sale, and the amount thereof credited upon the judgment.

This present action was commenced on the 29th of September, 1884, on a bond alleged to have been executed by the defendants named in the action, being Henry W. Howgate, William B. Moses, and Lebbeus H. Rogers. Of these defendants Mr. Moses was the only one served with process.

The original declaration contained but one count, and alleged that the defendants "on the 2d day of April, in the year of our Lord one thousand, eight hundred and seventy-eight, at the district aforesaid, by their certain writing obligatory, of that date, sealed with their seals, and now here in court produced, jointly and severally bound and acknowledged themselves to be indebted to the plaintiff in the sum of $12,000 to be paid to plaintiff on demand, yet, though requested, the said defendants have never paid the same to plaintiff, but have wholly neglected and refused, and still do neglect and refuse, so to do." Judgment for the sum was then demanded.

The bond sued on was introduced in evidence upon the trial, and reads as follows:

Know all men by these presents, that we, Henry W. Howgate, 1st Lieut. 20th U. S. Infantry, *William B. Moses, Washington, [574 D. C., and Lebbeus H. Rogers, New York city, New York, are held and firmly bound unto the United States of America in the sum of ($12,000) twelve thousand dollars, lawful money of the United States, to be paid to the United States; for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, for and in the whole, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the — day of March, in the year of our Lord one thousand, eight hundred and seventy-eight, and of the independence of said states the one hundred and second.

The condition of this obligation is such that whereas the above-bounded First Lieut. Henry W. Howgate, 20th Inf't'y, has been assigned to duty as a property and disbursing officer, Signal Service, U. S. A.,———has accepted said assignment:

Now, if the said 1st Lieut. Henry W. Howgate, 20th Infantry, shall and doth at all times henceforth and during his holding and remain-



Digitized by Google

ing in said office carefully discharge the duties thereof and faithfully expend all public money and honestly account for the same and for all public property which shall or may come into his hands on account of Signal Service, U. S. Army, without fraud or delay, then the above obligation to be void; otherwise to remain in full force and virtue.

Henry W. Howgate. [Seal.]
Lebbeus H. Rogers. [Seal.]
W. B. Moses. [Seal.]

Signed and delivered in presence of—
James A. Swift,
Anson Maltby,
Witnesses as to Lebbeus H. Rogers.
James A. Swift,
Witness as to W. B. Moses.

The bond contained also the justification of Mr. Rogers, as surety, and purported to have 575] been sworn to in the city of *New York on the 13th day of March, 1878. It also contained the justification of Mr. Moses, as surety, and purported to have been sworn to by him on the 14th day of March, 1878, at Washington, D. C. The bond also contained the indorsement of Chief Justice Carter of the supreme court of the District of Columbia, certifying that satisfactory evidence of the sufficiency of the sureties to the bond had been given and that he approved the same.

A second count to this declaration was subsequently added, in which the appointment of the defendant Howgate to the signal office at Washington, his assignment to duty there as property and disbursing officer, the execution of the bond bearing date the — day of March, 1878, its delivery and the condition contained in such bond, the receipt of a large amount of public moneys, and the failure to expend and honestly account for the sum of one hundred and thirty-three thousand and odd dollars, were all set forth at length and in detail.

The defendant Moses filed several pleas, setting forth substantially the defenses: (1) that the alleged writing was not his bond; (2) that it was extorted from Howgate without any authority of law; (3) that there was no such office created by law as was mentioned in the bond, and no duties pertaining to the office prescribed by law or by any regulation or order of any department or officer, and that the alleged bond was void for uncertainty; (4) that the accounting officer of the Treasury had duly settled the accounts of Howgate and issued to him a certificate of nonindebtedness to the United States, of which the defendant Moses had notice, which discharged him from liability as surety on the bond; (5) that Howgate had kept and performed the condition of the bond.

Prior to the trial and on the 2d of May, 1892, Moses died, and the suit was continued against his administrators. The trial commenced on the 22d of March, 1893. To maintain its case the government gave evidence as to the organization of the Signal Service. It then offered in evidence a duly certified copy of the order, dated April 18, 1868, from the adjutant general's office, directing Lieutenant Howgate 576] to report *for duty to the chief signal officer of the army. Also a duly certified copy of the order from the office of the chief signal officer of the army, dated Washington, July 25, 1876, stating that "First Lieutenant H. W. Howgate, 20th Infantry, Brevet Captain, U. S. A., acting signal officer's assistant, is hereby assigned to duty 'as property and disbursing officer' at this office, together with such other duties as may be assigned to him." Also copy of a letter of Howgate's, dated Washington, March 26, 1878, addressed to the Secretary of War, in which he said: "In compliance with what I understand to be the wishes of the department, I have the honor to inclose herewith a bond similar in amount and form to that given by a captain of the commissary department."

It appears from the record that this bond was referred by the War Department on the 27th of March, 1878, to the judge advocate general for an opinion as to its sufficiency and form; that on the same day it was returned to the Secretary of War by the judge advocate general, with a communication that the bond was in due form, "except in that it wants the formal seals required to be affixed to the signatures of the obligor and sureties, by standing order of the War Department of June 11, 1869." Whereupon on the 29th of March, 1878, the bond was returned to Lieutenant Howgate, by order of the Secretary of War, "to have the proper seals affixed." On the 1st of April, 1878, the bond was returned to the War Department, accompanied by a written communication, signed by Lieutenant Howgate, in which he said that the bond was "respectfully returned to the Honorable Secretary of War with seals affixed as per instructions." Thereupon, and on the 2d day of April, 1878, the bond was approved. The government then called the subscribing witness to the bond as to Howgate and Moses. The witness proved their signatures, and that they executed the bond at the signal office in Washington, March 14, 1878. The witness thought, though he was not positive, the seals were then on the bond. (In this he must have been mistaken, as the above statement substantially proves the contrary.) The bond was then offered and received in evidence under *defendants' [577 objections. The government then proceeded to give evidence to show the breach of the condition of the bond by producing transcripts of books and proceedings of the Treasury Department, which it claimed were properly certified under U. S. Rev. Stat. § 886, and by producing witnesses upon the question of the forgery of the vouchers by Howgate.

Various other questions arose upon the trial in regard to requests to charge which are sufficiently referred to in the opinion.

The jury found a verdict for $12,000 with interest from September 29, 1884, and the defendants, the administrators, having filed an admission of sufficient assets when administered to satisfy the recovery, judgment was, on the 1st day of April, 1893, entered upon the verdict.

The defendants' motion for a new trial, for errors of law and upon exceptions taken, was denied, and upon appeal to the court of appeals the judgment was affirmed, and the defendants now seek a review of that judgment by this court.

*Messrs.* **William F. Mattingly** and **W. L. Cole** for plaintiffs in error on first argument and on reargument.



Digitized by Google

*Messrs.* **Andrew B. Duvall,** Special Assistant United States Attorney, and **Lawrence Maxwell,** Jr., Solicitor General, for defendant in error on the first argument.

*Messrs.* **Holmes Conrad,** Solicitor General, and *Andrew B. Duvall,* for defendant in error, on reargument.

Mr. Justice **Peckham** delivered the opinion of the court:

Various errors are assigned in this court, the first two of which allege that error was committed: First, in admitting the alleged bond in evidence, there being a material variance in date between the instrument offered and the one described in the declaration; second, in admitting the alleged bond in evidence when there was no evidence tending to prove that it was sealed by W. B. Moses.

1. We think there was no material variance as claimed by the defendants. The first count in the declaration states the date of the bond as the 2d of April, 1878. The bond as offered in evidence is dated the — day of March, 1878. **578**] In the second count of the declaration, the bond sued on was alleged to have been dated the — day of March, 1878. The bond was offered in evidence, while that count stood, and as it showed no variance when compared with the second count, the defendants' counsel said that they were justified in making no objection to its admission at that time on that ground. When in the course of the trial the second count was withdrawn, by leave of the court, it left but the original first count in the declaration, and thereupon the defendants moved to strike out the bond that had been admitted in evidence, upon the ground that the bond declared upon in the first count of the declaration is described as a bond bearing date on the 2d day of April, 1878, and the bond which was theretofore offered in evidence by counsel for complainant purports to bear date on the — day of March, 1878. The motion was overruled, and defendants' counsel excepted, and it is that exception upon which defendants' counsel now claim a reversal of the judgment.

It is seen by reference to the foregoing statement of facts that the bond was finally sent back by Howgate to the Secretary of War, with seals attached, in a letter dated April 1, 1878, and that it was approved, that is, accepted, April 2, 1878. It is settled that a bond of that character takes effect on the date of acceptance, and it is from that time that it speaks. *United States* v. *Le Baron,* 60 U. S. 19 How. 73 [15: 525], same case, on another review, 71 U. S. 4 Wall. 642, 647 [18: 309, 310].

There is no claim made that there ever was any other bond than the one put in evidence, nor that the defendants were surprised or in any way misled by the difference in the date of the bond from the date alleged in the declaration. The objection is one of the most extreme technicality, and does not in any way reach the merits of the case.

The case of *Cooke* v. *Graham,* 7 U. S. 3 Cranch, 229 [2: 420], is cited by the defendants' counsel as authority for the claim that this variance is fatal. The question there arose upon a demurrer, and the decision is based upon the old and highly technical rules of pleading. Marshall, Chief Justice, said that the plaintiff having declared upon a bond dated the 3d of October, and oyer being prayed, [**579** the bond appeared to bear date of the 3d of January preceding. By the oyer the bond was made a part of the declaration. He said there were several pleadings, and among the rest a bad declaration, a bad rejoinder, and a special demurrer by the plaintiff to this bad rejoinder. He then said the variance between the date of the bond declared upon and that of the oyer is fatal. But the principle of that case has nothing to do with that involved in the case at bar. The question here does not arise on demurrer, but in the course of a trial upon the merits. The bond having been declared upon as dated the 2d of April, 1878, is produced, and is shown to bear date the — day of March, 1878. Otherwise it is the same bond in description as that declared on, with no claim of there being any other bond, and with the proof that the bond in question, although dated on the — day of March was not accepted by the War Department until the 2d day of April, 1878, at which time it became a completed instrument, and from which time it took effect. It is plain to be seen that no possible harm or injury could occur to the defendants from disregarding this variance.

In *Nash* v. *Towne,* 72 U. S. 5 Wall. 689, 698 [18: 527, 529], Mr. Justice Clifford, in delivering the opinion of the court upon a question of variance, said: "Formerly the rule in that respect was applied with great strictness, but the modern decisions are more liberal and reasonable. Decided cases may be found, unquestionably, where it has been held that very slight differences were sufficient to constitute a fatal variance. Just demands were often defeated by such rulings until Parliament interfered, in the parent country, to prevent such flagrant injustice. Federal courts have possessed the power from their organization to the present time to amend such imperfections in the pleadings, except in cases of special demurrer set down for hearing, and are directed to give judgment according to law and the right of the cause. Recent statutes in the states also confer a liberal discretion upon courts in allowing amendments to pleadings, and those statutes, together with the change they have superinduced in the course of judicial decision, may be said to have established the general rule in the state tribunals that no variance between the allegations of a [**580** pleading and the proofs offered to sustain it shall be deemed material, unless it be of a character to mislead the opposite party in maintaining his action or defense on the merits. Irrespective of those statutes however, no variance ought ever to be regarded as material where the allegation and proof substantially correspond." We think this exception is without merit.

2. We are also of opinion that there was no error in admitting the bond in evidence, under the objection that at the time it was admitted there was no evidence tending to prove that it was sealed by Mr. Moses. Passing the objection raised by the defendants in error as to the form of pleadings, and, referring to the foregoing statement of facts, it appears that at the time the bond was first tendered to the War Department it had been signed and acknowl-



Digitized by Google

edged by the principal and his sureties, and the latter had each made an affidavit justifying as to his financial ability to become such surety, and that Howgate had presented the bond (without seals) to the Secretary of War, as in compliance with the directions of the War Department.

The instrument being incomplete when first sent to the department, there was no acceptance of the same at that time. Its return by the department with the objection stated did not in any sense make Howgate the agent of the government to procure seals to the instrument; the government undertook no such mission, and it was not under any obligation so to do. It stood indifferent whether Howgate procured those seals or not; he was under obligation to present a proper bond to the department, and if he did not do so, the department would take its own measures consequent upon that failure.

We have a case, therefore, where the proof is full as to the original signing of the bond by the sureties; no pretense of any forgery or any irregularity in that respect, the only defect being the lack of seals. This defect was pointed out by the officer of the government, and Howgate took back the bond to have the seals put on, and in due time he returned it with the seals upon it. There is no direct evidence as to when or where the seals were put on or as [581] to the actual consent of the *sureties. Under these circumstances, and with the proof in the condition thus stated, we think the presumption is with the government, that the seals were placed upon the instrument with the consent of the parties, and if there were no such consent, that is matter of defense to be affirmatively established. The inference is very strong that consent was given. It has been held that proof of the execution of a bond, taken with the fact of possession by the proper party, was sufficient to found a presumption of proper delivery of the bond. *Edelin* v. *Sanders*, 8 Md. 118. In this case the evidence clearly forbids the supposition that the principal or the sureties contemplated a fraud upon the government, or intended to present to it an incomplete instrument. The latter had already consented to act as sureties, had signed the paper, acknowledged their signatures, and justified as to their financial ability. The government was asking no favor of them or of Howgate; it had simply declined to receive as a good bond the instrument they had executed for the very purpose of being accepted by the government. No change of circumstances is shown between the original execution of the bond and its return with the seals attached to it by Howgate. The sureties were not in the position of having secured what they wanted by the execution of the instrument in the manner originally shown; nor was the government in the attitude of asking something more of these sureties after they had secured the benefit for which the paper had been executed. As the matter stood, when the bond was returned to Howgate, he was under the same obligation to furnish a proper instrument that he had ever been, and for all that appears precisely the same reasons for signing the instrument originally still existed with the sureties at the time when the seals were placed upon the bond. The evidence is strong enough upon which to base the presumption that under these circumstances the seals were placed upon the bond with the consent of the sureties, and the bond returned to the War Department properly executed. At least a prima facie presumption to this effect ought to be indulged in in cases such as this where bonds are furnished the government to *secure the [582] proper performance of duty by the obligors in such bonds. This principle we think is illustrated in the cases of *Dair* v. *United States*, 83 U. S. 16 Wall. 1 [21: 491], and *Butler* v. *United States*, 88 U. S. 21 Wall. 272 [22: 614].

When the officers of the government received this bond for the second time, and the seals were then found upon it, there was nothing to attract their suspicion that the bond was not a proper instrument, executed in due form by all the obligors. The fact that it had once been presented without seals, and then when the objection was taken to that defect and the instrument returned to Howgate on that account, it was thereafter again sent in by Howgate, one of the obligors, with the seals affixed thereon, was not a circumstance of suspicion nor one to raise any doubt as to the consent of the other obligors to the placing of the seals upon the instrument signed by them. Being originally signed by them for the purpose of acceptance by the government, there is no fact upon which a presumption could be based that they would refuse to make the instrument complete by adding their seals when it was found that they had been theretofore omitted.

The cases cited by counsel for the defendants do not impair the strength of this principle, nor do away with the presumption. Among the cases cited are *Follett* v. *Rose*, 3 McLean, 332. The case involved but a question of fact, which was submitted to a jury, whether an instrument that was produced on the trial and had no seals attached to it, had had them attached when the instrument was originally executed many years prior thereto. *Edelin* v. *Sanders*, 8 Md. 118, 129, contains nothing inconsistent with the presumption that the seals in this case were affixed with the consent of the obligors.

In *State* v. *Humbird*, 54 Md. 327, the bond sued on had no seal opposite the name of one of the obligors, and there was no evidence that he had adopted the seal of any of the other parties to the instrument. It was held that the instrument was not his bond, because, in fact, there was no evidence of any seal belonging to him ever having been affixed, and no such seal was on the instrument when it was produced on the trial.

*In *Chilton* v. *People*, 66 Ill. 501, a *bond* [583] was sued on, while the instrument produced had no seal. It was held that the fact that the instrument contained the statement "sealed with my seal," when there was no seal or scroll, did not supply the defect of its absence.

In *Barnet* v. *Abbott*, 53 Vt. 120, the instrument when executed had no seal, but when delivered to the selectmen it was sealed. The evidence showed that the sureties did not affix the seals themselves, and in fact authorized no one to affix them to the instrument. The court held that it was defectively executed. No evi-



Digitized by Google

dence of this nature is to be found in the case at bar.

In *United States* v. *Linn*, 40 U. S. 15 Pet. 290, 311 [10: 742, 750], the second and third counts of the declaration were upon "an instrument in writing." It was not averred that it was under seal. The instrument was executed under an act of Congress providing for the execution of a bond. The defendant demurred to the two counts and the question was certified to this court upon a certificate of a division of opinion: (1) as to whether the obligation set out in the declaration, being without seal, was a bond within the act of Congress; and (2) whether such instrument was good at common law. It was held that the instrument was not a bond within the act, but that it was good at common law. The case went down for further proceedings, during which a trial was had and the case came again before this court on writ of error, and it is reported in 42 U. S. 1 How. 104 [11: 64]. It seems that after the case went down the pleadings in the case were altered, and finally a plea was filed on the part of the defendants alleging merely that seals were affixed to the bond without the consent of the defendants, without alleging that it was done with the knowledge or by the authority or direction of the plaintiffs. It was held in the court below that the special demurrer to the plea was bad, and the court gave judgment for the defendant, adjudging that the plea was sufficient in law. This court held otherwise, and it was upon the principle that the placing of the seals thereon after the execution of the instrument was a material alteration of it, but if done by a stranger and the instrument was valid without [584] out the seals and *was declared on as such an instrument, the action upon it could be maintained.

In *United States* v. *Nelson*, 2 Brock. 64, the parties to the bond were sureties, and signed in blank before the principal, but with full knowledge of the purpose for which the bond was to be executed. The blanks were afterwards filled up in their absence without express authority from them, and given to the officers of the United States, who accepted it. It was held by Marshall, Chief Justice, "with much doubt and with a strong belief that this judgment will be reversed," that the law is for defendants. Under the cases of *Dair* v. *United States*, 83 U. S. 16 Wall. 1 [21: 491], and *Butler* v. *United States*, 88 U. S. 21 Wall. 272 [22: 614], it would seem as if the doubts of the great chief justice were not entirely misplaced.

Not one of these cases lays down any principle which shows the ruling of the court below in this case to have been erroneous.

We come back, then, to a case where the proof was uncontradicted of a signing of an instrument, reciting that it was sealed (when in fact it was not) and that when sent to the obligee it was returned in order that seals might be affixed. It will, in the absence of evidence to the contrary, be presumed, when the bond is again presented with seals, that they had been inadvertently omitted, and that the sureties had consented to their being placed upon the instrument in order to make it effective, a purpose which they must have originally intended when they executed it. Any other presumption would tend to show that the sureties, when signing the instrument, intended an idle thing, that is, to sign a paper which would not answer the purpose for which it was then executed, or else they intended a fraud upon and to act dishonestly towards the government. Neither presumption should be indulged in. The presumption called for under the circumstances is the one which is based upon the view that the principal and the sureties intended to act honestly and to execute an instrument which would be accepted by the government.

Upon the case as it stood, there was no question to be submitted to the jury upon this bond. The presumption of a *final due execu- [585] tion arose from the evidence given on the part of the plaintiffs, and as none was given in explanation or in contradiction of it, the presumption was sufficient in law to base a finding of that fact thereon. We think that no sufficient objection in regard to the sealing of the bond was shown, and that this assignment of error is, therefore, not made good.

3. Another objection to the validity of the bond is taken by the defendants, which is, that the bond was extorted *colore officii*, and is void for that reason. The defendants allege that there was no statute or regulation directing or permitting the exaction of a bond from an officer of the Army assigned to duty in the signal service at Washington and discharging the duties of "property and disbursing officer," and that therefore the bond exacted from Lieutenant Howgate was void. Defendants' counsel offered to prove that some time after he had been assigned to his position the Secretary of War, through his chief clerk, directed that Lieutenant Howgate, before receiving moneys upon requisitions made by him, should file a bond as particularly stated, and if he failed to file such bond that he should be relieved from duty as disbursing officer; that Lieutenant Howgate protested against this requirement for various reasons which he stated to the chief clerk, who informed him that the Secretary of War had made his decision upon the question involved after due deliberation, and had directed that unless he filed the required bond he should be relieved from duty as disbursing officer; that after receiving this information from the chief clerk Lieutenant Howgate forwarded to the War Department the bond upon which this suit is brought. The evidence was rejected and exception taken by counsel for the defendant. It is now urged that such evidence was material; that it showed that the bond was improperly and illegally extorted from Lieutenant Howgate under fear of losing his position as property and disbursing officer, and that the bond is therefore void.

We think the evidence was properly excluded, although there was no statute specially providing for the execution of a bond by one occupying the position of Lieutenant Howgate. *The order of the War Department [586] that a bond should be executed was one which the Secretary of War had power to make.

It was held in the case of *United States* v. *Tingey*, 30 U. S. 5 Pet. 115 [8: 66], that the United States had a right to take a bond to insure the faithful performance of duty on the part of an individual or officer where such



Digitized by Google

bond was voluntarily given, and was not in violation of any provision of law. The particular bond in that case was held void as being extorted under color of office because it was in plain violation of the statute in regard to giving such bond, and it was demanded of the party upon the peril of losing his office. The court said under those circumstances that the bond was an illegal instrument, "for no officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of his holding his office, that he should execute a bond with a condition different from that prescribed by law." The court also said, however, "that a voluntary bond taken by authority of the proper officers of the Treasury Department, to whom the disbursement of the public moneys is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursery of public moneys, is a binding contract between him and his sureties and the United States, although such bond may not be prescribed or required by any positive law. The right to take such a bond is in our view an incident to the duties belonging to such a department; and the United States having a political capacity to take it, we see no objection to its validity in a moral or legal view." See also *United States* v. *Maurice*, 2 Brock. 96; *Jessup* v. *United States*, 106 U. S. 147 [27: 85], where the same views are set forth.

The consideration or the condition of the bond must not be in violation of law; it must not run counter to any statute; it must not be either *malum prohibitum* or *malum in se*. Otherwise and for all purposes of security, a bond may be valid, though no statute directs its delivery.

We do not understand by the decision in Peters, above cited, that the meaning of the term *voluntary bond* is that the bond must have been offered and pressed upon the government when never asked for or demanded by it. It is a 587] voluntary *bond when it is not demanded by any particular statute or regulation based thereon, and when it is not exacted in violation of any law or valid regulation of a department. Having the right to take a bond, the government in a case like this has the right to demand it from the officer, and to say to him that if he do not give it he will not be continued as "a property and disbursing officer of the signal service." Such a demand when complied with does not amount to the illegal exaction or extortion of the bond. The case of a bond so procured differs radically from a case like that of *Tingey*, *supra*, inasmuch as the bond in the latter case was extorted from a reluctant officer with a condition therein contained different from that which the statute called for.

The power of the government to take bonds in cases of this nature in the absence of any law or general regulation to that effect, but by direction of the head of a department, was recognized again in the case of *United States* v. *Bradley*, 35 U. S. 10 Pet. 343, 359 [9: 448, 454]. In that case the bond taken contained conditions beyond those provided for in the act of Congress, yet it was held that those conditions which were within the act were valid and could not be regarded as extorted from the obligor, although they were set forth in the same instrument which contained other and illegal conditions. *Tingey's Case*, *supra*, was cited by the court and approved as to the principle that the United States may take a bond as security, etc., when not in violation of any statute.

In this case we think the bond was a voluntary bond in the sense that it was not illegally extorted from the defendant Howgate, under color of office or by threats from a superior officer; that the United States through the Secretary of War had the right to demand a bond with conditions such as the bond in question contains, and that it did not cease to be a voluntary bond merely because Lieutenant Howgate did not gratuitously and without request proffer it and ask that it might be received, or because he was reluctant to give it, and only gave it upon the demand of the Secretary. Under the facts developed in this case, situated as Lieutenant Howgate was with respect to the public moneys, the United States, *having the right to take a bond, had the[588 right to demand it under penalty of refusing to permit him to longer remain as a disbursing officer or to further receive public moneys for disbursement by him. An action brought in the southern district of New York by the United States against Rogers, one of the sureties on this same bond, was decided in favor of the government by the United States district court (28 Fed. Rep. 607), and that judgment was affirmed by the United States circuit court in the southern district of New York. 32 Fed. Rep. 890. On writ of error to this court the judgment was affirmed, but not on any ground affecting the merits. Both the district and circuit courts held the bond was good, and adjudged accordingly.

We are, in view of all the facts, of opinion that the refusal to admit the evidence offered by defendants' counsel upon this issue did not constitute any error on the part of the learned trial court.

4. Another objection taken by the defendants is that this bond is void for uncertainty, because there was no law creating any such position as that "of property and disbursing officer of the signal service, U. S. A.," nor any law or army regulation defining the duties of any such officer.

The signal service corps as a branch of the army was known during the war. After its close and as long ago as 1870, Congress, by a joint resolution approved on the 9th day of February of that year, authorized the Secretary of War to provide for the taking of meteorological observations at the military stations and other points in the interior of the continent, and for giving notice on the northern lakes and seaboard of the approach and course of storms. On the 28th of February, 1870, the Secretary of War addressed a written communication to Brigadier General Meyer, chief signal officer of the army, in which, after embodying the joint resolution, as above referred to, the Secretary of War continued: "In view of this enactment, I have to inform you that you as chief signal officer of the army are charged with the duties to arise under the provisions of the same, subject to the direction of the Secretary *of War." On the 10th of June, [589



Digitized by Google

1872, one of the appropriation bills was approved, in which was an appropriation of $250,000 to provide materials and to pay for telegraphing the weather reports under the authority and regulation of the Secretary of War; and on the 27th of June, 1872, the War Department directed, in a written communication addressed to the chief of the United States signal corps, that such officer and all persons who had been or should be thereafter designated and employed by him for the taking of meteorological observations, etc., were thereby recognized and appointed as agents of the War Department for those purposes. By the army appropriation act of 1874 (18 Stat. at L. 72), it was enacted that the signal service should be maintained as then organized under the authority of the Secretary of War. Thereafter and on the 25th of July, 1876, Lieutenant Howgate, then acting signal officer and assistant at Washington, was duly assigned by the chief signal officer to duty as "property and disbursing officer" at the signal office at Washington, with such other duties as might be assigned to him. Appropriations of a similar nature to the above-mentioned act for the signal service have been constantly made by Congress ever since.

The Revised Statutes also authorized (§ 161) "the head of each department . . . to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, and distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property pertaining to it." Section 1094 of the Revised Statutes recognized the existence of the chief signal officer of the army of the United States, and § 1195 gave to that officer the rank of colonel of cavalry, and directed that under the direction of the Secretary of War he should have charge of all signal duty and of all books, papers, and apparatus connected therewith.

Upon this evidence we think it apparent that in the proper conduct of his office the chief signal officer had the right to designate one of the officers detailed for service under him as a "property and disbursing officer," to whom [590] should belong, as provided for in the order of such chief, the custody of all government property and funds pertaining to the office of the chief signal officer, and that such chief signal officer had the power, under the general direction of the Secretary of War, to provide that the property and disbursing officer should be responsible for the due execution of his duties as such. The Secretary in this, among other ways, recognized and approved the appointment of Howgate as a disbursing officer, and directed him to give a bond as such officer, and he thereby recognized, and, in effect, provided, that there should be such an office. Among the duties of such an office it is plain was that of receiving and disbursing those moneys which had been appropriated by Congress for the signal service, and which came to him by reason of his designation as the property and disbursing officer of that branch of the service at Washington. If all the duties of such officer were not clearly specified and defined by law or the regulations of the department in which he was serving, it was at least clearly apparent that the public moneys which he received he was bound to honestly disburse and to account for to the proper officers of the government. As a security for the honest discharge of such duties the bond in question was given, and one of the conditions of the bond was that he should "faithfully expend all public moneys and honestly account for the same, and for all public property which shall or may come into his hands on account of the signal service of the United States army without fraud or delay." When he was guilty of the forgery of vouchers and the embezzling of the public moneys received by him as said officer, there can be no doubt or uncertainty that such conduct was a plain violation of his duty as an officer, and that the condition of the bond certainly and plainly covered such conduct, and was violated thereby.

The principle decided in *United States* v. *Bradley*, 35 U. S. 10 Pet. 343 [9: 448], that bonds and other deeds may be, and in many cases are, good in part and void for the residue, where the residue is founded in illegality but not *malum in se*, may be invoked in this case. The two conditions of the bond were, (1) that Lieutenant Howgate should carefully discharge the duties of property and [591 disbursing officer of the signal service; and (2) that he should faithfully expend all public money, and honestly account, etc., as already stated. The condition that he should carefully discharge the duties of the office might, perhaps, be regarded as somewhat vague, on account of the uncertainty as to what constituted all of those duties, but there is neither vagueness nor uncertainty in the other condition, above stated. If the first condition were to be held void for uncertainty, there is no valid reason for holding that the second condition is also void, although not at all uncertain. When the cause of action consists in a breach of that particular condition of the bond which is plain, definite, and certain, there is no reason for denying a recovery because of the uncertainty of another condition which need not be referred to in order to sustain the action.

Counsel for defendants ask: "What proof was there that it was the duty of Howgate, under a bond with a penalty of $12,000, to receive and disburse the enormous sums charged against him in the 'consolidated transcript,' aggregating the sum of $1,132,742.32, in the brief period of about two years?" The attention of the War Department had been called to the Signal Service Office at Washington by reason of a requisition for $50,000, in February, 1878, to be paid to Lieutenant Howgate as disbursing officer of the signal service. The answer to such requisition given from the War Department, among other things, was that "requisitions for advances should be for a less amount than $50,000, or should not exceed $25,000 at any one time." The acts of Congress making appropriations for the signal service also show that a large amount of public moneys would be disbursed in the course of each year through the office of the chief signal officer of the army. How much that sum would reach it was not necessary to know accurately. A bond exacted for the sum of $12,000 was very likely demanded in



Digitized by Google

view of the fact that frequent settlements were customary between the officer and the Treasury Department, and that requisitions were not to be made for any enormous sum at any [592]one time. With such checks *upon the receipt and disbursement of public moneys, it might well have been thought that the amount demanded was sufficient. Reference was also had in the letter from the War Department to the amount of the bond demanded of a commissary of subsistence, having the same rank, though in a different branch of the service, and also charged with the receipt and disbursement of large amounts of public moneys. A bond in the same penalty as that given by such an officer was evidently supposed to offer sufficient security for the government. Although when the bond was executed it might not have been supposed that the officer would have such large sums to disburse, that fact forms no defense to an action on the bond, which was conditioned for the honest disbursement of the public moneys, whatever might be their amount.

So far as this cause of action is concerned, the bond is not void for uncertainty, and the exception of the defendants is unsustained.

5. The defendants also claim the existence of error in the decision of the court below, that the settlement of Howgate's accounts was not a bar to the action. The evidence shows that his accounts had been regularly stated and passed by the accounting officers of the Treasury, and a certificate given him of nonindebtedness. These facts the defendants say were matters of record in the Treasury Department, and they urged that the plaintiff should therefore be estopped from maintaining this action.

To the same effect is the objection that the government is estopped from maintaining this suit by the inequitable representations and conduct of their agents which misled the surety Moses, to his prejudice.

It is necessary to see what this alleged settlement was that is set up by defendants as a bar to the maintenance of this action. It is seen by reference to Army Regulations, § 2394, which is set forth in the statement of facts, that it was necessary to obtain certificates of nonindebtedness before an officer retiring from the service could obtain final payment of his salary. Immediately upon his resignation being offered, December 7, 1880, Lieu-[593]tenant Howgate *proceeded to obtain the necessary certificates. He procured from the third auditor of the Treasury Department various certificates under dates of October 1, December 10 and 23, 1880, January 6, and April 26, 1881. These certificates were for different quarters of the years 1879 and 1880, and certified that the auditor had examined and adjusted the account of H. W. Howgate, Lieutenant, 20th Infantry, A. S. O., and found the same balanced "as appears from the statement and vouchers herewith transmitted for decision and certification."

The last certificate signed by the third auditor, reads as follows:

Certificate of Nonindebtedness."

Treasury Department,

Third Auditor's Office, April 26, 1881.

It is hereby certified that the accounts and returns of H. W. Howgate, Lt. 20th Inf., late acting signal officer, U. S. A., have been examined, found correct, and are closed.

This certificate is granted to satisfy the pay department that the above-named officer is not indebted to the United States on the books of this office at the date hereof."

Certificates similar in their nature were obtained from the offices of the chief of engineers, the quartermaster, the ordnance department, second auditor's office, the paymaster's, and the commissary generals' departments. Each certified substantially that Howgate "was not charged on the books of that office as a debtor to the United States," or "that his returns had been received, examined, and found correct," or "that there were no charges remaining against him on the books of the office."

There is no proof that any one of these certificates was ever seen by the sureties or was known by them to exist, nor is there evidence that a settlement of any nature had ever been made between the principal and his sureties based upon or by reason of the certificates, nor that the condition of the sureties had been at all changed because of the existence of the certificates or any one of them. The certificates were, of course, based only upon what appeared after an examination *of the books [594] in each department. Undoubtedly they were prima facie evidence of the facts they certified to, and in the absence of any evidence of mistake or of fraud attacking the integrity of the items, or any of them, appearing on the books and upon which the certificates were based, they would be conclusive in favor of the officer in any action against him. *Soule* v. *United States*, 100 U. S. 8, 11 [25: 536, 537]; *United States* v. *Bell*, 111 U. S. 477 [28: 478]; *Ex parte Randolph*, 2 Brock. 447, 475; *United States* v. *Irving*, 42 U. S. 1 How. 250, 263 [11: 120, 125]; *United States* v. *Hunt*, 105 U. S. 184, 187 [26: 1038, 1039]. They would not, however, be conclusive as against evidence of the forgery of any vouchers upon which the accounts had been founded and settlement arrived at; this is too plain for argument.

It is urged, however, that even if the certificates and books upon which they were based would ordinarily be open to explanation and would not be regarded by the courts as conclusive, the rule is nevertheless changed in this case by the action of the officers of the government, by reason of which the government is estopped from showing the falsity of the certificates and the forgery of the vouchers. The government is charged with laches in failing to take proper means of enforcing its demands against Howgate, and in failing to promptly notify the sureties of the fact of his defalcation and of their liability to respond on that account to the extent of the penalty of the bond.

As late as April 26, 1881, the government was ignorant of any cause of suspicion against Lieutenant Howgate, for on that date the third auditor of the Treasury Department certified to the correctness of Howgate's accounts and returns. Between that time and the 24th of August, 1881, the suspicions of the officers of the government were aroused, an examination of the books was made, other



Digitized by Google

investigations were entered upon, and the facts of the defalcation discovered, and on the last-named date a suit was commenced against Howgate for the purpose of recovering the sum of $101,257.08. The "particulars of demand," accompanying the declaration, showed that the suit was commenced to recover money unlawfully drawn and obtained by Howgate from the Treasury of the United States 595]*on checks drawn by him on the Treasurer for the amount stated, aggregating the amount sued for in the action. The defendant appeared in the action by attorney, and finally judgment for want of an answer was entered on the 24th of May, 1883, and $28,000 subsequently realized on the sale of the defendant's property, was credited on judgment.

The suit had been commenced in the supreme court of the District of Columbia, and Howgate, the defendant, and Moses, one of the sureties on his bond, were residents of the city of Washington in that District, and had been for many years. It is impossible to suppose that the fact of the alleged defalcation of Howgate was unknown to Moses. The record shows that a personal service upon Howgate was not obtained for the commencement of the action against him, which would imply an inability to discover him within the District or else his absence therefrom. The affidavit used upon obtaining the attachment showed that Howgate was aware of the investigation going on in relation to his accounts, and that with such knowledge he suddenly, and without declaring any other business or reason for leaving, left the District without indicating how long he would remain or when, if ever, he would return. The presumption is very strong from all these circumstances that Moses, after Howgate's departure from Washington, knew of the alleged defalcation and of the suit brought by the government against Howgate. There can be no well-founded claim that such suit was not commenced promptly, and there is no evidence that it was not prosecuted with due diligence, even though no answer had been put in up to the time when the judgment was taken. Various reasons might have existed for the delay between the commencement of the action and the entry of judgment, which cannot be said to have been unusual. There is nothing in the fact that the government sued Howgate alone, without calling upon the sureties in the bond which would operate to the injury of the sureties. And there is no evidence that the sureties suffered any damage by reason of any action or lack of action on the part of the government.

As to the certificates of nonindebtedness, there 596]is no legal *presumption that the sureties had any knowledge that these certificates had ever been given to Howgate either at the time of or soon after his resignation, or at all. The case of *United States* v. *Alexander*, 110 U. S. 825 [28:166], does not hold that there is any such presumption. In that case the Secretary of the Treasury having abated taxes against the defendant, under an act of Congress, the Commissioner of Internal Revenue gave notice of the fact to the principals in the bond, who then gave the same notice to their sureties, and the case was not decided on the ground of any presumption of knowledge on the part of the sureties as to the abatement.

We have looked at the cases cited by the counsel for the defendants upon this branch of the case. They all show either the giving of notice to the sureties of payment of the debt for which they were originally liable, or an admission of payment of the debt by the holder thereof, or a declaration of the holder of the security that he would exonerate the surety, or else a reliance by the sureties upon some conduct of the holder of the security towards them, and a necessary injury to them if the holder should be permitted to subsequently assume a different attitude. The cases referred to are placed in the margin.†

The case here is entirely barren of evidence that the sureties had knowledge of any fact going towards their exoneration, or that they acted or failed to act in any particular with reference to their principal by reason of the conduct of the government officials or the existence of the certificates mentioned. We are of opinion also that no such exonerating fact existed.

We are therefore unable to find either in the certificates alluded to or in the action of the officials connected with the government anything precluding the inquiry as to the actual and true state of the accounts upon which the judgment in *this case rests. The [597 exception of the defendants upon this ground cannot prevail.

6. The defendants also took exception to the decision of the court below in permitting plaintiff to introduce certain transcripts of the books and proceedings of the Treasury Department for the purpose of proving the actual state of the accounts between the government and Howgate. These transcripts were objected to on two grounds: (1) that they showed on their face that they were mere statements of balances, and not the entire account between the parties; (2) that they showed that the government officers had made a restatement of Howgate's account after he ceased to be property and disbursing officer, and that there was no authority for making such restatement, and that it was not evidence against the defendants. We think that neither objection is well founded.

The transcripts were received under U. S. Rev. Stat. § 886, and were certified to under the hand of the Secretary of the Treasury and the seal of the Treasury Department, on the 10th of November, 1884. There was also a certificate from the third auditor of the Treasury Department attached to the papers and certifying that they were transcripts from the books and proceedings of the Treasury Department, and that the papers annexed thereto were true copies of the originals on file and of the whole of said originals. Then followed a copy of the bond, and then

†United States v. Alexander, 110 U. S. 825 [28: 166]; Harris v. Brooks, 21 Pick. 197 [32 Am. Dec. 254]; Carpenter v. King, 9 Met. 511 [43 Am. Dec. 405]; Baker v. Briggs, 8 Pick. 131 [19 Am. Dec. 311]; Taylor v. Lohman, 74 Ind. 418; Thornburgh v. Madren, 33 Iowa, 380; Chambers v. Cochran, 18 Iowa, 159; Gordon v. M'Carty, 3 Whart. 407; Brooking v. Farmers' Bank, 83 Ky. 431; Aaron v. Mendel, 78 Ky. 427 [39 Am. Rep. 245]; 1 Greenl. Ev. § 207.



Digitized by Google

another certificate from the third auditor that he had "examined and adjusted the account of H. W. Howgate, Lieutenant 20th Infantry, property and disbursing officer, signal service, U. S. Army, from April, 1878, to September, 1880, and found the balance as follows" (giving the balance for each fiscal year for the years 1879, 1880, and 1881, and resulting in a balance due the United States of $133,255.22). This last certificate thus made by the third auditor does not purport to certify to a copy of the whole account between the government and Howgate. The account which first follows the certificate is termed a "consolidated settlement," and is simply a summary of the amount, giving only the total amount due the United States for each of the fiscal years stated. It does not pur-
598] port *to be the full account between the parties. Following that summary or "consolidated account," however, are the transcripts from the books of the Treasury Department, containing the account of Howgate, "property and disbursing officer, signal service of the United States, with the United States," including items of credits and of disbursements. In other words, both sides of the account are given in these transcripts and also the items of difference; that is, those items of credit which had been originally claimed by and allowed to Howgate, but which were subsequently disallowed by the accounting officers of the government on a restatement of the account, were given in full. This restatement had been made in 1884, on the ground that many of the vouchers for items that had been formerly allowed Howgate were forged or otherwise fraudulent copies of the alleged fraudulent vouchers are also set forth. If, therefore, the so-called "consolidated settlement" were inadmissible, as not being a full account, it was wholly immaterial, because the same facts would appear from an examination of the account between Howgate and the United States, both sides of which were contained in the other transcripts accompanying that consolidated settlement.

We think the certificate as to those transcripts was entirely sufficient, and the transcripts themselves were admissible as sufficient transcripts from the books and proceedings of the Treasury Department within U. S. Rev. Stat. § 886, and that the certificate which certified that the papers annexed to the transcript were true copies of the originals on file, and of the whole of such originals, was a full compliance with law. *United States* v. *Pinson*, 102 U. S. 549 [26: 226]; *United States* v. *Bell*, 111 U. S. 477 [28: 478].

As to the objection that the transcripts show on their face that the accounts therein referred to had been restated since the acceptance of the resignation of Lieutenant Howgate, and that there was no authority to make such restatement, we think the objection untenable. As has been heretofore stated, there had been no actual and formal settlement between the government and Howgate, and no admission made by the government for the purpose of
599] discharging him and his sureties *from liability on the bond. Howgate, for the purpose of obtaining payment of his own salary, had procured certain statements from various departments, acknowledging that by the books of those departments he did not appear indebted to the government, and by virtue of those certificates he had obtained final payment of his salary, but subsequently to that time, when other facts became known, causing an investigation into the state of the accounts, it became apparent that Lieutenant Howgate, at the time when he obtained these certificates of nonindebtedness, was in truth a defaulter, and that he owed the government over $100,000. After the final payment of his salary, when these facts became known, the acting chief signal officer made up a statement of the account between Howgate and the government, which showed in detail the vouchers and checks which were known to be fraudulent, with the names of witnesses, etc., which statement was sent to the Secretary of War, together with a report of the officer making up the account showing the true state of the account. After that time, and in compliance with the request of the solicitor of the Treasury, the Secretary of War sent to the second comptroller of the Treasury this statement of the account, together with a copy of the report of the acting chief signal officer which accompanied it, and the Secretary stated that the papers were forwarded to the second comptroller with a view to a restatement of the accounts of Howgate for use in the suit on his bond of April 2, 1878.

It therefore appears that this so-called restatement of the account was no mere gratuitous and unsolicited work on the part of the clerks of the Treasury Department, but that the restatement was made substantially by direction of the Secretary of War, under the supervision of the second comptroller of the Treasury, and asked for by the solicitor of that department, and it was all done that from the books and proceedings from the Treasury Department a transcript might be made that would show the actual state of the accounts between the government and Howgate after excluding these false and forged vouchers upon which he had obtained credit and by means of which he *was enabled to procure the [600
certificates of nonindebtedness above referred to. The idea that under circumstances like these there would be no power in the officers of the government to restate an account between the government and an officer by disallowing credits given him upon false and forged vouchers cannot be entertained for a moment. The cases already referred to in this opinion dispose of such a claim.

7. One other objection was taken upon the trial, and that was to the admission of the judgment recovered against Howgate by the government.

Neither surety was a party to that judgment which was solely against Howgate, and the record in that case was admitted in evidence under the objection and exception of the defendants. We are of opinion that the judgment was properly admitted in evidence against the surety. It proved, at least, prima facie a breach of the bond by showing the amount of public moneys which Howgate, the principal, had failed to faithfully expend and honestly account for. It was far beyond the penalty in the bond, and, unexplained, the judgment was sufficient evidence of the



Digitized by Google

breach of condition. *Drummond* v. *Prestman*, 25 U. S. 12 Wheat. 515 [6: 712]; *United States* v. *Burbank*, 71 U. S. 4 Wall. 186 [18: 321]; *McLaughlin* v. *Bank of Potomac*, 48 U. S. 7 How. 220 [12: 675]; *Stovall* v. *Banks*, 77 U. S. 10 Wall. 583 [19: 1036]; *Washington Ice Co.* v. *Webster*, 125 U. S. 426 [31: 799].

This completes the examination of the various questions which were argued at the bar by counsel for the defendants. Other questions have been raised in the briefs and have received our careful attention.

*We find nothing in the record which justifies a reversal of the judgment, and the same is therefore affirmed.*

---

**601] UNITED STATES, *Appt.*,**
*v.*
**CLARENCE R. GREATHOUSE.**

(See S. C. Reporter's ed. 601-606.)

*Repeals by implication—limitation of claims against the United States—consul general.*

1. Repeals by implication are not favored, and when two statutes covering in whole or in part the same matter are not absolutely irreconcilable, effect should be given, if possible, to both of them.
2. The exception of persons beyond seas and those under other disabilities, from the six years' limitation of actions on claims against the United States, made by the proviso of U. S. Rev. Stat. § 1069, is not repealed by the act of March 3, 1887, known as the Tucker act, but § 1 of the latter act should be interpreted as if that proviso were added to it.
3. A consul general of the United States, so long as he remains abroad, is within the exception of "persons beyond the seas" from the limitation as to prosecuting claims against the United States.

[No. 234.]

*Argued March 25, 1897. Decided April 19, 1897.*

APPEAL from a judgment of the Court of Claims in favor of Clarence R. Greathouse against the United States to recover back moneys paid by him to the United States collected by him for certifying invoices of goods, etc. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **Joshua Eric Dodge**, Assistant Attorney General, for appellant.

*Mr.* **John C. Fay** for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought in the court of claims on the 24th day of April, 1894.

The claimant, Greathouse, was appointed consul general of the United States at Kanagawa, Japan, and served in that capacity from August 1, 1886, to March 31, 1889. Since the last-named date he has continuously resided in foreign countries, and had not when this cause was heard below returned to the United States.

During the above period he collected $1,795 from sundry persons for certifying invoices of goods shipped through the United States in transit to foreign countries and $61 from other persons for certifying the value of Japanese currency attached to such invoices.

Under the rules and regulations of the State and Treasury Departments the fees so collected were "accounted for and *paid" to the [602 United States, the first payment being made on January 27, 1887, and the last on July 18, 1889.

On the foregoing facts found by the court of claims, the majority of that court held as a conclusion of law that the claimant was entitled to recover from the United States $1,856, which was the aggregate amount of the above payments to the United States.

As it is a condition or qualification of the right to a judgment against the United States in the court of claims that, except where the claimant labors under some one of the disabilities specified in the statute, the claim must be put in suit by the voluntary action of the claimant, or be presented to the proper department for settlement within six years after suit could be commenced thereon against the government (*Finn* v. *United States*, 123 U. S. 227, 232 [31: 128, 130], it is contended that the court below erred in not holding that all demands for sums paid by the claimant into the Treasury prior to April 24, 1888, were barred by limitation, and that judgment should not have been rendered for any sum in excess of the aggregate amount paid by claimant into the Treasury after that date.

By U. S. Rev. Stat. § 1069, it is provided that "every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

*It will be observed that by this section[603 "persons beyond the seas" having claims against the United States cognizable by the court of claims were entitled to sue within three years after the disability of absence was removed. As Greathouse was beyond the seas during the whole period covered by his claim and up to the institution of this action, the limitation of six years would not apply to this case, if the exception made by the Revised Statutes of "persons beyond the seas" is still in force.

It is contended that since the passage of the act of March 3, 1887 (24 Stat. at L. 505, chap. 359), entitled "An Act to Provide for the

NOTE.—*As to repeal of statute by implication*, see note to United States v. Henderson, 20: 235.

*As to effect of state decisions and laws, in regard to statute of limitations, upon United States courts*, see note to Elmendorf v. Taylor, 6: 289.



Digitized by Google

Bringing of Suits against the United States," known as the Tucker act, the limitation of six years is applicable to *all* claims against the United States cognizable by any court, under whatever disability the claimant may have labored.

That act provides: "The court of claims shall have jurisdiction to hear and determine the following matters: First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely, by any court, department, or commission authorized to hear and determine the same. Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court: *Provided*, That no suit against the gov-[604]ernment of the United *States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made."

The district courts of the United States were given by the same act concurrent jurisdiction with the court of claims as to all matters named in the above section where the amount of the claim did not exceed $1,000, the circuit courts of the United States to have such concurrent jurisdiction in all cases where the amount of the claim exceeds $1,000 and does not exceed $10,000. Sec. 2.

It was further provided that the jurisdiction of the respective courts of the United States proceeding under that act, including the right of exception and appeal, should be governed by the law then in force, in so far as the same was applicable and not inconsistent with the provisions of that act; and the course of procedure is to be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as they may adopt. Sec. 4.

By the Tucker act, U. S. Rev. Stat. § 1079, was expressly repealed, and it was declared that the provisions of § 1080 shall apply to cases under that act. Sec. 8.

The 9th section of the act provides that "the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes."

The act of March 3, 1887, it will be observed, expressly repealed only § 1079 of the Revised Statutes, and all laws and parts of laws that were inconsistent with that act.

In *United States* v. *Jones*, 131 U. S. 1, 16 [33: 90, 91], it was held that the jurisdiction given to the court of claims by the act of 1887 was precisely the same as that given in the acts of 1855 and 1863 (10 Stat. at L. 612, chap. 122; 12 Stat. at L. 765, chap. 92), with the addition *that it was extended by the act of[605] 1887 to damages, liquidated and unliquidated, "in cases not sounding in tort, and to claims for which redress may be had either in a court of law, equity, or admiralty." But it does not follow that the proviso of § 1 of the act of 1887, declaring that "no suit against the government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made," should be held to have displaced every part of U. S. Rev. Stat. § 1069. The act of 1887 only superseded such previous legislation as was inconsistent with its provisions. It is true that if that act be literally construed, there is some ground for holding that Congress intended by the proviso of § 1 to cover the whole subject of the limitation of suits against the government, in whatever court instituted. But we cannot suppose that it was intended to strike down the exceptions made in U. S. Rev. Stat. § 1069, in favor of "the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued." Those exceptions were not expressly abrogated by the act of 1887, and they could be held to be repealed only by implication. But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them. *Frost* v. *Wenie*, 157 U. S. 46, 58 [39: 614, 619]; *United States* v. *Healey*, 160 U. S. 136, 147 [40: 369, 373].

In conformity with this principle we must adjudge that the above proviso of U. S. Rev. Stat. § 1069, is still in force, because not absolutely inconsistent with the last proviso of the act of 1887; consequently that the claim of a person who was beyond the seas at the time the claim accrued is not barred until three years shall have expired after such disability is removed without suit against the government. Although the act of 1887 prescribes the limitation for suits "under this [that] act," without making any exception in favor of persons under disability, it should be interpreted as *if the proviso in U. S. Rev. Stat. § 1069[606] were added to § 1 of that act. We could not hold otherwise without deciding, in effect, that the limitation of six years applied to claims accruing to married women and infants during their respective disabilities, as well as to the claims of idiots, lunatics, and insane persons. We are unwilling to hold that Congress intended any such result. We may add that it was not contemplated that the limitation upon suits against the government in the district and



Digitized by Google

circuit courts of the United States should be different from that applicable to like suits in the court of claims.

It results that as the appellee was "beyond the seas" at the time his demand first accrued, and had not returned to this country prior to the institution of this suit, his claim was not barred by limitation. *The judgment of the Court of Claims*—which is not disputed upon any ground affecting the merits of the claim in suit—*is therefore affirmed.*

---

## TEXAS & PACIFIC RAILWAY COMPANY, *Plff. in Err.*, v. HENRY D. CODY.

(See S. C. Reporter's ed. 606-616.)

*Removal of case—judicial notice—negligence, when questioned by jury — instructions—rights and duties of railroads and travelers reciprocal—requesting instructions.*

1. The right of a defendant to remove a case to the Federal court on the ground of diverse citizenship of the parties, or that the defendant is a Federal railroad corporation, cannot be cut off by plaintiff's averments or lack of averments respecting the parties.
2. Judicial notice will be taken of the fact of the Federal incorporation of a railroad company.
3. The negligence of one who was struck by a train backing over a street crossing is a question for the jury on proof that there was no light on the crossing or which indicated the approach of a train, and no bell ringing or whistle blowing, and that he, as he approached the crossing, slackened his pace, walked slowly, listened and looked, without seeing or hearing any train.
4. A court which gives proper instructions is not obliged to use the language requested by counsel, however correct it may be.
5. The obligations, rights, and duties of railroads and travelers upon highway crossings are mutual and reciprocal, and no greater degree of care is required of one than of the other.
6. Failure to request additional instructions, if those given on the subject are correct, will prevent an objection to their insufficiency on appeal.

[No. 246.]

*Argued and Submitted March 29, 1897. Decided April 19, 1897.*

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of that court affirming a judgment of the Circuit Court of the United States for the Northern District of Texas in favor of plaintiff, Henry D. Cody, against the Texas & Pacific Railway Company, for injury of plaintiff at a crossing by the carelessness and negligence of the defendant and its agents and servants. *Affirmed.*

See same case below, 30 U. S. App. 183.

Statement by Mr. Chief Justice **Fuller:**

This was an action commenced by Henry D. Cody against the Texas & Pacific Railway Company in the district court of Tarrant county, Texas, and removed by defendant to the circuit court of the United States for the northern district of Texas.

Plaintiff alleged in his petition that on March 4, 1893, he was injured at the crossing of the track of the defendant company over Jennings avenue in the city of Fort Worth, Texas, by the carelessness and negligence of the defendant and its agents and servants. Defendant demurred generally and pleaded the general issue, and, in special pleas, alleged the contributory negligence of plaintiff and his failure to exercise due care under the circumstances. The issues were submitted to a jury, which found a verdict in favor of plaintiff for the sum of $7,500, on which judgment was rendered. The case was taken to the circuit court of appeals for the fifth circuit and the judgment affirmed (30 U. S. App. 183), whereupon it was brought to this court by writ of error.

*Messrs.* **David D. Duncan,** *Winslow S. Pierce,* and *John F. Dillon,* for plaintiff in error:

The Federal courts have jurisdiction of this case.

The salient and controlling features of this case, as respects Federal jurisdiction, are that the Texas & Pacific Railway Company was by a public act of the Congress of the United States directly created a corporation by the name of the Texas & Pacific Railway Company. This court will judicially notice the act of Congress thus creating the defendant company.

*Mansfield, C. & L. M. R. Co.* v. *Swan,* 111 U. S. 379 (28: 462); *Cameron* v. *Hodges,* 127 U. S. 322 (32: 132); *Oregon S. L. & U. N. R. Co.* v. *Skottowe,* 162 U. S. 490 (40: 1048); *Osborn* v. *Bank of United States,* 22 U. S. 9 Wheat. 738 (6: 204); *Union P. R. Co.* v. *Myers* ("*Pacific R. Removal Cases*") 115 U. S. 1 (29: 319).

The legal status of the Texas & Pacific Railway Company as a Federal corporation has been directly adjudged by this court in what are called the *Pacific R. Removal Cases,* 115 U. S. 16 (29: 324).

All the decisions of this court which require that the Federal question must appear in the plaintiff's statement of his case in order that

---

NOTE.—*As to removal of causes under act of 1875; citizenship,*—see note to Meyer v. Delaware R. Const. Co. 25: 598.

*As to removal by one of two or more defendants; separable controversies,*—see note to Sloane v. Anderson, 29: 899.

*As to removal of causes to United States courts for local prejudice,* see notes to Gaines v. Fuentes, 23: 524, and Jefferson v. Driver, 29: 897.

*As to removal of causes from state to Federal courts where United States Constitution, act of Congress, or treaty comes in question,* see note to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

*As to civil rights; removal of causes, when denied,*—see note to Civil Rights Cases, 27: 835.

*As to questions of law and fact for court or jury, in civil and criminal cases,* see note to King v. Delaware Ins. Co. 3: 155.

*As to care and precautions necessary in crossing a railroad track,* see note to Continental Improv. Co. v. Stead, 24: 508.



Digitized by Google

the Federal courts may have jurisdiction were rendered in cases where some right expressly conferred by the Constitution, laws, or treaties of the United States was involved; or which required the construction of such Constitution, laws, or treaties; or in which, as in the *Skottowe Case*, the defendant corporation was not created by a law of the United States or whose powers were not derived therefrom.

The Federal courts take judicial notice of the public acts of Congress or "the law of the land."

Greenl. Ev. § 5; *Edye* v. *Robertson* ("*Head Money Cases*") 112 U. S. 580 (28: 798); *United States* v. *Rauscher*, 119 U. S. 407, 418 (30: 425, 428); *Armstrong* v. *United States*, 80 U. S. 13 Wall. 154 (20: 614).

The circuit court of appeals erred in affirming the charge of the judge at the trial that a person attempting to cross a railroad track has "a right to expect" that the signals required by law will be given.

*Elliott* v. *Chicago, M. & St. P. R. Co.* 150 U. S. 245 (37: 1068); *Missouri P. R. Co.* v. *Moseley*, 57 Fed. Rep. 921; *McGrath* v. *New York C. & H. R. R. Co.* 59 N. Y. 472, 17 Am. Rep. 359; *Chicago, R. I. & P. R. Co.* v. *Houston*, 95 U. S. 702 (24: 543); Beach, Contrib. Neg. § 63.

Plaintiff was guilty of contributory negligence in not exercising due care when he approached the track of the railway company.

*Tucker* v. *New York C. & H. R. R. Co.* 124 N. Y. 308; *Cincinnati, I. St. L. & C. R. Co.* v. *Howard*, 124 Ind. 280, 8 L. R. A. 593; *Aiken* v. *Pennsylvania R. Co.* 130 Pa. 380; *Missouri P. R. Co.* v. *Moseley*, 57 Fed. Rep. 921; *Salter* v. *Utica & B. R. Co.* 75 N. Y. 273.

The railway company was not negligent in respect to the lighting of the street at the crossing over its track.

The rights of railway companies at crossings are superior to those of passengers on the highway.

*Warner* v. *New York C. R. Co.* 44 N. Y. 465.

*Messrs.* **Ernest B. Kruttschnitt, Edgar H. Farrar, Benjamin F. Jonas, Thomas F. West,** and *Hewes T. Gurley*, for defendant in error:

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in that portion of its general charge wherein it instructed the jury that a person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, in this, that it presents an erroneous view of the law which requires that the traveler, upon approaching a railroad crossing, shall be on the alert and stop and look and listen to ascertain whether, if he ventures on the crossing, his life or limb may be imperiled by a train that may be nearing the crossing at the same time.

*Continental Improv. Co.* v. *Stead*, 95 U. S. 161 (24: 403); *Mills* v. *Smith*, 75 U. S. 8 Wall. 27 (19: 346); *Nudd* v. *Burrows*, 91 U. S. 426 (23: 286); *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 433 (36: 494).

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in that portion of its general charge wherein it instructed the jury that if they found for plaintiff they would find for him in any sum not to exceed $10,000, in this, that said charge prescribed no measure of damages, but leaves their assessment to the unbridled discretion of the jury.

*United States Exp. Co.* v. *Kountze*, 75 U. S. 8 Wall. 353 (19: 460); *Carter* v. *Carusi*, 112 U. S. 484 (28: 822); *Texas & P. R. Co.* v. *Volk*, 151 U. S. 78 (38: 80).

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The railway company raises a preliminary question of jurisdiction. Plaintiff below described himself in his petition as a resident of Tarrant county, Texas, and alleged the Texas & Pacific Railway Company to be "a private corporation, created and existing under the laws of the state of Texas," and that "the defendant owns and operates a line of railway *ex-[608 tending into and running through said Tarrant county, and into and through the city of Fort Worth, Tarrant county, Texas, and has, for the purpose of conducting and carrying on its business in the management and operation of said line of railway, an office and agency and an agent and representative in the city of Fort Worth, in said Tarrant county, upon whom citation may be served in this case, the name of the said agent being J. T. Clements."

The defendant company filed its petition for removal in due time, which, in addition to other necessary averments, stated "that at the commencement of this suit plaintiff was then and still is a citizen and resident of the state of Texas, and that your petitioner was then and still is a corporation organized under and by virtue of certain acts of Congress of the United States, to wit: an act entitled 'An Act to Incorporate the Texas & Pacific Railway Company and to Aid in the Construction of Its Road and for Other Purposes,' approved March 3, 1871 (16 Stat at. L. 573, chap. 122), and an act supplementary thereto approved May 2, 1872 (17 Stat. at L. 59, chap. 132); and that this is a suit arising under the laws of the United States within the meaning of the 2d section of an act of March 3, 1875 (18 Stat. at L. 470, chap. 137), as amended by the acts of March 3, 1887 (24 Stat. at L. 552, chap. 373), and August 13, 1888 (25 Stat. at L. 433, chap. 863)."

Bond was tendered and approved and the case removed accordingly. There is no controversy over the fact that the defendant corporation owed its existence to acts of Congress, and was entitled to remove the cause as one arising under the laws of the United States in accordance with the decision of this court in *Union P. R. Co.* v. *Myers* ("*Pacific R. Removal Cases*") 115 U. S. 1 [29: 319], but the railway company expresses apprehension lest we may hold that jurisdiction was not maintainable within the rule laid down in *Tennessee* v. *Union & P. Bank*, 152 U. S. 454 [38: 511], and other cases, because plaintiff below did not allege that defendant was a Federal corporation, but rather the contrary.

The rule thus referred to, and reiterated in *Chappell* v. *Waterworth*, 155 U. S. 102 [39: 85]; *Postal Teleg. Cable Co.* v. *United States* ("*Postal*



Digitized by Google

*Teleg. Cable Co.* v. *Alabama*") 155 U. S. 482 [39: 231]; and *Oregon S. L. & U. N. R. Co.* v. *Skottowe*, 162 U. S. 490 [40: 1048],—is that under the acts of March 3, 1887 (24 Stat. at L. 552, chap. 373), and August 13, 1888 (25 Stat. at L. 433, chap. 866), a case not depending upon the citi-
609 ]zenship *of the parties, nor otherwise specially provided for, cannot be removed from a state court into the circuit court of the United States, as one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim, and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.

By the acts of Congress of 1887 and 1888 the jurisdiction of the circuit court on removal by defendant (and defendants alone can remove) is limited to such suits as might have been originally brought in that court; and it is essential if the jurisdiction is invoked on the ground that the cause of action arises under the Constitution, laws, or treaties of the United States that this should be asserted. If recovery directly depends upon a right claimed under the Constitution, laws, or treaties, plaintiff's statement of his case must necessarily disclose the fact, and if the action is brought in the state court, defendant can remove it. If, however, plaintiff asserts no such right, and defendant put his defense on the possession of such right, or its denial to plaintiff, though essential to his recovery, then defendant is remitted to his writ of error from this court to the state court to test the Federal questions thus raised.

It is obvious that in the instance of diverse citizenship a different question is presented. Plaintiff may run his own risk in respect of the cause of action on which he proceeds, but he cannot cut off defendant's constitutional right as a citizen of a different state than the plaintiff to choose a Federal forum, by omitting to aver, or mistakenly or falsely stating, the citizenship of the parties.

And this must be so also as to Federal railroad corporations. It was held in *Union P. R. Co.* v. *Myers* ("*Pacific R. Removal Cases*") 115 U. S. 1 [29: 319], that as all the faculties and capacities possessed by such corporations were derived from their acts of incorporation by Congress, all their doings arose out of those laws, and, therefore, suits by and against them were "suits arising under the laws of the United States." Conceding this, the principle applicable to diverse citizenship may reasonably be applied to them.

610 ] *If in this case plaintiff had simply described defendant by its name, without more, there would seem to be no question that, as the corporation was judicially known to be a Federal corporation, defendant would be entitled to remove the case on proper allegations in its petition; and we think this necessarily follows, where, by some mistake, or otherwise, the defendant is erroneously stated to be created under state laws. Here defendant was described as "a private corporation, created and existing under the laws of the state of Texas," and this was repeated in an amended petition, filed in the circuit court; but no motion to remand was made, nor was the propriety of the removal questioned in any way. Possibly the pleader did not intend to deny the Federal character of the company, but whether so or not, no issue was or could be made as to the source of its corporate existence.

*Oregon S. L. & U. N. R. Co.* v. *Skottowe*, 162 U. S. 490 [40: 1048], is in harmony with these views. That was an action brought in a court of the state of Oregon to recover for personal injuries alleged to have been caused, in Oregon, by the negligence of the defendant company. A petition for removal was filed and denied, and this denial was approved by the supreme court of Oregon. Defendant was described in the complaint as "a corporation duly organized, existing, and doing business in the state of Oregon." In the removal petition the defendant was alleged to be a consolidated company, composed of several railway corporations severally organized and created under the laws of the territories of Utah and Wyoming and of the state of Nevada, and under an act of Congress, approved August 2, 1882 (22 Stat. at L. 185, chap. 372), entitled "An Act Creating the Oregon Short Line Railway Company, a Corporation in the Territories of Utah, Idaho, and Wyoming, and for Other Purposes;" and an act of Congress, approved June 20, 1878 (20 Stat. at L. 241, chap. 352), making the Utah & Northern Railway Company a railway corporation in the territories of Utah, Idaho, and Montana.

This court held that, so far as appeared, the defendant company existed and was doing business in the state of Oregon solely under the authority of that state, whether express or permissive; *that the acts of Congress referred [611
to did not disclose any intention on the part of Congress to confer powers or right to be exercised outside of the territories named therein, and that the supreme court of Oregon committed no error in affirming the action of the trial court denying the petition for removal.

We are of opinion that the circuit court properly entertained jurisdiction.

Turning to the case on the merits, we find no reason for disturbing the judgment of the circuit court of appeals. Fourteen errors were assigned in that court to the judgment of the circuit court, which were reduced to six in this court, of which the first was merely that the court of appeals erred in affirming the judgment. The five specific grounds of error assigned are that the circuit court erred in refusing to give each of the following instructions asked for by defendant:

"1. The defendant asks the court to instruct the jury to return a verdict in this case for the defendant."

"3. You are instructed that it was the duty of plaintiff upon approaching the railroad track on Jennings avenue crossing, if he was hurt on said crossing, to stop and look and listen for the approach of the train on the track before attempting to pass over said crossing, and if you believe from the evidence that he failed to stop and look and listen, and that in consequence of such failure he was injured, you will find for defendant, even though you should believe from the evidence that the defendant was negligent either in respect to not furnishing a light at said crossing or in respect to not giving signals of the approach of the



Digitized by Google

train or was negligent in respect to both of such matters."

"7. You are instructed that the rights of the railway company and of the public are not equal, but that the right of the company is superior to the right of the traveling public on all parts of its track, even at crossings."

And that there was error in that portion of the charge relating to the right of a person crossing a railroad track to expect the railroad company to give the signals required by law; and in that relating to the damages.

**612]** *There was evidence tending to show that on March 4, 1892, on a very dark night, plaintiff was walking along Jennings avenue, in Fort Worth, and towards the track of defendant, which he approached from the south and which crossed Jefferson avenue at right angles; that as he approached he slackened his pace, walked slowly, listened, looked, and saw and heard no train; that there was no light on the crossing, no bell ringing, no blowing of a whistle, and no light indicating the approach of a train; and that, as he passed over the track, he was struck by a train backing over the crossing, knocked down, and severely injured. The evidence was conflicting on the questions of negligence and contributory negligence, and the circuit court did not err in refusing to peremptorily instruct the jury in defendant's favor.

So far as the refusal of defendant's instructions, numbered "3" and "7" is concerned, the charge must be considered as a whole, as however correct either of them might be, the court was not obliged to use the language of counsel, and if the jury were otherwise properly advised on these points that was sufficient.

And this observation is applicable also to the exception to the reference to the giving of signals. That cannot be passed on as an isolated proposition.

After giving certain instructions requested by defendant, the court instructed the jury as follows:

"In this case the jury are instructed that plaintiff sues the defendant for the sum of $10,000, which he says he is entitled to by reason of injuries inflicted on him by defendant company in crushing his leg and causing its amputation, by serious injuries to his head, and by the bodily and mental pain incident and resulting from said injuries, as also from his diminished capacity to earn a living. He also alleges that he has incurred liabilities for nursing, lodging, attention and physician, in the sum of $700.

"2. If you believe from the evidence that plaintiff was injured on defendant's track east of Jennings avenue, then you will find for the defendant.

"3d. If, however, the jury find from the evi-**613]** dence that the *plaintiff was injured by the defendant on its track on the crossing of Jennings avenue in Fort Worth, then you are instructed that the statutes of the state of Texas provide 'that each locomotive engine shall have on it a bell or a steam whistle, and that the bell shall be rung or the whistle blown at the distance of at least 80 rods from the place where the railroad shall cross any road or street, and to be kept ringing or blowing until it shall have crossed such road or street or stopped.'

"4th. The plaintiff, if he was injured on Jennings avenue while attempting to cross defendant's track, was required to use due care himself to avoid danger. The care which a person who crosses a railroad track on a street in a city is required to use is a question of fact for the jury. It varies with the surrounding circumstances. Such person is required to use due care to avoid danger; should he not do so, and his own negligence is the proximate cause of his injuries, he cannot recover, although the railroad company may not have given the signals which the law requires to indicate the approach of the train.

"5th. Should you believe from the evidence that the plaintiff knew, or by the use of reasonable diligence might have known, of the approach of defendant's train, and thereby have avoided the danger, then you will find for the defendant.

"6th. If, on the other hand, you believe from the evidence that the plaintiff's negligence was not the proximate cause of his injuries, and that plaintiff, without fault on his part, was injured by defendant at Jennings avenue crossing through want of proper care on the part of the defendant, then you will find for plaintiff, in any sum not to exceed $10,000.

"A person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, and if he is without fault and such neglect on the part of the road results in his injury, then he can recover.

"7th. The degree of care that was proper care on the part of the plaintiff and defendant must fit and grow out of the time, the occasion, and circumstances. If the night was dark and misty and no arc light or other light lit up the crossing at Jennings avenue, then to the extent that such facts, if at all, *increased the [**614** danger at the crossing of Jennings avenue, then to that extent were greater care and prudence required of both plaintiff and defendant at said crossing.

"8th. The care to be exercised is such as an ordinary prudent man would exercise under similar circumstances. This is the true rule whether applied to the alleged negligence of the railroad company or the alleged contributory negligence of the plaintiff, and what is due care under a given state of facts must be determined by the jury by applying the rule as to what in their judgment a man of ordinary prudence would have done under the circumstances shown by the evidence.

"9th. If plaintiff was injured at the crossing of Jennings avenue over defendant's track, and his failure to use the care that a person of ordinary prudence would have used under the circumstances was the proximate cause of his injuries, then he cannot recover although defendant may have also been guilty of negligence in the matter of failing to ring the bell on the engine or in some other matter."

We think that this gave the law to the jury with substantial correctness and fully covered all that the company had the right to demand.

The circuit court applied the settled rule as expounded by Mr. Justice Bradley in *Continental Improv. Co.* v. *Stead*, 95 U. S. 161 [24: 403]. That was the case of a collision of a special railroad train with a wagon. There was evidence tending to show that the plaintiff,



Digitized by Google

who was driving the wagon, looked to the southward, from which direction the next regular train was to come, and did not look northwardly from which this train came; that his wagon produced much noise as it moved over the frozen ground; that his hearing was somewhat impaired; and that he did not stop before attempting to cross the track. The evidence was conflicting as to whether the customary and proper signals were given by those in charge of the locomotive, and as to the rate of speed at which the train was running at the time. The counsel for the railroad company requested the court to give certain specific instructions, **615**] to the general effect that *the plaintiff should have looked out for the train, and was chargeable with negligence in not having done so; and that it is the duty of those crossing a railroad to listen and look both ways along the railroad before going on it, and to ascertain whether a train is approaching or not. The trial judge refused to adopt the instructions framed by counsel, and charged that both parties were bound to exercise such care as under ordinary circumstances would avoid danger,—such care as men of common prudence and intelligence would ordinarily use under like circumstances; that the amount of care required depended upon the risk of danger; and explained the circumstances which bore on that question. He charged, in short, that the obligations, rights, and duties of railroads and travelers upon highways crossing them are mutual and reciprocal, and no greater degree of care is required of the one than of the other.

Mr. Justice Bradley said: "If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due care on the part of those traveling on the other, to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. . . . On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. . . . We think the judge was perfectly right, therefore, in holding that the obligations, rights, and duties of railroads and travelers upon intersecting high-**616**] ways *are mutual and reciprocal, and that no greater degree of care is required of the one than of the other. For, conceding that the railway train has the right of precedence in crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with a mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty. . . . The mistake of the defendant's counsel consists in seeking to impose upon the wagon too exclusively the duty of avoiding collision, and to relieve the train too entirely from responsibility in the matter. Railway companies cannot expect this immunity so long as their tracks cross the highways of the country upon the same level. The people have the same right to travel on the ordinary highways as the railway companies have to run trains on the railroads."

The case was reaffirmed, quoted from, and followed in *Baltimore & O. R. Co.* v. *Griffith*, 159 U. S. 603 [40: 274].

Tested by these principles, the circuit court did not err in the matters complained of.

Nor was there error in respect of the question of damages. What the trial judge said on that subject, taken together, was not incorrect, and if the railway company had desired particular instructions in reference to the measure of damages, it should have requested them, which it did not do. *Texas & P. R. Co.* v. *Volk*, 151 U. S. 73 [38:78].

*Judgment affirmed.*

---

## TEXAS & PACIFIC RAILWAY COMPANY, *Plff. in Err.*, v. WILLIAM K. BARRETT. [617

(See S. C. Reporter's ed. 617-620.)

*Injury to employee—defects in boiler—ordinary care—burden of proof.*

1. A railroad company is not liable for injury to an employee by the explosion of a locomotive boiler, unless it resulted from the want of ordinary care, either in selecting the engine or in keeping it in reasonably safe repair.
2. A railroad company is not required to adopt extraordinary tests for discovering defects in a locomotive boiler or any of its machinery, which are not approved, practicable, and customary; but it fulfils its duty in this regard if it adopts such tests as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances.
3. By ordinary care is meant such as a prudent

NOTE.—*As to who are coemployees and coservants within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a coservant,*—see note to Hough v. Texas & P. R. Co. 25: 612.

*As to negligence; responsibility of master to servant for carefulness and competency of coservants,*—see note to Wabash R. Co. v. McDaniels, 27: 605.

*As to fellow servants and their negligence; who are fellow servants; vice principal; superior servant; liability of master,*—see note to Baltimore & O. R. Co. v. Baugh, 37: 772.



Digitized by Google

man would use under the same circumstances; it must be measured by the character and risks of the business.

4. The burden of proof is on an employee suing for alleged negligence of his employer to show that the injury received was caused by the master's negligence, to which plaintiff's negligence did not contribute.

[No. 247.]

*Argued and Submitted March 29, 1897. Decided April 19, 1897.*

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the Northern District of Texas in favor of plaintiff, William K. Barrett, against the Texas & Pacific Railway Company, for injuries received by plaintiff by the explosion of an engine in defendant's yard. *Affirmed.*

See same case below, 30 U. S. App. 196.

The facts are stated in the opinion.

*Messrs.* **David D. Duncan,** *Winslow S. Pierce,* and *John F. Dillon,* for plaintiff in error:

The Federal courts have jurisdiction of this case.

The Texas & Pacific Railway Company is the creature of the laws of the United States incorporated by a public act of Congress of which the courts are bound to take judicial notice; an allegation of the title of the railway company is therefore a sufficient allegation of its Federal character.

In actions of tort, growing out of the explosion of an engine boiler, no presumption of negligence arises from the fact that such an explosion took place, but the presumption is that the proper appliances were furnished.

*Louisville & N. R. Co.* v. *Allen,* 78 Ala. 494; *Mobile & O. R. Co.* v. *Thomas,* 42 Ala. 672; Pierce, Railroads, 382, 383.

It is the duty of the trial judge to instruct the jury as to the law applicable to the case on trial, and not to announce abstract principles of law.

*Thorwegan* v. *King,* 111 U. S. 549 (28: 514); *Pleasants* v. *Fant,* 89 U. S. 22 Wall. 116 (22: 780); *Texas & P. R. Co.* v. *Reed,* 88 Tex. 439; *Texas & P. R. Co.* v. *Bryant,* 56 Fed. Rep. 803.

When a servant enters into the employment of another he assumes all the risks ordinarily incident to the business. He is presumed to have contracted in reference to all the hazards and risks ordinarily incident to the employment; consequently, he cannot recover for injuries resulting to him therefrom.

The servant takes the risk of the master's mode of conducting his business, though a safer one might be followed, if the servant fully knows the risk and continues to work.

The parties have in view, when engagements for services are made, the risks and dangers incident to the employment, and in consideration of them the rate of compensation is fixed. In all engagements of this character the servant assumes those risks that are incident to the service, and as between himself and the master he is presumed to have contracted on those terms, and if an injury is sustained by the servant in that service it is an accident and the misfortune must rest on him.

Wood, Mast. & S. 2d ed. § 326; 3 Wood, Railway Law, p. 1452, § 370; 14 Am. & Eng. Enc. Law, p. 843, § 23, also p. 845; *Texas & P. R. Co.* v. *Minnick,* 57 Fed. Rep. 362–368; *Tuttle* v. *Detroit, G. H. & M. R. Co.* 122 U. S. 189 (30: 1114); *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478 (27: 1003); *Houston & T. C. R. Co.* v. *Conrad,* 62 Tex. 627; *Woodworth* v. *St. Paul, M. & M. R. Co.* 18 Fed. Rep. 282; *Missouri P. R. Co.* v. *Somers,* 71 Tex. 700; *Green* v. *Cross,* 79 Tex. 130; *Naylor* v. *Chicago & N. W. R. Co.* 53 Wis. 661; *Wonder* v. *Baltimore & O. R. Co.* 32 Md. 411, 3 Am. Rep. 143; *Crilly* v. *Texas & P. R. Co.* (La.) 58 Am. & Eng. R. Cas. 104; *Kohn* v. *McNulta,* 147 U. S. 238 (37: 150).

A railway company is not liable to an employee for injuries received through the negligence of a fellow servant engaged in the same line of employment.

It is a well-settled proposition of law that railway companies are not obliged to apply extraordinary tests to machinery to discover latent defects.

*Richmond & D. R. Co.* v. *Elliott,* 149 U. S. 271, 272 (37: 732); *Louisville & N. R. Co.* v. *Allen,* 78 Ala. 494.

The burden of proof in this case is on the plaintiff to prove negligence; and this is not shifted by proving only the fact of injury from the explosion of the boiler. Such is the rule where an employee or servant sues, although a different principle is held to prevail where an injury is received by a passenger on a railroad, in consequence of a defect in any of its machinery or appliances.

*Mobile & O. R. Co.* v. *Thomas,* 42 Ala. 672, 715; *Illinois C. R. Co.* v. *Houck,* 73 Ill. 285; Pierce, Railroads, 382, 383.

*Messrs.* **A. H. Garland** and **R. C. Garland,** for defendant in error:

The duties of the master are to furnish, (a) proper machinery; (b) competent servants.

*Houston & T. C. R. Co.* v. *Myers,* 55 Tex. 111; *International & G. N. R. Co.* v. *Kernan,* 78 Tex. 294, 9 L. R. A. 703.

The company cannot delegate these duties.

*International & G. N. R. Co.* v. *Kernan, supra; Texas & P. R. Co.* v. *O'Fiel,* 78 Tex. 486; *Galveston, H. & S. A. R. Co.* v. *Farmer,* 73 Tex. 85; *Houston & T. C. R. Co.* v. *O'Hare,* 64 Tex. 600; *International & G. N. R. Co.* v. *Kindred,* 57 Tex. 501; *Houston & T. C. R. Co.* v. *Dunham,* 49 Tex. 188; *Houston & T. C. R. Co.* v. *Marcelles,* 59 Tex. 334.

For this reason the inspection of machinery is a duty of the company, and an inspector appointed for this purpose is not a fellow servant with employees in its use or in other departments of the company's service.

*International & G. N. R. Co.* v. *Kindred, Houston & T. C. R. Co.* v. *Marcelles,* and *Houston & T. C. R. Co.* v. *Dunham, supra; Carpenter* v. *Mexican Nat. R. Co.* 39 Fed. Rep. 317.

And the negligence of the inspector is the negligence of the company.

*Northern P. R. Co.* v. *Herbert,* 116 U. S. 647 (29: 758); *International & G. N. R. Co.* v. *Kernan,* 78 Tex. 294; *Texas & P. R. Co.* v. *O'Fiel,* 78 Tex. 486; *Houston & T. C. R. Co.* v.



Digitized by Google

*O'Hare*, 64 Tex. 600; *Missouri P. R. Co.* v. *White*, 76 Tex. 103; *Missouri P. R. Co.* v. *Jones*, 75 Tex. 158.

Sending out an engine in a crippled condition is the negligence of the master.

*Carpenter* v. *Mexican Nat. R. Co.* 39 Fed. Rep. 317.

An employee only assumes risks ordinarily incident to his employment.

*Galveston, H. & S. A. R. Co.* v. *Garrett*, 73 Tex. 262.

Not those unknown to him.

*Arabello* v. *San Antonio & A. P. R. Co.* (Tex.) 11 S. W. 916; *Houston & T. R. Co.* v. *Oram*, 49 Tex. 345.

Not those superadded by wrongful or negligent acts of the master.

*Missouri P. R. Co.* v. *Watts*, 63 Tex. 549; *Houston & T. C. R. Co.* v. *Conrad*, 62 Tex. 627; *Gulf, C. & S. F. R. Co.* v. *Silliphant*, 70 Tex. 624.

Employee has the right to expect the exercise of care, proportioned to the hazardous nature of the machinery.

*Hough* v. *Texas & P. R. Co.* 100 U. S. 213–217 (25: 612–615).

And has the right to count on this prudence and care.

*Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377–383 (28: 787–789); *Northern P. R. Co.* v. *Charles*, 51 Fed. Rep. 566.

Especially are these rules of trust upon the part of the employee applicable, when the defect causing the injury did not arise in the line of his duty and employment, nor where he was called upon to examine into the fitness of the machinery furnished.

*Taylor, B. & H. R. Co.* v. *Taylor*, 79 Tex. 104; *Houston & T. C. R. Co.* v. *McNamara*, 59 Tex. 255–259; *Houston & T. C. R. Co.* v. *Dunham*, 49 Tex. 181; *Missouri P. R. Co.* v. *Lehnberg*, 75 Tex. 63.

When, with the use of ordinary care, the company have discovered the weakness or defect, then it is charged with notice.

*Gulf, C. & S. F. R. Co.* v. *Silliphant*, 70 Tex. 623.

Ordinary care is the care which prudence and the exigencies of the case or situation demand, or hazards reasonably anticipated.

*Galveston City R. Co.* v. *Hewitt*, 67 Tex. 473; *Missouri P. R. Co.* v. *Wortham*, 73 Tex. 25, 3 L. R. A. 368; *Nix* v. *Texas & P. R. Co.* 82 Tex. 473; *International & G. N. R. Co.* v. *Bremond*, 53 Tex. 111; *International & G. N. R. Co.* v. *Doyle*, 49 Tex. 190.

The cases of *Fuller* v. *Jewett*, 80 N. Y. 46, 36 Am. Rep. 575, and *Ford* v. *Fitchburg R. Co.* 110 Mass. 247, 14 Am. Rep. 598, were cases of injuries from boiler explosions, and in which the doctrine above announced was applied as the law controlling the liability of the railroad.

In *Minneapolis* v. *Lundin*, 58 Fed. Rep. 527, the doctrine is tersely put in the following language:

"An employee discharging a personal duty of the master stands in the place of the master, and the latter is liable for any negligence in the discharge of the special duty."

This would be true though the employee was not free from contributory negligence.

*Union P. R. Co.* v. *Callaghan*, 56 Fed. Rep. 994; *Northwestern Fuel Co.* v. *Danielson*, 57 Fed. Rep. 915; *Grand Trunk R. Co.* v. *Cummings*, 106 U. S. 700 (27: 266); *Gulf, C. & S. F. R. Co.* v. *Johnson*, 83 Tex. 629.

In *International & G. N. R. Co.* v. *Kernan*, 78 Tex. 294, 9 L. R. A. 703, the court says that the railroad company cannot relieve itself of the duty of furnishing safe machinery by charging the servants with its performance.

In this case it was the negligence of a car inspector causing the injury, and the company was held chargeable for the injury received.

*Texas & P. R. Co.* v. *O'Fiel*, 78 Tex. 486; *Galveston, H. & S. A. R. Co.* v. *Farmer*, 73 Tex. 85; *International & G. N. R. Co.* v. *Bell*, 75 Tex. 53.

The definition of "ordinary care" as given by the court is in the exact language of the supreme court of Texas.

*Houston & T. R. Co.* v. *Oram*, 49 Tex. 341, approved in *Missouri P. R. Co.* v. *Lyde*, 57 Tex. 509, and again in *International & G. N. R. Co.* v. *Hester*, 72 Tex. 44.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was an action to recover for personal injuries, brought by Barrett, in the district court of Tarrant county, Texas, against the Texas & Pacific Railway Company, and removed on the application of the company to the circuit court of the United States for the northern district of Texas. Plaintiff obtained a verdict and judgment, and defendant thereupon carried the case on writ of error to the circuit court of appeals for the fifth circuit, by which the judgment was affirmed. 30 U. S. App. 196.

Plaintiff's complaint averred that he "is a resident of said Tarrant county and that defendant is a railway corporation, *duly incor- [618 porated." The petition for removal was sufficient, and as the company was created by act of Congress the circuit court properly entertained jurisdiction. *Texas & P. R. Co.* v. *Cody*, 167 U. S. — [*ante*, 754].

On the trial there was evidence tending to show that Barrett, while in the employment of the company as foreman in charge of a switch engine, and at work in the company's yard, was injured by the explosion of another engine, with which he had nothing, and was not required to have anything, to do, and which had been placed by the foreman of the round house on a track in the yard, with steam up, to take out a train; that the boiler of the locomotive at the time it exploded, and for a considerable time before that, was, and had been, in a weak and unsafe state by reason of the condition of the stay bolts, many of which had been broken before the explosion, and some of them for a long time before; that there were well-known methods of testing the condition of stay bolts in a boiler engine; and that if any of these tests had been properly applied to this boiler within a reasonable time before the explosion, the true condition of the stay bolts would have been discovered.

The circuit court instructed the jury, at defendant's request, "that the master is not the insurer of the safety of its engines but is required to exercise only ordinary care to keep such engines in good repair, and if he has used such ordinary care he is not liable for any in-



Digitized by Google

jury resulting to the servant from a defect therein not discoverable by such ordinary care; . . . that the mere fact that an injury is received by a servant in consequence of an explosion will not entitle him to a recovery, but he must, besides the fact of the explosion, show that it resulted from the failure of the master to exercise ordinary care either in selecting such engine or in keeping it in reasonably safe repair;" and "that a railway company is not required to adopt extraordinary tests for discovering defects in machinery, which are not approved, practicable, and customary; but that it fulfils its duty in this regard if it adopts such tests as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances."

619] *And thereupon further charged that a railway company is bound to use ordinary care to furnish safe machinery and appliances for the use of its employees, and the neglect of its agents in that regard is its neglect; that it is not bound to insure the absolute safety thereof, nor to supply the best and safest and newest of such mechanical appliances, but is bound to use all reasonable care and prudence in providing machinery reasonably safe and suitable for use, and in keeping the same in repair; that "by ordinary care is meant such as a prudent man would use under the same circumstances; it must be measured by the character and risks of such business; and where such persons, whose duty it is to repair the appliances of the business, know, or ought to know by the exercise of reasonable care, of the defects in the machinery, the company is responsible for their neglect." That, "if the jury believe from the evidence under the foregoing instructions, that the boiler which exploded and injured the plaintiff was defective and unfit for use, and that defendant's servants, whose duty it was to repair such machinery, knew, or by reasonable care might have known, of such defects in said machinery, then such neglect upon the part of its servants is imputable to the defendant, and if said boiler exploded by reason of said defects, and injured the plaintiff, the defendant would be responsible for the injuries inflicted upon plaintiff, if plaintiff in no way, by his own neglect, contributed to his injuries." But that "the burden of the proof is on the plaintiff throughout this case to show that the boiler and engine that exploded were improper appliances to be used on its railroad by defendant; that by reason of the particular defects pointed out and insisted on by plaintiff the boiler exploded and injured plaintiff. The burden is also on plaintiff throughout to show you the extent and character of his sufferings and the damages he has suffered by reason thereof. You must also be satisfied that plaintiff was ignorant of the defects in the boiler that caused its explosion, if the evidence convinces you that such was the case; and that he did not by his negligence contribute to his own injury."

We think that these instructions laid down the 620] applicable *rules with sufficient accuracy and in substantial conformity with the views of this court as expressed in *Hough* v. *Texas & P. R. Co.* 100 U. S. 218 [25: 515]; *Northern P. R. Co.* v. *Herbert*, 116 U. S. 642 [29: 755]; *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554 [34:235]; *Union P. R. Co.* v. *Snyder* ("*Union P. R. Co.* v. *Daniels*") 152 U. S. 688 [38: 600]; *Northern P. R. Co.* v. *Babcock*, 154 U. S. 190 [38: 958], and other cases.

Exceptions were preserved to portions of the charge, and to the refusal of the circuit court to give certain instructions requested by defendant, but, taking the charge as a whole, we are of opinion that the circuit court of appeals rightly held that no reversible error was committed. These matters fully appear in the report of the case in that court, and we do not feel called upon to restate them here in detail.

*Judgment affirmed.*

---

## NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*,
*v.*
## JUNIUS G. SANDERS *et al.*

(See S. C. Reporter's ed. 620-637.)

*Railroad land grant—exclusion of lands—right of government.*

1. The exclusion, by the express terms of a railroad land grant, of lands to which there are other claims at the time the line of a railroad is definitely fixed, will defeat the right of the railroad company to lands on which there are mineral claims, although the parties who deny its right have no interest in those claims, and confess that the lands did not contain precious metals in such quantities as to make them commercially valuable.
2. Formal applications to purchase lands as mineral lands, made in good faith in 1880 and 1881, were "claims" within the meaning of § 3 of the land grant act of Congress of July 2, 1864 (13 Stat. at L. 365, chap. 217), granting for the construction of the road of the Northern Pacific Railroad Company unappropriated lands "free from pre-emption or other claims or rights at the time the line of said road is definitely fixed."
3. The right of the government to dispose of any of the lands prior to the fixing of the line of definite location, which is contemplated by § 3 of the Northern Pacific land grant act of July 2, 1864, is not denied by the provision of § 6 that the odd sections of the grant shall not be liable to sale, entry, or pre-emption before or after they are surveyed, except by the company, but these sections must be taken together.

[No. 12.]

*Argued December 9, 10, 1895. Ordered for Reargument February 3, 1896. Reargued March 12, 1897. Decided April 19, 1897.*

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the District of Montana, in favor of the defendants, Junius G. Sanders *et al.*, in an

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 765.

*That patents for land may be set aside for fraud*, see note to Miller v. Kerr, 5: 361.

*As to errors in surveys and descriptions in patents for lands, how construed*, see note to Watts v. Lindsay, 5: 423.

*As to land grants to railroads*, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 23: 794.



Digitized by Google

action brought by the Northern Pacific Railroad Company, plaintiff, to recover from the defendants the possession of a section of land in the county of Lewis and Clarke in the state of Montana. *Affirmed.*

See same case below, 46 Fed. Rep. 239, 47 Fed. Rep. 604, 7 U. S. App. 47.

The facts are stated in the opinion.

*Messrs.* **A. B. Browne** and *A. T. Britton* for plaintiff in error on first argument.

*Mr.* **S. S. Burdett** for defendants in error on first argument.

*Messrs.* **A. B. Browne,** *A. T. Britton, John C. Spooner,* and *C. W. Bunn* for plaintiff in error, on reargument.

*Messrs.* **W. F. Sanders** and **S. S. Burdett** for defendants in error on reargument.

*Mr.* **Holmes Conrad,** Solicitor General, filed a brief for the United States on the reargument.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought by the Northern Pacific Railroad Company to recover from the defendants in error, the original defendants, the possession of section 21, township 10 north, of range 8 west in the county of Lewis and Clarke in the state of Montana.

The railroad company claims title under the act of Congress of July 2, 1864 (13 Stat. at L. 365, chap. 217), granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route.

The defendants do not assert title in themselves, but resist the claim of the railroad company upon the ground that, at the time of the definite location of the Northern Pacific Railroad, and of the filing of the plat thereof in the office of the Commissioner of the General Land Office, such "claims" were made of record upon the lands in dispute as excluded them from the grant to the Northern Pacific Railroad Company.

Congress granted to the Northern Pacific Railroad Company every alternate section of public land, "not mineral," designated by odd numbers, to the amount of 20 alternate sections per mile on each side of the railroad line, as the company might adopt, through the territories of the United States, and 10 alternate sections per mile on each side of the railroad whenever it passed through any state, "and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and *free* from pre-emption, *or other claims,* or rights *at the time the line of said road is definitely fixed* and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said **623**] company in lieu thereof, under *the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections. . . . *Provided further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, may be selected as above provided: *And provided further,* That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal." § 8.

The 6th section directed the lands to be surveyed for 40 miles in width on both sides of the entire line of the road after the general route was fixed and as fast as was required by the construction of the railroad, and provided that, "the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An Act to Secure Homesteads to Actual Settlers on the Public Domain,' approved May 20, 1862, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than $2.50 per acre, when offered for sale." § 6.

The amended complaint alleged that the railroad company duly accepted the terms and conditions of the act of Congress; that the general route of the railroad extending through the state of Montana was duly fixed February 21, 1872; that the land in dispute was on and within 40 miles of such general route, and at that date was "public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights;" that at the date of the passage of the act of 1864, as well as when said general route was fixed, no part of the land in controversy was "known mineral land," and *"was not mineral land, nor [**624** was any part of said last-described land within any exceptions from said grant;" that on July 6, 1882, the railroad company definitely fixed the line of its railroad extending opposite to and past said section 21, township 10 north, range 8 west, and filed a plat thereof in the office of the Commissioner of the General Land Office; that "said land is on and within 40 miles of said line of railroad so definitely fixed;" that thereafter the company duly constructed and completed that portion of its railroad and telegraph line extending over and along its line of definite location, whereupon the President of the United States appointed three commissioners to examine the same, who reported that that portion of the line had been completed in a good, substantial, and workmanlike manner; that the President of the United States duly accepted said line of road and telegraph so constructed and completed; that at the date of so definitely locating the line of railroad, and at the time of the filing of the plat thereof in the office of the Commissioner of the General Land Office, as above stated, the land in dispute was "not known" to be mineral land, but was agricultural land to which "the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre emption or other claims or rights."



Digitized by Google

The defendants, in their answer, "*confessing* that said premises did not contain gold or other precious metals in paying quantities or in such quantity as to make the same, or any part thereof, commercially valuable therefor, nevertheless say, *as to the northeast quarter of section 21*, that heretofore, to wit, on the 2d day of August, 1880, Theodore H. Kleinschmidt, Edward K. Knight, Henry M. Parchen, Charles K. Wells, George P. Reeves, David H. Cuthbert, Cornelius Hedges, and Stephen E. Atkinson, each being then and there a citizen of the United States, and each having theretofore filed upon a certain separate 20 acres on the northeast quarter of said section according to the laws of the territory of Montana, and the mining usages and customs then in force in the unorganized mining district in which said land was situated, and being then in all respects qualified to enter mineral land under the [625]*laws of the United States, did enter into the possession of, and did enter in the United States land office, and did file upon the said quarter of said section in the land office of the United States, at Helena, Montana, in which district said land was situate, as mineral land, and did apply for a patent therefor, and did then and there and in due form file an application to purchase said premises as such mineral land, and did then and there make oath before the register and receiver of said land office that they had discovered mineral thereon and had located the said quarter section as mineral land and claimed the same as such for the valuable mineral deposits therein, and that they had complied with U. S. Rev. Stat. chap. 6, title 32, which said application was so filed in the land office at Helena, Montana, under the oath of the said applicants, showing that they had complied with the law aforesaid, and describing the same by legal subdivisions, and they did then and there, prior to filing said application, post in a conspicuous place, on the claim embraced therein, a copy of said application and notice hereinafter mentioned, which said notice did then and there remain conspicuously posted, on said premises during the period of publication hereafter mentioned, and they did then and there file with their said application in said land office, an affidavit of two persons that such notice had been so duly posted, and did then and there file a copy of such notice in the land office with the register and receiver thereof, and by said application they requested to be permitted to purchase the same as mineral land, and they then and there undertook and offered to maintain by proof that the said premises were valuable for the gold contained therein and were mineral lands of the United States, to which they were entitled under the laws thereof, and that they had done the requisite amount of work thereon, to wit, work of the value of $500, and were entitled to a patent therefor, which said application and affidavit and notice were then and there entered of record in said United States land office by the register and receiver thereof, and the said application was set for a hearing upon their said proof to be produced, and notice of [626] such hearing in *due form of law was given by the register and receiver in the proper newspaper designated for that purpose, and was duly published therein, which said entry, application, affidavits, and notice were in all respects formal according to law, and the said application was set down for a hearing in said land office by the register and receiver thereof at the expiration of the period of time prescribed in said notice and at the date at which the same was so set, the said plaintiff having theretofore filed a protest against the perfection of the said entry, for the reason, as claimed by said plaintiff, that the same were not mineral lands or commercially valuable for the gold or other precious metals therein contained; that said application was continued thereafter by the consent of parties or otherwise, from time to time, and was asserted and remained pending on the 6th day of July, 1882, and thereafter the said applicants on the 6th day of July, 1882, and thereafter as theretofore, averring their ability to prove that the said land was commercially valuable for the gold therein contained, and was mineral land within the definition of that phrase contained in the act granting lands to said plaintiff mentioned in said amended complaint, and the said applicants were on the date last aforesaid claiming, affirming, and undertaking to maintain on their application for said premises in said land office, that the same was mineral land of the United States to which they were entitled thereunder, and was not land in quality such as was described in the grant to the said plaintiff."

The answer alleged like filings, applications, etc., under the mining laws of the United States, as follows: By George P. Reeves, Helen H. Reeves, Laura C. Ballou, John W. Eddy, Evelyn M. Eddy, Edward W. Knight, Theodosia M. Knight, and Anna Natolia King, August 12, 1880, upon 20 acres in the *northwest quarter* of said section 21; by Theodore Kleinschmidt, Henry M. Parchen, David H. Cuthbert, Stephen E. Atkinson, Lucius I. Rosecrans, Emma M. Parchen, Mary M. Kleinschmidt, and Annie E. Cuthbert, February 19, 1881, upon 20 acres in the *southwest quarter* of the same section; and by Cornelius Hedges, Thomas A. H. Hay, Mary L. Guthrie, Patrick Quinn, Louis A. Walker, William D. Wheeler, Edna L. *Hedges, and George E. Car- [627] penter, March 13, 1880, upon 20 acres of the *southeast quarter* of the same section.

Referring to the proceedings in the office of the county clerk and recorder of the county of Lewis and Clarke, Montana, in which county the premises are situate, and in the United States land office at Helena, the answer stated that they were in the form prescribed by law for the claim and entry of placer mining claims, and that thereafter, on the 4th day of August, 1887, the plaintiff presented to the said register and receiver a list of lands selected by it as having been granted by the act aforementioned, "to be approved to the end that the said premises in said list described might [be] certified to it for patent, which list includes said section 21, but to approve said list or certify said lands to said company the said register and receiver and the Land Department of the United States refused because of the existence on the 6th day of July, 1882, of the foregoing claims to the same as mineral lands;" that on the 21st day of February, 1872, the plaintiff filed a map of the general route of its road in the office of the Commissioner of the General



Digitized by Google

Land Office; that thereafter the Commissioner, under the directions of the Secretary of the Interior, duly prepared a plat showing that portion of the preliminary or general route of the Northern Pacific Railroad extending through the United States land district of Helena, and designated thereon lines showing the limits of the land grant to the plaintiff, for 40 miles in width on each side of said line of general route; that on April 22, 1872, the Commissioner of the General Land Office, under the directions of the Secretary of the Interior, duly transmitted said diagram to the register and receiver of the United States district land office at Helena, with instructions "to withdraw from sale or location, pre-emption or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of 40 miles, as designated on this map;" and that the said letter of instructions and diagram were received at the United States district land office at Helena May 6, 1872.

The plaintiff demurred to the answer and [628] the demurrer *was overruled. 46 Fed. Rep. 239. A rehearing having been granted, and the cause finally heard upon the amended complaint, the answer, and the demurrer to the answer, a judgment was rendered for the defendants. 47 Fed. Rep. 604. That judgment was affirmed in the circuit court of appeals. 7 U. S. App. 47.

It appears from the above statement of the case:

That lands were expressly excepted from the grant made for the benefit of the Northern Pacific Railroad that were not free from pre-emption "or other claims or rights" at the time the line of the road was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office;

That the general route of the Northern Pacific Railroad was fixed February 21, 1872, and its line of definite location was established and a plat thereof filed on the 6th day of July, 1882;

That after the railroad company filed its map of general route showing the limits of such route for 40 miles in width on each side of its line, the Commissioner of the General Land Office, under the directions of the Secretary of the Interior, April 22, 1872, transmitted a diagram of such route to the register and receiver of the land office at Helena, Montana, with a letter of instructions, directing the withdrawal from sale or location, pre-emption or homestead entry, of all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of 40 miles as designated on the map;

That the lands in dispute are within the exterior lines of both the general and definite routes of the railroad;

That prior to such definite location certain persons, qualified to enter mineral lands under the laws of the United States, entered upon the possession of the lands in dispute, and did "file upon" them "as mineral lands," applying for patents therefor, and conforming in all respects to the provisions of U. S. Rev. Stat. chap. 6, title 32, relating to *Mineral Lands and Mining Resources.*

That the railroad company filed in the proper office a protest against the perfection of any entry of these lands as *mineral lands [629 upon the ground that they were not mineral lands nor commercially valuable for any gold or other precious metals therein contained;

That at the time of the definite location of the Northern Pacific Railroad, and of the filing of the plat and map thereof in the General Land Office, on the 6th day of July, 1882, the applications for these lands as mineral lands were pending and undetermined, the applicants claiming, affirming, and undertaking to maintain before the proper office, that they were mineral lands of the United States to which they were entitled under their respective applications, and not lands in quality such as were described in the grant to the Northern Pacific Railroad Company; and,

That on the 4th day of August, 1887, the railroad company presented to the register and receiver of the proper land office, for approval, a list of lands selected under the above act of Congress, to the end that they might be patented to it; but that officer refused to approve such list (which included the lands here in dispute) because of the existence, on the 6th day of July, 1882, of the above claims to the lands as mineral lands.

It does not appear from the record what became of the several applications set out in the answer to purchase these lands as mineral lands, nor whether the railroad company appealed from the decision made in 1887 by the local land office at Helena refusing to approve the list presented of lands claimed by it under the act of Congress.

We have seen that the act of July 2, 1864, under which the railroad company claims title, excluded from the grant made by it all lands that were not, *at the time the line of the road was definitely fixed*, free from pre-emption "*or other claims* or rights;" and the demurrer to the answer admits that at that time there were claims pending in the land office, undetermined, to purchase these lands as mineral lands, and such applications conformed in all respects to the laws of the United States then in force relating to mineral lands.

But it is said that no account is to be taken of those applications, for the reason that the present defendants, who had *nothing to [630 do with them, and had no interest in them, confess, in their answer, that the lands in question "did not contain gold or other precious metals in paying quantities or in such quantity as to make the same, or any part thereof, commercially valuable therefor;" that the lands are therefore to be regarded as agricultural lands that passed to the company under the act of 1864, and were preserved to it by the filing of the map of the general route in 1872 and by their withdrawal in that year by the General Land Office "from sale or location, pre-emption or homestead entry." This view overlooks the fact that the express declaration of Congress was that no public lands should pass to the company to which, at the time of the definite location of the road, the United States did not have title free from pre-emption "or other claims or rights." If the applications made in 1880 and 1881, to purchase different parts of the section in question, and which were pending and undisposed of in 1882 when the company filed its map of definite location,



Digitized by Google

onstituted "claims," within the meaning of he act of 1864, then it was not competent for be defendants, by any admission *they* might nake, for whatever purpose made, as to the uality of these lands, whether mineral or not, o eliminate from the case the essential fact hat these "claims" existed of record when the ine of the road was definitely located. Indeed, if it now appeared that the Land Office inally adjudged, after the definite location of he road, that the lands embraced by those applications were not mineral, they could not be eld to have passed to the railroad company nder the act of 1864, for the reason that they were not, at the time of such definite location, ree from pre-emption or "other claims or ights."

Any other interpretation would defeat the vident purpose of Congress in excepting from ailroad grants lands upon which claims existed of record at the time the road to be aided vas definitely located. What that purpose vas has been frequently adverted to by this ourt. In *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 629, 639 644 [28: 1122, 1125-1127], which ase involved the construction of an act of Con-[631] gress *excluding from a railroad grant public lands sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may have attached at the time the line of its road was definitely fixed, this court said: "It is argued by the company that, although Miller's homestead entry had attached to the land, within the meaning of the excepting clause of the grant, before the line of definite location was filed by it, yet when Miller abandoned his claim so that it no longer existed, the exception no longer operated, and the land reverted to the company—that the grant by its inherent force reasserted itself and extended to or covered the land as though it had never been within the exception. . . . This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached; for, by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within 10 miles of the line had been sold, or disposed of, or reserved, or a homestead or pre-emption claim had attached to any of them. In regard to all such sections they were not granted." Again: "The company had no absolute right until the road was built, or that part of it which came through the land in question. The homestead man had five years of residence and cultivation to perform before his right became absolute. The pre-emptor had similar duties to perform in regard to cultivation, residence, etc., for a shorter period, and then payment of the price of the land. It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligation. . . . The reasonable purpose of the government *undoubtedly is that which[632] it expressed, namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a pre-emption or homestead right to attach. No right to such land passes by this grant. No interest in the railroad company attaches to this land or is to be founded on this statute. Such is the clear and necessary meaning of the words that there is granted every alternate section of odd numbers to which these rights have not attached. It necessarily means that, if such rights have attached, they are not granted." Finally, and as showing the meaning of the word "attached," the court said: "In the case before us a claim was made and filed in the land office, and there recognized, before the line of the company's road was located. That claim was an existing one of public record in favor of Miller when the map of plaintiff in error was filed. In the language of the act of Congress this homestead claim had *attached* to the land, and it therefore did not pass by the grant. . . . The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

In *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357, 366 [33: 363, 367], after an extended reference to the authorities and to the uniform practice of the Land Department, the court concluded: "For the foregoing reasons we concur with the court below that Turner's homestead entry excepted the land from the operation of the railroad grant; and that upon the cancelation of that entry the tract in question did not inure to the benefit of the company, but reverted to the government and became a part of the public domain, subject to appropriation by the first legal applicant."

In *Whitney* v. *Taylor*, 158 U. S. 85, 92, 93 [39: 906, 908, 909], where the contest was between a railroad grant of public lands and a homestead entry of record at the time of the filing of the company's map of definite location, the question now before us was again fully considered, and this principle deduced from the former cases: "Although these cases are none of them *exactly like the one before [633] us, yet the principle to be deduced from them is that when on the records of the local land office there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the government and has not been canceled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancelation by the government at its own suggestion, or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled be-



Digitized by Google

tween the government and the claimant, in respect to which the railroad company was not permitted to be heard."

Other cases are to the same effect as those to which we have above referred. *Sioux City & I. F. Town Lot & Land Co.* v. *Griffey*, 143 U. S. 32, 34 [36: 64, 65]; *Shiver* v. *United States*, 159 U. S. 491, 494 [40: 231, 232].

The principles announced in these cases fully sustain the proposition that if the above applications, of record, to purchase these lands as mineral lands were "claims" within the meaning of the act of July 2, 1864, then the lands were excepted from the operation of that act, and could not have come under the grant to the railroad company, even if, subsequently to the definite location of the road, the applications for them were finally rejected because of the fact that they were ascertained not to be mineral lands.

It is necessary now to inquire whether the applications in 1880 and 1881 to purchase these lands as mineral lands were "claims" within the meaning of the act of 1864.

Here we are met with the suggestion that when that act was passed no statute of the United States provided for the purchase of lands as mineral lands, and that when the railroad company filed its map of general route in 1872, and when the surveyed or unsurveyed odd-numbered sections within the exterior lines of that route were withdrawn by the Land **634**]*Office from "sale or location, pre-emption or homestead entry," no application was on file to purchase these lands as mineral lands.

It is quite true that at the time of the passage of the act of 1864 there was no act of Congress under which a right or claim could be initiated to mineral lands. But as said by Mr. Justice Field in *Jennison* v. *Kirk*, 98 U. S. 453, 458 [25: 240, 243], "for eighteen years—from 1848 to 1866—the regulations and customs of miners, as enforced and moulded by the courts and sanctioned by the legislature of the state, constituted the law governing property in mines and in water on the public mineral lands." And in 1866, before the general route of the Northern Pacific railroad was fixed, Congress passed an act looking to a sale of the mineral lands of the United States, and declared them to be "free and open to exploration and occupation by citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law and the local customs or rules of miners in the several mining districts so far as the same were not in conflict with the laws of the United States." 14 Stat. at L. 251, chap. 262. But prior to the passage of that act certain important rights of miners had been recognized. In *Broder* v. *Natoma Water & Min. Co.* 101 U. S. 274, 276 [25: 790, 791], it was said to be the established doctrine of this court that the rights of miners, who had taken possession of mines and worked and developed them, were rights which the government had by its conduct recognized and encouraged, and was bound to protect, before the passage of the act of 1866. The act of 1866 was held to be a statutory recognition of the right to explore for mineral lands. That right was in no wise impaired, in respect of the lands in question, by the subsequent acceptance from the Northern Pacific Railroad Company of its map of general route. And that act was supplemented by the act of May 10, 1872. 17 Stat. at L. 91, chap. 152. The company acquired, by fixing its general route, only an inchoate right to the odd numbered sections granted by Congress, and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted. Until such definite *location it was competent for [**635** Congress to dispose of the public lands on the general route of the road as it saw proper. Provision for the indemnification of the company in such an emergency was made by a clause in the act of 1864, providing that wherever, prior to the date of definite location, "any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd-numbers, not more than 10 miles beyond the limits of said alternate sections." 13 Stat. at L. 368, chap. 217. Hence it was said in *Barden* v. *Northern P. R. Co.* 154 U. S. 288, 320 [38: 992, 999], in which case the act of 1864 was construed, that the privilege of exploring for mineral lands was in full force at the time of the location of the definite line of road, and was a right reserved and excepted out of the grant at that time.

In this view—of the soundness of which we entertain no doubt—it would seem to be clear that the formal applications made in 1880 and 1881, under the statutes then and still in force, to purchase these lands as mineral lands, were "claims" within the meaning of the 3d section of the act of 1864. It was admitted by the demurrer that applicants made oath, before the proper officer, that they had discovered mineral thereon and had located the said quarter section as mineral land, and claimed the same as having valuable mineral deposits thereon. Upon the present record it cannot be said that those applications were not made in good faith. Whether the lands sought to be purchased as mineral lands were of that character was a matter for the determination, in the first instance, of the Land Department; and there was jurisdiction in that department to pass upon every question arising upon applications to purchase them as mineral lands. How, then, can it be said that such applications, filed and of record before the definite location of the road, were not "claims" within the meaning of the act of 1864? As the lands in question were not free from those claims at the time the plaintiff definitely located its line of road, it is of no consequence what *disposition was or has [**636** been made of the claims subsequent to that date.

The only ground upon which a contrary review can be rested is the provision in the 6th section of the act of 1864, that "the odd sections of land hereby granted shall not be liable to sale or entry or pre emption before or after they are surveyed, except by said company, as provided by this act." But this section is not to be construed without reference to other sections of the act. It must be taken in connection with § 3, which manifestly contemplated that rights of pre-emption or other claims and rights might accrue or become at-



Digitized by Google

ached to the lands granted after the general oute of the road was fixed and before the line f definite location was established. Literally nterpreted, the words above quoted from § 6 vould tie the hands of the government so that ven it could not sell any of the odd-numbered ections of the lands after the general route vas fixed—an interpretation wholly inadmissible in view of the provisions in the 3d section. The 3d and 6th sections must be taken ogether, and so taken it must be adjudged hat nothing in the 6th section prevented the government from disposing of any of the lands rior to the fixing of the line of definite location, or, for the reasons stated, from receiving, nder the existing statutes, applications to purhase such lands as mineral lands.

Much was said at the bar as to the decision f this court in *Buttz* v. *Northern P. R. Co.* 119 U. S. 55 [30: 330]. On one side it is said hat that case construes the 6th section of the act of 1864 as excluding the possibility of *any* right being acquired adversely to the railroad company to an odd-numbered section embraced by the exterior lines of the general route after that route had been established. On the other side it is contended that the only point necessary to be determined, and the only one judicially determined, in that case was that the defendant could not initiate a pre-emption right to the land there in dispute so long as the Indian title referred to in the opinion was unextinguished. Without stopping to examine these contentions, it is sufficient to say that the *Buttz* 637]* *Case* involved no inquiry as to the respective rights of the railroad company under the act of 1864, and of parties making applications in due form prior to the definite location of its road to purchase lands as mineral lands that were within the exterior lines of its general route. Mr. Justice Field delivered the opinion in the *Buttz Case*, and, speaking for the court in *Barden* v. *Northern P. R. Co.* 154 U. S. 288, 320 [38: 992, 999], stated that the grant in that act excepted the privilege of exploring for mineral lands.

For the reasons stated, we adjudge that the lands in question were excluded from the grant of 1864 by reason of the pendency, of record at the time of the definite location of the plaintiff's road, of applications to purchase them as mineral lands, such applications being in the form prescribed by the acts of Congress that related to such lands, and undetermined when the company filed its map of definite location.

*The judgment below is affirmed.*

---

JOHN N. WHITNEY, *Appt.*,
*v.*
MOYLAN C. FOX, Surviving Executor of the Last Will and Testament of Joab Lawrence, Deceased.

(See S. C. Reporter's ed. 637-648.)

*Deposition—plaintiff as witness against executor—laches—suit barred by.*

1. Where a deposition is not in the record, this court cannot decide that its exclusion as evidence was error.
2. A suit to establish a trust in property held by defendant as executor is a "claim or demand against the estate of a deceased person," as to which, under 2 Utah Comp. Laws 1888, title 10, chap. 2, p. 427, the plaintiff cannot testify in his own favor as to any matter of fact occurring before the death of decedent, which was equally within the knowledge of both.
3. Equity should refuse relief, even if a shorter time than that prescribed by the statute of limitations has elapsed without suit, when the delay in the assertion of rights is not adequately explained, and such circumstances have intervened in the condition of the adverse party as render it unjust to him or to his estate that a court of equity should assist plaintiff.
4. One who sleeps upon his rights for many years, without any demand upon his claim against another, while the latter, who denies the claim, is in proper mental condition and until he is deprived of his reason and faculties, will be barred by laches from any relief in equity.

[No. 68.]

*Argued March 3, 5, 1897. Decided April 19, 1897.*

APPEAL from a judgment of the Supreme Court of the Territory of Utah affirming a judgment of the District Court of the Third District of that Territory in favor of defendant, Moylan C. Fox, executor, in an action brought by John M. Whitney, plaintiff, to establish the existence of a trust in his favor in certain real estate and stock and to have an accounting in respect of the accumulations or profits of such property. *Affirmed.*

Statement by Mr. Justice **Harlan:**

This is an appeal from a judgment of the supreme court of the territory of Utah, affirming a judgment in favor of the defendant in an action brought in the year 1889 in the district court of the third district of that territory by the appellant Whitney against the executors of Joab Lawrence, deceased.

The object of the suit is to establish the existence of a trust in his favor in certain real estate and stock, and to have an accounting in respect of the accumulations or profits of such property.

The case made by the findings of fact is substantially as follows:

On and prior to October 7, 1872, the plaintiff was the owner of 250 shares, and Joab Lawrence, deceased, was the owner of more than 1,500 shares, of the capital stock of the Eureka Mining Company of Utah. Prior to that date the plaintiff delivered to Lawrence certificates representing his 250 shares of stock, to be disposed of by Lawrence together with the latter's own stock for their joint benefit.

At the above date Lawrence sold and disposed of to E. B. Ward of Detroit 1,500 of his own stock and the plaintiff's 250 shares, together with 250 shares belonging to W. H. Wood. In part consideration for the sale, Lawrence received real estate in Detroit consisting of

NOTE.—*As to competency of witnesses in United States courts in civil cases; how far governed by state laws*,—see note to Vance v. Campbell, 17: 168.

*That neither time nor statute of limitations runs against the state*, see note to Gibson v. Chouteau, 20: 534.



Digitized by Google

three city lots, and a building thereon, commonly known as the Mansion House, and took a deed therefor in his individual name. He also received in consideration of such sale a large amount of cash in hand, besides other property. Of the cash so received, $23,587.50 was applied by him in taking up an indebtedness against the Eureka Mining Company. The plaintiff being the owner of one eighth of the total number of shares of stock sold to Ward by Lawrence, the latter received the above real estate and the $23,587.50 in trust for the plaintiff to the extent of an undivided one-eighth interest. The balance of the consideration re-[639]ceived *by Lawrence from the sale of the stock was distributed immediately after such sale among himself, plaintiff, and Wood, according to their respective interests.

In recognition of the above trust Lawrence executed and delivered to the plaintiff the declaration of trust described in the complaint, which was in these words:

Salt Lake City, Nov. 9, 1872.

J. N. Whitney:

This is to certify that you are entitled to one-eighth interest in the real estate, mining and rolling-mills stocks, and in the $23,587.50 of which the Eureka Mining Company of Utah are indebted to me, of the property acquired by me of E. B. Ward, of Detroit, Michigan, October 7, less the farm of 160 acres, which was given to A. A. Griffith. I have also received of you 20 shares of Eureka stock, your one eighth of the 160 shares which was given to Messrs. Griffith and Mayhue.

Joab Lawrence.

On November 9, 1872, the Eureka Mining Company of Utah executed to Theodore M. Tracy, trustee, a mortgage to secure the payment of $43,587.50, Tracy taking and holding the mortgage as trustee for Lawrence, $23,587.50 of that sum representing the indebtedness of the Eureka Mining Company of Utah taken up by Lawrence, as above stated, with a portion of the proceeds of the sale of stock made to Ward, the remaining $20,000 representing an indebtedness due from the Eureka Mining Company of Utah to Lawrence individually. The mortgage was not to secure in whole or in part any indebtedness due from the company to the plaintiff or to Wood on account of services rendered by them or either of them to it. Afterwards, and prior to August 26, 1874, the mortgage was assigned by Tracy to Lawrence.

Subsequently Lawrence instituted proceedings to foreclose the mortgage, and did foreclose the equity of redemption on the property therein described, which included the mining property of the Eureka Mining Company of Utah. The decree of foreclosure was entered on July 27, 1876, and *thereafter a deed of [640] the property was duly executed to Lawrence by the United States marshal.

At the time of the foreclosure a new corporation, called the Eureka Hill Mining Company, with a capital stock of 10,000 shares, had been organized under and by virtue of the laws of the territory of Utah and had succeeded to the Eureka Mining Company of Utah.

On March 13, 1877, Lawrence sold and conveyed to the Eureka Hill Mining Company all his right, title, and interest in and to the premises and all that he had acquired under the above mortgage and foreclosure, and in part consideration therefor received 30 per cent of the capital stock of that company, amounting to 3,000 shares. He took the shares in his own name individually, and so held and retained them until his death, which took place December 28, 1888, claiming and receiving the dividends thereon, and in all respects holding and treating both the stock and dividends as his own property; nor did he at any time recognize any right or interest of the plaintiff in and to the same. The amount of dividends received on the stock at the commencement of this action amounted to $94 per share, and at the time of the hearing of the case to $124 per share.

On September 27, 1875, Lawrence wrote to Wood the following letter:

Wm. H. Wood, Esq.—Dear Sir: I am in receipt of yours. Hempstead advises me that the foreclosure suit will come up probably in October term, say about the last of the month. Your interest in the mortgage is one eighth of $25,000, $3,125. The administrators in the Ward estate have given Mr. Romeyn notice of the intention to amend their complaint, notwithstanding the demurrer to the complaint was sustained and the injunction was removed as against me. I have been spending a great deal of money and time in endeavoring to protect the Detroit property. I now intend going to Salt Lake early in the month. I wish you would at once inform me when you will probably be ready to go West, or will be in Salt Lake.

Yours, etc.,
Joab Lawrence.

*And on December 26, 1875, Lawrence [641] also wrote Wood as follows:

Mr. Romeyn informs me under date of the 16th inst. that the suit of Ward against Lawrence, Whitney, and Wood had been discontinued, the receiver discharged, and the property placed in my possession. The entire rents have been used up, only $317 to balance, which was paid to Romeyn.

Yours, etc.,
Lawrence.

After December 26, 1875, and until April 6,

---

*As to effect of state decisions and laws, in regard to statute of limitations, upon United States courts,* see note to Elmendorf v. Taylor, 6: 289.

*As to laches, when a good defense,* see note to Felix v. Patrick, 36: 719.

*As to length of time as bar to relief in cases of fraud; statute of limitations as a plea in equity; state claims; cases of undiscovered fraud; when laches bars remedy,*—see note to Hammond v. Hopkins, 36: 134.

*As to resulting trusts; when trust results to one who pays the consideration for land and the title is taken in the name of another; resulting trusts in chattels, where there are joint purchasers; trusts result eo instanti; trusts in personal property; fiduciary character; parol agreement alone creating trust; trusts by acts of agents; proof of trusts by parol; laches,*—see note to Ducie v. Ford, 34: 1091.

*As to statute of limitations, when not applicable to trust,* see note to Gisborn v. Charter Oak Life Ins. Co. 35: 1029.



Digitized by Google

888, the plaintiff at no time claimed or demanded of Lawrence any portion of the mortgage property or its proceeds, or any dividends received upon it, and Lawrence never recognized or admitted that he had any interest in the same.

On July 18, 1876, Wood wrote the plaintiff a letter, in which, among other things, he said: 'When in Boston I go to the 'Silver Islet' office, and found the reports from the mine good, but no sales of any account. I will keep you posted on it, and if a chance does come will get you out and myself. I met Hill (of the Winnemucca) in Phil'd. How are things in Utah? and does Lawrence and you get along? You know you and myself have about $17,000 of our money in the mortgage, beside our portion of the Detroit R. E., and, if necessary, have some money left to present my claim in court for a fair and honest adjustment. It seems to me that we should commence and claim our rights very soon, by suit, if in no other way—all I wish is what is justly due me."

On March 1, 1880, Wood also wrote Whitney as follows:

San Francisco, March 1, 1880.

Mr. John N. Whitney.

Dear Sir: Yours came to hand some time since and fully noted. What course is the best to take with Lawrence to bring him to a settlement? Will the law work in this case this late day? Our claim may be good upon the Eureka in case he should wish to sell, as I have his letter saying I was interested one eighth in the mortgage and in the Detroit prop-[642]erty. *I think it is time something should be done, and done promptly and fearlessly, and a full exposure made if necessary. I am satisfied the mine cannot be sold if our claim is put in the right shape. I think anyone can see it and think we can claim our portion of his receipts in law. Drop me a line at once, as I now intend to start for the East and home in about two weeks, and shall stop at Salt Lake City if it may be best; find out what he intends to do. I mean Lawrence. No other way but to take the bull by the horns; I fear him not. I have closed in one to-day and he gave down his milk and came to time. Yours in haste,

Wm. H. Wood.

This letter was received by Whitney in due course of mail, and was produced by him at the trial in pursuance of a notice. The plaintiff had actual knowledge of the conveyance to the Eureka Hill Mining Company at the time it was made, as well as of the terms on which it was made, and knew as early as March, 1880, that Lawrence denied and repudiated any alleged interest or claim of his in or to any part of the 3,000 shares of stock, or in the dividends that had been declared and paid upon such stock, or in any of the property mentioned in the complaint. Lawrence had received in part consideration of the conveyance to the Eureka Hill Mining Company, under date of March 13, 1877, in addition to the 3,000 shares of stock, a quartz mill, and as early as the summer of 1877 the plaintiff knew that he had sold and disposed of the machinery of the mill, and was informed of the sale by Lawrence in person, but plaintiff did not then nor afterwards make any demand upon Lawrence or his representatives for any part or portion of the proceeds of that sale, nor make any inquiry as to the amount realized by him therefrom, although ignorant of its terms.

As early as 1881 the plaintiff knew that the Eureka Hill Mining Company had declared and paid a dividend of $1 per share upon all of its capital stock, and as early as November, 1885, he had actual knowledge that that company had theretofore declared and paid dividends upon its capital stock aggregating $54 per share, and that Lawrence had received *in dividends that amount [643] per share on each and all of the 3,000 shares of stock; but he never at any time prior to April 6, 1888, made any demand upon or request of Lawrence for any part or portion of the proceeds of such dividend.

From April, 1877, until some time in 1885 Lawrence resided in Salt Lake City continuously, and was rarely absent therefrom, and when absent it was only for brief periods. He returned to that city in October, 1885, and remained there until February 10, 1886. On November 1, 1886, he returned again, remaining continuously in the city until January 25, 1887. Almost weekly during the years 1877, 1878, 1879, 1880, 1881, and 1882 the plaintiff met Lawrence in that city and conversed with him, and also met him there frequently in 1883 and 1884; and in November or December, 1885, after he had received actual knowledge of the receipt by Lawrence of the dividend of $54 per share on the 3,000 shares of stock, he met and conversed with Lawrence in Salt Lake City, but made no demand on or request of him for any part of such dividend.

During the latter part of the year 1887 the mind and memory of Lawrence became so impaired by disease that it was not possible for him to attend to ordinary business matters, and from that time to his death this impairment of his faculties daily increased, so that from the first of the year 1888 until his decease he was unable to comprehend any matter of business submitted to him.

On April 6, 1888, the plaintiff, knowing that for many months prior to that date Lawrence had been deprived of his reason and mental faculties, made for the first time a formal demand on him for an accounting as to his alleged interest in the stock, real estate, and rents described in his complaint.

As conclusions of law from the foregoing facts the court found and decided:

That Lawrence was at the time of his death the owner free from any and all trusts in favor of the plaintiff, of the property, both real and personal, described in the complaint;

That so far as it was sought to establish a trust in favor of the plaintiff in the real estate mentioned in the complaint, and to obtain an accounting of the rents, issues, and profits thereof, *the cause of action was barred [644] by the provisions of Utah Terr. Code Civ. Proc. § 180.

That the action in so far as it sought to establish a trust in favor of plaintiff in any portion of the 3,000 shares of the capital stock of the Eureka Hill Mining Company, and to obtain a judgment decreeing plaintiff to be the equitable owner of part of those shares, or to



Digitized by Google

any portions of the dividends declared and paid thereon, was barred by the provisions of Utah Terr. Code Civ. Proc. § 201;

That the plaintiff had by his laches and inexcusable neglect and delay barred and precluded himself of and from any relief; and

That the plaintiff should have or take nothing by his suit, and the defendants should have and recover of and from the plaintiff their costs to be taxed.

In accordance with these conclusions of law, it was adjudged that the plaintiff take nothing by his suit.

*Messrs.* **Arthur Brown** and *J. G. Sutherland* for appellant.

*Messrs.* **Jeremiah M. Wilson** and *A. A. Hoehling*, Jr., for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

At the hearing of this cause in the inferior territorial court, the first testimony offered in plaintiff's behalf was his own deposition, taken in a suit in the supreme court of New York, wherein he and Wood were plaintiffs and Joab Lawrence, then living, was the defendant—that case being substantially for the same cause of action presented in this case. The court ruled that Whitney's deposition could not be received except for the purpose of impeaching him, nor was his evidence in the former action admissible, he being present in court and orally testifying in this suit. This action of the [645 court is *assigned for error. But as the deposition was not made a part of and is not in the record, we cannot say that its exclusion was prejudicial to the rights of the plaintiff. Amendment of 21st Rule, 14 Wall. xii; *Buckstaff* v. *Russell*, 151 U. S. 626, 636 [38: 292, 296]; *Shauer* v. *Alterton*, 151 U. S. 607 [38: 286].

Whitney testified in this action on his own behalf, but the court ruled that his testimony as to any matter of fact occurring before the death of Lawrence and equally within the knowledge of both could not be received in his own behalf. Was this error? Among those who are disqualified by the statutes of Utah from being witnesses are "parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person, and equally within the knowledge of both the witness and the deceased person." 2 Utah Comp. Laws 1888, title 10, chap. 2, p. 427. The supreme court of Utah held that, under this statute, Whitney was incompetent to testify as to any fact equally within the knowledge of himself and Lawrence. It is said that the Utah statute was copied substantially from a statute of California, which declared incompetent as witnesses, "parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person as to any matter of fact occurring before the death of such deceased person." Deering's Code Civ. Proc. § 1880. The contention is that the interpretation placed by the supreme court of California upon the statute of that state should be followed in this case. We are referred to *Meyers* v. *Reinstein*, 67 Cal. 89, in which case the plaintiff sought a decree establishing a trust in his favor in a certain piece of land. The alleged trustee was dead when the case was heard. The court said: "We are of opinion that the witness was competent. The action was not on a claim or demand against the estate of Reinstein. The plaintiff asserted that the interest in the land sued for constituted no part of Reinstein's estate, but was held in [646 trust by Reinstein for Collins or his assigns, and after his death by the defendants, his devisees and successors. The defendants asserted that no such trust existed, but that Reinstein, their devisor, held the lands as his own estate, and that they had succeeded to his right. The very question to be determined here was whether the interest sought to be recovered was a part of Reinstein's estate or not. If it was a part of his estate, then no trust existed; he held it in trust in his lifetime, and the interest passed to his successors to the legal title, clothed with the trust. To hold that the claim or demand here attempted to be enforced was a part of the estate, and thus render the witness incompetent, would be to determine in advance the very question to be determined on the trial of the action. By so holding we would assume the very question to be tried and settled by the contestation between the parties. This we are not allowed to do."

The supreme court of Utah evidently entertained a different view of the Utah statute; for the claim asserted by Whitney in this case was, in the judgment of that court, "not only a claim against an estate, but one for many thousands." The relief sought was a decree declaring Whitney to be the equitable owner of one eighth of the Mansion House in Detroit, and entitled to the rents, issues, and profits thereof, as well as to part of the 3,000 shares of the stock of the Eureka Hill Mining Company, and the dividends that had theretofore been declared thereon; and that the executors of Lawrence be required, not only to account to the plaintiff for all of the said rents, issues, profits, and dividends, but to convey to him an undivided one-eighth interest in the real property, and assign to him a like proportion of such stock. It was also asked that a receiver be appointed to receive the dividends on the stock, and the rents, issues, and profits of the realty. We cannot doubt that the claims asserted in this suit by Whitney are, within the meaning of the Utah statute, claims or demands against the estate of a deceased person, and, consequently, Lawrence being dead, Whitney was incompetent to testify to any fact touching said claims or demands that occurred *before Lawrence's death, and were equal-[647 ly within the knowledge of both Whitney and Lawrence. The supreme court of Utah properly rejected the suggestion that such claim or demand was not against the estate of Lawrence. To say that the only issue here was whether the real property and stock described in the petition constituted a part of Lawrence's estate, and that no claim or demand was asserted against the estate, would be to defeat



Digitized by Google

what, it seems to us, was the manifest object of the statute. While, as said by this court in *Coulam* v. *Doull*, 133 U. S. 216, 233 [33: 596, 601], it is the ordinary rule to accept the interpretation given to a statute by the courts of the country by which it was originally adopted, the rule is not an absolute one, to be followed under all circumstances. We concur in the interpretation placed upon the Utah statute by the supreme court of Utah, as one required by the obvious meaning of its provisions, and we do not feel obliged, by the above rule, to reject that interpretation because apparently the highest court of the state from which the statute was taken has, in a single decision, taken a different view. We therefore hold that to the extent indicated by the court below Whitney was an incompetent witness as to any fact occurring before the death of Lawrence and equally within the knowledge of both.

It remains to inquire whether the judgment was right upon the merits. The supreme court of the territory held that the suit was barred upon the grounds both of laches and of the statute of limitations of Utah. The undisputed facts make a case of such gross laches upon the part of Whitney as to forfeit all right to the aid of a court of equity. Equity will sometimes refuse relief where a shorter time than that prescribed by the statute of limitations has elapsed without suit. It ought always to do so where, as in this case, the delay in the assertion of rights is not adequately explained, and such circumstances have intervened in the condition of the adverse party as render it unjust to him or to his estate that a court of equity should assist the plaintiff. It is impossible to doubt that Whitney knew, for many years, while Lawrence was in proper mental condition, that the latter did not admit, 648]*but denied, that the former had any just demand against him. But Whitney forebore to assert the rights which he now asserts, and although having abundant opportunity to do so, and having, if his present claims are just, every reason for promptness and diligence, he nevertheless slept upon his rights and made no demand upon Lawrence until disease had so far deprived the latter of his reason and faculties that he could not sufficiently comprehend any matter of business submitted to him. Under the peculiar circumstances of this case, the court below rightly held that the plaintiff's laches cut him off from any relief in equity. *Badger* v. *Badger*, 69 U. S. 2 Wall. 87, 95 [17: 836, 839]; *Hayward* v. *Eliot Nat. Bank*, 96 U. S. 611, 617 [24: 855, 858]; *Godden* v. *Kimmell*, 99 U. S. 201 [25: 431]; *Lansdale* v. *Smith*, 106 U. S. 391 [27: 219]; *Speidel* v. *Henrici*, 120 U. S. 387 [30: 720]; *Richard* v. *Mackall*, 124 U. S. 183, 188 [31: 396, 400]; *Mackall* v. *Casilear*, 137 U. S. 556, 566 [34: 776, 779]; *Hammond* v. *Hopkins*, 143 U. S. 224, 250, 274 [36: 134, 145, 153]. In this view, it is unnecessary to consider whether the plaintiff's causes of action were barred by the statute of limitations.

*The judgment is affirmed.*

---

The case of WM. H. WOOD v. M. C. FOX, *Surviving Executor of Joab Lawrence*, No. 56, on appeal from the supreme court of the territory of Utah, was argued by the same counsel and depends upon the same facts as appear in the above case, No. 68, and for the reason stated in the opinion in that case the judgment is *affirmed*.

---

F. G. OXLEY STAVE COMPANY, and F. G. Oxley, Trustee, *Plffs in Err.*,
*v.*
COUNTY OF BUTLER, St. Louis, Iron Mountain, & Southern Railway Company, and St. Francis Lumber Company.

(See S. C. Reporter's ed. 648-660.)

*Review of state judgment—averments of Federal question—right or immunity under United States Constitution.*

1. The validity of subscriptions by a county court to the stock of a railroad company, and of a conveyance to that company, and the matter of fraud in a decree, are questions of local law or practice on which the judgment of a state court cannot be re-examined by this court.
2. Averments of a Federal question to give jurisdiction to this court to review a state judgment must be so distinct and positive as to place it beyond question that the party bringing the case here from the state court intended to assert a Federal right.
3. The general allegation or claim that a decree was passed against some persons who were at the time dead, and against others who were necessary parties, but who had no notice of the proceedings, does not, within the meaning of U. S. Rev. Stat. § 709, especially set up a right or immunity under the 14th Amendment to the United States Constitution, forbidding a state to deprive any person of his property without due process of law.

[No. 221.]

*Argued March 19, 1897. Decided April 19, 1897.*

IN ERROR to the Supreme Court of the State of Missouri to review a judgment of that court reversing a judgment of the Circuit Court of the City of St. Louis, Missouri, setting aside and declaring to be null and void certain conveyances for lands in Butler County, Missouri, and quieting the title thereto, of the plaintiffs, the F. G. Oxley Stave Company *et al.*, in an action brought by them against the county of Butler *et al.* *Dismissed.*

---

NOTE.—*As to jurisdiction of Federal over state courts: necessity of Federal question; what constitutes Federal question,*—see note to Hamblin v. Western Land Co. 37: 267.

*As to jurisdiction of United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

*As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws*, see notes to Hart v. Lamphire, 7: 679, and Commercial Bank v. Buckingham, 12: 169.

*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.



Digitized by Google

See same case below, 121 Mo. 614.

The facts are stated in the opinion.

*Mr.* **Isaac H. Lionberger** for plaintiffs in error.

*Messrs.* **Frank M. Estes, John F. Dillon,** *Henry N. Phillips, Winslow S. Pierce,* and *Harry Hubbard* for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This writ of error brings up for review a final judgment of the supreme court of Missouri reversing a judgment of the circuit court of the city of St. Louis, Missouri, setting aside and declaring to be null and void certain conveyances for lands in Butler county, Missouri, and quieting the title thereto of the present plaintiffs in error.

It is contended on behalf of the defendants in error, who were defendants below, that, under the statutes regulating the jurisdiction of this court, we have no authority to re-examine that judgment.

It appears from the petition that the lands in controversy were part of the lands granted to Missouri by the swamp land act of Sept. 28, 1850 (9 Stat. at L. 519, chap. 84), and were subsequently, in 1857, patented by the state to the Cairo & Fulton Railroad Company, a Missouri corporation, in payment of a subscription to the capital stock of that company by the county of Butler, Missouri, which subscription was made under the authority of the state; that in pay-[650] ment of certain bonds *issued by it, the railroad company, on the 28d of May, 1857, conveyed the lands in question, with other lands, to John Moore, John Wilson, and A. G. Waterman, as trustees; that in 1871 Chouteau, having become the owner of the greater portion of such bonds, brought suit in the circuit court of Mississippi county, Missouri, for the foreclosure of the above deed of trust, in which suit there was a decree for the defendants; that such decree was reversed by the supreme court of Missouri, and a decree of foreclosure directed to be entered; that the lands were accordingly sold by a commissioner, Chouteau becoming the purchaser; and that afterwards, on the 19th day of November, 1886, Chouteau conveyed the same, with other lands, to the plaintiffs in error.

The petition also alleged that the county of Butler, November 7, 1866, filed in the circuit court of Butler county its petition against the Cairo & Fulton Railroad Company and Moore, Wilson, and Waterman, trustees as aforesaid, for the purpose of canceling and setting aside the patent from the state to the Cairo & Fulton Railroad Company, as well as the deed of trust from the railroad company to Moore, Wilson, and Waterman, trustees; that in that suit "service was attempted to be had by publication, the plaintiffs in said cause alleging that the said Moore, Waterman, and Wilson were nonresidents of the state of Missouri; that in the said proceeding the said Cairo & Fulton Railroad Company were brought in, as was pretended, by personal service; but your complainants herein here aver, charge, and show the fact to be that the service in said cause, the pretended appearance of the defendants by their attorney and in their own proper persons, was, in fact, a fraud and deception imposed upon the circuit court trying said cause; that in truth and in fact the said Waterman, previous to the bringing of said action in said circuit court, and said Moore, soon after the bringing of said action and before service upon him therein had been obtained, had departed this life, and their successors in said trust and as trustees had been appointed in pursuance to the provisions of the said deed of trust; that in consequence of their said deaths and the appointment of their successors as such trustees, as aforesaid, no service *was had in said[651] cause, the new trustees were not made parties, were not served with process, and had no notice of proceedings, although necessary and proper parties. The other defendant in said cause, *viz.*, the said Cairo & Fulton Railroad Company, was not a necessary or proper party, as by the foreclosure of the state lien on said railroad under what is known as the sell-out act and the purchase of said railroad under said sale the said company before the commencement of said suit, was dissolved and had ceased to exist and could not legally be made a party to said proceedings; that the only party defendant to said proceedings that was in fact present or pretending to make a defense in said action was Green L. Poplin, who had at one time been the president of the said railroad company, but long previous to the bringing of said suit had ceased to be connected with the said Cairo & Fulton Railroad Company in any capacity whatever, but was in fact acting in collusion with the attorneys and agents of said Butler county to aid said Butler county and its attorneys to avoid and disregard their said contract with the Cairo & Fulton Railroad Company. And these complainants aver and charge the fact to be that notwithstanding the fact that the said circuit court proceeded to find the issues in said case for the said county of Butler, and to decree that the said deed from the state of Missouri to the Cairo & Fulton Railroad Company and the deed of trust from said railroad company to the said Moore, Waterman, and Wilson be canceled, set aside, and for naught held, and that the interests of the defendants therein be devested out of them and invested in said county of Butler, that all said pretended proceedings were null, void, and of no effect whatever on account of the collusion of the parties thereto, and because the parties holding the title under said deed of trust in trust for the holders of the bonds of the said Cairo & Fulton Railroad Company were not parties to said suit and did not appear thereto, either in person or by attorneys. And because neither the said bondholders nor their assigns were in court by service of process or otherwise."

It was further alleged that in the year 1863 a number of judgments were obtained in the circuit courts of Mississippi *county, Mis-[652] souri, against the railroad company, and part of the lands in controversy were sold under execution, various persons becoming the purchasers and receiving conveyances. The petition sets out various sales of lands embraced in the above deed of trust, and makes defendants numerous parties who were in possession claiming title, including the St. Louis, Iron Mountain, & Southern Railroad Company. The petition avers that in the several suits in



Digitized by Google

the Butler circuit court the railroad company "was the only defendant; neither said trustee nor the bondholders were made parties to said suits, neither did they in any way have notice thereof or appear therein by attorney or otherwise, and whatever rights said judgment creditors acquired by reason of their said several judgments, and whatever title the said purchaser at said sheriff's sale made under said judgments acquired, were subject and subservient to the said first deed and the rights of the bondholders of said Cario & Fulton Railroad Company. The purchasers at said foreclosure proceeding under the decree of the supreme court took a paramount and superior title to all said parties and purchasers at said sheriff's sale; that the said sheriff's deeds made to the purchasers at said execution sales conveyed no title to the said purchaser as against the prior lien of the said trustees under said trust deed," etc.

In the court of original jurisdiction the issues were found for the plaintiffs. Some of the defendants moved to set aside the finding and judgment upon these general grounds: Because the court erred in admitting improper, illegal, irrelevant, and incompetent evidence, and in rejecting proper, legal, relevant, and competent evidence; in refusing to sustain defendants' demurrer to the plaintiffs' evidence offered at the close of plaintiffs' case; in finding the issues in favor of the plaintiffs and in rendering a decree in their favor; and because the decree was against the weight of the evidence. The motion for new trial was overruled, and the cause was carried to the supreme court of Missouri upon the appeal of the county of Butler and others. By the latter court the judgment was reversed, and the cause remanded to the circuit court of the city [653] of *St. Louis with instructions to enter a final decree dismissing the bill.

The opinion of the supreme court of Missouri is reported in 121 Mo. 614.

We have made a full statement of the case because of the earnest contention of the plaintiffs in error that this court has authority to re-examine the final judgment of the supreme court of Missouri.

This court may re-examine the final judgment of the highest court of a state when the validity of a treaty or statute of or an authority exercised under the United States is "drawn in question" and the decision is against its validity, or when the validity of a statute of, or an authority exercised under, any state is "drawn in question" on the ground of repugnancy to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity. But it cannot review such final judgment, even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege, or immunity was "specially set up or claimed" in the state court as belonging to such party, under the Constitution or some treaty, statute, commission, or authority of the United States. U. S. Rev. Stat. § 709.

Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the supreme court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege, or immunity was intended to be asserted. For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question.

The supreme court of Missouri properly said that only two questions were presented by the record for its determination: "First. Were the subscriptions by the county courts (county and district) of Butler county to the stock of the Cairo & Fulton Railroad Company, and the conveyance of the swamp lands of that county to said railroad in satisfaction of said subscriptions, *authorized by law? Second. Ought [654] the decree of the circuit court of Butler county annulling the conveyance of said lands to be set aside for the reasons urged by the plaintiffs, to wit, first, because procured by fraud, and, second, because two of the defendants named in it were dead at the time of its rendition, and the railroad company a dissolved corporation?"

Whether the subscription by the county court of Butler county to the stock of the railroad company and the conveyance to that company were valid, and whether the decree which the plaintiffs sought to have declared void was obtained by fraud, were questions of local law or practice in respect of which the judgment of the state court was final.

The only remaining question was not otherwise raised than by the general allegation that the decree was rendered against dead persons as well as in the absence of necessary parties who had no notice of the suit, and therefore no opportunity to be heard in vindication of their rights. Do such general allegations meet the statutory requirement that the final judgment of a state court may be re-examined here if it denies some title, right, privilege, or immunity "specially set up or claimed" under the Constitution or authority of the United States? We think not. The specific contention now is that the decree of the Butler county circuit court in the suit instituted by the county of Butler was not consistent with the due process of law required by the 14th Amendment of the Constitution of the United States. But can it be said that the plaintiffs *specially* set up or claimed the protection of that Amendment against the operation of that decree by simply averring—without referring to the Constitution or even adopting its phraseology—that the decree was passed against deceased persons as well as in the absence of necessary or indispensable parties?

This question must receive a negative answer, if due effect be given to the words "specially set up or claimed," in U. S. Rev. Stat. § 709. These words were in the 25th section of the judiciary act of 1789 (1 Stat. at L. 85), and were inserted in order that the revisory power of this court *should not extend to rights [655] denied by the final judgment of the highest court of a state, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties, or statutes of the United States. The words "specially set up or claimed" imply that if a party intends to invoke for the protection of



Digitized by Google

his rights the Constitution of the United States or some treaty, statute, commission, or authority of the United States, he must so declare; and unless he does so declare "specially," that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the circuit courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. Hence, the averment that a party resides in a particular state does not import that he is a citizen of that state. *Brown* v. *Keene*, 33 U. S. 8 Pet. 115 [8: 886]: *Robertson* v. *Cease*, 97 U. S. 646, 649 [24: 1057, 1059]. Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.

As the argument at the bar indicated some misapprehension as to our decisions upon this subject, it will be appropriate to refer to some of them.

In *Maxwell* v. *Newbold*, 59 U. S. 18 How. 511, 516 [15: 506, 509], which was a writ of error to the supreme court of Michigan, this court, speaking by Chief Justice Taney, and referring to the 25th section of the judiciary act of 1789, and the interpretation placed upon it in *Crowell* v. *Randell*, 35 U. S. 10 Pet. 368 [9: 458], said: "Applying this principle to the case before us, the writ of error cannot be maintained. The questions raised and decided in the state circuit court point altogether for their solution to the laws of the state, and make [656] no reference whatever to the *Constitution or laws of the United States. Undoubtedly, this did not preclude the plaintiffs in error from raising the point in the supreme court of the state, if it was involved in the case as presented to that court. And whether a writ of error from this court will lie or not, depends upon the questions raised and decided in that court. But neither of the questions made there by the errors assigned refer in any manner to the Constitution or laws of the United States, except the third, and the language of that is too general and indefinite to come within the provisions of the act of Congress, or the decisions of this court. It alleges that the charge of the court was against, and in conflict with, the Constitution and laws of the United States. But what right did he claim under the Constitution of the United States which was denied him by the state court? Under what clause of the Constitution did he make his claim? And what right did he claim under an act of Congress? And under what act, in the wide range of our statutes, did he claim it? The record does not show, nor can this court undertake to determine, that the question as to the faith and credit due to the record and judicial proceedings in Ohio was made or determined in the state court, or that that court ever gave any opinion on the question. For aught that appears in the record, some other clause in the Constitution, or some law of Congress, may have been relied on, and the mind of the court never called to the clause of the Constitution now assigned as error in this court." After stating the grounds upon which the decision in *Lawler* v. *Walker*, 55 U. S. 14 How. 149 [14: 364], were placed, the court proceeded: "So, in the case before us, the clause in the Constitution and the law of Congress should have been specified by the plaintiffs in error in the state court, in order that this court might see what was the right claimed by them, and whether it was denied to them by the decision of the state court."

In *Hoyt* v. *Thompson*, 66 U. S. 1 Black, 518, 521 [17: 65, 67], a writ of error to review the final judgment of a New York court, it was contended that full faith and credit were not given by that court to certain legislative enactments and judicial proceedings in the courts of New Jersey, as required by the Constitution of *the United States. This court, again [657 speaking by Chief Justice Taney, said: "But, in order to give this court the power to revise the judgment of the state court on that ground, it must appear upon the transcript filed by the plaintiff in error, that the point on which he relies was made in the New York court and decided against him; and that this section of the Constitution was brought to the notice of the state court, and the right which he now claims here claimed under it. The rule upon this subject is clearly and fully stated in *Maxwell* v. *Newbold*, 59 U. S. 18 How. 515 [15: 508], as well as in many other cases to which it is unnecessary to refer. This provision of the Constitution is not referred to in the plaintiff's bill of complaint in the state court, or in any of the proceedings there had. It is true, he sets out the act of the legislature of New Jersey, the proceedings and decree of the chancery court of that state under it, and the sale of the property in dispute by the authority of the court, which, he alleges, transferred the title to the vendee, under whom he claims, and charges that the assignment set up by the defendants was fraudulent and void, for the reasons stated in his bill. But all of the matters put in issue by the bill and answers, and decided by the state court, were questions which depended for their decision upon principles of law and equity, as recognized and administered in the state of New York, and without reference to the construction or effect of any provision in the Constitution, or any act of Congress. This court has no appellate power over the judgment of a state court pronounced in such a controversy, and this writ of error must therefore be dismissed for want of jurisdiction."

If there has been any modification of the views expressed in the two cases just cited, it has been only in the particular that it is not always necessary to refer to the precise words or to the particular section of the Constitution, under which some right, title, privilege, or immunity is claimed, and that it is sufficient if it appears affirmatively from the record that a right, title, privilege, or immunity is specially set up or claimed under that instrument or under the authority of the United States.

*The question was again examined in [658



Digitized by Google

*Sayward* v. *Denny*, 158 U. S. 180, 183, 184, 186 [89: 941-943]. It was stated in that case, the Chief Justice delivering the opinion of the court, that certain propositions must be regarded as settled, among which were that "the title, right, privilege, or immunity must be specially set up and claimed at the proper time and in the proper way," and that "the right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed,"—citing in support of the first of these propositions *Miller* v. *Texas*, 153 U. S. 535 [38: 812], and *Morrison* v. *Watson*, 154 U. S. 111, 115 [38: 927, 929], and in support of the second proposition the above cases of *Hoyt* v. *Thompson* and *Maxwell* v. *Newbold*. The Chief Justice said: "The contention is that the result of the rulings and decisions of the trial court in these respects, as affirmed by the supreme court, was to hold plaintiff in error conclusively bound by the judgment rendered against Crawford in an action 'in which he was not a party and of which he had no notice;' and that this was in effect to deprive him of his property without due process of law, or to deny him the equal protection of the laws, and amounted to a decision adverse to the right, privilege, or immunity of plaintiff in error under the Constitution of being protected from such deprivation or denial. But it nowhere affirmatively appears from the record that such a right was set up or claimed in the trial court when the demurrer to the complaint was overruled, or evidence admitted or excluded, or instructions given or refused, or in the supreme court in disposing of the rulings below. . . . We are not called on to revise these views of the principles of general law considered applicable to the case in hand. It is enough that there is nothing in the record to indicate that the state courts were led to suppose that plaintiff in error claimed protection under the Constitution of the United States from the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument."

In harmony with these views we said at the present term in *Chicago & N. W. R. Co.* v. *Chicago*, 659] 164 U. S. 454, 457 [*ante*, 511, 512]: "'It is assigned in this court for error that the judgment of the court of original jurisdiction had the effect to deprive the railroad company of its property without due process of law, in violation of the 14th Amendment of the Constitution of the United States. But the record does not show that the company specially set up or claimed in the state courts or either of them any right under the Constitution of the United States. It does not appear that the attention even of the trial court was called to the fact that the company, in any form or for any purpose, invoked the protection of that instrument. Nor does it appear from the record that any Federal right was specially set up or claimed in the supreme court of the state."

Our attention is called by the plaintiffs in error to *Armstrong* v. *Athens County*, 41 U. S. 16 Pet. 281 [10: 965]; *Proprietors of Bridges* v. *Hoboken Land & Improv. Co.* 68 U. S. 1 Wall. 116, 140 [17: 571]; *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574 [28: 1084], and *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.* 123 U. S. 552 [31: 202], as establishing the jurisdiction of this court in the present case. Interpreting the general language in the opinions in some of these cases in the light of the facts presented by them it is clear that no one of them supports our jurisdiction to re-examine the judgment now before us.

In *Armstrong* v. *Athens County* our jurisdiction was maintained upon the ground that the state court certified "on the record" that the validity of a statute of Ohio was drawn in question, on the ground of its repugnancy to the Constitution of the United States, and that the decision was against the validity of the statute. In *Proprietors of Bridges* v. *Hoboken Land & Improv. Co.* the court said that the true and rational rule was that "the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." It was held in that case that as the record showed that the state court had upheld a statute of New Jersey whose validity had been questioned as impairing the obligation of a contract, and that as, under the pleadings, it could not have made the final judgment complained of without *sustaining the validity of that act, this [660 court had jurisdiction to re-examine that judgment. In *Chicago L. Ins. Co.* v. *Needles*, it was said that, while the supreme court of Illinois did not, in terms, pass upon the claim that the statutes there in question were in derogation of rights and privileges secured by the Constitution of the United States, our jurisdiction could not be doubted, for the reason that the final judgment necessarily involved an adjudication of that claim. That language was used in a case in which it appeared from the record that the Federal right was specially set up and claimed in the inferior state court and reasserted in the supreme court of the state. In *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.* the Federal right was specially set up, because it was claimed under a decree or judgment of a court of the United States, the validity of which was disputed on the ground that the courts of the United States had no jurisdiction of the suit in which it was rendered, and therefore no legal power or authority in the premises. It is manifest that none of these cases conflict with the views herein expressed.

Without further references to adjudged cases, we are of opinion that the general allegation or claim, in different forms, that the decree of the Butler county circuit court was passed against some persons who were at the time dead, and against others who were necessary parties but who had no notice of the proceedings, does not, within the meaning of U. S. Rev. Stat. § 709, specially set up a right or immunity under the 14th Amendment of the Constitution of the United States, forbidding a state to deprive any person of his property without due process of law. If it appeared that the supreme court of the state regarded these general allegations as asserting such Federal right or immunity, and denied the claim so asserted, our jurisdiction could be sustained. But it does not so appear.

We are of opinion that this court is without jurisdiction to review the final judgment of the supreme court of Missouri.

*Writ of error dismissed.*



Digitized by Google

661] *Re* CHAPMAN, *Petitioner.*

(See S. C. Reporter's ed. 661-672.)

*Witness testifying before committee of Congress —refusal to answer—testimony of broker—jurisdiction of committee—punishment for contempt—jeopardy.*

1. A question of the constitutionality of U. S. Rev. Stat. § 103, excluding the claim of privilege by a witness testifying before either House of Congress or any committee of either House, cannot be raised by a witness who claimed no privilege, but refused to answer in violation of § 102, as those sections are not so inseparably connected that § 102 might not have been enacted without the other.
2. The provision that a refusal to answer "any question pertinent to the question under inquiry" shall be a misdemeanor does not render U. S. Rev. Stat. § 102, fatally defective because too broad and unlimited in its extent; but the word "any" will be deemed to refer to matters within the jurisdiction of the Houses of Congress and questions pertinent thereto.
3. Asking a broker engaged in buying and selling sugar stocks whether his firm was employed by any senator to buy or sell for him any of that stock whose market price might be affected by the Senate's action is not an unreasonable search into the private affairs of the witness, when the investigation is being made by a committee of the United States Senate because of charges that some of the senators had been corruptly influenced in the consideration of legislation which would affect the value of such stocks.
4. The failure of the preamble and resolutions of the Senate of the United States appointing a committee to investigate charges of corruption on the part of senators, to specify that the proceedings are taken for the purpose of censure or expulsion if certain facts are disclosed, does not defeat the jurisdiction of the committee of investigation.
5. A delegation of the power of a House of Congress to punish for contempt is not involved in U. S. Rev. Stat. § 104, providing for the indictment of the person guilty of the contempt by a grand jury of the District of Columbia.
6. A contumacious witness is not twice subjected to jeopardy for refusing to testify before a committee of the United States Senate, although he may be punished for contempt of the Senate and also indicted for a misdemeanor under U. S. Rev. Stat. § 102.

[No. 11, Original.]

*Argued March 24, 1897. Decided April 19, 1897.*

PETITION for writ of habeas corpus to relieve the petitioner from restraint of his liberty by the Marshal of the United States for the District of Columbia under a judgment of the Supreme Court of that District convicting him under U. S. Rev. Stat. § 102, for refusing to answer questions as a witness before a committee of the Senate, and a sentence in pursuance of said judgment that the petitioner be imprisoned in the jail of said District or pay a fine. *Writ denied.*

See same case, 5 App. D. C. 122, 156 U. S. 211 (39: 401), 24 Wash. L. Rep. 251, 297, 164 U. S. 436 (*ante*, 504).

Statement by Mr. Chief Justice **Fuller:**

This is a petition for a writ of habeas corpus, filed on leave, and a rule thereon entered, to which return was duly made.

The petition alleges as follows: That petitioner is a citizen of the United States, a resident of the city of New York, in the state of New York, and that he is now restrained of his liberty by the marshal of the United States for the District of Columbia. That on the 1st of October, 1894, in the supreme court of the District of Columbia, holding a criminal term, the grand jury impaneled in said court at said term thereof found an indictment against petitioner based on U. S. Rev. Stat. § 102, to which petitioner filed a demurrer alleging, among other objections, the unconstitutionality of the acts of Congress on which the indictment was based; that the demurrer was overruled and petitioner ordered to plead thereto; that the court of appeals for the District of Columbia allowed an appeal from [662 the order overruling the demurrer and subsequently affirmed it (*Chapman* v. *United States*; 5 App. D. C. 122), whereupon petitioner applied to this court for leave to file a petition for a writ of habeas corpus, which application was denied. *Re Chapman*, 156 U. S. 211 [39: 401]. That thereafter petitioner filed a petition in the court of appeals for a writ of prohibition to prevent the trial court from unlawfully assuming jurisdiction to try petitioner on said indictment, which petition was denied, and thereupon petitioner duly prosecuted an appeal and writ of error to this court from such order denying said petition, which are still pending, this court having refused to advance the cause; and having also declined to stay the proceedings below. That, thereupon, the trial of the petitioner under the indictment was proceeded with and a verdict of guilty returned; motions in arrest of judgment and for a new trial were made and overruled; and on February 1, 1896, the trial court entered its judgment and sentence on said verdict, that petitioner be imprisoned in the jail of the District of Columbia for the period of one month from date of arrival, and to pay a fine of $100, from which judgment and sentence petitioner prosecuted an appeal to the court of appeals; that court affirmed the judgment and sentence of the trial court (*Chapman* v. *United States*, 24 Wash. L. Rep. 251), but allowed a writ of error to remove the cause to this court for review (24 Wash. L. Rep. 297), which was dismissed for want of jurisdiction. *Chapman* v. *United States*, 164 U. S. 436 [*ante*, 504].

That petitioner was then surrendered in open court by his bondsmen and committed into the custody of the United States marshal for the

NOTE.—*As to power of Congress to regulate commerce*, see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

*As to power of Congress over territories*, see note to First Nat. Bank v. Yankton County, 25: 1046.

*As to competency of witnesses in United States courts in civil cases; how far governed by state laws*, —see note to Vance v. Campbell, 17: 168.

*As to when person is in jeopardy; when jury may be discharged without a verdict; former acquittal or conviction*, see notes to *Ex parte* Lange, 21: 872, and United States v. Perez, 6: 165.



Digitized by Google

District, who now holds and confines him and deprives him of his liberty.

The petition further alleged that the act of Congress under which petitioner was prosecuted was unconstitutional, and the imprisonment of petitioner unlawful, on various grounds set forth at length.

Petitioner attached duly certified copies of the record and proceedings, judgment and sen-
663] tence, under the aforesaid *indictment against him, and prayed that the same be considered in connection with the petition; and also referred to the record in the matter of the application of petitioner for a writ of prohibition.

The indictment averred that the House of Representatives had passed a certain tariff bill, which was pending in the Senate, with a very large number of proposed amendments thereto, during the months thereafter mentioned, and, among them, certain amendments providing for duties on sugar different from the provisions of the bill as it had been sent to the Senate, the adoption or rejection of which by the Senate would materially affect the market value of the stock of the American Sugar Refining Company. That the Senate adopted a preamble and resolutions raising a special committee and clothing it with full power of investigation into certain charges made in designated newspapers that members of the Senate were yielding to corrupt influences in the consideration of said legislation. That the investigation was commenced, and, in the course of it, petitioner, being a member of a firm of stock brokers in the city of New York, dealing in the stock of the American Sugar Refining Company, appeared as a witness and was asked whether the firm of which the witness was a member had bought or sold what were known as sugar stocks during the month of February, 1894, and after the 1st day of that month, for or in the interest, directly or indirectly, of any United States senator. Had the firm, during the month of March, 1894, bought or sold any stocks or securities, known as sugar stocks, for or in the interest, directly or indirectly, of any United States senator? Had the said firm during the month of April done so? Had the said firm during the month of May done so? Was the said firm at that time carrying any sugar stock for the benefit of, or in the interest, directly or indirectly, of any United States senator? But petitioner then and there wilfully refused to answer each of the questions so propounded, all of which were pertinent to the inquiry then and there being made by the said committee under the resolutions aforesaid.

*Messrs.* **George F. Edmunds, A. J. Dittenhoefer,** and *Jeremiah M. Wilson*, for petitioner:

The act of Congress upon which the indictment was based and conviction had is unconstitutional.

As applied to the present case, U. S. Rev. Stat. § 102, provides that if any person, summoned as a witness, having appeared, "refuses to answer any question pertinent to the question under inquiry," he "shall be deemed guilty of a misdemeanor," etc.

Section 103 provides that he shall not be privileged to refuse to testify on the ground that his testimony, or the production of the paper, may tend to disgrace him or render him infamous.

These two sections are parts of one scheme, and they are inseparable.

The provisions of this act are, in substance and effect, precisely as though it had been enacted as follows: If any person summoned before a committee of the Senate shall refuse to testify, even though his testimony may tend to criminate him, he shall be deemed guilty of a misdemeanor and shall be punished, etc.

The intent of Congress is clearly expressed, and no part of the act can be judicially eliminated so as to relieve some other part of the virus that permeates the whole.

*Baldwin* v. *Franks*, 120 U. S. 679 (30: 766); *Presser* v. *Illinois*, 116 U. S. 252 (29: 615); *Poindexter* v. *Greenhow* ("*Virginia Coupon Cases*") 114 U. S. 270 (29: 185); *United States* v. *Reese*, 92 U. S. 214 (23: 563); *United States* v. *Steffens* ("*Trade-Mark Cases*") 100 U. S. 82 (25: 550).

Section 102 of the Revised Statutes, upon which this indictment is based, is an attempt to delegate to the courts the power of the respective Houses to punish for contempt, and is unconstitutional for that reason.

Cooley, Const. Lim. 4th ed. *133; McCrary, Elections, §§ 348, 349; *Williamson* v. *Sickles*, 2 Elect. Cas. 288; *Harrison* v. *Davis*, 2 Elect. Cas. 241; Paine, Elections, §§ 974, 1003.

Congress cannot limit or impose restrictions upon the President's power to pardon.

*United States* v. *Klein*, 80 U. S. 13 Wall. 128 (20: 519); *Armstrong* v. *United States*, 80 U. S. 13 Wall. 154 (20: 614); *Pargoud* v. *United States*, 80 U. S. 13 Wall. 156 (20: 615); *Ex parte Garland*, 71 U. S. 4 Wall. 333 (18: 366).

Surely, if it is beyond the power of Congress to impair, restrain, limit, or otherwise control that distinct prerogative of the President, the pardoning power, it must, upon the same reasons and principle, be equally beyond the power of the Houses of Congress, and of each of them, respectively, to restrain or limit those separate functions of the Houses, respectively, which are conferred upon them by the Constitution, including this indispensable power to punish for contempt.

The rule does not warrant the avoidance of unconstitutionality of a statute by forcing upon its language under construction a meaning which, upon a fair test, is repugnant to its terms.

*Bigelow* v. *West Wisconsin R. Co.* 27 Wis. 478; *French* v. *Teschemaker*, 24 Cal. 518; *People* v. *San Francisco & A. R. Co.* 35 Cal. 606; *Attorney General* v. *Eau Claire*, 37 Wis. 400; *Spraigue* v. *Thompson*, 118 U. S. 90 (30: 115); *United States* v. *Reese*, 92 U. S. 214 (23: 563); Bishop, Written Laws, § 90.

There is a limitation on the power of the courts to enforce disclosure of private affairs.

*Re Pacific R. Com.* 32 Fed. Rep. 241; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 485 (38: 1060), 4 Inters. Com. Rep. 545; *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502; *McIntyre* v. *Mancius*, 3 Johns. Ch. 45–47; *Wilson* v. *Webber*, 2 Gray, 558; Story, Eq. Pl. 10th ed. § 818.

Restraints upon the courts, created by the 4th and 5th Amendments to the Constitution, protective of private rights and liberties, are



Digitized by Google

equally applicable to proceedings in legislative bodies.

*Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22; *Cullen* v. *Com.* 24 Gratt. 624; *United States* v. *James*, 60 Fed. Rep. 261; *Kilbourn* v. *Thompson*, 103 U. S. 168 (26: 377); Cooley, Const. Lim. 4th ed. *299.

Contempt proceedings must take on the definiteness of judicial prosecution.

*New Orleans* v. *New York Mail S. S. Co.* 87 U. S. 20 Wall. 387, 392 (22: 354, 357); *Hayes* v. *Fischer*, 103 U. S. 122 (26: 96); *Ex parte Kearney*, 20 U. S. 7 Wheat. 39 (5: 391); *Corbin* v. *Boies*, 34 Fed. Rep. 699; *Re Pacific R. Com.* 32 Fed. Rep. 250; *Kempe* v. *Kennedy*, 9 U. S. 5 Cranch, 173 (3: 70); *Williamson* v. *Berry*, 49 U. S. 8 How. 495 (12: 1170); *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 457 (21: 897); *Knowles* v. *Loganeport Gaslight & C. Co.* 86 U. S. 19 Wall. 58 (22: 70); *Pennoyer* v. *Neff*, 95 U. S. 714 (24: 565).

The record must affirmatively show all the facts necessary to create jurisdiction. The facts which must be shown to exist before the matter can be within the jurisdiction of an inferior court, and which can be inquired into collaterally, are such as, in the absence of which, the court cannot rightfully hear and determine any question touching the matter in controversy.

*Stannian* v. *Davis*, 1 Salk. 404; *Commissioners' Court* v. *Thompson*, 18 Ala. 694; *Keenan* v. *Commissioners' Court*, 26 Ala. 568; *State* v. *Ely*, 43 Ala. 568; *Hall* v. *Hood*, 10 Conn. 514, 27 Am. Dec. 696; *Proctor* v. *State*, 5 Harr. (Del.) 387; *Gray* v. *McNeal*, 12 Ga. 424; *Chicago* v. *Rock Island R. Co.* 20 Ill. 286; *Clay County Comrs.* v. *Markle*, 46 Ind. 96; *Gay* v. *Lloyd*, 1 G. Greene, 78; *Wight* v. *Warner*, 1 Dougl. (Mich.) 384; *State* v. *Metzger*, 26 Mo. 65; *Bergen Turnp. Co.* v. *State*, *Walker*, 25 N. J. L. 554; *People* v. *Koeber*, 7 Hill, 39; *Clyde & R. Pl. Road Co.* v. *Parker*, 22 Barb. 323; *Norwegian Street*, 81 Pa. 349; *Barrett* v. *Crane*, 16 Vt. 246; *Grignon* v. *Astor*, 43 U. S. 2 How. 319, 341 (11: 280, 292); *Peacock* v. *Bell*, 1 Saund. (Wms. ed.) 73, 74; *Byrd* v. *State*, 1 How. (Miss.) 163, 173: *Harvey* v. *Tyler*, 69 U. S. 2 Wall. 340 (17: 873); *Henry* v. *Estes*, 127 Mass. 474; *Newman* v. *Manning*, 89 Ind. 422; *Fahey* v. *Mottu*, 67 Md. 250; *Hendrick* v. *Whittemore*, 105 Mass. 23; *Wells* v. *Stevens*, 2 Gray, 115; *Sayles* v. *Briggs*, 4 Met. 421; *Nye* v. *Kellam*, 18 Vt. 594; *Wright* v. *Fletcher*, 12 Vt. 431; 2 Freem. Judgm. § 527, and cases cited; Cooley, Const. Lim. 4th ed. 508, 509, and note; 1 Bishop, Crim. Proc. § 236, note 3, also § 1169.

There are no presumptions in favor of guilt.

*People, McDonald*, v. *Keeler*, 99 N. Y. 463, 52 Am. Rep. 49.

An imprisonment by orders, judgments, or decrees made in absence of jurisdiction are absolutely void in law and constitute a false imprisonment; and also in so far as relates to such imprisonments not involving mere error, but being void owing to the absence of power or jurisdiction, and being relievable on habeas corpus, the same thing is found in a great multitude of cases.

*Ex parte Wilson*, 114 U. S. 417 (29: 89); *Mackin* v. *United States*, 117 U. S. 348 (29: 909); *Ex parte Bain*, 121 U. S. 1 (30: 849); *Ex parte Siebold*, 100 U. S. 371 (25: 717); *Ex parte Clarke*, 100 U. S. 399 (25: 715); *Ex parte Lange*, 85 U. S. 18 Wall. 163 (21: 872); *Ex parte Nielsen*, 131 U. S. 176 (33: 118); *Ex parte Snow*, 120 U. S. 274 (30: 658); *Ex parte Rowland*, 104 U. S. 604 (26: 861); *Ex parte Fisk*, 113 U. S. 713 (28: 1117); *Ex parte Ayers*, 123 U. S. 443 (31: 216); *Ex parte Sawyer*, 124 U. S. 200 (31: 402); *Spaids* v. *Cooley*, 113 U. S. 230 (28: 984); *Ex parte Terry*, 128 U. S. 289 (32: 405).

*Mr.* **Holmes Conrad,** Solicitor General, for respondent:

Sections 102, 103, and 104, Rev. Stat. are constitutional.

*United States* v. *Palmer*, 16 U. S. 3 Wheat. 610 (4: 471); *United States* v. *Kirby*, 74 U. S. 7 Wall. 486 (19: 280); *Church of Holy Trinity* v. *United States*, 143 U. S. 462 (36: 229).

Contempts of court have always been deemed to be misdemeanors. It was early indictable to disobey a judicial order.

1 Bishop, Crim. Law, § 240.

Such contempts are in the nature of a breach of the peace.

*Ex parte Whitchurch*, 1 Atk. 55.

This act does not purport to strip the Senate of its power to punish for contempts.

Proceedings for contempt and by indictment for the offense are entirely distinct, and neither proceeding is a bar to the other. They may be cumulative.

1 Bishop, Crim. Law, § 1067; *State* v. *Woodfin*, 5 Ired. L. 199, 42 Am. Dec. 161; *State* v. *Williams*, 2 Speers, L. 26; *Foster* v. *Com.* 8 Watts & S. 77; *Yates* v. *Lansing*, 9 Johns. 395, 6 Am. Dec. 290.

An act may be made indictable and punishable by both state law and Federal law.

*Fox* v. *Ohio*, 46 U. S. 5 How. 410 (12: 213).

In *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 485 (38: 1060), 4 Inters. Com. Rep. 545, this court said: "Except in the particular instances enumerated in the Constitution and considered in *Anderson* v. *Dunn*, 19 U. S. 6 Wheat. 204 (5: 242), and in *Kilbourn* v. *Thompson*, 103 U. S. 168–190 (26: 377–386), of the exercise by either House of Congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or punishment, in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises."

*Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502, and authorities there cited; *People, McDonald*, v. *Keeler*, 99 N. Y. 487, 52 Am. Rep. 49.

If an intent is unnecessarily alleged, it cannot, as a rule, affect the validity of the indictment, nor need it be proved, for it will be rejected as surplusage.

Clark, Crim. Proc. 192, 331, 332; Whart. Crim. Ev. § 158; *Rex* v. *Higgins*, 2 East, 5; *Rex* v. *Jones*, 2 Barn. & Ad. 611.

This is not a proper case for the exercise, by the Supreme Court of the United States, of its discretionary power to review by certiorari.

*Ex parte Lau Ow Bew*, 141 U.S. 587 (35: 869).



Digitized by Google

It may be true that no other case has ever come before this court presenting the question of the power of a committee of Congress to require a witness before it to answer such questions as were propounded to this petitioner. But U. S. Rev. Stat. chap. 7, tit. 2, is clear and distinct as to the existence of power; and *Kilbourn* v. *Thompson*, 103 U. S. 168 (26: 377); *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 485 (38: 1060), 4 Inters. Com. Rep. 545; *People* v. *Sharp*, 107 N. Y. 445; *People, McDonald*, v. *Keeler*, 32 Hun, 588; and *Hovey* v. *Foster*, 118 Ind. 508,—seem to be conclusive as to the frequency of its exercise in Federal and state legislatures.

**Mr. Chief Justice Fuller** delivered the opinion of the court:

It is insisted that the supreme court of the District of Columbia, sitting as a criminal court, had no jurisdiction; that the questions were not authorized under the Constitution; and that the act of Congress under which petitioner was indicted and tried is unconstitutional. Sections 102, 103, and 104, and § 859, of the Revised Statutes, are as follows:

"Sec. 102. Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months.

"Sec. 103. No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

"Sec. 104. Whenever a witness summoned as mentioned in § 102 fails to testify, and the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action."

665]* "Sec. 859. No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

These sections were derived from an act of January 24, 1857, entitled "An Act More Effectually to Enforce the Attendance of Witnesses on the Summons of Either House of Congress and to Compel Them to Discover Testimony" (11 Stat. at L. 155, chap. 19),† as amended by an act entitled "An Act Amending the *Provisions of the Second Section [666 of the Act of January Twenty-Fourth, Eighteen Hundred and Fifty-Seven, Enforcing the Attendance of Witnesses before Committees of Either House of Congress," approved January 24, 1862 (12 Stat. at L. 333, chap. 11); ‡ both of which are given in the margin.

From the record of the proceedings on the trial, accompanying and made part of the petition, it appears that petitioner, in declining to answer the questions propounded, expressly stated that he did not do so on the ground that to answer might expose him, or tend to expose him, to criminal prosecution; nor did he object that his answers might tend to disgrace him. Section 103 had, in fact, no bearing on the controversy in regard to this witness, and it is difficult to see how he can properly raise the question as to its constitutionality, notwithstanding § 859. And we cannot concur in the

† "That any person summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter before either House or any committee of either House of Congress, who shall wilfully make default, or who, appearing, shall refuse to answer any question pertinent to the matter of inquiry in consideration before the House or committee by which he shall be examined, shall, in addition to the pains and penalties now existing, be liable to indictment as and for a misdemeanor, in any court of the United States having jurisdiction thereof, and, on conviction, shall pay a fine not exceeding $1,000 and not less than $100 and suffer imprisonment in the common jail not less than one month nor more than twelve months.

"Sec. 2. That no person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify before either House of Congress or any committee of either House as to which he shall have testified whether before or after the date of this act, and that no statement made or paper produced by any witness before either House of Congress or before any committee of either House, shall be competent testimony in any criminal proceeding against such witness in any court of justice; and no witness shall hereafter be allowed to refuse to testify to any fact or to produce any paper touching which he shall be examined by either House of Congress, or any committee of either House, for the reason that his testimony touching such fact or the production of such paper may tend to disgrace him or otherwise render him infamous: *Provided*, That nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid.

"Sec. 3. That when a witness shall fail to testify, as provided in the previous sections of this act, and the facts shall be reported to the House, it shall be the duty of the Speaker of the House or the President of the Senate to certify the fact under the seal of the House or Senate to the district attorney for the District of Columbia whose duty it shall be to bring the matter before the grand jury for their action."

‡ "That the testimony of a witness examined and testifying before either House of Congress, or any committee of either House of Congress, shall not be used as evidence in any criminal proceeding against such witness in any court of justice: *Provided, however*, That no official paper or record, produced by such witness on such examination, shall be held or taken to be included within the privilege of said evidence so to protect such witness from any criminal proceeding as aforesaid; and no witness shall hereafter be allowed to refuse to testify to any fact, or to produce any paper touching which he shall be examined by either House of Congress, or any committee of either House, for the reason that his testimony touching such fact, or the production of such paper, may tend to disgrace him or otherwise render him infamous: *Provided*, That nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid."



Digitized by Google

view that §§ 102 and 103 are so inseparably connected that it can be reasonably concluded that if § 103 were not sustainable, § 102 would therefore be invalid. In other words, we do not think that there is ground for the belief that Congress would not have enacted § 102, if it had been supposed that a particular class of witnesses, to which petitioner did not belong, if they refused to answer by reason of constitutional privilege, could not be deprived of that privilege by § 103.

**667]** *Laying § 103 out of view, we are of opinion that §§ 102 and 104 were intended, in the language of the title of the original act of January 24, 1857, "more effectually to enforce the attendance of witnesses, on the summons of either House of Congress, and to compel them to discover testimony." To secure this result it was provided that when a person summoned as a witness by either House to give testimony or produce papers, upon any matter under inquiry before either House, or any committee of either House, wilfully fails to appear, or, appearing, refuses to answer "any question pertinent to the question under inquiry," he shall be deemed guilty of a misdemeanor and punished accordingly. And it was also provided that when, under such circumstances, the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, that the matter may be brought before the grand jury for their action.

It is true that the reference is to "any" matter under inquiry, and so on, and it is suggested that this is fatally defective because too broad and unlimited in its extent; but nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion (*Lau Ow Bew* v. *United States*, 144 U. S. 47, 59 [36: 340, 345]), and we think that the word "any," as used in these sections, refers to matters within the jurisdiction of the two Houses of Congress, before them for consideration and proper for their action; to questions pertinent thereto; and to facts or papers bearing thereon. When the facts are reported to the particular House, the question or questions may undoubtedly be withdrawn or modified, or the presiding officer directed not to certify; but if such a contingency occurs, or if no report is made or certificate issued, that would be matter of defense, and the facts of report and certificate need not be set out in an indictment under the statute. In this case we must assume that there was such report and certificate, and indeed we do not understand this to be controverted, as it could not well be in view of

**668]** *the Senate proceedings as disclosed by its journal and otherwise. Senate Journal, 53d Cong. 2d Sess. p. 238; Senate Rep. No. 477, 53d Cong. 2d Sess. p. 238; Rec. 53d Cong. 2d Sess. p. 6143.

Under the Constitution the Senate of the United States has the power to try impeachments; to judge of the elections, returns, and qualifications of its own members; to determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member; and it necessarily possesses the inherent power of self-protection.

According to the preamble and resolutions, the integrity and purity of the members of the Senate had been questioned in a manner calculated to destroy public confidence in the body, and in such respects as might subject members to censure or expulsion. The Senate, by the action taken, signifying its judgment that it was called upon to vindicate itself from aspersion and to deal with such of its members as might have been guilty of misbehavior and brought reproach upon it, obviously had jurisdiction of the subject-matter of the inquiry it directed and power to compel the attendance of witnesses, and to require them to answer any question pertinent thereto. And the pursuit of such inquiry by the questions propounded in this instance was not, in our judgment, in violation of the security against unreasonable searches and seizures protected by the 4th Amendment.

In *Kilbourn* v. *Thompson*, 103 U. S. 188 [26: 386], among other important rulings, it was held that there existed no general power in Congress, or in either House, to make inquiry into the private affairs of a citizen; that neither House could, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, investigate the affairs of that partnership, as a mere matter of private concern; and that consequently there was no authority in either House to compel a witness to testify on the subject. The case at bar is wholly different. Specific charges publicly made against senators had been brought to the attention of the Senate, and the Senate had determined that investigation was necessary. The subject-matter as affecting the Senate *was within the juris-[669 diction of the Senate. The questions were not intrusions into the affairs of the citizen; they did not seek to ascertain any facts as to the conduct, methods, extent, or details of the business of the firm in question, but only whether that firm, confessedly engaged in buying and selling stocks, and the particular stock named, was employed by any senator to buy or sell for him any of that stock, whose market price might be affected by the Senate's action. We cannot regard these questions as amounting to an unreasonable search into the private affairs of the witness simply because he may have been in some degree connected with the alleged transactions, and as investigations of this sort are within the power of either of the two Houses they cannot be defeated on purely sentimental grounds.

The questions were undoubtedly pertinent to the subject-matter of the inquiry. The resolutions directed the committee to inquire "whether any senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate." What the Senate might or might not do upon the facts when ascertained, we cannot say, nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative answers would have cleared that body of what the Senate regarded as offensive imputations, while affirmative answers might have



Digitized by Google

led to further action on the part of the Senate within its constitutional powers.

Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the [670] trust and duty of a *member. 1 Story, Const. § 838. Reference is there made to the case of William Blount, who was expelled from the Senate in July, 1797, for "a high misdemeanor entirely inconsistent with his public trust and duty as a senator." The offense charged against him, said Mr. Justice Story, was an attempt to seduce an American agent among the Indians from his duty, and to alienate the affections and confidence of the Indians from the public authorities of the United States, and a negotiation for services in behalf of the British government among the Indians. It was not a statutable offense nor was it committed in his official character, nor was it committed during the session of Congress, nor at the seat of government.

Commenting on this case, Mr. Sergeant says in his work on Constitutional Law, 2d ed. p. 302: "In the resolution, the Senate declared him guilty of a high misdemeanor, though no presentment or indictment had been found against him, and no prosecution at law was ever commenced upon the case. And it seems no law existed to authorize such prosecution."

The two Houses of Congress have several times acted upon this rule of law, and the cases may be found, together with debates on the general subject, in both Houses, of great value, in Smith's Digest of Decisions and Precedents, Senate Doc. No. 278, 53d Cong. 2d Sess. The reasons for maintaining the right inviolate are eloquently presented in the report of the committee in the case of John Smith, accused in 1807 of participating in the imputed treason of Aaron Burr. 1 Hall, Am. L. J. 459; Smith, Dig. p. 23.

We cannot assume on this record that the action of the Senate was without a legitimate object, and so encroach upon the province of that body. Indeed, we think it affirmatively appears that the Senate was acting within its right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded.

Doubtless certain general principles announced in *Runkle* v. *United States*, 122 U. S. 555 [30: 1170], cited by petitioner's counsel as conclusive, were correctly set forth, but that case has not been approved in subsequent de[671]cisions on the same *subject, and the presumptions in favor of official action have been held to preclude collateral attack on the sentences of courts-martial, though courts of special and limited jurisdiction. *United States* v. *Fletcher*, 148 U.S. 84 [37: 378]; *Swaim* v. *United States*, 165 U. S. 553 [*ante*, 823].

Counsel contend with great ability that the law under consideration is necessarily subject to being impaled on one or the other of two horns of a dilemma, either inflicting a fatal wound. The one alternative is that the law delegates to the District of Columbia criminal court the exclusive jurisdiction and power to punish as contempt the acts denounced, and thus deprives the Houses of Congress of their constitutional functions in the particular class of cases. The other alternative is that if the law should be interpreted as leaving in the Houses the power to punish such acts, and vesting in addition jurisdiction in the District criminal court to punish the same acts as misdemeanors, then the law is invalid because subjecting recalcitrant witnesses to be twice put in jeopardy for the same offense contrary to the 5th Amendment.

The refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the Senate, of course, constitutes a contempt of that body, and by the statute this is also made an offense against the United States.

The history of congressional investigations demonstrates the difficulties under which the two Houses have labored, respectively, in compelling unwilling witnesses to disclose facts deemed essential to taking definitive action, and we quite agree with Chief Justice Alvey, delivering the opinion of the court of appeals, "that Congress possessed the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legitimate functions;" and that it was to effect this that the act of 1857 was passed. It was an act necessary and proper for carrying into execution the powers vested in Congress and in each House thereof. We grant that Congress could not devest itself, or either of its Houses, of the *essential [672] and inherent power to punish for contempt, in cases to which the power of either House properly extended; but, because Congress, by the act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved; and the statute is not open to objection on that account.

Nevertheless, although the power to punish for contempt still remains in each House, we must decline to decide that this law is invalid because it provides that contumacy in a witness called to testify in a matter properly under consideration by either House, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States, who are interested that the authority of neither of their departments, nor of any branch thereof, shall be defied and set at naught. It is improbable that in any case cumulative penalties would be imposed, whether by way of punishment merely, or of eliciting the answers desired, but it is quite clear that the contumacious witness is not subjected to jeopardy twice for the same offense, since the same act may be an offense against one jurisdiction and also an offense against another; and indictable statutory offenses may be



Digitized by Google

punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu* and capable of standing together. *General Houston's Case*, 2 Ops. Atty. Gen. 655 (Attorney General Butler); *Rex* v. *Lord Ossulston*, 2 Strange, 1107; *Cross* v. *North Carolina*, 132 U. S. 131 [33: 287]; *Re Debs*, 158 U. S. 564 [39: 1092]; *State* v. *Woodfin*, 5 Ired. L. 199 [42 Am. Dec. 161]; *Yates* v. *Lansing*, 9 Johns. 395 [6 Am. Dec. 290]; *State* v. *Williams*, 2 Speers, L. 26; *Foster* v. *Com.* 8 Watts & S. 77.

In our opinion the law is not open to constitutional objection, and the record does not exhibit a case in which, on any ground, it can be held that the supreme court of the District, sitting as a criminal court, had no jurisdiction to render judgment.

*Writ denied.*

Mr. Justice **Harlan** concurred in the result.

---

## 673] MAYOR AND CITY COUNCIL OF BALTIMORE, *Appts.*,
*v.*
## BALTIMORE TRUST & GUARANTEE COMPANY, Trustee.

(See S. C. Reporter's ed. 673-685.)

*Right of street-railway company to lay tracks in streets — restriction — compensation for taking up tracks—right to use street.*

1. The right of a street-railway company under an ordinance granting permission to lay tracks in streets is subject to reasonable regulations by subsequent ordinances as to the use of streets.

2. An ordinance restricting a street-railway company to a single track for 1,100 feet in a narrow and busy thoroughfare is not an unreasonable restriction of its rights, or a material modification of a prior ordinance granting the company permission to lay double tracks in the streets for many miles.

3. Failure to provide any compensation to a street-railway company for taking up one track in a street in which it has laid double tracks does not make the ordinance unreasonable, if the double tracks were laid, except for a few hundred feet, after notice from the mayor and the city solicitor that there were objections to the double tracks, and that an ordinance was to be introduced to limit the road at that place to a single track.

4. A street-railway company which has relaid its track under direction of the city commissioner, as required by the provisions of an ordinance revoking its original license for two tracks, but providing that it may replace a single track if it removes its double tracks within twenty days, does not lose the right to use the street without a further ordinance, although it did not comply with the ordinance in twenty days but contested its validity by litigation, when it had an understanding with the city authorities that the limitation of time would not be enforced during the time necessary to get an adjudication.

[No. 209.]

*Argued March 11, 12, 1897. Decided April 26, 1897.*

APPEAL from a decree of the Circuit Court of the United States for the District of Maryland holding a certain ordinance to be a contract and enjoining the city authorities of Baltimore from tearing up or interfering with the railroad track laid down by the Lake Roland Elevated Railroad Company on Lexington street in that city, in an action brought by the Baltimore Trust & Guarantee Company, trustee and mortgagee, in a mortgage executed by the Lake Roland Company against the mayor and city council of Baltimore. *Reversed*, and cause remanded for further proceedings.

See same case below, 64 Fed. Rep. 158.

Statement by Mr. Justice **Peckham**:

The appellee, being the plaintiff below, brought this action in the circuit court of the United States for the district of Maryland for the purpose of enjoining the city authorities from tearing up or interfering with the railroad track laid down by the Lake Roland Elevated Railroad Company on Lexington street, in the city of Baltimore. The bill and the answer were duly filed in April, 1893, and the following are substantially the facts upon which the case was heard and determined by the court below:

The plaintiff sued as trustee and mortgagee named in a mortgage executed by the Lake Roland Company to secure the payment of certain bonds issued and to be issued by the company for the purpose of raising funds to construct its road. The mortgage was upon all the property of the company, its railroad plant, tracks, etc., and was executed on the 1st day of September in the year 1892. The amount of the bonds which the mortgage so secured was $1,000,000 the principal payable on the 1st of September in the year 1942. It was on the ground that the proposed action, hereafter mentioned, on the part of the city authorities would result in a most material impairment of the security of the mortgage that this suit was brought by the trustee and mortgagee for the purpose of restraining such action.

The Lake Roland Company was the result of a consolidation *of two railway compa-[674 nies, one of which, called the North Avenue Railway Company of Baltimore City, had the franchise to construct and operate a passenger railway in the city of Baltimore, the whole line of which road was to be located in that city. The Lake Roland Company succeeded to all the rights acquired by the North Avenue Railway Company. The legislature of Maryland, by the act, chapter 870 of the Laws of 1890, among other things enacted that "the mayor and city council of Baltimore shall have the power to regulate the use of the streets, lanes, and alleys in said city by railway or other tracks," etc. On the 8th of April, 1891, the common council of Baltimore passed what is termed ordinance No. 23, by which it authorized the North Avenue Railway Company of Baltimore City, in connection with its tracks

NOTE.—*Construction of grants to corporations; corporations have only powers granted or those necessary to carry into effect powers granted; and can act only in the mode prescribed by the law creating.*—see notes to Charles River Bridge v. Warren Bridge, 9: 775, and Beaty v. Knowler, 7: 813.



Digitized by Google

in other streets mentioned in the ordinance, "to lay down and construct double iron railway tracks for the purposes of its business, . . . on Lexington street westwardly to Charles street from North street." This is a distance of about 1,100 feet. The right was also given to the company to operate its road by electricity supplied from overhead wires, and the tracks, wires, and poles were to be laid and constructed under the supervision and direction of the city commissioner. Various other conditions and regulations were contained in the ordinance, all of which the railroad company accepted. As a portion of the road to be constructed consisted of an elevated road, it became necessary to obtain the sanction of the legislature before the company undertook the execution of the work. Accordingly chapter 112 of the Laws of 1892 was passed, the 1st section of which ratified and confirmed ordinance No. 23, with "the same effect as if the mayor and city council of Baltimore, at the time of the passage of said ordinance, had been fully authorized by the general assembly to pass said ordinance, and to grant each and all of the powers and privileges therein contained; the said mayor and city council to have the same power and control hereafter in reference to the enforcement, amendment, or repeal of said ordinance as it has, or would have, in respect to any ordinance passed under its general power."

Subsequently to the passage of this act of [675] 1892, the Lake *Roland Company, in the summer and fall of 1892, commenced to lay its tracks in the city and to build a portion of its elevated road. Prior to the laying down of any tracks on Lexington street, between North and Calvert streets, the latter being a street which crosses Lexington street between North and Charles street at a distance of between 300 and 400 feet west from North street, it became known to the railroad company that the mayor and some of the city authorities were opposed to the laying of double tracks in that street between those points. This was a short time prior to the 7th day of November, 1892. On that day the mayor wrote a letter to the president of the railway company, in which he stated that he had noticed the company had commenced laying double tracks on Lexington street, between North and Calvert streets, and that the public interest in his judgment required that no more than a single track should be laid on Lexington street at that point, and that the law officers of the city had informed him that it was competent for the city council to prohibit the laying of double tracks there. The mayor also stated that at the next session of the council an ordinance would be introduced prohibiting the company from laying double tracks on the portion of Lexington street above described. He ended by saying: "I write you this to prevent you from going to the unnecessary expense of laying a system of double tracks and afterwards being required to remove them." On the same day the president of the railroad company received from the city solicitor a notice that he was, at the request of the mayor, preparing an ordinance to prohibit the railroad company from laying more than a single track on Lexington street, between North and Calvert, and he offered to permit the president of the railroad company to see the proposed ordinance before it was sent to the council. It is stated, however, on the part of the railroad company, that at no time prior to the 12th day of November, 1892, two days prior to the passage of the ordinance hereafter spoken of, was there any intimation given to the officers of the company that there was any opposition to the laying of the company's double tracks on Lexington street, between *Calvert and Charles streets, which was [676] a distance of between 700 and 800 feet immediately west of Calvert street, and a portion of Lexington street, between Calvert and North streets, was immediately east from Calvert street. It is asserted on the part of the company that it laid the double tracks on Lexington street, between Calvert and Charles streets, without opposition on the part of anyone so far as it knew, but it admits that it did lay the double tracks between North and Calvert streets, notwithstanding the receipt of the letters mentioned and in spite of the known opposition of the mayor. This work was done, between North and Calvert streets, during the night and on election day, so that before the 14th of November, 1892, the work of laying the double tracks on Lexington street had been substantially completed the whole distance between North and Charles streets. The common council of the city met on the day last named, and passed "An Ordinance to Regulate the Use of Lexington Street between North Street and Charles Street by Railway Tracks, and to Prohibit the Laying or Maintaining or Using by North Avenue Railway Company, or Any Other Person or Corporation, of More than a Single Iron Railway Track upon Said Portion of Lexington Street." The 1st section of this ordinance reads as follows:

"Sec. 1. *Be it enacted and ordained by the mayor and city council of Baltimore*, That the 1st section of ordinance No. 23, approved April 8, 1891, so far as the same authorized and empowered the North Avenue Railway Company to lay double iron railway tracks upon the portion of East Lexington street between North street and Charles street, be, and hereby is, repealed, and that the authority and license given to said North Avenue Railway Company by said 1st section of said ordinance to lay such double iron railway tracks, be, and hereby is, revoked."

(It will be observed that this ordinance, instead of confining the single track to that portion only of Lexington street lying between North and *Calvert* streets, as spoken of by the mayor, included the whole of Lexington street between North and *Charles* streets.)

*The 2d section of the same ordinance [677] prohibited any person or corporation from laying down railway tracks on Lexington street except as provided in the succeeding section of the ordinance, and directed that all tracks which had been theretofore placed on Lexington street should be removed by the persons who laid them, within ten days after they received notice to that effect from the city commissioner."

The 3d section authorized the railroad company to lay down and maintain one track and no more on Lexington street, "upon the same terms and subject to the same provisions and limitations as were provided by the city ordi-



Digitized by Google

nance No. 23, of April 8, 1891, in respect to double iron railway tracks there authorized to be laid on said portion of Lexington street." The 3d section contained also the following proviso: "Provided, as a condition precedent to the right of the North Avenue Railway Company to exercise the authority or license in this section conferred upon it, the said North Avenue Railway Company shall within twenty days from the passage of this ordinance, at its own expense, remove the whole or such portion of the double iron railway tracks that it has caused to be laid on said portion of Lexington street as the city commissioner shall designate, and shall also, as its own expense, replace the pavement on the said portion of East Lexington street in a manner satisfactory to the city commissioner."

After the passage of this ordinance and before the expiration of the twenty days mentioned in the proviso to the 3d section, the railroad company, not admitting the right of the city to pass such ordinance or to compel the company to take up one of its tracks, and yet being embarrassed by the proviso as to the necessity of taking up the tracks within twenty days, came to an understanding with the city authorities that, as both parties desired a speedy determination of the question of law, a case should be made which should raise that question, and it should be presented to the courts for their decision, and that in the meantime the provision limiting the time in which to take up the track would not be enforced. Accordingly a bill was filed in the city court of Bal-[678]timore by *the railroad company raising the question, and a demurrer on the part of the city was served and a decree taken against the company *pro forma* in that court. An appeal was then taken by the company to the court of appeals of Maryland, which court after full argument of the question decided the case on its merits, and affirmed the judgment of dismissal directed by the court below. *Lake Roland Elev. R. Co.* v. *Baltimore*, 77 Md. 352 [20 L. R. A. 126]. This decision was rendered about the 16th of March, 1893.

Thereafter the railroad company took up one of its tracks on Lexington street and located the other under the direction of the city commissioner and proceeded with due diligence to lay down a single track on Lexington street and to restore the street to its proper condition.

While engaged in this work and on the 1st of April, 1893, the mayor notified the company by letter that he was advised that the company had no authority to lay its track on the bed of Lexington street between North and Charles streets, in the absence of an ordinance granting such a privilege from the mayor and city council. (This letter, it is supposed, was based upon the proposition that the company had not complied with the condition contained in the ordinance of November, 1892, already mentioned.) The mayor therefore advised the company that, in the opinion of the city law officers, the present single track of the company occupying the bed of the street was a violation of law. A suggestion was made by him that an application for an ordinance be at once made to the city council, and that there should be no delay in the matter, as the public convenience required Lexington street to be promptly made passable by repaving. The president of the company replied, declining, under the circumstances, to ask for the passage of another ordinance, because, as he was advised and believed, the company already had a clear right to lay down and maintain its tracks on Lexington street. The mayor, on April 5, 1893, then notified the company that on Wednesday, April 12, the commissioner would commence to take up the tracks on Lexington street, unless in the meantime the railroad company applied to the city council, which *would meet on April 10, for an[679] ordinance giving it the right to keep its track on the street.

Soon afterwards, and on the 15th of April, 1893, this suit was commenced. In the bill it was alleged that if the city were permitted to take up the tracks it would be impossible for the company to reach its terminus at the corner of Charles and Lexington streets, and that as the entire railway system of the company was on the eve of completion and operation, it would suffer great damage by the removal of the tracks; the plaintiff also claimed that ordinance No. 23, having been accepted and acted upon by the railroad company, there was thereby constituted an irrepealable and inviolable contract between the municipal corporation and the railroad company, the terms of which could not be altered or impaired without the consent of both parties to the contract, and that, therefore, the subsequent ordinance purporting to change the terms of the original so as to deprive the railroad company of the right to reach its terminus with double tracks was in contravention of the 10th section of the 1st article of the Constitution of the United States, which prevents legislation which impairs the obligation of contracts, and for that reason the subsequent ordinance was void. It was also alleged that the proposed action of the city authorities was not only invalid, but that it tended directly to impair the value of the mortgage security held by the plaintiff trust company as trustee for the bondholders.

On the other side, it was alleged on the part of the common council that the original ordinance was nothing but a revocable license, and that the existence of double tracks in that portion of Lexington street lying between North and Charles streets would be inconsistent with the reasonable use of the street at that point by the public and by other vehicles; that the street was so narrow as to leave just sufficient room between the curb and the railroad tracks for ordinary vehicles to pass, and that those which were of extra width could not meet or pass a car on the same side of the street; that the street was one of the main thoroughfares running east and west in the city of Baltimore; that at certain portions of the day it was crowded with vehicles of all descriptions, and *that to permit the use of the street at [680] the point in question by this company, with its electric cars running at a comparatively high rate of speed and with double tracks laid in the street, would prevent the reasonable use of the same by the public, and would be dangerous in the extreme and directly tend to loss of life and injury to property.

As to the matter of convenience to the public and of necessity to the company, the latter



Digitized by Google

asserted it would, in fact, accommodate the public more to have double tracks than a single one, while it was a real necessity to the company in order that it might, by giving accommodation to the public, impossible with a single track, successfully compete with rival roads running through adjacent streets for a fair share of patronage; that it could not do so, if it had but a single track for 1,100 feet on Lexington street.

Upon these facts the case was heard in the court below, and that court held that ordinance No. 23, upon its acceptance by the railroad company, became a contract between the city and the railroad company, which could not be substantially modified without the consent of both parties, and that the subsequent ordinance was a violation of that contract and therefore invalid, and a judgment was ordered enjoining the city authorities from interfering with the railroad company in the construction and maintenance of two parallel tracks on Lexington street, and from interfering in any manner with the company in the operation of its electric cars over and upon such tracks, provided the two tracks are laid and maintained and the cars operated in conformity with the provisions of ordinance No. 23, and in conformity with the general regulations of the mayor and common council of Baltimore relating to the construction and operation of such street railways, not inconsistent with the provisions of ordinance No. 23, above mentioned. From this decree, Judge Morris, district judge of Maryland, dissented. 64 Fed. Rep. 153. An appeal having been taken by the city of Baltimore, the case is brought here for review.

*Messrs.* **Thomas G. Hayes** and *Thomas Ireland Elliott* for appellant.

*Messrs.* **Francis K. Carey, E. J. D. Cross,** *John E. Semmes,* and *John N. Steele,* for appellee.

Mr. Justice **Peckham** delivered the opin ion of the court:

The discussion on the argument of this case took quite a wide range, but in the view we take, we can dispose of this appeal without deciding whether the common council had or had not the power to make a contract for the perpetual use of its streets by the railroad company, upon the terms and conditions which might be agreed upon between the common council and the railroad company, and which when once agreed upon should not be thereafter subject to repeal or material alteration by the common council. It is sufficient for the decision of this case to hold that the direction to lay but one track through Lexington street, between the points mentioned, did not substantially change the terms of the contract, and was no more than the exercise by the city of its acknowledged power to make a reasonable regulation concerning the use of that street by the railroad company, and that the original contract (assuming that one existed) was entered into subject to the right of the city to adopt such a regulation.

Chapter 370 of the act of 1890, referred to in the foregoing statement of fac's, distinctly granted to the mayor and city council of Baltimore the power to regulate the use of the streets by railway companies. In the absence of any such positive legislation, we think there could be no well-founded doubt of this power, and that any contract entered into by the city with a railroad company would be subject to its exercise, so long as it did not materially modify or impair the rights granted by the contract. Indeed, no question is made of the existence of a power of regulation by any party to this suit. It was not denied by the court below. The only dispute on this branch of the case between the parties is in regard to the question whether the direction to lay but a single track on Lexington street, between the points *mentioned, is or is not a reasona-[682 ble regulation of the use of that street to which the contract was subjected, as above stated.

We are not now concerned with the question of the right of the common council absolutely or unconditionally to repeal ordinance No. 23, but simply as to whether the passage of the subsequent ordinance amounted to a valid regulation of the use of the street by the railroad company. We think that the later ordinance, although the word "repeal" was used in its 1st section, was in substance a regulation of the use of the street which the city had the power to enact. The effect of the whole ordinance was simply to change the right of the company to operate its road on Lexington street for 1,100 feet, so that instead of using double tracks it should have in that street but a single track.

There is sufficient in the case before us from which it may be seen that the laying down of double tracks in some portion of the street in question was done with the knowledge that it was against the wishes of the mayor and the city authorities, and in spite of the notification by them to the company that immediate measures would be taken to have ordinance No. 23 so altered by the common council at its first session as to provide for the laying of but one track instead of double tracks between North and Calvert streets on Lexington street. Notwithstanding such notice the company proceeded by working night and day to lay down the double tracks in Lexington street between the points last named. In looking at the question, therefore, of the reasonableness of the ordinance which made no provision for payment by the city of the expense of taking up one track and relocating the other along Lexington street, but which on the contrary provided that it should be done at the expense of the railroad company, it is proper that we should view the case as if the proposed regulation had been passed before the company had laid any track on Lexington street, between North and Calvert streets, and before it had been put to any expense on account of such double track. We cannot say the regulation was unreasonable simply on the ground that it did not provide for paying the expense of taking up one track already laid in the street between Calvert and *Charles streets (a distance of a few hun-[683 dred feet), to the laying of which the city had not, at the time, objected. Having at one time granted the right to the company to lay double tracks through certain named streets of the city of Baltimore, was it a reasonable regulation of the use of one of those streets to, thereafter and before the completion and operation of the road therein, provide that but a single track in



Digitized by Google

that street should be used instead of the double tracks which had been first provided for?

Upon the facts already set forth a sufficient foundation was laid for the exercise of a fair and reasonable legislative discretion in determining the question whether the portion of the street mentioned should be occupied by a single or double track of the railway company. A regulation of that portion of the street by subjecting it to the use of but one instead of double railway tracks did not, in our judgment, thereby materially modify, nor did it, in effect, prohibit, the exercise of the privileges previously granted by the city to the railroad company, nor did it impair the obligation of the contract or destroy vested rights, nor was this regulation substantially inconsistent with the terms of ordinance No. 23. While that ordinance provided generally for double tracks through the streets mentioned therein, the reduction of the right to use two tracks and the granting of the right to use but one for such a comparatively short distance in one particularly crowded and narrow thoroughfare was not a regulation inconsistent with the terms of the original ordinance. It would, we think, be unreasonable to hold that the least limitation of the power to operate double tracks was an infringement and impairment of the contract as set forth in the ordinance. In our opinion, the ordinance does not give any such cast-iron right or one which shall be beyond any reasonable limitation and supervision by the city. It granted the use of the streets for double tracks for many miles, and the subsequent limitation of that use to one track related to but a few hundred feet where peculiar and exceptional conditions existed, where the danger to be apprehended from the use of electric cars on double tracks in a narrow and busy thor-**684**]oughfare was very *great, and where it might fairly be decided by the common council that double tracks at that point would be an unreasonable and dangerous use of the street by the company and directly tend to prevent its reasonable and safe use and enjoyment by the public at large.

In *St. Louis* v. *Western U. Teleg. Co.* 149 U. S. 465 [37: 810], Mr. Justice Brewer, in delivering the opinion of the court in regard to the power of regulation of the streets of a city, said:

"It is given power to open and establish streets, to improve them as it sees fit, and to regulate their use, paying for all this out of its own funds. The word 'regulate' is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will preceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11, 604, it simply regulates the use when it prescribes the terms and conditons upon which they shall be used. If it should see fit to construct an expensive boulevard in the city, and then limit the use to vehicles of a certain kind, or exact a toll from all who use it, would that be other than a regulation of the use? And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been to in opening and improving the street."

To same effect, see *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196-203 [29: 158-162, 1 Inters. Com. Rep. 382]. "The power to *regulate* commerce," says Mr. Justice Field, speaking for this court, "is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted."

If it be said in this case that the city had already regulated the use by prescribing that there should be two tracks, the answer is that this power of regulation is a continuing power; it is not exhausted by being once exercised, and so long as the object is plainly one of regulation, the power may be exercised *as often as[**685** and whenever the common council may think proper; the use of the street may be subjected to one condition to-day and to another and additional one to-morrow, provided the power is exercised in good faith and the condition imposed is appropriate as a reasonable regulation, and is not imposed arbitrarily or capriciously. *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650-672 [29: 516-524]; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 567 [38: 269, 273].

The effect of the 8d section of the latter ordinance was to leave with the railroad company the power to lay down and maintain and use one track instead of double tracks on Lexington street between the streets named. It is true the city assumed to attach a condition to the exercise of this right, which was that the railroad company should within twenty days remove the double tracks and replace the pavement. In view of all the facts, we should incline to regard this as in the nature of a penalty to secure obedience of the company to the regulation, and in any event, in the light of the conduct of the parties in relation to the litigation in the state court, we think the railroad company has not lost the right to maintain one track in the street in question as it now exists, without the adoption of any further ordinance on the subject.

On the ground which we have stated, *we think the decree of the Circuit Court wrong, and for that reason it must be reversed*, and the cause remanded for further proceedings not inconsistent with this opinion.



Digitized by Google

# LONG ISLAND WATER SUPPLY COMPANY, *Plff. in Err.*,
v.
# CITY OF BROOKLYN.

(See S. C. Reporter's ed. 685-697.)

*Eminent domain—taking of waterworks—taking a contract—power of state—due process of law—findings of fact—exclusive right to supply water—contract—statute for condemnation, when constitutional.*

1. The condemnation of a water-supply system is within the unquestioned limits of the power of eminent domain.
2. The power to take a waterworks system by eminent domain for the use of a city under statutory authority is not taken away by a contract for the supply of water by the private company owning the works during a term of years, with a provision requiring the payment of hydrant rentals by the municipality.
3. A contract is property, and, like any other property, may be taken under condemnation proceedings for public use.
4. The power of the state to condemn a waterworks system does not depend upon making the supply of water absolutely free to all individuals who desire to use it.
5. Due process of law in condemnation proceedings does not require that the assessment of damages shall be made by a jury.
6. There is no denial of due process of law in making the findings of fact by the triers of fact, whether commissioners or a jury, in a condemnation case, final as to such facts, and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted in their appraisal, or other errors in their proceedings.
7. An exclusive right to supply water to a town is not acquired by a water company organized under a statute which simply provides for the organization of such companies, when its contract with the town gives simply a privilege of laying its mains in the street, with a covenant for the payment of hydrant rentals, without any words of exclusion.
8. An act for the annexation of territory to a city, which gives the city the right to purchase or condemn waterworks in such territory at any time within two years, does not constitute a contract against condemnation after that time, or prevent the legislature from enlarging the time.
9. A statute providing for the condemnation of waterworks by a city is not unconstitutional because it fails to declare in terms that the city shall continue the same use or appropriate the property to some other equally public purpose.

[No. 216.]

*Argued March 17, 18, 1897. Decided April 26, 1897.*

IN ERROR to the Supreme Court of the State of New York to review a judgment of that court (after its affirmance by the Court of Appeals) confirming the report of commissioners in condemnation proceedings brought by the city of Brooklyn to condemn the property of the Long Island Water Supply Company. *Affirmed.*

See same case below, 143 N. Y. 596 [26 L. R. A. 270].

Statement by Mr. Justice **Brewer**:

Under authority of chapter 737 of the laws of New York for 1873 (N. Y. Laws 1873, p. 1100), as amended in 1881 (N. Y. Laws 1881, chap. 321, p. 443), the plaintiff in error was organized as a water company. On September 15, 1881, it entered into a contract with the town of New Lots, by which it agreed to lay water pipes and mains in the streets of New Lots, and supply the town with water. The town, on the other hand, agreed to pay for hydrants to be furnished and supplied, as provided in the contract, at a specified rate per hydrant, the number of hydrants to be not less than 200. The term of the contract was twenty-five years. This contract was modified on July 2, 1885, but the modification contains nothing material to this controversy.

In 1886, by chapter 335 (N. Y. Laws 1886, p. 540), the town of New Lots was annexed to and merged in the city of Brooklyn, to be known thereafter as the 26th ward of said city.

The 4th section of this act provided, among other things, that "the amount annually payable by said town for water supplied to it under existing contracts between it and the Long Island Water Supply Company shall, after this act takes effect, during the terms of said contract, or until said city shall purchase or acquire the property of said water company, as in the next section provided, be levied and collected from *the property situated and tax- [687 able within the territory hereby annexed, and such amount shall be paid to the said water company by said city as it falls due from time to time under said contracts, and the said city of Brooklyn shall not distribute or furnish water for consumption or use within said territory, or lay any pipes or mains for the distribution or supply of water within said territory, until the expiration of the charter of said company or until the said city shall purchase or acquire the property of said company, as in the next section provided."

By § 5 the city was given power to purchase or condemn the property of the company within two years, but did neither. In 1892 the legislature passed another act (N. Y. Laws 1892, chap. 481, p. 960), authorizing the city of Brooklyn to condemn the property of the company, the 1st section of which is as follows:

"Sec. 1. The public interest requires the acquisition, by the city of Brooklyn, for the public use, of the reservoir, wells, machinery, pipes, franchises, and all other property of the Long Island Water Supply Company, and the said city of Brooklyn is hereby authorized to acquire the same for such use by condemnation, free of all liens and encumbrances what-

NOTE.—*Payment for private property taken for public use; 5th Amendment to Constitution applies only to Federal government, and not to states,*—see note to Withers v. Buckley, 15: 816.

*As to eminent domain; damages to easements, noise, smoke, etc.; owners of lots abutting on streets; damages to access, light, and air; vibration; depreciation in value; use of street; telegraph poles; what constitutes taking; consequential injury,*—see note to Osborne v. Missouri P. R. Co. 37: 155.

*As to what is due process of law,* see note to Pearson v. Yewdall, 24: 436.



Digitized by Google

soever, provided that the proceedings herein, hereinafter, and hereby, authorized shall be commenced within one year after the passage of this act."

Subsequent sections prescribed the procedure. Proceedings were had under this act. The commissioners appointed as provided therein valued the property of the company at $570,000, of which $370,000 was named as the value of the tangible property, and $200,000 that of the franchises, contracts, and all other rights and property of whatsoever nature or kind of the company, including therein the contract between the town of New Lots and the company. The special term of the supreme court, on June 29, 1893, made an order vacating and setting aside this report and appointing new commissioners. The city of Brooklyn appealed to the general term of that court, which, on December 1, 1893, reversed the order of the special term and confirmed the
688] report of the *commissioners. The company then took an appeal to the court of appeals. That court affirmed the decision of the general term (143 N. Y. 596 [26 L. R. A. 270]) and remitted the record to the supreme court, which court, on December 4, 1894, entered final judgment in favor of the city of Brooklyn, and thereupon this writ of error was sued out.

*Messrs.* **John F. Dillon, Benjamin F. Tracy,** *Harry Hubbard,* and *John M. Dillon* for plaintiff in error.

*Messrs.* **George G. Reynolds** and **Albert G. McDonald** for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

So far as respects any mere matter of procedure, or of conflict between the statute authorizing the condemnation, or the proceedings had thereunder, and the Constitution of the state, the decision of the court of appeals is conclusive. *West River Bridge Co.* v. *Dix,* 47 U. S. 6 How. 507 [12: 535]; *Bucher* v. *Cheshire R. Co.* 125 U. S. 555 [31: 795]; *Adams Exp. Co.* v. *Ohio,* 165 U. S. 194 [*ante,* 683]. Our inquiry must be directed to the question whether any rights of the water-supply company secured by the Constitution of the United States have been violated. The contention of plaintiff in error is that the proceedings had under the statute which resulted in the judgment of condemnation violate U. S. Const. art. 1, § 10, which forbids any state to pass a law impairing the obligation of contracts, and were not "due process of law," as required by the 14th Amendment.

With reference to the first part of this contention it is said that in 1881 the town of New Lots made a contract with the water supply company by which for each and every year during the term of twenty-five years it covenanted to pay to the company so much per hydrant for hydrants furnished and supplied by it; that the act of annexation continued the bur-
689] den *of this obligation upon the territory within the limits of the town, although thereafter the town as a separate municipality ceased to exist, and the territory became simply a ward of the city of Brooklyn; that the condemnation proceedings destroyed this contract and released the territory from any obligation to pay the stipulated hydrant rental; that a state or municipality cannot do indirectly what it cannot do directly; that as the municipality could not by any direct act release itself from any of the obligations of its contract, it could not accomplish the same result by proceedings in condemnation. We cannot yield our assent to this contention. All private property is held subject to the demands of a public use. The constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation. That the supply of water to a city is a public purpose cannot be doubted, and hence the condemnation of a water-supply system must be recognized as within the unquestioned limits of the power of eminent domain. It matters not to whom the water-supply system belongs, individual or corporation, or what franchises are connected with it—all may be taken for public uses upon payment of just compensation. It is not disputed by counsel that, were there no contract between the company and the town, the waterworks might be taken by condemnation. And so the contention is practically that the existence of the contract withdraws the property, during the life of the contract, from the scope of the power of eminent domain, because taking the tangible property will prevent the company from supplying water, and therefore operate to relieve the town from the payment of hydrant rentals. In other words, the prohibition against a law impairing the obligation of contracts stays the power of eminent domain in respect to property which otherwise could be taken by it. Such a decision would be far reaching in its effects. There is probably no water company in the land which has not some subsisting contract with a municipality which it supplies, and within which its works are located, *and a ruling that all those [690 properties are beyond the reach of the power of eminent domain during the existence of those contracts is one which, to say the least, would require careful consideration before receiving judicial sanction. The fact that this particular contract is for the payment of money for hydrant rental is not vital. Every contract is equally within the protecting reach of the prohibitory clause of the Constitution. The charter of a corporation is a contract, and its obligations cannot be impaired. So it would seem to follow, if plaintiff in error's contention is sound, that the franchises of a corporation could not be taken by condemnation, because thereby the contract created by the charter is impaired. The privileges granted to the corporation are taken away, and the obligation of the corporation to perform is also destroyed.

The vice of this argument is twofold. First, it ignores the fact that the contract is a mere incident to the tangible property; that it is the latter which, being fitted for public uses, is condemned. And while the company, by being deprived of its tangible property, is unable to perform its part of the contract, and therefore can make no demands upon the town for performance on its part, it still is true that the



Digitized by Google

contract is not the thing which is sought to be condemned, and its impairment, if impairment there be, is a mere consequence of the appropriation of the tangible property. Second, a contract is property, and, like any other property, may be taken under condemnation proceedings for public use. *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 673 [29: 516, 525]. Its condemnation is of course subject to the rule of just compensation, and that is all that is implied in the decisions such as *Hall* v. *Wisconsin*, 103 U. S. 5 [26: 302], cited by counsel. In that case it appeared that Hall had a contract with the state for services entered into in pursuance of a statute, that he performed the services, but that before finishing his work the legislature repealed the statute authorizing the contract. It was held that he was nevertheless entitled to his stipulated compensation. The act of the legislature in the repeal was not one providing for condemnation, and in so 691] far as it partook of the *nature of a condemnation it ignored the obligation of just compensation and was therefore void; but it was not held that, if just compensation had been provided and a public use required the contract might not have been condemned.

The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public uses. The statute under which these proceedings were had declares the necessity of the acquisition "for the public use of the reservoir as well as machinery, pipes, franchises, and all other property" of the company, and the application for the appointment of commissioners not only described the tangible property but also added "all franchises, contracts, more particularly a certain contract dated the 15th day of September, 1881, between the town of New Lots and the said Long Island Water Supply Company, and referred to in N. Y. Laws 1886, chap. 335, and all other rights and property of whatsoever nature or kind as the same may so appear." The commissioners, after a hearing, valued first the tangible property at $370,000 and the franchises, contracts, and all other rights and property, including this particular contract at $200,000. In other words, the condemnation proceedings did not repudiate the contract but appropriated it and fixed its value. The case of *West River Bridge Co.* v. *Dix*, 47 U. S. 6 How. 507 [12: 535], is in point. The bridge company had a charter from the state of Vermont creating it a corporation and investing it with the exclusive privilege of erecting a bridge over West River within 4 miles of its mouth and with the right of taking tolls for passing the same. Under that authority it had erected its bridge and was in the enjoyment of the franchise. During the life of the charter, and under authority of an act of the legislature, condemnation proceedings were taken for the purpose of condemning the bridge and extinguishing the charter, converting the former into a free public highway. These proceedings culminated in an award of compensation and a judgment of condemnation. The supreme court of the state having sustained the proceedings they were brought to this court on error, and there, as here, the *contention was [692 that the proceedings were in violation of U. S. Const. art. 1, § 10. This contention was overruled, and in the course of the opinion it was observed:

"No state, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inhere necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated 'eminent domain' of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise. . . . Now, it is undeniable that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the state, or the government acting as its agent, and the grantee, and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between states and individuals, or between individuals only, there enter conditions which arise, not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, or nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never therefore be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right *does not operate to [693 impair the contract effected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition. . . . A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction, thus attempted, we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons, in the use or enjoyment of their private property, to control, and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and noth-



Digitized by Google

ing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating, in his second volume, chap. 3, p. 20, of the rights of things." See also *Richmond, F. & P. R. Co.* v. *Louisa R. Co.* 54 U. S. 13 How. 71, 83 [14: 55, 60]; *Boston & L. R. Corp.* v. *Salem & L. R. Co.* 2 Gray, 1, 35, 36.

The views thus expressed have never been overruled, and we think are controlling of this case. Counsel seek to distinguish that case from this in that here, as they say, there is an executory contract for twenty-five years, whereas in that case there was only incorporeal property, the result of an executed grant; here the use of the waterworks property is not changed, whereas there the bridge was converted from a toll into a free bridge, and they quote some remarks made by Mr. Justice McLean, in a concurring opinion in respect to this matter (p. 537 [547]), as follows:

"No state could resume a charter under the power of appropriation and carry on the functions of the corporation. A bank charter could not be thus taken, and the business of the bank continued for public purposes. Nor could this bridge have been taken by the state, and kept up by it as a toll bridge. This could [694] not be called an appropriation of *private property to public purposes. There would be no change in the use, except the application of the profits, and this would not bring the act within the power. The power must not only be exercised bona fide by a state, but the property, not its product, must be applied to a public use. . . . The use of this bridge, it is contended, is the same as before the act of appropriation. The public use the bridge now as before the act of appropriation; but it was a toll bridge, and by the act it was made free. The use, therefore, is not the same. The tax assessed on the citizens of the town to keep up and pay for the bridge may be impolitic or unjust; but that is not a matter for the consideration of this court."

We do not think the differences between the cases such as to affect the right of condemnation. A charter is not simply an executed grant but a continuing contract. There is a duty of performance by the recipients of the grant which continues during the life of the charter. Neither can the power of the state to condemn a waterworks system depend upon the question whether it makes the supply of water absolutely free to all individuals who desire to use it. The state, which, in the first place, has the power to construct a water-supply system and charge individuals for the use of the water, may condemn a system already constructed, and continue to make such charge. This is not turning property from one private corporation to another, but taking property from a private corporation and vesting the title in some municipal corporation for the public use. It is not essential to a public use that it be absolutely free and without any charge to anyone. The state may build a railroad and charge tolls for passengers and freight. It is, nevertheless, a public function which it is exercising, and the property is devoted to public uses. And so wherever there is cost in continuing a public work the state has a right to demand compensation for any individual use and personal benefit therefrom.

Neither can it be said that there was not "due process of law" in these condemnation proceedings. It is not essential that the assessment of damages be made by a jury. Such award may be made by commissioners, at least where there is *provision for review of [695] their proceedings in the courts. *Central Branch Union P. R. Co.* v. *Atchinson, T. & S. F. R. Co.* 28 Kan. 453, 463; Cooley, Const. Lim. 563. And §§ 9 and 10 of the act of 1892, under which these proceedings were had, requires that the commissioners make and file a report of their proceedings and determination in the supreme court of the county of Kings, and that application must be made to that court for a confirmation of the report; that notice of such application must be given, and that "upon such application the court may confirm the report, or may set it aside for irregularity, or for error of law in the proceedings before the commissioners, or upon the ground that the award, in part or in whole, is excessive, or is insufficient," and appeal was allowed from the decision of that court to a higher. We do not question the proposition that form is not the only thing essential to due process. We said in the recent case, *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 [*ante*, 979], "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

It may be true, as contended, that, as construed by the court of appeals, the determination of the commissioners is conclusive as to the mere value of the property, but there is no denial of due process in making the findings of fact by the triers of fact, whether commissioners or a jury, final as to such facts, and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted by the triers in their appraisal, or other errors in their proceedings.

The error charged against the commissioners in respect to their basis of valuation is that they failed to regard the company as possessed of exclusive rights. It is said by counsel in their brief that the company had, by virtue of its contract and the act of annexation, "two vested rights as against the city of Brooklyn: 1st. A vested right resting in contract to continue to supply water under and pursuant to the said contracts with the town of New Lots 'during the term of said *contracts;' that [696] is, for the unexpired period of said contracts—about fourteen years. 2d. A further vested right resting in contract and valid legislative enactment to enjoy its franchises until the expiration of its charter, protected from any rivalry on the part of the city of Brooklyn."

The view taken by the majority of the commissioners is thus stated in their report:

"To recapitulate what has just been said, we have valued the franchise upon the assumptions (1) that at present the water company alone has the right publicly to purvey water in the 26th ward; (2) that the exclusiveness now incident to its right may at any time be taken from it by the legislature, or by local authorities acting under legislation; but (3) that neither the legislature nor local authorities would, in determining whether to take



Digitized by Google

from the company the exclusiveness of its right, fail to have such due regard as is demanded by ample and fair public policy, to the past investment, risks, and services of the company and to the reasonably just expectations which those who have invested money in its work had in mind when so investing."

The court of appeals held that neither the statute under which the company was organized, nor the contract, nor the act of annexation, gave to the company rights exclusive and beyond the reach of legislative action. These conclusions of the court of appeals are vigorously challenged in the argument, but we are of opinion that they are correct. The statute simply provided for the organization of water companies. The contract in terms contained no words of exclusion. It gave to the company the privilege of laying its mains in the streets of the town, and contained a covenant on the part of the town to pay certain hydrant rental. But grants from the public are strictly construed in favor of the public, and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege. *Charles River Bridge Proprs.* v. *Warren Bridge Proprs.* 36 U. S. 11 Pet. 420 [9: 773]; *Washington & B. Turnp. Co.* v. *Maryland*, 70 U. S. 3 Wall. 210 [18: 180]; *Stein* v. *Beinville Water Supply Co.* 141 U. S. 67 [35: 622]; *Hamilton Gaslight & C. Co.* v. *Hamilton*, 146 U. S. 258 [36: 965]; *Syracuse Water Co.* v. *Syracuse*, 116 N. Y. 167 [5 L. R. A. 546]. Nor is there any-[697] thing in the act of annexation which made a contract or created a right beyond the power of the legislature to change. It gave the city the right to purchase or condemn at any time within two years, but this specification of time did not operate to prevent the legislature from enlarging the time, or from granting at any subsequent period during the life of the contract a further right of purchase or condemnation. No consent was asked of the town company in the act of annexation; it entered into no new contract; nothing was done to enlarge the rights which it had against the public. The act was simply one of legislative discretion in respect to municipal organization, and, like any other such act, subject to future modification by the legislature.

Neither can the act of 1892 be adjudged in conflict with the Federal Constitution because it fails expressly and in detail to prescribe the uses to which the property shall be put by the city of Brooklyn after the condemnation. The property condemned was not vacant land susceptible to a multitude of uses. The character of its use had already been determined by the action of the company. It was already used for public purposes, and the condemnation simply took the title away from the private corporation and vested it in the municipality. And the statute cannot be adjudged unconstitutional because it did not in terms declare that the city of Brooklyn should continue the same use or appropriate the property to some other equally public purpose.

These are the vital questions in the case. *We see no error in the judgment, and it is therefore affirmed.*

Mr. Justice **Peckham** takes no part in the decision of this case.

GEORGE W. SENTELL, Jr., *Plff. in Err.*,
*v.*
NEW ORLEANS & CARROLLTON RAILROAD COMPANY. [698]

(See S. C. Reporter's ed. 696-706.)

*Property in dogs—statute as to assessment and recovery for dogs.*

1. Restrictions on property in dogs making its protection conditional upon compliance with regulations for the protection of persons and property from destruction and annoyance by them are within the police power.
2. A state statute providing that no dog shall be entitled to the protection of the law unless placed upon the assessment rolls, and that no recovery for its value can be had for more than the amount fixed by the owner in the last assessment, is a constitutional exercise of the police power.

[No. 233.]

*Submitted March 25, 1897. Decided April 26, 1897.*

IN ERROR to the Court of Appeals for the Parish of Orleans in the State of Louisiana to review a judgment of that court reversing the judgment of the Civil District Court for the Parish of Orleans in favor of the plaintiff, George W. Sentell, Jr., against the New Orleans & Carrollton Railroad Company, for the value of a dog negligently killed by defendant, the judgment of the court of appeals being in favor of defendant. *Affirmed.*

Statement by Mr. Justice **Brown**:

This was an action originally instituted by Sentell in the civil district court for the parish of Orleans, to recover the value of a Newfoundland bitch, known as "Countess Lona," alleged to have been negligently killed by the railroad company.

The company answered, denying the allegation of negligence, and set up as a separate defense that plaintiff had not complied either with the requirements of the state law or of the city ordinances with respect to the keeping of dogs, and was therefore not entitled to recover. The law of the state was as follows:

"Sec. 1. *Be it enacted by the general assembly of the state of Louisiana*, That section (1201) twelve hundred and one of the Revised Statutes of Louisiana be amended and re-enacted so as to read as follows: From and after the passage of this act dogs owned by citizens of this state are hereby declared to be personal property of such citizens, and shall be placed on the same guaranties of law as other personal property; provided, such dogs are given in by the owner thereof to the assessor.

"Sec. 2. *Be it further enacted, etc.*, That no dog shall be entitled to the protection of the law unless the same shall have been placed upon the assessment rolls.

"Sec. 3. *Be it further enacted, etc.*, That [699] in civil actions for the killing of or for injuries done to dogs, the owner cannot recover beyond the amount of the value of such dog or dogs,

NOTE.—*As to police power of states; instances of its exercise,*—see note to Barbier v. Connolly, 28: 923.



Digitized by Google

as fixed by himself in the last assessment preceding the killing or injuries complained of.

"Sec. 4. *Be it further enacted, etc.*, That all laws in conflict with this act be repealed.

"Approved July 5, 1882."

By the city ordinance, adopted July 1, 1890, No. 4613, "no dog shall be permitted to run or be at large upon any street, alley, highway, common, or public square within the limits of the city of New Orleans; provided that this section shall not apply to any dog to which a tag, obtained from the treasurer, is attached." By § 8 the treasurer was directed to furnish metal dog tags to all persons applying for the same at the rate of $2 each, available only for the year in which they were issued.

Plaintiff denied the constitutionality of the state act; and the court charged the jury that the fact that the dog was not tagged, as required by the city ordinances, could not affect the right of the plaintiff to recover; that the above act of the legislature was unconstitutional as destructive of the right of property; and that a dog being property, a law which requires that property should not be protected unless listed for taxation was in conflict with the Constitution of the United States, providing that no person shall be deprived of his life, liberty, or property without due process of law. The jury returned a verdict in favor of the plaintiff for $250, upon which judgment was entered.

The case was carried to the court of appeals, which reversed the judgment of the trial court, and entered judgment in favor of the defendant, holding that plaintiff should have shown a compliance with the law of the state and the ordinances of the city as a condition precedent to recover. Whereupon the plaintiff sued out a writ of error from this court.

*Messrs.* **George Denegre** and *Omer Villeré* for plaintiff in error.

*Mr.* **Henry P. Dart** for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

The case turns upon the constitutionality of a law of the state of Louisiana requiring dogs to be placed upon the assessment rolls, and limiting any recovery by the owner to the value fixed by himself for the purpose of taxation.

The dog in question was a valuable Newfoundland bitch, registered in the American Kennel's stud-book, and was kept by her owner for breeding purposes. It seems that while following him in a walk upon the streets, she stopped on the track of the railroad company, and, being otherwise engaged for the moment, failed to notice the approach of an electric car which was coming toward her at great speed; and, being moreover heavy with young, and not possessed of her usual agility, she was caught by the car and instantly killed. The court of appeals was evidently of opinion that her owner, knowing of her condition, should not have taken her upon a public thoroughfare without exercising the greatest care and vigilance, and that the accident was largely due to a want of prudence upon his part. The facts, however, were not properly before the court, and the opinion was put upon the ground that the state law was constitutional and valid as a police regulation to prevent the indiscriminate owning and breeding of worthless dogs. The judges also annexed a certificate that the decision was reversed upon the ground that the law was constitutional, and that no other point was passed upon.

By the common law, as well as by the law of most, if not all, the states, dogs are so far recognized as property that an action will lie for their conversion or injury (2 Bl. Com. 396; *Cummings* v. *Perham*, 1 Met. 555; *Kinsman* v. *State*, 77 Ind. 132; *State* v. *McDuffie*, 34 N. H. 523 [69 Am. Dec. 516]; *Parker* v. *Mise*, 27 Ala. 480 [62 Am. Dec. 776]; *Wheatley* v. *Harris*, 4 Sneed, 468 [70 Am. Dec. 258]; *Dodson* v. *Mock*, 4 Dev. & B. L. 146 [32 Am. Dec. 677]; *Perry* v. *Phipps*, 10 Ired. L. 259 [51 Am. Dec. 387]; *Lentz* v. *Stroh*, 6 Serg. & R. 34), although in the absence of a statute they are not regarded as the subjects of *larceny (2 Bishop, Crim. [701 Law, § 778; *Reg.* v. *Lady Joan Young* ("*Case of Swans*") 4 Coke, 86, 91; *Norton* v. *Ladd*, 5 N. H. 204 [20 Am. Dec. 578]; *Findlay* v. *Bear*, 8 Serg. & R. 571; *People* v. *Campbell*, 4 Park. Crim. Rep. 386; *State* v. *Doe*, 79 Ind. 9 [41 Am. Rep. 599]; *Ward* v. *State*, 48 Ala. 161 [17 Am. Rep. 31]; *State* v. *Lymus*, 26 Ohio St. 400 [20 Am. Rep. 772]; *State* v. *Holder*, 81 N. C 527 [31 Am. Rep. 517]).

The very fact that they are without the protection of the criminal laws shows that property in dogs is of an imperfect or qualified nature, and that they stand, as it were, between animals *feræ naturæ* in which, until killed or subdued, there is no property, and domestic animals, in which the right of property is perfect and complete. They are not considered as being upon the same plane with horses, cattle, sheep, and other domesticated animals, but rather in the category of cats, monkeys, parrots, singing birds, and similar animals kept for pleasure, curiosity, or caprice. They have no intrinsic value, by which we understand a value common to all dogs as such, and independent of the particular breed or individual. Unlike other domestic animals, they are useful neither as beasts of burden, for draft (except to a limited extent), nor for food. They are peculiar in the fact that they differ among themselves more widely than any other class of animals, and can hardly be said to have a characteristic common to the entire race. While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and above all, for their natural companionship with man, others are afflicted with such serious infirmities of temper as to be little better than a public nuisance. All are more or less subject to attacks of hydrophobic madness.

As it is practically impossible by statute to distinguish between the different breeds, or between the valuable and the worthless, such legislation as has been enacted upon the subject, though nominally including the whole canine race, is really directed against the latter class, and is based upon the theory that the owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulation designed to distinguish him from the common



Digitized by Google

herd. Acting upon the principle that there is
702] but a qualified *property in them, and that, while private interests require that the valuable one shall be protected, public interests demand that the worthless shall be exterminated, they have, from time immemorial, been considered as holding their lives at the will of the legislature, and properly falling within the police powers of the several states. Laws for the protection of domestic animals are regarded as having but a limited application to dogs and cats, and, regardless of statute, a ferocious dog is looked upon as *hostis humani generis*, and as having no right to his life which man is bound to respect. *Putnam* v. *Payne*, 13 Johns. 312; *Hinckley* v. *Emerson*, 4 Cow. 351 [15 Am. Dec. 383]; *Brown* v. *Carpenter*, 26 Vt. 638 [62 Am. Dec. 603]; *Woolf* v. *Chalker*, 31 Conn. 121 [81 Am. Dec. 175]; *Brent* v. *Kimball*, 60 Ill. 211 [14 Am. Rep. 35]; *Maxwell* v. *Palmerton*, 21 Wend. 407.

Statutes of the general character of the one in question have been enacted in many of the states, and their constitutionality, though often attacked, has been generally, if not universally, upheld. Thus in *Tower* v. *Tower*, 18 Pick. 362, an act which authorized "any person to kill any dog or dogs found, and being without a collar," was construed to authorize the killing of a dog out of the inclosure of his owner, although he was under his immediate care, and this was known to the person killing the dog.

In *Morey* v. *Brown*, 42 N. H. 373, a statute providing that no person should be liable for killing a dog found without a collar with the name of the owner engraved thereon, was held to justify the killing, although the defendant had actual notice of the ownership of the dog found without such collar. Plaintiff claimed that the act was unconstitutional, but the court held that it was not an act to take private property for public use or to deprive parties of their property in dogs; but merely to regulate the use and keeping of such property in a manner which seemed to the legislature reasonable and expedient. "It is a mere police regulation such as, we think, the legislature might constitutionally establish." To the same effect are *Carter* v. *Dow*, 16 Wis. 299; *Mitchell* v. *Williams*, 27 Ind. 62; *Haller* v. *Sheridan*, 27 Ind. 494.

The statutes of Massachusetts, from the earli-
703] est colonial *period to the present day, are reviewed in an elaborate opinion in *Blair* v. *Forehand*, 100 Mass. 136 [1 Am. Rep. 94, 97 Am. Dec. 82], and laws were shown to have existed, sometimes for the killing of "unruly and ravenous dogs;" sometimes, as in Nantucket in 1743, for the killing of "any dog or bitch whatsoever that shall at any time be found there;" and sometimes for the killing of dogs "strolling out of the inclosure or immediate care of the owner," or going at large without a collar. In the particular case it was held that a statute declaring that any person might, and every police officer and constable should, kill or cause to be killed, all dogs, whenever or wherever found, not licensed and collared according to other provisions of the statute, was within the constitutional limits of the authority of the legislature. Such acts appear to have been very frequent in that state, and their constitutionality generally acquiesced in.

In the more recent case of *Morewood* v. *Wakefield*, 133 Mass. 240, the same statute was construed as authorizing any person to kill a dog which was licensed, but had no collar on, provided that he could do so without committing a trespass, although no warrant for the killing of dogs had been issued. The constitutional objection against general warrants, which was the occasion of so much controversy in that state in its colonial days, was held not to apply to dogs, and a warrant was sufficient which ordered the killing of all dogs, living in a town, not duly licensed and collared.

In *Ex parte Cooper*, 3 Tex. App. 489 [30 Am. Rep. 152], it was held that dogs were not property within the tax clause of the Constitution, and that a tax upon dogs was a police regulation and a legitimate exercise of the police power. The point was made that dogs, being property, should, under the Constitution, be taxed *ad valorem* as other property was. But it was held that the law was not a tax law in its ordinary sense, but a police regulation.

So, in *Tenney* v. *Lenz*, 16 Wis. 566, it was held that it was a legitimate exercise of the police power "to regulate and license the keeping of dogs," and that the exercise of that power was based upon the idea that the business licensed, or *kind of property regu-[704 lated, is liable to work mischief, and therefore needs restraints which shall operate as a protection to the public.

In *Jenkins* v. *Ballantyne*, 8 Utah, 245 [16 L. R. A. 689], the constitutional question is considered at great length, and the provisions of a city charter authorizing the city to tax, regulate, or prohibit the keeping of dogs, and to authorize the destruction of the same, when at large, contrary to the ordinance, and the issuance of a certificate of registration, requiring the wearing of a collar by the dog with his registered number thereon, and providing that all dogs not so registered and collared should be liable to be killed by any person,—were valid and were not in violation of the 5th Amendment to the Constitution.

The only case to the contrary, to which our attention has been called, is that of *Washington* v. *Meigs*, 1 McArth. 53, in which a city ordinance of Washington, requiring the owner of dogs to obtain a license for the keeping of the same, was held to be illegal. The substance of the opinion seems to be that if the dog be a species of property, which was conceded, it was entitled to the protection of other property and the owner should not be required to obtain a license for keeping the same.

Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the state, and might be destroyed or otherwise dealt with as in the judgment of the legislature is necessary for the protection of its citizens. That a state, in a bona fide exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be, which has for its objects the welfare and comfort of the citizen. For instance, meats, fruits, and vegetables do not cease to become private property by their decay; but it is clearly within the power of the state to order their destruction in



Digitized by Google

times of epidemic, or whenever they are so exposed as to be deleterious to the public health. There is also property in rags and clothing; but that does not stand in the way of their destruction in case they become infected and dangerous to the public health. No property is 705]more sacred than one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration, and that, too, without recourse against such authorities for the trespass. *Bowditch* v. *Boston*, 101 U. S. 16 [25: 980]; *Mouse's Case*, 12 Coke, 63; *British Cast Plate Mfrs.* v. *Meredith*, 4 T. R. 794, 797; *Stone* v. *New York*, 25 Wend. 157; *Russell* v. *New York*, 2 Denio, 461.

Other instances of this are found in the power to kill diseased cattle, to destroy obscene books or pictures, or gambling instruments, and, in *Lawton* v. *Steele*, 152 U. S. 133 [38: 385], it was held to be within the power of a state to order the summary destruction of fishing nets, the use of which was likely to result in the extinction of valuable fisheries within the waters of the state.

It is true that under the 14th Amendment no state can deprive a person of his life, liberty, or property without due process of law; but in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction. As was said in *Jenkins* v. *Ballantyne*, 8 Utah, 245, 247 [16 L. R. A. 689]: "The emergency may be such as not to admit of the delay essential to judicial inquiry and consideration, or the subject of such action and process may be of such a nature, or the conditions and circumstances in which the act must be performed to effect the protection and give effect to the law may be such, as to render judicial inquiry and consideration impracticable."

Although dogs are ordinarily harmless, they preserve some of their hereditary wolfish instincts, which occasionally break forth in the destruction of sheep and other helpless animals. Others, too small to attack these animals, are simply vicious, noisy, and pestilent. As their depredations are often committed at night, it is usually impossible to identify the dog or to fix 706]the liability upon the owner, who, moreover, is likely to be pecuniarily irresponsible. In short, the damages are usually such as are beyond the reach of judicial process, and legislation of a drastic nature is necessary to protect persons and property from destruction and annoyance. Such legislation is clearly within the police power of the state. It ordinarily takes the form of a license tax, and the identification of the dog by a collar and tag, upon which the name of the owner is sometimes required to be engraved, but other remedies are not uncommon.

In Louisiana there is only a conditional property in dogs. If they are given in by the owner to the assessor, and placed upon the assessment rolls, they are entitled to the same legal guaranties as other personal property, though in actions for their death or injury the owner is limited in the amount of his recovery to the value fixed by himself in the last assessment. It is only under these restrictions that dogs are recognized as property. In addition to this, dogs are required by the municipal ordinance of New Orleans to be provided with a tag, obtained from the treasurer, for which the owner pays a license tax of $2. While these regulations are more than ordinarily stringent, and might be declared to be unconstitutional, if applied to domestic animals generally, there is nothing in them of which the owner of a dog has any legal right to complain. It is purely within the discretion of the legislature to say how far dogs shall be recognized as property, and under what restrictions they shall be permitted to roam the streets. The statute really puts a premium upon valuable dogs, by giving them a recognized position, and by permitting the owner to put his own estimate upon them.

There is nothing in this law that is not within the police power, or of which the plaintiff has a right to complain, and *the judgment of the Court of Appeals is therefore affirmed.*

---

SPRINGVILLE CITY, *Plff. in Err.*, [707

*v.*

PERRY A. THOMAS and Lavina Thomas.

---

SALT LAKE CITY BREWING COMPANY, *Plff. in Err.*,

*v.*

FRED. W. WOLF COMPANY.

---

SALT LAKE CITY, *Plff. in Err.*,

*v.*

ELIZABETH B. TUCKER and Samuel J. Tucker.

(See S. C. Reporter's ed. 707-709.)

*Verdict by less than all the jurors—7th Amendment.*

1. The decision of the territorial court sustaining a territorial statute providing for verdicts by less than the whole number of jurors, on the ground that the organic act of the territory gave the legislature unlimited legislative power, as against the contention that the act of Congress as thus interpreted was in violation of the 7th Amendment, is subject to review by this court as involving the validity of an act of Congress.

2. The 7th Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common-law cases; and the act of Congress could not impart the power to change

NOTE.—*As to review by United States Supreme Court of territorial decisions; extent and manner of; distinction between an appeal and a writ of error,*—see note to Miners' Bank v. Iowa, 12: 587.

*As to power of Congress over territories*, see note to First Nat. Bank v. Yankton County, 35: 1028.



Digitized by Google

the constitutional rule, and could not be treated as attempting to do so.

[Nos. 103, 153, 199.]

*No. 103 Argued and Submitted October 29, 1896. No. 153 Submitted January 14, 1897. No. 199 Submitted January 29, 1897. Decided April 26, 1897.*

IN ERROR to the Supreme Court of the Territory of Utah to review a decision of that court, that the act of Congress of September 9, 1850, the organic act of the Territory, vested in the territorial legislature such unlimited power as enabled it to provide that unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict, and that such act was constitutional as against the 7th Amendment. *Judgments reversed*, and cases remanded for further proceedings.

See same cases below, 10 Utah, 173, 179.

The facts are stated in the opinion.

*Mr.* **J. L. Rawlins** for plaintiff in error in No. 103.

*Messrs.* **Parley L. Williams** for defendants in error in No. 103.

*Mr.* **William C. Hall** for plaintiff in error in No. 153.

*Messrs.* **Parley L. Williams**, *Frank Pierce*, and *Frank H. Scott*, for defendant in error in No. 153.

*Messrs.* **William McKay** and *D. B. Hempstead* for plaintiff in error in No. 199.

*Mr.* **William T. S. Curtis** for defendants in error in No. 199.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

In these three cases judgments were entered on verdicts returned by less than the whole number [708] of jurors by which they *were tried. It has been decided by this court that the territorial act of March 10, 1892, permitting this to be done (Utah Laws 1892, p. 46), was invalid, because in contravention of the 7th Amendment to the Constitution and the act of Congress of April 7, 1874 (18 Stat. at L. 27, chap. 80). *American Publishing Co.* v. *Fisher*, 166 U. S. 464 [*ante*, 1079].

Exceptions to the course pursued were sufficiently preserved, and the judgments must be reversed if this court has jurisdiction.

The amounts in controversy in each instance were not sufficient to give jurisdiction, and the inquiry is whether the validity of any statute of, or authority exercised under, the United States was drawn in question before the courts below. Act March 3, 1885 (23 Stat. at L. 443, chap. 355, § 2).

The supreme court of the territory held in *Hess* v. *White*, 9 Utah, 61 [24 L. R. A. 277] (and the decision was followed in these cases), that the act of Congress of September 9, 1850 (9 Stat. at L. 453, chap. 51, § 6), the organic act of the territory, vested in the territorial legislature such unlimited legislative power as enabled it to provide that unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict. But defendants contended that the act of Congress as thus interpreted was in violation of the 7th Amendment and the validity of the act was in that way drawn in question. In the view which the supreme court took of the act it was obliged to subject it to the test of the Constitution, and accordingly in deciding that the 7th Amendment did not require unanimity of action, the court held in effect that the act of Congress was constitutional although it empowered the territorial legislature to provide for verdicts by less than the whole number of jurors. The question involved was not matter of construction of the territorial act but the court discussed its validity, and this depended on the validity of the act of Congress giving it the scope which the court attributed to it.

In this there was error. In our opinion the 7th Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common-law cases, and the act of Congress *could not impart the power to change [709] the constitutional rule, and could not be treated as attempting to do so.

These cases are exceptional, and, under the peculiar circumstances, we think the jurisdiction may be maintained.

*Judgments reversed* and cases remanded to the supreme court of the state for further proceedings.

---

## LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Plff. in Err.*,
*v.*
## CITY OF LOUISVILLE.

(See S. C. Reporter's ed. 709-716.)

*Federal question—when not sufficiently raised.*

1. A definite issue as to the validity of a statute or the possession of a right must be distinctly deducible from the record before a state court can be held to have disposed of a Federal question by its decision.

2. Where the agreed case presented no issue as to the validity of a state statute, but only the question of its construction, and the state court only determined whether a railroad company was entitled to a discount on its taxes, and no Federal right was claimed or denied in the state court, and none was mentioned except in a motion to set aside the judgment, this court cannot take jurisdiction on the ground that, as thus construed, the statute impaired the obligation of a contract in the company's charter.

[No. 261.]

*Argued April 1, 1897. Decided April 26, 1897.*

IN ERROR to the Court of Appeals of the state of Kentucky to review a judgment of that court affirming the judgment of the Superior Court of Kentucky which affirmed the judgment of the chancellor, that the Louisville & Nashville Railroad Company had no right to any discount on its tax bill, and dismissing the action, which was brought by said company against the city of Louisville. *Writ of error dismissed.*

See same case below, 29 S. W. 865.

---

NOTE.—*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question,*—see note to Hamblin v. Western Land Co. 37: 287.

*As to what laws are void as impairing obligation of contracts*, see note to Fletcher v. Peck, 3: 162.



Digitized by Google

Statement by Mr. Chief Justice **Fuller:**

This was a case instituted in the Louisville chancery court by the Louisville & Nashville Railroad Company against the city of Louisville by the filing of an agreed case under the following provisions of the Civil Code of Practice of the state of Kentucky:

"Sec. 637. Parties to a question which might be the subject of a civil action may, without action, state the question and the facts upon which it depends, and present a submission thereof to any court which would have jurisdiction, if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good 710] *faith, to determine the rights of the parties. The court shall, thereupon, hear and determine the case, and render judgment as if an action were pending.

"Sec. 638. The case, the submission, and the judgment shall constitute the record.

"Sec. 639. The judgment shall be with costs, and may be enforced, and shall be subject to reversal, in the same manner as if it had been rendered in an action, unless otherwise provided in the submission."

The agreed case commenced as follows: "The Louisville & Nashville Railroad Company and the city of Louisville hereby state to the court the facts hereinafter presented and submit to the court for decision the question hereinafter stated." Then followed a statement of facts, and the stipulation thus proceeded:

"Upon the foregoing facts, was the Louisville & Nashville Railroad Company entitled then to a discount—and, if so, then to what discount upon the tax bills mentioned herein on February 4, 1892, when it offered to pay said bills less a discount, or on February 6, 1892, when it paid the amount of said bills under protest?

"If the court shall be of the opinion that the railroad company at the time of said tender or payment was entitled to a discount upon the amount of said tax bills, then judgment may be entered for the amount of such discount, with interest from February 6, 1892, until paid, in favor of the Louisville & Nashville Railroad Company against the city of Louisville for the amount of such discount and the costs of this proceeding; but if the court shall be of the opinion that said railroad company was not entitled to any discount on said bills on said day of tender or payment, then judgment may be entered dismissing the case and giving judgment for costs of this proceeding in favor of the city of Louisville against the Louisville & Nashville Railroad Company. The right of appeal from the judgment of the Louisville chancery court is not waived."

The case was heard, and the chancellor entered the following judgment:

711] *"This agreed case having been submitted in chief, and the court being sufficiently advised, delivered a written opinion, which is now filed, and in accordance therewith it is considered by the court that plaintiff, the Louisville & Nashville Railroad Company, had no right to any discount on its tax bill when it paid or tendered payment of same, as shown in said agreed case, and that this said action be, and is therefore, dismissed, and that defendant recover of plaintiff its costs herein expended."

The plaintiff excepted and carried the case by appeal to the superior court of Kentucky, and the judgment of the chancellor was affirmed.

Opinions were delivered by the chancellor, and by the superior court.

After the judgment of affirmance the railroad company "moved the court to set aside the submission and judgment and transfer this case to the court of appeals or to grant an appeal to the court of appeals" on these grounds:

"This day came appellant by counsel, and stated to the court that it believes the statutes involved in this action, as to the taxation of railroad property in the city of Louisville, as construed by the court in its opinion lately delivered herein, to be invalid and to be in violation of the Constitutions of the state of Kentucky and of the United States, and that it desired to be heard on the question of the validity of said statutes, and thereupon moved the court to set aside its judgment, and the order of submission herein and to transfer this action to the court of appeals; and came appellant further, by counsel, and moved the court to grant it an appeal from its judgment herein to the court of appeals in the event the court should overrule the preceding motions above set forth."

The superior court overruled the motion to set aside the judgment and submission, and transfer the cause, but granted the appeal to the court of appeals, which, being duly prosecuted, the judgment was again affirmed. 29 S. W. 865.

A writ of error was allowed from this court by the chief justice of the court of appeals.

*The assignment of errors in the [712 brief of counsel is as follows:

"1st. That the statutes involved, according to the construction put upon them by the court of appeals of Kentucky, do, in substance and effect, impose a different rate of taxation upon the property of the Louisville & Nashville Railroad Company from that which is imposed upon other property, either real or personal, in the city of Louisville; and,

"2d. That this violates the obligation of the contract contained in the charter of the Louisville & Nashville Railroad Company, whereby it was agreed that its property should not be assessed higher than other real property; thus conflicting with the provision of the Constitution of the United States which forbids any state to pass a law impairing the obligation of a contract; and,

"3d. That independently of the question of contract, these statutes, as construed by the court of appeals, impose a different rate of taxation upon the property of railroad companies from that which is imposed upon property of the same kind, in the same place and under the same circumstances, when owned by any other class of persons than railroad companies; and that therefore it comes within the inhibition of the 14th Amendment of the Constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws."

*Messrs.* **Helm Bruce,** *James P. Helm,* and *H. W. Bruce* for plaintiff in error.



Digitized by Google

*Mr.* **Henry L. Stone** for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By the terms of the agreed case the only questions submitted to the chancery court of Louisville were whether the railroad company was entitled to a discount on certain tax bills, and if so, what discount; and it was stipulated that if the court should be of opinion that the company was not entitled to any discount, 713] *then judgment should be entered dismissing the case with costs. The chancellor in his opinion pointed out that the act of the general assembly of Kentucky, entitled "An Act to Revise and Amend the Tax Laws of the City of Louisville," approved May 12, 1884, provided for a discount of 3 per cent on taxes paid in January; of 2 per cent on those paid in February; and of 1 per cent on those paid in March, but that the assessments for taxation, to which the act related, did not in terms include railroad property, the assessment of which was provided for by Ky. Gen. Stat. chap. 92. This chapter provided for the assessment of railroad property by state authority for state, county, city, and town purposes; for enforcement of payment by penalties on its chief officer; and required payment by a named day, but it nowhere in terms or by implication allowed any deduction for prompt payment of state, county, city, or town taxes; and it forbade assessments or collections of such taxes in any mode other than that therein designated.

The chancellor held that such a deduction was *pro tanto* in the nature of an exemption, and that exemptions were not allowable except where express authority affirmatively appeared therefor, and that no such authority appeared here; and he then said: "The ground of inequality in taxation, so much relied on by plaintiff's counsel, is not entitled to much weight, for the principle, if such there be, is misapplied. Taxes are imposed in this state on corporations by classes. No member of a class can complain if he is treated like all in the same class. If it be wrong not to allow deductions to banks, railroads, gas companies, etc., for prompt payment of taxes, then the legislature can remedy the wrong. In the present condition of the statute the courts cannot."

And the court, being of opinion that the company was not entitled to any discount, entered judgment strictly in accordance with the stipulation of the parties. There was no intimation in the agreed case that any constitutional question was submitted for determination, and no such question was propounded. The matter was one of construction merely.

The superior court had no appellate jurisdic- 714]tion of an *appeal involving the validity of a statute (Ky. Code 1895, p. 472), as was conceded at the bar, and yet plaintiff in error prosecuted its appeal to that court. After the superior court had gone to judgment, the railroad company made its motion to set the judgment aside and transfer the case to the court of appeals on the ground that it believed the statutes, "as construed by the court in its opinion lately delivered herein, to be invalid and to be in violation of the Constitutions of the state of Kentucky and of the United States." Even then, the company did not indicate in any way in what particulars the statutes were in contravention of either of those instruments. This motion was overruled, and an appeal allowed to the court of appeals. The court of appeals arrived at the same conclusion as the other courts, and rejected the claim for a discount as not permitted by the statute. The court closed its opinion thus:

"The city is not allowed to fix any value on appellant's property. The penalty on its failing to pay taxes to the city is not made to apply to the appellant, and it is plain, we think, that the charter provision or the law in regard to the assessment, collection, and payment of the taxes of the citizens within the municipality does not include railroads or such corporate property, and equally apparent that the legislature, in regard to these corporations, can enact a different system or mode of assessment and collection from that under which taxes are ordinarily collected, and the discount allowed the citizen to encourage the prompt payment of taxes is not a discrimination in his favor as against appellant, nor is it open to constitutional objection. *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky* ("*Kentucky R. Tax Cases*") 115 U. S. 321 [29: 414]."

The record does not disclose that any Federal question was specifically raised in the court of appeals, and the sole reference in the opinion to constitutional objection is in the language above quoted. Doubtless that reference was by way of answer to the contention that the statute might fail altogether unless construed to include railroad companies.

In *Powell* v. *Brunswick County*, 150 U. S. 433, 439 [37: 1134, 1136], we said: "As many times reiterated, it is essential to the maintenance of *jurisdiction upon the ground of er- [715 roneous decision as to the validity of a state statute or a right under the Constitution of the United States, that it should appear from the record that the validity of such statute was drawn in question as repugnant to the Constitution, and that the decision sustained its validity, or that the right was specially set up or claimed and denied. If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved so that the state court could not have given judgment without deciding it, that will be sufficient; but resort cannot be had to the expedient of importing into the record the legislation of the state as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon, in arriving at conclusions upon the matters actually presented and considered. A definite issue as to the validity of the statute or the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such a Federal question by its decision."

And see *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648 [*ante*, 1149], in which this subject is largely considered and the authorities cited.

The agreed case presented no issue as to the validity of the statute, but simply the question of its construction. The company did not sue



Digitized by Google

to recover back the taxes it had paid on the ground of the invalidity of the laws under which they were levied, but to recover the discount allowed to taxpayers by a particular statute. The chancery court was shut up by the agreement to determine whether the company was or was not entitled to that discount. The construction by the chancery court was concurred in by the superior court and by the court of appeals, and the judgment of the chancery court, rendered as stipulated, was affirmed. It is now said that as the proper construction of the statute was definitely settled by the court of appeals, this court can take jurisdiction at that stage of the case, because as thus construed the statute impaired the obligation of a contract created by the charter of the company (which was not mentioned in the agreed *case), and because it denied [716 the equal protection of the laws in contravention of the 14th Amendment, although no definite issue in either respect was tendered throughout the proceedings unless the mention of the Constitution of the United States on the motion to set aside may be so regarded. We do not think that was sufficient.

*Writ of error dismissed.*



Digitized by Google

# FOLLOWING ARE MEMORANDA

OF

# ALL CASES DISPOSED OF AT OCTOBER TERM, 1896,

WITHOUT OPINIONS, AND NOT ELSEWHERE OR OTHERWISE REPORTED IN THIS EDITION.

## TENTH RULE.

ALBERT PRICE *et al.*, *Plffs. in Err.*, *v.* ELIJAH CHISM. [No. 2.]
In Error to the Supreme Court of the State of Arkansas.
*Mr. John F. Dillon* for plaintiffs in error.
*Mr. S. W. Williams* for defendant in error.
*October 15, 1896.* Dismissed with costs, pursuant to the 10th Rule.

RICHARD D. UHTHOFF, *Plff. in Err.*, *v.* UNITED STATES. [No. 486.]
In Error to the District Court of the United States for the District of Maryland.
*Mr. William Colton* for plaintiff in error.
*The Attorney General* for defendant in error.
*October 23, 1896.* Dismissed pursuant to the 10th Rule.

G. F. B. HOWARD, *Plff. in Err.*, *v.* UNITED STATES. [No. 74.]
In Error to the Circuit Court of the United States for the Western District of Tennessee.
*Mr. Wm. H. Carroll* for plaintiff in error.
*The Attorney General* for defendant in error.
*October 27, 1896.* Dismissed pursuant to the 10th Rule.

CHARLES M. MATTHEWS *et al.*, Executors, *Appts.*, *v.* PETER HEVNER *et al.* [No. 77.]
Appeal from the Court of Appeals of the District of Columbia.
*Mr. Charles M. Matthews* for appellants.
*Mr. Arthur A. Birney* for appellees.
*October 23, 1896.* Dismissed with costs, pursuant to the 10th Rule.

JAMES S. STANDLEY *et al.*, *Appts.*, *v.* STEPHEN ROBERTS, Sheriff, etc. [No. 81.]
Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.
*Mr. George B. Denison* for appellants. No appearance for appellee.
*October 23, 1896.* Dismissed with costs, pursuant to the 10th Rule.

D. S. THOMAS, *Plff. in Err.*, *v.* J. M. LANE *et al.*, Partners, etc. [No. 99.]
In Error to the Supreme Court of the Territory of Arizona.
*Mr. Rochester Ford* for plaintiff in error.
*Mr. Frank W. Hackett* for defendants in error.
*October 29, 1896.* Dismissed with costs, pursuant to the 10th Rule.

LEWIS C. ROCKWELL, *Plff. in Err.*, *v.* FARMERS' NATIONAL BANK OF LONGMONT. [No. 117.]
In Error to the Court of Appeals of the State of Colorado.
*Mr. L. C. Rockwell* for plaintiff in error. No appearance for defendant in error.
*October 30, 1896.* Dismissed with costs, pursuant to the 10th Rule.

J. M. SCALES *et al.*, *Plffs. in Err.*, *v.* CHARLES DILLINGHAM *et al.*, Receivers, etc. [No. 79.]
In Error to the Court of Civil Appeals of the State of Texas.
*Mr. J. J. Darlington* for plaintiffs in error.
*Messrs. J. Hubley Ashton* and *R. S. Lovett* for defendants in error.
*November 2, 1896.* Dismissed with costs, pursuant to the 10th Rule.

TEXAS & PACIFIC RAILWAY COMPANY, *Plff. in Err.*, *v.* ELIZABETH NOLAN, etc. [No. 137.]
In Error to the United States Circuit Court of Appeals for the Fifth Circuit.
*Messrs. John F. Dillon* and *Winslow S. Pierce* for plaintiff in error. No appearance for defendant in error.
*November 3, 1896.* Dismissed with costs, pursuant to the 10th Rule.

MILO ELMORE *et al.*, *Plffs. in Err.*, *v.* VICKSBURG, SHREVEPORT, & PACIFIC RAILROAD COMPANY. [No. 142.]
In Error to the Supreme Court of the State of Louisiana.
*Mr. N. T. N. Robinson* for plaintiffs in error.
*Mr. Edward Colston* for defendant in error.
*November 4, 1896.* Dismissed with costs, pursuant to the 10th Rule.

JAMES A. SHREVE *et al.*, *Plffs. in Err.*, *v.* WALTER S. CHEESMAN *et al.* [No. 143.]
In Error to the Circuit Court of the United States for the District of Colorado.
*Mr. C. C. Parsons* for plaintiffs in error.
*Mr. C. J. Hughes*, Jr., for defendants in error.
*November 4, 1896.* Dismissed with costs, pursuant to the 10th Rule.

CHICAGO, KANSAS, & NEBRASKA RAILWAY COMPANY, *Plff. in Err.*, *v.* JUDSON B. VAN CLEAVE. [No. 148.]
In Error to the Supreme Court of the State of Kansas.
*Mr. W F. Evans* for plaintiff in error. No appearance for defendant in error.
*November 5, 1896.* Dismissed with costs, pursuant to the 10th Rule.



Digitized by Google

L. A. LINCECUM, *Plff. in Err.*, *v.* UNITED STATES. [No. 343.]

In Error to the District Court of the United States for the Northern District of Texas.

*Mr. X. B. Saunders* for plaintiff in error. *The Attorney General* for defendant in error.

*November 30, 1896.* Dismissed pursuant to the 10th Rule.

---

FRANK S. HOSKINS, *Plff. in Err.*, *v.* STATE OF MINNESOTA. [No. 166.]

In Error to the Supreme Court of the State of Minnesota.

*Mr. M. D. Munn* for plaintiff in error. No appearance for defendant in error.

*January 15, 1897.* Dismissed with costs, pursuant to the 10th Rule.

---

HENRY M. RECTOR, *Appt.*, *v.* EDWARD FITZGERALD. [No. 104.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. U. M. Rose* and *G. B. Rose* for appellant. *Mr. S. W. Williams* for appellee.

*January 19, 1897.* Dismissed with costs, pursuant to the 10th Rule.

---

JONSON ENGINEERING & FOUNDRY CO., *Appt.*, *v.* STEAM YACHT "PARADOX," etc. [No. 176.]

Appeal from the District Court of the United States for the Southern District of New York.

*Mr. George Hoadly* for appellant. No appearance for appellee.

*January 26, 1897.* Dismissed with costs, pursuant to the 10th Rule.

---

LAFAYETTE HUDSON, *Plff. in Err.*, *v.* UNITED STATES. [No. 179.]

In Error to the District Court of the United States for the Western District of Arkansas.

*Mr. Wm. M. Cravens* for plaintiff in error. *The Attorney General* for defendant in error.

*January 26, 1897.* Dismissed pursuant to the 10th Rule.

---

JAMES MURPHY, *Plff. in Err.*, *v.* STATE OF WASHINGTON. [No. 548.]

In Error to the Supreme Court of the State of Washington.

*Mr. George M. Emory* for plaintiff in error. *Mr. A. W. Hastie* for defendant in error.

*January 27, 1897.* Dismissed with costs, pursuant to the 10th Rule.

---

B. F. DOWELL *et al.*, *Plffs. in Err.*, *v.* DANIEL W. APPLEGATE *et al.* [No. 191.]

In Error to the Supreme Court of the State of Oregon.

*Mr. John H. Mitchell* for plaintiffs in error. No appearance for defendants in error.

*March 1, 1897.* Dismissed with costs, pursuant to the 10th Rule.

---

DANIEL HAMER, Tax Collector, etc., *Appt.*, *v.* WEBER COUNTY. [No. 243.]

Appeal from the Supreme Court of the Territory of Utah.

*Mr. Charles C. Richards* for appellant. No appearance for appellee.

*March 26, 1897.* Dismissed with costs, pursuant to the 10th Rule, and cause remanded to the supreme court of the state of Utah.

---

DANIEL HAMER, *Appt.*, *v.* WEBER COUNTY *et al.* [No. 244.]

Appeal from the Supreme Court of the Territory of Utah.

*Mr. Charles C. Richards* for appellant. No appearance for appellees.

*March 26, 1897.* Dismissed with costs, pursuant to the 10th Rule, and cause remanded to the supreme court of the state of Utah.

---

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*, *v.* JEB S. HOWELL. [No. 251.]

In Error to the Supreme Court of the State of Georgia.

*Messrs. J. Hubley Ashton* and *George H. Fearons* for plaintiff in error. No appearance for defendant in error.

*March 29, 1897.* Dismissed with costs, pursuant to the 10th Rule.

---

WILLIAM H. WHITEHILL, *Appt.*, *v.* GEORGE A. MEEARS *et al.* [No. 260.]

Appeal from the Supreme Court of the Territory of Utah.

*Mr. Harrington Putnam* for appellant. *Messrs. S. Shellabarger* and *J. M. Wilson* for appellees.

*March 30, 1897.* Dismissed with costs, pursuant to the 10th Rule, and cause remanded to the supreme court of the state of Utah.

---

LITTLE ROCK & FORT SMITH RAILWAY, *Plff. in Err.*, *v.* JOHN S. RENFROE. [No. 262.]

In Error to the Supreme Court of the State of Arkansas.

*Messrs. John F. Dillon* and *W. S. Pierce* for plaintiff in error. *Mr. Sol. F. Clark* for defendant in error.

*March 31, 1897.* Dismissed with costs, pursuant to the 10th Rule.

---

MAYOR, etc., OF THE CITY OF ANNAPOLIS, *Plff. in Err.*, *v.* HARRY M. REVELL *et al.* [No. 277.]

In Error to the Court of Appeals of the State of Maryland.

*Mr. Wm. Pinkney Whyte* for plaintiff in error. *Mr. John Prentiss Poe* for defendants in error.

*April 2, 1897.* Dismissed with costs, pursuant to the 10th Rule.

---

LAFAYETTE HUDSON, *Plff. in Err.*, *v.* UNITED STATES. [No. 297.]

In Error to the District Court of the United States for the Western District of Arkansas.

*Mr. W. M. Cravens* for plaintiff in error. *The Attorney General* for defendant in error.

*April 22, 1897.* Dismissed pursuant to the 10th Rule.

---

ALEXANDER LAZARD *et al.*, *Plffs. in Err.*, *v.* MERCHANTS' & MINERS' TRANSPORTATION COMPANY. [No. 305.]

In Error to the Court of Appeals of the State of Maryland.

*Messrs. E. G. Kremer* and *Jeff. Chandler* for plaintiffs in error. *Mr. Wm. Pinkney Whyte* for defendant in error.

*April 27, 1897.* Dismissed with costs, pursuant to the 10th Rule.



Digitized by Google

FRANZ HUNING, *Appt.*, *v.* UNITED STATES. [No. 308.]

Appeal from the Court of Private Land Claims.

*Mr. H. L. Warren* for appellant. *The Attorney General* for appellee.

*April 28, 1897.* Dismissed pursuant to the 10th Rule.

---

HENDERSON BRIDGE COMPANY, *Plff. in Err.*, *v.* COMMONWEALTH OF KENTUCKY. [No. 332.]

In Error to the Court of Appeals of the State of Kentucky.

*Messrs. James P. Helm* and *Helm Bruce* for plaintiff in error. No appearance for defendant in error.

*April 29, 1897.* Dismissed with costs, pursuant to the 10th Rule.

---

JOSEPH H. GOWDY, *Appt.*, *v.* W. BRIGGS GREEN. [No. 363.]

Appeal from the Circuit Court of the United States for the District of South Carolina.

*Mr. Henry N. Obear* for appellant. No appearance for appellee.

*April 30, 1897.* Dismissed with costs, pursuant to the 10th Rule.

---

## SIXTEENTH RULE.

JACK DAVIS, *Plff. in Err.*, *v.* UNITED STATES. [No. 124.]

In Error to the District Court of the United States for the Western District of Texas.

*Mr. A. H. Garland* for plaintiff in error. *The Attorney General* for defendant in error.

*November 2, 1896.* Dismissed pursuant to the 16th Rule.

---

ELVERTON R. CHAPMAN, *Appt. and Plff. in Err.*, *v.* UNITED STATES. [No. 291.]

Appeal from and in Error to the Court of Appeals of the District of Columbia.

*Messrs. S. Shellabarger, J. M. Wilson*, and *George F. Edmunds* for appellant and plaintiff in error. *The Attorney General* and *Solicitor General Conrad* for appellee and defendant in error.

*April 21, 1897.* Dismissed pursuant to the 16th Rule.

---

## TWENTY-EIGHTH RULE.

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*, *v.* A. B. KNOX. [No. 501.]

In Error to the Circuit Court of Union County, Mississippi.

*Messrs. J. Hubley Ashton* and *George H. Fearons* for plaintiff in error. *Mr. Charles B. Howry* for defendant in error.

*July 17, 1896.* Dismissed under 28th Rule.

---

KNOXVILLE, CUMBERLAND GAP, & LOUISVILLE R. Co. *et al.*, *Plffs. in Err.*, *v.* H. P. MASON *et al.* [No. 138.]

In Error to the Court of Appeals of Kentucky.

*Mr. Edmund F. Trabue* for plaintiffs in error. *Mr. Wm. Lindsay* for defendants in error.

*July 31, 1896.* Dismissed under 28th Rule.

SPRINGER LITHOGRAHING COMPANY, *Plff. in Err.*, *v.* BENJAMIN J. FALK. [No. 107.]

In Error to the United States Circuit Court of Appeals for the Second Circuit.

*Mr. John W. Boothby* for plaintiff in error. *Mr. Benno Lewinson* for defendant in error.

*August 4, 1896.* Dismissed under 28th Rule.

---

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*, *v.* LEWIS T. BATES. [No. 55.]

In Error to the Supreme Court of Georgia.

*Messrs. John F. Dillon, George H. Fearons*, and *Rush Taggart* for plaintiff in error.

*Mr. Frank A. Arnold* for defendant in error.

*August 5, 1896.* Dismissed under 28th Rule.

---

## MISCELLANEOUS.

KANSAS CITY, FORT SCOTT, & MEMPHIS RAILROAD COMPANY, *Plff. in Err.*, *v.* J. M. SHAWELL *et al.* [No. 65.]

In Error to the Supreme Court of the State of Missouri.

*Mr. Wallace Pratt* for plaintiff in error. *Mr. Edward P. Gates* for defendants in error.

*October 13, 1896.* Dismissed per stipulation.

---

NORTHERN PACIFIC RAILROAD COMPANY, *Appt.*, *v.* CITY OF SPOKANE, *et al.* [No. 207.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

*Messrs. A. H. Garland, W. J. Curtis*, and *C. W. Bunn* for appellant. No counsel entered for appellees.

*October 13, 1896.* Dismissed with costs, on authority of counsel for the appellant.

---

NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*, *v.* EUGENE TEETER. [No. 236.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. James McNaught, W. J. Curtis*, and *C. W. Bunn* for plaintiff in error. *Mr. M. E. Clapp* for defendant in error.

*October 13, 1896.* Dismissed per stipulation.

---

NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*, *v.* ANDREW MORTENSON. [No. 237.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. James McNaught, W. J. Curtis*, and *C. W. Bunn* for plaintiff in error. *Mr. F. B. Kellogg* for defendant in error.

*October 13, 1896.* Dismissed per stipulation.

---

TEMPLE SHORT *et al.*, *Appts.*, *v.* JOHN F. PIERCE *et al.* [No. 315.]

Appeal from the Supreme Court of the Territory of Utah.

*Mr. James N. Kimball* for appellants. No appearance for appellees.

*October 13, 1896.* Dismissed with costs, on motion of counsel for appellants, and cause remanded to the supreme court of the state of Utah.



Digitized by Google

MOUNT PLEASANT EQUITABLE CO-OP. *et al.*, *Appts.*, *v.* W. P. NOBLE MERCANTILE COMPANY *et al.* [No. 441.]

Appeal from the Supreme Court of the Territory of Utah.

*Mr. C. W. Bennett* for appellants. *Mr. C. S. Varian* for appellees.

*October 13, 1896.* Dismissed with costs, per stipluation, and cause remanded to the supreme court of the state of Utah.

---

DUBUQUE & SIOUX CITY RAILROAD COMPANY, *Appt.*, *v.* JOSEPH SAMPSON, Trustee. [No. 5.]

JOSEPH SAMPSON, Trustee, *Appt.*, *v.* ILLINOIS CENTRAL RAILROAD COMPANY *et al.* [No. 6.], and

CEDAR FALLS & MINNESOTA RAILROAD COMPANY, *Appt.*, *v.* ILLINOIS CENTRAL RAILROAD COMPANY. [No. 7.]

Appeals from the Circuit Court of the United States for the Northern District of Illinois.

*Messrs. John N. Jewett, Clarence A. Seward,* and *W. D. Guthrie* for appellant in No. 5. *Mr. Francis B. Daniels* for appellee in No. 5. *Messrs. Thomas De Witt Cuyler* and *Francis B. Daniels* for appellant in No. 6. *Mr. James Fentress* for appellees in Nos. 6 and 7. No appearance for appellant in No. 7.

*October 13, 1896.* Dismissed per stipulation.

---

NORTHERN PACIFIC RAILROAD COMPANY, *Appt.*, *v.* CHARLES W. CANNON *et al.* [No. 32.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

*Messrs. A. H. Garland, F. M. Dudley, W. J. Curtis,* and *C. W. Bunn* for appellant. *Messrs. E. W. Toole* and *Wm. Wallace,* Jr., for appellees.

*October 14, 1896.* Dismissed with costs, on motion of *Mr. A. B. Browne* in behalf of counsel for the appellant.

---

UNITED STATES, *Appt.*, *v.* PHILIP ROETTINGER, Administrator of Jacob Clark, Deceased. [No. 19.]

Appeal from the Court of Claims.

*The Attorney General, Assistant Attorney General Dodge,* and *Mr. Charles C. Binney* for appellant. *Mr. J. W. Warrington* for appellee.

*October 14, 1896.* Dismissed per stipulation.

---

O. T. MOORE, *Plff. in Err.*, *v.* CITY OF EUFAULA. [No. 80.]

In Error to the Supreme Court of the State of Alabama.

*Messrs. G. B. Clark, C. W. Wells, H. D. Clayton, John F. Dillon,* and *Rush Taggart* for plaintiff in error. *Mr. G. L. Comer* for defendant in error.

*October 15, 1896.* Dismissed with costs, on motion of *Mr. J. Hubley Ashton* for the plaintiff in error.

EAST TENNESSEE, VIRGINIA, & GEORGIA RAILROAD COMPANY *et al.*, *Appts.*, *v.* W. R. JORDAN. [No. 178.]

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

*Messrs. Henry Crawford* and *Francis Lynde Stetson* for appellants. *Messrs. Hoke Smith* and *Marion Erwin* for appellee.

*October 16, 1896.* Dismissed with costs, per stipulation.

---

MOLLIE KING *et al.*, *Plffs. in Err.*, *v.* UNITED STATES. [No. 508.]

In Error to the Circuit Court of the United States for the Western District of Arkansas.

No appearance for plaintiffs in error. *The Attorney General* for defendant in error.

*October 19, 1896.* Judgment reversed upon confession of error by counsel for the defendant in error, and cause remanded for further proceedings in conformity to law.

---

PRENTISS D. CHENEY, *Appt.*, *v.* JOHN S. BILBY. [No. 561.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. Charles E. Magoon* for appellant. No appearance for appellee.

*October 19, 1896.* Denied.

---

WILLIAM HENRY, *Appt.*, *v.* ALABAMA & VICKSBURG RAILROAD COMPANY. [No. 17.]

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

*Mr. Wade R. Young* for appellant. No appearance for appellee.

*October 19, 1896.* Dismissed with costs, on the authority of *Jacobs* v. *George*, 150 U. S. 415 [37: 1127].

---

HENRY H. TUCKER, *Appt.*, *v.* GORDON MCKAY, Trustee, etc. [No. 20.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

*Mr. Charles Allen Taber* for appellant. *Messrs. Joseph B. Warner* and *James J. Myers* for appellee.

*October 19, 1896.* Dismissed for the want of jurisdiction, on the authority of *Smith* v. *McKay*, 161 U. S. 355 [40: 731.]

---

ALDACE F. WALKER *et al.*, Receivers, etc., *Appts.*, *v.* WILSON T. KEENAN *et al.* [No. 533.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Mr. E. D. Kenna* for appellants. *Messrs. A. W. Green* and *H. S. Robbins* for appellees.

*October 19, 1896.* Denied.

Mr. Justice **Gray** took no part in the consideration of this application.

---

WESTERN UNION TELEGRAPH COMPANY, *Plf. in Err.*, *v.* J. O. TYLER. [No. 57.]

In Error to the Supreme Court of Appeals of the State of Virginia.

*Messrs. J. Hubley Ashton, J. F. Dillon, G. H. Fearons,* and *Rush Taggart* for plaintiff in error. No appearance for defendant in error.

*October 19, 1896.* Dismissed with costs, on motion of *Mr. J. Hubley Ashton* for the plaintiff in error.



Digitized by Google

R. J. DAILEY *et al.*, *Plffs. in Err.*, v. THE STATE OF OHIO. [No. 152.]

In Error to the Supreme Court of the State of Ohio.

*Messrs. J. Hubley Ashton* and *A. J. Woolf* for plaintiffs in error. No appearance for defendant in error.

*October 19, 1896.* Dismissed with costs, on motion of *Mr. J. Hubley Ashton* for the plaintiffs in error.

---

YOSEMITE MINING & MILLING COMPANY, *Appt.*, v. JOSEPH E. GALIGHER *et al.* [No. 218.]

Appeal from the Supreme Court of the Territory of Utah.

*Messrs. Arthur Brown* and *Henry P. Henderson* for appellant. *Mr. Parley L. Williams* for appellees.

*October 20, 1896.* Dismissed per stipulation, and cause remanded to the supreme court of the state of Utah.

---

MUTUAL BENEFIT LIFE INSURANCE COMPANY, *Appt.*, v. WILLIAM HUEBNER *et al.* [No. 511.]

Appeal from the Circuit Court of the United States for the District of Kansas.

*Mr. D. M. Valentine* for appellant. No appearance for appellees.

*October 23, 1896.* Dismissed with costs, on motion of counsel for appellant.

---

UNITED STATES, *ex rel.* CHARLES D. LONG, *Plff. in Err.*, v. WILLIAM LOCHREN, Commissioner of Pensions. [No. 333.]

In Error to the Court of Appeals of the District of Columbia.

*Messrs. Thos. S. Hopkins* and *Fred. A. Baker* for plaintiff in error. *The Attorney General, Solicitor General Conrad,* and *Assistant Attorney General Whitney* for defendant in error.

*October 26, 1896.* Dismissed without costs to either party, on the authority of *United States* v. *Boutwell,* 84 U. S. 17 Wall. 604 [21: 721], and other cases.

---

BOSTON SAFE DEPOSIT & TRUST COMPANY, *Appt.*, v. SAMUEL W. GROOME *et al.* [No. 574.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Mr. Henry B. Tompkins* for appellant. *Mr. Willard Parker Butler* for appellee.

*October 26, 1896.* Denied.

---

WILLIAM A. PHILLIPS, *Plff. in Err.*, v. CHEROKEE NATION *et al.* [No. 76.]

In Error to the United States Court in the Indian Territory.

*Mr. S. S. Burdett* for plaintiff in error. *Mr. John C. Fay* for defendants in error.

*October 27, 1896.* Dismissed with costs, on motion of counsel for the plaintiff in error.

MERCHANTS' & MINERS' TRANSPORTATION COMPANY, *Appt.*, v. NORFOLK & WESTERN RAILROAD COMPANY, Claimant. [No. 629.], and

MERCHANTS' & MINERS' TRANSPORTATION COMPANY, *Appt.*, v. NORFOLK & WESTERN RAILROAD COMPANY *et al.* [No. 630.]

Petitions for writs of certiorari to the United States Circuit Court of Appeals for the First Circuit.

*Messrs. Eugene P. Carver* and *Edward E. Blodgett* for appellant. *Mr. Wm. G. Roelker* for appellees.

*November 2, 1896.* Denied.

---

MAX COHEN, *Plff. in Err.*, v. UNITED STATES. [No. 485.]

In Error to the District Court of the United States for the District of Maryland.

*Mr. William Colton* for plaintiff in error. *The Attorney General* and *Assistant Attorney General Whitney* for defendant in error.

*November 2, 1896.* Judgment reversed and cause remanded for further proceedings to be had therein in conformity to law, on the authority of *McElroy* v. *United States,* 164 U. S. 76 [41: 355.]

---

JAMES B. WILSON, *Plff. in Err.*, v. UNITED STATES. [No. 416.]

In Error to the District Court of the United States for the District of Indiana.

*Mr. J. W. Kern* for plaintiff in error. *The Attorney General* and *Assistant Attorney General Dickinson* for defendant in error.

*November 2, 1896.* Judgment affirmed, on the authority of *Rosen* v. *United States,* 161 U. S. 29 [40: 606.]

---

CHARLOTTE EWER, *Plff. in Err.*, v. PEOPLE OF THE STATE OF NEW YORK. [No. 119.]

In Error to the Supreme Court of the State of New York.

*Mr. A. J. Dittenhoefer* for plaintiff in error. *Mr. Elbridge T. Gerry* for defendant in error.

*November 2, 1896.* Dismissed with costs, the case having abated.

---

CLEVELAND, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY, *Plff. in Err.*, v. MILLARD F. BROWN. [No. 120.]

On a certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

*Mr. John T. Dye* for plaintiff in error. *Mr. Samuel P. Wheeler* for defendant in error.

*November 2, 1896.* Stricken from the docket.

---

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*, v. JACOB MICHELSON. [No. 121.]

In Error to the Supreme Court of the State of Georgia.

*Messrs. J. Hubley Ashton* and *Geo. H. Fearons* for plaintiff in error. *Mr. Samuel B. Adams* for defendant in error.

*November 2, 1896.* Dismissed with costs, per stipulation.



Digitized by Google

NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*, v. SAMUEL MACLAY *et al.* [No. 145.]

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

*Messrs. James McNaught, F. M. Dudley, W. J. Curtis,* and *C. W. Bunn* for plaintiff in error. No appearance for defendants in error.

*November 4, 1896.* Dismissed with costs, on motion of counsel for the plaintiff in error.

---

JAMES CARSON, *Appt.*, v. HENRY BOHL, Agent of the Second National Bank of Xenia, Ohio. [No. 288.]

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

*Mr. John Little* for appellant. No counsel for appellee.

*November 6, 1896.* Dismissed with costs, on motion of counsel for the appellant.

---

STATE OF WASHINGTON, *Appt.*, v. M. L. COOVERT. [Nos. 90–97 inclusive.]

Appeals from the Circuit Court of the United States for the District of Washington.

*Mr. W. C. Jones* for appellant. *Messrs. J. H. Choate* and *C. E. S. Wood* for appellee.

*November 9, 1896.* Orders reversed with costs, and causes remanded with directions to discharge the writs and dismiss the petitions, on the authority of *Ex parte Royall*, 117 U. S. 241 [29: 868], and *Whitten* v. *Tomlinson*, 160 U. S. 231–242 [40: 406–412], and cases cited.

---

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, *Plff. in Err.*, v. ELIZABETH L. GRANT, Executrix, etc., *et al.* [No. 644.]

In Error to the Supreme Court of the State of Iowa.

*Mr. George E. Clarke* for plaintiff in error. *Mr. Charles A. Bishop* for defendants in error.

*November 9, 1896.* Dismissed with costs, per stipulation, on motion of *Mr. Charles A. Bishop* for the defendants in error.

---

STATE OF WISCONSIN, *ex rel.* JOHN R. BALTZELL, *Plff. in Err.*, v. ROBERT G. SIEBECKER, Circuit Judge, etc. [No. 8.]

In Error to the Supreme Court of the State of Wisconsin.

*Messrs. S. U. Pinney, Jno. C. Spooner,* and *A. L. Sanborn* for plaintiff in error. *Messrs. H. W. Chynoweth* and *Charles E. Buell* for defendant in error.

*November 16, 1896.* Judgment affirmed with costs, on the authority of *Wurts* v. *Hoagland*, 114 U. S. 606 [29: 229], and *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112 [41: 369.]

---

ZEPH T. HILL, *Plff. in Err.*, v. JOHN CORCORAN. [No. 9.]

In Error to the Supreme Court of the State of Colorado.

*Mr. W. C. Beecher* for plaintiff in error. *Messrs. C. S. Thomas, F. D. McKenney, J. H. McGowan,* and *Walter H. Smith* for defendant in error.

*November 16, 1896.* Judgment affirmed with costs, by a divided court.

NOBLE L. MCGINNIS, for Himself, etc., *Appt.*, v. UNITED STATES. [No. 652.]

Appeal from the Court of Claims.

*November 16, 1896.* Docketed and dismissed, on motion of *Mr. Solicitor General Conrad* for the appellee.

---

UNITED STATES, *Appt.*, v. MITCHELL KING. [No. 109.]

Appeal from the Circuit Court of the United States for the District of South Carolina.

*The Assistant Attorney General Dodge* for appellant. *Mr. J. P. Kennedy Bryan* for appellee.

*November 30, 1896.* Dismissed on the authority of *Chase* v. *United States*, 155 U. S. 489 [39: 234].

---

JOSEPH E. DOHERTY, *Plff. in Err.*, v. CLARENCE M. KNOWLTON. [No. 663.]

In Error to the Supreme Judicial Court of the State of Maine.

*November 30, 1896.* Docketed and dismissed with costs, on motion of *Mr. Ellis C. Johnson* for the defendant in error.

---

JACOB HENRY HENTZ *et al.*, *Appts.*, v. SAMUEL G. CORNWALL, Surviving Partner, etc. [No. 122:]

Appeal from the Court of Appeals of the District of Columbia.

*Mr. James K. Redington* for appellants. *Mr. Edward H. Thomas* for appellee.

*November 30, 1896.* Dismissed with costs, on motion of *Mr. Edward H. Thomas* for the appellee.

---

OREGON SHORT LINE & UTAH NORTHERN RAILROAD COMPANY, *Appt.*, v. NORTHERN PACIFIC RAILROAD COMPANY. [No. 275.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

*Mr. Jno. F. Dillon* for appellant. *Messrs. W. J. Curtis* and *C. W. Bunn* for appellee.

*December 1, 1896.* Dismissed without costs, per stipulation, and cause remanded for such further proceedings as may be necessary or proper to carry out the terms of the stipulation or otherwise to secure the rights of the parties.

---

GULF, COLORADO, & SANTA FÉ RAILWAY COMPANY, *Plff. in Err.*, v. A. B. ROSS. [No. 194.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. A. G. Britton, A. B. Browne,* and *P. L. Soper* for plaintiff in error. *Messrs. C. L. Herbert* and *J. J. Weed* for defendant in error.

*December 2, 1896.* Dismissed with costs, per stipulation.

---

WESTERN UNION TELEGRAPH COMPANY, *Appt.*, v. L. C. NORMAN, Auditor of Public Accounts of the Commonwealth of Kentucky. [No. 614.]

Appeal from the Circuit Court of the United States for the District of Kentucky.

*Messrs. Geo. H. Fearons, C. W. Wells, Willard Brown,* and *Lawrence Maxwell*, Jr., for appellant. *Mr. Wm. J. Hendrick* for appellee.

*December 2, 1896.* Dismissed with costs, per stipulation.



Digitized by Google

CHARLES A. GREGORY, *Appt.*, *v.* JOHN C. KEMP VAN EE. [No. 591.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

*Mr. F. A. Brooks* for appellant. *Mr. Russell Gray* for appellee.

*December 7, 1896.* Dismissed with costs.

---

LOUISVILLE TRUST COMPANY, Trustee, *Appt.*, *v.* CITY OF CINCINNATI. [No. 660.]

Petition for a writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Messrs. Alex. Pope Humphrey, Geo. M. Davis, H. A. Ferguson*, and *St. John Boyle* for appellant. *Messrs. Frederick Hertenstein*, and *J. D. Brannan* for appellee.

*December 7, 1896.* Denied.

---

CHICAGO, ST. PAUL, MINNEAPOLIS, & OMAHA RAILWAY COMPANY, *Plff. in Err.*, *v.* JOHN ROBERTS. [Nos. 14 and 15.]

In Error to the Supreme Court of the State of Minnesota.

*Messrs. James H. Howe* and *Thomas Wilson* for plaintiff in error. *Messrs. J. L. Macdonald, W. A. Day*, and *W. P. Montague* for defendant in error.

*December 7, 1896.* Judgments affirmed with costs by a divided court. (Mr. Justice Field took no part in the consideration and decision of these cases.)

---

JAMES DYER, *Plff. in Err.*, *v.* UNITED STATES. [No. 429.]

In Error to the District Court of the United States for the Western District of Arkansas.

*Messrs. Wm. M. Cravens, A. H. Garland*, and *R. C. Garland* for plaintiff in error. *The Attorney General* for defendant in error.

*December 7, 1896.* Judgment reversed upon confession of error by counsel for the defendant in error, and cause remanded for further proceedings in conformity to law.

---

WESTERN UNION TELEGRAPH COMPANY, *Appt.*, *v.* A. C. DAILY, Auditor, etc. [No. 448.]

Appeal from the Circuit Court of the United States for the District of Indiana.

*Messrs. S. O. Pickens, Willard Brown*, and *C. W. Wells* for appellant. *Mr. Wm. A. Ketcham* for appellee.

*December 7, 1896.* Dismissed with costs, on motion of counsel for the appellant.

---

TEXAS & PACIFIC RAILROAD COMPANY, *Plff. in Err.*, *v.* P. A. SCOVILLE. [No. 136.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

*Messrs. John F. Dillon, Winslow S. Pierce*, and *D. D. Duncan* for plaintiff in error. No appearance for defendant in error.

*December 9, 1896.* Dismissed with costs, on motion of *Mr. John F. Dillon* for the plaintiff in error.

---

WESTERN UNION TELEGRAPH COMPANY, *Appt.*, *v.* EBENEZER W. POE, Auditor of the State of Ohio, *et al.* [No. 352.]

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

*Messrs. Lawrence Maxwell*, Jr., *Willard Brown*, and *C. W. Wells* for appellant. *Messrs. J. K. Richards, Thos. McDougall*, and *F. S. Monnett* for appellees.

*December 10, 1896.* Dismissed with costs, on motion of *Mr. Lawrence Maxwell*, Jr., for the appellant.

---

WESTERN UNION TELEGRAPH COMPANY, *Appt.*, *v.* EBENEZER W. POE, Auditor of the State of Ohio. [Nos. 401 and 405.]

Appeals from the Circuit Court of the United States for the Southern District of Ohio.

*Messrs. Lawrence Maxwell*, Jr., *C. W. Wells*, and *Willard Brown* for appellant. *Messrs. F. S. Monnett, Thos. McDougall*, and *J. K. Richards* for appellee.

*December 10, 1896.* Dismissed with costs, on motion of *Mr. Lawrence Maxwell*, Jr., for the appellant.

---

HENRY CRAEMER, *Plff. in Err.*, *v.* STATE OF WASHINGTON. [No. 457.]

In Error to the Supreme Court of the State of Washington.

*Messrs. James B. Howe, Jas. Hamilton Lewis*, and *F. B. Crosthwaite* for plaintiff in error. *Messrs. A. W. Hastie* and *Jos. Shillington* for defendant in error.

*December 14, 1896.* Dismissed for the want of jurisdiction, on the authority of *Spies* v. *Illinois*, 123 U. S. 131 [31: 80], and other cases.

---

ADOLPH KRUG, *Plff. in Err.*, *v.* STATE OF WASHINGTON. [No. 477.]

In Error to the Supreme Court of the State of Washington.

*Mr. James Hamilton Lewis* for plaintiff in error. *Messrs. A. W. Hastie* and *Jos. Shillington* for defendant in error.

*December 14, 1896.* Dismissed for the want of jurisdiction on the authority of *Spies* v. *Illinois*, 123 U. S. 131 [31: 80], and other cases.

---

CHARLES W. NORDSTROM, *Plff. in Err.*, *v.* STATE OF WASHINGTON. [No. 284.]

In Error to the Supreme Court of the State of Washington.

*Mr. James Hamilton Lewis* for plaintiff in error. *Messrs. A. W. Hastie* and *Jos. Shillington* for defendant in error.

*December 14, 1896.* Judgment affirmed, on the authority of *Hurtado* v. *California*, 110 U. S. 516 [28: 232]; *Davis* v. *Texas*, 139 U. S. 652 [35: 301]; *McNulty* v. *California*, 149 U. S. 645 [37: 882]; *Talton* v. *Mayes*, 163 U. S. 376 [41: 196]; and *Draper* v. *United States*, 164 U. S. 240 [41: 419].

---

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*, *v.* C. G. RAWLINS. [No. 259.]

In Error to the Supreme Court of the State of Georgia.

*Messrs. J. Hubley Ashton* and *Geo. H. Fearons* for plaintiff in error. No appearance for defendant in error.

*December 14, 1896.* Dismissed with costs, on motion of *Mr. J. Hubley Ashton* for the plaintiff in error.



Digitized by Google

GEORGE F. DEARBORN, *Plff. in Err.*, *v.* PETER MORAN *et al.* [No. 82.]

In Error to the Supreme Court of the State of Washington.

*Messrs. Frederic D. McKenney* and *John P. Fay* for plaintiff in error. No appearance for defendants in error.

*December 14, 1896.* Dismissed with costs, on motion of *Mr. Frederic D. McKenney* for the plaintiff in error.

---

CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY, *Plff. in Err.*, *v.* CHARLES L. JONES. [No. 150.]

In Error to the Supreme Court of the State of Illinois.

*Mr. John J. Herrick* for plaintiff in error. *Mr. J. B. Cessna* for defendant in error.

*December 18, 1896.* Dismissed with costs, on motion of counsel for the plaintiff in error.

---

JOHN CHISHOLM *et al.*, *Appts.*, *v.* WILLIAM V. ABBOTT *et al.* [No. 651.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

*Mr. John Lowell* for appellants. No appearance for appellees.

*December 21, 1896.* Denied.

---

UNITED STATES, *Plff. in Err.*, *v.* CHICAGO, ROCK ISLAND, & PACIFIC RAILROAD COMPANY. [No. 69.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

*The Solicitor General Conrad* for plaintiff in error. *Mr. Robert Mather* for defendant in error.

*December 21, 1896.* Judgment affirmed by a divided court.

---

UNION PACIFIC RAILWAY COMPANY, *Plff. in Err.*, *v.* GEORGE J. NOVAK. [No. 157.]

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

*Messrs. John F. Dillon* and *J. M. Wilson* for plaintiff in error. *Messrs. O. B. Hallam* and *S. C. Hyde* for defendant in error.

*January 4, 1897.* Dismissed with costs, on motion of *Mr. J. M. Wilson* for plaintiff in error.

---

UNITED STATES MUTUAL ACCIDENT ASSOCIATION OF THE CITY OF NEW YORK, *Plff. in Err.*, *v.* R. MAUD HODGKIN. [No. 220.]

In Error to the Court of Appeals of the District of Columbia.

*Mr. John B. Larner* for plaintiff in error. *Messrs. I. B. Linton* and *J. J. Darlington* for defendant in error.

*January 11, 1897.* Dismissed per stipulation.

---

STATE OF SOUTH CAROLINA, *Appt.*, *v.* PORT ROYAL & AUGUSTA RAILWAY COMPANY. [No. 292.]

Appeal from the Circuit Court of the United States for the District of South Carolina.

*Mr. W. A. Barber* for appellant. *Mr. H. A. M. Smith* for appellee.

*January 13, 1897.* Dismissed, costs to be paid by the appellees, per stipulation.

---

HENRY B. KING *et al.*, *Appts.*, *v.* PORT ROYAL & AUGUSTA RAILWAY COMPANY *et al.* [No. 293.]

Appeal from the Circuit Court of the United States for the District of South Carolina.

*Mr. A. C. King* for appellants. *Mr. H. A. M. Smith* for appellees.

*January 13, 1897.* Dismissed, costs to be paid by the appellees, per stipulation.

---

STATE OF SOUTH CAROLINA, *Appt.*, *v.* PORT ROYAL & AUGUSTA RAILWAY COMPANY. [No. 323.]

Appeal from the Circuit Court of the United States for the District of South Carolina.

*Messrs. A. T. Smythe, Wm. A. Barber*, and *Alex. C. King* for appellant. *Mr. H. A. M. Smith* for appellee.

*January 13, 1897.* Dismissed, costs to be paid by the appellee, per stipulation.

---

RELIANCE MARINE INSURANCE COMPANY (Limited), *Appt.*, *v.* NEW YORK & CUBA MAIL STEAMSHIP COMPANY *et al.* [No. 684.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Mr. W. W. MacFarland* for appellant. *Mr. Harrington Putnam* for appellees.

*January 18, 1897.* Denied.

---

JACOB YOES, *Appt.*, *v.* UNITED STATES. [No. 553.]

Appeal from the Court of Claims.

*Messrs. L. T. Michener* and *R. R. McMahon* for appellant. *The Attorney General* for appellee.

*January 18, 1897.* Dismissed, per stipulation, on motion of *Mr. Assistant Attorney General Dodge* for the appellee.

---

CAPITAL BANK OF ST. PAUL, *Plff. in Err.*, *v.* SCHOOL DISTRICT No. 26. [No. 204.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. Wm. M. Jones* and *C. F. Benjamin* for plaintiff in error. *Messrs. S. L. Glaspell* and *Wm. Small* for defendant in error.

*January 25, 1897.* Denied.

---

CLEMENTINE ULMAN, etc., *Plff. in Err.*, *v.* MAYOR AND CITY COUNCIL OF BALTIMORE *et al.* [No. 174.]

In Error to the Court of Appeals of the State of Maryland.

*Mr. M. R. Walter* for plaintiff in error. *Messrs. T. G. Hayes* and *Wm. S. Bryan*, Jr., for defendants in error.

*January 25, 1897.* Judgment affirmed with costs, on the authority of *Spencer* v. *Merchant*, 125 U. S. 345 [31: 763].

---

WILLIAM CAMPBELL *et al.*, *Appts.*, *v.* THOMAS DE Q. RICHARDSON *et al.* [No. 683.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Messrs. Wm. L. Pierce* and *Allen Webster* for appellants. *Messrs. W. C. Strawbridge, F. P. Fish*, and *J. G. Johnson* for appellees.

*February 1, 1897.* Denied.



Digitized by Google

SAFETY INSULATED WIRE & CABLE COMPANY, *Plff. in Err.*, v. MAYOR AND CITY COUNCIL OF BALTIMORE. [No. 694.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

*Mr. Wm. Pinkney Whyte* for plaintiff in error. No appearance for defendant in error.

*February 1, 1897.* Denied.

---

HURLBUT LAND & CATTLE COMPANY, *Appt.*, v. JOHN S. TRUSCOTT, County Treasurer, etc. [No. 512.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

*Mr. J. M. Wilson* for appellant. *Mr. J. W. Strevell* for appellee.

*February 1, 1897.* Dismissed for the want of jurisdiction, on the authority of *Smith* v. *Adams*, 130 U. S. 167 [32: 895]; *McLish* v. *Roff*, 141 U. S. 661 [35: 893]; *Hume* v. *Bowie*, 148 U. S. 245 [37: 438]; *Gurnee* v. *Patrick County*, 137 U. S. 141 [34: 601]; *Bender* v. *Pennsylvania Co.* 148 U. S. 502 [37: 537].

---

UNITED STATES, *Appt.*, v. DESIDERIO GOMEZ *et al.* [No. 115.]

Appeal from the Court of Private Land Claims.

*The Attorney General* for appellant. No appearance for appellees.

*February 1, 1897.* Dismissed on motion of *Mr. Solicitor General Conrad* for the appellant.

---

UNITED STATES, *Appt.*, v. FRANK PEREW *et al.* [No. 116.]

Appeal from the Court of Private Land Claims.

*The Attorney General* for appellant. No appearance for appellees.

*February 1, 1897.* Dismissed on motion of *Mr. Solicitor General Conrad* for the appellant.

---

UNITED STATES, *Appt.*, v. ANICETO MARTINEZ *et al.* [No. 132.]

Appeal from the Court of Private Land Claims.

*The Attorney General* for appellant. No appearance for appellees.

*February 1, 1897.* Dismissed on motion of *Mr. Solicitor General Conrad* for the appellant.

---

UNITED STATES, *Appt.*, v. DONACIANO GURULE *et al.* [No. 183.]

Appeal from the Court of Private Land Claims.

*The Attorney General* and *Matt. G. Reynolds* for appellant. No appearance for appellees.

*February 1, 1897.* Dismissed on motion of *Mr. Solicitor General Conrad* for the appellant.

---

UNITED STATES, *Appt.*, v. JESUS ARMIJO Y JARAMILLO. [No. 185.]

Appeal from the Court of Private Land Claims.

*The Attorney General* and *Mr. Matt. G. Reynolds* for appellant. *Messrs. N. L. Jeffries* and *Geo. Hill Howard* for appellee.

*February 1, 1897.* Dismissed on motion of *Mr. Solicitor General Conrad* for the appellant.

---

JOHN C. STALLCUP, *Plff. in Err.*, v. CITY OF TACOMA. [No. 450.]

In Error to the Supreme Court of the State of Washington.

*Messrs. E. O. Wolcott* and *J. F. Shafroth* for plaintiff in error. *Messrs. C. C. Lancaster* and *B. S. Grosscup* for defendant in error.

*February 15, 1897.* Dismissed for the want of jurisdiction, on the authority of *Newport Light Co.* v. *Newport*, 151 U. S. 528 [38: 260]; *Gormley* v. *Clark*, 134 U. S. 338 [33: 909]; *Marchant* v. *Pennsylvania R. Co.* 153 U. S. 380 [38: 751]; *Leeper* v. *Texas*, 139 U. S. 462 [35: 225]; *Iowa C. R. Co.* v. *Iowa*, 160 U. S. 389 [40: 467]; *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111], and other cases.

---

THOMAS C. CHAPPELL, *Plff. in Err.*, v. MARY BALL CHAPPELL. [No. 478.]

In Error to the Court of Appeals of the State of Maryland.

*Mr. T. C. Chappell, p. p. Messrs. Samuel Maddox* and *D. Stewart* for defendant in error.

*February 15, 1897.* Dismissed for the want of jurisdiction.

---

JOSEPH RAYMOND, *Appt.*, v. JOHN LANGE. [No. 716.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

*February 15, 1897.* Docketed and dismissed with costs, on motion of *Mr. William A. Maury* for the appellee.

---

NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*, v. ARCHIE BEATON. [No. 217.]

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

*Messrs. W. E. Cullen, A. H. Garland, W. J. Curtis*, and *C. W. Bunn* for plaintiff in error. *Mr. Thomas C. Bach* for defendant in error.

*February 15, 1897.* Dismissed with costs on motion of *Mr. A. B. Browne* in behalf of counsel for the plaintiff in error.

---

E. J. AUGUSTIN, *Plff. in Err.*, v. UNITED STATES. [No. 572.]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

*Mr. Morris Marks* for plaintiff in error. *The Attorney General* for defendant in error.

*March 1, 1897.* Dismissed on motion of *Mr. Charles F. Buck* in behalf of counsel for the plaintiff in error.

---

WILLIAM CUTAJAR, *Appt.*, v. UNITED STATES *et al.* [No. 192.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

*Mr. Charles A. Hess* for appellant. *The Attorney General* for appellees.

*March 1, 1897.* Dismissed on authority of counsel for appellant.

---

HOWARD B. BULLARD, *Plff. in Err.*, v. DES MOINES & FORT DODGE RAILROAD COMPANY. [No. 317.]

In Error to the Supreme Court of the State of Iowa.

*Mr. E. F. Bullard* for plaintiff in error. *Mr. Robert Mather* for defendant in error.

*March 1, 1897.* Dismissed per stipulation.



Digitized by Google

ILLINOIS CENTRAL RAILROAD COMPANY, Petitioner, *v.* WILBUR F. DAVIDSON. [No. 696.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Messrs. James Fentress* and *Wm. E. Mason* for petitioner. *Mr. Edward Ryan Woodle* for respondent.

*March 8, 1897.* Denied.

---

DENNIS RYAN, Petitioner, *v.* JAMES STAPLES. [No. 703.]

Petition for a writ of error or writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. C. S. Thomas, W. H. Bryant,* and *F. D. McKenney* for petitioner. *Mr. Hugh Butler* for respondent.

*March 8, 1897.* Denied.

---

ST. LOUIS CAR COUPLER COMPANY, Petitioner, *v.* SHICKLE, HARRISON, & HOWARD IRON COMPANY. [No. 698.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. Chester H. Krum* and *F. D. McKenney* for petitioner. *Messrs. Geo. H. Knight* and *Melville Church* for respondent.

*March 8, 1897.* Denied.

---

E. M. PATTON, *Piff. in Err.*, *v.* TEXAS & PACIFIC RAILWAY COMPANY. [No. 149.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

*Messrs. Leigh Clark, W. O. Hart,* and *Millard Patterson* for plaintiff in error. *Messrs. Jno. F. Dillon, W. S. Pierce,* and *D. D. Duncan* for defendant in error.

*March 8, 1897.* Dismissed for want of jurisdiction, because the judgment is not final.

---

JEREMIAH R. HARMAN, *Appt.*, *v.* ANTHONY HARMAN *et al.* [No. 466.], and

JACOB M. HARMAN, *Appt.*, *v.* JEREMIAH R. HARMAN *et al.* [No. 467.]

On writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Messrs. E. A. Otis, C. B. Wood,* and *H. S. Oakley* for appellants. *Messrs. Jas. S. Norton* and *O. A. Burley* for appellees.

*March 8, 1897.* Dismissed with costs, on motion of *Mr. Clarence A. Burley* for the petitioners (the appellees).

---

HOKE SMITH, SECRETARY OF THE DEPARTMENT OF THE INTERIOR, *et al.*, *Appts.*, *v.* JEFFERSON RAYNOLDS, etc. [No. 626.]

Appeal from the Court of Appeals of the District of Columbia.

*The Attorney General* and *Assistant Attorney General Whitney* for appellants. *Mr. Alphonso Hart* for appellee.

*March 15, 1897.* Decree reversed on the authority of *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28 (41: 621), each party to pay their own costs in this court, and cause remanded to the said court of appeals, with directions to reverse the decree of the supreme court of the District of Columbia and remand the cause to that court with directions to dismiss the bill, with costs, for want of proper parties.

ADAM S. B. BAKER, *Piff. in Err.*, *v.* JOHN BRICKELL. [No. 345.]

In Error to the Supreme Court of the State of California.

*Mr. Charles N. Fox* for plaintiff in error. *Messrs. S. W. Holladay* and *E. Burke Holladay* for defendant in error.

*March 15, 1897.* Dismissed for want of jurisdiction, on the authority of *San Francisco* v. *Itsell,* 133 U. S. 65 [33: 570]; *Bacon* v. *Texas,* 163 U. S. 207, 227 [41: 132, 139], and cases cited.

---

FAIRFAX H. WHEELAN, Administrator, etc., *Piff. in Err.*, *v.* JOHN BRICKELL. [No. 346.]

In Error to the Supreme Court of the State California.

*Mr. Charles N. Fox* for plaintiff in error. *Messrs. S. W. Holladay* and *E. Burke Holladay* for defendant in error.

*March 15, 1897.* Dismissed for want of jurisdiction, on the authority of *California, Bryant,* v. *Holladay,* 159 U. S. 415, 417 [40: 202, 203]; *Bacon* v. *Texas,* 163 U. S. 207, 227 [41: 132, 139], and cases cited.

---

BROOKLYN & NEW YORK FERRY COMPANY, *Piff. in Err.*, *v.* KATIE J. MCMAHON, Administratrix, etc. [No. 681.]

In Error to the Supreme Court of the State of New York.

*Messrs. James Troy, Thomas H. Troy,* and *Geo. Bethune Adams* for plaintiff in error. *Mr. Charles J. Patterson* for defendant in error.

*March 15, 1897.* Dismissed for want of jurisdiction, on the authority of *Missouri* v. *Andriano,* 138 U. S. 496 [34: 1012].

---

UNITED STATES, *Appt.*, *v.* NUMA REYMOND *et al.* [No. 706.]

Appeal from the Court of Private Land Claims.

*The Attorney General* for appellant. *Mr. S. B. Newcomb* for appellees.

*March 15, 1897.* Dismissed on motion of *Mr. Solicitor General Conrad* for the appellant.

---

J. HARRISON JOHNSON, *Appt.*, *v.* BALTIMORE & POTOMAC RAILROAD COMPANY. [No. 210.]

Appeal from the Court of Appeals of the District of Columbia.

*Messrs. Samuel Maddox* and *J. M. Wilson* for appellant. *Mr. Enoch Totten* for appellee.

*March 19, 1897.* Dismissed per stipulation.

---

LEANDER G. GOODSELL, *Piff. in Err.*, *v.* DELTA & PINE LAND COMPANY *et al.* [No. 537.]

In Error to the Supreme Court of the State of Mississippi.

*Mr. T. B. Catron* for plaintiff in error. *Mr. Frank Johnson* for defendants in error.

*March 22, 1897.* Dismissed for the want of jurisdiction, on the authority of *Bacon* v. *Texas,* 163 U. S. 207, 227 [41: 132, 139]; *Chicago & N. W. R. Co.* v. *Chicago,* 164 U. S. 454 [41: 511]; *Missouri* v. *Andriano,* 138 U. S. 496 [34: 1012]; *Winona & St. P. R. Co.* v. *Plainview,* 143 U. S. 390 [36: 199]; *Evers* v. *Watson,* 156 U. S. 527 [39: 520], and other cases.



Digitized by Google

E. H. R. GREEN. Petitioner, *v.* FARMERS' LOAN & TRUST COMPANY *et al.* [Nos. 747, 748.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Mr. Chas. W. Ogden* for petitioner. No opposition.

*March 22, 1897.* Denied.

---

NATIONAL SAFE DEPOSIT, SAVINGS, & TRUST COMPANY, Administrator, etc., *Plff. in Err.*, *v.* WILLIAM G. STERETT *et al.* [No. 751.]

In Error to the Court of Appeals of the District of Columbia.

*Mr. R. Ross Perry* for plaintiff in error. No appearance for defendants in error.

*March 22, 1897.* Dismissed with costs, on motion of *Mr. R. Ross Perry* for the plaintiff in error.

---

REPUBLICAN MINING COMPANY, Petitioner, *v.* TYLER MINING COMPANY. [No. 750.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*Mr. W. B. Heyburn* for petitioner. No opposition.

*March 29, 1897.* Denied.

---

GEORGE W. RUSS, Petitioner, *v.* COUNT JOSEPH TELFENER. [No. 755.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Messrs. Joseph Wheeler* and *Clarence H. Miller* for petitioner. *Mr. J. L. Peeler* for respondent.

*March 29, 1897.* Denied.

---

AMERICAN HARROW COMPANY, *Appt.*, *v.* JOSEPH B. SHAFFER, Commissioner, etc., *et al.* [No. 228.]

Appeal from the Circuit Court of the United States for the Western District of Virginia.

*Mr. F. S. Blair* for appellant. *Mr. R. Taylor Scott* for appellees.

*March 29, 1897.* Dismissed for the want of jurisdiction.

---

JOHN KNIGHT, *Plff. in Err.*, *v.* INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY *et al.* [No. 263.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Mr. H. Chilton* for plaintiff in error. No appearance for defendants in error.

*March 31, 1897.* Dismissed for want of prosecution.

---

ALLEXEY W. VON SCHMIDT, Petitioner, *v.* A. B. BOWERS. [No. 754.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*Messrs. M. A. Wheaton* and *F. J. Kierce* for petitioner. *Mr. John H. Miller* for respondent.

*April 5, 1897.* Denied.

I. R. PARSONS, *Plff. in Err.*, *v.* STATE OF MISSOURI. [No. 245.]

In Error to the Supreme Court of the State of Missouri.

*Mr. John E. Craig* for plaintiff in error. *Mr. R. F. Walker*, Attorney General of Missouri, for defendant in error.

*April 5, 1897.* Judgment affirmed with costs, on authority of *Emert* v. *Missouri*, 156 U. S. 296 [39: 430].

---

UNITED STATES, *et al.*, *Appts.*, *v.* MARIANO S. OTERO. [No. 272.]

Appeal from the Court of Private Land Claims.

*The Attorney General* for appellants. No appearance for appellee.

*April 8, 1897.* Dismissed on motion of *Mr. Matt. G. Reynolds* for the appellants.

---

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*, *v.* STATE OF NORTH CAROLINA, *ex rel.* BOARD OF RAILROAD COMMISSIONERS *et al.* [No. 288.]

In Error to the Supreme Court of the State of North Carolina.

*Messrs. John F. Dillon, Rush Taggart, Geo. H. Fearons*, and *Robert Stiles* for plaintiff in error. No appearance for defendants in error.

*April 8, 1897.* Dismissed with costs, on motion of *Mr. J. Hubley Ashton* for the plaintiff in error.

---

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*, *v.* D. KEMP. [No. 290.]

In Error to the Supreme Court of the State of Nebraska.

*Messrs. J. Hubley Ashton* and *Geo. H. Fearons* for plaintiff in error. No appearance for defendant in error.

*April 8, 1897.* Dismissed with costs, on motion of *Mr. J. Hubley Ashton* for the plaintiff in error.

---

JOHN CLAFLIN, Executor, etc., *et al.*, Petitioners, *v.* THEODORE A. TUTTLE, Trustee, etc. [No. 763.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. Edmund Wetmore* and *O. W. Gould* for petitioners. *Mr. B. F. Lee* for respondent.

*April 12, 1897.* Denied.

---

AMERICAN BELL TELEPHONE COMPANY, *Appt.*, *v.* WESTERN UNION TELEGRAPH COMPANY *et al.* [No. 461.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

*Mr. J. J. Storrow* for appellant, in opposition to petition. *Messrs. Jno. F. Dillon* and *J. H. Benton*, Jr., for appellees, in support of petition.

*April 12, 1897.* Denied.



Digitized by Google

BONDHOLDERS AND PURCHASERS OF THE IRON RAILROAD, *Appts.*, v. TOLEDO, DELPHOS, & BURLINGTON RAILROAD COMPANY *et al.* [No. 667.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Messrs. Jno. C. Coombs* and *Chas. H. Hanson* for appellants. *Mr. Clarence Brown* for appellees.

*April 12, 1897.* Denied.

---

OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE CO. OF NEBRASKA *et al.*, *Piffs. in Err.*, v. SPENCER SMITH. [No. 672.]

In Error to the Supreme Court of the State of Iowa.

*Mr. Jno. N. Baldwin* for plaintiffs in error. *Mr. W. S. Strawn* for defendant in error.

*April 12, 1897.* Dismissed for the want of jurisdiction.

---

RUDOLPH DEIMEL, Petitioner, v. JULIUS STROHEIM *et al.* [No. 769.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Mr. Hiram T. Gilbert* for petitioner. *Mr. Levy Mayer* for respondents.

*April 12, 1897.* Denied.

---

ELVERTON R. CHAPMAN, Petitioner, v. UNITED STATES. [No. 749.]

Petition for a writ of certiorari to the Court of Appeals for the District of Columbia.

*Messrs. Geo. F. Edmunds, A. J. Dittenhoefer,* and *J. M. Wilson* for petitioner. No opposition.

*April 19, 1897.* Denied.

---

HUGH MURPHY, *Appt.*, v. COLORADO PAVING COMPANY *et al.* [No. 720.]

Appeal from the Circuit Court of the United States for the District of Colorado.

*Messrs. C. S. Thomas, W. H. Bryant,* and *F. D. McKenney* for appellant. *Mr. James H. Brown* for appellees.

*April 19, 1897.* Dismissed for the want of jurisdiction, on the authority of *Smith* v. *McKay*, 161 U. S. 355 [40: 731]; *Carey* v. *Houston & T. C. R. Co.* 161 U. S. 115 [40: 638]. See *Colorado Pav. Co.* v. *Murphy*, 78 Fed. Rep. 28.

---

FITZGERALD & MALLORY CONSTRUCTION COMPANY, *Piff. in Err.*, v. MARY FITZGERALD, Administratrix, etc. [No. 385.]

In Error to the Supreme Court of the State of Nebraska.

*Messrs. Isham Reavis* and *John F. Dillon* for plaintiff in error. No appearance for defendant in error.

*April 22, 1897.* Dismissed with costs, on motion of counsel for plaintiff in error.

---

NATIONAL FOUNDRY & PIPE WORKS, Limited, *et al.*, Petitioners, v. S. D. ANDREWS *et al.* [No. 725.], and

NATIONAL FOUNDRY & PIPE WORKS, Limited, *et al.*, Petitioners, v. CITY OF OCONTO. [No. 726.]

Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Mr. Geo. H. Noyes* for petitioners. *Mr. W. H. Webster* for respondents.

*April 26, 1897.* Denied.

---

NEWARK ELECTRIC LIGHT & POWER COMPANY, Petitioner, v. HENRY M. GARDEN, Administrator, etc. [No. 780.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Mr. Mahlon Pitney* for petitioner. *Mr. H. M. Garden, pro se.*

*April 26, 1897.* Denied.

---

AGRICULTURAL DITCH COMPANY, *Piff. in Err.*, v. FARMERS' INDEPENDENT DITCH COMPANY. [No. 618.]

In Error to the Supreme Court of the State of Colorado.

*Mr. Charles J. Hughes*, Jr., for plaintiff in error. *Messrs. C. S. Thomas* and *W. H. Bryant* for defendant in error.

*April 30, 1897.* Dismissed for the want of jurisdiction, for the want of a final judgment.

---

ANGLO-CALIFORNIAN BANK, Limited, Petitioner, v. SECRETARY OF THE TREASURY. [No. 764.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*Mr. J. F. Evans* for petitioner. *The Attorney General* and *Solicitor General Conrad* for respondent.

*April 30, 1897.* Denied.

---

THE TITAN, etc., Petitioner, v. MARION E. LEGG *et al.*, Administrators, etc. [No. 787.]

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. Jno. W. Deady* and *Henry W. Goodrich* for petitioner. *Mr. Henry Galbraith Ward* for respondents.

*April 30, 1897.* Denied.

---

NATIONAL MACHINE COMPANY, Petitioner, v. WHEELER & WILSON MANUFACTURING COMPANY. [No. 790.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Mr. Edwin H. Brown* for petitioner. *Mr. Livingston Gifford* for respondent.

*April 30, 1897.* Denied.

---

EINSTEIN, WOLFF, & Co., Petitioners, v. UNITED STATES. [No. 793.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. Charles Curie, W. Wickham Smith,* and *David Ives Mackie* for petitioners. No opposition.

*April 30, 1897.* Denied.



Digitized by Google

# CLXVI UNITED STATES.

166 U. S. 1–83, 41 L. 897, THE THREE FRIENDS.

**Admiralty.**— Decree for dismissal unless libel amended in ten days, takes immediate effect where party elects to appeal instead, p. 49.

Circuit Court of Appeals' decree in admiralty is final, but Supreme Court may grant certiorari in exceptional case, p. 49.

Approved in The Conqueror, 166 U. S. 114, 41 L. 939, 17 S. Ct. 511, issue of mandate by Circuit Court of Appeals does not affect jurisdiction on certiorari; Forsyth v. Hammond, 166 U. S. 511, 514, 41 L. 1097, 1098, 17 S. Ct. 667, 668, decree need not be final to support certiorari.

**Neutrality laws.**— Forfeiture of vessel under R. S., § 5283, is civil suit in rem, independent of conviction of any person, p. 49.

**Neutrality laws.**— Forfeiture of vessel may be decreed under R. S., § 5283, though guilty persons unknown, p. 50.

**Neutrality laws.**— Neutrality in its strict sense, and as respects prevention of filibustering, defined, p. 52.

**Neutrality.**— R. S., § 5283, prohibiting fitting out of vessels for foreign "people," includes any insurgent body, p. 62.

**War.**— Belligerency is recognized when political struggle attains magnitude affecting interests of recognizing power, p. 63.

**War.**— Time for recognition of belligerency is for political department, p. 63.

**War.**— Difference between recognition of belligerency and of political revolt, illustrated in Cuba, p. 64.

Neutrality law, R. S., § 5283, applies where actual conflict against friendly power, though belligerency not recognized, p. 65.

Approved in Underhill v. Hernandez, 168 U. S. 253, 42 L. 457, 18 S. Ct. 85, acknowledgment of belligerency is not necessary to prove state of war.

**Admiralty.**— Release on bond under R. S., § 941, is discretionary on forfeiture proceedings for filibustering, p. 68.

**Admiralty.**— Vessels in court's custody are frequently allowed to pursue ordinary avocation, under supervision, p. 68.

**Miscellaneous.**— Cited in The Three Friends, 85 Fed. 424, 52 U. S. App. 576, generally.



Digitized by Google

166 U. S. 83–109, 41 L. 925, BARBER v. PITTSBURGH, ETC., RY.

Courts.— Judgment in ejectment, not conclusive by State law in its courts, is not, in second action in Federal court, p. 99.

Courts.— Construction of deeds or wills become a rule of property, binds Federal courts, p. 99.

Approved in Independent Dist. v. Beard, 83 Fed. 15, following Iowa rule as to following trust fund; Low v. Blackford, 87 Fed. 407, following North Carolina rule as to enforcing mortgage securities.

Courts.— Single State decision, construing devise, does not conclude Federal courts, even between same parties, unless res adjudicata, p. 100.

Distinguished in Buchanan v. Denig, 84 Fed. 865, State rulings, though not absolutely conclusive, are persuasive.

Wills.— Devise, without words of inheritance, unqualified by other provisions, held to pass a fee, p. 101.

Wills.— Devise over, if married woman die without offspring by her husband, held same as death without issue, p. 101.

Perpetuity is not created by power to sell on expiration of estate tail, and divide among persons then ascertainable, p. 108.

Wills.— Devise to "heirs" of living person is sufficient description, p. 108.

Wills.— Extrinsic circumstances are admissible to explain ambiguities, but not to control construction, p. 109.

Wills.— Evidence of testator's health when will made, or duration of life thereafter, cannot affect its construction, p. 109.

166 U. S. 110–136, 41 L. 937, THE CONQUEROR.

Supreme Court may grant certiorari to Circuit Court of Appeals if Circuit Court record still there, though mandate sent down, p. 113.

Approved in Panama R. R. v. Napier Shipping Co., 166 U. S. 284, 41 L. 1005, 17 S. Ct. 574, entire case is reviewable upon certiorari after affirmance of final decree; Louisville, etc., R. R. v. Behlmer, 169 U. S. 648, 42 L. 890, 18 S. Ct. 503, mandate goes to court of first instance, not Circuit Court of Appeals.

Supreme Court may bring up judgment entered after its adjournment, by certiorari at next term, p. 112.

Customs duties.— Foreign-built pleasure yacht, brought by citizen into American waters, is not dutiable, p. 114.

Approved in The International, 89 Fed. 485, 60 U. S. App. 422, affirming S. C., 83 Fed. 841, scows and dredges are free of duty.

Shipping.— Foreign-built vessels can be used as American vessels only by special act of Congress, p. 119.

Statutes.— Original statute may be referred to where revision is ambiguous, p. 122.

Digitized by Google

Customs collector has immunity from damages by R. S., § 970, only if proceedings against vessel instituted upon information, p. 122.

Customs collector is not protected from damages for seizing vessel for duties, by certificate of probable cause, p. 124.

Shipping.— Demurrage is allowable only for loss of actual or probable profits, not for inability to use pleasure craft, p. 125.

Approved in The Saginaw, 95 Fed. 704, where there was no pecuniary loss.

Shipping.— Damages for detention are best estimated from value of charter, or vessel's utility to owner, p. 127.

Evidence.— Damages for vessel's detention, based on mere opinion unfortified by data, are too conjectural, p. 127.

Evidence of experts is admissible to prove damages for detention of vessel, but Admiralty Court may exercise independent judgment, p. 133.

Approved in Overweight, etc., Elev. Co. v. Improved Order, 94 Fed. 160, court need not accept expert's opinion of equivalents.

Customs.— Demurrage allowed against collector, for improper detention of yacht, held excessive, p. 134.

Admiralty.— Commission's findings as to charges for keeping vessel, detained by collector, not disturbed on appeal, p. 136.

Approved in Compagnia La Flecha v. Brauer, 168 U. S. 123, 42 L. 406, 18 S. Ct. 17, conclusions of fact are reversed only upon clear evidence of error; Pioneer Fuel Co. v. McBrier, 84 Fed. 500, 55 U. S. App. 190, inadequacy of damages awarded must be clear.

166 U. S. 136–138, 41 L. 948, IN RE ALIX.

Prohibition may be denied where there is remedy by appeal, jurisdiction is doubtful, or application by stranger, p. 138.

Not cited.

166 U. S. 138–142, 41 L. 949, ALLEN v. GEORGIA.

Dismissal is universally granted in civil cases, where no real dispute remains or case settled, p. 140.

Constitution.— Supreme Court interferes with State court, for denial of due process, only if fundamental rights denied, p. 141.

Approved in Wilson v. North Carolina, 169 U. S. 593, 42 L. 870, 18 S. Ct. 438, 122 N. C. 1108d, upholding suspension of railroad commissioner.

Distinguished in Hovey v. Elliott, 167 U. S. 443, 42 L. 230, 17 S. Ct. 854, contempt does not justify striking out defense and judgment pro confesso; In re McKee, 19 Utah, 237, 57 Pac. 25, trials must be according to State's prescribed procedure.

Criminal law.— Court's dismissal of writ of error, after prisoner's escape, is not denial of due process, p. 141.

Digitized by Google

166 U. S. 143–150, 41 L. 951, GRAND LODGE v. NEW ORLEANS.

Constitution.— Tax exemption requires consideration to be a valid contract; pledge of masonic revenues to charity is not such consideration, hence exemption is mere revocable gratuity, p. 148.

Approved in Manistee, etc., R. R. v. Commissioner of R. R., 118 Mich. 351, 76 N. W. 634, Laws of 1891, 1893, exempting railroads, are repealable.

Distinguished in City Ry. v. Citizens' R. R., 166 U. S. 567, 41 L. 1117, 17 S. Ct. 656, continued operation of street railroad may constitute consideration for franchise extensions.

166 U. S. 150–170, 41 L. 953, HENDERSON BRIDGE CO. v. KENTUCKY.

Taxation.— Bridge franchise from State may properly be included in taxable assets, p. 153.

Approved in Owensboro Nat. Bank v. Owensboro, 173 U. S. 671, 672, 683, 19 S. Ct. 539, 543, annulling Kentucky tax on national banks; Keokuk, etc., Bridge Co. v. Illinois, 175 U. S. 632, 20 S. Ct. 207, upholding tax on stock of interstate bridge company; United States v. Hopkins, 82 Fed. 538, annulling laws of stockyard association handling cattle from several States; Taylor v. Louisville, etc., R. R., 88 Fed. 361, 60 U. S. App. 188, market value of stock and bonds is relevant in assessing railroad; Liverpool, etc., Ins. Co. v. Board of Assessors, 51 La Ann. 1034, 72 Am. St. Rep. 489, 25 So. 972, 45 L. R. A. 527, franchise is taxable at situs of owner's domicile; Louisville, etc., Ferry Co. v. Commonwealth, — Ky. —, 47 S. W. 879, upholding franchise tax law; Louisville Tobacco Warehouse Co. v. Commonwealth, — Ky. —, 49 S. W. 1070, and dissenting opinion on first hearing, S. C., — Ky. —, 48 S. W. 424, upholding same law as applied to public corporations only; Bank of Kentucky v. Stone, 88 Fed. 395, exemption from taxation includes tax provided by Kentucky act of 1892; First Nat. Bank v. Stone, 88 Fed. 411, upholding Kentucky tax law of 1892, applied to national banks.

Tax on interstate bridge franchise is not on commerce, though affected by amount of tolls received, p. 154.

Approved in Thomas v. Gay, 169 U. S. 274, 42 L. 744, 18 S. Ct. 343, upholding tax on cattle in unorganized counties; Keokuk, etc., Bridge Co. v. Illinois, 175 U. S. 632, 20 S. Ct. 207, upholding tax on stock of interstate bridge company; United States v. Hopkins, 82 Fed. 540, annulling laws of stockyard association handling cattle from several States.

Taxing right of State is not affected by congressional declaration that bridges over the Ohio are post roads, p. 154.

Taxation.— State cannot tax gross earnings of domestic corporation, derived from interstate commerce, per White, J., dissenting, p. 165.

Digitized by Google

Approved in dissenting opinion in Adams Express Co. v. Kentucky, 166 U. S. 184, 41 L. 965, 17 S. Ct. 532, majority upholding tax of corporate stock based on ratio of local to whole property.

166 U. S. 171–185, 41 L. 960, ADAMS EXPRESS CO. v. KENTUCKY.

Taxation of intangible corporate property by Kentucky act of 1894, proportioned on mileage, etc., infringes no Federal provision, p. 180.

Approved in Owensboro Nat. Bank v. Owensboro, 173 U. S. 670, 672, 674, 19 S. Ct. 539, annulling Kentucky tax on national banks; Bank of Kentucky v. Stone, 88 Fed. 395, exemption from taxation includes tax provided by Kentucky act of 1892; Thomas v. Cincinnati, etc., Ry., 93 Fed. 591, construing lessee's stipulation to pay taxes; Louisville Tobacco Warehouse Co. v. Commonwealth, — Ky. —, 49 S. W. 1070, and dissenting opinion on first hearing in S. C., — Ky. —, 48 S. W. 424, upholding franchise tax law, as applied to public corporations only; State v. Stephens, 146 Mo. 681, 69 Am. St. Rep. 636, 48 S. W. 934, cars in transit through State are not taxable; First Nat. Bank v. Stone, 88 Fed. 411, upholding Kentucky tax law of 1892, as applied to national banks.

Taxation.— Kentucky tax law of 1894 is not invalid under the State Constitution, pp. 181–183.

166 U. S. 185–225, 41 L. 965, ADAMS EXPRESS CO. v. OHIO STATE AUDITOR.

Commerce.— State tax, in effect taxing privilege of carrying on interstate commerce, is void, p. 218.

Commerce.— Restriction on State's interference with commerce does not abridge right to tax its instrumentalities, p. 218.

Approved in Thomas v. Gay, 169 U. S. 274, 42 L. 744, 18 S. Ct. 344, cattle in unorganized counties are taxable; Hall v. American, etc., Transit Co., 24 Colo. 300, 65 Am. St. Rep. 227, 51 Pac. 424, and Union, etc., Transit Co. v. Lynch, 18 Utah, 394, 55 Pac. 643, upholding tax on non-resident's cars used in State.

Taxation of express companies by Kentucky and Ohio laws, held not tax on the business, but on the property, p. 218.

Taxation.— State may tax intangible property, and at its real value, p. 219.

Approved in Wells-Fargo Co.'s Exp. v. Crawford Co., 63 Ark. 588, 40 S. W. 713, 37 L. R. A. 375, assessment is not excessive because it exceeds value of tangible assets.

Taxation.— Joining of separate articles of tangible property in a unity of use, often develops an intangible property exceeding the value of the tangible, p. 219.

Taxation.— Whatever property is worth for income and sale, it is worth for taxation, p. 220.

Digitized by Google

Approved in Buck v. Miller, 147 Ind. 601, 62 Am. St. Rep. 446, 47 N. E. 11, 37 L. R. A. 390, non-resident's bonds and notes within State are taxable; dissenting opinion in State Board v. Holliday, 150 Ind. 249, 49 N. E. 24, 42 L. R. A. 838, majority holding insurance policies non-taxable.

**Taxation.**— Good-will of organized and established industry is of taxable value, e. g., express business, p. 221.

**Taxation.**— Situs of express company's good-will, for taxation, is distributed where it does business, not centered at home office, p. 221.

Approved in American, etc., Transit Co. v. Hall, 174 U. S. 79, 19 S. Ct. 603, State may tax average number of cars used therein; Taylor v. Louisville, etc., R. R., 88 Fed. 361, 60 U. S. App. 188, market value of stock and bonds is relevant in assessing railroad; Thomas v. Cincinnati, etc., Ry., 93 Fed. 591, construing lessee's stipulation to pay taxes.

**Taxation.**— Maxim, mobilia personam sequuntur, is not of universal application, seldom to taxation, p. 224.

Approved in Buck v. Miller, 147 Ind. 601, 62 Am. St. Rep. 446, 47 N. E. 11, 37 L. R. A. 390, non-resident's bonds and notes within State are taxable. See note in 62 Am. St. Rep. 449.

**Taxation.**— Corporate franchise to do, embracing all its corporate powers, is of value and taxable wherever corporation is engaged in exercising its powers, p. 224.

Approved in Union, etc., Transit Co. v. Lynch, 18 Utah, 392, 55 Pac. 642, upholding tax on cars used in State. See note in 62 Am. St. Rep. 475.

**Taxation.**— Corporations should not be allowed to escape just taxes by theories as to situs, p. 225.

166 U. S. 226–263, 41 L. 979, CHICAGO, ETC., R. R. v. CHICAGO.

**Courts.**— If federal right claimed so as to bring it to State court's attention, and denied expressly or impliedly, it is sufficient, p. 231.

Approved in Meyer v. Richmond, 172 U. S. 82, 93, 19 S. Ct. 109, 110, following rule; Missouri, etc., Ry. v. Haber, 169 U. S. 622, 42 L. 881, 18 S. Ct. 492, where decision of Federal question was necessarily involved; Green Bay, etc., Canal Co. v. Patten Paper Co., 172 U. S. 68, 19 S. Ct. 101, no particular form of words need be used; Dewey v. Des Moines, 173 U. S. 199, 19 S. Ct. 381, where record did not show necessary Federal question; Apex, etc., Co. v. Garbade, 32 Or. 590, 591, 54 Pac. 367, 368, denying writ of error to Supreme Court; Allen v. Portland, 35 Or. 460, 58 Pac. 521, refusing to determine Federal question not raised below.

**Constitution.**— Prohibitions of fourteenth amendment apply to legislative, judicial and executive branches, p. 233.

Digitized by Google

Approved in Nashville, etc., Ry. v. Taylor, 86 Fed. 184, following rule.

Distinguished in Blake v. McClung, 172 U. S. 260, 19 S. Ct. 173, upholding law preferring local creditors to non-resident corporation creditors.

**Constitution.**— Due process is determined from substance, not form of procedure; fact of notice of condemnation proceeding is not conclusive of due process, p. 235.

Approved in Brown v. New Jersey, 175 U. S. 175, 20 S. Ct. 78, upholding New Jersey struck-jury law; Postal Tel. Cable Co. v. Southern Ry., 89 Fed. 192, construing North Carolina condemnation law.

Distinguished in Long Island Water, etc., Co. v. Brooklyn, 166 U. S. 695, 41 L. 1168, 17 S. Ct. 722, State may make commissioner's findings of fact, in condemnation, conclusive.

**Constitution.**— State judgment under State law, taking property without compensation, is not due process, p. 241.

Approved in Tindal v. Wesley, 167 U. S. 222, 42 L. 143, 17 S. Ct. 777, possession by State agent cannot defeat right to compensation; Bauman v. Ross, 167 U. S. 583, 42 L. 286, 17 S. Ct. 980, ascertainment of compensation is judicial question; Smyth v. Ames, 169 U. S. 525, 42 L. 842, 18 S. Ct. 426, statute fixing unprofitable railroad rates is void; Norwood v. Baker, 172 U. S. 277, 19 S. Ct. 190, where tax substantially exceeded benefit of improvement; Henderson Bridge Co. v. Henderson Co., 173 U. S. 614, 19 S. Ct. 561, upholding municipal taxation of interstate bridge; San Diego Land Co. v. National City, 174 U. S. 754, 19 S. Ct. 810, California statute provides sufficient notice to support fixing water rates; Newburyport Water Co. v. Newburyport, 85 Fed. 727, annulling statute effecting forfeiture of water works without fair compensation; Iron Mountain Ry. v. Memphis, 96 Fed. 122, forfeiture by city council of grant to railroad presents Federal question; dissenting opinion in Backus v. Fort Street, etc., Depot Co., 169 U. S. 578, 42 L. 862, 18 S. Ct. 453, see majority holding infra; Howell v. Miller, 91 Fed. 136, 62 U. S. App. 28, arguendo.

Distinguished in Atchison, etc., R. R. v. Matthews, 174 U. S. 105, 19 S. Ct. 613, upholding Kansas law providing damages and attorneys' fees against railroads for fires.

**Courts.**— Seventh amendment, as to facts in jury cases, in Federal court, applies to writs of error from State courts, p. 242.

Approved in Capital Traction Co. v. Hof, 174 U. S. 9, 12, 19 S. Ct. 584, rule applies to both Federal and State courts.

Supreme Court cannot, on error to State court, review jury's findings, but only errors in law guiding jury, p. 246.

Approved in Backus v. Fort Street, etc., Depot Co., 169 U. S. 565, 576, 42 L. 857, 861, 18 S. Ct. 448, 452, refusing to examine matters not necessarily involving substantial Federal right; Missouri,

Digitized by Google

etc., Ry. v. Haber, 169 U. S. 639, 42 L. 887, 18 S. Ct. 498, findings of jury are not reviewable.

Supreme Court will not review State court rulings not substantially affecting the Federal question, p. 246.

Eminent domain.— Measure of damages due railroad, for city's opening of street across its tracks, stated, p. 248.

Approved in Mobile, etc., R. R. v. Postal Tel. Cable Co., 120 Ala. 36, 24 So. 412, 413, Mobile, etc., R. R. v. Postal Tel. Cable Co., 76 Miss. 746, 749, 750, 751, 26 So. 371, 372, 373, 45 L. R. A. 225, 226, 227, Railroad v. Telegraph Co., 101 Tenn. 71, 46 S. W. 573, 41 L. R. A. 406, Gulf, etc., Ry. v. Southwestern, etc., Tel. Co., — Tex. Civ. App. —, 52 S. W. 87, Texas, etc., R. R. v. Postal Tel. Cable Co., — Tex. Civ. App. —, 52 S. W. 109, and Southwestern, etc., Tel. Co. v. Gulf, etc., Ry. Co., — Tex. Civ. App. —, 52 S. W. 107, where telegraph company condemns part of railroad's way; Morris, etc., R. R. v. Orange City, 63 N. J. L. 266, 43 Atl. 735, damages for street crossing at same grade are nominal; Cleveland v. City Council, 102 Ga. 246, 29 S. E. 590, 43 L. R. A. 643, arguendo.

Eminent domain.— Possible, or imaginary uses, or owner's speculative schemes, are to be excluded from value, p. 250.

Reaffirmed in Mobile, etc., R. R. v. Postal Tel. Cable Co., 120 Ala. 36, 24 So. 412.

Railroad laying tracks within city, is subject to possibility of new streets being opened across them, p. 250.

Approved in Morris, etc., R. R. v. Orange City, 63 N. J. L. 266, 43 Atl. 735, following rule; Cleveland v. City Council, 102 Ga. 237, 29 S. E. 586, 43 L. R. A. 640, railroad must pay for change of grade crossing.

Municipality opening street across railroad tracks, is not bound to pay for fee, or expense of gates and flagmen, p. 251.

Approved in Morris, etc., R. R. v. Orange City, 63 N. J. L. 269, 43 Atl. 736, expense of planking and gates are for railroad.

Constitution.— Railroad takes charter subject to police power, and property injured thereby is not an unlawful deprivation within the Constitution, p. 252.

Approved in Morris, etc., R. R. v. Orange City, 63 N. J. L. 269, 43 Atl. 736, following rule; Cleveland v. City Council, 102 Ga. 242, 247, 29 S. E. 588, 590, 43 L. R. A. 642, 644, railroad must pay for change of grade crossing.

166 U. S. 258, 41 L. 994, CHICAGO, ETC., R. R. v. CHICAGO.

Adjudged in conformity with Chicago, etc., R. R. v. Chicago, supra, q. v.

166 U. S. 263-268, 41 L. 994, IN RE POTTS.

Appeal.— Circuit Court cannot, after reversal of its decree dismissing infringement bill, patent being held valid by Supreme

Digitized by Google

Court. grant rehearing, but must obey Supreme Court mandate, p. 268.

Distinguished in In re Blake, 175 U. S. 117, 20 S. Ct. 43, refusing mandamus to State court.

Appeal.— Supreme Court having decided on merits, Circuit Court may not, without leave, allow new trial, or new defenses, p. 268.

Approved in Walker v. Brown, 86 Fed. 365, 369, declining to allow amendment of answer.

166 U. S. 269–276, 41 L. 996, GIBSON v. UNITED STATES.

Navigable waters.— Government improvement in navigable waters, rendering dock useless, is not an unlawful deprivation, p. 275.

Navigable waters.— Riparian owner must suffer consequences of improvement in navigation, and cannot have damages, p. 276.

Approved in Meyer v. Richmond, 172 U. S. 96, 98, 19 S. Ct. 111, 113, where city authorized railroad to obstruct street; Lane v. Harbor Commrs., 70 Conn. 695, 698, 40 Atl. 1061, 1062, permit to wharf may be modified to meet requirements.

Distinguished in Brown v. United States, 81 Fed. 57, where government took submerged land in plaintiff's possession.

166 U. S. 276–280, 41 L. 1002, NELSON v. FLINT.

Evidence.— Conversation between two makers of note in payee's absence do not bind latter, p. 278.

Appeal.— Party cannot bring matters into record by filing with clerk affidavit not in bill of exceptions, p. 279.

Appeal.— Record showing instruction handed in after jury instructed does not show its proper presentation, p. 280.

Approved in Northern Pac. R. R. v. Krohne, 86 Fed. 235, 56 U. S. App. 600, new objections to instructions cannot be raised on appeal.

166 U. S. 280–290, 41 L. 1004, PANAMA R. R. v. NAPIER SHIPPING CO.

Supreme Court issuing certiorari to Circuit Court of Appeals, after second appeal from libel, is not limited to matters on second appeal, p. 284.

Approved in Staffords v. King, 90 Fed. 141, 61 U. S. App. 498, certiorari suspends operation of order of Circuit Court of Appeals dissolving injunction.

Admiralty has jurisdiction of injury to vessel by running upon sunken obstruction, p. 285.

Admiralty has jurisdiction of torts within waters of foreign power, p. 285.

Digitized by Google

**Admiralty** may take jurisdiction of tort between foreigners, though it may decline, especially if consul object, p. 285.

**Wharfowner** is not liable for injury to vessel sunk by obstruction known to vessel's agent, p. 289.

Distinguished in Smith v. Burnett, 173 U. S. 435, 19 S. Ct. 444, wharfinger must give notice of obstruction.

166 U. S. 290–374, 41 L. 1007, UNITED STATES v. TRANS-MISSOURI FREIGHT ASSN.

**Appeal.**— Dissolution, pending appeal, of freight association enjoined by lower court, does not prevent review by Supreme Court, decree also restraining similar associations, p. 309.

Approved in Behlmer v. Louisville, etc., R. Co., 83 Fed. 903, 42 U. S. App. 581, injunction of unlawful rates binds association's unnamed successor.

**Appeal.**— Statutory amount may be made to appear by affidavits where not in bill, p. 310.

**Commerce.**— Act of 1890, forbidding contracts in restraint of trade, covers contract of competing roads, directly so acting, p. 313.

Approved in United States v. Joint Traffic Assn., 171 U. S. 558, 559, 562, 19 S. Ct. 27, 28, 29, following rule; United States v. Addyston Pipe, etc., Co., 85 Fed. 299, 54 U. S. App. 773, annulling iron-pipe trust; Bailey v. Association of Master Plumbers, 103 Tenn. 107, 52 S. W. 854, annulling by-laws of plumbers' association.

Commerce act of 1887 is not inconsistent with act of 1890 against contracts in restraint of trade, p. 315.

**Statutes.**— Debates in Congress may not be resorted to, in construing act; only its language and history of times, p. 318.

Approved in State v. Lancashire Fire Ins. Co., 66 Ark. 472, 51 S. W. 635, 45 L. R. A. 351, following rule; United States v. Coal Dealers' Assn., 85 Fed. 261, act extends to all restraints, regardless of common law; Fay v. Springfield, 94 Fed. 421, construing statute authorizing special assessment for improvements; Dunlap v. United States, 173 U. S. 75, 19 S. Ct. 323, arguendo.

**Railroad** contracts may be restraints of trade, if affecting rates at all prejudicially to public interests, p. 334.

Approved in United States v. Hopkins, 82 Fed. 537, and United States v. Coal Dealers' Assn., 85 Fed. 262, reasonableness of restraint is no defense; United States v. Addyston Pipe, etc., Co., 85 Fed. 278, 54 U. S. App. 741, arguendo.

**Commerce.**— Act of 1890 includes all contracts in restraint of commerce, though restraint is reasonable, p. 328.

Approved in United States v. Joint Traffic Assn., 171 U. S. 565, 566, 568, 573, 574, 19 S. Ct. 30, 31, 33, following rule; United States

Digitized by Google

v. Hopkins, 82 Fed. 540, annulling laws of stock exchange handling cattle from several States; State v. Firemen's Fund Ins. Co., 152 Mo. 44, 52 S. W. 607, 45 L. R. A. 376, annulling fire insurance trust; Lufkin Rule Co. v. Fringeli, 57 Ohio St. 608, 49 N. E. 1033, 41 L. R. A. 189, annulling agreement by vendor of factory not to compete; Bailey v. Association of Master Plumbers, 103 Tenn. 109, 119, 52 S. W. 855, 857, contracts stifling competition are void; Waters, etc., Oil Co. v. State, 19 Tex. Civ. App. 11, 44 S. W. 941, upholding State laws against combinations.

Distinguished in United States v. Boyer, 85 Fed. 435, annulling slaughter-house inspection act; Gulf, etc., Ry. v. Miami S. S. Co., 86 Fed. 421, 52 U. S. App. 759, railroad may contract with one connecting line exclusively; The Charles E. Wiswall, 86 Fed. 673, 57 U. S. App. 183, 42 L. R. A. 86, combination of tugs operating wholly within State; Post v. Southern Ry., 103 Tenn. 223, 52 S. W. 310, mutual declaration of policy of maintaining rates is not unlawful; Houston, etc., R. R. v. Dumas, — Tex. Civ. App. —, 43 S. W. 610, arguendo.

**Statutes.**— Public policy is what the law enacts, if there is a law on the subject, p. 340.

Approved in Heller v. National Marine Bank, 89 Md. 618, 43 Atl. 804, 45 L. R. A. 444, construing law making preferred stock lien on corporate assets; State v. Firemen's Fund Ins. Co., 152 Mo. 47, 52 S. W. 608, 45 L. R. A. 377, upholding State anti-trust law; St. Louis Min. Co. v. Montana Min. Co., 171 U. S. 655, 19 S. Ct. 63, arguendo.

**Commerce.**— If contract necessarily restrains commerce, government need not prove the intent, p. 342.

**Statutes.**— Making the act of 1890 against restraints of trade applicable to prior continuing traffic agreement, is not retroactive, p. 342.

**Commerce.**— Congress, in its control over commerce, may give remedy of injunction to government, p. 343.

166 U. S. 375-388, 41 L. 1039, THE MAJESTIC.

**Carriers.**— Limitations of liability and recovery, in notice on back of ticket, unsigned, held no part of contract, p. 381.

Approved in Compagnia La Flecha v. Brauer, 168 U. S. 118, 42 L. 405, 18 S. Ct. 15, stipulations limiting carrier's liability are construed strictly; New York, etc., R. Co. v. Sayles, 87 Fed. 445, transverse red ink stipulation binds purchaser only if he accepts with notice thereof; San Antonio, etc., Ry. v. Newman, 17 Tex. Civ. App. 611, 43 S. W. 918, binding force of limitation indorsed on drover's pass depends on notice.

Distinguished in Ginn v. Ogdensburg Transit Co., 85 Fed. 986, 57 U. S. App. 405, upholding stipulation limiting time of suit; The Kensington, 94 Fed. 887, upholding limitation of face of ticket.

Digitized by Google

Carrier has burden of proving injury was due to act of God, p. 386.

Approved in Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 196, carrier must prove damage by sea; Mitchell v. Carolina Cent. R. R., 124 N. C. 244, 32 S. E. 673, 44 L. R. A. 518, and omission to so charge is error.

Carriers.— Act of God is limited to cases where no man had any agency; damage by sea water from broken port is not, p. 386.

166 U. S. 388–391, 41 L. 1044, ST. LOUIS v. WESTERN UNION TEL. CO.

Appeal from trial without jury is limited to sufficiency of complaint, and rulings on law; bill cannot bring up whole testimony, p. 390.

Not cited.

166 U. S. 391–395, 41 L. 1045, IASIGI v. VAN DE CARR.

Habeas corpus by embezzling foreign consul, will be dismissed if at hearing he no longer holds office, p. 394.

Habeas corpus is to ascertain whether prisoner can be legally held; if so, defects in commitment do not warrant discharge, p. 395.

Approved in In re Boardman, 160 U. S. 43; 42 L. 654, 18 S. Ct. 293, application for writ cannot be filed where prisoner must be remanded; Price v. McCarty, 89 Fed. 85, 59 U. S. App. 581, where prisoner was remanded to another district for trial.

166 U. S. 395–399, 41 L. 1049, HOOE v. JAMIESON.

Courts.— District of Columbia citizen cannot sue in Circuit Court, for diverse citizenship, though joining co-plaintiff who could, p. 397.

Approved in United States v. Ames, 95 Fed. 456, transmitting lottery ticket from one State to another does not include territory.

166 U. S. 399, 41 L. 1051, HOOE v. WERNER.

Adjudged in conformity with Hooe v. Jamieson, supra, q. v.

166 U. S. 399–404, 41 L. 1051, MARTIN v. ATCHISON, ETC., R. R.

Master.— Section foreman, and conductor and hands of work train, are fellow servants of section laborer, p. 402.

Approved in Alaska Min. Co. v. Whelan, 168 U. S. 89, 42 L. 392, 18 S. Ct. 42, foreman and members of mining gang; Grady v. Southern Ry., 92 Fed. 493, foreman and employee in repair shop; Deserant v. Cerrillos Coal R. Co., 9 N. Mex. 499, 55 Pac. 290, pit boss and miners; Gann v. Railroad, 101 Tenn. 386, 70 Am. St. Rep. 690, 47 S. W. 494, gang boss in charge of brake on hand car, and gang; Stephani v. Southern Pac. R. R., 19 Utah, 204, 57 Pac. 36, track-walker and engineman; Norfolk, etc., R. R. v. Houchins, 95 Va. 409, 64 Am. St. Rep. 801, 28 S. E. 582, conductor and brakeman.

Digitized by Google

166 U. S. 404–428, 41 L. 1053, THE UMBRIA.

**Collision.**— Full speed in a fog in known proximity to another vessel, is such gross fault that other's fault must be very clear, p. 409.

Approved in The Victory, 168 U. S. 423, 42 L. 528, 18 S. Ct. 155, vessel guilty of gross fault must clearly show contributory fault.

**Collision.**— Court cannot sanction custom of mail steamers to run full speed in fog, p. 409.

**Collision.**— Change of course, in ignorance of course of approaching vessel, is not always fault, p. 410.

**Collision.**— In thick weather steamer need use only precautions necessary to stop after sighting approaching vessel, p. 417.

Approved in The Nymphæa, 84 Fed. 715, dividing damage where each failed to check speed; The Albany, 91 Fed. 808, full speed in fog in North river is not moderate; The Patria, 92 Fed. 414, seven knots is excessive speed in dense fog.

**Collision.**— If facts show stopping or reversing would not have availed, non-observance of rule is not fault, p. 419.

**Collision.**— Propriety of manœuvres depends on whether vessels can stop before courses intersect, p. 420.

**Collision.**— Damages for total loss include value of vessel, interest and freight pending, not prospective charter, p. 421.

Approved in The Hamilton, 95 Fed. 845, measure is ship's value and interest where loss is complete.

**Collision.**— Net profits of prospective charter may be considered in damages for partial loss by collision, p. 421.

Followed in The Ohio, 91 Fed. 559, 62 U. S. App. 109.

166 U. S. 424–427, 41 L. 1063, HUNT v. UNITED STATES.

**Courts.**— Scire facias on recognizance in District Court is criminal case in which Circuit Court of Appeals is final, p. 424.

Followed in United States v. McGlashan, 170 U. S. 703, 42 L. 1218, 18 S. Ct. 948.

166 U. S. 427–432, 41 L. 1064, GLADSON v. MINNESOTA.

**Railroads.**— State may regulate speed and stoppage of domestic trains, except when affecting interstate commerce, p. 430.

Approved in Chicago, etc., Ry. v. Solan, 169 U. S. 138, 42 L. 692, 18 S. Ct. 291, upholding law against contracts, exempting carriers from liability; Richmond, etc., R. R. v. Tobacco Co., 169 U. S. 316, 42 L. 761, 18 S. Ct. 337, upholding law making railroads liable for lost goods; State v. Wagener, 77 Minn. 500, 77 Am. St. Rep. 690, 80 N. W. 637, upholding act regulating commission business; Smith v. State, 100 Tenn. 503, 46 S. W. 569, 41 L. R. A. 434, upholding separate coach law.



Digitized by Google

**Railroads.**— Law for stopping trains at county seats is reasonable police regulation, not a deprivation of property, nor interference with commerce or the mails, p. 431.

Approved in Lake Shore, etc., Ry. v. Ohio, 173 U. S. 307, 19 S. Ct. 474 (see dissenting opinion in 173 U. S. 323, 19 S. Ct. 480), upholding law requiring interstate trains to stop at certain stations.

166 U. S. 432–439, 41 L. 1066, IN RE HIEN.

**Court of Appeals of District was duly authorized by acts of 1893, 1894 to limit, by rule, time for appeals from patent commissioner, p. 439.**

Not cited.

166 U. S. 440–462, 41 L. 1069, ABERDEEN BANK v. CHEHALIS CO.

**Supreme Court is bound by State decision, that Washington national bank taxing act, § 21, is to be read with § 23, p. 444.**

Approved in Sioux City R. R. v. North American Trust Co., 173 U. S. 107, 19 S. Ct. 344, following Iowa decisions as to corporate debts beyond charter limit. See 69 Am. St. Rep. 44, note.

**Taxation.**— Washington act of 1891, taxing national bank shares, and requiring bank to pay stockholders' taxes, is valid, p. 444.

Distinguished in Stapylton v. Thaggard, 91 Fed. 95, 62 U. S. App. 643, and Baker v. King Co., 17 Wash. 624, 625, 50 Pac. 481, 482, tax cannot be enforced against receiver of insolvent bank.

**Taxation.**— Money invested in railroads, etc., is not in competition with national banks within R. S., § 5219, forbidding discrimination, p. 460.

Approved in Bank of Commerce v. Seattle, 166 U. S. 463, 41 L. 1079, 17 S. Ct. 996 (see dissenting opinion in 166 U. S. 464), following rule; Merchants' Bank v. Pennsylvania, 167 U. S. 465, 42 L. 238, 17 S. Ct. 831, upholding Pennsylvania act of 1891, respecting taxation of national banks; National Bank v. Chapman, 173 U. S. 214, 219, 19 S. Ct. 410, 413, upholding Ohio tax system; National Bank v. Mayor, etc., 92 Fed. 243, upholding law limiting tax on stock in foreign corporations. See 69 Am. St. Rep. 43, 47, note.

**Taxation.**— Exemption of savings deposits and charities is not discrimination against national banks within R. S., § 5219, p. 461.

See 69 Am. St. Rep. 48, note.

Distinguished in Newport v. Mudgett, 18 Wash. 276, 51 Pac. 467, national bank shares are assessable as credits subject to deduction of debts.

166 U. S. 463–464, 41 L. 1079, BANK OF COMMERCE v. SEATTLE.

**Taxation.**— Bank of Aberdeen v. Chehalis County followed, p. 464.

Approved in National Bank v. Chapman, 173 U. S. 219, 19 S. Ct. 413, upholding Ohio tax system.

Digitized by Google

Distinguished in Newport v. Mudgett, 18 Wash. 276, 51 Pac. 467, bank shares are assessable as credits subject to deduction of debts.

166 U. S. 464–468, 41 L. 1079, AMERICAN PUB. CO. v. FISHER.

**Jury.**— Utah territorial act, allowing verdict by nine jurors, is void by organic act, requiring common-law juries, p. 467.

Approved in Springville v. Thomas, 166 U. S. 708, 41 L. 1173, 17 S. Ct. 718, following rule; Thompson v. Utah, 170 U. S. 346, 42 L. 1065, 18 S. Ct. 621, State cannot decrease number of jurors for trial of offense committed before statehood; Rhyne v. Lipscombe, 122 N. C. 654, 29 S. E. 58, interpreting "Superior Court" in sense which obtained when Constitution adopted.

Distinguished in Bauman v. Ross, 167 U. S. 593, 42 L. 289, 17 S. Ct. 983, compensation for land condemned need not be fixed by jury; Halloway v. Dunham, 170 U. S. 618, 42 L. 1167, 18 S. Ct. 785, instructions are not reviewable unless properly excepted to; Guthrie Nat. Bank v. Guthrie, 173 U. S. 538, 19 S. Ct. 517, and Providence Gold-Min. Co. v. Burke, — Ariz. —, 57 Pac. 642, constitutional right to jury does not extend to proceedings other than common-law actions; Croco v. Oregon, etc., R. R., 18 Utah, 321, 54 Pac. 987, 44 L. R. A. 288, common law as to champerty was modified by statute

**Jury.**— Litigant's right to unanimity of verdict in Utah Territory could not be taken away by legislature, p. 468.

166 U. S. 468–480, 41 L. 1081, UNITED STATES v. AMERICAN TOBACCO CO.

**Insurer** paying insured for unused revenue stamps destroyed by fire, properly sues in insured's name and right, p. 474.

Approved in Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 192, defendant cannot dictate by whom suit shall be brought; Medbury v. United States, 173 U. S. 498, 19 S. Ct. 505, Court of Claims has jurisdiction of claim for excessive payment for land.

**Insurer's** payment to owner does not bar right against one primarily liable; insured becomes insurer's trustee, and there is equitable assignment of his rights, p. 474.

**Internal revenue.**— Affidavit that no claim made against government for burned stamps, is compliance with requirement that affidavit shows that no claim had been presented, p. 476.

**Insurance.**— Owner has insurable interest in unused stamps, though entitled to reimbursement from government for loss, p. 479.

**Estoppel.**— Election of government to pay in stamps for destroyed unused ones, first set up on appeal, is too late, p. 480.

166 U. S. 481–485, 41 L. 1085, IN RE ECKART.

**Habeas corpus.**— Conviction of murder in first degree, without finding by jury as to degree, is error, not jurisdictional defect, p 482.

Digitized by Google

Approved in Humphries v. District of Columbia, 174 U. S. 195, 19 S. Ct. 639, failure to poll jury is mere error; Ex parte Tice, 32 Or. 184, 49 Pac. 1039, where court has jurisdiction, only question is whether process is void.

166 U. S. 485–488, 41 L. 1087, ZADIG v. BALDWIN.

Courts.— Federal question set up only in counsel's brief and argument in State court, is not properly presented, p. 488.

Followed in Ross v. King, 172 U. S. 641, 19 S. Ct. 879.

166 U. S. 489–493, 41 L. 1088, ELETRIC CO. v. DOW.

Estoppel.— Party electing jury trial under act allowing addition of 50 per cent. to verdict, is precluded from questioning act's validity, p. 492.

Not cited.

166 U. S. 493–501, 41 L. 1090, CARTER v. RUDDY.

Public lands.— In general, patent is necessary to transfer legal title to public lands, p. 495.

Approved in Shaw v. Kellogg, 170 U. S. 342, 42 L. 1061, 18 S. Ct. 645, title passes without patent where Congress fails to provide therefor.

Ejectment is not maintainable in Federal court on equitable title, p. 496.

Distinguished in Pokegama Sugar Pine L. Co. v. Klamath Riv., etc., Imp. Co., 96 Fed. 56, lessee ejected for technical forfeiture may sue in equity.

Appeal.— Verdict of jury on facts is not examinable, except to ascertain if sufficient facts to justify verdict, p. 498.

Trial.— Instructions need not be in counsel's language if otherwise fully given, p. 500.

Adverse possession on parcel of tract cut up and treated as distinct lots, does not extend to whole tract, p. 498.

Approved in Turnage v. Kenton, 102 Tenn. 334, 52 S. W. 175, where land was described as single tract; Dennis v. Northern Pac. Ry., 20 Wash. 331, 55 Pac. 213, possession of right of way is notice to purchaser.

166 U. S. 501–506, 41 L. 1093, ALLEN v. CULP.

Patent surrendered to secure reissue, continues valid until reissue, or, as previously, if reissue denied, p. 505.

Approved in McCormick Mach. Co. v. Aultman, 169 U. S. 610, 611, 42 L. 877, 18 S. Ct. 444, 445, denial of reissue for want of novelty does not affect original patent.

Patentee's declaration of patent's invalidity, on application for reissue, is no defense to action on contract, over profits, p. 505.

Digitized by Google

166 U. S. 506–520, 41 L. 1095, FORSYTH v. HAMMOND.

Supreme Court may certiorari Circuit Court of Appeals by act of 1891, where latter's decision otherwise final, and before or after its decision, p. 513.

Approved in Parsons v. Chicago, etc., Ry., 167 U. S. 454, 42 L. 234, 17 S. Ct. 889, arguendo.

Distinguished in Newman v. Gates, 150 Ind. 62, 49 N. E. 827, decision of appellate court, within its jurisdiction, is final.

Supreme Court will certiorari Circuit Court of Appeals sparingly; to avoid conflict of decision or in national matters, p. 514.

Followed in Taylor v. Louisville, etc., R. R., 172 U. S. 648, 19 S. Ct. 887.

Constitutional law.— Question of validity of municipal proceedings to annex contiguous lands, is essentially judicial, p. 517.

Judgments.— Competent court's decision of essential facts, binds parties in subsequent actions, though different in form, p. 518.

Approved in Norton v. San Jose Fruit-Packing Co., 83 Fed. 514, 48 U. S. App. 594, dismissal of infringement bars suit against purchaser of same machine; Columb v. Webster Mfg. Co., 84 Fed. 593, 50 U. S. App. 266, 43 L. R. A. 197, State judgment bars Federal suit alleging additional acts of negligence; Garner v. Second Nat. Bank, 89 Fed. 636, default judgment or dismissal is conclusive.

Courts.— Territorial boundaries of municipality is local question, generally for State courts and authorities, p. 518.

Approved in Williams v. Eggleston, 170 U. S. 310, 42 L. 1049, 18 S. Ct. 619, upholding law apportioning expense of condemned bridge between several municipalities.

Courts.— In general, State court's construction of its laws and Constitution binds Federal courts, p. 518.

Approved in Brown v. New Jersey, 175 U. S. 174, 20 S. Ct. 78, following State decision, upholding struck-jury law; Liverpool, etc., Ins. Co. v. Clunie, 88 Fed. 172, following California decision holding statute unconstitutional; Indianapolis v. Navin, 151 Ind. 158, 51 N. E. 81, 41 L. R. A. 344, reaffirming former construction of State law, notwithstanding subsequent Federal court decision.

Distinguished in Central Trust Co. v. Citizens' St. Ry., 82 Fed. 4, where construction involving contract follows it.

Municipality's boundaries is generally legislative question, but Federal Constitution does not prohibit leaving it to courts, p. 519.

Approved in Board of Commrs. v. Terre Haute, 147 Ind. 135 (see 46 N. E. 350), upholding annexation proceedings in proper statutory form.

166 U. S. 521–532, 41 L. 1101, WASHINGTON, ETC., R. R. v. HICKEY.

Negligent act of horse-car driver in trying to cross before a train is not excused by contributory negligence of railroad employee, p. 527.

Digitized by Google

Distinguished in Stone v. Boston, etc., R. R., 171 Mass. 540, 51 N. E. 3, 41 L. R. A. 797, negligence of railroad in storing oil does not make it liable for negligent firing thereof by stranger.

Appeal.— Question of excessive damages is not open on error, in absence of exception to charge thereon, p. 530.

Pleading.— Variance is immaterial if not misleading and allegation and proof substantially correspond, p. 531.

166 U. S. 533–548, 41 L. 1105, MANSON v. DUNCANSON.

Infants.— Non-resident infant's realty in District of Columbia may be sold through guardian ad litem, without personal service on him, to pay decedent owner's debts, p. 541.

Powers.— Property as to which donee has exercised power of appointment, is subject to his debts, p. 546.

Judgment for sale of decedent's realty for debts by proper court having parties before it, is not collaterally attackable, p. 547.

Not cited.

166 U. S. 548–557, 41 L. 1110, IN RE LENNON.

Habeas corpus cannot be made to discharge functions of writ of error or appeal, p. 552.

Judgments.— Parties may not collaterally question jurisdictional averments in a record except if false as to themselves, p. 553.

Judgments.— Diverse citizenship, appearing on face of record, cannot be attacked collaterally by one not party, p. 553.

Circuit Court has jurisdiction of bill to enforce compliance with commerce act; such is a Federal case, p. 553.

Injunction.— One is amenable to, though not a party, nor served, if he has actual notice, p. 554.

Approved in United States v. Sweeney, 95 Fed. 447, following rule; Nashville, etc., Ry. v. McConnell, 82 Fed. 87, where injunction was against scalping special rate round-trip tickets; American Steel, etc., Co. v. Wire Drawers, etc., Unions, 90 Fed. 605, injunction of leaders of organized strike operates against all concerned; Appleton W.-W. Co. v. Central Trust Co., 93 Fed. 288, preliminary injunction in foreclosure gives exclusive jurisdiction over rem.

Distinguished in United States Playing-Card Co. v. Spalding, 92 Fed. 369, manufacturers of infringing article are bound by injunction only from supplying parties enjoined.

Injunction restraining railroad from refusing cars of another is not attempt to compel performance of personal contract for services, p. 555.

Approved in Pokegama, etc., Lumber Co. v. Klamath River, etc., Imp. Co., 86 Fed. 536, and Fairfield Floral Co. v. Bradbury, 87 Fed. 416, both holding injunction is not mandatory because incidentally compelling affirmative action.

Digitized by Google

**Injunction** is not restricted to restraint of threatened acts, but may require affirmative action, p. 556.

166 U. S. 557-571, 41 L. 1114, CITY RAILWAY v. CITIZENS, ETC., R. R.

**Circuit Court** has jurisdiction of bill claiming exclusive street railway contract and city's attempt to abrogate it, p. 562.

**Constitution.**— Under State law authorizing incorporation of street railway with city's consent, reserve power to alter or repeal is exercisable only by legislature, p. 563.

Approved in Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 694, 42 L. 630, 18 S. Ct. 227, ordinance authorized by State is State law; Indianapolis v. Central Trust Co., 83 Fed. 531, 533, 53 U. S. App. 662, 666, arguendo.

**Equity.**—Bill, in good faith, alleging State has impaired contract, cannot be disposed of on motion to dismiss, p. 564.

Approved in Indianapolis Gas Co. v. Indianapolis, 82 Fed. 245, Nashville, etc., Ry. v. Taylor, 86 Fed. 182, and San Joaquin, etc., Irr. Co. v. Stanislaus Co., 90 Fed. 520, where Federal question appears diverse citizenship is unnecessary; Indianapolis v. Central Trust Co., 83 Fed. 532, 53 U. S. App. 663, appeal, involving validity of statute impairing contract, is to Supreme Court; Michigan Tel. Co. v. Charlotte, 93 Fed. 13, where telephone company claimed ordinance impaired contract rights; California Oil & Gas Co. v. Miller, 96 Fed. 23, Federal question must appear from complaint.

**Corporation** may file bill before approaching expiration of charter, although it may affect its right to decree, p. 564.

**Statute** is presumed prospective; law authorizing control of street railway does not affect existing charter, p. 565.

**Municipality** is estopped from impeaching extension of railway charter, knowing bond issued negotiated in reliance thereon, p. 566.

Distinguished in Cleveland v. Cleveland, etc., Ry., 93 Fed. 130, in determining estoppel, acts must be considered in light of understanding of rights.

**Municipality** gets sufficient consideration for extension of street railway franchise, in road's operation, p. 567.

**Constitution.**— Ordinance offering franchise in consideration of street railway's operation, is unimpeachable after performance, p. 567.

Approved in Indianapolis v. Central Trust Co., 83 Fed. 533, 53 U. S. App. 666, appeal involving validity of statute impairing contract is to Supreme Court; Cleveland City Ry. v. Cleveland, 94 Fed. 395, Federal court may enjoin enforcing of ordinance which impairs contract rights.

Digitized by Google

Distinguished in Wabash R. R. v. Defiance, 167 U. S. 100, 42 L. 93, 17 S. Ct. 752, city's right to control streets overrides prior license.

**Municipal corporations.**— Request for ordinance obviates necessity for its acceptance by benefited party, p. 568.

**Municipal** ordinance may be presumed accepted because beneficial, and because bonds fell due in accord with it, p. 569.

166 U. S. 571-600, 41 L. 1119, MOSES v. UNITED STATES.

**Army** disbursing officer's bond takes effect on day when accepted by government, p. 578.

**Principal and surety.**— Bond rejected by obligee because no seal, returned with proper seals, is presumably with sureties' consent, p. 581.

**Army** disbursing officer may be required to give bond by secretary of war, though no law so provides, p. 586.

**Army.**— Chief signal officer may designate property and disbursing officer, p. 589.

**Army.**— Certificate of non-indebtedness to retiring disbursing officer, will not stand against proof of forged vouchers, p. 594.

Approved in United States v. Zabriskie, 87 Fed. 717, mint refiner is liable for assistant's embezzlement.

**United States.**— Treasury transcripts and certificate of genuineness of attached copies, held sufficient under R. S., § 886, p. 598.

**Army.**— Disbursing officer's account being proved fraudulent, government may restate account, p. 600.

**Principal and surety.**— Judgment against principal is admissible against surety to prove breach, p. 600.

Miscellaneous.— Cited in State v. Broome, 61 N. J. L. 116, 38 Atl. 842, architect employed to supervise public building is not an officer.

166 U. S. 601–606, 41 L. 1130, UNITED STATES v. GREATHOUSE.

**Statutes.**— Repeals by implication are not favored, and effect should be given both laws, if possible, p. 605.

**United States.**— Tucker act of 1887 for suits against government did not repeal R. S., § 1069, respecting period of limitation for persons under disability, p. 605.

Not cited.

166 U. S. 606–616, 41 L. 1132, TEXAS, ETC., RY. v. CODY.

**Removal of case because a Federal one, cannot be had unless plaintiff's statement shows it to be such, p. 609.**

Digitized by Google

Followed in Argonaut Min. Co. v. Kennedy Min., etc., Co., 84 Fed. 2.

Distinguished in Arkansas v. Kansas, etc., Coal Co., 96 Fed. 355, under facts.

Removal cannot be had where defendant sets up Federal defense, but plaintiff no Federal right; error is remedy, p. 609.

Courts.— Plaintiff cannot cut off defendant's right to Federal forum by falsely stating citizenship of parties, p. 609.

Followed in Greer v. Texas, etc., Ry., 17 Tex. Civ. App. 359, 360, 42 S. W. 1040.

Courts.— Suit by or against a Federal corporation is one under Federal law, p. 609.

Followed in Texas, etc., Ry. v. Barrett, 166 U. S. 618, 41 L. 1138, 17 S. Ct. 708, and Texas, etc., Ry. v. Watson, — Tex. Civ. App. —, 43 S. W. 1061.

Distinguished in Hoyt v. Bates, 81 Fed. 645, suit to enforce assignment of copyright fraudulently procured; Chicago, etc., Ry. v. Martin, 59 Kan. 447, 53 Pac. 464, where all defendants did not join in removal petition.

Removal.— Court will judicially notice that defendant is Federal corporation and remove, though plaintiff avers otherwise, p. 610.

Approved in Speckart v. German Nat. Bank, 85 Fed. 16, intervening national bank receiver may remove; In re Stutsman Co., 88 Fed. 342, arguendo.

Railroads.— Rights and duties of railroad and traveller, at crossing, are mutual and reciprocal, p. 613.

Approved in Illinois Cent. R. Co. v. Jones, 95 Fed. 379, whether driver should have stopped where view of track was obstructed is for jury; Norton v. North Carolina R. R., 122 N. C. 932, 29 S. E. 893, railroad's right of way is conditioned on care.

Appeal.— Omission of instructions on measure of damages is not error, if not requested, and those given, correct, p. 616.

166 U. S. 617-620, 41 L. 1136, TEXAS, ETC., RY. v. BARRETT.

Removal petition alleging that defendant company is chartered by Congress, is sufficient, p. 618.

Approved in Greer v. Texas, etc., Ry., 17 Tex. Civ. App. 360, 42 S. W. 1040, though complaint allege defendant chartered by State.

Railroad must use ordinary care to furnish safe machinery to employees, p. 618.

Master.— Defect in boiler being known to railroad employees required to repair same, their negligence is imputable to company in suit for injury to employee by explosion, p. 619.

Digitized by Google

Approved in New York, etc., R. Co. v. O'Leary, 93 Fed. 741, neglect of agent as to safety of machinery is neglect of principal.

Negligence.— What is ordinary care, defined, p. 619.

Approved in Heckman v. Evenson, 7 N. Dak. 178, 73 N. W. 429, where reasonable men might differ, question is for jury.

Master.— Employee suing for injury by boiler explosion, has burden of proving it due to claimed defects, p. 619.

Approved in The Anaces, 87 Fed. 569, and Flippin v. Kimball, 87 Fed. 260, 59 U. S. App. 7, proof of fellow-servant's negligence is insufficient.

166 U. S. 620–637, 41 L. 1139, NORTHERN PAC. R. R. v. SANDERS.

Public lands.— Filings on land of disputed nature, as mineral, are "claims" within exceptions from Northern Pacific land grant of 1864, though now proven to be non-mineral, p. 630.

Approved in Menotte v. Dillon, 167 U. S. 720, 42 L. 339, 17 S. Ct. 951, construing railroad grants of 1862, 1864; Northern Pac. R. R. v. Musser, etc., Mfg. Co., 168 U. S. 609, 42 L. 598, 18 S. Ct. 207, withdrawal under State grant excluded lands from Northern Pacific grant; George v. Riddle, 94 Fed. 692, 693, where department wrongfully cancelled prior entry; Northern Pac. Ry. v. McCormick, 94 Fed. 937, 940, 942 (see dissenting opinion in 94 Fed. 944, affirming S. C., 89 Fed. 662), right of pre-emption continues till filing of route map; Moore v. Cormode, 20 Wash. 313, 55 Pac. 219, pre-emption rights continue till actual selection by railroad.

Distinguished in Northern Pac. Ry. v. De Lacey, 174 U. S. 635, 19 S. Ct. 796, where claim had expired for failure to make proof.

166 U. S. 637–648, 41 L. 1145, WHITNEY v. FOX.

Appeal.— Exclusion of deposition is not reversible error where not in record, to show it prejudicial, p. 645.

Statute is usually given interpretation adopted in country of its original enactment, p. 647.

Supreme Court will follow Utah court on Utah statute, though State where originally enacted holds contra, p. 647.

Equity will sometimes refuse relief in shorter time than statute prescribes if delay unexplained and prejudicial, p. 647.

Approved in Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 697, 42 L. 631, 18 S. Ct. 228, or where rights of third parties have intervened.

Distinguished in Wabash Ry. v. Lumley, 96 Fed. 774, reforming release, notwithstanding delay where reasonable excuse exists.

166 U. S. 648, 41 L. 1149, WOOD v. FOX.

Adjudged in conformity with Whitney v. Fox, supra, q. v.

Digitized by Google

166 U. S. 648–660, 41 L. 1149, OXLEY STAVE CO. v. BUTLER CO.

Supreme Court cannot review State decision denying Federal right, unless it was set up or claimed, p. 653.

Approved in Louisville, etc., R. R. v. Louisville, 166 U. S. 715, 41 L. 1175, 17 S. Ct. 727, Levy v. Superior Court, 167 U. S. 177, 42 L. 127, 17 S. Ct. 770, Muse v. Arlington Hotel Co., 168 U. S. 435, 42 L. 533, 18 S. Ct. 111, Baldwin v. County Commrs., 168 U. S. 705, 42 L. 1213, 18 S. Ct. 939, Chappell v. Stewart, 169 U. S. 733, 42 L. 1215, 18 S. Ct. 940, Fenwick Hall Co. v. Old Saybrook, 169 U. S. 734, 42 L. 1215, 18 S. Ct. 942, Kipley v. Illinois, 170 U. S. 187, 42 L. 1001, 18 S. Ct. 551, Tompkins v. Cooper, 170 U. S. 703, 42 L. 1217, 18 S. Ct. 947, Ross v. King, 172 U. S. 641, 19 S. Ct. 879, and German Ins. Co. v. First Nat. Bank, 173 U. S. 702, 19 S. Ct. 876, all following rule; Green Bay, etc., Canal Co. v. Patten Paper Co., 172 U. S. 67, 19 S. Ct. 100, form of words is not material; Dewey v. Des Moines, 173 U. S. 198, 19 S. Ct. 381, Citizens' Sav. Bank v. Owensboro, 173 U. S. 643, 19 S. Ct. 533, and Keokuk, etc., Bridge Co. v. Illinois, 175 U. S. 634, 20 S. Ct. 208, refusing to consider constitutional questions not raised below; Allen v. Portland, 35 Or. 457, 58 Pac. 520, Vaughn v. Wabash R. R., 145 Mo. 61, 46 S. W. 954, and James v. Mut. Reserve Fund L. Assn., 148 Mo. 19, 49 S. W. 982, constitutional points must be raised in trial court; Ash v. Independence, 145 Mo. 125, 46 S. W. 750, and must be specific.

Distinguished in Columbia Water-Power Co. v. Columbia Elec., etc., Power Co., 172 U. S. 488, 19 S. Ct. 252, where Federal question appears on record and is necessarily involved.

Courts.— R. S., § 709, requires that party declare in terms his reliance on Federal treaty, law, etc., p. 655.

Approved in Mutual L. Ins. Co. v. Kirchoff, 169 U. S. 110, 42 L. 680, 18 S. Ct. 262, Federal question must be specially set up; Allen v. Portland, 35 Or. 460, 58 Pac. 521, precise words are not material.

Courts.— Allegation that State decree was against person who had no notice does not specially set up a Federal right, p. 660.

Approved in Mutual L. Ins. Co. v. Kirchoff, 169 U. S. 110, 42 L. 680, 18 S. Ct. 262, Federal question must be specially set up; Bump v. Butler Co., 93 Fed. 298, upholding decree based on service of surviving trustee.

166 U. S. 661–672, 41 L. 1154, IN RE CHAPMAN.

Statute should receive sensible construction, if possible, avoiding unjust or absurd conclusion, p. 667.

United States.— R. S., §§ 102 and 104, were enacted to enforce attendance of witnesses before Congress, and are valid, p. 667.

United States.— Congress may pass law to enforce attendance of witnesses and compel disclosure of facts, p. 671.

Digitized by Google

Approved in In re Davis, 58 Kan. 380, 49 Pac. 163, legislative committee, investigating bribery, may sit after legislature adjourns.

United States.— Law making witnesses' refusal to answer a misdemeanor, does not subject to double jeopardy, notwithstanding inherent power to punish for contempt, p. 672.

Miscellaneous.— Cited in In re Huntley, 85 Fed. 889, 56 U. S. App. 610, certified copies of records are sufficient in habeas corpus.

166 U. S. 673–685, 41 L. 1160, BALTIMORE v. BALTIMORE TRUST, ETC., CO.

Municipality's direction to street railroad to maintain single instead of double track, impairs no contract, and is valid exercise of police power, p. 681.

Approved in Wabash R. R. v. Defiance, 167 U. S. 98, 42 L. 92, 17 S. Ct. 752, where, after railroad erected bridges, city changed grade of street crossing.

Municipality's power of regulating streets is not exhausted by one exercise, but continues, p. 685.

166 U. S. 685–697, 41 L. 1165, LONG ISLAND WATER, ETC., CO. v. BROOKLYN.

Courts.— State decision is final on mere State procedure or questions of validity under State Constitution, p. 688.

Approved in Backus v. Fort Street, etc., Depot Co., 169 U. S. 566, 42 L. 858, 18 S. Ct. 449, and Sutherland, etc., Co. v. Evart, 86 Fed. 599, following rule; Merchants' Bank v. Pennsylvania, 167 U. S. 463, 42 L. 237, 17 S. Ct. 830, where Pennsylvania court upheld national bank tax law under State Constitution; Chappell Chem. Co. v. Sulphur Mines Co., 172 U. S. 471, 19 S. Ct. 268, State decision resting upon other than Federal ground is not reviewable; Indianapolis v. Navin, 151 Ind. 158, 51 N. E. 81, 41 L. R. A. 344, following former State, as against intervening Federal construction.

Municipality may take by eminent domain water-supply system, paying just compensation; it impairs no contract, p. 689.

Distinguished in Norwood v. Baker, 172 U. S. 277, 19 S. Ct. 190, restraining exaction of local improvement tax substantially exceeding benefit.

Eminent domain.— Taking of a contract by condemnation does not terminate it, but appropriates it to public use, p. 691.

Eminent domain.— Taking for public use does not necessitate property's future use without charge, p. 694.

Constitution.— Due process does not require damages assessed on condemnation proceedings to be by jury, p. 695.

Followed in Bauman v. Ross, 167 U. S. 593, 42 L. 289, 17 S. Ct. 982.

Digitized by Google

**Constitution.**— Making facts found by triers of fact, conclusive, leaving to court only errors, is due process, p. 695.

Approved in North Springs Water Co. v. Tacoma, 21 Wash. 529, 58 Pac. 777, grant of franchise to water company does not prevent city from competing.

166 U. S. 698–706, 41 L. 1169, SENTELL v. NEW ORLEANS, ETC., R. R.

**Animals.**— In general, dogs are property; action will lie for their conversion; but they are not subject of larceny, p. 700.

Approved in Salley v. Manchester, etc., R. R., 54 S. C. 483, 71 Am. St. Rep. 811, 32 S. E. 526, following rule; Jones v. Illinois, etc., R. R., 75 Miss. 973, 23 So. 358, where dog was killed by train running at prohibited speed. See 67 Am. St. Rep. 289, 291, 292, note.

**Animals.**— Though dogs are property, they are subject to State police power, and may be destroyed thereunder, p. 704.

Approved in Hamby v. Samson, 105 Iowa, 113, 67 Am. St. Rep. 286, 74 N. W. 919, 40 L. R. A. 514, dog is subject of larceny; Hagerstown v. Witmer, 86 Md. 301, 37 Atl. 966, 39 L. R. A. 663, and n., upholding ordinance for impounding, and, unless redeemed, killing dogs found at large. See 67 Am. St. Rep. 290, note.

**Animals.**— Law that only dogs on assessment-rolls shall have legal protection, and only owners of such may recover for their unlawful killing, is within police power, p. 706.

Approved in Hagerstown v. Witmer, 86 Md. 302, 37 Atl. 967, 39 L. R. A. 665, and n., upholding ordinance for killing dogs running at large, unless redeemed. See 67 Am. St. Rep. 298, note.

166 U. S. 707–709, 41 L. 1172, SPRINGVILLE v. THOMAS.

**Jury.**— Utah territorial act allowing verdict by only nine jurors, is contrary to seventh amendment, p. 708.

Approved in Thompson v. Utah, 170 U. S. 346, 42 L. 1065, 18 S. Ct. 621, constitutional jury rights extend to territories.

Distinguished in Bauman v. Ross, 167 U. S. 593, 42 L. 289, 17 S. Ct. 983, compensation for condemned land need not be fixed by jury; Holloway v. Dunham, 170 U. S. 618, 42 L. 1167, 18 S. Ct. 785, due exception must be taken to erroneous instructions; Guthrie Nat. Bank v. Guthrie, 173 U. S. 538, 19 S. Ct. 517, jury is not essential to statutory proceeding against municipal corporation.

166 U. S. 709–716, 41 L. 1173, LOUISVILLE, ETC., R. R. v. LOUISVILLE.

**Courts.**— Federal right claimed only on motion to set aside judgment and in oral argument is not sufficiently raised, p. 715.

Approved in German Ins. Co. v. First Nat. Bank, 173 U. S. 702, 19 S. Ct. 876, following rule; Levy v. Superior Court, 167 U. S. 178,

Digitized by Google

42 L. 127, 17 S. Ct. 770, jurisdiction to re-examine must not be merely inferential; Citizens' Sav. Bank v. Owensboro, 173 U. S. 643, 19 S. Ct. 533, declining to consider Federal questions not raised below; Allen v. Portland, 35 Or. 460, 58 Pac. 521, city council's jurisdiction to order improvements depends on number of petitioners.

166 U. S. 720, 41 L. 1187, VON SCHMIDT v. BOWERS.

Cited in Bowers v. San Francisco Bridge Co., 91 Fed. 401, for facts.

166 U. S. 722, 41 L. 1188, ANGLO-CALIFORNIAN BANK v. SECRETARY.

Cited in Anglo-Californian Bank v. United States, 175 U. S. 38, 20 S. Ct. 19, for facts.

Digitized by Google

Digitized by Google

Digitized by Google

# GENERAL INDEX

TO THE

# FOUR VOLUMES CONTAINED IN THIS BOOK,

## 163, 164, 165, 166.

OCTOBER TERMS, 1895, 1896.

---


**ABATEMENT.** See ACTION OR SUIT, 7.

**ACCOUNT.** See EVIDENCE, 20, 21.

**ACTION OR SUIT.**

1. A bill by the United States for the dissolution of an unlawful combination of carriers in violation of the act of Congress of July 2, 1890, and for an injunction against continuing such a combination, is authorized by § 4 of that act. *United States* v. *Trans-Missouri Freight Asso.* 1007

2. A citizen whose property imported is seized by officials under an unconstitutional statute cannot proceed for an injunction on behalf of other persons who may make similar importations. *Scott* v. *Donald*, 648

3. Legatees need not be joined in a suit by daughters who are also executrices, although they do not sue as such but bring suit in their own right, to establish an indebtedness of the estate to them. *Glover* v. *Patten*, 760

4. A decree declaring ordinances granting franchises or privileges to be null and void will not be made if none of the persons for whose benefit the ordinances were passed are made parties. *New Orleans Waterworks Co.* v. *New Orleans*, 518

5. The rights of the principal parties to a suit to enforce a resulting trust in land are not affected by the joinder of one named as trustee to whom they had made conveyances merely to enable him to bring suit, and who had brought a suit which was voluntarily dismissed before the present bill was filed. *Hopkins* v. *Grimshaw*, 739

6. A child who because of infancy was not a party to a document settling and adjusting an indebtedness of a mother as guardian to her children, but who ratified it after maturity, may be joined as a party in an action to charge the mother's estate with the indebtedness thereby acknowledged. *Glover* v. *Patten*, 760

7. A suit against a Secretary of the Interior seeking a mandatory injunction abates by his resignation of the office. *Warner Valley Stock Co.* v. *Smith*, 621

8. A bill against the Secretary of the Interior and Commissioner of the General Land Office, which aims to control the action of the secretary and asks merely incidental relief against the Commissioner, cannot be maintained against the latter after the Secretary's resignation. *Id.*

9. The successor in office cannot be substituted as defendant for a Secretary of the Interior who resigns his office while a bill is pending against him for a mandatory injunction against exercising further jurisdiction over certain lands, and to compel him to issue a patent therefor. *Id.*

10. A petition in general terms for removal of a cause to a Federal court, without specifying and restricting the purpose of the defendant's appearance in the state court, cannot be considered, like a general appearance, as a waiver of any objection to the jurisdiction of the court over the person of the defendant. *Wabash W. R. Co.* v. *Brow*, 431; *National Acci. Soc.* v. *Spiro*, 435

11. Reinstatement of a bill voluntarily dismissed will not be allowed unless surprise or mistake is shown. *Willard* v. *Wood*, 531

**ACT OF GOD.** See EVIDENCE, 7, 55.

**ADMIRALTY.** See also APPEAL AND ERROR, 1.

1. A court of admiralty has jurisdiction of a libel against a domestic corporation by a foreign corporation for damage to a vessel in a foreign port while entering a pier, by a dangerous obstruction under water. *Panama R. Co.* v. *Napier Shipping Co.* 1004

2. The release on a bond of a vessel charged with liability to forfeiture under U. S. Rev. Stat. § 5283, before answer or hearing and against the objection of the United States, when this may result in a hostile expedition against a friendly power, should not be allowed; and if such an order of release is improvidently made, the vessel should be recalled. *United States* v. *The Three Friends*, 897

**ADVANCEMENT.** See EVIDENCE, 14; EXECUTORS AND ADMINISTRATORS.

**ADVERSE POSSESSION.**

1. Adverse possession of land under a deed from a person who was entitled to a patent




Digitized by Google

may begin, as against other persons claiming under the same grant, before the patent is actually issued. *Dibble* v. *Bellingham Bay Land Co.* 72

2. Color of title is not essential to a claim of adverse possession in Washington. *Id.*

3. Constructive possession of a half block of land which is cut up into separate and distinct blocks and so marked upon the ground, and which are held and treated as distinct tracts, is not shown by actual possession of some of the lots. *Carter* v. *Ruddy*, 1090

**AFFIDAVIT.** See APPEAL AND ERROR, 56.

**ALASKA.** See APPEAL AND ERROR, 21.

**ALIENS.** See also CLERK, 2; CONTRACT LABOR.

1. Imprisonment of Chinese persons at hard labor under the act of Congress of May 5, 1892, ordered by judgment of a commissioner without trial by jury, is in violation of the constitutional provisions as to presentment or indictment of a grand jury in case of an infamous crime, and as to due process of law. *Wong Wing* v. *United States*, 140

2. Aliens within the territory of the United States are entitled to the protection of the 5th and 6th Amendments of the Federal Constitution regulating procedure in criminal cases. *Id.*

**ANIMALS.** See CONSTITUTIONAL LAW, 35; EVIDENCE, 27-29.

**ANTI-TRUST.** See CONSPIRACY.

**APPEAL AND ERROR.**

I. APPELLATE JURISDICTION IN GENERAL.

II. JURISDICTION.
- a. *Over Federal Courts.*
- b. *Over Courts of Territory or District of Columbia.*
- c. *Over State Courts.*

III. TRANSFER OF CAUSE.

IV. RECORD AND CASE ON APPEAL.

V. EXCEPTIONS; MODE OF RAISING QUESTIONS.

VI. DISMISSAL.

VII. HEARING AND DETERMINATION.
- a. *In General.*
- b. *Objections Waived or Cured Below.*
- c. *Objections First Raised on Appeal.*
- d. *Decisions on Facts.*
- e. *Discretionary Rulings.*
- f. *What Errors Warrant Reversal.*

VIII. JUDGMENT AND ITS EFFECT.

IX. REHEARING.

See also CASES CERTIFIED; CONSTITUTIONAL LAW, 4; MANDAMUS.

I. APPELLATE JURISDICTION IN GENERAL.

1. A decree ordering the dismissal of a libel if not amended within ten days is final for the purpose of an appeal by the libellant within that time, as the appeal is an election to waive the right to amend. *United States* v. *The Three Friends*, 897

2. A so called court order made upon a return to a writ of habeas corpus granted by a judge and returnable before him does not constitute a final judgment or decree in a suit in the highest court of a state in which a decision can be had which may be reviewed on writ of error from the Supreme Court of the United States to a state court, under U. S. Rev. Stat. § 709. *Clarke* v. *McDade*, 673

3. An appeal from an interlocutory decree of the circuit court granting an injunction and ordering an account in a patent case under the act of Congress of 1891, § 7, may be taken from the whole of such interlocutory order or decree and not merely from that part which grants or continues an injunction, and thereupon the circuit court of appeals may consider and decide the case upon its merits, and, if it decides for the defendant, may render or direct a final decree dismissing the bill. *Smith* v. *Vulcan Iron Works*, 810

4. An appeal cannot be taken from the finding of the court of claims under the act of Congress of August 23, 1894, upon the subsidiary question as to the particular person to whom the appropriation made by the act of March 3, 1891, for payment of French spoliation claims, should be paid, as these acts, construed with the act of 1885, referring such claims to the court of claims for merely advisory finding, clearly show that such an appeal was not within the intent of Congress. *United States* v. *Gilliat*, 344

5. The dissolution of an association of common carriers after a decree dismissing a bill seeking such dissolution and asking for an injunction against the continuance of the carriers in such association or in any like combination and against their further conspiring, agreeing, combining, or acting together to maintain rates of freight, will not preclude the maintenance of an appeal,—especially when the defendants claim that their agreement is perfectly proper and in fact necessary, and they immediately, on dissolving such association, enter into another of similar character. *United States* v. *Trans-Missouri Freight Asso.* 1007

II. JURISDICTION.

a. *Over Federal Courts.*

6. The judgment of the circuit court of appeals in a case in which the jurisdiction of the circuit court was originally invoked solely upon the ground of citizenship is final, even if another ground were developed in the course of the proceeding. *Ex parte Jones*, 601

7. Jurisdiction depends entirely upon citizenship of the parties, so that the decision of the circuit court of appeals is final and not subject to review by the supreme court when the complaint in a Federal court showing that the parties are citizens of different states does not claim or in any way mention the Constitution or laws of the United States, and plaintiff at the trial relies wholly upon the common-law right, although the defendant invokes the Fed-



Digitized by Google

ral Constitution and laws. *Press Pub. Co. v. Monroe*, 367

8. An appeal to the Supreme Court of the United States from the circuit court on the ground that the jurisdiction of the circuit court is in question cannot be maintained when no such question is certified and the appellant has taken an appeal upon the whole case to the circuit court of appeals, although the case involved the construction of a treaty and the constitutionality of an act of Congress, and may be taken to the supreme court upon certiorari after decision in the circuit court of appeals. *Robinson* v. *Caldwell*, 745

9. An appeal from a decree by a circuit court of the United States affirming its own prior decree in obedience to a mandate, with the declaration that the decree of the circuit court of appeals is made the final decree of that court, cannot be deemed an appeal from the circuit court of appeals for the purpose of the jurisdiction of the supreme court. *Webster* v. *Daly*, 111

10. The dismissal of a bill on demurrer for want of equity, holding that in a former suit a person was sufficiently made a party to bind him by the decree in his individual as well as in his representative capacity, cannot be the subject of appeal on the ground that it denied due process of law, if the question of constitutional right was not presented in the lower court. *Cornell* v. *Green*, 76

11. A writ of scire facias upon a forfeited recognizance to secure the appearance of a person to answer a charge of embezzlement is a case "arising under the criminal laws," of which the jurisdiction of the circuit court of appeals is made final by the act of Congress of March 3, 1891, chap. 517. *Hunt* v. *United States*, 1063

**Amount in dispute.**

12. A decree by a circuit court of appeals affirming a decree of a circuit court without specifying the sum for which it is rendered is final for the purposes of a writ of error. *Texas & P. R. Co.* v. *Gentry*, 186

13. A stipulation between the parties, while not controlling as to the amount in controversy on appeal, may be regarded in a particular case with other facts appearing in the record as sufficient proof of the amount in controversy to sustain the jurisdiction of the court. *United States* v. *Trans-Missouri Freight Asso.* 1007

14. The amount involved on an appeal exceeds $1,000 where the bill seeks a dissolution of an association of common carriers for the regulation of rates, when those rates exceed $1,000, per day, and the carriers claim that such an association or something similar thereto is necessary to the prosperity, if not the life, of each company. *Id.*

15. The matter in controversy on a contest of the discharge of a bankrupt does not make a case for an appeal to the Supreme Court of the United States on the ground that it exceeds $1,000,—especially where there is no proof of the value of the certificate of discharge, although the creditor who contests the discharge has a claim of more than $5,000. *Huntington* v. *Saunders*, 174

16. The taxes for several parishes cannot be added together to make the jurisdictional amount in a suit in the United States circuit court to enjoin sheriffs of several parishes from enforcing payment of taxes. *Citizens' Bank* v. *Cannon*, 451

17. A conjecture that taxes of other years were for amounts similar to the amount proved for a single year cannot be made to support the jurisdiction of the circuit court of the United States in an action for an injunction against a tax. *Id.*

18. A judgment by a Federal circuit court in an action for death under the Texas statutes, although the recovery is by the jury apportioned among different persons, is not separate and distinct in favor of each of them, but is an entirety for the purpose of determining the amount in controversy for review by the supreme court. *Texas & P. R. Co.* v. *Gentry*, 186

b. *Over Courts of Territory or District of Columbia.*

19. The decision of a territorial court sustaining a territorial statute providing for verdicts by less than the whole number of jurors, on the ground that the organic act of the territory gave the legislature unlimited legislative power, as against the contention that the act of Congress as thus interpreted was in violation of the 7th amendment, is subject to review by the Supreme Court of the United States as involving the validity of an act of Congress. *Springville City* v. *Thomas*, 1173

20. The liability for $5,000 of each of several subscribers to stock of a corporation cannot give jurisdiction on appeal to the Supreme Court of the United States from a territorial court, although they contend that their subscriptions were paid with joint property. *Wilson* v. *Kiesel*, 422

21. The district court of Alaska is one of the "supreme courts of the several territories," within the meaning of the act of Congress of March 3, 1891, § 15, providing for appeals to the circuit court of appeals; but it is not one of the district or circuit courts within the meaning of that act. *The Coquitlam* v. *United States*. 184

22. An appeal in a criminal case cannot be taken to the Supreme Court of the United States from the court of appeals for the District of Columbia under the act of Congress of February 9, 1893, providing for appeals when the matter in dispute exceeds $5,000, and, irrespective of the amount in dispute, when the validity of a patent, copyright, treaty, or statute of or authority exercised by the United States is involved. *Chapman* v. *United States*. 504

23. The right to appeal in a habeas corpus case involving the question of personal freedom, which is given by U. S. Rev. Stat. § 1909, in cases decided by territorial courts, is not repealed by the act of March 3, 1885, chap. 355, regulating appeals from courts of the territories and of the District of Columbia. *Gonzales y Borrego* v. *Cunningham*, 572

24. A decision of the court of appeals of the District of Columbia as to the custody and care of children, in a controversy between their mother and testamentary guardian, cannot be



Digitized by Google

reviewed by the Supreme Court of the United States, as the matter in dispute is incapable of being reduced to a pecuniary standard of value. *Perrine* v. *Slack*, 510

c. *Over State Courts.*

25. A circuit court of the United States cannot interfere with the granting of writs of error from the Supreme Court of the United States, either by restraining the parties from applying therefor or by directing the dismissal of such writs after they have been granted. *Ex parte Chetwood*, 782

26. A judgment of an inferior state court which is the highest court of the state in which a decision can be had because a writ of error has been denied by the supreme court of the state can be reviewed, if it involves a Federal question, by writ of error from the Supreme Court of the United States. *Bacon* v. *Texas*, 182

27. A case disposed of by a state court as to all the parties on a ground common to all upon two appeals, one taken by the plaintiff and the other by a portion only of the defendants, will not be considered by the Supreme Court of the United States on appeal by the plaintiff only, to which the defendants who made the other appeal are not parties. *Wilson* v. *Kiesel*, 422

**Federal questions.**

28. A Federal question involved in a decision of a state court will not be looked into by the Supreme Court of the United States, if there is another independent ground of the decision by the state court upon which its judgment can rest. *Bacon* v. *Texas*, 182

29. The erroneous decision of a Federal question by a state court will not give jurisdiction to the Supreme Court of the United States, if questions of fact adequate to determine the controversy, and broad enough to maintain the judgment independent of any Federal question, were decided. *Egan* v. *Hart*, 680

30. A decision by a state court that a party who has elected to have damages assessed by a jury is precluded from contesting the validity of a provision of the statute for the addition of 50 per cent to the verdict is not subject to review by the Supreme Court of the United States, as it is not based on any Federal question. *Electric Co.* v. *Dow*, 1088

31. The question whether private property has been taken for any other than a public use is a Federal question, notwithstanding the absence of any prohibition in the Federal Constitution which is applicable to the state authority against taking property for any but a public use, when the taking for any other use is alleged to be a deprivation of property without due process of law. *Fallbrook Irrig. Dist.* v. *Bradley*, 369

32. A denial by a state court of the effect claimed for an equitable title apparently conveyed by proceedings in the United States land office presents a Federal question. *Huseman* v. *Durham*, 664

33. A decision sustaining plaintiff's claim in ejectment based upon a patent of the United States for a mining claim does not present any Federal question, when the defenses were based solely upon an estoppel *in pais* and a statute of limitations. *Carothers* v. *Mayer*, 453

34. A Federal question presented by an unsuccessful claim of title under a congressional land grant is not made ineffectual as the basis of a writ of error by the fact that the answer also sets up certain proceedings in the land department, the decision of which was adverse and has not been set aside, when this was set up merely by way of answer to plaintiff's claim that such decision was controlling in his favor. *Northern P. R. Co.* v. *Colburn*, 479

35. The validity of subscriptions by a county court to the stock of a railroad company, and of a conveyance to that company, and the matter of fraud in a decree, are questions of local law or practice on which the judgment of a state court cannot be re-examined by the Supreme Court of the United States. *F. G. Oxley Stave Co.* v. *Butler County*, 1149

36. A decision by a state court as to the rights of a national bank as to interest under a state statute, which merely determines the meaning of the state law as applied to all creditors, without denying equality of right to the bank, does not present a Federal question. *Union Nat. Bank* v. *Louisville, N. A. & C. R. Co.* 177

37. A decision by the highest court of a state against the validity of a lease made by a national banking association which is not yet authorized to commence business, but which has made and filed its articles of association, is subject to review by writ of error from the Supreme Court of the United States, when the lessor specially set up and claimed a right to recover on the lease under U. S. Rev. Stat. § 5136, on the ground that the lease was within the exception of incidental and preliminary business, and also that the prohibition of business by that section did not make prohibited contracts invalid as between the parties. *McCormick* v. *Market Nat. Bank*, 817

38. The statement in the opinion of a state court, that holders of stock in a bank issued after the state Constitution prohibited exemptions from taxes would be entitled to the exemption given by the bank charter if the holders of older stock could claim it, while the court actually decides that the exemption applies only to the bank's capital stock, and not to the holders of any shares, is not such a determination in favor of the holders of new shares as to preclude a review of the decision as to them by the Supreme Court of the United States on reversing the decision against the holders of the old shares and establishing their right to the exemption, or prevent the affirmance of the decision against the holders of new shares if that is right, although it is upheld for a different reason than that which controlled the state court. *Bank of Commerce* v. *Tennessee, Memphis*, 311

39. A decision of a state court in favor of the validity of an order made by the board of directors of an irrigation district for the issue of bonds which is rendered on a petition by the board under Cal. act March 16, 1889, in a proceeding substantially *ex parte*, although one



Digitized by Google

resident of the district appeared and filed an answer unsuccessfully and set up a claim of right under the United States Constitution, will not sustain a writ of error from the United States Supreme Court, since the adjudication is merely of the right to make a contract, which is a purely moot question unless the board shall see fit to exercise such right, and the proceeding is after all nothing but one to secure evidence. *Tregea* v. *Modesto Irrig. Dist.* 395

40. A change of view by a state court in regard to the proper construction of a state statute, even if its former holding had become a rule of property, cannot constitute a Federal question as to the impairment of the obligation of a contract, for which a writ of error will lie from the Supreme Court of the United States to a state court. *Bacon* v. *Texas*, 182

41. The decision by a state court that an alleged contract never existed because of the want of a compliance with a state statute, whereupon judgment is given wholly without reference to a subsequent statute which is alleged to have impaired the obligation of the contract, does not involve a Federal question. *Id.*

42. An alleged conflict between proceedings confirmed by a state court and rights claimed unsuccessfully under the Constitution of the United States, including the contention that a party is deprived of property without due process of law, presents a Federal question. *Tregea* v. *Modesto Irrig. Dist.* 395

43. The claim that a state statute imposing a license tax is void because not sufficiently determinate, definite, and certain in its character, does not involve a Federal question for review by the Supreme Court of the United States on writ of error to a state court. *Osborne* v. *Florida*, 586

**When and how claimed.**

44. The claim of a Federal right comes too late when set up for the first time after final decision of the case by the supreme court of a state, and then by petition for rehearing, which is overruled without any determination or allusion to the alleged Federal question. *Pim* v. *St. Louis*, 714

45. A definite issue as to the validity of a statute or the possession of a right must be distinctly deducible from the record before a state court can be held to have disposed of a Federal question by its decision. *Louisville & N. R. Co.* v. *Louisville*, 1178

46. Averments to present a Federal question which will give jurisdiction to the Supreme Court of the United States to re-examine the final judgment of a state court must be so distinct and positive as to place it beyond question that the party bringing the case from the state court intended to assert a Federal right. *F. G. Oxley Stave Co.* v. *Butler County*, 1149

47. An allegation that a statute as construed by the court is in violation of the Constitutions of the state and of the United States, made in a motion to set aside a judgment on an agreed case which presents no issue as to the validity of the statute, is not sufficient to present a Federal question on the theory that as the proper construction of the statute has been definitely settled it can be seen that the statute, as thus construed, impairs the obligation of a contract created by a charter not mentioned in the agreed case, and that it denies the equal protection of the laws. *Louisville & N. R. Co.* v. *Louisville*, 1173

48. A claim for the rescission of a contract for the exchange of an invention for a stock of merchandise, which is denied by a state court on the ground that allegations of fraud and of the entire worthlessness of the invention are not established, and where the plaintiff does not specially set up and claim at the proper time and in the proper way any right under the laws of the United States, or that any such right was denied him by the decision of the state court, does not present any ground for a writ of error from the Supreme Court of the United States to a state court. *Wade* v. *Lauder*, 851

49. A constitutional right is not "specially set up or claimed" in an eminent domain case under U. S. Rev. Stat. § 709, so as to give jurisdiction to review the decision of a state court in the Supreme Court of the United States, when the assignments of error in the state court do not refer in any way to the Federal Constitution, but merely assert error in finding that the party "was not entitled to any compensation," that compensation "was not more than $1," and in other forms complained of the amount of damages, and the state court made no reference to the Federal Constitution. *Chicago & N. W. R. Co.* v. *Chicago*, 511

50. The general allegation or claim that a decree was passed against some persons who were at the time dead, and against others who were necessary parties, but who had no notice of the proceedings, does not, within the meaning of U. S. Rev. Stat. § 709, specially set up a right or immunity under the 14th Amendment of the Constitution of the United States, forbidding a state to deprive any person of his property without due process of law. *F. G. Oxley Stave Co.* v. *Butler County*, 1149

51. A Federal question is sufficiently set up and denied when distinctly asserted by the defendant in a written motion to set aside the verdict and grant a new trial in a condemnation case in which no provision is made for filing an answer, but is denied by the overruling of the motion and is again asserted in an assignment of errors filed in the supreme court, but necessarily denied by that court in its decision, although the opinion does not expressly refer to the Federal question. *Chicago, B. & Q. R. Co.* v. *Chicago*, 979

52. The decision of a state court as to the sufficiency of allegations to present an issue of a right or privilege claimed under the Constitution and laws of the United States is not conclusive upon the Supreme Court of the United States. *Covington & L. Turnp. Road Co.* v. *Sandford*, 560

III. TRANSFER OF CAUSE.

53. A rule limiting the time for an appeal may be made applicable to a case already decided, since the right of appeal is not a vested right that may not be altered by statute or by rule of court made under statutory authority. *Re Hien*, 1068



Digitized by Google

54. The two years' limitation under U. S. Rev. Stat. § 4894, prescribed for the prosecution of applications for patents, has no relation to the limitation on appeals under § 4911. *Id.*

55. Authority to regulate the time for taking appeals from the commissioner of patents is given to the court of appeals of the District of Columbia by § 6 of the act creating the court (26 Stat. at L. 434, chap. 74), as well as by § 6 as amended by the act of July 30, 1894. *Id.*

### IV. RECORD AND CASE ON APPEAL.

56. An affidavit filed with the clerk, but not incorporated in any bill of exceptions, cannot bring into the record evidence of what took place on the trial. *Nelson* v. *Flint*, 1002

57. The opinion of a lower court cannot be referred to for the purpose of eking out, controlling, or modifying the scope of its findings. *Stone* v. *United States*, 477

58. The opinion of the supreme court of Louisiana is to be treated as part of the record in the Supreme Court of the United States; and for the purpose, not of deciding the facts, but of throwing light on the findings, the opinion and other parts of the record may be examined. *Egan* v. *Hart*, 680
See also *supra*, 38.

59. A mere allegation in what is called a bill of exceptions of an adjudication in insolvency is not sufficient to show any final judgment which will sustain a writ of error from the Supreme Court of the United States to a state court. *Clarke* v. *McDade*, 678

60. A modification by the supreme court of Utah of the findings of fact of the court below, without ordering a new trial, cannot be reviewed by the Supreme Court of the United States in the absence of any statement of the facts to show whether they were sufficient to sustain the judgment rendered or not, and of any exceptions as to the admission or rejection of evidence. *Salina Stock Co.* v. *Salina Creek Irrig. Co.* 90

61. A general statement that a decision is against the constitutional rights of a party or against the 14th Amendment, or that it is without due process of law, particularly when it appears only in specifications of error so called, will not raise a Federal question. *Clarke* v. *McDade*, 678

62. A certificate of the presiding judge of a state court is insufficient to show that a Federal question was raised and decided, where the recorded opinion of the court shows that the decision was based on a ground that did not involve a Federal question. *Dibble* v. *Bellingham Bay Land Co.* 72

63. An assignment of errors cannot avail to present a Federal question when there is an entire absence in the record of any fact showing that such question was decided in the state court. *Fowler* v. *Lamson*, 424

64. The failure of the record to show that any question of the validity of a state statute under the Constitution was made in a state court is fatal to a writ of error from the Supreme Court of the United States, although there is printed in the record what purports to be an extract from the closing brief of counsel presented to the state court discussing the Federal question, and it is orally asserted at the bar that in the oral argument in the state court such question was presented. *Zadig* v. *Baldwin*, 1087

65. An assignment of errors cannot be availed of to import into a cause questions which the record does not show were raised in the court below and rulings asked thereon so as to give jurisdiction to the Supreme Court of the United States under the act of Congress of March 3, 1891, § 5. *Cornell* v. *Green*, 76

66. An amendment of the record in a criminal case, in order to show the fact of arraignment and the pleas of the defendant, may be ordered at a subsequent term, pending an appeal from a conviction, and the order returned to the appellate court. *Gonzales y Borrego* v. *Cunningham*, 572

67. Alleged error in admitting evidence will not be presumed to have been injurious in the absence of a bill of exceptions disclosing at least the substance of the evidence and of an assignment of error. *Murray* v. *Louisiana*, 87

### V. EXCEPTIONS; MODE OF RAISING QUESTIONS.

68. An objection to hearsay evidence although first made after it was received, when a request to exclude it was made, is sufficient to present the error on appeal, where the judge overruled it because he deemed the evidence competent and not because it was not made in time. *Lucas* v. *United States*, 282

69. Error in an instruction as to damages cannot be considered in the absence of any exception thereto. *Washington & G. R. Co.* v. *Hickey*, 1101

70. An exception to a whole paragraph of a charge is sufficient where the subject of the paragraph is the single one of the proper effect to be given to evidence of defendant's good character. *Edgington* v. *United States*, 467

71. Want of evidence to sustain a verdict against some of the defendants in a criminal case may be considered as ground of reversal although no motion or request was made in the lower court to instruct the jury to find for them. *Wiborg* v. *United States*, 289

72. Failure to request additional instructions, if those given on the subject are correct, will prevent an objection to their insufficiency on appeal. *Texas & P. R. Co.* v. *Cody*, 113

### VI. DISMISSAL.

73. The proper judgment on a decision that no Federal question exists on writ of error from the Supreme Court of the United States to a state court is one of dismissal. *Bacon* v. *State*, 168

### VII. HEARING AND DETERMINATION.

#### a. *In General.*

74. The entire case is open for examination by the Supreme Court of the United States when in the exercise of its supervisory jurisdiction it issues a writ of certiorari to bring



Digitized by Google

› the whole record of the case after an opinion
r the circuit court of appeals affirming a de-
ee for damages, although this was the second
›peal and the circuit court of appeals may
ave been limited to the mere question of dam-
ges because on a prior appeal it had decided
ie merits of the case by reversing a decree of
ismissal, and had remanded the case for an
ssessment of damages. *Panama R. Co.* v.
*Napier Shipping Co.* 1004

75. The rule that a writ of habeas corpus annot be used to perform the office of a writ f error applies not only to original writs of abeas corpus, but on appeals in habeas cor-›us proceedings. *Gonzales y Borrego* v. *Cun-ingham*, 572

76. A general finding and rendition of judg-nent in favor of the defendant, without any ›pecial finding of facts, in a case tried by the ›ourt without a jury, will permit an inquiry on writ of error only as to the sufficiency of the complaint and the rulings, if any be pre-served by bill of exceptions, on questions of law arising during the trial, but will not per-mit a bill of exceptions to bring up the whole testimony for review. *St. Louis* v. *Western U. Teleg. Co.* 1044

77. Presumptions unfavorable to a judgment will not be indulged for the purpose of revers-ing it, unless they are natural and probable and such as ought to be drawn from the facts actually found by the court below. *Bear Lake & R. W. & I. Co.* v. *Garland*, 327

78. There is no substantial variance between the allegations and proof of the plaintiff, when the alleged variance was mainly produced by proof introduced by the defendants, who are not in any manner injured by the variance. *Washington & G. R. Co.* v. *Hickey*, 1101

79. The interpretation of a state statute by the supreme court of the state, as to the divisi-bility of provisions some of which are uncon-stitutional, is binding on the Supreme Court of the United States on writ of error. *Noble* v. *Mitchell*, 472

80. The construction given to a state statute by the highest court of the state must be ac-cepted by the Supreme Court of the United States in judging whether the statute conforms to the Constitution of the United States. *Missouri P. R. Co.* v. *Nebraska, Board of Trans-portation*, 489

81. The bankruptcy of the plaintiff cannot be set up by a defendant to show error in re-viving a judgment in favor of plaintiff's exec-utrix, especially when the assignee in bank-ruptcy has ratified the action of the executrix by becoming a party to the proceedings. *Brown* v. *Wygant*, 284

82. A statement in the opinion of the court, that it has no reason other than the lapse of time and the inaction of the claimant to dis-credit the witnesses or suspect a claim which was supported by himself and one other wit-ness only, and which the court holds was not sufficiently proved, is not to be understood as laying down an arbitrary rule of evidence as to the number of witnesses required in different classes of cases, but amounts only to saying that the proof is not satisfactory. *Stone* v. *United States*, 477

b. *Objections Waived or Cured Below.*

83. An objection to the jurisdiction pre-sented by filing a demurrer for the special and single purpose of raising it is not waived by answering to the merits when the demurrer is overruled. *Re Atlantic City R. Co.* 579

84. One who voluntarily invokes equity ju-risdiction cannot urge on appeal that his com-plaint should have been dismissed because of an adequate remedy at law. *Perego* v. *Dodge*, 113

85. Improper remarks of counsel promptly withdrawn when the court held them im-proper will generally be deemed to be cured. *Dunlop* v. *United States*, 799

c. *Objections First Raised on Appeal.*

86. A contention that relief was improperly awarded because no cross-complaint was filed cannot be first made on appeal, when an an-swer was treated in the court below as equiva-lent to a cross-pleading. *Perego* v. *Dodge*, 113

87. A mere transfer of the place of trial from one division of a district of the United States to another does not present ground of error when not challenged at the time or objected to on the trial. *Rosencrans* v. *United States*, 708

88. An objection that the Commissioner of Internal Revenue had the option to deliver other stamps, instead of refunding money paid for stamps which had been destroyed, is made too late when made for the first time upon ar-gument in the Supreme Court of the United States, in an action against the United States for the value of the stamps, which was brought after the Commissioner had absolutely refused to reimburse the claimant in either way, on the ground that their value had been already paid to him by insurers. *United States* v. *American Tobacco Co.* 1081

d. *Decisions on Facts.*

89. A verdict of the jury rendered on con-flicting evidence cannot be reviewed on writ of error, when there was sufficient evidence to justify the conclusions reached by the jury. *Carter* v. *Ruddy*, 1090

90. The findings of the court of claims in an action at law determine all matters of fact pre-cisely as the verdict of a jury. *Stone* v. *United States*, 477

91. The sufficiency of evidence to be sub-mitted to the jury cannot be reviewed by the Supreme Court of the United States on writ of error to a state court. *Noble* v. *Mitchell*, 472

92. Evidence in a chancery case cannot be re examined by the Supreme Court of the United States on writ of error to a state court, but a finding of facts is conclusive. *Egan* v. *Hart*, 680

93. The re-examination of facts tried by a jury in a state court, when the case is taken by writ of error to the Supreme Court of the United States, is limited by the 7th Amend-ment of the Federal Constitution, providing that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. *Chicago, B. & Q. R. Co.* v. *Chicago*, 979



Digitized by Google

94. The ascertainment by a jury of just compensation in an eminent domain case being provided for by the state Constitution in Illinois, it can be re-examined in the Supreme Court of the United States on writ of error only in accordance with the rules of the common law respecting facts tried by a jury, although the right to a jury trial would not exist in the absence of an express constitutional provision on the subject. *Id.*

95. An allowance to a receiver of hotel property, being 10 per cent of the receipts of the business and amounting to about $2,500, for his services from May to December, during which he spent ordinarily only his evenings at the hotel and employed a manager at $125 or $150 per month and under bond, will not be disturbed on appeal after it has been approved by two lower courts, where there is testimony by hotel proprietors that $5,000 a year was fair compensation, and he has had no compensation for the custody and responsibility of a large amount of personal property, and the position was attended with considerable anxiety, and he retained it apparently against his own inclinations, in compliance with the wishes of the party in interest. *Cake* v. *Mohun*, 447

96. A finding as to the amount of necessary expenses of caring for a vessel, incurred by the owner while it was in the nominal possession of the collector of a port under seizure for duties, although the amount seems large, will not be disturbed when it has been affirmed by the district court and the court of appeals. *The Conqueror*, 987

97. Failure of the owner of cattle to prevent them from being intermingled with those of other owners whose cattle are infected with Texas fever is not so clearly contributory negligence, where the cattle ranges are unfenced, that it must be so held on appeal where the trial court has held to the contrary. *Grayson* v. *Lynch*, 280

### e. *Discretionary Rulings.*

98. The discretion of the trial court in respect to requiring a bill of particulars is not subject to review on writ of error. *Dunlop* v. *United States*, 799

99. The discretion of the court in ordering several defendants to be tried together, if not abused, will not be reviewed on writ of error. *Ball* v. *United States*, 800

100. The exercise of the discretion of the court in refusing to require matter which is alleged to be too obscene to be spread upon the records of the court is not subject to review on writ of error. *Dunlop* v. *United States*, 799

101. Error in decreeing costs, including a solicitor's fee, when a circuit court of the United States dismisses a suit for want of jurisdiction, may be considered on appeal,—at least when the appeal is not taken on the matter of costs alone. *Citizens' Bank* v. *Cannon*, 451

102. The granting or refusal of a request first made in the midst of a trial for murder by the defendant that he may shoot off a gun in the presence of a deputy marshal to test the truth of evidence that it scattered shot is within the discretion of the court which will not be disturbed on writ of error. *Ball* v. *United States*, 800

103. Allowing a witness to be recalled to change statements made on cross-examination is in the discretion of the court. *Faust* v. *United States*, 224

104. The refusal to grant a new trial cannot be assigned for error in the Supreme Court of the United States. *Addington* v. *United States*, 679

### f. *What Errors Warrant Reversal.*

105. The admission of a statement of balances of an officer's account, made by the Treasury Department, is not material error when it is accompanied by other transcripts giving both sides of the account with the items. *Moses* v. *United States*, 1119

106. Refusal to receive a deposition which is not in the record cannot be assigned for error, as it cannot be said to be prejudicial. *Whitney* v. *Fox*, 1145; *Wood* v. *Fox*, 1149

107. The fact that a delinquent list used as prima facie evidence in proceedings to collect delinquent taxes under Ariz. Rev. Stat. 1887, §§ 2684 *et seq.*, was a printed copy of the list published, and not the original list filed with the county treasurer, is not ground for reversal where the objection thereto, under § 2688, was that the list "is not a copy of the original," but did not point out wherein it was incorrect, and no objection to its admission in evidence was made on the ground that the original had not been first offered, or that the published list was different from the original. *Maish* v. *Arizona*, 567

108. The rule that the admission of improper evidence on a trial by the court without a jury will not require a reversal unless it appears that such evidence was relied upon is not changed by the New Mexico act of 1889, chap. 1, § 4, providing that a cause tried without a jury shall be reviewed in the same manner and to the same extent as if it had been tried by jury. *Grayson* v. *Lynch*, 280

109. Variances will not be held material on the ground that they were misleading, where no question as to them was raised at the trial court or in the court to which appeal was first taken. *Id.*

110. A conviction will be reversed for improper consolidation of indictments with others for different transactions, although it is not shown that defendants were thereby prejudiced or embarrassed in their defense, where it cannot be said that they may not have been embarrassed and prejudiced, or that the attention of the jury may not have been distracted to their injury in passing upon the distinct and independent transactions. *McElroy* v. *United States*, 355

### Instructions.

111. Instructions that the jury may allow interest are not ground for reversal if they did not allow it. *Eddy* v. *Lafayette*, 235

112. The opinion of the court expressed to the jury that a question of fact is free from reasonable doubt is not ground of reversal if



Digitized by Google

he expressly tells them that it is a question for their determination alone. *Wiborg* v. *United States*, 289

113. An instruction that evidence to overcome a presumption of original intent arising from certain facts must be sufficient to satisfy the jury "beyond a reasonable doubt" is not prejudicial, where the whole instruction fully and clearly states that the presumption of innocence remains with the defendant until the jury are satisfied beyond a reasonable doubt that he is guilty and had a criminal intent. *Agnew* v. *United States*, 624

114. A judgment of death must be reversed if the conviction by a jury was made under a charge of the court which in some of its features was erroneous in law because not full enough on the subject discussed, even though in other parts of the charge a more full and correct statement of the law was given. *Mills* v. *United States*, 584

115. Refusal by the trial court to give an instruction presented after the charge was finished, without showing that the matter had not already been fully and satisfactorily explained to the jury, will not warrant a reversal. *Nelson* v. *Flint*, 1002

116. Refusal of the court to permit one of the jurors who have handed in a sealed verdict to change his vote is not ground of reversal, if on the evidence the court could have peremptorily instructed the return of such a verdict. *W. B. Grimes Dry Goods Co.* v. *Malcolm*, 524

### VIII. JUDGMENT AND ITS EFFECT.

117. Entry of the proper judgment below will be directed on reversing a decision in a case heard upon a stipulation waiving a jury and upon an agreed statement of facts. *Meyer* v. *Richards*, 199

118. The invalidity of a remittitur of a portion of damages which were clearly excessive will make it necessary to remand for a new trial on reversing a judgment rendered for the reduced sum. *Southern P. Co.* v. *Tomlinson*, 193

119. The defendant in an action for causing the death of a person has the right to object to a judgment apportioning the damages, not as lawfully divided by the jury, but as unlawfully fixed by the plaintiff of record by filing a remittitur reducing to nominal damages the sums awarded by the jury to some of the other persons entitled, thereby leaving the defendant open to the danger of another suit by these persons. *Id.*

120. Ten per cent damages are awarded on an affirmance when the errors alleged are frivolous and the writ of error was sued out for delay. *Nelson* v. *Flint*, 1002

121. Questions of the novelty and infringement of a patent decided in reversing on the merits a decree which dismissed the bill cannot be construed again by the lower court but must be deemed to have been finally settled. *Re Potts*, 994

122. The merits of the case, having been once determined by the circuit court of appeals in reversing an interlocutory decree of the circuit court granting an injunction in a patent case, and remanding it with instructions to dismiss the bill, are not open to reconsideration at a later stage of the same case, either in that court or in the court below. *Smith* v. *Vulcan Iron Works*, 810

See also *infra*, IX.

### IX. REHEARING.

123. A petition for rehearing on account of newly discovered evidence after the merits of the case have been decided on appeal by the Supreme Court of the United States cannot be granted, without leave of that court, by the circuit court. *Re Potts*, 994

**APPEARANCE.** See ACTION OR SUIT, 10; APPEAL AND ERROR, 83.

**ARMY.**

1. An officer of the army suspended from duty is not entitled to emoluments or allowances. *Swaim* v. *United States*, 823

2. A lieutenant in the navy is entitled to pay for sea service while on board a vessel of the United States anchored at and tied to a wharf in New York harbor, on which a nautical school is maintained in which he acts as an instructor, when the vessel is furnished by the Secretary of the Navy who assigns the lieutenant to such duty and he receives no orders except from the commander of the vessel, although the service is called by the Secretary "employment on shore duty" and the lieutenant receives pay also as instructor from the state of New York. *United States* v. *Barnette*, 675

**ASSAULT.** See TRIAL, 31.

**ASSESSMENTS.** See PUBLIC IMPROVEMENTS.

**ASSIGNMENT FOR CREDITORS.** See INSOLVENCY.

**ASSUMPSIT.**

A railroad company which procures or acquiesces in the withdrawal of a receivership and the discharge of the receiver and the cancelation of his bond, and accepts the restoration of its road largely enhanced in value by betterments, may be sued in assumpsit on a claim which was valid against the receiver, but not satisfied by him or by the court which discharged him, at least when it does not claim that the amount of the betterments was less than the demand sued on. *Texas & P. R. Co* v. *Manton*, 580

**ATTORNEY'S FEES.** See CONSTITUTIONAL LAW, 29.

**BAIL AND RECOGNIZANCE.** See APPEAL AND ERROR, 11.

**BANKRUPTCY.** See APPEAL AND ERROR, 81.



Digitized by Google

**BANKS.** See also APPEAL AND ERROR, 15, 36–38; CHECK; COURTS, 18, 19; ESTOPPEL, 4; EVIDENCE, 23, 41; INSOLVENCY, 1, 2; PLEADING, 7; TAXES, 6–8.

1. A guaranty of the payment of the principal and interest of bonds which are worthless or of small value, made by the president of a national bank to obtain credit for their face value, without consent or authority of any meeting of the directors or stockholders, does not relieve him from liability for an intent to injure the bank by taking a wrongful advantage of the credit, although he was at the time solvent and intended to make his guaranty good. *Agnew* v. *United States*, 624

2. Giving the comptroller of the currency power to appoint a receiver of a national bank or to make a ratable call upon the stockholders does not vest him with judicial power in violation of the Constitution. *Bushnell* v. *Leland*, 598

3. A receiver of an insolvent bank has no greater rights than the bank in a fund against which the bank had given a check which constituted an equitable transfer or appropriation of the fund. *Fourth Street Nat. Bank* v. *Yardley*, 855

4. A mere pledgee of shares of stock in a national bank is not subject to liability as a shareholder under U. S. Rev. Stat. § 5151, where his name appears as "pledgee" both on the certificates of stock and the books of the bank, and there does not appear to have been any intent of the real owner of the shares to escape responsibility. *Pauly* v. *State Loan & T. Co.* 844

5. In determining who is liable as the owner of shares of stock in a national bank, the courts will look at the relations of the parties as they actually are, or as by reason of their conduct they must be assumed to be for the protection of creditors; and the object of the statute is not to be defeated by the mere forms of transactions between shareholders and their creditors. *Id.*

6. A lease by a national banking association after it has made and filed its articles of association and organization certificate with the comptroller of the currency, but before it has received from him a certificate authorizing it to do business, made for a term of five years, determinable at the end of any year by either party, of an office to be occupied for banking business, is within the prohibition of U. S. Rev. Stat. § 5136, which prohibits the transaction of any business "except such as is incidental and necessarily preliminary to its organization," until authorized by the comptroller to commence business. *McCormick* v. *Market Nat. Bank*, 817

7. An entry of overdrafts under the heading "Loans and discounts," in a report as to the condition of a national bank, when they were made by depositors who had permission to make them under arrangements with the proper managers of the bank for credit, does not constitute a false entry under U. S. Rev. Stat. § 5209. *Graves* v. *United States*, 732

**BENEVOLENT SOCIETIES.** See INSURANCE, 3.

**BILLS AND NOTES.** See also EVIDENCE, 33.

An implied warranty of identity of the thing sold, which arises at common law on the sale of goods and chattels, applies on the sale of commercial paper without indorsement or without express assumption of liability on the paper itself. *Meyer* v. *Richards*, 199

**BONA FIDE PURCHASERS.** See PUBLIC LANDS, 31.

**BONDS.** See also ADMIRALTY, 2; EVIDENCE, 11; LIENS, 8, 9; PRINCIPAL AND SURETY.

1. The implied warranty of the existence of the thing sold, on the sale of a credit or incorporeal right, created by La. Civ. Code, § 2646, applies on a sale of bonds negotiable in form, and includes a warranty that they are existing obligations. *Meyer* v. *Richards*, 199

2. An implied warranty of the validity of state bonds as existing obligations arises on a sale of such bonds having the genuine signatures of state officers and the seal of the state thereon, and appearing on their face to be valid, and which are believed by both parties to the sale to be valid, but which have been stricken with nullity by the Constitution of the state. *Id.*

3. Vendees cannot enforce a bond given to secure the execution and delivery of a deed within a certain time, if they have failed to make a payment within the time agreed, where the obligatory part of the bond expressly provides that they shall comply with their part of the contract. *Coughran* v. *Bigelow*, 442

4. A bond by an officer may be valid, although no statute directs its delivery, when its consideration or its condition is not in violation of law, and it does not run counter to any statute and is not *malum prohibitum* or *malum in se*. *Moses* v. *United States*, 1119

5. An official bond is voluntary in the sense that it is not illegally extorted, although the officer is reluctant to give it and only does so upon the demand of his superior, who has a right to demand the bond as a condition of permitting the officer to remain in his position. *Id.*

6. The absence of any law creating such a position as that of "property and disbursing officer of the signal service, U. S. A." or of any law or army regulation defining all the duties of such officer, will not prevent his bond from being a valid security for the honest discharge of his duties. *Id.*

7. An order of the War Department that an army officer assigned to duty in the signal service as property and disbursing officer should give a bond is within the power of the Secretary of War to make, although there is no provision of statute requiring it. *Id.*

8. The fact that larger sums were disbursed by an officer than was anticipated forms no defense to an action on his bond conditioned for his honest disbursement of the public moneys. *Id.*



Digitized by Google

## BOUNDARIES.

1. The boundary line between the states of Indiana and Kentucky is established and declared to be as delineated and set forth in the report of the commissioners and the map accompanying and referred to in said report, and the commission continued for the purpose of permanently marking said line with directions to report to the court without prejudice to further proceedings, for the determination of such part of the line as may not have been settled by this decree. *Indiana* v. *Kentucky*, 250

2. An order establishing boundary between Missouri and Iowa, with allowance for expenses of remarking. *Missouri* v. *Iowa*, 655

## BOUNTY.

1. A moral and honorable claim upon the public treasury, which Congress had the constitutional right to recognize and pay, arose in favor of persons who proceeded to manufacture sugar or make preparations therefor in reliance upon the act of Congress of 1890 providing bounties for such manufacture, even if they may have been engaged in the business before that act was passed. *United States* v. *Realty Co.* 215

2. The sugar bounty act of Congress of March 2, 1895, appropriating money to pay bounties to persons who had been prevented by the repeal of the act of 1890 from obtaining bounties for the production of sugar before the act was repealed, or for sugar manufactured during the year ending June 30, 1895, after filing notice of application for license and bond under the act of 1890,—is not unconstitutional, even if the act of 1890 should be held unconstitutional. *Id.*

## BOYCOTT. See CONTEMPT.

## BRIDGES. See also RAILROADS, 1; TAXES, 12, 13, 21.

The power of a state court to order the removal or modification of a bridge by quo warranto proceedings, on the ground that it is a public nuisance impeding the navigation of a river which is wholly within the state, is not taken away by the act of Congress of 1890 requiring the approval of the Secretary of War as a condition of the erection of a bridge over navigable water. *Lake Shore & M. S. R. Co.* v. *Ohio, Humphrey*, 747

## BROKER. See SEARCH.

## BURIAL GROUND. See REAL PROPERTY, 5.

## CANAL. See LIENS, 3, 5.

## CARRIERS. See also ACTION OR SUIT, 1; APPEAL AND ERROR, 5; COMMERCE, 4–8; CONSPIRACY, 6; CONSTITUTIONAL LAW, 13; EVIDENCE, 4, 7, 55; INJUNCTION, 5.

A notice on the back of a steamship contract ticket, which is not referred to in terms or by reference on the face of the ticket, although there is conspicuously printed thereon the words "See back," is not a part of the contract so as to make the conditions of the notice, whether in respect to the amount of liability for baggage or otherwise, binding on a passenger whose attention is not called to the notice. *The Majestic*, 1039

## CASES CERTIFIED.

1. A writ of certiorari to the circuit court of appeals pending action by that court may be issued by the Supreme Court of the United States under the judiciary act of March 3, 1891, § 6, if the court is of opinion that the circumstances justify the allowance of the writ, although it is a power not ordinarily to be exercised. *United States* v. *The Three Friends*, 897

2. An application for a certiorari to review a decree of the United States circuit court of appeals entered after the adjournment of the supreme court for the term is made with reasonable promptness if during the next term of the court and within a year after the original decree. *The Conqueror*, 937

3. The fact that the mandate of the circuit court of appeals to the district court affirming the decree of that court has gone down does not preclude a writ of certiorari from the supreme court to review the decision of the circuit court of appeals. *Id.*

4. The power of the Supreme Court of the United States to require a case to be certified by the circuit court of appeals under the act of March 3, 1891, is not affected by the condition of the case as it exists in the latter court, but may be exercised before or after any decision by that court, and irrespective of any ruling or determination therein. *Forsyth* v. *Hammond*, 1095

5. The supreme court will sparingly exercise the power to require a case to be certified by the circuit court of appeals, and will exercise it only when the circumstances of the case show that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interest of the nation in its internal or external relations, demands such exercise. *Id.*

6. The unfortunate possibilities of conflict and collision which might arise from adverse decisions of the supreme court of a state and a Federal circuit court of appeals respecting the validity of the annexation of territory to a city, when the decision of the circuit court of appeals would except from the territorial limits of the city a tract within its exterior boundaries, constitute sufficient reason for requiring the latter court to certify the case to the supreme court at the earliest possible moment, although no final decree has been entered therein. *Id.*

7. The discretionary power of issuing a writ of certiorari will not be exercised by the Supreme Court of the United States to review a decision of the circuit court of appeals in dismissing an appeal from the circuit court, where the only difference that could result would be an affirmance, instead of a dismissal, and would not affect the essential rights of the parties. *Smith* v. *Vulcan Iron Works*, 810



Digitized by Google

8. The right to certificates of division of opinion in criminal cases under U. S. Rev. Stat. §§ 651, 697, is taken away by the act of March 3, 1891, which impliedly repeals those sections and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error, or certificate. *United States* v. *Rider*, 101

9. Certificates of division of opinion in criminal cases, whether made at the request of the United States or of the accused, are not allowable since the act of March 3, 1891, by which the provisions of U. S. Rev. Stat. §§ 651, 697, in relation to such certificates are repealed. *United States* v. *Hewecker*, 345

**CEMETERY.** See REAL PROPERTY, 5.

**CERTIFICATE OF DIVISION.** See CASES CERTIFIED, 8, 9.

**CERTIFICATES.**

Certificates by accounting officers of the Treasury that an officer is not indebted to the United States, which are given to enable him to obtain payment of salary, are not conclusive against the government on subsequently discovering that he has obtained such settlement by forged vouchers. *Moses* v. *United States*, 1119

**CERTIORARI.**

For certiorari to require case to be certified under the Act of Congress of 1891, see CASES CERTIFIED.

See also APPEAL AND ERROR, 8, 74.

Certiorari may be issued by the Supreme Court of the United States to review judgments in contempt proceedings which are rendered in excess of jurisdiction, if there is no other adequate remedy. *Ex parte Chetwood*, 782

**CHECK.**

1. A check drawn generally will be treated as an order for payment out of a specific designated fund, where it is clear that it was the intention and agreement of the parties to the transaction that it should be paid out of that particular fund. *Fourth Street Nat. Bank* v. *Yardley*, 855

2. A fund to the credit of an embarrassed bank in a bank of another city, though consisting in part of collection items not yet turned into cash, is transferred and appropriated *pro tanto* by a check against this fund given to obtain, as a matter of accommodation from a third bank, a quantity of gold clearing-house certificates which it needs to meet its debtor balance at the clearing house, where it is clear that the certificates were furnished on the faith of this check and representations made as to the fund on which it was drawn. *Id.*

**CHEMIST.** See CONTRACT LABOR.

**CHINESE.** See ALIENS, 1.

**CIRCUIT COURT OF APPEALS.** See APPEAL AND ERROR, II. a.

**CIRCUIT COURTS.** See APPEAL AND ERROR, II. a.

**CITIZENS.** See CLAIMS, 1.

**CIVIL RIGHTS.** See CONSTITUTIONAL LAW, 25, 26; REMOVAL OF CAUSES, 2.

**CLAIMS.** See also APPEAL AND ERROR, 4, 88, 90; INTEREST, 4; INTERNAL REVENUE; PATENTS, 1; PUBLIC MONEY. WATERS, 2.

1. A corporation of a state is a "citizen of the United States" within the meaning of the act of Congress of March 3, 1891, providing for the adjudication of claims of citizens of the United States for property taken or destroyed by Indians. *United States* v. *Northwestern Exp. S. & T. Co.* 500

2. A war claim cannot be devested of that character so as to give jurisdiction to the court of claims, by anything done or omitted to be done by any officer or department of the government. *United States* v. *Winchester & P. R. Co.* 145

3. The certification of a war claim by an executive department to the court of claims under U. S. Rev. Stat. § 1063, cannot give the court jurisdiction. *Id.*

4. The seizure and appropriation of a railroad and its appurtenances during the war by military authorities of the United States, without regard to the assent of the owner and without any understanding that compensation was to be made, is to be regarded as an act of war; and a claim of the owner for the proceeds of the property appropriated must be deemed a "war claim" within the meaning of the act of Congress of 1887 excluding war claims from the jurisdiction of the court of claims. *Id.*

5. Judgment for Indian depredations may be rendered against the United States alone, where the tribe of Indians to which the depredators belonged cannot be identified, although by the act of March 3, 1891, § 5, the court is required to determine, if possible, the tribe which committed the wrong and render judgment "against the United States and against the tribes of Indians committing the wrong when such can be identified." *United States* v. *Gorham*, 720

6. U. S. Rev. Stat. § 5438, relating to false depositions to obtain a payment of approval of any claim against the United States, is not repealed by § 4746, relating to the offense of procuring any false or fraudulent affidavit respecting a pension claim. *Edgington* v. *United States*, 651

7. Transportation of postoffice inspectors without pay for a series of years, on their production of commissions declaring their right to free travel, and without any demand for compensation or any protest against carrying them free, is a waiver of any right subsequently to demand payment therefor. *Central P. R. Co.* v. *United States*, 530

8. A life tenant is not so far a trustee or representative of remaindermen that his purchase from the United States at public auction of land that had been sold for direct taxes under



Digitized by Google

the act of February, 6, 1863, will constitute a redemption or repurchase on the part of the remaindermen. *United States* v. *Elliott*, 474

9. One who was a mortgage creditor at the time of the sale of property to enforce the direct tax assessed by the United States under the act of Congress of 1861 is not the legal owner who is entitled under the act of Congress of 1891 to reimbursement. *Glover* v. *United States*, 440

10. A claim for moneys received by the United States from the sale of lands bid in for taxes under the direct tax act of Congress of 1861 cannot be asserted under the last clause of § 4 of the act of 1891, when the claimants have already obtained judgment under the 1st clause of that section for the amount appropriated as the value of the lands. *McKee* v. *United States*, 487

11. The exception of persons beyond seas and those under other disabilities, from the six years' limitation of actions on claims against the United States, made by the proviso of U. S. Rev. Stat. § 1069, is not repealed by the act of March 3, 1887, known as the Tucker act, but § 1 of the latter act should be interpreted as if that proviso were added to it. *United States* v. *Greathouse*, 1180

12. A consul-general of the United States, so long as he remains abroad, is within the exception of "persons beyond the seas" from the limitation as to prosecuting claims against the United States. *Id.*

**CLEARING HOUSE.** See CHECK, 2.

**CLERK.** See also OFFICERS.

1. Fees received from private parties in civil actions and from the territory on account of territorial business by a clerk of the district court in the territory of Utah are within the fees and emoluments of his office for which he is obliged to make returns to the United States. *United States* v. *McMillan*, 805

2. Sums received for declarations of intention and for naturalizations of aliens, by a clerk of the district court of the territory of Utah, are not included in the fees and emoluments of his office for which he is obliged to make returns to the United States. *Id.*

3. The subsequent withdrawal of a plea which constituted the issue does not take away the right of a clerk to the docket fee of $3, if testimony is given, or of $2 otherwise, provided by U. S. Rev. Stat. § 828, in a cause where issue is joined. *United States* v. *Kurtz*, 846

4. Causes "dismissed or discontinued," for which a clerk is entitled to $1 each under U. S. Rev. Stat. § 828, ¶ 3, do not include a case discontinued upon the entry of *nol pros.* after issue was joined therein, but in such case the clerk is entitled to the larger docket fee on the joinder of issue; and this right is not lost by subsequent discontinuance. *Id.*

5. The entire record of a case is to be taken as one instrument in computing the folios for which a clerk is entitled to charge under U. S. Rev. Stat. § 828; and each document, judgment, order, and direction of the court cannot be treated as a separate instrument in counting the folios, *Id.*

6. A folio charge for making a record of the names of jurors with their residences, as drawn by the jury commissioner, can be claimed by a clerk when he is required to make and post or file such list by order or practice of the court, and no other mode of compensating him is provided. *Id.*

7. A clerk is entitled to fees for entering an order of court directing him as to the disposition of money received for fines, and for filing certificates of deposits for fines, although he has also a commission of 1 per cent for receiving, keeping, and disbursing the money. *Id.*

**COLLECTOR.** See DUTIES, 2.

**COLLISION.** See DAMAGES, 6; SHIPPING, 5–13.

**COLONY.** See NEUTRALITY, 1.

**COLOR OF TITLE.** See ADVERSE POSSESSION, 2.

**COMMERCE.** See also INJUNCTION, 4; TAXES, 18–21.

1. The police laws of a state, to which intoxicating liquors imported from another state are made subject by the act of Congress of August 8, 1890, do not include the South Carolina dispensary law of January 2, 1895, which discriminates against liquors which are imported from other states, while it recognizes such liquors as a commodity which may lawfully be dealt in under the regulations prescribed. *Scott* v. *Donald*, 682

2. A discrimination against intoxicating liquors imported from other states renders the South Carolina law of January 2, 1895, an unconstitutional hindrance to interstate commerce, and an unjust preference of the products of the enacting state as against similar products of the other states. *Id.*

3. An express company may be subject to a state license tax on its local business, although it is at the same time engaged in interstate or foreign commerce which is exempt from the statute. *Osborne* v. *Florida*, 586

4. Cars employed in interstate commerce are not exempt, in the absence of national legislation covering the subject, from the operation of state laws forbidding under penalties the heating of passenger cars in that state by stoves or furnaces kept inside the cars or suspended therefrom. *New York, N. H. & H. R. Co.* v. *New York*, 858

5. State laws for the security of passengers traveling within their respective limits from one state to another on cars propelled by steam are not in any degree interfered with by the provision of U. S. Rev. Stat. § 5258, as to the right of railroads operated by steam to carry on business from one state to another and connect with other roads. *Id.*

6. A state statute requiring an interstate train carrying passengers and United States mail to turn aside from the direct interstate route, and run to a station 3½ miles away and back again, because that is the county-seat, is an unconstitutional interference with interstate



Digitized by Google

commerce and with the transportation of the mails. *Illinois C. R. Co.* v. *Illinois, Butler*, 107

7. A railroad train running between two points within the same state, although carrying passengers who are to be transferred to another train of the same company which will carry them to another state, is not exempt from a state law requiring it to stop at county seats, on the ground that this constitutes an interference with interstate commerce. *Gladson* v. *Minnesota*, 1064

8. A state statute making it unlawful to run any freight train on Sunday is not an unconstitutional regulation of interstate commerce as applied to an interstate train in the same way that it applies to domestic trains, in the absence of any congressional legislation upon the subject. *Hennington* v. *Georgia*, 166

**COMMISSIONER.** See also ACTION OR SUIT, 8: EVIDENCE, 24.

A commissioner appointed by a district court having circuit court powers if continued by the circuit court afterwards established in the district is an officer *de facto*, even if not expressly reappointed. *Starr* v. *United States*, 577

**COMMITTEE.** See CONGRESS, 1.

**COMPROMISE.** See also DEATH.

A document which a guardian procures all her daughters except one who is an infant to sign, stating the amount of indebtedness from her as guardian to them, although not signed by herself, may constitute an acknowledgment of indebtedness on her part to each of the children, including the infant. *Glover* v. *Patten*, 760

**COMPTROLLER.** See BANKS, 2.

**COMPTROLLER OF CURRENCY.** See EVIDENCE, 29.

**CONFLICT OF LAWS.**

1. The law of a state in which land is situated governs its descent, alienation, and transfer, and the effect and construction of wills and other conveyances. *De Vaughn* v. *Hutchinson*, 827

3. The law of the place where a covenant was made between residents governs the limitation of an action brought there to enforce the covenant, although the covenant was to be performed elsewhere. *Willard* v. *Wood*, 531

**CONGRESS.** See also BOUNTIES, 2; CONSTITUTIONAL LAW, 1; SEARCH.

1. The failure of the preamble and resolutions of the Senate of the United States appointing a committee to investigate charges of corruption on the part of senators, to specify that the proceedings are taken for the purpose of censure or expulsion if certain facts are disclosed, does not defeat the jurisdiction of the committee of investigation. *Re Chapman*, 1154

2. The provision that a refusal to answer "any question pertinent to the question under inquiry" shall be a misdemeanor does not render U. S. Rev. Stat. § 102, fatally defective because too broad and unlimited in its extent; but the word "any" will be deemed to refer to matters within the jurisdiction of the Houses of Congress and questions pertinent thereto. *Id.*

3. A question of the constitutionality of U. S. Rev. Stat. § 103, excluding the claim of privilege by a witness testifying before either House of Congress or any committee of either House cannot be raised by a witness who claimed no privilege, but refused to answer in violation of § 102, as those sections are not so inseparably connected that § 102 might not have been enacted without the other. *Id.*

**CONSPIRACY.** See also ACTION OR SUIT, 1; CONTEMPT.

1. Competing and nonconnecting railroads are not authorized by the commerce act to make an agreement of maintenance of rates and the curbing of competition. *United States* v. *Trans-Missouri Freight Asso.* 1007

2. A contract between competing railroads relating to traffic rates for the transportation of articles of commerce between the states, the direct effect of which is to produce a restraint of trade or commerce, is within the provision of the act of Congress of July 2, 1890, declaring that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is illegal. *Id.*

3. The words "unlawful restraints and monopolies," in the title of the act of Congress of July 2, 1890, do not show that the purpose of the act was to include only contracts which were unlawful at common law, and do not restrict the language of the body of the act declaring what contracts shall be unlawful. *Id.*

4. All combinations in restraint of trade or commerce are prohibited by the act of Congress of July 2, 1890, whether they are in the form of trusts or in any other form whatever. *Id.*

5. The term "contract in restraint of trade," as used in the act of congress of July 2, 1890, does not refer only to contracts which were invalid at common law, but includes every contract in restraint of trade, even if the restraint is reasonable and valid. *Id.*

6. An agreement between railroad companies "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local," is by its necessary effect an agreement to restrain trade or commerce within the meaning of the act of Congress of July 2, 1890, no matter what the intent was on the part of those who signed it. *Id.*

**CONSTITUTIONAL LAW.** See also ALIENS; APPEAL AND ERROR, 93; BANKS, 2; BOUNTIES, 2; CONTRACTS, 8–14; COURTS, 4; FOOD, 2; STATE; TOLLS, 3; TRIAL, 9, 89.

1. A delegation of the power of a house of Congress to punish for contempt is not involved in U. S. Rev. Stat. § 104, providing for indictment of the person guilty of contempt by a grand jury of the District of Columbia. *Re Chapman*, 1154



Digitized by Google

2. Legislative power is not delegated by enacting conditions upon the performance of which an irrigation district shall be regarded as organized within boundaries fixed by a board of supervisors after a hearing and a vote of electors therein in favor of the incorporation. *Fallbrook Irrig. Dist.* v. *Bradley*, 369

**Due process of law.**

3. The finding of an indictment by a grand jury of less than thirteen does not violate the due process clause of the Constitution. *Talton* v. *Mayes*, 193

4. The dismissal of a writ of error taken by the accused from a conviction, because he has escaped and is a fugitive from justice, is not a denial of due process of law within the meaning of the Federal Constitution. *Allen* v. *Georgia*, 949

5. A state law conferring judicial powers on jury commissioners in selecting jurors does not for that reason conflict with the 14th Amendment to the Federal Constitution. *Murray* v. *Louisiana*, 87

6. Adjudging a prosecutor to be liable for the costs and subject to imprisonment in default of their payment, when the jury finds that he instituted the prosecution without probable cause and from malicious motives, does not deprive him of liberty or property without due process of law, if he is not denied the right to be heard at the trial before the jury upon every question which is to be determined by their verdict. *Lowe* v. *Kansas*, 78

7. A person is not deprived of property without due process of law by a statute making anyone liable for all damages done to a highway on a hillside in driving a herd of animals over it, where the liability must be ascertained by judicial proceedings, and the statute clearly specifies the condition under which a presumption of neglect arises. *Jones* v. *Brim*, 677

8. A statute reducing the tolls that may be charged by a turnpike company, so far as to prevent it from keeping its road in proper repair and earning any dividends whatever for stockholders, when the tolls previously charged are not unjust,—is unconstitutional as a deprivation of property without due process of law. *Covington & L. Turnp. Road Co.* v. *Sandford*, 560

9. The right of a citizen of a state to send a notification by mail to an insurance company in another state, which is not authorized to do business in the state where he resides, in order that insurance previously provided for by a valid contract made and to be performed outside the state might attach to the property specified in a shipment mentioned in the notice, although the property was then within the state, cannot be prohibited by a state statute, since that right is included in the "liberty" of the citizen which is protected against deprivation without due process of law. *Allgeyer* v. *Louisiana*, 832

10. The privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, embraces the right to make all proper contracts in relation thereto. *Id.*

11. Corporations are persons within the meaning of the constitutional provision forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws. *Covington & L. Turnp. Road Co.* v. *Sandford*, 560; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 666

12. A railroad company is not deprived of property without due process of law by a statute making such companies liable for all fires caused and communicated from locomotives. *St. Louis & S. F. R. Co.* v. *Mathews*, 611

13. A reasonable exercise of the police power of the state requiring railroad trains to stop at all stations at county seats does not take the property of the railroad company without due process of law. *Gladson* v. *Minnesota*, 1064

14. A railroad is not deprived of property without due process of law by a statute prohibiting the heating of passenger cars on other than mixed trains by stoves or furnaces inside of or suspended from the cars, except for temporary use in case of accident or other emergency. *New York, N. H. & H. R. Co.* v. *New York*, 853

**In taking or assessing property.**

15. The taking by a state of the private property of one person or corporation without the owner's consent, for the private use of another, is not due process of law and is a violation of the 14th Article of Amendment of the Constitution of the United States. *Missouri P. R. Co.* v. *Nebraska, Board of Transportation*, 489

16. A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use without compensation made or secured to the owner, is wanting in the due process of law required by the 14th Amendment of the United States Constitution. *Chicago, B. & Q. R. Co.* v. *Chicago*, 979

17. The prohibition of the 14th Amendment of the Federal Constitution against taking property without due process of law refers to all instrumentalities of a state, and is therefore violated whenever any person, by virtue of public position under a state government, deprives another of any right protected by that Amendment against deprivation by the state. *Id.*

18. Due process of law in condemnation proceedings does not require that the assessment of damages shall be made by a jury. *Long Island Water Supply Co.* v. *Brooklyn*, 1165

19. There is no denial of due process of law in making the findings of fact by the triers of fact, whether commissioners or a jury, in a condemnation case final as to such facts, and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted in their appraisal, or other errors in their proceedings. *Id.*

20. A landowner has the right to be heard upon the question of benefits to his property before it can be taken into an irrigation district to be assessed for benefits, unless the legislature itself decides the question of benefits. *Fallbrook Irrig. Dist.* v. *Bradley*, 369

21. An owner is not deprived of property without due process of law by taxes, assess-



Digitized by Google

ments, servitudes, or other burdens imposed by state authority upon his property for the public use, whether it be of a whole state or of some more limited portion of the community, if the state laws provide for a mode of confirming or contesting the charge in the ordinary courts of justice, with notice appropriate to the nature of the case. *Id.*

22. The adoption of an ad valorem method of assessing the lands in an irrigation district for the expense of the improvement is not a taking of the property without due process of law. *Id.*

**Equality.**

23. Equal protection of the laws is not denied to any person by a statute which is applicable to all persons under like circumstances, and does not subject the individual to an arbitrary exercise of power. *Lowe* v. *Kansas*, 78

24. The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment of the Federal Constitution, but the classification must be based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. *Gulf, C. & S. F. R. Co.* v. *Ellis*, 666

25. The constitutional provision against slavery and involuntary servitude is not violated by a state statute requiring separate accommodations for white and colored persons on railroads. *Plessy* v. *Ferguson*, 256

26. A state statute providing for separate railway carriages for the white and colored races, and the assignment of passengers to the coaches according to their race by conductors, does not deprive a colored person of any rights under the 14th Amendment to the Federal Constitution. *Id.*

27. A statute which makes any person who drives a herd of horses, asses, cattle, sheep, goats, or swine over a public highway constructed on a hillside, liable for all damages done by such animals in destroying the banks or rolling rocks into or upon such highway, does not deny the equal protection of the laws, since it applies to all persons under substantially like circumstances, and is not an arbitrary exercise of power. *Jones* v. *Brim*, 677

28. A turnpike company is not deprived of the equal protection of the laws merely because it is not allowed to charge as high rates as are allowed to other companies differently located, but it can only demand the right to receive such compensation as will be just both to itself and to the public under all the circumstances of the case. *Covington & L. Turnp. Road Co.* v. *Sandford*, 560

29. A statute imposing the penalty of an attorney's fee upon railroad corporations in case of failure to pay certain debts, without applying to individuals or other corporations, denies to railroad companies the equal protection of the laws. *Gulf, C. & S. F. R. Co.* v. *Ellis*, 666

30. The equal protection of the law is not denied to railroad companies by a statute making them liable without regard to negligence for fires set by engines. *St. Louis & S. F. R. Co.* v. *Mathews*, 611

31. An express company is not denied the equal protection of the laws by classifying it with railroad and telegraph companies as subject to the unit rule of taxation, which estimates the value of the whole plant, though situated in different states, as an entirety, for the purpose of determining the value of the property in one state. *Adams Exp. Co.* v. *Ohio State Auditor*, 683; *American Exp. Co.* v. *Indiana*, 707

32. A penalty of 50 per cent for nonpayment of taxes by telegraph, telephone, palace car, sleeping car, drawing-room car, dining car, express, fast freight, joint-stock associations, companies, etc., doing business in the state, which is imposed by Ind. act March 6, 1893, is not unconstitutional as a denial to such companies of the equal protection of the law or as an arbitrary classification. *Western U. Teleg. Co.* v. *Indiana*, 725

33. The exclusion of railroads less than 50 miles in length from the operation of a state law prohibiting stoves or furnaces inside of or suspended from cars on other than mixed trains does not deny to other railroads the equal protection of the laws. *New York, N. H. & H. R. Co.* v. *New York*, 853

34. A railroad company is not denied the equal protection of the laws by awarding it merely nominal compensation for the laying out of a street across its road, while individual property owners are given the value of their land which is taken. *Chicago, B. & Q. R. Co.* v. *Chicago*, 979

**Police power.**

35. A state statute providing that no dog shall be entitled to the protection of the law unless placed upon the assessment rolls, and that no recovery for its value can be had for more than the amount fixed by the owner in the last assessment, is a constitutional exercise of the police power. *Sentell* v. *New Orleans & C. R. Co.* 1169

**CONSUL.** See CLAIMS, 12.

**CONTEMPT.** See also CERTIORARI; CONSTITUTIONAL LAW, 1; CRIMINAL LAW, 8.

An announcement that he quits the service, made by a locomotive engineer when ordered to take into his train a car which his brotherhood had boycotted, will not relieve him from liability for contempt of an injunction against refusing to receive such cars, when he made the announcement merely as a trick and device to avoid obeying the order of the court, and as soon as he was instructed by the brotherhood, after he had held the train for a few hours, continued with his train to its destination, and said nothing more about quitting. *Ex parte Lennon*, 1110

**CONTINUANCE.**

Postponement of a sentence from a special term at which a verdict of guilty was rendered, to a regular term about two weeks later, which is made at the request of the defendant, who moves for a new trial and in arrest of judgment, does not destroy the jurisdiction. *Gonzales y Borrego* v. *Cunningham*, 573



Digitized by Google

## CONTRACT LABOR.

A chemist employed on a sugar plantation in Louisiana belongs to a "recognized profession" within the exemption made by the proviso of the contract labor act of March 3, 1891. *United States* v. *Laws*, 151

**CONTRACTS.** See also APPEAL AND ERROR, 39-41, 47, 48; CONSPIRACY, 1-5; CONSTITUTIONAL LAW, 10; CORPORATIONS, 4-6; EMINENT DOMAIN, 3; ESTOPPEL, 2; PUBLIC LANDS, 88; RAILROADS, 2; TAXES, 24, 25.

1. A contract to put down iron rails and maintain a switch for the benefit of a lumberman so long as he needs it is not within the clause of the statute of frauds as to agreements not to be performed within one year. *Warner* v. *Texas & P. R. Co.* 495

2. A grant of an easement in real estate within the Texas statute of frauds as to conveyances of any estate of inheritance or freehold for a term of more than one year, or contract for the sale of real estate, but omitting the words of the English statute as to uncertain interests or "any interest" in lands, is not made by a contract to maintain a switch for the benefit of a lumberman so long as he may need it. *Id.*

3. The continued operation of a street railroad may be a sufficient consideration for the extension of its franchise. *City R. Co.* v. *Citizens' Street R. Co.* 1114

4. One of the cotenants of a canal who replies to a letter proposing to make necessary repairs at joint expense, by agreeing that an arrangement of that sort is desirable, saying that it will direct its engineer to co-operate with an agent of the co-owner in examining and reporting what repairs are necessary, but suggesting that they should be limited for the present to those required for preservation of the property, may be held liable for one half the expense of necessary repairs made by the co-owner during several years, when it has received bills therefor from time to time without any expression of dissent or disavowal of an agreement between them, or refusal to co-operate, and its engineer has acted with the agent of the other party in examining and reporting as to needed repairs, although during this time it has not been making use of the canal. *Old Jordan Min. & M. Co.* v. *Société Anonyme Des Mines*, 427

**Public policy.**

5. The right of a railroad company to charge reasonable rates does not include the right to enter into a combination with competing roads to maintain rates. *United States* v. *Trans-Missouri Freight Asso.* 1007

6. The public policy of the government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the law-making power speaks on a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts. *Id.*

7. A contract or combination made in violation of a law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on the subject. *Id.*

**Impairing obligation.**

8. A statute making a railroad company liable for damages caused by fire from locomotives does not impair the obligation of a contract in its charter which merely authorizes the use of steam or of animal power or mechanical power in operating the road. *St. Louis & S. F. R. Co.* v *Mathews*, 611

9. A state statute which authorizes the redemption of property sold upon foreclosure of a mortgage where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage. *Barnitz* v. *Beverly*, 93

10. A state statute declaring that real estate sold on foreclosure of a mortgage shall not again be liable for sale for any balance due upon the judgment or decree under which it was sold impairs the obligation of the contract of a pre-existing mortgage. *Id.*

11. A state statute seeking to substitute on the foreclosure of pre-existing mortgages a right to sell the premises subject to an estate or right of possession in the debtor or his alienees for eighteen months, in place of the right to sell them free from redemption, is an impairment of the obligation of the contract. *Id.*

12. Judicial decisions or acts of tribunals or officers under statutes which were in force at the time a contract was made are not within the constitutional prohibition against state laws impairing the obligation of the contract. *Hanford* v. *Davies*, 157

13. A provision in a bank charter for the increase of capital stock without prescribing any limitation, by issuing stock to a depositor at his option when his deposit amounts to $50 or more, while such stock is made exempt from taxation by the charter, does not constitute a contract which is impaired by a new state Constitution which renders all shares subsequently issued subject to taxation. *Bank of Commerce* v. *Tennessee, Memphis*, 211

14. A contract is created by the acceptance on the part of holders of claims against a levee board of the proposition made by Miss. act Feb. 13, 1867, for the liquidation of the liabilities incurred for levee purposes by the issue of bonds and assessments on the lands benefited; and therefore the rights acquired under that statute cannot be impaired by subsequent legislation. *Ford* v. *Delta & P. Land Co.* 590

**CORPORATIONS.** See also BANKS, 4-6; CLAIMS, 1; CONSTITUTIONAL LAW, 9, 11; CONTRACTS, 13; ESTOPPEL, 2; EVIDENCE, 8; RAILROADS, 1-8.

1. A contract with a state relating to the exercise of franchises, if susceptible of two meanings, the one restricting and the other extending the powers of a corporation, should be construed in the way which works the least harm to the state. *Covington & L. Turnp. Road Co.* v. *Sandford*, 560



Digitized by Google

2. The mere collecting of tolls in conformity with reduced rates fixed by a statute does not show an assent by a turnpike company to the exercise by the legislature at will of the power to amend or repeal its charter. *Id.*

3. A grant to each of two new corporations, of "the powers, rights, and capacities" which had been granted to a corporation which they succeed, and the property of which is divided between them, does not confer on the new companies the exemption which belonged to the original company from legislation changing the rates of toll which it might charge so as to prevent the company from earning as much as 14 per cent on its capital stock. *Id.*

4. A person dealing with a corporation which is formed under general laws by the recording or filing in a public office of the required articles of association and certificate is bound to take notice of the documents recorded or filed, upon which, as authorized and controlled by the general laws, depend the existence of the corporation, the extent of its corporate powers, and its capacity to act as a corporation. *McCormick* v. *Market Nat. Bank*, 817

5. A contract between railroads, extending beyond the time when the charter of one company will expire by its terms, is not for that reason invalid, when it is drawn carefully in view of that fact, binding the parties to take such steps as may be necessary to continue it in force. *Union P. R. Co.* v. *Chicago, R. I. & P. R. Co.* 265

6. Ratification of a contract of a corporation by a board of directors appears without any affirmative action on their part, when the execution of the contract is entered upon with full knowledge of the directors. *Id.*

7. The ultimate determination of the management of corporate affairs rests with the stockholders when by the charter the powers of the corporation are vested in them, or when it is silent on that question and does not commit the exclusive control to the directors. *Id.*

8. A provision for government directors of the Pacific Railroad Company does not take that corporation out of the general rule giving stockholders final control of corporate affairs in the absence of a charter limitation. *Id.*

9. A stockholder is not under any obligation to refrain from selling his shares, at the sacrifice of his personal interests, in order to secure the welfare of the corporation, or to enable another stockholder to make gains and profits. *Farmers' Loan & T. Co.* v. *Chicago, P. & S. R. Co.* 60

**COSTS.** See also APPEAL AND ERROR, 101; CONSTITUTIONAL LAW, 6.

A decree for costs, including a solicitor's fee, in the nature of a penalty, is not within the power of a circuit court of the United States on dismissing a suit for want of jurisdiction. *Citizens' Bank* v. *Cannon*, 451

**COUNTIES.** See also TAXES, 1.

The subsequent incorporation of counties or other municipalities will include them among the "municipal or other corporations" which may tax the real or personal property of the railroad company chartered by Ga. Laws 1833, p. 246, although a county was not a corporation when that act was passed. *Central R. & B. Co.* v. *Wright*, 454

**COUNTY SEAT.** See RAILROADS, 4, 5.

**COUPONS.** See COURTS, 14.

**COURTS.** See also BRIDGES; COSTS; INDIANS, 1; PUBLIC LANDS, 8, 7; TAXES, 29.

1. The validity of proceedings under a statute for the annexation of territory to a city is a question of a judicial nature, and not a matter solely of legislative cognizance. *Forsyth* v. *Hammond*, 1095

**Judges.**

2. The power of another justice to perform the duties of any justice of the supreme court who is absent from his district or incapacitated from acting, which is conferred by N. M. Comp. Laws 1884, § 1852, is within the power of the legislative assembly, and is not inconsistent with the provision of the act of Congress of July 10, 1890, for the assignment of the judges to particular districts and their residence therein. *Gonzales y Borrego* v. *Cunningham*, 572

**Term.**

3. The discretion of the trial judge in continuing a special term in order to conclude the trial of a pending case, even if it is prolonged beyond the day fixed for a regular term, is not controlled by N. M. Comp. Laws 1884, §§ 552, 552*a*, which provide that a special term shall not conflict with a regular term of the court in the same district. *Id.*

**State courts.**

4. The Federal Constitution does not prevent the people of a state from giving, if they see fit, full jurisdiction to the courts to determine the territorial boundaries of a municipal corporation, since the preservation of legislative control in such matters is not one of the essential elements of a republican form of government guaranteed by U. S. Const. art. 4, § 4. *Forsyth* v. *Hammond*, 1095

5. Exclusive jurisdiction of the state courts over crimes on Indian reservations, not committed by or against Indians, is not taken away by the clause of the enabling act of the state of Montana providing that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." *Draper* v. *United States*, 419

6. The power of the justices of the peace to arrest deserting seamen and to deliver them on board their vessel is not within the definition of "judicial power" as defined by the Constitution of the United States; and it may lawfully be conferred by Congress upon state officers. *Robertson* v. *Baldwin*, 715

**Federal courts.**

7. A claim by a corporation in good faith that it has a contract with the city, which the latter has attempted to impair by a grant to another corporation, is sufficient to give jurisdiction to a circuit court of the United States of a bill to enjoin the latter corporation from interfering with the rights of the former, al-



Digitized by Google

though both parties are corporations and citizens of the same state. *City R. Co.* v. *Citizens' Street R. Co.* 1114

8. A bill to enforce provisions of the Interstate Commerce Act of 1887 by requiring a railroad company to receive cars from another line in the course of interstate business is within the jurisdiction of a Federal court, irrespective of the citizenship of the parties. *Ex parte Lennon*, 1110

9. A man will be regarded as a citizen by adoption of the Cherokee Nation for the purpose of determining the jurisdiction of the offense of killing him, when it appears that he sought to become a citizen, took all the steps that he supposed necessary therefor, considered himself a citizen, and the Cherokee Nation in his lifetime recognized him as such and still asserts his citizenship by asserting jurisdiction over the parties who killed him. *Nofire* v. *United States*, 588

10. An action by two or more joint plaintiffs is not within the jurisdiction of a Federal court on the ground of diverse citizenship, unless each one of the plaintiffs could sue the defendants in the Federal court on that ground. *Hoos* v. *Jamieson*, 1049; *Hoos* v. *Werner*, 1051

11. The District of Columbia is not a state within the meaning of the provision giving courts of the United States cognizance of controversies between citizens of different states. *Id.*

12. A claim for damages to an amount within the jurisdiction of a circuit court of the United States, in a case which justifies exemplary damages, will give the court jurisdiction, although the actual recovery may be much less than the jurisdictional amount. *Scott* v. *Donald*, 632

13. A controversy exceeding the value of $2,000 is presented in a suit for an injunction, where complainant intends to import certain liquors exceeding $2,000 in value and defendants have seized some thus imported, and threaten to seize all that he shall import, under an unconstitutional statute. *Scott* v. *Donald*, 648

14. The amount of a matured interest coupon which itself bears interest and constitutes a cause of action separate from that on the bond to which the coupon is attached can be added to the amount of the bond in determining the jurisdictional amount of $2,000 "exclusive of interest," in an action brought in a circuit court of the United States. *Edwards* v. *Bates County*, 155

15. The jurisdiction of the United States circuit court for the southern division of the district of Montana, created by the act of Congress of July 20, 1892, is coextensive with the district, since the implication in the latter part of the act, that a distribution of territorial jurisdiction was intended, is not sufficient to create a distribution which the statute does not make in terms. *Rosencrans* v. *United States*, 708

16. The submission of special questions to the jury in accordance with state practice is in the discretion of a Federal court. *W. B. Grimes Dry Goods Co.* v. *Malcolm*, 524

**Conflict of jurisdiction.**

17. The jurisdiction of a court once attached cannot be arrested or taken away by proceedings in another court. *Ex parte Chetwood*, 782

18. The substitution of an agent elected by the stockholders of a national bank, for a receiver, under the act of Congress of August 28, 1892, cannot oust the jurisdiction of a state court in a suit against the bank and receiver, *Id.*

19. The filing of a petition by a national bank receiver in a Federal court does not operate to make him an officer of that court, or to place the assets of the bank within the control of the court in the sense in which control is acquired where a receiver is appointed by the court. *Id.*

**Rules of decision.**

20. The headnote of a Georgia case construing a statute will not be regarded by the Supreme Court of the United States as controlling, when the opinions of the three judges of the court agree simply in the result, but no two of them concur in such construction. *Central R. & B. Co.* v. *Wright*, 454

21. The Supreme Court of the United States is bound by the judgment of the supreme court of a state in the mere matter of the construction of a state law. *First Nat. Bank* v. *Chehalis County*, 1069

22. Federal courts are not justified in running counter to the decision of the highest state court upon questions involving the construction of state statutes or Constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law, if they do not violate the Federal Constitution. *Fallbrook Irrig. Dist.* v. *Bradley*, 369

23. The construction given by the supreme court of a state to a statute of limitations of the state will be followed by a Federal court. *Dibble* v. *Bellingham Bay Land Co.* 72

24. The construction by a state court of a state license statute, holding that it does not apply to the interstate business of an express company, will be followed by the Federal courts. *Osborne* v. *Florida*, 586

25. A suggestion that a decision of the supreme court of a state sustaining the constitutionality of a state statute was obtained in a prepared case which did not involve a genuine controversy will not prevent the Supreme Court of the United States from regarding that decision as controlling. *Adams Exp. Co.* v. *Ohio State Auditor*, 683

26. Federal courts follow state decisions as to the rights and liabilities respecting surface water as a matter of local law. *Walker* v. *New Mexico & S. P. R. Co.* 837

See also APPEAL AND ERROR, 79, 80.

27. The decisions of the California courts that the use of water for irrigation is a public use, and the declaration of the people and legislature of the state to similar effect in their Constitution and statutes, must be accorded great respect by the Federal courts, although they are not absolutely binding on the latter. *Fallbrook Irrig. Dist.* v. *Bradley*, 369



Digitized by Google

28. The decision of a state court that a devise over to the heirs of a certain person in case of the death of a first devisee unmarried or without offspring by her husband is substitutionary and can take effect only at the time of testator's death, and not afterwards, is not conclusive in a Federal court when it is not based on any settled rule of property in the state. *Barber* v. *Pittsburg, Ft. W. & C. R. Co.* 925

29. The question whether the opinion of the supreme court of a state as to the effect of a devise is conclusive evidence of the law of the state in a court of the United States depends upon the further question whether the opinion is declaratory of the settled law of the state as to the effect of such devises, or is a decision upon the construction of this particular devise. *Id.*

30. The decision of a state court in a former action of ejectment is not conclusive as an adjudication of the rights of the parties in a Federal court, or a bar to a second action of ejectment, when a single verdict and judgment in ejectment is not conclusive under the laws and in the courts of the state. *Id.*

31. The matter of the territorial boundaries of a municipal corporation is local in its nature, and its determination by the supreme court of the state cannot be reviewed or controlled by a circuit court of the United States on collateral attack, when it is not subject to review on writ of error by the Supreme Court of the United States. *Forsyth* v. *Hammond*, 1095

## COURTS-MARTIAL.

1. The power of the President to appoint a general court-martial is necessarily vested in him as commander in-chief and is not limited to the single case specified in U. S. Rev. Stat. § 1342, in which the commander of an officer charged with an offense is himself the accuser or prosecutor. *Swaim* v. *United States*, 823

2. The President is not shown to be the accuser or prosecutor of a person tried by court-martial merely because on an accusation made by another person to the Secretary of War the President appoints a court of inquiry and on its report, by order of the Secretary of War, refers the subject to an officer with directions to prepare charges and specifications, and afterwards appoints a general court-martial to hear them. *Id.*

3. The action of the President in twice returning proceedings to a court-martial urging a more severe sentence is justified by the Army Regulations of 1881, § 923, which have superseded the provision in the British mutiny act prohibiting any recommendation of the increase of a sentence, if that provision was ever in force in this country. *Id.*

4. The decision of a court-martial in determining the validity of a challenge of the right of an officer to sit on the trial because of his enmity and dislike toward the accused cannot be reviewed by the court of claims in a collateral action. *Id.*

5. A sentence by court-martial held by officers inferior in rank to the accused cannot be collaterally attacked on the ground that the 79th article of war, providing that an officer shall not be tried by officers inferior to him in rank when it can be avoided, was violated, since it must be presumed that the officers to compose the court-martial were detailed in pursuance of law. *Id.*

6. The claim that no offense was shown by the facts before a court-martial cannot be effectual to avoid the sentence on collateral attack in a civil court. *Id.*

7. Questions of procedure—such as errors in the admission or exclusion of evidence and permitting a person to act as judge advocate who was not properly appointed or sworn—cannot constitute grounds of collateral attack on the decision of a court-martial. *Id.*

## COVENANT.

See CONFLICT OF LAWS, 2; LIMITATION OF ACTIONS, 4–6.

## CRIMINAL LAW.

Evidence of crime, see EVIDENCE.

See also ALIENS; APPEAL AND ERROR, 66; COURTS, 5, 9; INDIANS, 2; TRIAL, 22, 24.

1. A plea in abatement of an indictment stating that the drawing of grand jurors tended to the defendant's injury and prejudice, without stating any grounds for such conclusion, is fatally defective. *Agnew* v. *United States*, 624

2. An objection to irregularities in drawing grand jurors is too late when it is made in a plea of abatement filed five days after indictment and two weeks after the irregularities complained of began, when no reason is given for failure to make the objection earlier. *Id.*

3. A contumacious witness is not twice subjected to jeopardy for refusing to testify before a commitee of the United States Senate, although he may be punished for contempt of the Senate and also indicted for a misdemeanor under U. S. Rev. Stat. § 102. *Re Chapman*, 1154

4. Defendants who obtain the reversal of a judgment and sentence against themselves by writ of error on the ground of defects in the indictment cannot afterwards set up such conviction as a bar to a new indictment. *Ball* v. *United States*, 300

5. A general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder and not objected to before the verdict is insufficient in that respect as a bar to a second indictment for the same killing, although the first indictment was, subsequently to the acquittal, held invalid as to other defendants who were found guilty. *Id.*

6. Power to sentence a convict to a penitentiary within the state but out of the judicial district in which he is convicted, which is conferred by U. S. Rev. Stat. §§ 5440–5442, is not taken away by § 5546 as amended by the act of July 12, 1876, providing for the sentence of a convict to imprisonment in a convenient state or territory when there is no suitable place of imprisonment in the district or territory where he is convicted. *United States* v. *McMahon*, 357

7. A sufficient judgment for all purposes is made by a record showing the offense charged and the indictment, arraignment, plea, trial,



Digitized by Google

conviction, and a recital that defendant "having been convicted" "it is thereupon ordered by the court" that he be imprisoned in a specified penitentiary for a specified period. *White* v. *United States*, 365

**CUBA.** See EVIDENCE, 2; NEUTRALITY, 1.

**CUSTOM.** See EVIDENCE, 42; SHIPPING, 10.

**DAMAGES.** See also APPEAL AND ERROR, 120; EVIDENCE, 44; TRIAL, 17.

1. Intentional, malicious, and repeated interference with the exercise of personal rights and privileges secured by the Constitution of the United States may constitute a wrong and injury which is not the subject of compensation by mere money standard, but for which exemplary damages may be allowed. *Scott* v. *Donald*, 632

2. The mere possibility that a railroad right of way might in the future be used for other purposes is not to be taken into account in determining the damages for laying out a street across the railroad. *Chicago, B. & Q. R. Co.* v. *Chicago*, 979

3. Expenses of erecting gates, planking the crossing, and maintaining flagmen, which will necessarily result from the laying out of a street across a railroad, must be regarded as incidental to the exercise of the police powers of the state, and do not constitute an element of the just compensation to the railroad. *Id.*

4. The right to lay additional tracks on a railroad right of way is not affected by opening a street across the railroad, and therefore the loss of such right is not an element of damages for laying out the street across the tracks. *Id.*

5. A reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purpose of pleasure, must be shown in order to obtain damages for the loss of its use in case of a seizure of a yacht designed only for pleasure. *The Conqueror*, 937

6. The probable profits of a charter not yet entered upon cannot be included in the damages for the total loss of a vessel by collision, but these are limited to the value of the vessel, with interest thereon, and the net freight pending at the time of the collision. *The Umbria*, 1053

**DEADLY WEAPON.** See TRIAL, 85.

**DEATH.** See also APPEAL AND ERROR, 18.

A widow who brings an action for the death of her husband under Ariz. Rev. Stat. 1887, §§ 2145–2155, for the benefit in part of the children and of the parents of the deceased, as well as of herself, has no right to compromise or release by remittitur any part of the recovery awarded by the jury to the other beneficiaries. *Southern P. Co.* v. *Tomlinson*, 198

**DEBTS.** See PUBLIC MONEY.

**DECOY.** See POSTOFFICE, 4.

**DE FACTO.** See OFFICERS.

**DEFINITIONS.** See CONSPIRACY, 5; LIENS, 1; NEUTRALITY, 1; POSTOFFICE, 1; PUBLIC MONEY; SHIPPING, 1; TAXES, 10.

**DELEGATION OF POWER.** See CONSTITUTIONAL LAW, 1, 2; FOOD, 2.

**DEPOSITIONS.** See CLAIMS, 6.

**DIRECT TAXES.** See CLAIMS, 8–10.

**DISTRICT ATTORNEY.**

Fees earned by a district attorney by service without special employment in defending habeas corpus cases brought to release Chinese emigrants detained by order of the collector of the port are part of the emoluments of his office for which he must account to the government under U. S. Rev. Stat. § 833. *Hilborn* v. *United States*, 183

**DISTRICT OF COLUMBIA.** See APPEAL AND ERROR, 22–24; COURTS, 11; INTEREST, 3, 4.

**DOCKET FEE.** See CLERK, 3, 4.

**DOGS.** See CONSTITUTIONAL LAW, 35.

**DOWER.**

A mere locator of a mining claim having only the possessory rights conferred by the laws of the United States does not have such an estate in the property as will sustain a claim by his widow for dower,—especially as against his grantee,—since his conveyance, although his wife did not sign it, was an abandonment of his interest in the claim. *Black* v. *Elkhorn Min. Co.* 221

**DUTIES.** See also APPEAL AND ERROR, 96.

1. A foreign-built vessel designed only for pleasure, and purchased by a native-born American citizen, is not subject to duty under the act of October 1, 1890. *The Conqueror*, 937

2. A collector of a port is not protected by a certificate of probable cause from a judgment for damages for seizure and detention of a vessel on an invalid claim for duties, since such a seizure is not within U. S. Rev. Stat. § 970, providing for a certificate of reasonable seizure to preclude a recovery of costs by a claimant, as that applies to a seizure for a penalty or forfeiture; but the case more properly falls within § 989, providing that execution shall not issue against the collector, but the judgment be paid from the treasury. *Id.*

3. The drawback on imported bituminous coal afterwards used for fuel by coasting vessels, given by the tariff act of 1883, is not preserved in the act of 1890, § 25, by the provision continuing any drawback allowed "under existing law," as a comparison of the two acts shows that the former was entirely superseded by the latter. *United States* v. *Allen*, 242

4. A claim for a drawback of duty on imports is within the rule that exceptional privileges or exemptions from the general operation



Digitized by Google

of a law must be strictly construed and doubts resolved against the claim, *Id.*

5. A protest within ten days after the ascertainment and liquidation of duties, though not made until after payment by the importer, is sufficient under U. S. Rev. Stat. §§ 2931, and 3011, since the amendment of the latter section by striking out the clause providing that protest should be made at or before payment. *Saltonstall* v. *Birtwell*, 848

**DYING DECLARATIONS.** See EVIDENCE, 86, 87.

**EJECTMENT.** See also COURTS, 80.

A certificate of location of Sioux half-breed scrip under the act of Congress of April 17, 1854, creates at best only an equitable title, which is insufficient to sustain an action of ejectment in the Federal courts. *Carter* v. *Ruddy*, 1090

**ELECTRICITY.** See STREET RAILWAYS, 1.

**EMBEZZLEMENT.**

Want of consent of a postmaster to embezzlement of money-order funds by his assistant is not necessary to make the latter liable for the crime. *Faust* v. *United States*, 224

**EMINENT DOMAIN.** See also APPEAL AND ERROR, 81, 51, 94; CONSTITUTIONAL LAW, 15, 16, 18, 19.

1. The power of the state to condemn a waterworks system does not depend upon making the supply of water absolutely free to all individuals who desire to use it. *Long Island Water Supply Co.* v. *Brooklyn*, 1165

2. The power to take a waterworks system by eminent domain for the use of a city under statutory authority is not taken away by a contract for the supply of water by the private company owning the works during a term of years, with a provision requiring the payment of hydrant rentals by the municipality. *Id.*

3. An act for the annexation of territory to a city, which gives the city the right to purchase or condemn waterworks in such territory at any time within two years, does not constitute a contract against condemnation after that time, or prevent the legislature from enlarging the time. *Id.*

4. A statute providing for the condemnation of waterworks by a city is not unconstitutional because it fails to declare in terms that the city shall continue the same use or appropriate the property to some other equally public purpose. *Id.*

5. A statute compelling grant of a location on a railroad right of way for the erection by an association of private individuals of an elevator in which to store grain for their own benefit, without reserving any control of the use of such land or of the building to be erected thereon to the railroad company, cannot be upheld, as it would be in essence and effect a taking of private property of the railroad corporation for the private use of other persons. *Missouri P. R. Co.* v. *Nebraska, Board of Transportation*, 489

**EQUITY.** See also APPEAL AND ERROR, 84.

1. Complete relief, including the question of any allowance to a defendant for expenses, may be granted by a court of equity after it has acquired jurisdiction. *Hopkins* v. *Grimshaw*, 739

2. Chancery has jurisdiction to enforce a resulting trust. *Id.*

3. A bill for partition of land may be brought in equity when the title of the plaintiffs is purely equitable. *Id.*

4. A suit in equity to establish an indebtedness of an estate to the plaintiffs, who are executrices, may be maintained because they cannot bring an action at law. *Glover* v. *Patten*, 760

5. One who attempts to make a homestead entry of land knowing that it has been selected and certified to the state under a grant for internal improvements, and has been transferred to purchasers for value, will not be aided by a court of equity in attacking the title under such grant, if it is not valid. *Deweese* v. *Reinhard*, 757

**ESTATE TAIL.** See REAL PROPERTY, 1.

**ESTOPPEL.**

1. The invalidity of an adjudication as against one who had no notice of it cannot be set up by another person who has no privity with him. *Huseman* v. *Durham*, 664

2. A contract made by a corporation contrary to the express prohibition of a statute cannot be made good by estoppel so as to support an action to recover anything beyond the value of what the corporation actually received and enjoyed. *McCormick* v. *Market Nat. Bank*, 817

3. A city is estopped to assert that an ordinance extending the franchise of a street railway company is invalid for want of consideration, as against bondholders who have in good faith invested their money in the bonds of the company relying upon the validity of the ordinance. *City R. Co.* v. *Citizens' Street R. Co.* 1114

4. An insolvent bank and its receiver are in equity estopped from asserting to the prejudice of another bank that the character and condition of the fund on which the latter bank had accepted a check upon the faith of certain representations were otherwise than they were represented to be. *Fourth Street Nat. Bank* v. *Yardley*, 855

5. One who asserts as claims against a debtor notes indorsed by him and drafts drawn by him from the discounting of which payments on behalf of the debtor were made, and who seeks to absorb the debtor's assets on this theory, is thereby prevented from claiming as against other creditors that such payments were made by himself. *Walker* v. *Brown*, 865

6. A party electing to have damages assessed by a jury in the exercise of a privilege given by statute is precluded from denying the validity of a provision of that statute for the addition of 50 per cent to the verdict. *Electric Co.* v. *Dow*, 1088



Digitized by Google

7. A grantee of one who appeared on the records to be, but was not, the equitable owner of public lands, is not, after he has successfully acquired the equitable and legal title to the land from the United States, estopped from contesting tax deeds made under state laws before he acquired his equitable title. *Hussman* v. *Durham*, 664

**EVIDENCE.** See also APPEAL AND ERROR, 102, 105–109.

**Judicial notice.**

1. The court may properly take judicial notice of the fact that the yachting season in our northern waters practically comes to an end before the 1st of November. *The Conqueror*, 937

2. Proclamations and messages by the President are sufficient to give the court judicial information of the existence of an actual conflict of arms in Cuba in resistance of the authority of the government of Spain, although acknowledgment of the insurgents as belligerents by the political department has not taken place. *United States* v. *The Three Friends*, 897

3. Judicial notice will be taken of the fact of the Federal incorporation of a railroad company. *Texas & P. R. Co.* v. *Cody*, 1132

4. It is a matter of common knowledge that agreements as to rates have been continually made of late years between railroad companies, and that complaints of each company in regard to the violation of such agreements by its rivals have been frequent and persistent. *United States* v. *Trans-Missouri Freight Asso.* 1007

5. A presumption that indebtedness of a testatrix to children is extinguished by a bequest does not arise where the will is made several years before the indebtedness is liquidated,—especially where it appears that the testatrix did not consider that the indebtedness to one of the children was extinguished. *Glover* v. *Patten*, 760

**Presumption and burden of proof.**

6. The creation of a presumption to be deduced from a given state of facts is within the province of the legislature. *Jones* v. *Brim*, 677

7. A carrier has the burden of proving that injury to the baggage of a passenger was caused by an act of God for which the carrier is not liable. *The Majestic*, 1039

8. The presumption is that a railroad employee who was killed at night by a flat car in front of an engine when crossing a track did not expose himself recklessly, but did look and listen for coming trains. *Texas & P. R. Co.* v. *Gentry*, 186

9. The burden of proof is on an employee suing for alleged negligence of his employer, to show that the injury received was caused by the master's negligence, to which plaintiff's negligence did not contribute. *Texas & P. R. Co.* v. *Barrett*, 1136

10. Knowledge of the invalidity of an act of Congress will not be imputed in advance of any authoritative declaration to that effect, to those who are acting under its provisions, so as to preclude them from having equities based on their reliance upon the act. *United States* v. *Realty Co.* 215

11. A prima facie presumption that seals upon an official bond were placed there with the consent of the parties arises when there is full proof of the original signing of the bond by the sureties, and of its presentation to the government without any defect except the lack of seals, and that after this defect was pointed out the principal on the bond took it back to obtain the seals, and returned it subsequently to the government with seals upon it. *Moses* v. *United States*, 1119

12. The acceptance of an ordinance extending the franchise of a street-railway company may be presumed from the fact that the amendment is beneficial to the corporation,—especially when it proceeds to issue bonds falling due at the expiration of the enlarged franchise. *City R. Co.* v. *Citizens' Street R. Co.* 1114

13. A presumption that all statutory prerequisites to the issue of a marriage license were complied with arises from the fact that it was issued. *Nofire* v. *United States*, 588

14. An advancement to a child by a parent who is in debt to the child is presumed to be a satisfaction of the debt *pro tanto*. *Glover* v. *Patten*, 760

15. A presumption that a negro killed in the Indian territory is not a member of an Indian tribe cannot be made for the purpose of sustaining the jurisdiction of a Federal court under an indictment alleging that he was not an Indian and where there is some evidence on the question. *Lucas* v. *United States*, 282

16. It will not be presumed that persons in possession of hay were guilty of a trespass or of violating a criminal statute in cutting it, if it does not appear that it could not have been cut lawfully. *Eddy* v. *Lafayette*, 225

17. The intent to commit a homicide may be inferred from the very fact of firing a bullet that causes the death of a person. *Allen* v. *United States*, 528

18. False evidence purposely and intentionally invoked by an accused person is evidence against him as the basis of a presumption of guilt. *Id.*

**Documentary evidence.**

19. A judgment against a public officer establishing a defalcation far beyond the penalty in his bond is at least prima facie evidence against his sureties to show a breach of the bond. *Moses* v. *United States*, 1119

20. A restatement of an account between the government and an officer, disallowing credits which had been given him upon false and forged vouchers, is not inadmissible against his sureties, although it was made after his resignation. *Id.*

21. A certified transcript of the account of a postmaster is admissible on the trial of an indictment of his assistant postmaster for embezzling money-order funds. *Faust* v. *United States*, 224

22. An assessment upon stockholders of a national bank, made by the comptroller of the currency, cannot be excluded from evidence in an action against a stockholder on the



Digitized by Google

ground that the assessment is an attempt of an executive officer to exercise judicial functions. *Buchnell* v. *Leland*, 598

23. Entries made by a jailer in a book which he is required to keep, whether by statute or by command of his superior, are competent evidence to show the presence of a prisoner in the jail on a certain day, although the jailer has no distinct recollection of the fact independently of the record. *White* v. *United States*, 365

24. A warrant signed by a person as "commissioner U. S. court" for a certain district is not inadmissible on the ground that it does not purport to be issued by any officer authorized to issue a warrant, and that he is not a commissioner of the circuit court. *Starr* v. *United States*, 577

**To vary writing.**

25. The legal construction of the terms of a will executed and attested as required by law cannot be affected by testimony as to the testator's state of health at the time of publishing the will, or as to his length of life afterwards. *Barber* v. *Pittsburg, Ft. W. & C. R. Co.* 925

**Opinions and conclusions.**

26. The opinion of a witness as to the financial responsibility of one who is accused of fraud in obtaining credit upon a guaranty is not admissible. *Agnew* v. *United States*, 624

27. Men employed by the Department of Agriculture to investigate diseases of animals, and who have investigated Texas fever, may testify as experts to the nature and symptoms of that disease. *Grayson* v. *Lynch*, 230

28. Statements that a certain cattle disease is ordinarily called "Texas fever," made by witnesses who have given the symptoms of the disease, are not improper although the witnesses are not experts. *Id.*

29. The fact that certain districts of Texas are infected with Texas fever may be stated by experts familiar with that disease, though they have never visited those districts in person. *Id.*

30. One testifying as a medical expert, who has stated all that he had seen and heard and given his own expert opinion thereon concerning the sanity of a person, need not be allowed to be asked what medical science teaches on the subject. *Davis* v. *United States*, 750

**Declarations.**

31. On the question whether a combination was lawful or not declarations of those engaged in it explanatory of acts done in furtherance of its object are competent evidence after the combination has been proved. *Wiborg* v. *United States*, 289

32. A conversation between two makers of a note, in the absence of a payee, cannot be proved in their favor against him in an action upon the note. *Nelson* v. *Flint*, 1002

33. Statements by the mortgagor after the execution of a mortgage and delivery of possession under it, as to what he intended the instrument to be, are not admissible in evidence against the mortgagee. *W. B. Grimes Dry Goods Co.* v. *Malcolm*, 524

34. In a contest between heirs or next of kin, communications of the ancestor to an attorney who drew a will or similar document are not privileged. *Glover* v. *Patten*, 760

35. On a trial for killing a negro in the Indian country his statements to a witness that he did not belong to that country but had come from Arkansas, offered on the question of the jurisdiction of a Federal court, are mere hearsay and not within the rule as to declarations by deceased persons against their interest, although the adoption of a colored man into the Indian tribe confers certain benefits, rights, and privileges. *Lucas* v. *United States*, 282

36. Evidence that a person whose dying declarations are offered in evidence had received extreme unction is admissible as showing the circumstances under which the declaration was made. *Carver* v. *United States*, 602

37. Dying declarations may be impeached by evidence of other statements by the same person which are inconsistent therewith. *Id.*

38. Evidence of a conversation may be met with testimony by the other party respecting the same conversation, to explain, vary, or contradict it. *Id.*

**Relevancy; materiality.**

39. Evidence that another person had committed another and different offense, and had been indicted and convicted thereof, is not admissible on a prosecution for crime. *Foust* v. *United States*, 224

40. The flight of an accused person is competent evidence against him, as having a tendency to establish his guilt. *Allen* v. *United States*, 528

41. Evidence of the commercial rating of a defendant charged with defrauding a bank by obtaining credit on his guaranty of bonds which are worthless or nearly so is not admissible to show his financial condition. *Agnew* v. *United States*, 624

42. The customs and course of business of the postoffice may be proved by government officers in that department to raise a presumption that papers delivered by postoffice employees were delivered in the usual way after having been mailed at the postoffice for publication. *Dunlop* v. *United States*, 799

43. Proof that copies of a newspaper were actually received at a postoffice in large numbers every day for mailing is admissible to show that copies of a five o'clock edition of that paper, received as part of the mail matter of certain persons, came through the postoffice. *Id.*

44. Estimates of the value of the use of a pleasure yacht, made by friendly witnesses, with no practical illustrations to support them, without any showing that the vessel was earning profits or belonged to a class of vessels for which there is a steady demand in the market, are insufficient to be made the basis of a judicial award for damages by its detention. *The Conqueror*, 937

45. Evidence of a general reputation for truth and veracity is admissible on a prosecution for making a false deposition, not merely to give weight to defendant's personal testimony in the case, but to establish a general character inconsistent with guilt of that crime,



Digitized by Google

whether he has testified or not. *Edgington* v. *United States*, 467

46. Evidence as to collateral security which, it is claimed, should have been exhausted before bringing action on a note, is not admissible on the part of the defense, where there is no suggestion in the answer respecting such security. *Nelson* v. *Flint*, 1002

47. Allegations alleging a joint relationship and the doing of negligent acts jointly are divisible, and will sustain proof of negligence on the part of one defendant only. *Atlantic & P. R. Co.* v. *Laird*, 485

48. A variance between a bond described in the declaration as bearing date April 2, when the instrument in evidence purports to bear date the — day of March, is immaterial when the evidence shows that the bond was accepted on April 2, as it speaks from the date of acceptance. *Moses* v. *United States*, 1119

**Sufficiency.**

49. Evidence of an established reputation for good character, if relevant to the issue, may alone create a reasonable doubt, although without it the other evidence would be convincing. *Edgington* v. *United States*, 467

50. A mere preponderance of evidence which at the same time is vague or ambiguous is not sufficient to warrant a finding of fraud. *Lalone* v. *United States*, 425

51. Testimony as to value by witnesses duly qualified to testify in relation to the subject of inquiry, even if uncontradicted, will not prevent the jury from exercising their independent judgment. *The Conqueror*, 937

52. A delinquent tax list which is made prima facie evidence by Ariz. Rev. Stat. 1887, § 2686, that the taxes therein are due, is of the same effect as evidence respecting taxes of prior years reassessed in that list, as of the taxes for the current year. *Maish* v. *Arizona*, 567

53. A newspaper in which a person's name after the word "by" is printed just below the name of the paper is admissible to prove the proprietorship of such person, on an indictment against him for publishing such paper, —especially when it is shown by other evidence that he is the proprietor and publisher of a paper of that name. *Dunlop* v. *United States*, 799

54. The responsible head of a newspaper establishment is sufficiently proved to have known the indecent character of the contents of his paper after several years' proprietorship and complaints made to him on the subject. *Id.*

55. Damage by sea water to baggage in a compartment of a steamship is not shown to have been caused by an act of God or inevitable accident, by evidence which merely tends to show that it resulted from the breaking in of the cover of a porthole in the compartment by floating wreckage, where the evidence does not fully establish this fact or the fact that the porthole was properly inspected before the alleged accident, or explain why, if the wreckage was sufficient to do that damage, the vessel did not steer away from it or slacken speed while passing through it. *The Majestic*, 1039

**EXECUTIVE DEPARTMENT.** See CLAIMS, 3.

**EXECUTORS AND ADMINISTRATORS.** See also ACTION OR SUIT, 8; EQUITY, 4; LIMITATION OF ACTIONS, 1.

Holding that advances by an administrator with the will annexed to pay debts of the decedent constitute a collectible debt against the estate for which real estate may be sold, even if erroneous, does not invalidate the sale on collateral attack. *Manson* v. *Duncanson*, 1105

**EXPERTS.** See EVIDENCE.

**EXPLOSIVES.** See MASTER AND SERVANT, 1, 2.

**EXPRESS COMPANIES.** See COMMERCE, 8; CONSTITUTIONAL LAW, 81; TAXES, 15–19.

**EXTRADITION.** See HABEAS CORPUS, 4, 5.

**FALSE SWEARING.** See CLAIMS, 6; EVIDENCE, 45.

**FEDERAL QUESTION.** See PLEADING, 5.

**FELLOW SERVANTS.** See MASTER AND SERVANT.

**FELONY.** See TRIAL, 2.

**FICTION.** See LIENS, 5.

**FIRES.** See CONSTITUTIONAL LAW, 12, 80; CONTRACTS, 8.

**FOOD.**

1. The oleomargarine legislation does not differ in character from the internal revenue laws contained in U. S. Rev. Stat. §§ 3312, 3395, 3445, 3446, etc., but the primary object in both is the same, namely, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue, rather than the protection of purchasers. *Re Kollock*, 813

2. Requiring manufacturers and dealers in oleomargarine to put it in packages marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, does not constitute a delegation of power to those officers to determine what acts shall be criminal, but the act of Congress of August 2, 1886, sufficiently defines the offense by requiring the packages to be marked and branded, prohibiting the sale of packages that are not, and prescribing the punishment for sales in violation of its provisions, leaving the mere description of particular marks, stamps, and brands to be determined by those officers. *Id.*

**FORFEITURE.** See also ADMIRALTY, 2; PUBLIC LANDS, 25–31.

Forfeiture of a vessel under U. S. Rev. Stat. § 5283, on the ground that it was fitted out to cruise or commit hostilities against a foreign



Digitized by Google

prince or state, does not depend upon the conviction of a person or persons for doing the criminal acts. *United States* v. *The Three Friends*, 897

**FORMER JEOPARDY.** See CRIMINAL LAW, 3–5.

**FRANCHISE.** See TAXES, 9, 10, 14.

**FRAUD.** See EVIDENCE, 26, 50.

**FREEMASONS.** See TAXES, 24.

**FRENCH SPOLIATION CLAIM.** See APPEAL AND ERROR, 4.

**GIFT.** See BOUNTIES, 1.

**GRAND JURY.** See CONSTITUTIONAL LAW, 8; CRIMINAL LAW, 2; INDIANS, 2.

**GUARANTY.** See BANKS, 1.

**GUARDIAN AD LITEM.** See INFANTS.

**HABEAS CORPUS.** See also APPEAL AND ERROR, 2, 23, 75.

1. A writ of habeas corpus cannot be made use of to perform the functions of a writ of error or an appeal. *Ex parte Lennon*, 1110

2. Jurisdiction of a court cannot be collaterally attacked by evidence *dehors* the record upon habeas corpus, by one who was not a party to the original case. *Id.*

3. A conviction on a verdict which fails to specify the degree of the crime, when the law divides it into degrees, with punishment varying according to the degree, although it is erroneous, is not a jurisdictional defect for which the convict can be released on habeas corpus. *Re Eckart*, 1085

4. The discharge on habeas corpus of a person arrested on a warrant of a state court as a fugitive from the justice of a state of which he is a native born citizen, when claimed on the ground that he holds a consular office, may be denied by a Federal court when his consular office has terminated at the date of the order, although it existed at the time of his arrest and when the petition for the writ was filed. *Iasigi* v. *Van De Carr*, 1045

5. Courts of the United States may exercise a discretion in determining the question of the discharge of a person on habeas corpus who has been arrested as a fugitive in a state proceeding in aid of a prosecution for the violation of the laws of another state. *Id.*

**HEIRS.** See WILLS.

**HIGHWAYS.** See also CONSTITUTIONAL LAW, 7, 27; DAMAGES, 2–4; INJUNCTION, 7; RAILROADS, 6.

A railroad may be permitted by city authorities to use a highway reserved for public use as a highway and for other public uses under the act of Congress of July 2, 1836, which provided for platting lands in Iowa into towns. *Burlington Gaslight Co.* v. *Burlington, C. R. & N. R. Co.* 749

**HOMESTEAD.** See PUBLIC LANDS, 4.

**HOMICIDE.** See also EVIDENCE, 17, 25; INDICTMENT, 5; TRIAL, 29, 30, 32–34.

1. An assault which will justify the homicide of the assailant must be something more than an ordinary assault, and must be such as would lead a reasonable person to believe that his life is in peril. *Allen* v. *United States*, 528

2. Mere words, however aggravating, are not sufficient to reduce a homicide from murder to manslaughter. *Id.*

3. The intent necessary to constitute malice aforethought under the common law of murder need not have existed for any particular time before the killing, but may spring up at the instant, and be inferred from the fact of killing. *Id.*

4. A person assaulted is, in general, bound to retreat as far as he can before slaying his assailant. *Id.*

5. A guest in the office of a hotel is not required to step aside when an assailant rapidly advances upon him with a deadly weapon, but has a right to remain where he is and resist the attack and do whatever is necessary, or what he has reasonable grounds to believe is necessary, to save his life or protect himself from great bodily harm. *Rowe* v. *United States*, 547

6. One who makes an assault under the provocation of offensive language, but in such a way as to show that he has no intent to do serious bodily harm, and then retires under such circumstances as show that he does not intend to do anything more, but in good faith withdraws from further contest, has the right of self-defense when the person assaulted unlawfully pursues him with a deadly weapon and seeks to take his life or do him great bodily harm. *Id.*

**HOTEL.** See RECEIVERS, 2.

**HUNT.** See INDIANS, 5.

**HUSBAND AND WIFE.** See EVIDENCE, 18.

**IGNORANCE OF LAW.** See EVIDENCE, 10.

**INCOMPETENT PERSONS.** See EVIDENCE, 30; TRIAL, 26.

**INDIANA.** See BOUNDARIES, 1.

**INDIAN DEPREDATIONS.** See CLAIMS, 5.

**INDIANS.** See also COURTS, 5, 9; EJECTMENT; EVIDENCE, 15; PUBLIC LANDS, 29.

1. The questions of the repeal of one statute of the Cherokee Nation by another, and as to what is the existing law of that nation as to the constitution of a grand jury, are solely for the courts of that nation to decide, without any right of review in Federal courts by habeas corpus proceedings. *Talton* v. *Mayes*, 196

2. The provision as to a grand jury, in the



Digitized by Google

5th Amendment to the Federal Constitution, has no application to criminal procedure in the courts of the Cherokee Nation, whose powers of local self government were enjoyed before the Constitution was made. *Id.*

8. The treaty between the United States and the Ottawa Indians, completed in 1868 by accepting, with some modifications in matters of detail, a proposition made by the Indians in February, 1867, is not invalid on the ground that the tribal organization of the Ottawas had ceased to exist, although by the treaty of 1862 the tribal organization was to be dissolved July 16, 1867, since the proposition to change this was made by the tribe before that date. *Wiggan* v. *Conolly*, 69

4. The provision in the Ottawa treaty of 1867, for the issue of patents to heads of families and to all who have come of age among the allottees under the treaties of 1862, so that they may sell their lands without restriction in order to remove to new homes, supersedes the provision in the earlier treaty for the issue of patents to each individual member of the tribe, so that a minor who is not the head of a family cannot make a valid sale of lands even by order of the state probate court. *Id.*

5. The right of the Bannock Indians to hunt upon the "unoccupied lands of the United States," which is given them by the treaty of February 24, 1869, "so long as game may be found thereon and so long as peace subsists among the whites and Indians on the borders of the hunting districts," cannot be exercised within the limits of the state of Wyoming in violation of its laws, as it is repealed in so far as such lands are embraced within the limits of the state of Wyoming, by the admission of that state on an equal footing with the original states. *Ward* v. *Race Horse*, 244

**INDICTMENT.** See APPEAL AND ERROR, 110.

1. An indictment not demurrable on its face will not become so by the addition of a bill of particulars. *Dunlop* v. *United States*, 799

2. A description of the draft is sufficiently made in an indictment for destroying a registered letter containing a draft, by naming its amount, drawee, number, and place of payment, adding that a more particular description is unknown to the grand jurors. *Rosencrans* v. *United States*, 708

3. An allegation that defendant knowingly deposited in the mails a publication "the character of which is so obscene, lewd, and lascivious that said book would be offensive if set forth in this indictment," sufficiently charges that the book was in fact obscene, lascivious, or lewd, and that he knew it to be so. *Price* v. *United States*, 727

4. An indictment is not defective because it spells the name of the defendant "Faust," instead of "Foust." *Faust* v. *United States*, 224

5. An indictment sufficiently alleges that a person shot by defendant died of the wound inflicted by him and at the time and place at which the wound was inflicted by alleging the infliction of a mortal wound upon such person, of which "he did languish and languishing did then and there instantly die." *Ball* v. *United States*, 800

**INEVITABLE ACCIDENT.** See EVIDENCE, 55.

**INFANTS.** See also ACTION OR SUIT, 6; APPEAL AND ERROR, 24; INTEREST, 1.

1. An answer by a guardian *ad litem* of an alleged infant who was present when the guardian was appointed cannot be repudiated by the latter in a collateral proceeding on the ground that he was past twenty-one years of age when the answer was made. *Manson* v. *Duncanson*, 1105

2. A nonresident minor may be bound by a decree for the sale of lands in which he is interested for the debts of his ancestor, without any service of process upon him, when a guardian *ad litem* is appointed to represent him. *Id.*

**INHERITANCE TAX.** See TAXES, 26, 27.

**INJUNCTION.** See also ACTION OR SUIT, 1, 2, 7, 9; APPEAL AND ERROR, 16, 17.

1. Equity is not limited to the restraint of a contemplated or threatened action, but may even require affirmative action where the circumstances of the case demand it. *Ex parte Lennon*, 1110

2. The legislative acts of a municipal body in enacting ordinances will not be restrained by injunction. *New Orleans Waterworks Co.* v. *New Orleans*, 518

3. An injunction to restrain an action at law cannot be maintained on grounds which would constitute a complete defense at law. *Deweese* v. *Reinhard*, 757

4. A remedy by injunction for the protection of interstate commerce may be provided by Congress as more efficient than any other civil remedy. *United States* v. *Trans-Missouri Freight Asso.* 1007

5. An injunction against refusing to extend to a certain railway such facilities for the interchange of traffic on interstate business as are enjoyed by other companies, and against refusing to receive its cars billed from one state to another, is not subject to the objection that it attempts to compel the performance of personal contracts for service by railroad employees. *Ex parte Lennon*, 1110

6. An injunction to restrain executive officers of a state from continued and repeated acts of trespass in seizing and carrying away and confiscating for the use of the state the property of the complainant, under alleged authority of an unconstitutional statute, is not invalid on the ground that it is a proceeding against the state or that it interferes with official discretion. *Scott* v. *Donald*, 648

7. An injunction against a railroad on land reserved for "public uses" cannot be granted to an adjoining lotowner, whatever right there may be to compensation for injury. *Burlington Gaslight Co.* v. *Burlington, C. R. & N. R. Co.* 749

8. Officials who are not parties to a suit for an injunction against enforcing an unconstitu-



Digitized by Google

tional statute cannot be included in the injunction. *Scott* v. *Donald*, 648

9. A person having actual notice of an injunction may be amenable thereto, although he was not a party to the suit in which the injunction was issued and has not been served with any process or notice in the proceedings. *Ex parte Lennon*, 1110

**INNKEEPER.** See RECEIVERS, 2.

**INNOCENCE.** See TRIAL, 21, 22.

**INSANE PERSONS.** See INCOMPETENT PERSONS.

**INSOLVENCY.**

1. The security vested in a national bank by a conveyance from an insolvent in violation of Mass. Pub. Stat. chap. 157, §§ 96, 98, is not taken away from the bank in violation of the United States law because the state statute makes the conveyance merely voidable, and not void. *McClellan* v. *Chipman*, 461

2. A national bank is not exempted from the operation of Mass. Pub. Stat. chap. 157, §§ 96, 98, prohibiting preferences to creditors of an insolvent, by U. S. Rev. Stat. § 5137, authorizing national banks for certain purposes to purchase real estate. *Id.*

3. A conveyance in trust to secure certain debts, reserving the right to redeem the property within sixty days, and on failure to do so giving a trustee power to sell the property for cash and execute the trust, returning the balance, if any, to the grantor, although it gives exclusive possession immediately to the trustee, is not an assignment for creditors within the scope of the Arkansas statute relating to assignments, § 805 (Mansf. Dig. 1884, p. 219). *W. B. Grimes Dry-Goods Co.* v. *Malcolm*, 524

**INSURANCE.** See CONSTITUTIONAL LAW, 9; INTERNAL REVENUE, 2.

1. A state can lawfully punish or regulate, by the imposition of civil liability or otherwise, the doing of acts within its territory by agents of a foreign insurance company, which are calculated to neutralize and make ineffective a statute prescribing conditions of the right of such corporation to do business within the state. *Noble* v. *Mitchell*, 472

2. A tobacco company has an insurable interest in internal revenue stamps which it has purchased and paid for to use on packages of its goods. *United States* v. *American Tobacco Co.* 1081

3. Certificate holders in a benefit society have the right to rely upon a construction given to the rules and regulations of the order by the highest tribunals of the order, and to presume that the supreme lodge will not enforce a forfeiture under circumstances which the board of control has held did not create one. *Supreme Lodge K. of P.* v. *Kalinski*, 168

4. The continued receipt of assessments upon a certificate of membership in an endowment rank of the Knights of Pythias, up to the date of the death of the member, is a waiver of any technical forfeiture of the certificate by reason of the nonpayment of his lodge dues, for which separate accounts were kept and which formed no part of the consideration for the certificate, where the member had not been suspended but had been told to pay them before the next meeting of the lodge and died before that time. *Id.*

**INTENT.** See EVIDENCE, 17; HOMICIDE, 3.

**INTEREST.** See also APPEAL AND ERROR, 111; COURTS, 14.

1. Interest should not be allowed on an indebtedness by a mother as guardian to her daughters, most of whom were of age, during the time they lived with her without any charge for maintenance. *Glover* v. *Patten*, 760

2. A claim of 10 per cent interest on a mortgage executed in a state where such interest is allowed cannot be allowed when the mortgage is included in a general account upon which the bill is founded, and which, as taken from the creditor's books, shows a charge of 6 per cent only, computed to a short time before the bill was filed. *Walker* v. *Brown*, 865

3. The District of Columbia is not entitled to interest on a counterclaim against a contractor for an illegal excess paid him on a contract, where the counterclaim itself is extinguished by the act of Congress of February 13, 1895, establishing the validity of a previously illegal claim for board rates instead of contract rates. *District of Columbia* v. *Johnson*, 784; *District of Columbia* v. *Hall*, 788; *District of Columbia* v. *Dickson*, 788

4. An allowance of board rates, instead of contract rates, by the act of Congress of February 13, 1895, in favor of contractors with the District of Columbia, being a pure gratuity establishing a claim which was previously illegal, will not make the claim bear interest prior to the date of the statute. *Id.*

5. The neglect of the Postmaster General to readjust the salary of a postmaster when it is his duty to do so will not entitle the postmaster to interest on the amount allowed him prior to the time of its liquidation, since the government is not chargeable for the neglect of its officers. *United States* v. *Verdier*, 407

6. Interest on a judgment against a postmaster for balance due on his account to the United States must be added to the judgment from the time of verdict, when the judgment remains unpaid for many years and until a readjustment of the postmaster's salary under the act of Congress of March 3, 1883, shows a balance in his favor even after deducting the judgment, although such interest cannot be offset by any interest on his claim for the readjusted salary earned prior to the judgment because it was unliquidated. *Id.*

**INTERNAL REVENUE.** See also FOOD, 1.

1. An oath to the fact of destruction of internal revenue stamps purchased by a tobacco company, and that the company had not presented any claim for the refunding of the amount or any part thereof to the government, or received the value thereof, either directly or indirectly, from the government, is a substan-



Digitized by Google

tial compliance with the regulations of the department providing the form of an oath from which the words "to the government" are omitted. *United States* v. *American Tobacco Co.* 1081

2. The right of a tobacco company to recover from the United States the value of tobacco tax stamps which were destroyed unused by a fire, under U. S. Rev. Stat. § 3426, is not lost by the fact that the company has received payment therefor from an insurance company, but the recovery may be had in its name for the benefit of the insurer. *Id.*

**INTERNATIONAL LAW.** See NEUTRALITY, 1.

**INTERSTATE COMMERCE.** See COMMERCE.

**INTOXICATING LIQUORS.** See COMMERCE, 1, 2.

**INVOLUNTARY SERVITUDE.** See CONSTITUTIONAL LAW, 25; SHIPPING, 1.

**IRRIGATION DISTRICTS.** See also APPEAL AND ERROR, 39; CONSTITUTIONAL LAW, 2, 20, 22; COURTS, 27.

1. An apportionment of water between the landowners of an irrigation district on the basis of their assessments, with the right of each to assign the whole or any portion of his share, does not show that the use is other than public, or that it amounts to a distribution to individuals rather than to lands, and on that account may not result in a use for irrigation. *Fallbrook Irrig. Dist.* v. *Bradley*, 369

2. The fact that the use of water in an irrigation district is limited to the landowners therein without expressly giving every resident in the district a right to share in the use, although any landowner has the right to sell or assign any or all of his portion, does not prevent the use from being public. *Id.*

3. Land which can be beneficially used to a certain extent without irrigation may yet be so much improved by it that it can properly be included in an irrigation district and assessed for the benefits of the artificial irrigation as a public improvement. *Id.*

4. The right to appear and contest the facts upon which a petition for an irrigation district is based, and also the fact of benefit to any particular land, is implied in the provisions of Cal. act March 7, 1887, as amended by the acts of 1889 and 1891, which require a petition to be presented after notice published, and that the board shall hear the same and on final hearing shall define the boundaries of the district. *Id.*

**JAILS.** See EVIDENCE, 23.

**JUDGE.** See COURTS, 2.

**JUDGMENT.** See also ACTION OR SUIT, 4; ESTOPPEL, 1; EVIDENCE, 19; EXECUTORS AND ADMINISTRATORS; HABEAS CORPUS, 2; INFANTS, 1.

1. Jurisdiction to render judgment of "flat executio" on the return of "nihil" to two successive writs of scire facias on the original judgment is obtained in accordance with the rule that the return of two nihils is equivalent to a service. *Brown* v. *Wygant*, 284

2. Error in holding that a trust did not protect real estate from the creditors of the beneficiary, or in holding that a will not so executed that it can be proved in the jurisdiction constitutes a sufficient exercise of a power of appointment, will not render the decision void on collateral attack. *Manson* v. *Duncanson*, 1105

3. One who has voluntarily sought the judgment of the supreme court of a state to declare that a decree of a lower court was not only erroneous but void, although not a voluntary litigant in the trial court, is bound by the judgment of the supreme court as *res judicata*, and cannot attack it collaterally in a circuit court of the United States. *Forsyth* v. *Hammond*, 1095

4. Recovery against either of the defendants may be had under the California practice, even when the action is founded upon a contract. *Atlantic & P. R. Co.* v *Laird*, 485

**JUDICIAL NOTICE.** See EVIDENCE, 2.

**JURISDICTION.** See ACTION OR SUIT, 10; COSTS.

**JURY.** See CONSTITUTIONAL LAW, 5; REMOVAL OF CAUSES, 2; TRIAL, 42.

**JUSTICE OF THE PEACE.** See COURTS, 6.

**KENTUCKY.** See BOUNDARIES, 1.

**KNIGHTS OF PYTHIAS.** See INSURANCE, 4.

**LABOR ORGANIZATIONS.** See CONTEMPT.

**LACHES.** See LIMITATION OF ACTIONS, 6, 7.

**LEASE.** See BANKS, 6.

**LEVEES.** See CONTRACTS, 14.

**LICENSE.** See COMMERCE, 3; COURTS, 24; EVIDENCE, 18.

**LIENS.** See also SHIPPING, 2–4.

1. A person for whom work is done on land under a contract may be the "owner" within the Utah mechanics' lien law of March 12, 1890, although without any legal or equitable title until the work was done, if he became the owner when the work was completed by virtue of its performance. *Bear Lake & R. W. W. & I. Co.* v. *Garland*, 327

2. A mortgage is not a valid encumbrance upon after-acquired land within the meaning of a lien law preserving the priority of valid encumbrances, when the mortgagor's title is acquired with the burden of the lien, which attached simultaneously with the vesting of title in him. *Id.*



Digitized by Google

3. A lien of a contractor for the construction of a canal on public lands, by the completion of which his employer acquires a right of way under U. S. Rev. Stat. § 2339, is superior to that of a prior mortgage given by the latter which included after acquired property. *Bear Lake & R. W. W. & I. Co.* v. *Garland*. 327

4. The fact that a mortgage, including after-acquired property was on record before any work was done by a contractor who claims a lien on the property does not subordinate his lien to the mortgage, if the mortgagor acquired his title burdened with the lien upon the completion of the work. *Id.*

5. The fiction of the doctrine of relation will not be indulged for the purpose of effecting an injustice to lienors by subjecting the right of way for a canal on public lands to the prior lien of a mortgage including after-acquired property, when the existence of the mortgagor's title to the right of way was made possible only after and by the lienors. *Id.*

6. The repeal of a mechanics' lien law during the progress of the work for which a lien is claimed does not cut off the lienor's right for the work already done, where the repealing statute re-enacts and continues the lien law, with some changes in matters of procedure only. *Id.*

7. An extension of the time to enforce a mechanics' lien, made by a new lien law repealing, but substantially re-enacting, the former during the progress of the work for which a lien is claimed, does not affect any right or remedy of the lienor, within the meaning of a proviso that the repeal shall not affect any right or remedy under the former law; and therefore the proviso does not prevent him from claiming the benefit of the enlargement of time. *Id.*

8. A lien on bonds to secure a claim against a third person is created by a letter from the owner of the bonds to a creditor, stating that he has loaned the bonds to the debtor, with the understanding that any indebtedness that may be owing to such creditor at any time shall be paid before the return of the bonds or the value thereof to the owner, and that they or their value are at the risk of the debtor's business so far as any claim the creditor may have against such debtor is concerned. *Walker* v. *Brown*, 865

9. A contribution to the assets of a debtor, for which a debt exists to a person who had loaned bonds to the debtor and agreed with another creditor that they should not be returned, or the value thereof, until any claim the latter might have against the debtor should be paid, cannot affect the lien on the bonds for the latter's claim against the debtor. *Id.*

**LIFE TENANT.** See CLAIMS, 8.

**LIMITATION OF ACTIONS.** See also CLAIMS, 11; CONFLICT OF LAWS, 2; COURTS, 23.

1. A claim by an executor against his estate is not within the statute of limitations in force in the District of Columbia. *Glover* v. *Patten*, 760

2. The mere fact that a bill is left on the files will not relieve from the effect of laches where there is failure in diligent prosecution. *Willard* v. *Wood*, 531

3. The dismissal of an action during the pendency of which the limitation has run will bar the remedy in the absence of any statutory provision to the contrary. *Id.*

4. Liability by reason of the acceptance of a deed without executing it, in which a covenant of the grantee to assume a mortgage is recited, is subject to the limitation prescribed as to simple contracts. *Id.*

5. The limitation of a cause of action against a grantee by reason of his acceptance of a deed in the execution of which he does not join, but which recites his covenant to assume a mortgage, is fixed in equity, by analogy, at the time that an action at law would be barred. *Id.*

6. A grantee's covenant assuming a mortgage will not be enforced in equity after sixteen years' delay to issue process against him, during seven of which he resided in the jurisdiction and for as long a period had resided in a state not far distant in which an action could have been maintained, although several years before process was issued against him suit was brought against another party, but subsequently dismissed, and during the delay the remedy against several other parties who were liable on the mortgage had been lost by bankruptcy, death, and lapse of time, while the property had diminished in value one half and had passed into the ownership of the heirs of the mortgagee. *Id.*

7. One who sleeps upon his rights for many years without any demand upon his claim against another, while the latter, who denies the claim, is in proper mental condition and until he is deprived of his reason and faculties, will be barred by laches from any relief in equity. *Whitney* v. *Fox*, 1145; *Wood* v. *Fox*, 1149

8. An amendment merely dismissing one of two joint tortfeasors, and complaining of the remaining defendant only, does not introduce a new cause of action with respect to the statute of limitations. *Atlantic & P. R. Co.* v. *Laird*, 485

9. Amendments to a complaint stating that plaintiff was traveling upon a "ticket," instead of a "first-class" ticket as originally stated, and that the defendant was chartered by Congress, instead of the laws of Massachusetts as first averred, do not state a new cause of action with respect to the statute of limitations. *Atlantic & P. R. Co.* v. *Laird*, 485

**LOTTERIES.**

A paper that contains nothing but figures which in fact relate to a drawing that has already been completed is not a paper, certificate, or instrument purporting to be or representing a ticket, chance, share, or interest in any lottery, which the act of Congress of 1895, chap. 191, makes it unlawful to bring into the United States or deposit in the mails or carry from one state to another, as the statute describes papers which contemplate a future



Digitized by Google

drawing of the lottery. *France* v. *United States*, 595

**MAILS.** See POSTOFFICE.

**MALICE.** See TRIAL, 25.

**MANDAMUS.**

1. Mandamus may be issued to compel the circuit court to set aside its orders granting a rehearing for newly discovered evidence after the merits of the case have been disposed of by the Supreme Court of the United States on appeal when they were in unintentional but practical disobedience of the mandate. *Re Potts*, 994

2. Mandamus will not be granted to compel the circuit court of the United States to dismiss a suit for lack of jurisdiction of the defendant, and to vacate an order overruling a demurrer raising the question of jurisdiction, since if a decree should pass against the defendant there is a remedy by appeal. *Re Atlantic City R. Co.* 579

**MANSLAUGHTER.** See HOMICIDE.

**MARSHAL.**

1. The delivery of warrants of commitment to the warden of a penitentiary by a marshal who has transported a prisoner is not a "service" for which the marshal is entitled to a fee under U. S. Rev. Stat. § 829, in addition to his other fees. *United States* v. *McMahon*, 857

2. A marshal is entitled, under U. S. Rev. Stat. § 829, to fees at the rate of 10 cents per mile, and not merely the actual expenses for transporting a convict to a penitentiary in the same state but outside the district in which he was sentenced, where the court sentences him to that penitentiary under its discretion given by §§ 5541, 5542, and not under § 5546, because of the absence of any suitable place of confinement in the district or territory. *Id.*

3. The attendance of a special deputy marshal before a commissioner on election day, which is incidental to his service in arresting a fraudulent voter and taking him before the commissioner, is covered by the *per diem* provided by U. S. Rev. Stat. § 2031, and he cannot claim additional compensation for such attendance. *Id.*

4. A marshal attending examinations before two different commissioners on the same day is entitled to his fee of $2 for attendance before each. *Id.*

5. For attending criminal examinations before the same commissioner, in separate and distinct cases, on the same day, a marshal is entitled to a single fee only, under U. S. Rev. Stat. § 829, *Id.*

**MASTER AND SERVANT.** See also NEGLIGENCE, 9; TRIAL, 6, 7, 19.

1. A railroad company is not liable for injury to an employee by the explosion of a locomotive boiler, unless it resulted from the want of ordinary care, either in selecting the engine or in keeping it in reasonably safe repair. *Texas & P. R. Co.* v. *Barrett*, 1136

2. A railroad company is not required to adopt extraordinary tests for discovering defects in a locomotive boiler or any of its machinery which are not approved, practicable, and customary; but it fulfils its duty in this regard if it adopts such tests as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances. *Id.*

3. An engineer on one train is a fellow servant of a conductor of another train on the same road. *Oakes* v. *Mase*, 746

4. A conductor and hands on a work train, and a section foreman in charge of a hand car, are fellow servants of a laborer on the hand car under the orders of such foreman, when through their negligence he is injured by a collision of the train while running backward, and the hand car. *Martin* v. *Atchison, T. & S. F. R. Co.* 1051

5. The orders of a section foreman to a laborer who is with him on a hand car that he shall not look back to watch for a train, and assurance that the foreman himself will watch and give warning of any danger, do not make the master liable for an injury to the laborer resulting from the negligence of the foreman in failing to watch for the train. *Id.*

6. The doctrine as to the duty of the master to furnish a safe place for the servant to work has no application to the failure of a foreman in charge of a hand car to watch for an approaching train, when the car itself is in every way fit for the purpose for which it is used. *Id.*

**MAXIMS.**

1. Caveat emptor. *Meyer* v. *Richards*, 199

2. Caveat venditor. *Id.*

3. Damnum absque injuria. *Singer Mfg. Co.* v. *June Mfg. Co.* 118

4. De minimis non curat lex. *Maish* v. *Arizona*, 567

5. Equality is equity. *Glover* v. *Patten*, 760

6. Mobilia personam sequuntur. *Adams Exp. Co.* v. *Ohio State Auditor*, 965

7. Noscitur a sociis. *United States* v. *The Three Friends*, 897

8. Sic utere tuo ut alienum non lædas. *Singer Mfg. Co.* v. *June Mfg. Co.* 118

**MECHANICS' LIENS.** See LIENS.

**MEMORANDUM CASES.** See pp. 805, 1177.

**MILITARY EXPEDITION.** See NEUTRALITY.

**MINES.** See also APPEAL AND ERROR, 33; DOWER; PUBLIC LANDS, 21, 22.

A trial by jury in a proceeding as to adverse mining claims under U. S. Rev. Stat. § 2326, is not made necessary by the act of Congress of March 3, 1881 (21 Stat. at L. 505) chap. 140, providing for a finding by jury on a question of title. *Perego* v. *Dodge*, 113

**MISTAKE.** See POSTOFFICE, 1, 2; PUBLIC LANDS, 2.



Digitized by Google

**MORTGAGE.** See also CLAIMS, 9; CONTRACTS, 9–11; EVIDENCE, 33; INTEREST, 2; LIMITATION OF ACTIONS, 4–6; LIENS, 2–4; INSOLVENCY, 8.

A clause in a mortgage which subjects subsequently acquired property to the lien thereof is valid. *Bear Lake & R. W. & I. Co.* v. *Garland*, 327

**MUNICIPAL CORPORATIONS.** See COUNTIES; COURTS, 1, 4, 31; EMINENT DOMAIN, 2–4; ESTOPPEL, 3; HIGHWAYS; INJUNCTION, 2; WATERS, 3.

**MURDER.** See HOMICIDE.

**NAME.** See INDICTMENT, 4; TRADEMARK.

**NAVIGABLE WATERS.** See WATERS, 1.

**NAVY.** See ARMY AND NAVY, 2.

**NEGLIGENCE.** See also APPEAL AND ERROR, 97; EVIDENCE, 8, 9; MASTER AND SERVANT; PROXIMATE CAUSE; RAILROADS, 6; STREET RAILWAYS, 8; TRIAL, 5–8, 18–20.

By ordinary care is meant such as a prudent man would use under the same circumstances; it must be measured by the character and risks of the business. *Texas & P. R. Co.* v. *Barrett*, 1136

**NEGROES.** See REMOVAL OF CAUSES, 2.

**NEUTRALITY.** See also ADMIRALTY, 2; FORFEITURE.

1. Any insurgent or insurrectionary body of people acting together, undertaking and conducting hostilities, although its belligerency has not been recognized, is included in the terms "colony, district, or people" as used in U. S. Rev. Stat. § 5283, making it an offense to fit out a vessel to be employed "in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace." *United States* v. *The Three Friends*, 897

2. A military expedition or enterprise prohibited by U. S. Rev. Stat. § 5286, is entered upon when men combined and organized in this country are taken with arms and ammunition under their control by a tug 30 or 40 miles out to sea to a steamer on which they embark and drill and by which they are taken to Cuba, where they disembark to effect an armed landing on the coast with intent to make war against the government. *Wiborg* v. *United States*, 289

3. Mates of the vessel who proceeded on the voyage under the captain's orders are not guilty of assisting a military expedition by reason of the fact that the vessel carried the persons engaged in such expedition, in the absence of proof of guilty knowledge of or participation in such expedition before they left port. *Id.*

**NEWSPAPER.** See EVIDENCE, 53, 54.

**NEW TRIAL.** See APPEAL AND ERROR, 104.

**NONSUIT.** See TRIAL, 9.

**NOTES (Editorial), INDEX TO.**

**Assault with intent to kill;** what is; what intent sufficient; what evidence sufficient; distinction between intent to murder and intent to kill. 481

**Banks.** See CHECKS.

**Carriers.** See SHIPPING.

**Character.** See EVIDENCE.

**Checks;** presentment and notice; time for; reasonable time; delay; antedated and postdated checks; certified checks; forged checks; damages for wrongful dishonor; checkholder's right to sue bank for refusal to pay. 855

**Collision.** See SHIPPING.

**Constitutional law.** See also TRIAL.

Retroactive laws; power of states to pass; constitutionality; construction; impairing vested rights; curative and confirmatory statutes. 94

**Contracts.** See also INFANTS.

Statute of frauds; agreements not to be performed within one year; when statute applicable and when not. 495

Illegal; monopolies; restraint of trade; trade combinations; corporate trusts and combinations; stockholding corporations. 1008

**Corporations.** See CONTRACTS.

**Criminal law.** See ASSAULT; EVIDENCE.

**Damages.** See SHIPPING.

**Evidence;** expert testimony, when admissible; opinions of nonexperts, when admissible; medical experts; questions of science, skill, and trade; hypothetical case; form of question; effect of the evidence; railway cases, etc. 750

Of good character of one accused of crime; how proved of bad or violent character; when admissible; distinction between reputation and character; particular acts; neighborhood; reasonable time. 467

**Experts.** See EVIDENCE.

**Extradition;** international and interstate; treaty; laws of Congress; crimes; political offenses; complaint; hearing and evidence; delivery by executive; power to surrender; indictment or affidavit; receiving agents; power of judge or justice of the peace; crime, how proved; revoking warrant; who are fugitives from justice. 1046



Digitized by Google

**Homicide.** See ASSAULT.

**Infants;** contracts by and acts of, when voidable; bills and notes; bonds; mortgages; conveyances; leases; marriage settlements; arbitration; subscriptions; other voidable acts; avoidance of acts and contracts by; by whom avoidance made; liability of infant as partner; time for avoidance; ratification. 760

**Injunction;** against municipal ordinances. 519

**Jury.** See TRIAL.

**Liens;** equitable; arising from express contract; identification of property; assignment of chose in action arising from implied contract; equitable assignment; equitable mortgages; lien by creditors on capital stock; enforcement of equitable liens; assignment of mortgage by transfer of debt; assignment without transfer of debt. 865

**Master and servant;** liability of a railroad company for injury to an employee or to another from an unblocked frog or switch; injuries from projections or structures dangerously near the track. 236

**Monopolies.** See CONTRACTS.

**Mortgage.** See LIENS.

**Municipal corporations.** See also WATERS.

Authority to make ordinances; reasonableness; consistent with general laws; impartial and general, certain and definite; not to contravene common right, restrain trade, nor authorize a nuisance; when equity will enjoin. 519

**Navigable waters.** See WATERS.

**Negligence.** See also MASTER AND SERVANT.

Contributory; when a question for the jury; duty of the court as to directing verdict; freedom from contributory negligence; when may be inferred. 82

**Principal and surety.** See SUBROGATION.

**Railroad.** See also MASTER AND SERVANT.

As to surface waters, see WATERS.

**Riparian rights.** See WATERS.

**Shipping;** demurrage; what is; when accrues; delay by act of master or consignee; express contract for demurrage; usage; delay; in discharging cargo; implied contract; lay-days; amount of damages. 937

Rules of navigation; vessels meeting; speed; vessels in a fog; steamships; other vessels. 1053

**Statute of frauds.** See CONTRACTS.

**Subrogation of sureties;** when right accrues; sureties on bonds and in other instances. 412

**Surface waters.** See WATERS.

**Trial;** challenges to jurors; to the array and to the panel; to individual jurors; peremptory and for cause. 104

Constitutional right of trial by jury; extent of right; in what cases the right exists. 113

**Trusts.** See CONTRACTS.

**Waters;** drainage of surface waters; general rule; right to drain; injuries thereby; prescriptive right; eaves-drip; municipal control of surface water and liability therefor; surface water in highways; obstruction and drainage of surface water by railroads. 887

Navigable; ownership; tide waters; interstate water; public right of passage; exercise of the right; legislative power over improvements; right of riparian owner to compensation. 997

**NOTICE.** See EVIDENCE, 10.

**NUISANCE.** See BRIDGES.

**OATH.** See INTERNAL REVENUE, 1.

**OBSCENITY.** See APPEAL AND ERROR, 100; EVIDENCE, 54; INDICTMENT, 8; POST-OFFICE, 4; TRIAL, 28.

**OFFICERS.** As to Official Bonds, see BONDS.

See also ACTION OR SUIT, 7, 9; BONDS; CERTIFICATES; COMMISSIONERS; PUBLIC LANDS, 8.

The signature of a marriage license in the name of a clerk by another person who was not a deputy, but who was in sole charge of the office, transacting the business, with the recognition of the clerk and the deputy, is that of an officer *de facto*. *Nofire* v. *United States*. 588

**OLEOMARGARINE.** See FOOD.

**OPINION.** See APPEAL AND ERROR, 88, 57, 58.

**OWNER.** See LIENS, 1.

**PACIFIC RAILROAD COMPANY.** See CORPORATIONS, 8.

**PARENT AND CHILD.** See INTEREST, 1.

**PARTIES.** See ACTION OR SUIT, 2–6.

**PARTITION.** See EQUITY, 8.

**PATENTS.** For Land, see PUBLIC LANDS.

See also APPEAL AND ERROR, 3, 54, 55, 121; TRADEMARK, 1, 2.

1. A patent for letter boxes already in use by the Postoffice Department, issued against 1221

Digitized by Google

the protest of an agent of the government to a person who was not the inventor of the boxes, but who furnished them to the government under a contract which had expired and which the government had refused to renew, does not give to his assignee any right to recover royalties upon the theory of an implied promise for the previous use of such boxes in a suit which was pending when the patent was issued. *Kirk* v. *United States*, 66

2. The increase of the weight of the handwheels in road machines described in claims 4, 10, 11, 18 of the Taft patent, 331,920, in order to correct the tendency of smaller wheels to reverse, did not involve patentable novelty. *American Road Machine Co.* v. *Pennock & S. Co.* 337

3. A surrender of a patent for reissue becomes operative under the patent act of 1870, § 53, only when a reissue is granted; and if a reissue be refused the surrender never takes effect, and the patent stands as if no application had ever been made for a reissue, even if in making his surrender the patentee declared that the patent was inoperative and invalid. *Allen* v. *Culp*, 1093

**PAYMENT.** See CHECKS.

**PENALTY.** See TAXES, 30.

**PENSIONS.**

A pension obtained for partial paralysis claimed to have resulted from disease and sickness contracted in the army cannot be held fraudulent by showing that the paralysis was the direct, immediate result of a blow or accident, if the prior physical condition caused by ill health and exposure in the army may fairly be regarded as a concurring cause of the paralysis. *Lalone* v. *United States*, 425

**PEOPLE.** See NEUTRALITY, 1.

**PERJURY.** See CLAIMS, 6.

**PERPETUITIES.**

1. A power to sell upon the expiration of an estate tail, and to divide the proceeds among persons then ascertainable, is not within the rule against perpetuities. *Barber* v. *Pittsburg, Ft. W. & C. R. Co.* 925

2. The rule against perpetuities is inapplicable to a resulting trust which arises on the failure of an estate granted for a particular use which has ceased. *Hopkins* v. *Grimshaw*, 739

**PIER.** See ADMIRALTY, 1; WHARVES.

**PLEADING.** See also EVIDENCE, 46, 47; LIMITATION OF ACTIONS, 8, 9.

1. A complaint averring that plaintiff was the holder of and traveling upon a certain ticket on a train which was derailed and thrown from the track causing an injury, without alleging any undertaking or promise or any breach of such, does not state an action *ex quasi contractu*. *Atlantic & P. R. Co.* v. *Laird*, 485

2. An answer denying the validity of a statute reducing tolls, which discloses the average annual receipts of the company for several years immediately preceding, and the average annual expenses, and alleges that the receipts for that time have not admitted of more than 4 per cent dividend upon the par value of the stock, and that the statute in question has reduced the tolls 50 per cent and this will make the income insufficient to maintain the road and meet ordinary expenses and earn any dividend whatever,—is sufficiently full to raise the question of validity of the statute. *Covington & L. Turnp. Road Co.* v. *Sandford*, 560

3. An allegation that investments were "taxable capital," without describing their character, is an averment in the nature of a legal conclusion. *First Nat. Bank* v. *Chehalis County*, 1069; *National Bank of Commerce* v. *Seattle*, 1079

4. An allegation that defendants "were a common carrier of passengers," in a complaint which in its caption designates them as distinct corporations and several defendants, and in separate paragraphs alleges each to be a corporation, cannot be construed as an averment that they constituted a single company or that neither had capacity to be sued alone. *Atlantic & P. R. Co.* v. *Laird*, 485

**Jurisdictional averments.**

5. Want of due process of law in proceedings of a probate court is not sufficiently alleged to show a Federal question by the allegation that the court acted entirely without jurisdiction. *Hanford* v. *Davies*, 157

6. An averment that the value of the exemption of a bank's property during the continuance of its charter exceeds $2,000 is not sufficient to give jurisdiction to a circuit court of the United States in a suit for an injunction against taxes for specific years the amount of which is not shown. *Citizens' Bank* v. *Cannon*, 451

7. Jurisdiction of a suit against a national bank, brought since the act of August 13, 1888, was passed, must be deemed to depend upon citizenship alone, under averments that the bank is a citizen of Massachusetts and the complainant is a citizen of Pennsylvania. *Ex parte Jones*, 601

**PLEDGE.** See BANKS, 4; EVIDENCE, 46.

**POSTMASTER.** See INTEREST, 5, 6.

**POSTOFFICE.** See also CLAIMS, 7; COMMERCE, 6; EMBEZZLEMENT; EVIDENCE, 21, 42, 43, 54; INDICTMENT, 2; INTEREST, 5, 6; PATENTS, 1; RAILROADS, 4.

1. An erroneous conclusion in the construction or application of a statute by the Postmaster General is a "mistake" within the meaning of U. S. Rev. Stat. § 4057, providing for suit to recover money paid by mistake. *Wisconsin C. R. Co.* v. *United States*, 399

2. Overpayments by a Postmaster General for transportation of mails, which are made under misconstruction or misapprehension of the law, can be deducted by his successor from money subsequently coming due to the same person, as this power is included in the power to cause suit to be brought under U. S. Rev. Stat. § 457, for money paid by mistake. *Id.*

3. The provision for transportation of mails



Digitized by Google

at such price as Congress or the Postmaster General shall fix, made by § 5 of the land grant act of Congress of June 3, 1856, the substance of which is not re-enacted by the act of May 5, 1864, is among those intended by § 3 of the later act, declaring that the grant is made "upon the same terms and conditions as are contained" in the act of 1856. *Id.*

4. It is no defense for the mailing of obscene publications that they are sent to a government inspector who has written decoy letters asking for them. *Price* v. *United States*, 727

**PRE-EMPTION.** See PUBLIC LANDS.

**PRESIDENT.** See COURTS-MARTIAL, 1-3.

**PRESUMPTION.** See EVIDENCE; TRIAL, 21, 22.

**PRINCIPAL AND SURETY.** See also EVIDENCE, 19, 20; SUBROGATION.

1. A release of the sureties on a bond calling for a deed, by the vendee's failure to make a payment at the time agreed, which was a condition of the bond, cannot be avoided and the obligation renewed by the waiver of the default on the part of the vendors by accepting a subsequent payment. *Coughran* v. *Bigelow*, 412

2. Sureties on an official bond are not released by the facts that the government on discovering a defalcation brings an action against the officer alone and attaches his property, and that there is a delay of more than a year and a half in taking judgment against him, although he puts in no answer, when there is no evidence that they have suffered any damage by reason of any action or lack of action on the part of the government. *Moses* v. *United States*, 1119

**PRIVATE LAND CLAIMS.** See also TAXES, 2.

1. A particular designation of the land to be acquired by towns or pueblos under the law of Spain was required before a vested right or title to the use thereof could arise. *United States* v. *Santa Fé*, 874

2. The Spanish law did not, *proprio vigore*, confer upon every Spanish villa or town a grant of 4 square leagues of land to be measured from the center of the plaza of such town, but contained mandatory provisions exacting a grant and its confirmation in order to confer title to lands upon such villa or town. *Id.*

3. An inchoate claim which could not have been asserted as an absolute right against the government of either Spain or Mexico, and which was subject to the uncontrolled discretion of Congress, is not within the purview of the act of March 3, 1891, creating the court of private land claims (26 Stat. at L. 854, chap. 534), and therefore is beyond the reach of judicial cognizance. *Id.*

4. The city of Sante Fé is not entitled to a tract of 4 square leagues of land in trust for the use of its inhabitants, in the absence of any evidence of a grant or that it has ever possessed the land or that any lot holder in the city claims to own or hold by virtue of any title derived under the supposed right of the city, while there is evidence that in 1715 the city petitioned for and obtained a grant of a tract of swamp land situated within the boundaries of the 4 square leagues which are claimed. *Id.*

**PROCLAMATION.** See EVIDENCE, 2.

**PROHIBITION.**

Issues of fact on which the question of jurisdiction depends, raised by a petition of intervention and an answer thereto, are not sufficient ground for a writ of prohibition against enforcing or proceeding further in orders or decrees previously made in the suit. *Ex parte Alix*, 948

**PROTEST.** See DUTIES, 5.

**PROXIMATE CAUSE.** See also PENSIONS.

The negligence of the driver of a street car in attempting to cross a railroad in front of a rapidly approaching train which is so near that the least interruption or delay in crossing will probably lead to an accident, and the negligence of a gateman in lowering the gates so as to pen the car in on the track, must be regarded as one cause of concurring negligence united to produce the result; and the negligence of the gateman cannot be considered as a distinct and proximate cause of the resulting accident, even if this would not have happened if the gates had not been lowered improperly. *Washington & G. R. Co.* v. *Hickey*, 1101

**PUBLIC IMPROVEMENTS.** See also CONSTITUTIONAL LAW, 21, 22; CONTRACTS, 14; IRRIGATION DISTRICT.

1. Property is not exempted from liability for assessment for local improvements by a clause exempting it from taxation. *Ford* v. *Delta & P. Land Co.* 590

2. Deeds reciting that lands have been sold to the state for taxes, and that the grantee has paid a certain amount "in full of all of the state and county taxes," executed in pursuance of Miss. act March 16, 1872, do not constitute evidence that levee taxes on the property have been paid and discharged. *Id.*

**PUBLIC LANDS.** See also ACTION OR SUIT, 8, 9; APPEAL AND ERROR, 32-34; EJECTMENT; EQUITY, 5; HIGHWAYS; INDIANS, 5; POSTOFFICE, 3; PRIVATE LAND CLAIMS.

1. The legal title created by the issue of a patent for public lands relates back only to the inception of the equitable title on payment for the land, and not to a prior date when an apparent equitable title was created by the issue of a certificate of location. *Hussman* v. *Durham*, 664

2. A patent for land issued by inadvertence and mistake, in violation of a rule to suspend action pending motions for review of the secretary's decisions, and in ignorance of the fact that there was such a motion pending, as well as pending appeals from the local land officers, will be set aside in order that the matters of fact involved in these contests may be settled



Digitized by Google

by the land department. *Germania Iron Co. v. United States*, 754

8. A ruling of the land department that occupation and cultivation without filing any claim in the land office will exempt land from a grant is not conclusive on the parties against an attempt to review it in the courts, although the decision as to the fact of occupation is conclusive. *Northern P. R. Co. v. Colburn*, 479

4. A homestead patent for lands within the limits of an incorporated city, issued in violation of U. S. Rev. Stat. §§ 2258, 2289, is not a conclusive determination of the land department in favor of the patentee, where the city was incorporated by public act before the patentee's right was initiated by application to enter the lands. *Burfenning v. Chicago, St. P. M. & O. R. Co.* 175

5. The right to enter "additional" lands, given to an honorably discharged soldier by U. S. Rev. Stat. § 2306, if he has not already entered lands to the extent of 160 acres, is assignable and transferable. *Webster v. Luther*, 179

6. The confirmation of entries by the act of Congress of March 3, 1891, § 7, does not apply to an entry which has been previously canceled for fraud, but the statute refers only to existing entries. *Parsons v. Venzke*, 360

7. The cancelation and setting aside of a pre-emption entry for fraud after the local land officers have approved the evidences offered of settlement and improvement, received the purchase money, and issued the receiver's final receipt, is within the jurisdiction of the general land office, although subject to judicial review like other orders and rulings of that department. *Id.*

8. A register and receiver of a newly established land office enters upon the discharge of his duties within the meaning of U. S. Rev. Stat. § 2243, providing for his compensation, when, after qualifying, he is engaged under directions of the commissioner of the general land office in attending to business pertaining to his office, which necessarily had to be transacted before the day of the formal opening of the office, in accordance with the published notice. *United States v. Delaney*, 435

9. Mere settlement and cultivation upon a portion of sections 16 and 36 before the same shall be surveyed, without any entry in the land office or any declaratory statement, does not exclude the land from the school grant or prevent the operation upon it of the act of Congress of February 18, 1889, authorizing the entry of the land for town-site purposes. *Gonzales v. French*, 458

**Railroad grants.**

10. The right of the government to dispose of any of the lands prior to the fixing of the line of definite location which is contemplated by § 8 of the Northern Pacific land grant act of July 2, 1864, is not denied by the provision of § 6 that the odd sections of the grant shall not be liable to sale, entry, or pre-emption before or after they are surveyed, except by the company, but these sections must be taken together. *Northern P. R. Co. v. Sanders*, 1139

11. The title of the act of Congress of May 4, 1870, describing the railroad line to be aided by a land grant as "from Portland to Astoria and McMinnville," does not control the text, which is to aid a line "from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville," to the extent of showing that the grant was for a single railroad, instead of a main road and a separate branch road. *United States v. Oregon & C. R. Co.* 541

12. The grant of lands to aid a railroad and telegraph line "from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville, in the state of Oregon," which was made by the act of Congress of May 4, 1870, contemplates, for the purposes of selecting adjacent sections of granted land, two distinct roads, one from Portland to Astoria and a branch road from the junction near Forest Grove to McMinnville. *Id.*

13. The use of the singular number in the title of the act forfeiting a grant to aid a "railroad" does not show that the intent in the original act to make the grant for a main road and a branch road is to be ignored and that all is to be taken as a single road. *Id.*

14. The acceptance of a completed section of railroad from Hillsboro to McMinnville, curving around near Forest Grove, which was named as the point of junction of the roads for which lands were granted under the act of May 4, 1870, does not amount to a construction by the Secretary of the Interior of the act as providing for a continuance of the railroad to McMinnville, instead of a separate road to that place from the junction, when at the time of the acceptance the entire line of both main and branch roads had been entered and located and the lands withdrawn. The same is true with respect to the Secretary's approval of the map of definite location. *Id.*

15. The saving of the grant for completed portions of the road, by the act of Congress of January 31, 1885, forfeiting the railroad grant of May 4, 1870, so far as the lands are adjacent to and coterminous with the uncompleted portions of the road, the main line of which was contemplated to be built from Portland easterly to Forest Grove then turning north nearly at right angles to Astoria and a branch road south from Forest Grove to McMinnville, but which was actually built only from Portland to the junction; curving past that over the branch to McMinnville,—does not permit the grantee to have the limits of the grant measured from the road as built, following round the curve, treating the completed road as an entirety, but only to take what the building of those portions of the road would have given a right to if the whole road had been built; and thus the branch road and the completed portion of the main road are to be taken separately and the limits of the grant measured at right angles from each of these separate lines. *Id.*

16. An extension of the time for construction of a railroad for which lands are granted, until such time as mortgagees may see fit to foreclose, is not made by a statute authorizing a mortgage of the road which shall extend only to so much of the land as shall be coterminous with such part of the road as shall be "con



Digitized by Google

structed at the time of the foreclosure of said mortgage." *Atlantic & P. R. Co.* v. *Mingus*, 770

17. Mortgage creditors of a railroad company having no lien, legal or equitable, upon lands granted to the company, cannot pursue the lands in the hands of another company to which they have been granted after a forfeiture of the prior grant for failure to comply with its conditions. *Farmers' Loan & T. Co.* v. *Chicago P. & S. R. Co.* 60

**Swamp land grants.**

18. The title of a state to swamp lands under the act of Congress of 1850 is incohate, and does not become perfect until the lands have been identified by the Secretary of the Interior and a patent issued therefor. *Rogers Locomotive Mach. Works* v. *American Emigrant Co.* 552

19. A contract with a county for swamp and overflowed land can give no better right than the county had to lands which had previously been certified to the state by the Secretary of the Interior as included in a railroad grant. *Id.*

20. The acceptance by a state of lands certified to it by the Secretary of the Interior as included in a railroad grant is conclusive upon a county and persons deriving their rights from the county, against a claim to the lands under the act of Congress of 1850 granting swamp and overflowed lands, where no patent or identification of these lands by the Secretary of the Interior had been made under this grant. *Id.*

**Lands excluded from grant.**

21. The exclusion, by the express terms of a land grant, of lands to which there are other claims at the time the line of a railroad is definitely fixed, will defeat the right of the railroad company to lands on which there are mineral claims, although the parties who deny its right have no interest in those claims, and confess that the lands did not contain precious metals in such quantities as to make them commercially valuable. *Northern P. R. Co.* v. *Sanders*, 1139

22. Formal applications to purchase lands as mineral lands, made in good faith in 1880 and 1881, were "claims" within the meaning of § 3 of the land grant act of Congress of July 2, 1864 (13 Stat. at L. 365, chap. 217), granting unappropriated lands "free from pre-emption or other claims or rights at the time the line of said road is definitely fixed." *Id.*

23. Possession by a pre-emption claimant whose filing had been made and never canceled on the records of the land office, which began before any claim of right to the land by a railroad company, either by filing its map of definite location or surveying and staking its line, constitutes such notice to a purchaser from the railroad company as to prevent the latter from being deemed a bona fide purchaser who is protected by the acts of Congress of 1887 and 1896, when the land was erroneously certified to the railroad company. *Winona & St. P. R. Co.* v. *United States*, 798

24. The filing of a map of the line surveyed for a railroad definitely fixed its location under the land grant of July 26, 1866, for railroads in Kansas, so that the rights of a settler thereafter acquired were not subject to any risk on account of a subsequent change of the location of the road. *Missouri, K. & T. R. Co.* v. *Cook*, 239

**Forfeitures.**

25. A land grant may be forfeited for breach of condition by legislative act, without any judicial proceeding. *Atlantic & P. R. Co.* v. *Mingus*, 770

26. No express words of forfeiture or reinvestiture of title are necessary to authorize a forfeiture of a grant of public lands for breach of condition. *Id.*

27. The option of forfeiting the railroad land grant of July 27, 1866, is not defeated by the "further condition" in § 9 that on any breach of condition the United States may do any and all acts and things which may be needful and necessary to secure the speedy completion of the road. *Id.*

28. A survey of public lands, which a land grant provides that the President shall cause to be made, is not a condition precedent to the right to declare a forfeiture of the grant for noncompliance with its conditions,—at least when the failure did not prevent the grantee from realizing the full value of the land grant by mortgage. *Id.*

29. Failure of the United States to extinguish Indian title to lands through which a railroad is to run does not prevent the forfeiture of a railroad land grant, under a provision that the United States will extinguish such title "as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession." *Id.*

30. The right to declare a railroad land grant forfeited for noncompletion of the road is not defeated by subsequently making Indian reservations in the region through which the road is to pass, when these are made opposite portions of the road already built, and do not seriously interfere with the prosecution of the work. *Id.*

31. Bona fide purchasers protected by the act of Congress of 1896 respecting the cancelation of patents and certifications of public lands include a purchaser of such land for value in good faith believing that he is acquiring a perfect title, although he may be charged by the records with knowledge of certain entries which by the true rules of construction would make the title defective. *United States* v. *Winona & St. P. R. Co.* 789; *United States* v. *Union P. R. Co.* 797

**State lands.**

32. An office survey constructed by merely copying and adopting the field notes of a previous survey made on the ground for other parties by other surveyors is not sufficient to enable a purchaser to enforce an executory contract for the sale of public lands, under the Texas act of July 14, 1879, as amended March 11, 1881. *Telfener* v. *Russ*, 87

33. In order to enforce a contract for the purchase of a right in public lands in Texas under an application for their purchase, the vendor must show that he has so far complied with the law as to obtain a vested right to pat-



Digitized by Google

ents as against the state on making the required payments in the required time. *Telfener* v. *Russ*, 87

**PUBLIC MONEY.** See also BOUNTIES, 2.

The "debts" of the United States which Congress has power to pay under U. S. Const. art. 1, § 8, include those debts or claims which rest upon a merely equitable or honorary obligation, which would not be recoverable in a court of law if existing against an individual, but which would be binding upon his conscience or honor. *United States* v. *Realty Co.* 215

**PUBLIC POLICY.** See CONTRACTS, 6.

**PUBLIC USE.** See HIGHWAYS.

**PUNCTUATION.** See STATUTES, 5.

**QUO WARRANTO.** See BRIDGES.

**RAILROADS.** See also ASSUMPSIT; CLAIMS, 7; COMMERCE, 4–8; CONSPIRACY, 6; CONSTITUTIONAL LAW, 12–14, 29, 30, 33, 34; CONTRACTS, 8; CORPORATIONS, 8; DAMAGES, 2–4; EVIDENCE, 3; HIGHWAYS; INJUNCTION, 5, 7; POSTOFFICE, 3; PUBLIC LANDS, 10–17, 20–24, 27, 29, 30; RECEIVERS, 4; SPECIFIC PERFORMANCE; STREET RAILWAYS, 8; TAXES, 3; TRIAL, 5–8, 18–20.

1. The power of the Union Pacific Railroad Company to grant to the Chicago Rock Island, & Pacific Railway Company the right to run trains with engines over the bridge between Council Bluffs and Omaha extends to the use of the approaches and terminial facilities in those cities, with a track about 4 miles long to South Omaha, where the tracks of the companies connect. *Union P. R. Co.* v. *Chicago, R. I. & P. R. Co.* 265

2. A contract by a railroad company to let another company run trains over its tracks in a city or vicinity, with full, equal, and joint possession and use of the tracks, but subject to the orders of the officers of the former company, being really an agreement for trackage rights with compensation on a mileage or wheelage basis, although it is called a lease and the so-called lessee is to haul its trains with its own engines,—is not *ultra vires* because not expressly authorized by statute. *Id.*

3. A restriction on the power of the Union Pacific Railroad Company to operate any line of road other than that which Congress had specifically authorized it to construct does not prevent it from making a valid contract to run trains for an agreed compensation by mile age, for 45 miles over another railroad. *Id.*

4. A train carrying United States mails is not exempt from the operation of a state law requiring all regular passenger trains to stop at all stations at county seats. *Gladson* v. *Minnesota*, 1064

5. A railroad aided by lands granted under an act of Congress with a provision that the road shall remain a public highway for the use of the government, free from all toll or other charge for transportation of property or troops of the United States, and that it shall transport mails at prices fixed by Congress or the Postmaster General, and permitting connections with another railroad, is not thereby exempted from the operation of a state law requiring trains to stop at a county seat. *Id.*

6. The obligations, rights, and duties of railroads and travelers upon highway crossings are mutual and reciprocal, and no greater degree of care is required of one than of the other. *Texas & P. R. Co.* v. *Cody*, 1133

7. An obstruction by a railroad embankment of the ordinary ditches and passageways which surface water will cut in a generally level district in its efforts to reach some flowing stream does not constitute an injury to other landowners, where the common law is recognized as the rule of practice and decision without any special statutory provisions in respect to the matter. *Walker* v. *New Mexico & S. P. R. Co.* 887

**RAPE.** See also TRIAL, 27.

Nonconsent, which is a mere lack of acquiescence, is not enough to constitute the crime of rape; and in such case the force which is only incidental to the act itself is not sufficient to constitute the crime. *Mills* v. *United States*, 584

**RATIFICATION.** See CORPORATIONS, 6; STREET RAILWAYS, 1.

**REAL PROPERTY.** See also LIENS, 4.

1. An estate tail is given by a devise to a girl with a provision that in the event of her dying unmarried or without offspring by her husband the property is to be sold and the proceeds divided equally among the heirs of a certain person. *Barber* v. *Pittsburg, Ft. W. & C. R. Co.* 925

2. The rule in *Shelley's Case* was introduced into Maryland as part of the common law, and has continued in force in that state and in the District of Columbia. *De Vaughn* v. *Hutchinson*, 827

3. A devise to a daughter for life, and at her decease to her heirs begotten of her body and to their heirs and assigns, shows an intention that her children shall become the root of a new succession and take as purchasers, and not as heirs. *Id.*

4. A resulting trust to the grantor and his heirs, whether the conveyance is by way of gift or for valuable consideration, arises on the extinction of the use for which only a conveyance is made in trust. *Hopkins* v. *Grimshaw*, 739

5. A trust in a conveyance to trustees of an unincorporated society for a burial ground "and for no other purpose whatever" ends, at the latest, when the land ceases to be used as a burial ground and the society is dissolved. *Id.*

**REASONABLE DOUBT.** See EVIDENCE, 49.

**RECEIVERS.** See also APPEAL AND ERROR, 95; ASSUMPSIT; BANKS, 2, 3; COURTS, 18, 19; WRIT AND PROCESS.

1. The power of a receiver to incur obligations for supplies and materials incidental to



Digitized by Google

the business, with permission of the court, follows as a necessary incident to the receivership. *Cake* v. *Mohun*, 447

2. The borrowing of money by a receiver of the furniture and other personal property in a hotel may be authorized by the court in order to prevent the closing of the hotel and the loss of the goodwill of its business during the pendency of a suit for foreclosure. *Id.*

3. An undertaking to pay a receiver such sums as the court should thereafter find to be due him on account of his indebtedness or expenditures, when made to obtain possession of the property in his hands as receiver after foreclosure sale, will prevent the obligors from claiming that the expenditures of the receiver were made without authority, or that the purchaser, who is one of the obligors, is not personally liable for such expenditures. *Id.*

4. An action against a railroad company for damages for personal injuries received by a passenger on the railroad when in the hands of a receiver, but which is restored to the company largely enhanced in value, is not cut off by failure to present the claim by intervention in the receivership case, under an order providing for such claims and that if not so presented by a certain date they shall be barred and not a charge on the property of the company, since this merely limits the time for intervention, but does not preclude other remedies which may be within the reach of the claimants. *Texas & P. R. Co.* v. *Manton*, 580

**REGISTER AND RECEIVER.** See PUBLIC LANDS, 8.

**REGISTERED LETTER.** See INDICTMENT, 2.

**RELATION.** See LIENS, 5.

**RELEASE.** See DEATH.

**REMOVAL OF CAUSES.** See also ACTION OR SUIT, 10.

1. The right of a defendant to remove a case to the Federal court on the ground of diverse citizenship of the parties, or that the defendant is a Federal railroad corporation, cannot be cut off by plaintiff's averments or lack of averments respecting the parties. *Texas & P. R. Co.* v. *Cody*, 1132; *Texas & P. R. Co.* v. *Barrett*, 1136

2. A criminal prosecution is not removable to a Federal court from a state court under U. S. Rev. Stat. § 641, because jury commissioners or other subordinate officers have excluded colored citizens from juries because of their race, if this has been done without authority derived from the Constitution and laws of the state. *Murray* v. *Louisiana*, 87

**REMITTITUR.** See APPEAL AND ERROR, 118, 119.

**RIPARIAN RIGHTS.** See WATERS.

**ROBBERY.** See TRIAL, 2.

**RULES.** See APPEAL AND ERROR, 88.

**SANTA FE.** See PRIVATE LAND CLAIMS, 4.

**SCHOOL LANDS.** See PUBLIC LANDS, 9.

**SCIRE FACIAS.** See APPEAL AND ERROR, 11; JUDGMENT, 1.

**SEARCH.**

Asking a broker engaged in buying and selling sugar stocks whether his firm was employed by any senator to buy or sell any of that stock whose market price might be affected by the senate's action is not an unreasonable search into the private affairs of the witness, when the investigation is being made by a committee of the United States Senate because of charges that some of the senators had been corruptly influenced in the consideration of legislation which would affect the value of such stocks. *Re Chapman*, 1154

**SECRETARY OF INTERIOR.** See ACTION OR SUIT, 7–9.

**SECRETARY OF WAR.** See BONDS, 7.

**SEALS.** See EVIDENCE, 11.

**SEAMEN.** See SHIPPING, 1.

**SELF-DEFENSE.** See TRIAL, 32–34.

**SENATE.** See CONGRESS, 1.

**SERVICE.** See WRIT AND PROCESS.

**SET-OFF.** See POSTOFFICE, 2.

**SHELLEY'S CASE.** See REAL PROPERTY, 2, 3.

**SHIPPING.** See also ADMIRALTY, 2; APPEAL AND ERROR, 96; CARRIERS; COURTS, 6; DAMAGES, 5, 6; DUTIES, 2; EVIDENCE, 55; FORFEITURE; WHARVES.

1. Compulsory service of deserting seamen in fulfilment of their contracts is not in violation of the 13th Amendment of the Federal Constitution which prohibits involuntary servitude. *Robertson* v. *Baldwin*, 715

**Maritime liens.**

2. A lien cannot be asserted under the maritime law for the value of coal supplied to a vessel under an order of a charterer by one who has knowledge that under the charter party the charterer is obliged to provide and pay for the coal, even if he furnished it in fact upon the credit both of the charterer and of the vessel. *The Kate*, 512

3. Debts contracted by the charterer of a vessel, for which a lien is given by N. Y. Laws 1862, p. 956, chap. 482, do not include, by reasonable construction of that statute, a debt for coal furnished on the order of a charterer by one who knows that the charterer does not rep-



Digitized by Google

resent the owners, but has agreed to furnish supplies at his own cost. *The Kate*, 512

4. A maritime lien is not created by supplying coal to a vessel on the order of a charterer, without any order or procurement of the master or his expressed consent, where the charterer was required by the charter to provide and pay for the coal, and had an office at the port of supply so that the party providing it could easily have ascertained the ownership of the vessel and the relation of the charterer to it, although he acted in fact on a belief that the vessel was responsible. *The Valencia* v. *Ziegler*, 710

**Collision.**

5. A steamer in a fog is bound to use only such precautions as will enable her to stop in time to avoid a collision after the approaching vessel comes in sight, provided the latter is herself going at the moderate speed required by law. *The Umbria*, 1053

6. If two steamers are approaching each other in a fog, their manœuvers must be determined, not by the chance of their meeting at a point where their courses intersect, but upon the theory that their courses shall not actually intersect; in other words, that both will stop before the point of intersection is reached. *Id.*

7. A vessel running at a moderate speed in a fog is not chargeable with a contributory fault for keeping her engines in motion, in case of her collision with an approaching vessel which was running at such speed that a collision could not possibly have been avoided by the stopping and reversing of the other vessel. *Id.*

8. It is not necessarily a fault for a vessel proceeding at moderate speed in a fog, on hearing a whistle which appears to come from off her port bow, to port her own helm two points, the effect of which would be to give the other vessel more room, although it may be more prudent not to change the course. *Id.*

9. There is no rigid rule prohibiting either ship to alter her helm until the signals of the other give clear indication of her direction, when two steamships approach each other in a fog, but each case must depend upon its own circumstances, which may afford reasonable ground for belief as to what the direction must be. *Id.*

10. An alleged custom of large passenger steamers carrying the mails to run at full speed in a fog, on the ground that this is really the safer course for them, as they pass the fog belt the sooner, cannot be sanctioned by the courts, as it implies a flagrant disregard of the safety of other vessels. *Id.*

11. Doubts regarding the management of a vessel or contribution of her faults, if any, to a collision, should be resolved in her favor, where the other vessel was guilty of gross fault. *Id.*

12. An order to go ahead at full speed in a fog, after hearing whistles from another vessel the course and position of which has not been definitely ascertained, and which is in fact so near that a collision results within a minute or two, is a gross fault, although the master thought the whistles indicated that the vessel was a long distance off and well out of his course. *Id.*

13. A vessel is gravely in fault for running at a speed of from 16 to 19 knots an hour within 12 miles of New York harbor, in the track of vessels going in and out, when there is an intermittent or variable fog which is sometimes so dense that vessels cannot see each other more than 1 or 2 lengths off. *Id.*

**SIGNAL SERVICE.** See BONDS, 6, 7.

**SLAVERY.** See CONSTITUTIONAL LAW, 25; SHIPPING, 1.

**SOLDIERS.** See PUBLIC LANDS, 5.

**SPECIFIC PERFORMANCE.**

Specific performance may be decreed of a contract by one railroad company to give to another the right to run trains over the road of the former subject to the orders of its officers. *Union P. R. Co.* v. *Chicago, R. I. & P. R. Co.* 265

**STATE.** See also BOUNDARIES, 1; INJUNCTION, 6.

A suit brought against persons who claim to act as officers of a state, and under color of an unconstitutional statute commit acts of wrong and injury to plaintiff's property, to recover money or property in their hands unlawfully taken by them in behalf of the state, or for compensation for damages, is not an action against the state within the meaning of the 11th Amendment of the Federal Constitution. *Scott* v. *Donald*, 682

**STATUTE OF FRAUDS.** See CONTRACTS, 1, 2.

**STATUTE OF LIMITATIONS.** See LIMITATION OF ACTIONS.

**STATUTES.** See also CONSPIRACY, 8; CONTRACTS, 14; COURTS, 21; LIENS, 6, 7; PUBLIC LANDS, 11, 13.

1. To render the title of an act of any avail in its construction the language of the act must be doubtful or ambiguous, and the ambiguity must be in the context, and not in the title. *United States* v. *Oregon & C. R. Co.* 541

2. The force and effect of statutes clearly defining the jurisdiction of the courts should not be disturbed by a mere implication flowing from subsequent legislation. *Rosencrans* v. *United States*, 708

3. Debates in Congress are doubtful sources of information from which to discover the meaning of the language of a statute passed by that body. *United States* v. *Trans-Missouri Freight Asso.* 1007

4. Departmental construction of an act of Congress, especially when it was neither contemporaneous nor continuous,—will not be regarded when the court does not consider the true construction as doubtful. *Wisconsin C. R. Co.* v. *United States*, 899



Digitized by Google

5. Punctuation of a statute is not decisive of the construction. *Ford* v. *Delta & P. Land Co.* 590

6. The obvious purpose of an act of Congress will be sustained by the courts, notwithstanding a contrary construction by an executive department. *Webster* v. *Luther*, 179

7. A new statute should be construed as a continuation of the old one with the modifications contained in the new one, although it formally repeals the old statute, when it reenacts its substantial provisions with minor modifications. *Bear Lake & R. W. & I. Co.* v. *Garland*, 327

8. A statute should not be construed to act retrospectively or to affect contracts entered into prior to its passage, unless its language be so clear as to admit of no other construction. *City R. Co.* v. *Citizens' Street R. Co.* 1114

9. Retroactive effect is not given to a statute making combinations in restraint of trade illegal by applying the statute to a continuation, after its passage, of a pre existing contract. *United States* v. *Trans-Missouri Freight Asso.* 1007

10. Repeals by implication are not favored, and when two statutes covering in whole or in part the same matter are not absolutely irreconcilable, effect should be given, if possible, to both of them. *United States* v. *Greathouse*, 1180

**STOCKHOLDER.** See BANKS, 4, 5; CORPORATIONS, 9.

**STREET RAILWAYS.** See also CONTRACTS, 3; ESTOPPEL, 8; EVIDENCE, 12; PROXIMATE CAUSE.

1. A statute allowing cities to permit the use of electricity on street railways ratifies a previous consent by a city to the use of such power, on the faith of which large expenditures have been incurred. *City R. Co.* v. *Citizens' Street R. Co.* 1114

2. The right of a street-railway company under an ordinance granting permission to lay tracks in streets is subject to reasonable regulations by subsequent ordinances as to the use of streets. *Baltimore* v. *Baltimore Trust & G. Co.* 1160

3. An ordinance restricting a street-railway company to a single track for 1100 feet in a narrow and busy thoroughfare is not an unreasonable restriction of its rights, or a material modification of a prior ordinance granting the company permission to lay double tracks in the streets for many miles. *Id.*

4. A street-railway company which has relaid its track under direction of the city commissioner, as required by the provisions of an ordinance revoking its original license for two tracks, but providing that it may replace a single track if it removes its double tracks within twenty days, does not lose the right to use the street without a further ordinance, although it did not comply with the ordinance in twenty days, but contested its validity by litigation, when it had an understanding with the city authorities that the limitation of time would not be enforced during the time necessary to get an adjudication. *Id.*

5. Failure to provide any compensation to a street-railway company for taking up one track in a street in which it has laid double tracks does not make the ordinance unreasonable, if the double tracks were laid, except for a few hundred feet, after notice from the mayor and city solicitor that there were objections to the double tracks, and that an ordinance was to be introduced to limit the road at that place to a single track. *Id.*

6. No formal resolution of acceptance of the extension of a franchise of a street-railway company is necessary, if there is an actual practical acceptance or action which would be explicable only in case of the acceptance. *City R. Co.* v. *Citizens' Street R. Co.* 1114

7. A consent by the manager of a street-railway company to an ordinance modifying the provision which he sought to have made by an amendment to the ordinance granting the company's franchise may obviate the necessity of a subsequent acceptance of the new ordinance by the corporation. *Id.*

8. An attempt by a driver of a street car to cross a railroad when a train was so near that the least delay would probably lead to an accident may constitute negligence, even though he would have got across safely except for the unanticipated and wrongful act of a gatekeeper in lowering the gates. *Washington & G. R. Co.* v. *Hickey*, 1101

**SUBPŒNA.** See WITNESSES, 1.

**SUBROGATION.**

A surety who completes a contract with the United States on the contractor's default is subrogated to the rights of the United States in a fund created by the retention of 10 per cent of the sums estimated from time to time as the value of the work done, in order to insure its completion; and this right relates back to the making of the contract, so that it is superior to any equitable lien asserted by a bank for advances made without the surety's knowledge before he began to complete the work. *Prairie State Nat. Bank* v. *United States*, 412

**SUCCESSION TAX.** See TAXES, 26, 27.

**SUGAR BOUNTY.** See BOUNTIES.

**SUNDAY.** See also COMMERCE, 8.

The verdict of a jury may be received and the jury discharged on Sunday when a case was committed to the jury on Saturday. *Ball* v. *United States*, 300

**SUSPENSION OF ALIENATION.** See PERPETUITIES.

**SWAMP LAND.** See PUBLIC LANDS, 18–20.

**TAXES.** See also APPEAL AND ERROR, 16, 17, 38, 48; CLAIMS, 8–10; CONSTITUTIONAL LAW, 21, 31, 32; CONTRACTS, 13; COUNTIES; ESTOPPEL, 7; EVIDENCE, 59; PUBLIC IMPROVEMENTS.

1. A levy of taxes for the payment of interest on county bonds shown to be funding bonds



Digitized by Google

cannot be defeated on the ground that they exceeded the amount for which the county could lawfully become indebted, where they may have been simply a change in the form of an indebtedness which was incurred before the limitation was imposed, and all the facts concerning the indebtedness, the time when it arose, and the circumstances under which it was created, do not appear. *Maish* v. *Arizona*, 567

2. A party in possession of a tract of land under a perfect grant, such as a Mexican land grant, has a possessory and equitable right which is of value and that is enough to sustain taxation. *Id.*

3. Taxation of real and personal property of the railroad company in the ratio that other like property is taxed is within the power of counties and other municipal corporations, under Ga. Laws 1833, p. 246, chartering a company with the provisions that the railway and appurtenances shall not be taxed higher than ¼ per cent on its annual net income, and also that no municipal or other corporation shall have power to tax the stock of the company, but may tax any property, real or personal, of the company, in the ratio of taxation of like property. *Central R. & B. Co.* v. *Wright*, 454

4. The rule of uniformity is not violated or any unlawful discrimination made between individual taxpayers and corporations, companies, and associations by the fact that the intangible property of such corporations, companies, and associations is taxed by Ky. Stat. 1894, § 4077, by a somewhat different mode from that of individual taxpayers. *Adams Exp. Co.* v. *Kentucky*, 960

5. Whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation. *Adams Exp. Co.* v. *Ohio State Auditor*, 965

**On national banks.**

6. A statutory appointment of a national bank to pay, as agent of the stockholders, a tax assessed upon its capital stock, is not inconsistent with the Federal law pertaining to national banks. *First Nat. Bank* v. *Chehalis County*, 1069

7. The omission from taxation of investments by individual citizens in loans and securities, and of moneyed capital invested in stocks and bonds of insurance, wharf, and gas companies and other moneyed institutions, does not make the taxation of the shares of capital stock in a national bank invalid as a discrimination against the latter, unless it is shown that the money invested in the property which is not assessed comes into competition with the business of national banks. *Id.; National Bank of Commerce* v. *Seattle*, 1079

8. The omission from assessment of all the moneyed capital in a city owned by resident individual citizens and invested in interest-bearing loans, discounts, and securities, except that invested in incorporated banks located in the city, is not sufficient to make a tax on the shares of stock of a national bank invalid as an unlawful discrimination against the latter, unless the moneyed capital left unassessed was, as to any material portion thereof, moneyed capital coming into competition with that of national banks. *National Bank of Commerce* v. *Seattle*, 1079

**Of franchise and intangible property.**

9. The franchise to do is an independent franchise, or, rather, a combination of franchises embracing all things which a corporation is given power to do; and this power is as much a thing of value and a part of the intangible property of the corporation as the franchise to be, and constitutes a substantive matter of taxation in every state in which such franchises are exercised in connection with tangible property. *Adams Exp. Co.* v. *Ohio State Auditor*, 965

10. The word "franchise" as used in Ky. Stat. 1894, § 4077, providing for taxes on the franchise of every "corporation, company, or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service," is not employed in a technical sense; but construing this section with §§ 4078–81 it is plain that the legislature intended that the entire property, tangible and intangible, of all foreign and domestic corporations and all foreign and domestic companies possessing no franchise should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible property thus ascertained be taxed under these provisions. *Adams Exp. Co.* v. *Kentucky*, 960

11. The taxation of intangible property which has not been taxed as tangible property is not in violation of Ky. Const. § 172, requiring all nonexempt property to be assessed at its fair cash value, or § 174, requiring it to be taxed in proportion to its value, and that corporate property shall pay the same rate of taxation paid by individual property. *Id.*

12. The value of the intangible property of a bridge company which maintains a bridge over a river between two states is properly estimated for the purpose of taxation in the state which granted the franchise of the company, by estimating the total value of the entire property of the corporation in both states, and deducting therefrom the tangible property in the state named as well as the value of all the property, tangible and intangible, in the other state, although certain privileges are granted to the corporation by the other state and also by an act of Congress regulating the height and width of the spans of the bridge and declaring it a post road. *Henderson Bridge Co.* v. *Kentucky*, 953

13. The fact that a bridge over a navigable river between two states is made a post road by an act of Congress which also regulates the height of the bridge and the width of the spans does not interfere with the right of the state to impose taxes upon the bridge company. *Id.*

14. A taxation of franchises granted by the United States to a telegraph company, or of its property outside of the state, is not made by assessing for taxation its property within the state at such proportion of the entire value of its property as the length of its lines within the state bears to the total length of its lines, after excluding real estate subject to local taxation, and by taking the aggregate value of its



Digitized by Google

shares, if they have a market value, or, if not, the actual value thereof, or of the capital of the company, in ascertaining the true cash value of the entire property. *Western U. Teleg. Co.* v. *Taggart*, 49

15. The property of an express company distributed through different states constitutes a single plant united in a single specific use, so that for the taxation of that portion of it which is within any state the contracts for transportation facilities and the capital necessary to carry on the business, whether represented in tangible or intangible property, in the state, as well as its horses, wagons, safes, pouches, and furniture, may be included in the assessment. *Adams Exp. Co.* v. *Ohio State Auditor*, 683; *American Exp. Co.* v. *Indiana*, 707

16. Regarding the property of an interstate express company as a unit profit-producing plant at the value which it has as used and by reason of its use, for the purpose of fixing the value of that portion of the property in one state, and considering the value of its capital stock as an essential factor in, though not as a necessary equivalent of, the value of the entire property, do not amount to an assessment on property situated in other states, and for that reason constitute a taking of property without due process of law. *Id.*

17. The situs of the intangible property of an express company engaged in interstate business is not, for the purpose of taxation, simply where its home office is, but such property is distributed wherever its tangible property is located and its work is done. *Adams Exp. Co.* v. *Ohio State Auditor*, 965

**As affecting interstate commerce.**

18. A state tax on an interstate express company is not a burden on interstate commerce so long as it is essentially a tax upon property only. *Adams Exp. Co.* v. *Ohio State Auditor*, 683; *Adams Exp. Co.* v. *Indiana*, 707

19. Estimating the property of an interstate express company as an entirety, and, after deducting the value of all tangible property, assessing its intangible property within the state on the basis of the mileage of its lines within and without the state, is not in violation of the commerce clause or the 14th Amendment of the Federal Constitution. *Adams Exp. Co.* v. *Kentucky*, 960

20. An unlawful burden upon interstate commerce is not imposed by taxing property of a telegraph company within the state according to the proportion of its whole property, exclusive of real estate subject to local taxation, which the length of its lines within the state bears to the total length of its lines, and by taking the market value of shares of its stock in fixing the valuation of its entire property. *Western U. Teleg. Co.* v. *Taggart*, 49

21. A state tax on the intangible property of a company chartered by that state and maintaining a bridge over a river on the state boundary is not an unconstitutional burden on interstate commerce, when the business carried on over the bridge is done by other persons and corporations which pay the bridge company tolls for the privilege of using the bridge. *Henderson Bridge Co.* v. *Kentucky*, 953

**Exemptions.**

22. No claim of exemption from taxation can be sustained unless within the express letter or the necessary scope of the exempting clause. *Ford* v. *Delta & P. Land Co.* 590

23. An exemption by the charter of a corporation from the taxation of capital stock and of property and effects of the company does not extend to property not necessary for its business, which is acquired under the authority of a subsequent act of the legislature containing no exemption clause. *Id.*

24. The exemption from taxation of the hall of the Grand Lodge "so long as it is occupied as a Grand Lodge of the F. & A. Masons," made by La. act 1855, which was passed after the property was acquired under pledges that the total revenue should be applied to specified charitable purposes, does not constitute a contract which can be protected against the provision of the Constitution of 1879 exempting the property of charitable institutions only when "not used or leased for purposes of private or corporate profit or income." *Grand Lodge of the State of Louisiana* v. *New Orleans*. 951

25. The same necessity for a consideration exists for the purpose of a contract exempting property from taxation that there would be if it were a contract between private parties. *Id.*

**Inheritance tax.**

26. The United States do not constitute a corporation "exempt by law from taxation" within the meaning of the inheritance tax laws of New York, as the corporations intended to be exempt are only those created by the state and are confined to those of a religious, educational, charitable, or reformatory purpose. *United States* v. *Perkins*, 287

27. An inheritance tax imposed upon a legacy to the United States by the laws of a state is not invalid as an attempt to tax the property of the United States since it is imposed upon the legacy before it reaches the hands of the government. *Id.*

**Procedure; collection.**

28. Something more than an error of judgment must be shown, something indicating fraud or misconduct, in order to defeat an assessment for taxes on the ground of a fraudulent discrimination between taxpayers. *Maish* v. *Arizona*, 567

29. Jurisdiction of the district court under Ariz. Rev. Stat. 1887, §§ 2684 *et seq.*, in proproceedings to collect delinquent taxes, is not ousted by continuing the proceedings for the hearing and determination of objections beyond the time prescribed by §§ 2685, 2693, for the sale of the property. *Id.*

30. The amount of penalty to be imposed for nonpayment of taxes is in the discretion of the legislature. *Western U. Teleg. Co.* v. *Indiana*, 725

**TELEGRAPHS.** See TAXES, 14, 20.

**TEXAS FEVER.** See APPEAL AND ERROR, 97; EVIDENCE, 27-29.

**TICKET.** See CARRIERS.



Digitized by Google

**TOLLS.** See also CONSTITUTIONAL LAW, 8, 23; CORPORATIONS, 2, 3.

1. The turnpike roads established by a corporation under authority of law are public highways and the right to exact tolls from those using them comes from the state creating the corporation, and its exercise may be controlled by the legislative authority to the same extent that charges by railroad corporations may be. *Covington & L. Turnp. Road Co.* v. *Sandford*, 560

2. The interests of the public as well as of the owner of the property must be considered, with all the circumstances, in determining what is a just rate to be charged by a turnpike company as toll. *Id.*

3. The right of a corporation to realize a given per cent upon its capital stock cannot be claimed without reference to the interests of the public, in order to limit the power of the legislature to reduce its tolls on a turnpike. *Id.*

**TRADEMARKS.**

1. One using the name of another which has become the generic name of a patented article on which the patent has expired must adopt such precautions as will protect the property of others and prevent injury to the public interest, if by so doing no substantial restriction is imposed on the right of freedom of use. *Singer Mfg. Co.* v. *June Mfg. Co.* 118

2. The right to use the generic name of a patented article in every form passes to the public with the dedication resulting from the expiration of the patent, even if the name is the surname of the patentee or original manufacturer. *Id.*

3. The lettering "New York S. M. Mfg. Co.," corresponding in size and style of letters with the lettering "The Singer Mfg. Co." on the brass plates of the latter company, cannot lawfully be used on sewing machines similar to those of the Singer Company, by a company bearing the former name, although it does not employ the name "Singer," when the position and size, as well as the inscription found on the plate, are imitations of those used by the Singer Company, and are calculated to deceive the public. *Singer Mfg. Co.* v. *Bent*, 181

4. An unlawful attempt to deceive the public in the sale of Singer sewing machines by inducing the belief that they were made by the Singer Manufacturing Company is shown where the shape, material, and place of position of the plate upon the machine, as well as the words upon it, were in imitation of the plate used by the Singer Company, while there was also a colorable imitation of the device cast in the legs of the machines, and the numbers used in the machines were taken in the millions to convey the impression that they were the result of a long-established manufacture, and in addition to this a tension screw on the machine of the Singer company, which was covered by a subsisting patent, was imitated by a dummy screw on the other machine, which served no mechanical purpose whatever. *Singer Mfg. Co.* v. *June Mfg. Co.* 118

**TRAFFIC ASSOCIATION.** See APPEAL AND ERROR, 5, 14; CONSPIRACY; STATUTES, 9.

**TREASURY.** See CERTIFICATES.

**TREATY.** See INDIANS, 3–5.

**TRESPASS.** See EVIDENCE, 16.

**TRIAL.** See also APPEAL AND ERROR, 93, 94, 116; MINES; SUNDAY.

**Jury.**

See also *infra*, 9, 39, 40.

1. The provision for the waiver of a jury, in Utah Code, § 3378, does not preclude a waiver of the right in another mode. *Perego* v. *Dodge*, 118

2. The offense of robbing a mail carrier and putting his life in jeopardy, in violation of U. S. Rev. Stat. § 5472, is a felony, on the prosecution of which the defendant is entitled to ten peremptory challenges under U. S. Rev. Stat. § 819. *Harrison* v. *United States*, 104

**Consolidation of indictments.**

3. Indictments for distinct felonies not provable by the same evidence, and in no sense resulting from the same series of acts, cannot be consolidated for trial. *McElroy* v. *United States*, 355

4. A consolidation for trial of indictments for assault with intent to murder, with other indictments against only part of the defendants for arson committed on the same day, as well as for indictments against all of them for arson committed two weeks later, when there is nothing to show a conspiracy or to connect the transactions together,—is erroneous. *Id.*

**Questions for jury.**

5. Negligence of a railway company in allowing combustible materials, which are liable to take fire from sparks, to accumulate upon its track and right of way, is a question for the jury. *Eddy* v. *Lafayette*, 225

6. The reasonable safety of a road engine and flat car for switching purposes, and the question of negligence on the part of a railroad employee killed thereby while crossing a track, are questions for the jury. *Texas & P. R. Co.* v. *Gentry*, 186

7. The negligence of a member of a section crew in jumping from a train going about 4 miles per hour, to a station platform, in broad daylight, in obedience to the command of the conductor, who was his direct superior, and after fellow laborers had jumped and landed safely, is not so obvious as to be a necessary legal conclusion, but is a question for the jury. *Northern P. R. Co.* v. *Egeland*, 82

8. The negligence of one who was struck by a train backing over a street crossing is a question for the jury on proof that there was no light on the crossing or which indicated the approach of a train, and no bell ringing or whistle blowing, and that he, as he approached the crossing, slackened his pace, walked slowly, listened and looked, without seeing or hearing any train. *Texas & P. R Co.* v. *Cody*, 1132

9. Granting a nonsuit for want of sufficient evidence is not an infringement of the constitutional right of trial by jury. *Coughran* v. *Bigelow*, 443



Digitized by Google

**Instructions.**

10. A court which gives proper instructions is not obliged to use the language requested by counsel however correct it may be. *Texas & P. R. Co.* v. *Cody*, 1132

11. A requested instruction is properly refused when all its propositions have been embraced in the charge given by the court. *Rio Grande Western R. Co.* v. *Leak*, 160; *Agnew* v. *United States*, 624

12. An instruction which singles out particular circumstances and omits all reference to others of importance may be refused. *Rio Grande Western R. Co.* v. *Leak*, 160

13. A charge that the jury should apply the same rules of good sense to the facts in evidence that they would apply to any other subject that comes under their consideration in life is not improper. *Dunlop* v. *United States*, 799

14. A charge that jurors should examine the questions submitted with candor and with a proper regard and deference to the opinions of each other, and decide the case, if they could conscientiously do so, is not improper. *Allen* v. *United States*, 528

15. A statement of fact based on uncontradicted testimony made in a recapitulation of the evidence by the judge is not error. *Wiborg* v. *United States*, 289

16. A charge to the jury that opinions of people to impeach the veracity of a witness "must grow out of the dispassionate judgment of men who are honest men and good men," and "not the judgment of bad people, the criminal element," is too narrow and restrictive, since the reputation for truth and veracity among one's neighbors is equally competent whether they are virtuous or immoral, or whether it is founded upon dispassionate judgment or upon warm admiration for constant truthfulness, or natural indignation at habitual falsehood. *Brown* v. *United States*, 410

**As to damages.**

17. An instruction that if land of a railroad company to be crossed by a proposed street was used as part of its "railroad and terminal facilities," the value of which would be lessened by laying out the street, then the company could recover for the depreciation in value as damages to part of its land not taken or crossed,—is properly refused for the reason, if no other, that it is too general. *Chicago, B. & Q. R. Co.* v. *Chicago*, 979

**As to negligence.**

18. A further instruction as to the duty of a traveler to look and listen at a railroad crossing may be refused where the court has charged that the jury must determine whether he looked out, as he should have done, for coming trains, or listened, and added that he must use such care as was proportionate to the danger in crossing the track. *Rio Grande Western R. Co.* v. *Leak*, 160

19. A charge to the jury that the single question is whether or not a frog was blocked at the time a railroad employee was injured by catching his foot in it is not improper, when the pleading and evidence have narrowed the inquiry to this single matter. *Union P. R Co.* v. *James*, 236

20. A sufficient charge as to negligence in driving so close to a railway as to be injured by passing cars is given by telling the jury to look at all the circumstances in determining whether the person acted with due care or was guilty of negligence and in approaching was bound to use care proportionate to the danger. *Rio Grande Western R. Co.* v. *Leak*, 160

**As to crimes.**

21. After a court has charged the jury on the presumption of innocence it cannot be required to repeat the charge in a separate instruction at the request of the defendant. *Allen* v. *United States*, 528

22. An instruction that the presumption of defendant's innocence is stronger than the presumption that messengers or other postffice employees who deposited papers in boxes in the course of distributing the mails took them from the mails is properly refused. *Dunlop* v. *United States*, 799

23. A charge that the jury may consider defendant's good character and give it such weight as they see proper under all the evidence in the case, and that he is entitled to reasonable doubt, sufficiently states the fact of his good character, although the court unnecessarily adds that the law presumes every defendant to have a good character. *White* v. *United States*, 365

24. An instruction that flight raises a presumption of guilt and is a silent admission that defendant is unable or unwilling to face the case against him is erroneous. *Starr* v. *United States*, 577

25. A charge that wilfulness and malice aforethought may be inferred from the facts stated by certain witnesses if they are believed is not error when their testimony, if true, is sufficient to support the finding. *Allen* v. *United States*, 528

26. An instruction that insanity as a defense for crime is such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong or unconscious of the nature of the act he is committing, or so complete a destruction of the will or governing power of the mind that one's actions are not subject to it, but are beyond his control,—is sufficiently favorable to the defendant. *Davis* v. *United States*, 750

27. Instructions that all the force that need be exercised is the force incident to the commission of the act if there is no consent, in a rape case, are erroneous unless they are limited to a case in which the will or resistance of the victim has been overcome by threats or fright or she has become helpless or unconscious. *Mills* v. *United States*, 584

28. A charge that obscene publications must be calculated with the ordinary reader to deprave his morals or lead to impure purposes is not objectionable as amounting to a statement that a publication which tends to deprave the morals in any way whatever comes within that class, as there can be no misapprehension as to what is meant. *Dunlop* v. *United States*, 799

29. Failure to say that manslaughter must be done unlawfully and wilfully does not ren-



Digitized by Google

der erroneous an instruction distinguishing between murder and manslaughter, which says that the accused cannot be found guilty of murder if the killing, though intentional, was without malice. *Addington* v. *United States*, 679

30. An instruction as to manslaughter is unnecessary when there is no testimony to reduce the offense, if any, below the grade of murder. *Davis* v. *United States*, 750

31. An instruction that the intent to commit an assault may be found in the act itself is not erroneous when it is said, in connection with repeated declarations, that the intent is to be deduced from all the circumstances of the case, without anywhere stating that the assault of itself necessarily proves the intent. *Acers* v. *United States*, 481

32. An instruction that an apparent danger to justify self-defense is danger to life or of deadly violence to person is not erroneous as implying that there must be an intention of the assailant to take life,—especially when other parts of the charge show that this was not meant. *Id.*

33. An instruction that a real danger, to justify self-defense, cannot be a past danger or a danger of a future injury, but must be a present danger and one of great injury to the person, that would maim him or be permanent in its character or that might produce death,—is not erroneous. *Id.*

34. The right of self-defense is sufficiently stated in an instruction that a man may kill his assailant if the circumstances are such as to produce upon his mind, or that of a reasonably prudent man, the impression that by so doing only could he save his own life or protect himself from serious bodily harm. *Addington* v. *United States*, 679

35. An instruction that a deadly weapon is anything with which death can be easily and readily produced, with a reference to the manner in which it was used and the part of the body upon which a blow was struck with it, is not improper. *Acers* v. *United States*, 481

**Findings by the court.**

36. A variance between an allegation that cattle communicated Texas fever on plaintiff's range, and a finding by the court that it could not be determined whether it was on that range or on defendant's range or in the road, is immaterial where the cattle were indiscriminately mixed on both ranges, which were unfenced. *Grayson* v. *Lynch*, 230

37. A variance between an allegation that cattle communicated "Texas cattle fever," and a finding of the court that the disease was "Texas fever," is immaterial where it appears that the same disease was known by these names and others. *Id.*

38. A variance between an allegation that Texas fever is a "contagious" disease of cattle, and a finding that it is an "infectious" disease, where the question is merely as to liability for negligence in allowing cattle to communicate the disease, and no medical question is involved as to the strict use of those terms,—is immaterial. *Id.*

**Verdict.**

39. Unanimity being one of the peculiar and essential features of trial by jury at the common law, a constitutional guaranty of the right to a jury trial is violated by a statute attempting to authorize a verdict by the concurrence of nine or more members of the jury. *American Pub. Co.* v. *Fisher*, 1079

40. A provision for a verdict in a civil case on concurrence of nine or more members of the jury, made by Utah act March 10, 1892, is invalid, either by force of the 7th Amendment of the Constitution of the United States, or, if that does not apply in and of itself, by the act of Congress establishing a territorial government for Utah (9 Stat. at L. 458, § 17), extending the Constitution and laws of the United States over the territory, and by 18 Stat. at L. p. 27, chap. 80, confirming various territorial statutes regulating procedure, with a proviso that no party shall be deprived of the right of trial by jury in cases cognizable at common law. *Id.*

41. A verdict of conviction is not invalid because the jury were in charge of a deputy marshal who had taken no oath except his oath of office, where no special oath was at any time requested or any objection made during the trial that it was not taken. *Ball* v. *United States*, 300

42. A statute authorizing special findings of fact by the jury, and providing for judgment upon them if they are inconsistent with the general verdict, does not violate the right of trial by jury. *Walker* v. *New Mexico & S. P. R. Co.* 337

43. Special findings that an injury was done by surface water caused by rainfall and cloud burst are not materially contradicted by the answer, "It did run," given to a question whether any of the water did "flow or run over the plaintiff's land except the water which fell from the clouds as rain." *Id.*

**TRUSTS.** See ACTION OR SUIT, 5; EQUITY, 2; JUDGMENT, 2; PERPETUITIES, 2; REAL PROPERTY, 4, 5.

**TURNPIKES.** See CONSTITUTIONAL LAW, 8, 28; CORPORATIONS, 2; TOLLS.

**UNITED STATES.** See ACTION OR SUIT, 1; CORPORATIONS, 8; TAXES, 26, 27.

**VARIANCE.** See EVIDENCE, 48; TRIAL, 36–38.

**VENDOR AND PURCHASER.** See BONDS, 3; LIMITATION OF ACTIONS, 4–6; PRINCIPAL AND SURETY, 1.

**VERDICT.** See TRIAL, 39–41.

**WAR CLAIMS.** See CLAIMS, 2–4.

**WARRANT.** See EVIDENCE, 24; MARSHAL, 1.

**WARRANTY.** See BILLS AND NOTES; BONDS, 1, 2.



Digitized by Google

**WATERS.** See also BRIDGES; COURTS, 26, 27; EMINENT DOMAIN, 1, 2, 4; IRRIGATION DISTRICT; RAILROADS, 7.

1. Riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard. *Gibson* v. *United States*, 996

2. Obstruction to the use of the landing of a riparian owner, which is merely incidental to the lawful and proper exercise of governmental power in improving navigation, and which is done without coming into physical contact with the land of the person injured, or throwing back water upon it, or being the cause of contact with it in any way,—does not give any right to claim damages from the United States. *Id.*

3. An exclusive right to supply water to a town is not acquired by a water company organized under a statute which simply provides for the organization of such companies, when its contract with the town gives simply a privilege of laying its mains in the street, with a covenant for the payment of hydrant rentals, without any words of exclusion. *Long Island Water Supply Co.* v. *Brooklyn*, 1165

**WHARVES.** See also ADMIRALTY, 1.

The owner of a pier is not liable for injury to a vessel while entering a berth at the pier, by a spindle of a sunken dredge the location of which was not known, where he merely assented to the occupation of the berth, and the agent of the vessel, who was acquainted with the danger or put upon inquiry respecting it, assumed the responsibility of providing the vessel with a safe berth. *Panama R. Co.* v. *Napier Shipping Co.* 1004

**WILLS.** See also CONFLICT OF LAWS, 1; COURTS, 28, 29; EVIDENCE, 5, 25, 34; REAL PROPERTY, 3.

A devise to the "heirs" of a living person named in the will describes the persons intended with sufficient certainty, although strictly speaking no one is the heir of a living person. *Barber* v. *Pittsburg, Ft. W. & C. R. Co.* 925

**WITNESSES.** See also APPEAL AND ERROR, 108; CONGRESS, 3; TRIAL, 16.

1. A *subpœna duces tecum* may be refused by the court when it does not describe or refer to any paper or document which is in the possession of the witness and which is required. *Murray* v. *Louisiana*, 87

2. A suit to establish a trust in property held by an executor is a "claim or demand against the estate of a deceased person," as to which, under 2 Utah Comp. Laws 1888, tit. 10, chap. 2, p. 427, the plaintiff cannot testify in his own favor as to any matter of fact occurring before the death of the other party, which was equally within the knowledge of both. *Whitney* v. *Fox*, 1145; *Wood* v. *Fox*, 1149

3. A widow who is neither a party to nor interested in a suit is not competent under the act of Congress of July 2, 1864, chap. 223 (13 Stat. at L. 374) making parties and persons interested competent, with a proviso that husband or wife shall not be compelled to disclose communications made during marriage, to prove conversations with her husband. *Hopkins* v. *Grimshaw*, 739

4. A witness who has testified on behalf of the defendant in a homicide case, as to his mental condition, may be asked on cross-examination if from his experience and conversation with him he thinks defendant killed the man because he threatened his life. *Davis* v. *United States*, 750

5. On cross-examination of a witness for the prosecution who admits that he employed counsel to aid the district attorney a question as to what he paid him is properly excluded. *Ball* v. *United States*, 300

6. The reason for the voluntary resignation of a cashier of a bank, who has testified on behalf of the president of the bank, who is accused of fraudulently injuring the bank, may be inquired into on his cross-examination. *Agnew* v. *United States*, 624

**WRIT AND PROCESS**

Service on an agent of the receivers of a railroad appointed by Federal courts is sufficient if made as required for service on an agent of a railroad company. *Eddy* v. *Lafayette*, 225

**YACHT.** See DAMAGES, 5; DUTIES, 1; EVIDENCE, 44.



MAR 3 - 1916

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

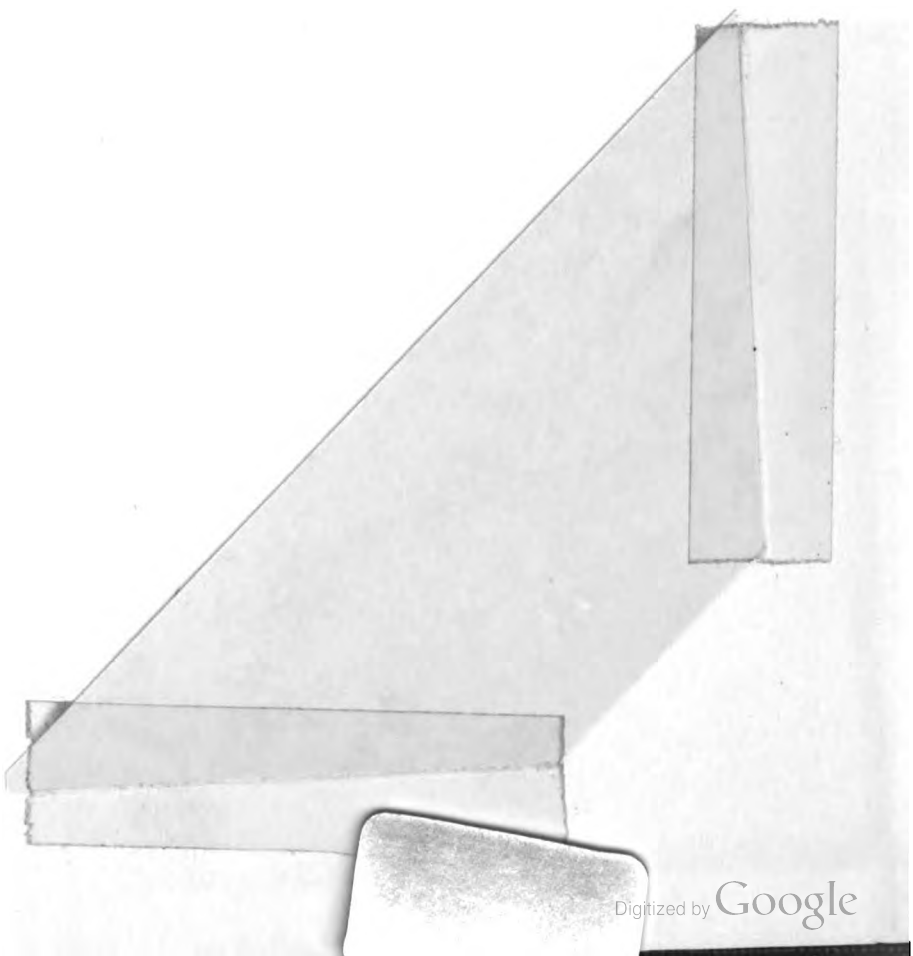
Digitized by Google

Digitized by Google

Replaced with Commercial Microform

1993

UNIVERSITY OF MICHIGAN
3 9015 02791 6041



Digitized by Google